QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Kennedy v State of Queensland (Queensland Health)* [2024] QIRC 079
PARTIES:	**Kennedy, Phillip** (Appellant) **v** **State of Queensland (Queensland Health)** (Respondent)
CASE NO.:	PSA/2023/105
PROCEEDING:	Public Sector Appeal
DELIVERED ON:	10 April 2024
HEARING DATE:	On the papers
MEMBER:	Power IC
HEARD AT:	Brisbane
ORDERS:	**Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016* (Qld), the decision appealed against is confirmed.**
CATCHWORDS:	PUBLIC SECTOR – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – PUBLIC SERVICE APPEAL – where the Appellant was suspended without pay under s 189(1) of the *Public Service Act 2008* – where the Act was amended – where appellant claims entitlement to reimbursement pursuant to the amended legislation – where respondent denied the amended provisions applied to appellant's suspension – whether the decision was reasonable.
LEGISLATION:	*Industrial Relations Act 2016* (Qld), ss 562B and 562C

Public Sector Act 2022 (Qld), ss 91, 289 and 324

Public Service Act 2008 (Qld), s 187

CASES: *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245

Goodall v State of Qld & Anor [2018] QSC 319

Reasons for Decision

Introduction

[1] Mr Philip Kennedy ('the Appellant') is employed by the State of Queensland (Queensland Health) as an Operational Services Officer at Redland Hospital within Metro South Hospital and Health Service ('MSHHS').

[2] The Appellant filed a fair treatment appeal following a decision ('the decision') by Ms Noelle Cridland, Acting Chief Executive, MSHHS, providing the Appellant with the outcome of an internal review. The decision reviewed an earlier decision by Dr Michael Cleary, Chief People, Engagement and Research Officer, MSHHS, that the Appellant was not entitled to reimbursement of remuneration for the period during which he was suspended without pay.

[3] The Appellant appealed the decision pursuant to s 131(1)(d) of the *Public Sector Act 2022* (Qld) ('the PS Act'), on the basis that the decision was unfair and unreasonable.

Appeal principles

[4] The appeal must be decided by reviewing the decision appealed against.[1] As the word 'review' has no settled meaning, it must take its meaning from the context in which it appears.[2] An appeal under ch 11 pt 6 div 4 of the *Industrial Relations Act 2016* (Qld) ('the IR Act') is not by way of rehearing,[3] but involves a review of the decision arrived at and the decision making process associated therewith.

[5] The stated purpose of such an appeal is to decide whether the decision appealed against was fair and reasonable.[4] The issue for determination is whether the decision by Ms Cridland to confirm the internal review decision was fair and reasonable. Findings which are reasonably open to the decision maker are not expected to be disturbed on appeal.

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[1] *Industrial Relations Act 2016* (Qld) s 562B(2) ('IR Act').
[2] *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261.
[3] *Goodall v State of Qld & Anor* [2018] QSC 319, 5 as to the former, equivalent provisions in s 201 of the *Public Service Act 2008* (Qld).
[4] IR Act, s 562B(3).

What decisions can the Industrial Commissioner make?

[6] In deciding this appeal, s 562C of the IR Act provides that the Industrial Commissioner may:

(a) confirm the decision appealed against; or

(b) set the decision aside and substitute another decision; or

(c) set the decision aside and return the issue to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

Grounds of appeal

[7] In the appeal notice, the Appellant contends that the decision of Ms Cridland is unfair and unreasonable. Specifically, the Appellant contends that Ms Cridland -

1. Has incorrectly interpreted and characterised the legislative and custom and practice basis across the entirety of the Queensland Public Sector since at least 1996 to reimburse periods of suspension without remuneration where the outcome is that the employing public sector entity cancels the employee's suspension and the employee resumes duty;

2. Has incorrectly interpreted the relevant legislative provisions applying to the Applicant's suspension on 25 September 2020 when s 189 of the then *Public Service Act 2008* was repealed and immediately replaced by s 137 of the amended *Public Service Act 2008*;

3. Has misinterpreted the relevant provisions of the *Acts Interpretation Act 1954* in asserting that from 25 September 2020 onwards, the Applicant's suspension continued under the repealed s 189 of the *Public Service Act 2008*;

4. Has incorrectly concluded that the *Public Service Commission Suspension Directive 16/20* did not apply to the Applicant's suspension from the commencement of this Directive on 25 September 2020;

5. Has unreasonably relied upon the absence of transitional provisions in the amended *Public Sector Act 2008* in reference to suspension matters by falling to have regard to the relevant provision of the Acts Interpretation Act whereby if an Act repeals some or all of the provisions of an Act and enacts new provisions in substitution for the repealed provisions, the repealed provisions continue in force until the new provisions commence.

6. Has unreasonably relied upon a previously unstated "intention" which was not conveyed to the Applicant at the time, that reference to the amended suspension provisions of the *Public Service Act 2008* in correspondence dated 23 December 2021 was merely for information purposes only and not an acknowledgement that the amended suspension provisions applied.

Submissions

[8] The Commission issued a Directions Order calling for submissions from both parties following receipt of the appeal notice. The submissions are summarised below.

Appellant's submissions

[9] In support of the appeal the Appellant submits, in summary, the following:

(a) The Respondent has incorrectly interpreted and characterised the legislative basis and custom and practice across the entirety of the Queensland Public Sector since at least 1996 to reimburse periods of suspension without remuneration where the outcome is that the employing public sector entity cancels the employee's suspension and the employee resumes duty.

- Section 30(4) of the *Public Service Management and Employment Act 1988* provided for the reimbursement of a period of suspension without pay.

- Section 92(2) of the *Public Service Act 1996* provided for the reimbursement of a period of suspension without pay.

- When the pre-amended Act commenced in 2008 there was no express intention to depart from the long-established public policy position providing for the reimbursement of a period of suspension without pay where an employee's suspension is cancelled, and duty is resumed and suspension without pay was only to occur in exceptional circumstances.

(b) The Respondent incorrectly interpreted the relevant legislative provisions applying to the Applicant's suspensions post 25 September 2020 when s 189 of the then *Public Service Act 2008* was repealed and immediately replaced by s 137 of the amended *Public Service Act 2008.*

(c) The Respondent misinterpreted the relevant provisions of the *Acts Interpretation Act 1954 (AI Act)* in asserting that from 25 September 2020 onwards, the Applicant's suspensions continued under the repealed s 89 of the *Public Service Act 2008* -

- The Respondent has incorrectly determined that the Appellant's suspension continued pursuant to repealed provisions of the pre-amended Act and in doing so mistakenly relies upon s 20(2)(b) of the *Acts Interpretation Act 1954* (Qld).

- Section 20(2)(b) of the AI Act provides that the repeal or amendment of an

Act does not affect the previous operation of the Act or anything suffered, done or begun under the Act.

- The Appellant's suspension began pursuant to sections 189 and 191 of the pre-amended Act, this is not in contention.

- What is in contention is whether the Appellant's suspension continued under the repealed sections 189 and 191 of the pre-amended Act.

- The Appellant contends that pursuant to s 21 of the AI Act, his suspension cannot have continued under these repealed provisions as these provisions were immediately replaced by new provisions in substitution for appealed provisions in the amended Act.

(d) The Respondent incorrectly concluded that the Public Service Commission Suspension Directive 16/20 did not apply to the Applicant's suspension from the commencement of this Directive on 25 September 2020

- In accordance with cl 11 (Transitional arrangements) of the Public Service Commission Suspension Directive 16/20 (the Directive), only the provisions relating to reviews under clauses 8 and 9 of the Directive do not apply to suspension matters that commenced prior to the commencement of this Directive.

- Thus, it is clear that this Directive applied to the Appellant's suspension and that he therefore must be reimbursed for the period of suspension without pay in accordance with subclauses 6.6 and 6.7 of the Directive.

(e) The Respondent unreasonably relied upon the absence of transitional provisions in the amended *Public Sector Act 2008* in reference to suspension matters by failing to have regard to the relevant provision of the AI Act whereby if an Act repeals some or all of the provisions of an Act and enacts new provisions in substitution for the repealed provisions, the repealed provisions continue in force until the new provisions commence.

- The Respondent relies upon s 20(2)(b) of the AI Act 1954 in asserting that the Appellant's suspension, commenced pursuant to s 189 and 191 of the pre-amended Act continued after these sections were repealed.

- Further, the 'Transitional and validation' provisions of the amended Act (sections 292-301) do not apply to suspension matters. These provisions apply to conversion matters, existing disciplinary processes pursuant to s 187 of the Act, appeals and acts or omissions of WHS prosecutors.

- Had it been the intention of the Queensland legislature to continue suspensions pursuant to repealed sections 189 and 191 of the pre-amended Act, this would have been provided for in the 'Transition and validation' provisions of the amended Act.

(f) The Respondent unreasonably relied upon a previously unstated 'intention' which was not conveyed to the Applicant at the time, that reference to the amended suspensions provisions of the *Public Service Act 2008* in correspondence dated 23 December 2021 was merely for information purposes only and not an acknowledgment that the amended suspension provisions applied.

- In the internal review outcome, the Respondent asserts that the correspondence they sent to the Appellant dated 23 December 2021 cancelling his suspension referred to the amended Act provisions (s 137(1)(b) and section 137(4)(b) '*only to provide additional information about the equivalent provisions*' under the pre-amended Act, '*without any intention to indicate that the suspension had been transition [sic] to that section*'.

- It is unfair and unreasonable to rely upon an unstated intention that was never previously conveyed to the Appellant pursuant to the principles of natural justice as a basis for non-reimbursement of his suspension without pay.

Respondent's submissions

[10] The Respondent's submissions are summarised as follows:

(a) The Appeal Notice sets out six grounds of appeal, but also makes a preliminary conclusion regarding the applicability of section 21 of the *Acts Interpretation Act 1954* (Qld) ('the AI Act') to this matter. The Respondent takes a different view of the AI Act. This issue is key to this matter and impacts upon several grounds of appeal, particularly grounds 2 and 3, so these submissions address this issue and grounds 2 and 3 before each other ground.

Preliminary issue and Appeal grounds 2 and 3 - the correct application of sections 20(2)(b) and 21 of the AI Act

(b) On 14 September 2020, section 189 and 191 of the pre-amended PS Act were repealed and replaced as part of amendments made to s 137 by the *Public Service and Other Legislation Amendment Act 2020* (Qld) ('the PS Amendment Act').

(c) The Appellant submits that the effect of the underlined wording is that the Appellant's suspension cannot have continued under sections 189 and 191 of the

Pre-amended PS Act following their repeal, as that would have been unlawful. This is incorrect.

(d) Section 21 of the AI Act speaks for itself and does not have any impact on the continued effect of anything done under a repealed provision following its repeal.

(e) Section 20(2) of the AI Act deals with the continued effect of a thing done under a repealed provision.

(f) In *McLean v James Cook University of North Queensland* [1994] 1 Qd R 399 (*McLean*), de Jersey J considered the meaning of the words "done or begun" in that section, and held that the word "done" operated to preserve the validity of a thing done under the repealed provision, while the word "begun" meant that the amendment of the relevant provision in that case was, " ... *not to affect the process which has been set up under the old rules, which has been begun under the old rules, implying that it may be continued under the old rules*".

(g) In *Kentlee Pty Ltd v Prince Consort Pty Ltd* [1998] 1 Qd R 162 (*Kentlee*) Fitzgerald P considered that section 20(2)(b) of the AI Act had the effect that, " ... *the application ...for approval was "done" under the former [provision omitted]... and/or the "proceeding" [provision omitted] for approval was "begun" under the former [provision omitted], the substitution of the new {provision omitted] did not "affect" that application/proceeding for approval, which therefore remained in existence by virtue of subs20(2)(b) of the Acts Interpretation Act'*. Further, in considering what protection section 20(2)(b) of the AI Act afforded, Dowsett J said that " ... *the act or process suffered, done or begun is not affected [by the amendment or repeal]*".

(h) The Respondent submits that, by operation of section 20(2)(b) of the AI Act and in accordance with *McLean* and *Kentlee*, the Appellant's suspension without pay was either "done" or "begun" under section 191 of the Pre-amended PS Act and continued under that section despite its repeal. It follows that the Appellant's suspension did not transition by operation of law to become a suspension under section 137 of the amended *Public Service Act 2008* (Qld) (Amended PS Act), following the repeal of section 191 or at any other time.

Appeal ground 1 – incorrect interpretation and characterisation of legislative custom and practice

(i) The Appellant provides no evidence of the claimed custom and practice. The Appellant refers only to provisions in legislation preceding the Pre-amended PS Act and submits that there was no express intention to depart from this position when the Pre-amended PS Act came into force. If the Queensland Public Sector reimbursed employees who returned to work following a period of suspension

without pay during that period, it did so because that was required by legislation that applied at the time. Complying with legislation does not create a custom or practice that continues into the future when the relevant legislative obligation is removed.

(j) The Appellant had no entitlement under the provisions he was suspended under to reimbursement for wages and entitlements not paid during the period of his suspension without pay. MSHHS's decision not to reimburse the Appellant following his return to duty accorded with section 191 of the Pre-amended PS Act, being the provision under which the Appellant was suspended, which did not entitle an employee to reimbursement.

(k) In the decision, Ms Cridland found that the AWU first advanced this argument when seeking the internal review of the decision by Dr Cleary. Since there is no custom and practice as alleged by the Appellant and neither the AWU nor the Appellant otherwise put to Dr Cleary that the alleged custom and practice existed, Dr Cleary could not have failed to have regard to it when arriving at the Cleary Decision. In those circumstances, the Respondent submits that Ms Cridland did not act unreasonably or unfairly in making the Decision.

Appeal ground 4 – application of Public Service Commission Suspension Directive 16/20 – Suspension Directive

(l) The Directive was made pursuant to a requirement under section 137A of the amended PS Act, added by the PS Amendment Act, for the Public Service Commission to "... *make a directive about procedures relating to suspension from duty under section 137*". Therefore, the Directive applied only to suspensions under section 137 of the amended PS Act. It did not (and was not expressed to) apply to existing suspensions under sections 189 or 191 of the Pre-amended PS Act. In further support of this, the clauses dealing with suspensions set out in the Directive are tailored to the requirements of section 137 and are inapposite for suspensions under section 189 and 191 of the Pre-amended PS Act.

(m) Further, the absence from clause 11 of the Directive of any transitional provisions related to suspensions under sections 189 and 191 of the Pre-amended PS Act does not, as the Appellant alleges, show that the Directive applied to the Appellant's suspension. Rather, this absence shows that the Directive was intended to apply only to suspensions commenced under section 137, and clause 11 ensured that the Directive's clauses regarding reviews of suspensions would apply only to suspensions subject to the Directive, and not earlier suspensions continuing under sections 189 and 191 of the Pre-amended PS Act.

Appeal ground 5 – Unreasonable reliance on absence of transitional provisions

(n) The Respondent submits that transitional provisions were not required to explain what happened to suspensions made under the Pre-amended PS Act because section 20(2)(b) of the AI Act, outlined above,12 already made it clear that anything done or begun under the Pre-amended PS Act would be unaffected by the amendment or repeal of section 189 and 191. Rather, the absence of any transitional provisions regarding suspensions under sections 189 and 191 of the Pre-amended PS Act supports the opposite conclusion to that submitted by the Appellant. Given the effect of section 20 of the AI Act, acts done or begun under the Pre-amended PS Act would be unaffected unless changed by some transitional provision in the PS Amendment Act. Parliament must be taken to be aware of the operation of section 20 of the AI Act when drafting the PS Act Amendment. Parliament considered it appropriate not to insert provisions in the PS Act Amendment regarding the transition of suspensions under sections 189 and 191 to section 137 of the amended PS Act. Therefore, Parliament must be taken to have intended for section 20 of the AI Act to operate in its orthodox fashion.

Appeal ground 6 – reliance on unstated "intention" in the Suspension Cancellation

(o) In support of ground 2 in the Internal Review Request the AWU noted that the Suspension Cancellation " *... referenced the amended 2008 PS Act provisions relation to suspensions"*. Prior to this, neither the Appellant nor the AWU had formally raised this point. The Decision therefore explained why the Suspension Cancellation made those references and that there was no "*...intention to indicate that the suspension had been transitioned to* [section 137] ".

(p) The Respondent does not accept that its explanation in the decision indicated any "intention" behind the Suspension Cancellation. The Decision's explanation merely confirmed that the purported "intention" suggested by the Appellant did not exist.

(q) To the extent that the Decision relied on any *"intention"* behind the Suspension Cancellation, the Respondent submits that was reasonable for the Decision to do so and it did not deny the Appellant natural justice. The Decision's explanation responded to a matter raised in the Internal Review Request which had not been formally raised prior to that. Since the *"intention"* behind the Suspension Cancellation alleged by the Appellant did not exist, the Respondent had no choice but to address the matter in the Decision.

(r) The Respondent submits that the Commission should confirm the decision appealed against and dismiss the appeal.

Appellant's submissions in reply

[11] The Appellant makes the following submissions in reply -

- The Appellant notes that the Respondent confirms in their submissions that previous iterations of the *Public Sector Act 2008* required that an employee who returned to work following a period of suspension without pay would be reimbursed.

- The Appellant notes that the Respondent's Submissions rely upon section 20(2)(b) of the *Acts Interpretation Act 1954* (AI Act).

- The Appellant understands that the Respondent's submission is that the Appellant's suspension continued pursuant to repealed sections of the PS Act 2008 by virtue of s.20(2)(b) of the AI Act. That is, the Appellant's suspension without pay was either "done" or "begun " under s. 191 of the pre-amended PS Act and continued under that section despite its repeal.

- The Appellant submits that the Respondent's reliance on s.20(2)(b) of the AI Act fails to consider the interaction of s.21 of the AI Act in combination with s.20B of the AI Act.

- The Appellant continues to contend that the effect of s. 21 of the AI Act means that the Respondent could not have continued the suspension under sections 189 and 191 of the pre-amended PS Act given that the amended PS Act expressly repealed both provisions and enacted new provisions in substitution for the repealed provisions.

- The new provisions of the amended Act commenced immediately following the repealing of section 189 and 191 of the pre-amended Act.

- The Appellant contends that sections 189 and 191 of the pre-amended PS Act authorising suspensions and suspension without remuneration are provisions of law in accordance with s 20B(1)(a) of the AI Act.

- In accordance with s.20B of the AI Act, the provisions of the amended PS Act apply to suspensions and suspensions without remuneration that were in force before the commencement of the amended PS Act. Thus, it is section 137 of the amended PS Act that applies to the entirety of the Appellant's suspension. Therefore, the Appellant is entitled to be reimbursed for the whole period of his suspension without remuneration.

- The Appellant submits that in the alternative, that from the date the amended PS

Act commenced, the suspension was in force pursuant to s. 137 of the amended PS Act, and that the Appellant is therefore entitled to be reimbursed for that period of his suspension without remuneration (from September 2020 to 3 January 2022).

Respondent's submissions in reply

[12] The Respondent makes the following submissions in reply -

- Section 21 of the AI Act speaks for itself.

- The Respondent submits that section 20B of the AI Act operates to the effect that section 137 of the Public Service 2008 (Qld), following its amendment on 14 September 2020 (Amended PS Act), applied to the Appellant's suspension. The Respondent submits that the Appellant's submissions about the operation of section 20B of the AI Act are incorrect.

- Section 20B was inserted into the AI Act by the Statute Law (Miscellaneous Provisions) Act 1993 (Qld) on 3 June 1993 (Statute Act). The purpose of the Statute Act was to "make minor amendments to the statute law of Queensland where the amendments are concise, of a minor nature and non-controversial". The Statute Act was not meant to and did not make substantive changes to the operation of the AI Act.

- The explanatory notes to the Statute Act describe section 20B as a provision to "[make] it clear that appointments… delegations and other things (other than statutory instruments) existing before the amendment of the power under which they were made continue in force after the amendment if they could be made under the amended provision".

- These explanatory notes, the title of section 20B itself and the things expressly contemplated by section 20B clarify that section 20B is intended to confirm the continued operation of things made under provisions of law of the character of appointments or delegations. The Respondent submits that the other "things [that] may be done" falling within section 20B should be read narrowly in that context.

- The Respondent submits that the decisions to suspend the Appellant with and without pay under sections 189 and 191 respectively of the Public Service Act 2008 (Qld) before its amendment on 14 September 2020 (Pre-amended PS Act) were not 'things made' through the exercise of a legislative power of the same character as an appointment, delegation, or any other thing within the ambit of section 20B of the AI Act. Rather, those decisions commenced with a view to forming part of an ongoing disciplinary process under Chapter 6 of the Pre-amended PS Act, which continued in operation until the conclusion of the Appellant's suspension.

- If decisions of that nature were intended to fall within section 20B of the AI Act, then it is not clear how section 20B would interact with section 20(2)(b) of the AI Act and the reference under that provision to things "*begun*". The Statute Act also made amendments to section 20 of the AI Act but did not make any changes to (then) section 20(1)(b) (now section 20(2)(b)). If section 20B was intended to affect the operation of (then) section 20(1)(b) as submitted by the Appellant, that would have been made clear in the Statue Act.

- The Respondent submitted that the decision to suspend the Appellant without pay was either "*done*" or "*begun*" under section 191 of the Pre-amended PS Act. Having considered the Appellant's Reply the Respondent submits that the better interpretation is that the Appellant's suspension was "*begun*" under section 191.

- The Respondent continues to rely on *McLean v James Cook University of North Queensland* (*McLean*) and *Kentlee Pty Ltd v Prince Consort Pty Ltd* (*Kentlee*).

- *Kentlee* was decided after the commencement of section 20B of the AI Act but section 20B was not considered in that matter. As to the meaning of the word "begun" in section 20(2)(b), the Respondent notes that in *Kentlee* Dowsett J considered (in obiter) the meaning of the word "begun" in (then) section 20(1)(b) and said that that word "implies the commencement of a process which remains incomplete…", and "…is more appropriately used in connection with proceedings…which have a recognizable continuity over a period of time. Applications involving a series of prescribed steps might also be described as "begun".

- *McLean* was decided on the same day as section 20B of the AI Act commenced, and therefore could not have considered the interaction of section 20B and (then) section 20(1)(b). However, in addition to *Kentlee* several other courts and tribunals have considered the operation of section 20(2)(b) of the AI Act following the commencement of section 20B, and have reached the same conclusion as in *McLean* as to the correct operation of section 20(2)(b) of the AI Act, including in respect of procedural matters involving discipline and particular processes created by legislation.

- The Respondent submits that those decisions confirm the consideration in *McLean* as to the effect of section 20(2)(b) of the AI Act, that is to preserve the operation of a provision in respect of something "begun" under that provision despite its later repeal or amendment, such that the thing "begun" under the provision may continue under that provision.

- None of those decisions considered the possible effect of section 20B of the AI Act.

The only decision considering section 20B simply confirmed that a delegation made under superseded legislation continued in force despite the enactment of succeeding legislation. It did not consider how sections 20(2)(b) and 20B of the AI Act should interact.

- The Respondent submits that the lack of judicial consideration of section 20B of the AI Act, including its potential interaction with section 20(2)(b), reflects the narrow scope of section 20B.

- The Respondent submits that the Appellant's suspension without pay was a continuing process "begun" under section 191 of the Pre-amended PS Act on 4 February 2019 until its conclusion on 4 January 2022. Therefore, the Appellant's suspension did not transition by operation of law to become a suspension under section 137 of the Amended PS Act.

Application of the Public Service Commission Suspensions Directive 16/20 - Suspension Directive

- In the alternative, if the Commission finds that the Appellant's suspension did transition to become a suspension under section 137 of the Amended PS Act, the Directive did not apply to his suspension.

- The Respondent repeats and relies upon its submissions at paragraph 22 of the Submissions and maintains that the Directive was intended to apply only to suspensions commenced under section 137 of the Amended PS Act. The absence of any transitional provisions in the Directive and the Public Service and Other Legislation Amendment Act 2020 (Qld) (PS Amendment Act), which repealed sections 189 and 191 and amended section 137 of the Pre-amended PS Act, shows that neither the requirements of suspension under section 137 nor the requirements and rights under the Directive were intended to apply to suspensions commencing before the commencement of the amended section 137 and the Directive. It must be taken that, if Parliament had intended that to be the case, it would have made that clear in the PS Amendment Act. Further, if that had been the intent of the Directive, that would have been made clear in the transitional provisions included in the Directive but it was not.

Consideration

[13] Consideration of an appeal of this kind requires a review of Ms Cridland's decision to determine if the decision was fair and reasonable in the circumstances.

[14] The decision confirmed that the Appellant was not entitled to reimbursement of remuneration for the period during which he was suspended without pay.

Background

[15] The Appellant was suspended from duty on full pay on 21 December 2018 pursuant to s 189(a) of the *Public Service Act 2008* ('the pre-amended PS Act'). On 4 December 2019, the Appellant was suspended without pay pursuant to s 191(1) of the pre-amended PS Act.

[16] The *Public Service Act 2008* was amended on 14 September 2020 by the *Public Service and Other Legislation Amendment Act 2020*. As part of a number of amendments, s 189 was repealed and replaced by s 137(1)(b) and s 191(1) was repealed and replaced by s 137(4)(b).

[17] The Respondent advised the Appellant on 23 December 2023 that his suspension would be lifted effective from 4 January 2022 at which time he would return to his position.

[18] Following the Appellant's return from suspension, Dr Michael Cleary provided the Appellant with his decision that the Appellant was not entitled to reimbursement of remuneration for the period during which he was suspended without pay.

[19] The Appellant's representative, the AWUEQ, requested a review of Dr Cleary's decision in accordance with the employee grievance process.

[20] Ms Cridland conducted the review and provided correspondence confirming her decision that Dr Cleary's decision was fair and reasonable.

[21] The Appellant appealed Ms Cridland's decision pursuant to s 131(1)(d) of the Public Sector Act. The Appellant's grounds of appeal will be considered in turn below.

Acts Interpretation Act (AI Act)

[22] On 14 September 2020 the *Public Service and Other Legislation Amendment Act 2020* repealed sections 189 and 191 of the PS Act and made amendments to s 137.

[23] Section 21 of the AI Act states the following –

> **21 Continuance of repealed provisions**
>
> If an Act repeals some or all of the provisions of an Act and enacts new provisions in substitution for the repealed provisions, the repealed provisions continue in force until the new provisions commence.

[24] The Appellant submits that the consequence of the application of s 21 of the AI Act to s 189 and s 191 of the PS Act is that the Appellant's suspension cannot have continued

following their repeal as that would have been unlawful.

[25] The words of s 21 of the AI Act are not ambiguous and when applied to this matter provide that s 189 and s 191 continue in force until the new provisions in the amended PS Act commenced. It does not mean that suspensions made pursuant to s 189 and s 191 then transitioned to suspensions pursuant to the new provision (ie. s 137). It simply means that the former provisions continue to operate until the new provisions commence. That is, there is no 'gap' between the repeal of the earlier provisions and the commencement of the new provisions.

[26] Consistent with the principles of statutory construction, s 21 must be read in conjunction with s 20(2)(b). The High Court in *R v A2,* summarised the principles of statutory construction as follows –

> "The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.
>
> Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. "Mischief" is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve."[5]

[27] Section 20(2)(b) of the AI Act states the following –

> **20 Saving of operation of repealed Act etc.**
>
> …
>
> (2) The repeal or amendment of an Act does not—
>
> (a) revive anything not in force or existing at the time the repeal or amendment takes effect; or
>
> (b) affect the previous operation of the *Act* or anything suffered, done or begun under the *Act* ; or

[5] *R v A2* (2019) 269 CLR 507

(c) affect a right, privilege or liability acquired, accrued or incurred under the *Act* ; or

(d) affect a penalty incurred in relation to an offence arising under the *Act* ; or

(e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in *paragraph (c)* or *(d)*.

[emphasis added]

[28] As referred to by the Respondent, in the matter of *McLean v James Cook University of North Queensland* the court considered the meaning of the word 'begun' in the section and stated that the amendment of the relevant provision was "*not to affect the process which has been set up under the old rules, which has been begun under the old rules, implying that it may be continued under the old rules*".

[29] The consequence of the operation of s 20(2)(b) of the AI Act is that the Appellant's suspension had 'begun' under s 191 and then continued to operate.

[30] Section 20(2)(b) confirms that the repeal of a section does not affect the previous operation of anything that has begun under the provision. It is not in dispute that the suspension of the Appellant commenced pursuant to s 189 and s 191 or had 'begun' prior to the amendment. Accordingly, a suspension commenced pursuant to s 189 and s 191 is not affected by the repeal of the section.

[31] The Appellant submits that s 20B of the AI Act operates such that s 137 of the PS Act applied to the Appellant's suspension.

[32] Section 20B of the AI Act is outlined as follows –

20B Continuance of appointments etc. made under amended provisions

(1) This section applies if—

(a) a provision of a law expressly or impliedly authorises or requires—

(i) the making of an appointment; or

(ii) the delegation of a function or power; or

(iii) the doing of anything else (other than the making of a statutory instrument); and

(b) the provision is amended by an Act; and

(c) under the amended provision—

(i) the appointment may be made; or

> (ii) the function or power may be delegated; or
>
> (iii) the thing may be done.
>
> (2) An appointment, delegation or other thing mentioned in *subsection (1)* that was in force immediately before the commencement of the amendment continues to have effect after the commencement as if it had been done under the amended provision.
>
> (3) In this section—
>
> "amend" includes omit and re-enact in the same law (with or without modification), but does not include omit and re-enact in another law.

[33] The Appellant submits that in accordance with s 20B of the AI Act, the provisions of the pre-amended PS Act apply to suspensions that were in force before the commencement of the amended PS Act such that s 137 of the pre-amended PS Act applies to the entirety of the Appellant's suspension, or in the alternative for the period following the commencement of the amended PS Act.

[34] The Respondent refers to the *Statute Law (Miscellaneous Provisions) Act 1993*, which inserted s 20B into the AI Act, noting that the explanatory notes to the *Statute Law Act* describe s 20B as a provision to –

> [make] it clear that appointments … delegations and other things (other than statutory instruments) existing before the amendment of the power under which they were made continue in force after the amendment if they could be made under the amended provision.

[35] The explanatory note as outlined above indicates that where particular appointments, delegations and other things were 'made', they continue in force after the amendment if they could be made under the amended provision. The reference to 'the doing of anything else' as outlined in s 20B(1)(a)(iii) should be read in the context of s 20B(1)(a)(i) and(ii). In applying the *ejusdem generis* rule of statutory construction that general matters are constrained by reference to specific matters, it seems to me that the act of suspending employees as part of an ongoing administrative process is not an action in the same vein as an appointment or delegation within the parameters of s 20B.

[36] For s 20B to operate in the way suggested by the Appellant, it would be inconsistent with the operation of s 20(2)(b) which provides that the amendment of an Act does not affect the previous operation of anything that has begun under the pre-amendment provision.

[37] The Appellant's suspension without pay commenced on 23 January 2019 pursuant to s 189 and s191 of the PS Act. The decision by Ms Cridland that the Appellant's suspension did not transition to s 137 of the amended PS Act was fair and reasonable.

Appeal ground 1

The decision maker has incorrectly interpreted and characterised the legislative and custom and practice basis across the entirety of the Queensland Public Sector since at least 1996 to reimburse periods of suspension without remuneration where the outcome is that the employing public sector entity cancels the employee's suspension and the employee resumes duty.

[38] The Appellant submits that reimbursement of a period of suspension without pay was provided for in the *Public Service Management and Employment Act 1988* and the *Public Service Act 1996*. Further, the Appellant submits that the *Public Service Act 2008* expressed no intention to depart from the *'long-established public policy position'* providing for the reimbursement of a period of suspension without pay where an employee's suspension is cancelled, and duty is resumed.

[39] In the decision Ms Cridland noted that there was a requirement under s 92 of the *Public Service Act 1996* that an employee be paid remuneration for suspension following the resumption of duty 'unless the employing authority decided otherwise'. The decision noted that there was no equivalent of this requirement under the PS Act prior to its amendment in September 2020.

[40] Ms Cridland reasonably determined that payment for suspension following the resumption of duty was a requirement of the 1996 Act and not merely a ‘practice’.

[41] In the decision Ms Cridland determined that there was no obligation under s 189 or s 191 of the pre-amended PS Act to reimburse a public service employee for wages and entitlements lost during a period of suspension without pay, regardless of what action is taken later regarding that employee's employment.

[42] In circumstances where there was no statutory requirement under the pre-amended PS Act to reimburse employees where duty was resumed following suspension, there was no legal requirement that the Respondent do so in the Appellant's case.

[43] Ms Cridland stated in the decision that the submission regarding a 'long-standing practice of reimbursement' had not been raised prior to the review and consequently it was not unjust or unreasonable that Dr Cleary did not consider such a practice. In the absence of evidence of such a practice being provided to Dr Cleary, it was open to Ms Cridland to determine that his decision to not consider such a view was not unreasonable or unjust.

Appeal ground 2 and 3

The decision maker has incorrectly interpreted the relevant legislative provisions applying to the Applicant's suspension on 25 September 2020 when s 189 of the then Public Service Act 2008 was repealed and immediately replaced by s 137 of the amended Public Service Act 2008;

The decision maker has misinterpreted the relevant provisions of the Acts Interpretation Act 1954 in asserting that from 25 September 2020 onwards, the Applicant's suspension continued under the repealed s 189 of the Public Service Act 2008.

[44] As outlined at [26] – [35], the Appellant was suspended pursuant to s 189 and s 191 of the pre-amended PS Act. Pursuant to the s 20(2)(b) of the AI Act, the amendment of the PS Act in September 2020 repealing s 189 and s 191 did not affect the operation of the Appellant's suspension as it had already commenced under the previous legislation. The Appellant's suspension did not transition to s 137 of the amended PS Act, rather it continued to operate pursuant to s 189 and s 191.

Appeal ground 4

The decision maker incorrectly concluded that the Public Service Commission Suspension Directive 16/20 did not apply to the Applicant's suspension from the commencement of this Directive on 25 September 2020;

[45] The Appellant submits that cl 11 of the Directive provides that only the provisions relating to reviews under cl 8 and cl 9 of the Directive do not apply to suspension matters that commenced prior to the commencement of the Directive. On this basis, the Appellant submits that the Directive applied to the Appellant's suspension and consequently he must be reimbursed for the period of suspension without pay in accordance with subclauses 6.6. and 6.7 of the Directive.

[46] Clause 11 of the Directive is outlined as follows –

11 Transitional arrangements

11.1 Provisions relating to periodic reviews under clause 8 and provisions relating to reviews requested by a suspended employee under clause 9 apply to work performance matters that commence after the commencement date of this directive.

[47] The Directive was created pursuant to the requirement in s 137 of the amended PS Act for the Public Service Commission to make a directive about procedures relating to suspension from duty. In circumstances where the Appellant has not been suspended pursuant to s 137, the Directive does not apply to the Appellant's suspension.

[48] I accept the Respondent's submission that the clauses dealing with suspensions set out in the Directive are tailored to the requirements of s 137 and are inapposite for suspensions under s 189 and 191 of the pre-amended PS Act. This context further supports a conclusion that the Directive only applies to suspensions undertaken pursuant to s 137 of the PS Act.

[49] Clause 11 of the Directive reflects a determination that the Directive is to apply to certain matters that commenced after the commencement date of the Directive. The absence of any transitional provisions in the Directive regarding suspensions under s 189 and s 191 of the pre-amended PS Act supports a conclusion that the legislature intended that the sections would be subject to the conventional operations of s 20 of the AI Act. That is, that suspensions that had begun prior to the amendment would be unaffected by the change.

Appeal ground 5

The decision maker has unreasonably relied upon the absence of transitional provisions in the amended Public Sector Act 2008 in reference to suspension matters by falling to have regard to the relevant provision of the Acts Interpretation Act whereby if an Act repeals some or all of the provisions of an Act and enacts new provisions in substitution for the repealed provisions, the repealed provisions continue in force until the new provisions commence.

[50] The Appellant submits that the 'transitional and validation' provisions of the amendment Act do not apply to suspensions matters, rather s 292 – 301 apply to conversion matters, existing disciplinary processes, appeals and acts or omissions of WHS prosecutors. The Appellant contends that had it been the intention of the Queensland legislature to continue suspensions pursuant to repealed s 189 and s 191 of the pre-amended Act, this would have been provided for in the 'transition and validation' provision of the amendment Act.

[51] The Respondent's submission supports the conclusion that it was not the intention of the legislature to allow suspensions made pursuant to s 189 and s 191 to transition to s 137. The fact that the legislature chose to make specific transitional arrangements for a number of sections, but did not include s 189 and s 191, supports an inference that it was never the intention that these sections be subject to specific transitional arrangements. In the absence of such inclusion, it is clear that the intention of the legislature was to allow s 189 and s 191 to operate pursuant to the conventional operation of s 20(2)(b) of the AI Act. That is, that anything 'done or begun' under these sections would be unaffected by any repeal or amendment.

Appeal ground 6

The decision maker has unreasonably relied upon a previously unstated "intention" which was not conveyed to the Applicant at the time, that reference to the amended suspension provisions of the Public Service Act 2008 in correspondence dated 23 December 2021 was merely for information purposes only and not an acknowledgement that the amended suspension provisions applied.

[52] In the decision Ms Cridland referred to the letter sent to the Appellant on 23 December 2021 in which reference was made to s 137 of the PS Act. The letter stated the following–

> In correspondence dated 21 December 2018, Dr Ayre advised you of his decision to suspend your [sic] from duty on full pay pursuant to section 189(1) of the Public Service Act 2008 (PS Act) (now section 137(1)(b) of the PS Act).
>
> In correspondence dated 23 January 2019, Dr Ayre determined to suspend you from duty without pay pursuant to section 191(1) of the PS Act (now section 137(4)(b) of the PS Act), effective from 4 February 2019 until otherwise determined.

[53] Ms Cridland did not accept that the mere reference to s 137(1)(b) and s 137(4)(b) of the PS Act in the letter transitioned or confirmed a previous transition of the Appellant's suspension without pay to a suspension under s 137(1)(b) of the amended PS Act. The decision states –

> I am satisfied that to the extent that letter referred to section 137(1)(b) and 137(4)(b) of the PS Act, it did so only to provide additional information to you about the equivalent provisions under the PS Act (as at December 2021) and without any intention to indicate that your suspension had been transitioned to that section.

[54] The Appellant submits that it was unfair and unreasonable to rely upon an unstated intention that was never previously conveyed to the Appellant pursuant to the principles of natural justice as a basis for non-reimbursement of his suspension without pay.

[55] There was no 'unstated intention'. The decision confirms that there was no intention to indicate that the suspension had been transitioned to the new sections. It was open to the decision maker to confirm that the reference to s 137(1)(b) and s 137(4)(b) in the original decision was simply to provide information about the equivalent provisions and that there was no intention to indicate that the Appellant's suspension had been transitioned to those sections.

Conclusion

[56] The Appellant clearly feels that the decision not to reimburse him for wages lost during his period of suspension was unjust, particularly given that those circumstances may be managed differently if they were to occur under the current statutory provisions. However, there was no requirement that the Appellant be reimbursed given that the statutory provisions under which he was suspended did not require reimbursement.

[57] Based on the information before the Commission, I am satisfied that the decision is fair and reasonable in the circumstances.

Order

[58] I make the following order:

1. Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016* (Qld), the decision appealed against is confirmed.