FAIR WORK AUSTRALIA

DECISION

Workplace Relations Act 1996
s.120 - Appeal to Full Bench

Catholic Regional College Sydenham
v
Independent Education Union of Australia
(C2011/3428)

SENIOR DEPUTY PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT HAMBERGER
COMMISSIONER SPENCER

MELBOURNE, 10 MAY 2011

Appeal against decision [[2011] FWA 1003] of Commissioner Roe at Melbourne on 15 February 2011 in matter number DR2010/654 - permission to appeal granted - appeal upheld - decision of Commissioner Roe quashed.

[1] This is an appeal by the Catholic Regional College Sydenham (CRCS) against a decision made by Commissioner Roe on 15 February 2011.[1] That decision was made in proceedings initiated by the Independent Education Union of Australia (IEUA) under the dispute settlement provisions in the *Victorian Catholic Education Multi-Employer Agreement 2008* (the Agreement).[2] Clause 10 of the Agreement is entitled "Grievance Procedure".

[2] On 9 December 2010, the IEUA made an application to have a dispute resolution procedure conducted under clause 10 of the Agreement. The application was made pursuant to what was s.709 of the *Workplace Relations Act 1996* (the WR Act) at that time. It is common ground that the Agreement is a transitional instrument for the purposes of the *Fair Work (Transitional Procedures and Consequential Amendments) Act 2009* (the Transitional Act).[3] It is also common ground that pursuant to the Transitional Act the WR Act continues to apply in relation to a dispute arising under the Agreement and Fair Work Australia may deal with such a dispute.[4]

[3] The dispute before Commissioner Roe related to actions taken in respect of alleged conduct by an employee at CRCS and, in particular, the application of clause 11 of the Agreement - Due Process - to the case of the particular employee.

[4] The relevant clauses of the Agreement, clauses 11 and 25, are recorded in the Commissioner's decision. The central question before the Commissioner went to the meaning of "may" in clause 11.1.2 and whether CRCS had to comply with the "Due Process" requirements in clause 11 of the Agreement, in relation to terminations of employment with notice, involving the conduct or performance of the employee. Clause 11 provides:

"**11.1 Concerns about conduct or performance**

11.1.1 An Employer who has concerns with the conduct or performance of an employee shall in the first instance hold discussions with the relevant employee. A record of these discussions shall be held. The Employee shall have the right to be accompanied by a nominee of the Employee in these discussions.

11.1.2 Should the employer still hold concerns regarding the employee's performance or conduct, following the discussions outlined above, the employer may initiate Due Process as outlined below.

11.2 Instigating the Due Process

11.2.1 To instigate Due Process the Employer or the Principal/Employer's nominee shall advise the Employee in writing of:-

11.2.1(a) the Employer's concern about the Employee's conduct or performance;

11.2.1(b) the period of the Due Process, stating the expected timeline of the total process, and the times and dates when review meetings will take place within the timeline;

11.2.1(c) the forms of assistance and counselling as appropriate that will be provided by the Employer to help the Employee address and overcome the Employer's concerns; and

11.2.1(d) the proposed time, date and place of the Initial Meeting of the Due Process.

11.3 The Initial Meeting

11.3.1 At the Initial Meeting:

11.3.1(a) the Employee shall be given an opportunity to seek clarification of any points raised in the Employer's letter and to respond to the concerns raised; and

11.3.1(b) there shall be an attempt to reach agreement regarding the expected timeline of the total process, and the times and dates when review meetings will take place within the timeline.

11.3.2 The Employee shall have the right to be accompanied by a nominee of the Employee at this Initial Meeting and subsequent review meetings.

11.4 Review Meetings

11.4.1 At the review meetings during the period of Due Process:

11.4.1(a) the Employee shall demonstrate how the concerns of the Employer are being addressed; and

11.4.1(b) the Employer shall provide advice to the Employee as to the progress of the Employee in addressing the concerns.

11.5 Concluding the Due Process

11.5.1 At the end of the timeline, the Employer shall advise the Employee in writing as to whether:

11.5.1(a) the Employer's concerns have been satisfactorily addressed; and

11.5.1(b) whether sufficient progress has been made to conclude the Due Process, or whether the Employer intends to extend the period of the Due Process.

11.6 Following the conclusion of the Due Process, if the Employer's intended course of action is to terminate the Employment of the Employee, Clause 25 of the Agreement and the provisions of the WR Act apply."

[5] The Agreement does not create a separate right of appeal. The only appeal available is s.120 of the WR Act. It provides:

"(1) Subject to this Act, an appeal lies to a Full Bench, with the leave of the Full Bench, against:

(a) an award or order made by a member of the Commission; and

(b) a decision of a member of the Commission not to make an award or order; and

(c) a decision of a member of the Commission under paragraph 111(1)(e); and

(d) a decision of a member of the Commission to vary, or not to vary, an award under section 812; and

(e) a decision of the Commission to vary, or not to vary, an award or workplace Agreement that has been referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*; and

(f) a decision of a member of the Commission that the member has jurisdiction, or a refusal or failure of a member of the Commission to exercise jurisdiction, in a matter arising under this Act.

(2) A Full Bench shall grant leave to appeal under subsection (1) if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted."

[6] In this case, an appeal only arises under s.120(1)(f) of the WR Act. It is not submitted that the Commissioner did not have jurisdiction, so the first part of s.120(1)(f) is not relevant. Therefore the issue is whether the Commissioner refused or failed to exercise jurisdiction.

[7] CRCS submitted that the Commissioner failed to exercise jurisdiction. It submitted that the failure is a constructive failure to exercise that jurisdiction, which arises in circumstances where the decision is affected by jurisdictional error.

[8] The appeal grounds contend that the Commissioner erred as to his jurisdiction by asking himself the wrong question and/or applying the wrong principles and taking into account irrelevant and superfluous considerations as to the meaning of the word "may" in clause 11.1.2 of the Agreement, including, in particular:

a. Inadmissible evidence and material as to the subjective intentions of the parties to the Agreement;

b. Inadmissible historical evidence and materials that did not constitute objective background facts known to both parties; and

c. Inadmissible evidence and materials as to the alleged "custom and practice" in the Catholic School education sector prior to the making of the Agreement.

[9] CRCS submitted that, in order to resolve the dispute before him, Commissioner Roe was required to properly construe the Agreement. It submitted that he approached his task from the wrong direction, asked himself the wrong questions and as a consequence placed reliance on material he was prohibited from considering. He failed to exercise the jurisdiction properly reposed in him to "determine the matter in dispute consistent with the limits or standards set by the relevant provisions of this Agreement".[5]

[10] CRCS submitted that the Commissioner was permitted to look at evidence of prior negotiations or surrounding circumstances only if the words of the Agreement were susceptible to more than one meaning and only then would objective evidence of background facts be relevant to the interpretation of an agreement to the extent that it shows mutuality of intention.[6]

[11] CRCS submitted that the conclusion of the Commissioner that he must have regard for the context of the Agreement as a whole and the "custom and practice" in the Catholic School education sector prior to the making of the Agreement[7] is wrong. It submitted that the Commissioner erred by not starting with the words of the Agreement, instead resorting to the history of the clause as an aid to interpretation, completely reversing the ordinary approach to the construction of an agreement.

[12] CRCS submitted that the Commissioner erred by imposing as a test whether there was evidence of any mutual intention to alter the effect of previous instruments, rather than assess evidence as to whether there was a mutual intention to reflect that past history in the current Agreement.

[13] CRCS submitted that commencing an interpretation of the term "may" in clause 11.1.2, as the Commissioner ought to have done, by considering the words in the context of the Agreement, the word "may" is permissive and discretionary. The word could be mandatory but ordinarily the context and purpose must point to that interpretation with some clarity. It does not do so in the context of clause 11 as a whole:

- "May" in clause 11.1.2 cannot mean "must" or "shall" in context because clause 11 repeatedly uses the word "shall" to indicate what parts of the clause are mandatory.
- The Agreement as a whole repeatedly draws a distinction between "must", "shall", "will" and "may" and uses "may" in contra distinction to the other words. Consecutive clauses distinguish between "shall" and "may".
- The apparent intention of the Agreement is not that "Due Process" is mandatory. On its face it is a remedial, educative, coaching and mentoring system.
- The IEUA construction leads to absurd results. All performance and conduct defects not amounting to serious misconduct would need to be subjected to the drawn-out "Due Process" clause.
- There is nothing absurd or unusual about the CRCS construction which, subject to overarching obligations to consult or notify, allows an employer to determine how its enterprise is run.

[14] IEUA submitted that there was no basis for the CRCS assertion that Commissioner Roe relied on inadmissible evidence in reviewing the history of the Termination and Due Process clauses regulating Victorian Catholic Schools through awards and agreements over paragraphs 23-32 of his decision. Such an assertion was made only in respect of paragraph 32 in which the Commissioner sets out matters about which there was no evidence or about which there was no contest.

[15] IEUA submitted that the CRCS contention that Commissioner Roe did not apply the rules of statutory interpretation, evidenced by reliance on "repeated references to 'mutual intention'" is unsustainable. IEUA submitted that Commissioner Roe was aware of the approach to the construction of the Agreement required, noting the reference by Mr West, for CRCS, to:

> ". . . Full Bench in *The Australian Worker's Union – West Australian Branch v Co-Operative Bulk Handling Limited* [[2010] FWAFB 4801]. That Full Bench referred with approval to the distillation of the law by Vice President Lawler in *Kenneth Watson & Ors v ACT Department of Disability Housing and Community Services* [(2008) 171 IR 392 at [8] to [14]], including the following:
>
> > '. . . the parties' presumed intention may be taken into account in determining which of two or more possible meanings is to be given to a contractual provision. What cannot be taken into account is evidence of statements and actions of the parties which are reflective of their actual intentions and expectations. Objective background facts can include statements and actions of the parties which reflect their mutual actual intentions. That is, evidence of the mutual subjective intention of the parties to a contract may be part of the

> objective framework of facts within which the contract came into existence. It is the mutuality which makes the evidence admissible' [*BP Australia Pty Limited v Nyran Pty Limited [[2003] FCA 520*].'"[8]

[16] IEUA submitted that mutual intention relative to the construction issue before the Commissioner was used in paragraphs 39, 40, 42, 45, 48, 49, 50, 52, 57 and 59 in the manner described in *Watson v ACT Department of Disability Housing and Community Services*.[9] The "objective background facts" relied upon by the Commissioner in paragraphs 42 and 45 identify evidence on which he could rely as to mutual intention.

[17] IEUA submitted that there was no substance in the CRCS contention on appeal that the Commissioner relied heavily on inadmissible evidence led by the IEUA. Many of the issues raised by CRCS relate to the issue of "conduct or performance" which was not in issue in the appeal. Otherwise, contrary to the submissions of CRCS, the Commissioner explicitly did not rely on evidence referred to at paragraph 31 of his decision. At paragraph 39 he made no reference to evidence and at paragraphs 49-60, the evidence referred to was that of CRCS and/or was not relied upon by the Commissioner in determining the dispute. In relation to paragraphs 53-54, IEUA submitted that the Commissioner was entitled to take account of the "evolution of relevant industrial instruments".[10]

[18] Further, it submitted, the awareness and application by the Commissioner of the correct approach to mutual intention was reflected in his assessment of the evidence of witnesses for each party:

> "Much of the evidence of Ms Cotter and Mr Howett was '*evidence of statements and actions of the parties which are reflective of their actual intentions and expectations'* These are matters which the authorities, particularly those referred to by Mr West for the Respondent, suggest I cannot have regard to. Their evidence certainly established that the parties disagree about the meaning of the word "may" in the Due Process clause and that they held the view that they now hold about the correct interpretation of the word prior to this case. Neither of the parties provided detailed evidence of cases where Due Process had been applied and where it had not been applied where there were concerns about conduct or performance and the employer was seeking to dismiss the employee with notice."[11]

[19] IEUA submitted that a fair reading of the decision of Commissioner Roe disclosed that there was no reliance by him, let alone heavy reliance on inadmissible evidence.

[20] IEUA submitted that impermissible reliance on "custom and practice" by the Commissioner alleged by CRCS in respect of his findings at paragraph 39 is misplaced because, when properly read in the context of paragraph 40 of his decision, this reference is to be understood as a reference to those matters which reflect objective background facts. Given Commissioner Roe specifically identified those matters which he was entitled to have regard to there is no warrant to give it any other meaning.

[21] IEUA submitted that CRCS had identified no error of law or jurisdiction sufficient to sustain leave to appeal.

Consideration

[22] An appeal under s.120(1)(f) of the WR Act is only available with leave of Fair Work Australia and only in respect of jurisdictional error by the Member at first instance. A Full Bench will grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted.

[23] Unsurprisingly, CRCS has characterised the errors alleged as jurisdictional in nature. Whether a particular error constitutes an excess of jurisdiction or a failure to exercise jurisdiction is often difficult to determine.[12] Whilst "it is not every mistake in understanding the facts, in applying the law or in reasoning to a conclusion that will amount to a constructive failure to exercise jurisdiction"[13] falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.[14]

[24] The appeal grounds contend that the Commissioner erred as to his jurisdiction by asking himself the wrong question and/or applying the wrong principles and taking into account irrelevant and superfluous considerations as to the meaning of the word "may" in clause 11.1.2 of the Agreement, including, in particular:

a. Inadmissible evidence and material as to the subjective intentions of the parties to the Agreement;

b. Inadmissible historical evidence and materials that did not constitute objective background facts known to both parties; and

c. Inadmissible evidence and materials as to the alleged "custom and practice" in the Catholic School education sector prior to the making of the Agreement.

[25] We dispose of one submission advanced by CRCS in the appeal which, in our view, reflects an unreasonable reading of the decision of Commissioner Roe.

[26] CRCS submitted that the conclusion of the Commissioner that he must have regard for the "custom and practice" in the Catholic School education sector[15] prior to the making of the Agreement is wrong. The reference to "custom and practice" should be fairly read as a reference to the "custom and practice" to the extent permitted in the authorities cited and adopted by the Commissioner in the paragraphs immediately following.[16]

[27] We also reject the broadly stated contention of CRCS that the Commissioner erred by not starting with the words of the Agreement, instead resorting to the history of the clause as an aid to interpretation, completely reversing the ordinary approach to the construction of an Agreement and cannot be sustained. Read fairly, whilst the Commissioner did address the historical background to clause 11.1 of the Agreement at paragraphs 23-36 of his decision, he did so by way of background. He undertook his consideration of the proper construction of the clause under the heading "Does the word 'may' in Clause 11 Due Process have a compulsory or a discretionary and facilitative meaning?" In doing so he set out the question to be answered,[17] found that the clause was unclear and set out the competing interpretations,[18]

set out his approach to the interpretation[19] and then applied that approach in paragraphs 37-60 of his decision.

[28] The substantive ground of CRCS, which we will now address, is that, whilst the Commissioner was permitted to look at evidence of prior negotiations or surrounding circumstances in circumstances where the words of the Agreement were susceptible to more than one meaning:

- in considering previous instruments the Commissioner erred by imposing as a test whether there was evidence of any mutual intention to alter the effect of previous instruments, rather than assess evidence as to whether there was a mutual intention to reflect that past history in the current Agreement; and

- in construing the Agreement clause his consideration extended beyond objective evidence of background facts relevant to the interpretation of an Agreement, which showed mutuality of intention.

[29] As Commissioner Roe noted,[20] since 1994 the "Due Process" provision in either the *Victorian Catholic Schools and Catholic Education Officers Award 1994*[21] (the Award) or the Agreement operating at the relevant time, "has always provided that an employer who has or who continues to have concerns with or regarding 'the conduct or performance of an employee may instigate Due Process'". [emphasis added] However, as also noted by the Commissioner,[22] "In the period from 1994 to 1998 the Termination Clause provided that 'if an employer is considering whether to terminate for reasons related to conduct or performance, the provisions of [then] Clause 10 (Due Process) must be applied.'" [emphasis added]. But this clause was not included in the Award or Agreement after 1998. It was removed from the Award as a result of the then s.89A of the WR Act. The *Victorian Catholic Schools and Catholic Education Offices Certified Agreement [1998]*[23] continued to reference the (by that time amended) Award.

[30] CRCS submitted that in the context of a substantial change in the Agreement, dating back to 1998, which removed the provision within the Termination Clause that "if an employer is considering whether to terminate for reasons related to conduct or performance, the provisions of Clause 10 (Due Process) must be applied", [emphasis added] the Commissioner applied the wrong test in relying on the absence of evidence as to a mutual intention to alter the effect of the pre-1998 instruments. It submitted that this erroneous approach is evident in paragraph 42 of the Commissioner's decision where the Commissioner found "that it is clearly the mutual intention of the parties that provisions retain their original meaning in subsequent instruments unless there is evidence to the contrary or unless there are relevant changes to the wording", notwithstanding the removal of that part of the Termination Clause. CRCS also submitted that the same error arose in paragraph 48 where the Commissioner found that "the interpretation would only change if there was evidence that the mutual intention of the parties changed. There was no such evidence presented", notwithstanding the removal of that part of the Termination Clause of the Award.

[31] We are satisfied that the Commissioner erred in applying as a test whether there was evidence of any mutual intention to alter the effect of previous instruments in circumstances where there was a relevant change in the Agreement - the absence from 1998 of that part of the Termination Clause which required that "if an employer is considering whether to terminate for reasons related to conduct or performance, the provisions of Clause 10 (Due

Process) must be applied." [emphasis added] Notwithstanding the uncertainty as to the meaning of "may" in clause 11.1 of the Agreement, and all predecessor instruments, the relevant part of the Termination Clause is clear and its removal from the Agreement, in terms or by incorporation, is significant.

[32] The Commissioner, in taking the approach he did as to a mutual intention that "may" in clause 11.1 has a compulsory meaning from its inception in 1994, relied on evidence of Mr Howett, the witness for CRCS, that he accepted that "may" had a compulsory meaning in the Award.[24] This finding was based on evidence that Mr Howett reconciled the different terminology between clause 10 of the Award (now clause 11.1 of the Agreement) and the Termination Clause (27.3.1) of the Award by advising "you've got to apply 27.3.1".[25] When asked "So the employer would be compelled to go through due process, is that correct?", Mr Howett responded "Yes, for reasons relating to conduct or performance".[26] With respect to the Commissioner, this evidence went to the effect of clause 27.3.1 of the Award, not clause 10 (or clause 11.1 of the Agreement) and cannot be relied upon to substantiate a finding that there was a mutual intention that "may" had a compulsory meaning in 1994.

[33] In these circumstances, we find that Commissioner Roe erred in finding a mutual intention that "may" had a compulsory meaning in 1994 and searching for evidence of a mutual intention to change that understanding. In assessing prior instruments, the Commissioner should have directed his search to positive evidence of a mutual intention as to the meaning of "may" in clause 11.1 of the Agreement and comparable provisions of predecessor instruments.

[34] Given this error, which was material to the Commissioner's determination of the dispute, we grant leave to appeal, uphold the appeal and quash the decision of 15 February 2011.[27]

Rehearing

1. We have decided to rehear the dispute application ourselves.

2. The question before us, as it was before Commissioner Roe, is whether the word "may" in Clause 11.1.2 Due Process has a discretionary and facilitative meaning or whether it has a compulsory meaning.

[35] CRCS submitted that in the context of the Agreement, the word "may" in clause 11.1 of the Agreement is permissive and discretionary. The word could be mandatory but ordinarily, the context and purpose must point to that interpretation with some clarity. It does not do so in the context of clause 11 of the Agreement as a whole for four reasons:

i. the word "may" in clause 11 cannot mean "must" or "shall" in context because clause 11 repeatedly uses the word "shall" to indicate which parts of "Due Process" are mandatory;

ii. the Agreement as a whole draws a distinction between "must", "shall", "may" and "will" and uses the first three terms in contra distinction with the fourth;

iii. it is not the apparent intention of the Agreement that "Due Process" be mandatory. On its face clause 11 is a remedial, educative, coaching and mentoring system, designed

to provide employees with the benefit of a performance management system, enabling them the time and support needed to remedy deficiencies in their performance and conduct; and

iv the IEUA construction leads to absurd results, requiring all performance or conduct defects not amounting to serious misconduct to go through "Due Process".

[36] IEUA submitted that:

i. Asking questions about whether or not particular words in a document are directory or mandatory is an imprecise way of determining the meaning of the document. The classification as mandatory or directory records a result that has been reached on other grounds.[28]

ii. The term "may" is used consistently throughout the Agreement as a permissive term to permit the relevant party to exercise an option that would otherwise be unavailable, as distinct from permitting a party from taking up that option on the one hand or taking any other action it may decide upon.

iii. CRCS claims that the IEUA construction would lead to absurd results, but identifies none.

iv. The CRCS construction sits poorly with the general rules of construction. It contends that despite the specific process of "Due Process" being provided it may nonetheless engage in some other unidentified general process.[29]

[37] There is little controversy between the parties as to the approach to be taken to the construction of an Agreement, with the controversy in the appeal being about the application of the principles of construction by Commissioner Roe. Two principal authorities *Kucks v CSR Limited* (*Kucks Case*)[30] and *Amcor Limited v Construction, Forestry, Mining and Energy Union and Others* (*Amcor*),[31] were relied upon by each party, directing attention to the giving effect to the evident industrial purpose of the Agreement provision.

[38] Madgwick J in *Kucks Case* stated that:

> "It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand."[32]

[39] In *Amcor* Kirby J stated:

> "The nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it served combine to suggest that the construction to be given to cl 55.1.1 should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement."[33]

[40] A Full Bench of the Australian Industrial Relations Commission in *CPSU, the Community and Public Sector Union and University of New South Wales*[34] supported the adoption more readily of an interpretation which gives a provision substantive operation:

> "A court called upon to construe a commercial agreement will strive to give operation to a term rather than leave it with no operation at all. [See for example, *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436-7 per Barwick CJ] The same approach should be taken to the interpretation of workplace agreements. This does not mean that a meaning should be ascribed to a provision when, viewed objectively, it is impossible to ascertain the parties' intention. Rather the Commission may more readily adopt an interpretation which gives a provision substantive operation than one which does not."

[41] We find that the construction of clause 11.1.2 of the Agreement advanced by the CRCS is not sustainable for several reasons:

i. It provides no role to clause 11.1.2 within the Agreement. Interpreted as providing an open choice for employers to chose to apply or not to apply "Due Process", as they see fit, clause 11.1.2 creates no rights or obligations. On that construction, clause 11.1.2 authorises a course of action for which no authority is required. On the CRCS construction, clause 11.1.2 serves no purpose other than to illustrate one of an unlimited and otherwise unspecified suite of options which may be adopted by the employer in the event that the employer still holds concerns regarding the employee's performance or conduct following the discussions required by clause 11.1.1. We doubt that the industrial parties in the Catholic Education sector would have intended such a limited effect of clause 11.1.2 of the Agreement.

ii. CRCS submit that on its face clause 11 is a remedial, educative, coaching and mentoring system, designed to provide employees with the benefit of a performance management system, enabling them the time and support needed to remedy deficiencies in their performance and conduct. To this must be added the proposition that the process also provides an employee with a fair and transparent procedure, ensuring natural justice is served. Looked at in an industrial context, it is more likely that the intent of clause 11.1.1 is to create an entitlement for employees to enjoy the benefits of that system and an obligation to meet their responsibilities under it, an entitlement to the time and support needed to remedy deficiencies in their performance and conduct and an entitlement to a fair and transparent procedure in circumstances where the termination of their employment is a possibility, in the event that their employer chooses to take further steps in relation to concerns about their conduct or performance following the completion of the discussions in clause 11.1.1. This may be contrasted with an interpretation which has clauses 11.2-11.5 simply illustrating one of a range of unspecified options available to an employer in the event of continuing

concerns. Interpreted as creating an entitlement and obligations, clause 11.1.1 serves some real purpose and has a substantive operation.

iii. The CRCS construction suggests an employer who continues to hold a concern about an employee's conduct and performance could adopt any course of action including the application of "Due Process" as detailed in clauses 11.2-11.5, the application of a process which adapts that process, the application of some other process or the application of no process at all. An employer could commence the process in clauses 11.2-11.5 and then terminate the employment without completion of the process on the basis that they had not utilised the authority to initiate "Due Process" but decided simply to undertake some of the steps within it. The CRCS construction suggests that an employer may engage in some unidentified general process, notwithstanding the specific process of "Due Process" being provided. Such an interpretation extends beyond initiating "Due Process" or not initiating "Due Process".[35]

iv. Whilst the Agreement draws a distinction between "must", "shall", "may" and "will", the use of "may" is generally authorising a party to do the thing permitted and does not authorise some other unspecified course of action. For example, clause 13.1 uses the word "may" authorise an employer to direct an employee to undertake duties subject to qualifications specified. Further, there are instances where the word "may", when read in context, clearly has a mandatory meaning[36] within the Agreement.

[42] In interpreting clause 11.1.2 of the Agreement, we accept the submission of CRCS at first instance[37] that there is no evidence of any mutual accepted intention in relation to clause 11.1.2.

[43] We find that the better construction of clause 11.1.2, and one that gives effect to its evident purpose in the context of the relevant industry and industrial relations environment, is that it provides an employer who still has concerns about the conduct and performance of an employee, following the completion of the discussions required in clause 11.1.1, with the option to choose to take no further steps in relation to those concerns or to take further steps, in which case they are required to initiate and apply the "Due Process" set out in clauses 11.2-11.5, rather than take any unspecified steps to address those concerns. It is apparent from the way in which the clause operates that it is not designed to be used in cases of serious misconduct, as defined in clause 25.2 of the Agreement. This was conceded by both parties in the proceedings before Commissioner Roe.[38] Such a construction does not require all performance or conduct defects not amounting to serious misconduct to go through "Due Process" because an employer, having ventilated its concerns during the clause 11.1.1 discussions, may choose to take no further action, rather than initiate "Due Process". However, if an employer chooses to take further steps they are required by clause 11.1.2 to initiate and apply the "Due Process" set out in clauses 11.2-11.5 of the Agreement.

SENIOR DEPUTY PRESIDENT

Appearances:

S. Wood on behalf of the Catholic Regional College Sydenham.

E. White on behalf of the Independent Education Union of Australia.

Hearing details:

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[1] [2011] FWA 1003.

[2] AC316117.

[3] See item 2 of Part 2 of Schedule 3 of the Transitional Act.

[4] See items 1 and 2 respectively of Schedule 19 of the Transitional Act.

[5] Clause 10.3.2 of the Agreement.

[6] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Others v Qantas Airways Limited* (2001) 106 IR 307, at 21 and 31.

[7] [2011] FWA 1003, at para 39.

[8] [2011] FWA 1003, at para 40.

[9] (2008) 171 IR 392.

[10] *University of Western Australia v National Tertiary Education Industry Union* (2003) 129 IR 348, at 357-358. See also *Short v F W Hercus Pty Limited* (1993) 40 FCR 511, per Burchett J at 518, *Kucks v CSR Limited* (1996) 66 IR 182 at 186, and *National Union of Workers v GrainCorp Operations Limited,* PR918161, at paras 49-50.

[11] [2011] FWA 1003, at para 55.

[12] *Re Tweed Valley Fruit Processors*, Print M6526, and Kirby J in *Coal and Allied Operations Pty Limited and Australian Industrial Relations Commission and Others* (2000) 203 CLR 194 at 227.

[13] *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26, at 87 and 88.

[14] *Craig v The State of South Australia* (1994-1995) 184 CLR 163, at 179. See also *Minister for Immigration and Multicultural Affairs v Yusuf and Another* (2001) 180 ALR 1, at para 84.

[15] [2011] FWA 1003, at para 39.

[16] [2011] FWA 1003, at paras 40-41.

[17] [2011] FWA 1003, at para 37.

[18] [2011] FWA 1003, at para 38.

[19] [2011] FWA 1003, at paras 39-41.

[20] [2011] FWA 1003, at para 32.

[21] Print M0877, V0162.

[22] [2011] FWA 1003, at para 32.

[23] V0311 Print P7721.

[24] [2011] FWA 1003, at para 45.

[25] Appeal Book, at page 45, at para 182.

[26] Appeal Book, at page 45, at para 183.

[27] [2011] FWA 1003.

[28] *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355, at 390.

[29] *Anthony Hordern and Sons Limited and Others v The Amalgamated Clothing and Allied Trades Unions of Australia*, (1931-32) 47 CLR 1 at 7.

[30] (1996) 66 IR 182.

[31] (2005) 222 CLR 241.

[32] *Kucks v CSR Ltd* (1996) 66 IR 182, at 184.

[33] (2005) 222 CLR 241, at 270.

[34] [2007] AIRCFB 892, at 25.

[35] *South Australian Cold Stores Ltd v Electricity Trust of South Australia*, (1965-1966) 115 CLR 247 at 264-265.

[36] Clause 27.7.1 of the Agreement.

[37] Appeal Book, at page 52, at para 232.

[38] [2011] FWA 1003, at para 21.