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|  | Industrial Relations Commission  New South Wales |

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| Case Name: | Woollahra Municipal Council v Ayman Tawfils |
| Medium Neutral Citation: | [2020] NSWIRComm 1063 |
| Hearing Date(s): | 16 June 2020 |
| Date of Orders: | 17 September 2020 |
| Decision Date: | 17 September 2020 |
| Jurisdiction: | Industrial Relations Commission |
| Before: | Chief Commissioner Constant; Commissioner Murphy; Commissioner Webster |
| Decision: | Appeal dismissed |
| Catchwords: | EMPLOYMENT AND INDUSTRIAL LAW – Industrial Relations Commission – Jurisdiction – Unfair Dismissal Claim – whether applicant required to provide undertaking not to pursue in future an application for reinstatement under Workers Compensation legislation – whether refusal by applicant to provide undertaking deprives Commission of jurisdiction |
| Legislation Cited: | Anti-Discrimination Act 1977 (NSW) Government and Related Employees Appeal Tribunal Act 1980 (NSW) Industrial Relations Act 1996 (NSW) Industrial Relations Further Amendment Act 2006 (NSW) Workers Compensation Act 1987 (NSW) |
| Cases Cited: | Australian Salaried Medical Officers’ Federation (NSW) v Central Sydney Area Health Service (2005) 147 IR 56 Bindaree Beef Pty Ltd v Riley (2013) 239 IR 52 Cansino v South Western Sydney Area Health Service (1999) 130 IR 1 Certain Lloyds Underwriters Subscribing to Contract Number IH00AAQS v Cross (2012) 248 CLR 378 Fitzpatrick v Nepean Blue Mountains Local Health District [2016] NSWIRComm 1030 Martinez v Park Trent Properties Group Pty Limited (No 2) [2016] NSWSC 1661 Public Employment Office, Department of Corrective Services v Sarolta Boda [2006] NSWIRComm 1 Public Service Association of New South Wales v New South Wales Crime Commission & Other Matters (1993) 48 IR 363 Ronald MacDonald v Jetstar Airways Pty Ltd [2019] NSWIRComm 1010 Secretary, NSW Ministry of Health v Health Services Union NSW [2018] NSWIRComm 1007 Tasovac v NSW Police Service (1998) 83 IR 410 Warrell & Western Sydney Tiles Pty Ltd [2004] NSWIRComm 1089 |
| Category: | Principal judgment |
| Parties: | Woollahra Municipal Council (the Apellant) Ayman Tawfils (the Respondent) |
| Representation: | Counsel: M Easton (for the Appellant) R Kumar (for the Respondent)  Solicitors: Mills Oakley (for the Appellant) Brydens Lawyers (for the Respondent) |
| File Number(s): | 2020/75619 |
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| Court or Tribunal: | Industrial Relations Commission of NSW |
| Jurisdiction: | [2020] NSWIRComm 1007 |
| Citation: | [2020] NSWIRComm 1007 |
| Date of Decision: | 17 February 2020 |
| Before: | Commissioner Sloan |
| File Number(s): | 2019/326573 |

decision

1. The matter before this Full Bench of the Commission is an application for leave to appeal and, if granted, an appeal by Woollahra Municipal Council (the Appellant) from a decision made by Commissioner Sloan on 17 February 2020 (the Decision) in respect of a jurisdictional objection raised the Appellant in unfair dismissal proceedings filed by Mr Ayman Tawfils (the Respondent).
2. In summary, in this matter, the Full Bench is being asked to consider whether the Commission at first instance correctly interpreted s 90 of the *Industrial Relations Act 1996* (NSW) (the Act) in determining that the Respondent is not required to give an undertaking he will not commence proceedings pursuant to s 242 of the *Workers Compensation Act 1987* (NSW) (the WC Act) in the context of his unfair dismissal proceedings.

Background

1. The Respondent was employed by the Appellant as a Building & Compliance Officer from August 2007. On 17 October 2008, the Respondent sustained an injury in the course of his employment. Since that time, he has experienced periods of partial or total incapacity for work. On 25 September 2019, his employment was terminated for the reason that he was unable to perform the inherent requirements of his role.
2. On 11 October 2019, the Respondent filed an Application for Relief in relation to Unfair Dismissal pursuant to s 84 of the Act complaining that his dismissal was harsh, unreasonable or unjust (the Application).
3. On 28 October 2019, the Appellant filed an Employer’s Reply to Application for Relief in relation to Unfair Dismissal, in which it objected to the Commission dealing with Respondent’s application on jurisdictional grounds. Notwithstanding its objection, the Appellant did not oppose the matter proceeding to conciliation. When conciliation failed to resolve the matter, the Appellant pressed its jurisdictional objection.
4. The Commission heard the Appellant’s objection and proceeded on the basis that the Appellant was applying for an order that the Application be dismissed due to lack of jurisdiction. The Appellant’s argument on the Application was that the Respondent’s unfair dismissal claim had been ‘brought without jurisdiction’ because he had not provided an undertaking under s 90 of the Act.
5. In the Decision, the Commissioner dismissed the Appellant’s application. By way of Application for Leave to Appeal and Appeal filed on 9 March 2020, the Appellant seeks to appeal from the Decision.

Legislative Provisions

1. Chapter 2 Pt 6 of theAct contains the Commission’s unfair dismissals jurisdiction. A dismissed employee who claims that their dismissal was harsh, unreasonable or unjust may apply to the Commission for relief: s 84. The Commission must endeavour, by all means it considers proper and necessary, to settle the claim by conciliation: s 86. When, in the opinion of the Commission, all reasonable attempts to settle the claim by conciliation have been made but have been unsuccessful, the Commission is to determine the claim: s 87. Such determination can include orders for reinstatement, re-employment, remuneration or compensation: s 89.
2. Section 90 of the Act is in these terms:

**90   Effect of availability of other remedies**

The Commission must not determine an applicant’s claim by making an order under section 89 if:

(a)  another Act or a statutory instrument provides for redress to the person in relation to the dismissal, and

(b)  the person has commenced proceedings under the other Act or instrument or has not lodged a written undertaking not to proceed under the other Act or instrument.

1. Part 8 of theWC Act is titled “Protection of injured workers from dismissal”. It relevantly provides as follows:

**240   Definitions**

…

(2)  For the purposes of this Part, an *injured worker* is a worker who receives an injury for which the worker is entitled to receive compensation under this Act or the *Workers’ Compensation (Dust Diseases) Act 1942*.

…

**241   Application to employer for reinstatement of dismissed injured worker**

(1)  If an injured worker is dismissed because he or she is not fit for employment as a result of the injury received, the worker may apply to the employer for reinstatement to employment of a kind specified in the application.

(2)  The kind of employment for which the worker applies for reinstatement cannot be more advantageous to the worker than that in which the worker was engaged when he or she first became unfit for employment because of the injury.

(3)  The worker must produce to the employer a certificate given by a medical practitioner to the effect that the worker is fit for employment of the kind for which the worker applies for reinstatement.

**242   Application to Industrial Relations Commission for reinstatement order if employer does not reinstate**

(1)  If an employer does not reinstate the worker immediately to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), the worker may apply to the Industrial Relations Commission for a reinstatement order.

…

(3)  The Industrial Relations Commission may not make a reinstatement order, except in special circumstances, if the application to the employer for reinstatement was made more than 2 years after the injured worker was dismissed.

**243   Order by Industrial Relations Commission for reinstatement**

(1)  The Industrial Relations Commission may, on such an application, order the employer to reinstate the worker in accordance with the terms of the order.

(2)  The Industrial Relations Commission may order the worker to be reinstated to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), but only if the Commission is satisfied that the worker is fit for that kind of employment.

(3)  If the employer does not have employment of that kind available, the Industrial Relations Commission may order the worker to be reinstated to employment of any other kind for which the worker is fit, being—

(a)  employment of a kind that is available but that is less advantageous to the worker, or

(b)  employment of a kind that the Commission considers that the employer can reasonably make available for the worker (including part-time employment or employment in which the worker may undergo rehabilitation).

(4)  If the Industrial Relations Commission orders the worker to be reinstated, it may order the employer to pay to the worker an amount stated in the order that does not exceed the remuneration the worker would, but for being dismissed, have received after making the application to the employer for reinstatement and before being reinstated in accordance with the order of the Commission.

1. Section 249 of theWC Act provides that Pt 8 “does not affect any other rights of a dismissed worker under this or any other Act or under any State industrial instrument or contract of employment”.

The Decision under appeal

1. It is convenient to set out the pertinent aspects of the Decision at this point. Under the heading Consideration, the Commissioner set out the well settled principles of statutory construction as pronounced by French CJ and Hayne J in *Certain Lloyds Underwriters Subscribing to Contract Number IH00AAQS* *v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [23]-[25].
2. The Commissioner then considered the legislative text of s 90(a) of the Act stating that the WC Act is obviously “another Act” and set out the dictionary definition of “redress”: [16] of the Decision.
3. The Commissioner then set out principles arising from judicial consideration of the phrase “in relation to” which included, relevantly, that a “statutory test of relationship requires that the relationship ‘must lie within the bounds of relevance to the statutory purpose’” at [19]. He then at [21] engaged in an examination of the purpose of s 90, relevantly extracting the following principle from *Public Service Association of New South Wales v New South Wales Crime Commission & Other Matters* (1993) 48 IR 363 (*New South Wales Crime Commission*) at p 366-367:

“…the waiver is designed to prevent a duality of approach to different tribunals for relief in relation to the same complaint in so far as the remedy involves an application concerning a dismissal (or threat of dismissal) which is harsh unreasonable or unjust.”

1. At [22] of the Decision the Commissioner posits the questions:

“If the purpose of s 90 is to “prevent a duality of approach to different tribunals for relief in relation to the same complaint”, the question arises whether an application under s 242 of the *Workers Compensation Act* would fit that description when compared to a claim under s 84 of the *Industrial Relations Act*. Further, consistent with that purpose, is such an application properly to be regarded as being “in relation to the dismissal”?”

1. The Commissioner considered the legislative history of Part 8 of the WC Act, including extrinsic material and the Court of Appeal decision in *Bindaree Beef Pty Ltd v Riley* (2013) 239 IR 52; [2013] NSWCA 305 at [47] (*Bindaree*), concluding that it is clear that the legislative purpose of Part 8 is to assist in the rehabilitation of injured workers: Decision at [23]-[32].
2. The Commissioner then continued at [33]-[40]:

“[33] An application under s 84 of the *Industrial Relations Act* requires the applicant to prove that the dismissal was harsh, unreasonable or unjust. If the applicant discharges their onus and proves to the satisfaction of the Commission that their dismissal was harsh, unreasonable or unjust they are entitled to relief, which may include an order for reinstatement. That remedy is the direct consequence of the employer’s unfair treatment of them. It falls squarely within the definition of “redress” set out at [16] above.

[34] Obviously, an application under s 242 of the *Workers Compensation Act* could only be made if there had been an earlier dismissal. However, the dismissal is not the focus of the proceedings, but the employee’s capacity for work. All that needs to be established is that the dismissal was brought about because the injured worker was not fit for employment as a result of the injury received, and that they are fit for the kind of employment to which they seek to be reinstated. An order for reinstatement under s 242 does not require a finding that the dismissal was harsh, unreasonable or unjust: *Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales (on behalf of Peter Riley) v WorkCover Authority of New South Wales* [2006] NSWIRComm 108 at [69]. The statutory purpose of Pt 8 is not to provide redress for the manner or fairness of a person’s dismissal. Rather, as stated, it is to enhance rehabilitation prospects for injured employees who recover fitness such as to be able to resume their former employment.

[35] For these reasons, while an order for reinstatement under s 243 of the *Workers Compensation Act* would be remedial in nature, I do not consider that it is properly to be regarded as involving redress *in relation to the dismissal* within the meaning of s 90(a) of the *Industrial Relations Act*. To adopt the language in *Birch*, the availability of relief under Pt 8 of the *Workers Compensation Act* is not “within the bounds of relevance to the statutory purpose” of s 90 of the *Industrial Relations Act*. Or, to use the language of the Full Bench in *New South Wales Crime Commission*, an application under s 242 of the *Workers Compensation Act* is not to be regarded as “the same complaint” as an application under s 84 of the *Industrial Relations Act*.

[36] I am supported in this view by the fact that an application under s 84 must be made not later than 21 days after the dismissal of the employee: s 85(1) of the *Industrial Relations Act*. By contrast, an application under s 242 can be made up to 2 years after the injured worker was dismissed: s 242(3) of the *Workers Compensation Act*. These limitation periods reflect the very different focus of the respective provisions and highlight that they are designed to provide relief for quite different purposes. In the case of s 84, the focus is on the employer’s conduct in the process culminating in the dismissal. That conduct can be ascertained at that time and any unfairness addressed promptly. Under s 242 the relevant question is the employee’s fitness for work, which can change over time.

[37] Viewed in this light, it does not require a great stretch of imagination to envisage a situation in which the construction pressed by the Council could create unfairness. Consider an employee who is dismissed on the basis of a work-related injury. The circumstances are such that the dismissal would be considered harsh, unreasonable or unjust. At the time, it is not possible to state with certainty whether, or the time within which, the employee will recover their fitness to work.

[38] On the construction pressed by the Council, the employee is left with an invidious choice. One option is to commence proceedings under s 84 of the *Industrial Relations Act* to recover compensation for the unfairness of their dismissal (recognising that reinstatement or re-employment is unlikely to be ordered in the absence of fitness to work). However, to obtain such compensation the employee would need to relinquish any future claims to reinstatement in the event that they do recover fitness.

[39] The second option for the employee is to forgo an unfair dismissal claim in the hope that within the following two years their condition improves such as to enable them to claim reinstatement under Pt 8 of the *Workers Compensation Act*. This would require them to relinquish any claim for the unfairness of their dismissal. The employer would have paid no price for its unfair treatment of the employee.

[40] In the present case, it is to be borne in mind that on the Council’s case Mr Tawfils is not fit to perform the inherent requirements of his former role. If this is correct (about which I make no finding), Mr Tawfils currently has no entitlement to bring a claim under Pt 8 of the *Workers Compensation Act*, and may indeed never have such an entitlement.

1. Having made the above findings, the Commissioner decided at [44] that he did not accept the Appellant’s submission that Mr Tawfils was obliged to provide a written undertaking in accordance with s 90(b) of the Act and that, because he had refused to do so, his Application was brought without jurisdiction.

Leave to appeal

1. Leave to appeal was opposed by the Respondent on two bases:
2. The Decision is not inconsistent with Full Bench and single-member decisions on the same jurisdictional point, because the question of whether s 90(a) of theAct is engaged turns on the facts of the particular matter.
3. Leave to appeal is “not to be lightly granted” and will not be granted where the issues in the appeal have already been the subject of authoritative pronouncement. The construction of s 90 has been the subject of authoritative pronouncement from the Full Bench, including in *Public Employment Office, Department of Corrective Services v Sarolta Boda* [2006] NSWIRComm 1 (*Boda*), which relevantly considered temporal considerations that apply in construing the provision.
4. Section 188 of theActis in the following terms:

**188 Appeals to Full Bench by leave only**

(1) An appeal to a Full Bench of the Commission under this Part may be made only with the leave of the Full Bench.

(2) The Full Bench is to grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted.

(3) The Full Bench may deal with an application for leave to appeal separately and without conducting a hearing into the merits of the appeal.

(4) This section does not apply to an appeal made by the Minister.

1. In *Secretary, NSW Ministry of Health v Health Services Union NSW*[2018] NSWIRComm 1007 the Full Bench (Chief Commissioner Kite SC, Stanton C and Murphy C) set out the principles governing the grant of leave under s 188 at [28] which we have applied to this matter.
2. We have decided to grant leave to appeal on the basis that the matter, which is the subject of the Appeal, is of such importance that, in the public interest, leave should be granted under s 188 of the Act. We do so for the following reasons:
3. The Appeal raises substantial issues of law regarding the operation of s 90 of the Actand the Commission’s statutory capacity to determine s 84 applications.
4. The application for leave to appeal raises questions as to the Commission's jurisdiction under the Act, which is of such importance that, in the public interest, leave to appeal must be granted.
5. A Full Bench of the Commission has not previously considered the specific questions raised by the Appeal, namely whether an unfair dismissal applicant is required to give an undertaking that they will not make an application for reinstatement pursuant to s 242 of the WC Act before the matter is arbitrated.
6. Specifically, we note that the Full Bench in *Boda*, considered the construction of s 90 in a different factual context, namely where an unfair dismissal application had been commenced after the applicant had lodged and withdrawn a Notice of Appeal under s 28 of the *Government and Related Employees Appeal Tribunal Act*1980 (NSW). This matter calls upon the Full Bench to consider the construction of s 90 within a different context.

Appeal

1. The parties relied upon both written and oral submissions in the Appeal. The parties also filed supplementary submissions following a question from the Full Bench during the hearing of the Appeal. We have considered these submissions and refer to them as required in our consideration of the Appeal.

Consideration of Appeal

1. The Appellant contends in these proceeding that Commissioner Sloan erred in finding that s 242 of the WC Act does not provide for redress in relation to a dismissal. In summary, the Appellant advances the following points in support of its contention:
2. While the focus of proceedings for unfair dismissal and an application pursuant to s 242 are different, they are still both “in relation” to the dismissal;
3. The Commissioner erred in finding that “redress” in s 90(a) is limited to redress for unfairness at [33] of the Decision.
4. The Decision is inconsistent with *New South Wales Crime Commission*, *Tasovac v New South Wales Police* (1998) 83 IR 410 (*Tasovac*) and *Fitzpatrick v Nepean Blue Mountains Local Health District* [2016] NSWIRComm 1030 (*Fitzpatrick*).
5. The Commissioner erred in taking into account the consequent effect of requiring the undertaking to be given in respect of s 242 was that the employer would have paid “no price for its unfair treatment of the employee.”
6. We consider each of these points in turn.

While the focus of proceedings for unfair dismissal and an application pursuant to s 242 are different, they are still both “in relation” to the dismissal

1. The Appellant argued that the distinction drawn by the Commissioner between the “purpose” of Chapter 2 Pt 6 of the Act and Pt 8 of the WC Act respectively is “merely a matter of semantics” and a distinction “without a difference”. In support of this proposition, the Appellant referred to the overlap between the two regimes including:
2. the Commission’s jurisdiction to deal with s 84 and s 242 applications is dependent upon the existence of a dismissal; and
3. the power for the Commission to provide redress in injured worker applications is dependent upon the Commission making certain findings about the dismissal by reference to statutory criteria.
4. We consider that the Commissioner went about the task of interpreting s 90 of the Act in an entirely orthodox manner. The Commissioner correctly identified the purpose of the unfair dismissal and injured worker applications with reference to the express statement of purpose, the text of those provisions themselves, as well as the consideration of relevant extrinsic materials in the context of the injured worker provisions.
5. The matters referred to by the Appellant do not support the inference that Chapter 2 Pt 6 of the Act and Pt 8 of the WC Act have the same purpose. While each type of application has as a prerequisite that there has been a dismissal, this does not lead to the conclusion that both regimes have the same purpose.
6. Before concluding that the purpose of the injured worker applications was to “assist in the rehabilitation of injured workers”, the Commissioner engaged in an inquiry into the purpose of Pt 8 of the WC Act by reference to the language of Pt 8 and extrinsic materials, including the extract from the Second Reading Speech to the *Industrial Relations Further Amendment Act 2006* (NSW) (the 2006 Amendment Act) where it was stated that the “…injured worker protections contained in the bill are an integral part of the workers compensation scheme to get injured workers back to work and to ensure employers are engaged in this process.”
7. In the process of considering the purpose of s 90 of the Act, the Commission at first instance did not refer to the historical context of the injured workers provisions and, in particular, their relocation from the Act to the WC Act by way of the 2006 Amendment Act. The Commission was assisted by the parties filing supplementary submission with respect to this amendment after the hearing of the matter.
8. Prior to their relocation, an application for reinstatement under the injured worker provisions (as then contained in Part 7 of Chapter 2 of the IR Act) did not enliven s 90(a) such as to require an undertaking before an application under section 84 of the Act could be determined because the provisions were not contained in “another Act” or “statutory instrument”: see *Warrell & Western Sydney Tiles Pty Ltd* [2004] NSWIRComm 1089 at [26].
9. The Explanatory Note to the Industrial Relations Further Amendment Bill for the 2006 Amendment Act stated:

“Schedule 3 [1] amends the *Workers Compensation Act 1987* so as to relocate these provisions in a new Part 8 of that Act. The relocated provisions are in substantially the same terms as the provisions of Part 7 of Chapter 2 of the *Industrial Relations Act 1996*. Certain minor modifications have been made to the relocated provisions to ensure that *they have the same operation despite their relocation*.”

(emphasis added)

1. In our view it is appropriate that this passage also be taken into account in interpreting s 90 of the Act.
2. To find that the injured worker provisions provide redress in relation to the Respondent’s dismissal would bring those provisions within the meaning of s 90(a) and, accordingly, give them a different operation as a consequence of their relocation.
3. Such a finding would not afford the legislation the meaning Parliament intended, namely to ensure that the provisions have the same operation despite their relocation.
4. We would also add that the plain text of the provisions and their operation also support the conclusion that they have a different purpose and in particular, that an injured worker application does not seek “redress” in relation to the employee’s dismissal. Although the injured worker provisions have, as a prerequisite, the dismissal of the employee in particular circumstances, s 242 of the WC Act provides a remedy in relation to the employer’s refusal of an injured worker’s application to be reinstated. This is not a remedy in respect of his or her dismissal which may have been fair or unfair at the time it occurred. The remedy provided for in s 243 is not designed to address or remedy the dismissal of the injured worker, but rather, the refusal to reinstate the worker upon application.
5. The Appellant submitted that, even though there need not be consideration of the fairness or otherwise of the dismissal in injured worker proceedings, the remedy of reinstatement was still to “redress” the dismissal. We think that this is inconsistent with the plain words of s 90(a) and, in particular, the meaning of “redress” as set out at [16] of the Decision contained in the Macquarie Dictionary:

“*noun* 1.  the setting right of what is wrong: *redress of abuses.*

2.  relief from wrong or injury.

3.  compensation for wrong or injury.

–*verb* (*t*) 4.  to set right; remedy or repair (wrongs, injuries, etc.).

5.  to correct or reform (abuses, evils, etc.).

6.  to remedy or relieve (suffering, want, etc.).

7. to adjust evenly again, as a balance.”

1. We consider the first three definitions to relevantly define “redress” in the context in which it appears in s 90(a). Each of the relevant definitions of “redress” provides that the thing that is being remediated (the dismissal in the context of s 90(a)) was “wrong” or an “injury”. It is not possible to remedy or fix something that is not wrong in the first instance. On a plain reading of   90(a) the injured worker provisions do not provide “redress” in relation to the dismissal. What is being redressed in injured worker matters is the decision of the employer not to reinstate the injured worker after the dismissal.
2. In its submission on Appeal, the Appellant extracted at length decisions of the Commission enunciating the principles associated with the jurisdiction and jurisprudence of the Commission in determining injured workers applications: *Bindaree*; *Cansino v South Western Sydney Area Health Service* (1999) 130 IR 1; *Australian Salaried Medical Officers’ Federation (NSW) v Central Sydney Area Health Service* (2005) 147 IR 56; *Ronald MacDonald v Jetstar Airways Pty Ltd* [2019] NSWIRComm 1010. The Appellant submitted that, upon analysis of the relevant principles in respect of injured worker applications, the Full Bench should “readily see that claims under Part 8 of the WC Act are inextricably ‘in relation to’ a dismissal because the Commission may be called upon to determine” a range of matters listed by the Appellant.
3. Relevant matters to be considered in the context of an injured worker application may overlap with the types of matters the Commission may consider in the context of considering the exercise of discretion to award a remedy in an unfair dismissal proceeding. Indeed, some of the matters the Commission may need to enquire about in the context of an injured worker application relate to the employee’s termination, but only if the employer puts these in issue given the operation of the presumption in s 244 of the WC Act that the worker was dismissed because he or she was not fit for employment as a result of the injury received; where the employer does not seek to rebut the presumption, the Commission in a s 242 application will not necessarily be required to make any factual findings about the dismissal. It is not a condition precedent to awarding relief that the dismissal was fair, unfair or unlawful in injured worker proceedings. The Commission’s enquiry in an injured worker matter lies in an examination of the merits of the employee’s claim for reinstatement at a point in time after the dismissal. This will involve consideration of matters such as the current capacity of the applicant to work and the availability of work at the employer’s workplace.
4. On the other hand, the termination of the employment is the primary inquiry in an unfair dismissal case. Issues going to reinstatement only arise once unfairness has been established and in the context of the Commission considering whether to exercise its discretion to order a remedy.
5. In the Decision, the Commissioner engaged in an inquiry of the purpose of Chapter 2 Pt 6 of the Act by reference to the plain meaning of the relevant provisions, namely to provide remedies for a dismissal where the dismissal is “harsh, unreasonable or unjust”. Clearly, the purpose of the unfair dismissal regime is to remedy unfairness in the dismissal of an employee.
6. We concur with the Commissioner that the statutory regimes to address unfair dismissal and injured worker applications have different purposes. The identification of the different purposes of the two statutory regimes is important in the context of construing s 90 consistent with its purpose, namely to avoid duality of proceedings. We consider that the Commissioner went about that task correctly and we can see no error in his conclusion that that injured worker provisions do not provide redress in relation to the dismissal of an employee. The further extrinsic material considered above adds support to this conclusion and the Commissioner’s construction is consistent with the principles of statutory construction applying to beneficial legislation.

The Commissioner erred in finding that “redress” is s 90(a) is limited to redress for unfairness at [33] of the Decision

1. We do not read [33] of the Decision as a statement that the undertaking required by s 90(a) is limited to causes of action involving redress for unfairness. At [33], the Commissioner correctly describes the precondition for the granting of relief under Chapter 2 Pt 6 of the Act, which is that the Applicant must satisfy the Commission that the dismissal was harsh, unreasonable or unjust. However the Commissioner does not say that “redress” pursuant to s 90(a) of the Act can only relate to causes of action involving consideration of the fairness of the decision to terminate.

The Decision is inconsistent with New South Wales Crime Commission, Tasovac v New South Wales Police and Fitzpatrick v Nepean Blue Mountains Local Health District.

1. The Respondent argued that the Commission did not correctly apply the decision in *New South Wales Crime Commission* in that he asked the wrong question, namely whether the relief was “in relation to the same complaint”: [21]-[22] of the Decision.
2. We agree with the Appellant that in considering whether an undertaking is required, the question that must be asked is contained within the statue itself, properly construed, namely, whether “another Act or a statutory instrument provides of redress to the person in relation to the dismissal”. We consider the Commissioner dealt squarely with that question in the Decision.
3. The Full Bench in the *New South Wales Crime Commission* was not tasked with considering whether another Act or statutory instrument provided for redress in relation to a dismissal. Rather, it was concerned with the issue of whether an undertaking was required to be given contemporaneously with an application for relief for unfair dismissal being filed. Indeed, there may be more than one complaint in respect of the same dismissal. However, we are of the view, for reasons already set out, that the Commissioner correctly determined that an application pursuant to s 242 of the WC Act does not provide relief in relation to an employee’s dismissal. It provides relief in respect of an employer’s decision to not reinstate an employee upon application in certain circumstances.
4. The Respondent argued that the Decision is inconsistent with previous decisions of the Commission, namely *Tasovac* and *Fitzpatrick*.
5. In *Tasovac* the Full Bench of the Commission considered the terms of a qualified undertaking given by Ms Tasovac pursuant to s 90 in the context of her unfair dismissal application. In those proceedings, Ms Tasovac gave an undertaking that she would not seek a remedy in the “Human Rights/Equal Opportunity Commission” (though this ought to have been a reference to the Equal Opportunity Commission) “relating to [her] dismissal and threatened dismissal”. The undertaking included a note, “N.B I put all parties on Notice that the Discrimination is Separate to, & different from the dismissal & Threatened Dismissal Subject to this Complaint.”
6. The Full Bench found that the undertaking provided by Ms Tasovac satisfied the requirement of s 90 of the Act because the issue of duplication of the issues of reinstatement did not arise and, accordingly, Ms Tasovac could pursue matters other than her dismissal pursuant to the *Anti-Discrimination Act 1977* (NSW) (ADA) as these did not fall within the remit of s 90. That Ms Tasovac’s dismissal claim or claims under the ADA would enliven s 90 is consistent with the Decision, because a dismissal claim under the ADA would involve an examination of the merits of Ms Tasovac’s dismissal and potentially provide a remedy in respect of it, whereas an application under s 242 does not. The remedy sought in an s 242 application is not in respect of the dismissal but in respect of the employer’s refusal to reinstate an employee upon application in certain circumstances.
7. The Appellant also relied upon the decision of Newall C in *Fitzpatrick*. In that matter, Ms Fitzpatrick had commenced proceedings pursuant to s 242 of the WC Act and subsequently withdrawn these. The question was whether Ms Fitzpatrick was precluded from having her unfair dismissal claim arbitrated because she had “commenced proceedings under the other Act” even though she had provided the relevant undertaking. Although the Commission proceeded on the basis that s 242 applications were caught by s 90(a), the Commission did not examine this question at all and it would seem from the text of *Fitzpatrick* that Ms Fitzpatrick did not agitate this argument: see [12]. Ultimately the Commissioner decided that Ms Fitzpatrick was not precluded from having her case heard because she had not maintained her s 242 application. The decision does not assist the Appellant’s case.

Commissioner Sloan erred it taking into account the consequent effect of requiring the undertaking to be given in respect of s 242 was that the employer would have paid “no price for its unfair treatment of the employee.”

1. The Commissioner did not err in considering as he did, the practical consequences or results of the operation of s 90 for which the Appellant contends: see [38]-[40] of the Decision. As the Commissioner identified at [15] of the Decision, the primary object of statutory construction is to construe a provision so that it is consistent with the language and purpose of all of the provisions of the statute.
2. It is well established that in construing a statute, consideration must be given both to the purpose of the legislative scheme and the consequences of the giving a particular meaning to a provision: see *Martinez v Park Trent Properties Group Pty Limited (No 2)* [2016] NSWSC 1661 at [89]; and *Boda* at [31]-[33] where a Full Bench of the Commission considered whether the construction of s 90 contended for would produce unfair, unjust or inequitable results in the context of beneficial legislation.
3. Although it was not developed in its submissions, we also consider the Appellant’s ground of appeal that the Commissioner erred in considering at [40] whether Mr Tawfils was eligible to make a claim under Pt 8 of the WC Act at the time of making his s 84 application must fail for the same reasons.

Conclusion

1. For the reasons set out in this decision, we are of the view that the Commissioner did not fall into error when he found that proceedings brought pursuant to s 242 of the WC Act do not provide for redress in relation to the dismissal of the worker.
2. Accordingly, we dismiss the Appeal.

Orders

1. The Full Bench makes the following orders:
2. Leave to Appeal is granted.
3. The Appeal is dismissed.

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