Federal Court of Australia

Alasady v Australian Capital Territory [2022] FCA 967

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| File number(s): |  |
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| Judgment of: | **RAPER J** |
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| Date of judgment: | 18 August 2022 |
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| Catchwords: | **INDUSTRIAL LAW –** application for an interlocutory injunction preventing the respondents from taking any further action in relation to the disciplinary investigation or procedure -alleged breaches of the investigation procedures under enterprise agreements –- whether apprehended bias on the part of the person who will be the sanction delegate  **PRACTICE AND PROCEDURE** – application for an interlocutory injunction – whether prima facie case of breach of enterprise agreements – whether prima facie case of apprehended bias on the part of the person who will be the sanction delegate – whether the balance of convenience favours a grant of interlocutory injunctive relief –application for interlocutory application dismissed |
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| Legislation: | *Federal Court of Australia Act 1973* (Cth) s 23  *Public Sector Management Act 1994* (ACT)  *Work Health and Safety Act 2011* (ACT) |
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| Cases cited: | *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2002] HCA 10; 222 CLR 242  *Australian Broadcasting Corporation v O’Neill* [2006] HCA 46; 227 CLR 57  *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1; (1968) 118 CLR 618  *Castlemaine Tooheys Ltd v South Australia* [1986] HCA 58, 161 CLR 148  *Kucks v CSR Limited* (1996) 66 IR 182  *Samsung Electronics v Apple* [2011] FCAFC 156; 217 FCR 238 |
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| Division: | Fair Work Division |
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| Registry: | Australian Capital Territory |
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| National Practice Area: | Employment and Industrial Relations |
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| Date of hearing: | 15 August 2022 |
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| Counsel for the Applicant: | Mr C Eskine SC with Ms G Sullivan |
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| Solicitor for the Applicant: | Bradley Allen Love Lawyers |
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| Counsel for the Respondents: | Ms K Nomchong SC with Mr H Pararajasingham |
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| Solicitor for the Respondents: | The ACT Government Solicitor |
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ORDERS

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|  | | ACD 33 of 2022 |
| BETWEEN: | MUAYAD ALASADY  Applicant | |
| AND: | AUSTRALIAN CAPITAL TERRITORY  First Respondent  MR DAVID PEFFER  Second Respondent  MR IAN MCPHEE  Third Respondent | |

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| order made by: | RAPER J |
| DATE OF ORDER: | 18 August 2022 |

THE COURT ORDERS THAT:

1. The application for interlocutory relief dated 1 August 2022, filed on 2 August 2022 be dismissed.
2. The costs of and pertaining to the application are reserved.
3. The matter be set down for a case management hearing on a date convenient to the parties and the Court.

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

REASONS FOR JUDGMENT

RAPER J:

## Introduction

1. By application dated 1 August 2022, the applicant applies, pursuant to section 23 of the *Federal Court of Australia Act 1973* (Cth), for an interim injunction in the following terms:

**Orders sought**

1. An order in the nature of an injunction preventing the Respondents, either in their capacity as employees of the Canberra Health Services directorate, or as entities in their own right, from undertaking, until the Originating Application in this proceeding has been heard by the Court:

(a) any further action in relation to the disciplinary investigation against the Applicant; and

(b) any further action in relation to any disciplinary procedure or sanction against the Applicant.

1. The applicant has been employed as a cardiologist on a part-time basis by the first respondent since 2011 and has worked at the Canberra Hospital in the Cardiology Departments. Since approximately October 2018, the applicant has been located within the Canberra Health Services (**CHS**) directorate.
2. In February 2020, CHS commissioned Ms Jennifer Johns and Ms Carolyn Naismith to undertake a review of the Canberra Health Services Cardiology Services (the **Johns Review**). This review considered cultural issues in the Cardiology Department. A written report was provided to the CHS in late 2020 or early 2021. The Johns Report made a number of findings about persons within the Cardiology Department which included the applicant. The applicant pleads that there were many findings, some of which include the identification of a poor professional relationship between the applicant and another Doctor which should be addressed, long-standing conflict, a culture of blame, unparticularised breaches which must be managed and that “bullying and unprofessional behaviour were still perceived as ongoing problems”.
3. On 1 December 2021, the CHS retained Ms Barbara Deegan to conduct a preliminary assessment of the Cardiology Unit within Canberra Hospital regarding the culture of the unit and allegations of misconduct by cardiologists within it (the **Deegan assessment**).
4. Ms Deegan interviewed 18 employees on 13 January 2022. Ms Deegan identified “three clear issues” in her report, dated 3 March 2022, namely:

There is a consensus that the working environment of all staff is adversely affected by a group of cardiologists who:

* are arrogant, with a sense of entitlement which informs their general behaviour;
* abuse the positions they occupy in the public hospital by failing to carry out their full range of duties or adhere to rostered hours; and
* fail to respect the qualifications and abilities of nursing and allied health staff treating them with disdain and a lack of respect.

1. The applicant was identified in her report as one of the cardiologists about whom the concerns had been raised. Ms Deegan identified, with respect to each of the cardiologists, a number of incidents which required further investigation.
2. On 28 March 2022, the applicant was suspended from employment with pay, pending an investigation into allegations regarding his behaviour towards staff and colleagues at the CHS.
3. On or about 18 April 2022, Griffin Legal was retained by CHS to conduct the investigation into the applicant’s behaviours.
4. On 15 June 2022, the applicant was informed by Ms Claire Carton, a partner of Griffin Legal, that she had been appointed by the ACT Public Sector Standards Commissioner as the investigator. On 27 June 2022, Ms Carton provided details of the alleged behaviours together with extracted statements made by named doctors and other hospital staff. The document was 37 pages in length (noting there were page breaks on certain pages). In addition, Ms Carton attached 15 documents including emails, minutes of meetings and complaints. The applicant was given until 8 August 2022 to provide his response. As part of these proceedings, the respondents have agreed to extend the time for the applicant to provide his response until 3 weeks after the Court’s determination of this injunction. This, to an extent, removes some of the urgency with respect to this interim application.
5. By originating application, filed on 26 July 2022, the applicant claims declaratory relief on the basis that the investigation is in breach of the *ACT Public Sector Medical Practitioners Enterprise Agreement 2021-2022* and seeks the following orders:
6. an order that the second respondent and the Public Sector Standards Commissioner be required to direct Griffin Legal “to stop any further work in relation to the “Griffin investigation”;
7. an order “revoking” the suspension of the applicant from duty;
8. alternatively to (b), an order requiring the second respondent and the Public Standards Commissioner to direct Griffin Legal to stop any further work in relation to the investigation until proper particulars are provided to the applicant;
9. alternatively to (b), an order restraining the second respondent and any person employed within the CHS directorate from being a decision-maker in relation to “existence of misconduct on the part of the applicant or any sanction upon the applicant”; and
10. an order for a pecuniary penalty to be imposed.
11. The applicant’s employment was the subject of a number of enterprise agreements as they applied from time to time being:
12. the ACT Public Sector Medical Practitioners Enterprise Agreement 2013-2017 (the **2013 Agreement**);
13. the ACT Public Sector Medical Practitioners Enterprise Agreement 2017-2021 (the **2017 Agreement**);
14. the ACT Public Sector Medical Practitioners Enterprise Agreement 2021-2022 (the **2021 Agreement**);

(collectively described as the **applicable enterprise agreements**)

1. In addition, the applicant’s employment is governed by the *Public Sector Management Act 1994* (ACT) and the ACT Public Service Codeof Conduct and Signature Behaviours.
2. The applicant’s claim is articulated in a lengthy fifty-seven-page Statement of Claim and largely unparticularised. At a high level the applicant claims:
3. that there have been various breaches of the applicable enterprise agreements that effectively mean he is immune from being the subject of the current investigation and it must cease. These claims are dealt with in further detail in the section of these reasons dealing with the serious question to be tried below; and
4. the applicant further claims that there is a “clear case of apprehension of bias”, given the second respondent, the CEO of CHS, has made several public statements about the disciplinary investigations, which “indicate that if any practitioner is found guilty of any disciplinary offence under investigation, they will be sacked”, from which the applicant submits that the consequence of any disciplinary finding against him has been predetermined.

## Relevant facts

1. The undisputed evidence establishes the following facts.
2. As described above, in February 2020, CHS commissioned Ms Jennifer Johns and Ms Carolyn Naismith to undertake a review of the Canberra Health Services Cardiology Services (the **Johns Review**). A written report was provided to the CHS in late 2020 or early 2021. The Johns Report made a number of findings about persons within the Cardiology Department including the applicant.
3. On 1 December 2021, the CHS retained Ms Barbara Deegan to conduct a preliminary assessment of the Cardiology Unit within Canberra Hospital regarding the culture of the unit and allegations of misconduct by cardiologists within it (the **Deegan assessment**). It is noted that the applicant disputes whether this assessment could constitute a preliminary assessment under the relevant applicable enterprise agreement.
4. On 28 March 2022, the applicant received a letter from Ms Jacqui Taylor, Executive Director, Medicine within CHS, informing him that she had commissioned Ms Deegan to undertake a review of the culture within the Cardiology Unit and to assist in gathering information for a preliminary assessment. Ms Taylor informed him that Ms Deegan had made a number of observations about the applicant’s conduct which, in her opinion, required further investigation. Ms Taylor notified the applicant in the letter that she had decided, in accordance with clause 117 of the 2021 Agreement to appoint an independent investigator. The applicant was informed that as part of the investigation the applicant would be given an opportunity to respond to the allegations at an interview and would receive written notification of any interview.
5. Ms Taylor informed the applicant in the letter that he would be suspended from duty with pay, pursuant to clause 122 of the 2021 Agreement but was giving the applicant an opportunity to respond to this, before making a final decision. On 4 April 2022, Ms Taylor made the final decision to suspend the applicant.
6. On 21 April 2022, the applicant’s representative wrote to the ACT Minister for Health, Ms Rachel Stephen-Smith, regarding the impact of the suspension of the applicant (and another doctor) on the available resources at the hospital. The representative stated expressly: *“The purpose of this letter is not to cavil about the investigation taking place. My clients accept that it should and will take its course.”*
7. On or about 28 April 2022, Griffin Legal was retained by CHS to conduct the investigation into the applicant’s behaviours.
8. On 9 June 2022, the applicant’s representative wrote to the third respondent, Mr Ian McPhee, the Public Standards Commissioner, amongst other things, to confirm the scope of the investigation and the exercise of powers. The Commissioner relied to this correspondence on 17 June 2022.
9. On 9 June 2022, the applicant was informed by Ms Claire Carton, a partner of Griffin Legal, that she had been appointed by the ACT Public Sector Standards Commissioner as the investigator and asked him to sign the “Consent to Release Information” form.
10. The applicant did not respond to this letter. On 14 June 2022, Ms Carton sent the letter again and sent the same letter again on 15 June 2022.
11. On 27 June 2022, Ms Carton provided details of the alleged behaviours together with extracted statements made by named doctors and other hospital staff and associated documentation, as referred to at paragraph 9 above. The applicant was given until 8 August 2022 to provide his response. Ms Carton provided the applicant with an opportunity to respond to the allegations and was provided with three options:
12. a recorded interview via Microsoft Teams (scheduled for 30 June 2022 at 9:00am):
13. a written response; or
14. both (a) and (b).
15. On 28 June 2022, the applicant’s legal representative responded to Ms Carton, stating that the applicant did not want to provide a written response but would participate in an interview. The applicant requested that an interview occur in the week of 18 July 2022.
16. On the same day, Ms Carton responded and suggested times that were available for an interview in the week beginning 18 July 2022. The applicant’s representative did not respond. Ms Carton sent an additional email on 1 July 2022 regarding the times for the interview.
17. On 12 July 2022, the applicant’s legal representative sent an email to Ms Carton changing their position and rather than providing dates for attending an interview responded that they would provide a written response and could not do it by 18 July 2022. On 13 July, the applicant’s legal representative sought an extension until 1 August 2022, stating that he anticipated “*the written response will be quite lengthy and comprehensive and, therefore, there may be no need for an interview. Given that,* ***whilst substantial progress******has been made****, the response still has a way to go in terms of getting to finalisation, neither I nor Dr Alasady are in a position to conclusively determine whether an interview is necessary at this point; but if one is, say sometime during the first week in August.*” (Emphasis added)
18. On 25 July 2022, Ms Carton wrote to the applicant’s legal representative again confirming her expectation that a written response would be received from the applicant on or before “next Monday 1 August 2022” and stating, inter alia, that

After this date I will be finalising my investigation including findings, noting your client has now had a reasonable time to respond.

I also confirm my understanding Dr Alasady does not wish to be interviewed. If he does wish to be interviewed, it will need to occur this week, and I ask that you let me know as soon as possible.

1. The following day, being 26 July 2022, the applicant served the “Urgent Application”.
2. On 29 July 2022, the applicant’s representative wrote to Ms Carton, and, inter alia, stated “I am still working on the written response notwithstanding the proceedings” and sought access to certain medical records.
3. Following the filing and service of the Originating Process and Statement of Claim, the applicant’s representative sought the following undertaking from the respondents:

“the undertaking of the parties that no steps prejudicial to him, including any continuation of the investigation currently being conducted by the law practice, Griffin Legal, be undertaken until the court has determined his application.”

1. This was not accepted by the respondents on the basis of their view that it was effectively giving the applicant part of the final relief he was seeking.
2. The applicant thereafter sought an undertaking to the effect of the interim relief sought in his application, filed on 1 August 2022.
3. The respondents informed the applicant, on 3 August 2022, that they were not prepared to give this undertaking but were prepared to provide a two-week extension for the applicant’s written response to Griffin Legal subject to the applicant consenting to proposed directions in relation to his Urgent Application. The applicant agreed but on the basis that he proposed a “three-week extension” (after the Court’s determination of the injunction) to provide his written response.
4. This chronology reveals:
5. the applicant has been on notice of the fact of the respondents’ view that a preliminary assessment was conducted by Ms Deegan, the general nature of the allegations and that the matter has been referred to investigation since 28 March 2022;
6. the applicant has been legally represented since April 2022;
7. at no point in the interparty correspondence has the applicant sought particulars or claimed he is unable to respond absent particulars save for the request for medical records on 29 July 2022 (which post-dates the filing of his application and statement of claim);
8. the applicant and his representative have had (to the date of the hearing) since 27 June 2022 to prepare his written response with numerous extensions granted by Ms Carton on request;
9. the applicant’s representative asserted in correspondence to the respondents that there was already “substantial progress” in the preparation of his response on 13 July 2022 and that, as at 29 July 2022, work was still being done on the response and the respondents have agreed to a further extension that the applicant may provide the response 3 weeks after the Court’s determination of the interim injunction; and
10. at no point in any of the interparty correspondence has the applicant alleged any of the matters he now raises in his claim.

## Relevant principles

1. The application is brought under the Court’s general power under s 23 of the *Federal Court of Australia Act 1973* (Cth).
2. The parties agree that the relevant principles are as articulated in the respondents’ submissions, which may be summarised as follows. The applicant bears the onus of proving: *First,* that there is a serious question to be tried as to the applicant’s entitlement relief. An applicant will make out a prima case if, *were the evidence to remain as it is*, there is probability that at trial the applicant would be entitled to the relief claimed. *Secondly,* the inconvenience or injury the applicant would be likely to suffer absent the injunction outweighs any injury the respondent would suffer if it were granted, namely the balance of convenience is in the applicant’s favour: *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1; (1968) 118 CLR 618 at 622-623 (per Kitto, Taylor, Menzies and Owen JJ). *Thirdly,* damages would not be an adequate remedy:see, for example, *Australian Broadcasting Corporation v* ***O’Neill*** [2006] HCA 46; 227 CLR 57 at [19] (per Gleeson CJ and Crennan J).
3. The demonstration of whether there is a prima facie case for relief only requires that the applicant show that there is sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending trial. The strength of the likelihood depends on the nature of the rights the applicant asserts and the practical consequences likely to result from the order he or she seeks: see *O’Neill* at [65] and [71] (per Gummow and Hayne JJ).
4. The degree of the likelihood of success is a factor related to the balance of convenience: *Castlemaine Tooheys Ltd v South Australia* [1986] HCA 58, 161 CLR 148 per Mason ACJ at 153. The apparent strength of the case “will often be an important consideration to be weighed in the balance”: *Samsung Electronics v Apple* [2011] FCAFC 156; 217 FCR 238 at 261 [67] (per Dowsett, Foster and Yates JJ). Accordingly, the stronger the prima facie case, the less that may be required to tip the balance of convenience and vice versa.

### Is there a serious question to be tried?

#### Alleged breaches of the applicable enterprise agreement

1. It is accepted at this interlocutory stage that there was limited time available for the applicant to make his submissions and that the Court, of course, does not have the benefit of all the evidence and full argument as yet in this matter. The applicant’s counsel was succinct in his submissions and took care to argue the claim as best he could. Whilst difficult to summarise, given the lengthy, repetitive nature of the numerous pleaded claims, the applicant’s counsel, appropriately, at hearing refined the focus to the following elements (not comprising the totality) of the applicant’s claim in support of this application. The alleged breaches of the applicable enterprise agreement are claimed to have arisen both because of and in the wake of both the Johns Review and the Deegan Assessment.
2. *First,* the applicant contends that by operation of the applicable enterprise agreements:
3. the conducting of a “preliminary assessment” is an essential precursor to an investigation and no investigation can be undertaken without a “preliminary assessment”. As a consequence, the applicant contends that if the Court finds that no or a defective preliminary assessment was undertaken, the respondents are not able to conduct the current investigation;
4. when a “potential disciplinary matter arises, whether reported to a supervisor or from a supervisor’s own observation, the relevant supervisor has a duty to conduct a preliminary assessment *with expedition* to see if the matter warrants further investigation” (emphasis added) and if such an assessment is not conducted proximate to the time that the manager observed or became aware of the behaviour *then* the applicant is immune from being the subject of any later investigation by reason of their purported failure to act with expedition. The applicant variously claims that various managers did not investigate the current allegations at the relevant time and therefore he is now immune from being the subject of an investigation;
5. the “preliminary assessment” defines the parameters of any “investigation” and given here that the Deegan Report did not include certain allegations that have now been raised by Ms Carton as investigator, Ms Carton is precluded from investigating those matters;
6. if there have been previous preliminary assessments and/or they had determined no further investigation was needed, then the respondents are precluded from any further preliminary assessment be made in relation to the same allegations against the applicant. The applicant claims that either there have been previous preliminary assessments and/or they had determined no further investigation was needed, thus by reason of the purported operation of the agreement, the current investigation cannot proceed; and
7. a person who is the subject of a preliminary assessment is entitled to procedural fairness which includes being informed of the commencement of the preliminary assessment, entitled to respond to the allegations and be informed of its outcome.
8. The applicant contends alternatively that to the extent that the Deegan Assessment constituted a preliminary assessment, this assessment was purportedly “fundamentally flawed” in two respects, the details of which are detailed further below.
9. The applicant submitted that if the allegations have been dealt with “with expedition”, the applicant “would have had the opportunity to consider his conduct and take steps to avoid repetition” and “instead, years after the events, he is now the subject of a disciplinary investigation that trawls through allegations that should have been considered at the time the allegations were made.”
10. *Secondly,* the applicant then claims that a significant number of the allegations lack particulars, such that they are “so vague and imprecise” that it is not possible to respond fairly.
11. *Thirdly,* the applicant further claims that there is a “clear case of apprehension of bias”, given the second respondent, the CEO of CHS, has made several public statements about the disciplinary investigations, which “indicate that if any practitioner is found guilty of any disciplinary offence under investigation, they will be sacked”, from which the consequence of any disciplinary finding has “therefore been predetermined” in the applicant’s case.
12. For the following reasons, I accept that there is a *prima facie* case, albeit a weak one.
13. Dealing firstly with the alleged breaches of the applicable enterprise agreement. The interpretation of enterprise agreements involves a process of construing the language of the particular agreement understood in the light of its industrial context and purpose: *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2002] HCA 10; 222 CLR 242 at 246 (per Gleeson CJ and McHugh J;*Kucks v CSR Limited* (1996) 66 IR 182 at 184.
14. The applicant’s arguments rest largely on a reading of clause 117 (which deals with preliminary assessments) without apparent proper consideration of its context. The applicant’s submissions were based solely on consideration of the 2021 Agreement. Care needs to be taken not to read this clause in isolation from the rest of the enterprise agreement and particularly those provisions that relate to disciplinary procedures as otherwise contained within Section N of the 2021 Agreement (which includes clause 117).
15. Section N – “Workplace Values and Behaviours” provides for the procedures in which workplace values and behaviours are dealt with. They include procedures relating to conducting preliminary assessments (clause 117), counselling (clause 118), underperformance (clause 119), misconduct and discipline (clause 120), dealing with allegations of misconduct (clause 121), suspension, reassignment or transfer (clause 122), investigations (clause 123), findings with respect to misconduct (clause 124), disciplinary action and sanctions (clause 125), criminal charges (clause 126), rights of appeal (clause 127), competency review procedures (clause 128) and clinical practice processes (clause 129).
16. Clause 117 provides:

117.1. In cases where an allegation of inappropriate behaviour or alleged misconduct is made, or an incident occurs which may be deemed to be inappropriate behaviour or alleged misconduct, the appropriate manager or supervisor must undertake an assessment to determine whether the matter can be resolved or whether further action is required.

117.2. The manager or supervisor may seek advice from an appropriate Human Resources adviser, however the manager or supervisor is responsible for undertaking the assessment unless an actual or perceived conflict of interest exists.

117.3. The assessment must be done in an expedient manner and generally be limited to having discussions (either verbal or written) about the allegation or incident, with relevant employees, and, if requested, their representatives.

117.4. Although the principles of procedural fairness apply, this assessment is not a formal investigation (as this may occur after the assessment is undertaken) and is designed to enable a manager or supervisor to quickly determine whether formal investigation or other action is needed or not to resolve the issues. The manager or supervisor must communicate the outcomes to relevant employees and their representatives if any.

117.5. If the manager or supervisor determines that the allegations require investigation the manager or supervisor must recommend to the head of service that the matter be investigated.

117.6. The head of service may determine that no investigation is necessary where the employee admits to the alleged misconduct and the employee agrees that there is no need for an investigation. The employee must fully understand the misconduct they are admitting to and make an admission statement.

117.7. Where an employee makes an admission in accordance with subclause 117.6 the head of service may determine the appropriate disciplinary action or sanction in accordance with clause 125. The head of service must ensure that they have sufficient information concerning the nature and full circumstances of the misconduct, any mitigating factors, and details of the employee's prior service record and performance to enable a fair and reasonable determination under clause 125to be made.

1. The applicant claims that a preliminary assessment is a precondition for any subsequent investigation by reason of the terms of the clause and where it is the manager/supervisor “who is in the loop” in contrast to the ultimate investigator under clause 121 who will be either a “head of service” or the “Public Sector Standards Commissioner” who are “out of the loop”. Further the applicant relied, in his oral submissions, on the contents of the ACT Public Sector Standards Commissioner’s ***Guidelines*** *to the Misconduct Process* dated October 2019.
2. Section 121 concerns how one deals with allegations of misconduct, and is extracted as follows:

121.1. Upon becoming aware of a matter of alleged misconduct the head of service must determine whether or not the matter needs to be investigated. Where the head of service determines that investigation is required the head of service must refer the matter to the Public Sector Standards Commissioner for investigation.

121.2. At any stage of dealing with alleged misconduct the head of service may, in accordance with clause 122, do any of the following:

121.2.1. transfer the employee to other duties,

121.2.2.re-allocate duties away from the employee;

121.2.3. suspend the employee with pay;

121.2.4. suspend the employee without pay where serious misconduct is alleged.

121.3. Upon receiving a referral in accordance with subclause 121.1the Public Sector Standards Commissioner must either make arrangements for an appropriately trained or experienced person (the investigating officer) to investigate the alleged misconduct in accordance with clause 123 or may decide that an investigation will not resolve the matter and refer it back to the head of service for resolution or further consideration.

121.4. The head of service may determine that no investigation is necessary where the employee admits to the alleged misconduct and the employee agrees that there is no need for an investigation. The employee must fully understand the misconduct they are admitting to and make an admission statement.

121.5. Where an employee makes an admission in accordance with subclause 121.4 the head of service may determine the appropriate disciplinary action or sanction in accordance with clause 125. The head of service must ensure that they have sufficient information concerning the nature and full circumstances of the misconduct, any mitigating factors, and details of the employee's prior service record and performance to enable a fair and reasonable determination under clause 125 to be made.

121.6. The Public Sector Standards Commissioner may at any time decide to instigate an investigation of alleged misconduct, in the absence of a referral under subclause 121.1, if satisfied that the matter warrants investigation.

121.7. Notwithstanding the provisions of this section, the head of service may summarily terminate the employment of an employee without notice for serious misconduct as defined within the Fair Work Regulations

1. I am of the view that there are a number of difficulties with the applicant’s contention that by operation of clause 117 a preliminary assessment is a precondition for any investigation. There is nothing in the words of clause 117 nor those clauses that deal with investigations (clauses 121 and 123) which suggest the same. It may ultimately be more persuasive that Section N contains a number of ways in which employee performance and misconduct may be dealt with. The content of the Section wards against this interpretation. It identifies the roles various actors may play in the management of these issues. There is overlap - a manager/supervisor under clause 117 may determine whether a matter requires investigation (clause 117.5) - under clause 121.1 a head of service “upon becoming aware of a matter of alleged misconduct” must determine whether or not the matter needs to be investigated. If it were the case that it was only through a “preliminary assessment” that an investigation could be undertaken, why does the “head of service” have a power to make that decision and referral? Similarly, clause 121.6 states that the Public Standards Commissioner may *at any time decide to instigate an investigation of alleged misconduct*, in the absence of a referral under subclause 121.1. This suggests that a preliminary assessment is not the only gateway by which a matter may be the subject of investigation under clause 121. Both subclauses 121.1 and 121.6 appear to provide no fetter to the powers of either to decide whether to investigate at all or as to the content of any purported investigation.
2. The manner in which allegations may come to light in any organisation can be multifarious. The various pathways for dealing with those allegations identified in the enterprise agreement appear consistent with industrial reality. An organisation or governmental agency will need to be flexible in the way they respond to performance and misconduct allegations. It may be that it would be entirely inappropriate that a manager or supervisor conduct a “preliminary assessment” (as the Guidelines acknowledge). This could be for many reasons including by reason of the seriousness and the sensitivity of the allegations, where those allegations involve multiple employees across an organisation or where the manager or supervisor may themselves be the subject of the allegations.
3. Care needs to be taken when using the Guidelines as an aid to the construction of the applicable enterprise agreements. They are a “guide”. They say nothing about how they interact with any obligations under the enterprise agreements. Whilst I accept it may be, where the argument might be more fulsomely explored at trial, that the Guidelines provide some assistance to the applicant’s claims, it appears that it will be difficult for them to aid a construction which appears to be at odds with the purpose and terms of the enterprise agreement.
4. The forgoing also exposes the weakness of the applicant’s argument that a preliminary assessment may only be undertaken with “expedition” and if such an assessment is not conducted proximate to the time that the manager observed or became aware of the behaviour then the applicant is immune from being the subject of a later preliminary assessment and/or investigation.
5. There does not appear to be anything within the words of clause 117 that creates any time bar in which an assessment may be made proximate to when the incident occurred. This is unsurprising given that an employer does not (and cannot) control when an employee will raise any allegation of misconduct (which may be some time after an incident has occurred). Furthermore, employers have a myriad of statutory obligations to ensure employee health and wellbeing, ensure employees are not the subject of bullying and are not harassed or discriminated against. Further, an employer may have express and implied contractual obligations or statutory obligations to deal with the complaint regardless of whether it is made promptly after the alleged conduct or how it may or may not have been handled in the past. Accordingly, it appears difficult to argue that the parties to the enterprise agreement intended that there could be such a cloak of immunity placed on the applicant (as contended by the applicant) in the face of the first respondent’s concurrent statutory and contractual obligations which may require otherwise.
6. For the same reasons, I am of the view that the applicant’s argument that if there have been previous preliminary assessments and/or they had determined no further investigation was needed, the respondents are precluded from any further preliminary assessment being made in relation to the same allegations is a difficult one and therefore weak.
7. Similarly, I am of the view that the applicant’s argument that the preliminary assessment defines the parameters of any investigation will be difficult to argue. The terms of clause 117 state that the “assessment” does not constitute an “investigation” (subclause 117.4). The assessment is confined to determining whether a formal investigation or other act is needed or not (subclause 117.4). There does not appear to be anything within the terms of clause 117 nor clause 121 which suggests that it is for the “manager/supervisor” to set the parameters of the investigation.
8. In any event, even if one accepts the applicant’s argument that a preliminary assessment constitutes a precondition for an investigation, it does appear arguable that the Deegan assessment falls within that description. In this respect I accept that the applicant contends, in the alternative, that Deegan assessment was purportedly “fundamentally flawed” in two respects.
9. *First*, it is claimed that Ms Deegan’s assessment cannot be relied upon because it did not cover the majority of the allegations that have since been made against the applicant in the Griffin investigation, such that the applicant submits that those matters “have not been properly assessed to determine that a formal disciplinary investigation can go ahead”. In this respect, I repeat my reasons above - the applicant’s argument that a “preliminary assessment” is a precondition for an investigation is not strong. Further, it is not readily apparent how the applicant alleges that clause 117 (and its content) define the parameters of the investigation going forward.
10. *Secondly,* the applicant claims that he has been denied procedural fairness as required by the applicable enterprise agreement by reason of the alleged failure to give him an opportunity to respond to any proposed recommendation by Ms Deegan for the matter to be investigated and by not being given an opportunity to respond the matters that had been “brought up about [him]”. There appears to be nothing in the terms of clause 117 to give rise to such obligations. The reference to “principles of procedural fairness” in subclause 117.4 appear to refer to the obligation on the part of the manager or supervisor to communicate the outcomes to the relevant employee and their representative as identified in the last sentence of the subclause. The clause states that a “preliminary assessment” does not comprise a “formal investigation” and its purpose is to consider the referral of the matter for investigation or a number of other outcomes.

#### The claimed lack of particulars

1. The applicant claims that a significant number of the allegations lack particulars, such that they are “so vague and imprecise” that it is not possible to respond fairly. I do not understand how this contention relates to any breach of the applicable enterprise agreements. It is perplexing that there was no evidence before me that the applicant, despite being legally represented since April, has never requested particulars, save for certain medical records and has repeatedly claimed to the respondents, through his representatives, in correspondence that he has substantially progressed his response and will be able to do so.

#### The apprehension of bias

1. The applicant further claims that there is a “clear case of apprehension of bias”, given the second respondent, the CEO of CHS, has made several public statements about the disciplinary investigations, which on the applicant’s submission “indicate that if any practitioner is found guilty of any disciplinary offence under investigation, they will be sacked”. He submits that by reason of this bias, the consequence of any disciplinary finding has “therefore been predetermined.
2. There appear to be some difficulties with respect to this claim which is highly speculative. *First,* an investigation is being undertaken by an external lawyer, Ms Carton, not the second respondent. *Secondly,* the evidence reveals that Ms Carton is conducting the investigation in an orthodox way. She has set out in detail the allegations and the supporting material. She has provided the applicant with numerous ways to respond and engage in the process and afforded him multiple extensions to put on his response. There is nothing on the evidence to suggest that her task is infected with any of the alleged biased views of the CEO of the CHS. *Thirdly,* it remains to be determined whether the second respondent will be the Sanction Delegate. The first respondent has communicated with the applicant to say that the second respondent is “likely to be” the sanctions delegate but that is all. *Fourthly,* the public statements are conditional. They indicate that *if* misconduct is made out, what the disciplinary consequences may be. The 2021 Agreement provides for a range of sanctions that may flow from any findings, not only termination of employment. *Fifthly,* in any event the applicant has rights of appeal from any decision made by the sanctions delegate under clause 127 of the 2021 Agreement.

### Does the balance of convenience favour the applicant?

1. For the following reasons I do not think that the inconvenience or injury the applicant would be likely to suffer absent the injunction outweighs any injury the respondent would suffer if it were granted.
2. The applicant claimed that the balance weighed in his favour for a number of reasons which are addressed as follows.
3. *First,* he submits that by not seeking that his suspension be uplifted at this stage, there is no possibility of any harm to other employees if there is a “pause” in the investigation process.
4. *Secondly,* he submits that given the staleness of the allegations, the fact of the investigation process taking some time, a “short delay” will not prejudice the respondents particularly where the matter could be brought on with expedition.
5. In this regard, I note that the fact of him being absent from the workplace does alleviate some of the prejudice that would be suffered by the respondent if there is a “pause” in the investigative process. However, this must be weighed against the likely length of the “pause”, which is unlikely to be a matter of weeks but rather a matter of months. There do appear to be deficiencies in the applicant’s pleading for which particulars may be warranted. The pleading is lengthy and the claims numerous. The respondents submitted that there is a possibility of contested evidence. Accordingly, one has to assume the “pause” will be at least one to two months before the matter can be heard with additional time for judgment.
6. A complicating and competing factor which weighs against the balance of granting the interim relief, is that the applicant is one of a number of employees who are the subject of this investigation and where there are competing allegations as between them. Accordingly, a likely consequence of any “pause” with respect to the investigation as against the applicant, will carry over to other parts of the investigation. Further delay has real consequences for any persons who have made allegations or been the subject of any of the alleged conduct. Whilst of course there have been no findings, and there may ultimately be no findings made against the applicant and the other persons who are the subject of the investigation, delay in the completion of the investigation will have an effect on all those who are involved in the investigation (whether as complainants, witnesses or persons who are the subject of the investigation).
7. In addition, the allegations include conduct that purportedly creates an unsafe environment which may be contrary to the first respondent’s work, health and safety obligations. It is alleged that the applicant has behaved in an unprofessional manner, fostering a dysfunctional relationship with staff, unfairly criticising and disparaging colleagues. I accept that the first respondent has obligations not only under the enterprise agreement but also at common law and under the *Work Health and Safety Act 2011* (ACT) to identify safety issues (which are likely to be identified as part of the investigation) and has a statutory non-delegable duty to put in place measures to address those risks.
8. These two matters identify real prejudice to the respondents if the interim injunction were granted.
9. *Thirdly,* to the extent that it is accepted (which I do) that the applicant will suffer stress and expense in responding to the allegations, I understand from the communications from his legal representatives that his response has been substantially completed. Further, it is a necessary and ordinary incident of employment that employees have to respond to allegations (even if they do not accept them or those allegations are not ultimately made out).
10. *Fourthly,* to the extent that the applicant alleges that he will suffer from negative publicity if the investigation continues, I accept this may be the case but of course the extent to which it is negative depends on the outcome of the investigation which is at this stage unknown. However, I am of the view that these matters do not outweigh the real prejudice to the respondents outlined above.
11. *Lastly,* the applicant claims that damages will be inadequate because if the investigation continues *and* it is determined that the allegations are made out *and* if the Court subsequently determines that the investigation was flawed and should not have taken place then “monetary damages would not be sufficient” by reason of the reputational damage suffered. I accept that the potential for the applicant to suffer reputational damage by reason of any adverse investigation finding. However, I note that this possible prejudice is predicated on a number of things occurring, which are at this stage speculative. Further, any subsequent finding by the Court regarding the investigative process would be capable of assuaging that potential detriment in some respects.
12. Here the fact that the applicant’s prima facie case is weak must be weighed in the balance against this consideration. This is particularly so with respect to the applicant’s claims regarding predetermination and the “inevitability” of termination. For the reasons set out above, his concerns regarding predetermination arise from multi-layered speculation and are premature.

### Conclusion

1. The applicant’s claim is weak. The prejudice to the applicant is outweighed by the prejudice to the respondents.
2. Accordingly, the application for interlocutory injunctive relief is dismissed. The parties have made no submission regarding costs and as to whether section 570 of the *Fair Work Act 2009* (Cth) is applicable in these circumstances. I reserve the question of costs.

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| I certify that the preceding seventy-nine (79) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Raper. |

Associate:

Dated: 18 August 2022