INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Pennington v Jamieson & Anor* [2022] ICQ 022
PARTIES:	**ADRIAN PENNINGTON** (appellant) **v** **PETA JAMIESON (IN HER CAPACITY AS CHAIR OF THE WIDE BAY HOSPITAL AND HEALTH SERVICE)** (first respondent) **and** **WIDE BAY HOSPITAL AND HEALTH SERVICE** (second respondent)
FILE NO/S:	C/2022/1
PROCEEDING:	Appeal
DELIVERED ON:	26 July 2022
HEARING DATE:	30 May 2022
MEMBER:	Davis J, President
ORDER/S:	**1. The appeal is dismissed.** **2. The respondents file and serve by email upon the appellant by 4 August 2022 any written submissions on the costs of the appeal.** **3. The appellant file and serve by email upon the respondents by 15 August 2022 any written submissions on the costs of the appeal.** **4. Each party have leave to file and serve by 22 August 2022 any application for leave to make oral submissions as to the costs of the appeal.** **5. In the absence of any application to make oral submissions on costs of the appeal being filed by 22 August 2022, the question of costs will be decided on any written submissions filed and without further oral hearing.**
CATCHWORDS:	INDUSTRIAL LAW - QUEENSLAND - INDUSTRIAL RELATIONS COMMISSION - JURISDICTION - where the appellant was employed as Health Service Chief Executive by the second respondent - where the appellant's employment was governed by the *Hospital and Health Boards Act* 2011 (the HHB Act) and a contract of employment - where the appellant's employment was terminated by the second respondent by action of the first respondent - where the

appellant alleged that the termination constituted adverse action - where the appellant applied to the Queensland Industrial Relations Commission (QIRC) for reinstatement and other orders - where the HHB Act contained a privative provision excluding matters from review or appeal - whether the HHB Act excluded the jurisdiction of the QIRC to hear and determine the appellant's application

INDUSTRIAL LAW - QUEENSLAND - DISMISSALS - where the appellant was employed as Health Service Chief Executive by the second respondent - where the appellant's employment was governed by the HHB Act and a contract of employment - where the appellant's employment was terminated by the second respondent by action of the first respondent - where the appellant alleged that the termination constituted adverse action - where an adverse action claim is not available where the action is authorised by statute - where the HHB Act authorised the termination - whether the adverse action claim is thereby excluded - where the contract of employment mirrored the HHB Act - whether the termination was made pursuant to the contract - whether then the termination was authorised by the HHB Act - whether a termination pursuant to the contract can constitute adverse action - whether termination in bad faith was authorised by the HHB Act - where the notice of termination was given pursuant to the employment contract - whether that makes the termination authorised by the contract - whether then the termination is not authorised by the HHB Act

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - CONSTRUCTION AND INTERPRETATION - where the appellant was employed as Health Service Chief Executive by the second respondent - where the appellant's employment was governed by the HHB Act and a contract of employment - where the appellant's employment was terminated by the second respondent by action of the first respondent - where the appellant alleged that the termination was effected pursuant to the terms of the contract - where the contract provided for the giving of notice - where the HHB Act provided that any termination was subject to Ministerial approval - where the appellant alleged that the notice was defective - whether the termination was defective

Acts Interpretation Act 1954, s 24AA
Fair Work Act 2009 (Cth)
Hospital and Health Boards Act 2011, s 5, s 17, s 22, s 28, s 32A, s 32B, s 33, s 67, s 74, s 75
Industrial Relations Act 2016, s 282, s 284, s 285, s 286, s 309, s 310, s 311, s 312, s 313, s 314, s 403, s 405, s 407, s 424, s 429, s 448, s 449, s 451, s 539, s 541, s 557
Judicial Review Act 1991, s 4

Trading (Allowable Hours) Act 1990, s 5, s 21, s 31
Workers' Compensation and Rehabilitation Act 2003

CASES:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27, followed
Arthurson v Victoria (2001) 140 IR 188, cited
Boswell v Secretary of Department of Foreign Affairs and Trade (1993) 118 ALR 719, cited
Byrne v Australian Airlines Ltd (1995) 185 CLR 410, cited
Commissioner of Taxation v Futuris Corporation Ltd (2008) 237 CLR 146, cited
Construction, Forestry, Mining and Energy Union v Rio Tinto Coal Australia Pty Ltd (2014) 232 FCR 560, considered
Director-General of Education v Suttling (1987) 162 CLR 427, followed
Ex parte Johnson; Re MacMillan & Anor (1946) 47 SR (NSW) 16, considered
Ex parte McLean (1930) 43 CLR 472, cited
Federal Commissioner of Taxation v Futuris Corporation Ltd (2008) 237 CLR 146, cited
Forge v Australian Securities and Investments Commission (2006) 228 CLR 45, cited
Gerlach v Clifton Bricks Pty Ltd (2002) 209 CLR 478, followed
Harrison v President, Industrial Court [2017] 1 Qd R 515, cited
Hossain v Minister for Immigration and Border Protection & Anor (2018) 264 CLR 123, cited
Isbester v Knox City Council [2014] VSC 286, cited
Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44, followed
Kirk v Industrial Court (NSW) (2010) 239 CLR 531, followed
Lennon v State of South Australia [2010] SASC 272, cited
Litchfield v Chief Executive, Department of Manufacturing, Innovation, Trade, Resources and Energy (2014) 119 SASR 293, cited
NAAV v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 123 FCR 298, followed
Pennington v Jamieson & Anor (No 2) [2021] QIRC 426, related
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, followed
Queensland Nurses and Midwives' Union of Employees v West Moreton Hospitals and Health Service [2020] QIRC 49, considered
State of South Australia v McDonald (2009) 104 SASR 344, cited
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362, followed

The Queen v A2; The Queen v Magennis; The Queen v Vaziri (2019) 269 CLR 507, followed
Unions New South Wales v New South Wales (2019) 264 CLR 595, cited
VDAE v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1557, cited
Witthahn & Ors v Chief Executive of Hospital and Health Services and Director General of Queensland Health; Johnstone & Ors v Commissioner of Police & Ors [2021] QCA 282, cited
XA v Minister for Home Affairs (2019) 274 FCR 289, cited

COUNSEL: I Neil SC with L Doust for the appellant
C J Murdoch QC with C J Martin for the first respondent
J E Murdoch QC with E D Shorten for the second respondent

SOLICITORS: Hall Payne for the appellant
Minter Ellison for the first respondent
GR Cooper, Crown Solicitor for the second respondent

[1] This is an appeal from a judgment of the Queensland Industrial Relations Commission (QIRC) dismissing the appellant's (Mr Pennington) application for protection from adverse action by his employer, the second respondent, through action of the first respondent (Ms Jamieson).[1]

[2] The adverse action consisted of:

1. dismissing Mr Pennington on 30 September 2019;[2]
2. prior threats to dismiss Mr Pennington made on each of 12 April, 10 May, 26 June and 19 September 2019 (the threats of dismissal);
3. threats of injury in Mr Pennington's employment made on each of 5 July and 14 August 2019 (the threats of injury);
4. recommending Mr Pennington's termination to the Minister;
5. injuring Mr Pennington by announcing to the media on 30 September 2019 that Mr Pennington's appointment and employment had been terminated;
6. discriminating against Mr Pennington due to an impairment.

[3] The QIRC summarily dismissed the adverse action application upon finding that:

1. the dismissal did not constitute adverse action;[3] and
2. the QIRC had no jurisdiction to hear any of the claim, including as it related to the threats of dismissal, the threats of injury, the injury and discrimination.[4]

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1 *Pennington v Jamieson & Anor (No 2)* [2021] QIRC 426.
2 And made effective by the Minister on 16 December 2019.
3 *Pennington v Jamieson & Anor (No 2)* [2021] QIRC 426 at [18].
4 *Pennington v Jamieson & Anor (No 2)* [2021] QIRC 426 at [77] and [87].

Background

[4] The second respondent, Wide Bay Hospital and Health Service (WBH&HS), is a hospital and health service established pursuant to s 17 of the *Hospital and Health Boards Act* 2011 (the HHB Act). Ms Jamieson was, at all relevant times, the Chair of the WBH&HS.

[5] Mr Pennington was appointed Health Service Chief Executive of the WBH&HS in 2012. That position is one recognised by the HHB Act.

[6] Ms Jamieson terminated Mr Pennington's appointment and employment and the act of termination is part of the adverse action alleged.

[7] A Health Service Chief Executive is appointed by a hospital and health service pursuant to s 33 of the HHB Act. Section 74 requires a written contract of employment to be executed by the Health Service and the Health Service Chief Executive who has been appointed.[5]

[8] Mr Pennington and the WBH&HS entered into such a contract in 2012 and again on 1 March 2017 (the contract of employment) when he was appointed for a further five year term.[6] Relevantly, the contract of employment provides:

> "**1. DEFINITONS & INTERPRETATION**
>
> 1.1 In this Contract, unless a contrary intention appears: …
>
> **Commencement Date** means the date specified in Item 2 of Schedule 1, on which this Contract commences; …
>
> **End Date** means the date on which this Contract ends, being whichever is the earliest of the following:
>
> (a) the Expiry Date;
>
> (b) the effective date of termination in accordance with clause 7.5;
>
> (c) the date of termination contained in a notice given by the Health Service CE under clause 8; or
>
> (d) another date of termination prescribed by the Act;
>
> **Expiry Date** means the date specified in Item 3 of Schedule 1, on which this Contract will expire; ...
>
> **2. APPOINTMENT & CONDITIONS OF EMPLOYMENT**
>
> 2.1 The Health Service CE[7] accepts appointment under this Contract as Health Service CE and health executive, from the Commencement Date until the End Date. ...

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5 Section 74 relates to all "health executives" which include a "health service chief executive". See Schedule 2, Dictionary definition of "health executive" and s 67, and Dictionary definition of "health service chief executive" and s 33.

6 A Deed Poll dated 1 March 2017 was also executed by Mr Pennington concerning confidential information to which he may become privy.

7 Defined in the employment contract as Mr Pennington.

2.3 The Health Service CE's conditions of employment are governed by the Act,[8] the Applied Public Service Law,[9] Health Service Directives,[10] this Contract and the Health Service Chief Executive Terms and Conditions.[11]

2.4 If there is an inconsistency between this Contract and the Act or the Applied Public Service Law, the Act or Applied Public Service Law prevails to the extent of the inconsistency. …

3. TERM OF EMPLOYMENT

3.1 This Contract, and the employment of the Health Service CE, starts on the Commencement Date and ends on the End Date. …[12]

7. TERMINATION BY AUTHORITY

7.1 The Health Service CE's appointment and this Contract may be terminated by notice signed by the Authority,[13] which must specify a proposed termination date that is at least one (1) month after the date on which the notice is given to the Health Service CE. The notice does not need to provide reasons for the termination.

7.2 The termination of the Health Service CE's appointment and this Contract is not effective until it is approved by the Minister.[14]

7.3 The Health Service CE may, within seven (7) days after receiving a notice under clause 7.1, provide a written submission to the Authority explaining why this Contract should not be terminated.

7.4 The Authority must ensure that any written submission received from the Health Service CE under clause 7.3 is included in any submission to the Minister seeking approval to

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8 Defined as the *Hospital and Health Boards Act 2011*.

9 The contract adopts the definition in the *Hospital and Health Boards Act* 2011:

> "***applied Public Service law***, for a health service employee, means the following that are applied to the employee under a regulation under the *Public Service Act* 2008, section 23—
> (a) a provision of the *Public Service Act* 2008;
> (b) a directive issued under that Act."

10 The contract adopts the definition in the *Hospital and Health Boards Act* 2011:

> "***health service directive*** means a health service directive issued by the chief executive to a Service under section 47."

11 Defined in the employment contract as:

> "**Health Service Chief Executive Terms and Conditions of Employment** means the terms and conditions of employment applicable to the Health Service CE and contained in the document entitled 'Health Service Chief Executive Terms and Conditions of Employment', as amended from time to time."

12 Effectively the date of expiry of the term or the date of termination under either clause 7 or clause 8 or the date of any termination by force of the *Hospital and Health Boards Act* 2011.

13 "Authority" is defined as "the chair of the board for the [Wide Bay Hospital and Health Service]"; Ms Jamieson.

14 "Minister" is defined in the contract as "means the Minister with portfolio responsibility under the [*Hospital and Health Boards Act* 2011]".

terminate the Health Service CE's appointment and this Contract.

7.5 If, after consideration of any submission received from the Health Service CE under clause 7.3, the Minister approves termination of the Health Service CE's appointment and this Contract, the effective date of termination will be whichever of the following dates is the later:

(a) the proposed termination date specified in the notice given under clause 7.1; or

(b) the date on which the Minister gives approval.

7.6 The Authority may direct the Health Service CE to take special leave on full pay and without debit to any of the Health Service CE's leave accounts during the notice period.

7.7 The Authority may revoke a notice under clause 7.1 before it takes effect.

8. TERMINATION BY HEALTH SERVICE CE

8.1 The Health Service CE may resign or retire by giving at least one (1) months notice to the Authority.

8.2 The Authority may consent to a shorter notice period after the Health Service CE's notice of resignation or retirement is received.

8.3 A consent by the Authority to a shorter notice period is not a termination under clause 7.

8.4 If the Health Service CE does not give at least the minimum period of notice required under clause 8.1, the Health Service CE must pay to the Authority, as a liquidated debt and realistic estimate of any detriment that the Authority may suffer because of the termination of this Contract by the Health Service CE, an amount of the Total Remuneration Package that is equivalent to the period of notice not given by the Health Service CE. …

14. GENERAL PROVISIONS

14.1 This Contract supersedes and replaces all other Contracts, understandings or arrangements between the parties. …

SCHEDULE 1 - CONTRACT PARTICULARS

Item No	Topic	Details
1.	Health Service CE (clause 1.1)	Mr Adrian Pennington
2.	Commencement Date (clause 1.1)	1 March 2017

3.	Expiry Date (clause 1 .1) (must not be longer than 5 years from the Commencement Date)	28 February 2022…"

[9] On 30 September 2019, Ms Jamieson, by a letter bearing that date, terminated Mr Pennington's appointment and employment. The terms of the letter are important to the submissions made on the appeal. The full text is:

> "Dear Adrian
>
> I refer to your contract of employment dated 1 March 2017 (Contract) and your appointment as Chief Executive of the Wide Bay Hospital and Health Service (Health Service).
>
> The purpose of this correspondence is to advise that your employment and appointment as Chief Executive of the Health Service are terminated pursuant to clause 7.1 of the Contract, effective from 30 October 2019.
>
> Pursuant to clause 7.6 of the Contract, I am directing you to take special leave on full pay, effective immediately. The stand down will remain in place for the duration of the notice period.
>
> The decision needs to be approved by the Minister for Health and Ambulance Services (Minister). If you would like to do so, you can make a written submission setting out why the Contract should not be terminated within seven (7) days. If you would like to do this, please mark is as 'Private and Confidential' and send it to me at ……[15] I will provide a copy of any written submission from you with any submission I provide to the Minister seeking approval of the decision to terminate your employment and appointment in accordance with clause 7.4 of the Contract.
>
> Subject to receiving the approval of this decision from the Minister, the termination of your employment and appointment will take effect on the date which is the later of 30 October 2019 or the date on which the Minister gives approval. If the Minister approves the decision to terminate your employment and appointment, you will receive written confirmation of the effective date of termination.
>
> I remind you that, notwithstanding the termination of your employment and appointment with the Health Service (if approved by the Minister), certain obligations under your Contract continue. These obligations include, but are not limited to, obligations relating to confidentiality.
>
> You will short1y receive a summary of all payments and entitlements calculated to 30 October 2019 which may be payable

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15 Email address redacted.

> on termination, including the Separation Payment payable under clause 9.1 of the Contract.
>
> Should you have any questions regarding your final payment estimate or your employment terms and conditions please contact Ms Cathie Franks, Director, Executive Policy and Contracts Team, Human Resources Branch, Department of Health on …… or by email, ……"[16]
>
> Yours sincerely
>
> Peta Jamieson
>
> Chair
>
> Wide Bay Hospital and Health Service Board
>
> 30 September 2019" (emphasis added)

[10] Following receipt of Ms Jamieson's letter (the letter of termination), Mr Pennington instructed his lawyers to make a submission against the termination. Submissions were made. That step was no doubt taken pursuant to clause 7.3 of the contract of employment and the invitation in the letter of termination.

[11] The Minister approved the termination on 16 December 2019. That decision was communicated to Mr Pennington by a letter bearing that date. Relevantly, the Minister's letter said:

> "I refer to the letter dated 30 September 2019 from Ms Peta Jamieson, Board Chair, regarding the proposed termination of your employment and appointment as Chief Executive, Wide Bay Hospital and Health Service (the Wide Bay HHS).
>
> As you are aware, in accordance with clause 7.2 of your Contract of Employment with Wide Bay HHS and section 74(5) of the *Hospital and Health Boards Act 2011* the termination of the appointment and Contract of Employment is not effective until it is approved by me as responsible Minister.
>
> You were provided with an opportunity to make written submissions as to why your Contract and appointment should not be terminated. To this end I note I have received correspondence from Hall Payne Lawyers on your behalf, dated 4 October 2019 and 28 October 2019.
>
> After careful consideration of this matter I have decided on this basis to approve the decision to terminate your employment and appointment. This decision is effective from today's date, being 16 December 2019. …" (emphasis added)

[12] Mr Pennington filed an application in the QIRC on 6 January 2020.[17] He sought the following relief:

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16 Telephone and email details redacted.

17 Application GP/2020/1.

"1. An order reinstating the applicant[18] to his position as Health Service Chief Executive with the Wide Bay Hospital and Health Service.

2. Order to preserve the continuity of the applicant's employment.

3. Further, and or in the alternative to 1 above, orders for compensation for remuneration lost as a consequence of the termination of the applicant's employment.

4. Orders for compensation in the nature of general damages for the pain, suffering, hurt and humiliation suffered by the applicant.

5. Injunctions to restrain the respondent from further contraventions of the Act."

[13] In support of his application, Mr Pennington swore an affidavit. He swore that between 5 February 2019 and 26 September 2019, he made various complaints about Ms Jamieson's conduct. Those complaints were made to various persons, including Ms Barbara Phillips, the Deputy Director-General of Queensland Health, Mr Michael Walsh, who was then the Director-General of Queensland Health, and Dr John Wakefield, who was Mr Walsh's successor in that position.

[14] In his affidavit, Mr Pennington swore that he applied for workers' compensation alleging psychiatric injury caused by his work, especially the conduct of Ms Jamieson. He then swore:

"**Adverse Action**

8. Ms Jamieson and others took adverse action against me because of my complaints. The adverse action included, but was not limited to:

(a) threatening to injure me in my employment

(b) recommending the termination of my employment to the Health Minister;

(c) announcing the termination of my employment to the media; and

(d) terminating my employment.

Threats

9. On 15 April 2019, during the conversation referred to at paragraph 6(d), Ms Jamieson threatened to injure me in my employment.

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18 Mr Pennington.

10. As described at paragraph 6(f), on 10 May 2019, while discussing the DBC[19] with me, Ms Jamieson threatened that I would lose my job.

11. On 26 June 2019, Ms Jamieson threatened that I would lose my job.

12. On 5 July 2019, Ms Jamieson threatened to injure me in my employment.

13. On 14 August 2019, Ms Jamieson threatened to delay my return to work following my absence due to my suicide attempt.

14. On 19 September 2019, Karen Prentis, another WBHHS Board member and Ms Jamieson threatened to injure me in my employment and to terminate my employment respectively.

Letter recommending termination

15. On 30 September 2019, I met with Ms Jamieson. She handed me a letter which gave me notice that she intended to ask the minister to terminate my employment.

Announcement of termination to media

16. Later that day, Ms Jamieson reported to the media that she had in fact terminated my employment. This announcement injured me in my employment.

Actual termination

17. On 9 December 2019, the Health Minister, Stephen Miles, confirmed the termination of my employment.[20]

Reasons for adverse action

Exercise of workplace rights

18. I allege that adverse action was taken against me because of the exercise of the following workplace rights

    (a) making complaints about my employment, particularised in paragraph 6 of this affidavit; and

    (b) making a workers' compensation application, particularised at paragraph 7 of this affidavit.

Discrimination because of impairment

19. I further allege that adverse action was taken against me because of my mental illness, namely severe depression."

[15] Points of Claim and Points of Defence were then exchanged and some were amended.

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19 Defined in the affidavit as "Detailed Business Case" for a new hospital; see paragraph 6(d) of Mr Pennington's affidavit.

20 The letter confirming the termination is dated 16 December 2019.

[16] It is not necessary to descend to an analysis of what are essentially the pleadings in the case before the QIRC. Relevantly here, Ms Jamieson, in paragraphs up to 46 of the Points of Defence, denied any wrongdoing and then alleged:

> "46A. Further or in the alternative to the above pleadings in paragraphs 7 to 46, the First Respondent denies:
>
> (a) paragraphs 42, 43 and 44 because:
>
> (i) the decision to dismiss the Applicant from his employment is an 'excluded matter' within the meaning of section 75(4)(b) of the HHB Act and is thus, by reason of section 75(1) of the IR Act, not an industrial matter for the IR Act and, in the premises, sections 282 and 295 of IR Act does not provide the Applicant with a basis for the relief sought; and
>
> (ii) the decision to dismiss the Applicant from his employment is not 'adverse action' within the meaning of section 282 of the IR Act because it was authorised under sections 74(4) and 74(5) of the HHB Act and is thereby excluded from the definition of 'adverse action' by section 282(6) of the IR Act; and
>
> (b) paragraph 45, because:
>
> (i) discrimination in employment arising from a dismissal from employment based on impairment is an 'industrial matter' as defined in Schedule 1 of the IR Act;
>
> (ii) by section 75(1) of the HHB Act, an 'excluded matter' is not an 'industrial matter' for the purposes of the IR Act;
>
> (iii) the decision to dismiss the Applicant from his employment is an 'excluded matter' under section 75(4)(b) of the HHB Act; and
>
> (iv) in the premises, section 295 of the IR Act does not provide the Applicant with a basis for the relief sought and the alternative claim of impairment based discrimination is beyond the jurisdiction of the Commission."

[17] The WBH&HS made an identical plea in its Points of Defence.

[18] Ms Jamieson and WBH&HS brought an application to the QIRC seeking orders that Mr Pennington's application be dismissed as the QIRC had no jurisdiction to hear it. That argument was based on what was pleaded in the Points of Defence and which I

have set out above. The QIRC obviously had power to summarily dismiss an adverse action application if it had no jurisdiction to hear it.[21]

[19] On 15 December 2021, the QIRC published reasons and made an order:

> "1. The application filed 6 January 2020[22] is dismissed for want of jurisdiction."[23]

Statutory provisions

[20] Section 282 of the *Industrial Relations Act* 2016 (the IR Act) defines "adverse action". It provides, relevantly:

> "**282 Meaning of *adverse action***
>
> (1)
>
> ***Adverse action*** is taken by an employer against an employee if the employer—
>
> (a) dismisses the employee; or
>
> (b) injures the employee in his or her employment; or
>
> (c) alters the position of the employee to the employee's prejudice; or
>
> (d) discriminates between the employee and other employees of the employer.
>
> (2)
>
> ***Adverse action*** is taken by a prospective employer against a prospective employee if the prospective employer—
>
> (a) refuses to employ the prospective employee; or
>
> (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
>
> (3)
>
> ***Adverse action*** is taken by an employee against an employer if the employee—
>
> (a) ceases work in the service of the employer; or
>
> (b) takes industrial action against the employer.
>
> (4)

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21 *Industrial Relations Act* 2016, ss 451, 539 and 541, especially 541(b)(ii).
22 Mr Pennington's application.
23 *Pennington v Jamieson & Anor (No 2)* [2021] QIRC 426.

Adverse action is taken by an industrial association, or an officer or member of an industrial association, against a person if the association, or the officer or member of the association—

(a) organises or takes industrial action against the person; or

(b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or

(c) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to an amount legally owed to the association by the member).

(5)

Adverse action includes—

(a) threatening to take action covered by subsections (1) to (4); and

(b) organising to take action covered by subsections (1) to (4).

(6)

Adverse action does not include action that is authorised under—

(a) this Act or any other law of the State; or

(b) a law of the Commonwealth.

(7) Without limiting subsection (6), ***adverse action*** does not include an employer standing down an employee who is engaged in protected industrial action and employed under a contract of employment that provides for the employer to stand down the employee in the circumstances."

[21] Section 285 of the IR Act prohibits the taking of adverse action in circumstances where the employee has, or has exercised, or proposes to exercise, or is exercising a workplace right. Section 284 defines "workplace right". Sections 284 and 285 provide:

"**284 Meaning of *workplace right***

(1) A person has a ***workplace right*** if the person—

(a) has a right to the benefit of, or has a role or responsibility under, an industrial law, industrial instrument or order made by an industrial body; or

(b) is able to start, or participate in, a process or proceedings under an industrial law or industrial instrument; or

(c) is able to make a complaint or inquiry—

(i) to an entity having the capacity under an industrial law to seek compliance with that law or an industrial instrument; or

(ii) if the person is an employee—in relation to his or her employment.

(2) In this section—

industrial body means—

(a) the commission; or

(b) the court, or another court or commission (however called), exercising industrial law functions and powers corresponding to the commission's functions and powers.

285 Protection

(1) A person must not take adverse action against another person—

(a) because the other person—

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes to or proposes not to, or has at any time proposed to or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

(2) A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes to or has at any time proposed to exercise, a workplace right for the second person's benefit or for the benefit of a class of persons to which the second person belongs."[24]

[22] Section 295 of the IR Act prohibits the taking of adverse action based on discrimination. This was specifically pleaded by Mr Pennington.[25] Section 295 provides:

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24 Statutory notes omitted.

25 Paragraph 19 of Mr Pennington's affidavit set out at paragraph [14] of these reasons.

"**295 Discrimination**

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities or association with, or in relation to, a person identified on the basis of any of these attributes.

(2) However, subsection (1) does not apply to action that is—

(a) not unlawful under an anti-discrimination law; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, taken—

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Each of the following is an anti-discrimination law—

(a) the *Age Discrimination Act 2004* (Cwlth);

(b) the *Disability Discrimination Act 1992* (Cwlth);

(c) the *Racial Discrimination Act 1975* (Cwlth);

(d) the *Sex Discrimination Act 1984* (Cwlth);

(e) the *Anti-Discrimination Act 1991*."[26]

[23] Section 74 of the HHB Act prescribes various things in relation to the employment of health executives.[27] That section says:

"**74 Basis of employment for health executives**

(1) Each person appointed as a health executive must enter into a written contract of employment with the following—

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26 Statutory note omitted.

27 A Health Service Chief Executive is a "health executive"; *Hospital and Health Boards Act* 2011, ss 67 and 74.

(a) for a health executive employed by a Service (other than the health service chief executive)—the health service chief executive;

(b) for a health executive in the department—the chief executive;

(c) for a health service chief executive—the chair of the board for the Service.

(2) The contract of employment must state—

(a) the term, of not longer than 5 years, of the person's employment; and

(b) that, if the person's employment as a health executive continues to the end of the term, a further contract may be entered into under this section; and

(c) the person's functions; and

(d) that the person must meet any performance criteria stated in the contract; and

(e) the person's classification level, and the remuneration to which the person is entitled.

(3) A health executive may resign by written notice of resignation given, at least 1 month before the notice is to take effect, to the person with whom the health executive entered into the contract of employment.

(4) A health executive's appointment and contract of employment may be terminated by written notice given to the health executive at least 1 month before it is to take effect by—

(a) for a health executive employed by a Service (other than the health service chief executive)—the health service chief executive;

(b) for a health executive in the department—the chief executive;

(c) for a health service chief executive—the chair of the board for the Service.

(5) For subsection (4), the termination of the appointment and contract of employment of a health service chief executive is not effective until it is approved by the Minister." (emphasis added)

[24] Section 75 of the HHB Act excludes certain decisions made under it from review. It provides:

> "**75 Exclusion of certain matters from review under other Acts**
>
> (1) An excluded matter, or a matter affecting or relating to an excluded matter, is not an industrial matter for the *Industrial Relations Act 2016*.
>
> (2) Without limiting subsection (1), industrial instruments do not apply to a health executive.
>
> (3) A decision about an excluded matter can not be challenged, appealed against, reviewed, quashed, set aside, or called in question in another way, under the *Judicial Review Act 1991*.
>
> (4) In this section—
>
> ***excluded matter*** means—
>
> (a) a decision to appoint, or not to appoint, a person as a health executive; or
>
> (b) the contract of employment of, or the application of this part or a provision of this part to, a health executive."

The decision of the Queensland Industrial Relations Commission

[25] The respondents argued before the QIRC that the termination of Mr Pennington's contract of employment and his appointment as Health Service Chief Executive was "authorised" by s 74(4) of the HHB Act. Therefore, the termination was not "adverse action" given the exclusion in s 282(6) of the IR Act.

[26] The respondents further argued before the QIRC that the claim based on adverse action was an "excluded matter" as defined in s 75 of the HHB Act, so that the QIRC had no jurisdiction to hear it, as it is, by s 75(1), not an "industrial matter". Mr Pennington submitted that if the dispute was not an "industrial matter", the QIRC otherwise had jurisdiction vested by ss 309 and 448(1)(c) of the IR Act.

[27] Both the employment contract and s 74(4) of the HHB Act provide for termination by notice given "one month before it is to take effect". The termination notice, being given on 30 September and specifying a date of termination at 30 October, is, it was submitted, one day short. How the notice operates against the legislative scheme was a matter of contention before the QIRC. Mr Pennington argued that the notice, and therefore the termination, were invalid and further that the termination was not "authorised" by the HHB Act, but by the contract of employment. Therefore, he argued, the exclusion in s 282(6) of the IR Act did not apply.

[28] Before the QIRC, Mr Pennington argued that the termination was motivated by reprisal against him for the complaints he had made against Ms Jamieson. Therefore, he argued, the termination power was exercised in bad faith. That, he said, meant that it was not "authorised".

[29] The Industrial Commissioner held:

1. the act of termination of Mr Pennington's employment was excluded from "adverse action" as that act was authorised by s 74(4) of the HHB Act;[28]

2. the other acts alleged to be adverse action were not authorised by s 74(4) and therefore could constitute "adverse action";[29]

3. a termination made in bad faith is still excluded by s 282(6) of the IR Act;[30]

4. no case of termination in bad faith was properly raised in Mr Pennington's points of claim;[31]

5. the termination notice was valid as the termination became effective upon the approval of the Minister and that occurred more than one month after the giving of the notice;[32]

6. the termination was made pursuant to the HHB Act, not the employment contract;[33]

7. the entirety of Mr Pennington's claim is an "excluded matter" by force of s 75(1) of the HHB Act;[34]

8. sections 448 and 309 of the IR Act do not operate so as to grant jurisdiction to the QIRC in relation to Mr Pennington's claim on the basis that jurisdiction is "referred" to the QIRC;[35]

9. The QIRC has no jurisdiction to hear any part of Mr Pennington's claim.

[30] Consistently with those findings, Mr Pennington's application was dismissed.

The appeal

[31] The grounds of appeal are:

> "1. The Commission erred in concluding that the termination of the applicant's employment was 'authorised' within the meaning of s.282(6) of the Industrial Relations Act 2016 (the IR Act), by s.74(4)(c) of the Hospital and Health Boards Act 2011 (the HHB Act), and was not, for that reason 'adverse action' within the meaning of s.282 of the IR Act.
>
> 2. The Commission erred in concluding that the written notice of termination given to the applicant was given in accordance with s.74(4) of the HHB Act.
>
> 3. The Commission erred in concluding that s.75(1) of the HHB Act operated to exclude the jurisdiction of the Commission under Chapter 8, Part 1 of the IR Act."[36]

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28 *Pennington v Jamieson & Anor (No 2)* [2021] QIRC 426 at [18].
29 At [23].
30 At [29].
31 At [31].
32 At [36]-[39].
33 At [51] and [52].
34 At [87].
35 At [93].
36 The "general protections" provisions.

Ground 1: The termination was not authorised by s 74(4)(c) of the *Hospital and Health Boards Act* 2011 and therefore was not excluded from the definition of "adverse action"

[32] There are five arguments mounted by Mr Pennington in support of ground 1. He submits that the termination was not authorised by s 74(4)(c) because:

1. where there is more than one authority for the action, the action cannot be said to be "authorised by the statute". Here, there was both a contractual (clause 7 of the employment contract) and statutory (s 74(4) of the HHB Act) authority for the termination;
2. the act of termination is only "authorised" by a statutory requirement to dismiss the employee;
3. the act of termination was not, in fact and law here, an act done by authority of the statute. It was an act taken pursuant to the employment contract and therefore not "authorised by" s 74(4) of the HHB Act; and
4. on a proper construction of s 282(6) of the IR Act and s 74(4)(c) of the HHB Act, adverse action is not authorised;
5. action taken for an improper purpose or in bad faith is not authorised.

[33] Before turning to the consideration of the five submissions, it is necessary to consider ss 74 and 75 of the HHB Act and s 282(6) of the IR Act.

The proper construction of ss 74 and 75 of the Hospital and Health Boards Act 2011 and its interaction with s 282(6) of the Industrial Relations Act 2016

[34] The aim of construction of a statute is to determine the meaning of the actual language of the particular provision[37] by reference to the words in the statute as a whole having regard to context and purpose.[38]

[35] Division 3 of Chapter 8 of the IR Act, which concerns adverse action, establishes a statutory scheme giving certain rights to employees.[39] It then limits those rights where the action that infringes the right is authorised.[40]

[36] A similar approach is taken in relation to dismissals in that a statutory right is created but subject to limitations.[41] A right to bring an application for reinstatement for unfair dismissal is granted by s 317 of the IR Act.[42] Section 315 limits the classes of employees who may bring a reinstatement application. For example, Mr Pennington is not eligible to bring an unfair dismissal claim as he is an

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37 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

38 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47], *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] and [35]-[40] and *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* (2019) 269 CLR 507 at [32]-[37].

39 Section 285.

40 Section 282(6).

41 Chapter 8 Part 2.

42 As to when a dismissal is "unfair", see s 316.

employee who is not employed under an industrial instrument[43] and his annual wages exceed a defined amount.[44]

[37] The exclusion of those statutory remedies does not leave Mr Pennington without rights. Nothing in the IR Act excludes Mr Pennington from his common law rights arising under the contract of employment.

[38] Against that background, it is necessary to consider the HHB Act and its impact upon any rights otherwise arising as a result of adverse action.

[39] The HHB Act seeks to establish "a public sector health system that delivers high quality hospital and other health services to persons in Queensland".[45] It does that by establishing an infrastructure.

[40] Section 7 of the HHB Act provides:

> "**7 Role of Hospital and Health Services**
>
> (1) Hospital and Health Services are statutory bodies and are the principal providers of public sector health services.
>
> (2) Each Hospital and Health Service is independently and locally controlled by a Hospital and Health Board.
>
> (3) Each Hospital and Health Board appoints a health service chief executive.
>
> (4) Each Hospital and Health Board exercises significant responsibilities at a local level, including controlling—
>
> (a) the financial management of the Service; and
>
> (b) the management of the Service's land and buildings; and
>
> (c) for a prescribed Service, the management of the Service's staff.
>
> (5) This Act requires each Hospital and Health Service to have regard to the need to ensure the effective and efficient use of public sector health system resources and the best interests of patients and other users of public sector health services throughout the State." (emphasis added)

[41] Central to the system is the existence of independently operated local health services which are each controlled by a board.[46] The board members hold office subject to powers of removal exercisable by the Governor in Council upon the

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43 Section 315(1)(e)(i); and the *Hospital and Health Boards Act* 2011, s 75(2), and s 66, especially s 66(2).

44 Section 315(1)(e)(ii).

45 *Hospital and Health Boards Act 2011*, s 5.

46 *Hospital and Health Boards Act 2011*, s 22.

recommendation of the Minister.[47] The board of each health service establishes an executive committee[48] whose function is to support the board in its role in controlling the service.[49]

[42] Section 33 of the HHB Act concerns the appointment of the Health Service Chief Executive.

[43] There is a clear distinction between the appointment of the Health Service Chief Executive and the entering into of a contract of employment with that person. Section 33 provides:

> "**33 Appointment of health service chief executives**
>
> (1) A Hospital and Health Service's board must appoint a health service chief executive to manage the Service.
>
> (2) The appointment is not effective until it is approved by the Minister.
>
> (3) The person appointed as health service chief executive must also be appointed as a health executive.
>
> (4) In managing the Service, the health service chief executive is subject to direction by the Service's board." (emphasis added)

[44] Against that context, s 74 prescribes the basis of the employment of health executives. By s 74(1)(c), the Health Service Chief Executive[50] must enter into a written contract of employment with the chair of the board. Section 74(2) prescribes various mandatory conditions of the contract of employment.

[45] Nothing in s 74(2) restricts what terms may be included in a Health Service Chief Executive's employment contract, save that no term could be inconsistent with any of the prescribed terms.

[46] Section 74(4) provides that the Health Service Chief Executive appointed (pursuant to s 33), and who has entered into an employment contract (pursuant to s 74(1)), may be terminated on one months notice. Of note:

1. nothing in s 74(4) suggests that any grounds for termination must be identified;
2. nothing in s 74(4) hints at what any grounds of termination might be;
3. the termination may be without cause;
4. like the decision to employ a Health Service Chief Executive, the decision to terminate the appointment and contract of employment of a Health Service Chief Executive is only operative when and if approved by the Minister.[51]

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47 *Hospital and Health Boards Act 2011*, s 28(e).
48 Section 32A.
49 Section 32B.
50 Relevantly here, but s 74 concerns all health executives.
51 Section 74(5).

[47] Section 75 of the HHB Act is relevant to ground 3 of the appeal. It is also relevant to the consideration of s 74 and therefore to ground 1. Section 75(1), when read with the definition of "excluded matter" in s 75(4), means "the contract of employment of … a health executive or a matter affecting or relating to the contract of employment of … a health executive" is not an "industrial matter" for the IR Act.

[48] An "industrial matter" is defined by the IR Act as:

> "**9 What is an industrial matter**
>
> (1) An ***industrial matter*** is a matter that affects or relates to—
>
> (a) work done or to be done; or
>
> (b) the privileges, rights or functions of—
>
> (i) employers or employees; or
>
> (ii) persons who have been, or propose to be, or who may become, employers or employees; or
>
> (c) a matter the court or commission considers has been, is, or may be a cause or contributory cause of an industrial action or industrial dispute.
>
> (2) However, a matter is not an industrial matter if it is the subject of a proceeding for—
>
> (a) an indictable offence; or
>
> (b) a public service appeal.
>
> (3) Without limiting subsection (1) or affecting subsection (2), a matter is an industrial matter if it relates to a matter mentioned in schedule 1."[52]

[49] Section 75(2) provides that industrial instruments do not apply to health executives. "Industrial instruments" in the HHB Act has the meaning attributed to it by the IR Act which is:

> "***industrial instrument*** means—
>
> (a) an award; or
>
> (b) a certified agreement; or
>
> (c) an arbitration determination; or
>
> (d) a code of practice under section 389;[53]
>
> (e) an order under chapter 2, part 5 or 6."[54]

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52 Nothing in Schedule 1 is relevant here.

53 Only relates to clothing outworkers.

54 Only relates to apprentices, trainees and employees who participate in a labour market program.

[50] Section 75(2) effectively removes health executives from the unfair dismissal regime in the IR Act.[55]

[51] A review under the *Judicial Review Act* 1991 (the JR Act) of decisions "about an excluded matter" is excluded by s 75(3).

[52] The legislative purpose[56] is clear. Health executives are high level employees of the particular health service whose employment must be approved directly by the Minister. Their employment is governed by the HHB Act and the contract of employment, and they are largely removed from the protections provided by the industrial relations system. Those positions can be contrasted with other health service employees who have the benefit of industrial instruments.[57]

[53] Once the statutory scheme is understood, it is clear that s 74(4) is intended to "authorise" the termination of a health executive's appointment and employment. Section 74(4) gave a power to Ms Jamieson as the chair of the board to terminate Mr Pennington's appointment as Health Service Chief Executive and to terminate his contract of employment. That act of termination is "authorised" by s 74(4) which is a "law of the State"[58] and the adverse action claim, to the extent that it is based on the act of termination, is excluded.

[54] The five submissions in support of ground 1 argue, for various reasons, that s 74(4) of the HHB Act and s 282(6) of the IR Act do not operate to exclude Mr Pennington's claim for various reasons.

Ground 1 - first submission: *The statute did not authorise the act, because the contract of employment authorised the act*

[55] It is submitted by Mr Pennington that the authority to terminate given under s 74(4) of the HHB Act is not authority for the purposes of s 286(6) as there was some authority already vested in Ms Jamieson to make the termination. Here, Ms Jamieson had authority to terminate Mr Pennington's appointment and employment by force of clause 7.1 of the contract of employment and, therefore, the submission goes, she was not relevantly "authorised" by s 74(4).

[56] To authorise the taking of an action is "to give authority or legal power to: empower (to do something)".[59] As already observed, s 74(4) clearly enough authorised Ms Jamieson to terminate the appointment and employment of Mr Pennington. Nothing on the face of s 74 of the HHB Act or s 282 of the IR Act suggests otherwise.

[57] However, Mr Pennington seeks support for his submission from statements made in *Ex parte Johnson; Re MacMillan & Anor*[60] and *Queensland Nurses and Midwives' Union of Employees v West Moreton Hospitals and Health Service*.[61]

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55 *Industrial Relations Act 2016*, s 315(1)(e)(i).

56 "Purpose" is the intended aims of Parliament discerned objectively from the language of the statute; *Unions New South Wales v New South Wales* (2019) 264 CLR 595 at [168]-[172] per Edelman J.

57 *Hospital and Health Boards Act* 2011, s 66. See s 66(1) compared with s 66(2).

58 *Industrial Relations Act 2016*, s 282(6)(a).

59 Macquarie Dictionary, 8th edition, 2020, definition of "authorise" and see also the definition of "authorised".

60 (1946) 47 SR (NSW) 16.

[58] *Ex parte Johnson* concerned the National Security (War Service Moratorium) Regulations of New South Wales. These came into existence in 1941 and were war time regulations designed to protect unoccupied houses from squatters. A "protected person" could apply to a magistrate for a warrant authorising the delivery of possession of the dwelling to the applicant. It was envisaged that the warrant would issue to a police officer who would then, by executing the warrant, deliver possession to the rightful occupant.

[59] As to the term, "authorise", Jordan CJ observed:

> "The word 'authorize,' according to its natural meaning, signifies the conferring upon a person of a right to do something which, apart from the authorization, he does not possess. It has been argued that it is used with this meaning in reg. 30A, with the result that a person to whom a warrant is issued may please himself whether he executes it. But the word, like any other word, may be controlled by its context; and, to give it the meaning contended for, would defeat the obvious intention of the regulation-making authority. In its present context, I am of opinion that 'authorizing' in reg. 30A(1) must be read as including 'requiring'."[62]

And later:

> "But there is another matter which calls for consideration. The use of the word 'authorizing' is significant. In its context, the word, I think, includes the sense of 'requiring'; but, in doing so, it does not, in my opinion, lose its primary sense. Its use indicates clearly enough that it is intended and required that the warrant should be issued not to the owner but to someone who needs such an authority to justify him in delivering possession of the premises. For this reason, I am of opinion that the warrant issued in the present case to Mrs Johnson was one which the magistrate had no jurisdiction to grant."[63] (emphasis added)

[60] Industrial Commissioner Black sitting in the QIRC decided *Queensland Nurses and Midwives' Union of Employees v West Moreton Hospitals and Health Service*. The Industrial Commissioner there considered two provisions argued to give authority for action taken that might otherwise fall within s 282(6) of the IR Act. He observed:

> "A distinction can to be drawn between an action which is taken pursuant to a provision of an Act, and an action which is expressly authorised by an Act provision in circumstances where the action would not otherwise be permissible at law."[64] (emphasis added)

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61 [2020] QIRC 49.
62 At 18.
63 At 19.
64 At [91].

[61] There is, in my view, no general principle that a statutory provision does not "authorise" an action merely because there is some other legal justification for taking the action. Otherwise, if there were two statutory provisions empowering the taking of the action, then neither could "authorise" the action because of the authority of the other. Ultimately, the answer is in the construction of the particular provision.

[62] The appropriate approach is to identify the action taken and then identify "… some immediate source of authority to be found in some statutory provision"[65] for the taking of the action. Section 74(2)(a) mandates that the contract of employment must have a "term, of not longer than 5 years". Section 74(4) authorises the chair of the board of the Service to terminate the appointment and the contract of employment. That is direct authority to "dismiss the employee" which is the action identified in s 282(1)(a).

[63] The first submission in support of ground 1 fails.

Ground 1 - second submission: *The act of termination is only authorised if the statute requires the dismissal of the employee*

[64] This submission is founded on the judgment of Flick J in *Construction, Forestry, Mining and Energy Union v Rio Tinto Coal Australia Pty Ltd*.[66]

[65] *Rio Tinto* concerned s 342 of the *Fair Work Act* 2009 (Cth) which is, for present purposes, identical to s 282 of the IR Act.

[66] Rio Tinto and its employees were subject to industrial instruments which governed their entitlements. Rio Tinto discriminated between employees who were members of the CFMEU and employees who were not. Those who were members of the CFMEU received their entitlements and those who were not received more.

[67] When an adverse action claim was brought alleging discrimination, Rio Tinto sought to strike out the application on the basis that the payments to the CFMEU employees were authorised by the industrial instruments and therefore authorised by the *Fair Work Act* and therefore could not constitute adverse action. Justice Flick held that the exclusion did not apply and the offending payments were capable of establishing adverse action.

[68] Mr Pennington relies upon the passage in the judgment that:

> "The 'authorisation' here relied upon by Rio Tinto, it may be accepted, was said to be sourced in other provisions of the *Fair Work Act* and not in a 'direction' that may have been given by a 'myriad of persons'. But there is no provision of the *Fair Work Act* which imposes a 'specific requirement' for it to make payments which were otherwise 'discriminatory'. And to make such discriminatory payments would otherwise not promote the 'general scheme' set forth in Item 1(d) of s 342(1). Although provisions such as ss 50, 51 and 52 of the *Fair Work Act* require the payment to

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65 *Construction, Forestry, Mining and Energy Union v Rio Tinto Coal Australia Pty Ltd* (2014) 232 FCR 560 at [54].

66 (2014) 232 FCR 560.

> employees of their lawful entitlements, no provision authorises the payment of 'discriminatory' amounts."[67]

And:

> "There is no readily apparent reason why such a provision should be read in any manner other than beneficially and in a manner which makes meaningful the protections there afforded. One of the protections there provided for is the protection of an employee from an employer 'discriminat[ing] between the employee and other employees'. Section 342(3), in this confined statutory context, provides an exception. Section 342(3) should obviously not be construed in a manner which would render the protections meaningless. That which s 342(3) contemplates, it is concluded, is 'action' that is expressly 'authorised' by the *Fair Work Act* or 'action' that is sanctioned or approved by a provision (for present purposes) relevantly found elsewhere in the *Fair Work Act*.
>
> The 'authority' which is referred to is an 'authority' which takes its content from the 'adverse action' which is prohibited. In the present context, the 'authority' to which s 342(3)(a) is referring is an 'authority' to engage in conduct which otherwise falls within Item l(d). Sections 50, 51 and 52 provide no real 'authority'.
>
> If attention is confined to the terms employed in s 342 and the legislative objective sought to be achieved by that one provision, Rio Tinto's submission is rejected as to the 'wide construction' sought to be given to s 342(3) and the narrow operation to be given to s 342(1)."[68]

[69] These paragraphs must, with respect, be read in context. They do not, in my view, support the proposition that s 74(4) does not authorise the termination for the purposes of s 282(6).

[70] Immediately after the first passage cited by Mr Pennington, there appears in the judgment of Flick J:

> "Even on the argument of Rio Tinto that it was simply making payments to one class of employees according to their legal entitlements and making payments to another class of employees according to their legal entitlements, no provision of the *Fair Work Act* required Rio Tinto to make different payments. The difference in the payments being made was the consequence of the different contractual entitlements of the employees — the making of different payments, it is not considered, was done in 'obedience' to any requirement imposed by the *Fair Work Act* to treat different classes of employees differently."[69]

[71] After considering the use of the term "authorise" used elsewhere in the *Fair Work Act*, his Honour then observed:

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67 At [41].
68 At [46]-[48].
69 At [42].

> "The variety of different contexts in which the term 'authorise' has been employed elsewhere in the *Fair Work Act* necessarily means that it is a term which must be construed with some degree of flexibility. It is a term employed by the legislature to cover other situations where it wishes to proscribe what terms may not be included in an award and situations where conduct is prohibited unless it is 'authorised' by or under the *Fair Work Act* or some other 'law'. In the former context what is envisaged is not some 'legal authority' or 'authority' conferred by some statutory provision but, rather, an 'authority' sought to be more immediately conferred by agreement. In the latter context, there is no lack of ambiguity. Where the legislature has seen fit to proscribe certain conduct, that standard must be complied with unless a person can point to some 'authority by or under law'.
>
> Notwithstanding whatever flexibility may be inherent in the term 'authorise', what is common to all contexts is the search for some 'authority' to engage in particular conduct. In the case of those provisions which refer to 'authorised by law', the search is for some immediate source of authority to be found in some statutory provision. Section 524 is an example of one such provision.
>
> A requirement to pay monies pursuant to a legal obligation to one class of employees, it is considered, is not an 'authority' to make different payments to other employees. The search in the present case, if the case for Rio Tinto is to succeed, is to find some statutory authority in the *Fair Work Act* which authorises discrimination. But one searches in vain for any such provision of relevance to the present proceeding."[70]

[72] The point being made by his Honour was not that an authorisation must be an act taken otherwise than in exercise of discretion, but that the authority must relate to the specific "action" otherwise prohibited by the *Fair Work Act* equivalent to s 282(1) of the IR Act. As there was no requirement, or other authority, to discriminate against the employees, the discrimination was not authorised.

[73] Here, on a proper construction of the HHB Act, there was authority to dismiss without cause under s 74(4). The action was to dismiss. Therefore, s 74(4) authorised the action. That the action which was taken was discretionary, does not render the action not "authorised".

[74] The second submission in support of ground 1 fails.

Ground 1 - third submission: *The termination of Mr Pennington's appointment and employment was effected under the contract, not s 74(4)*

[75] In Ms Jamieson's letter of 30 September 2019, she expressly terminated Mr Pennington's "employment and appointment … pursuant to clause 7.1 of the Contract". Therefore, Mr Pennington submits that the act of termination is not one "authorised by" s 74(4), but was an action authorised by, and effected under, the contract. The Minister's letter of 16 December refers to both s 74(5) of the HHB

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70 At [53]-[55].

Act and clause 7.2 of the contract of employment as having the effect that the termination is not effective until it is approved by the Minister.

[76] Section 74(4) and 74(5) of the HHB Act are not without difficulty. The appointment and contract of employment are, by s 74(4), terminated "by written notice given to the health executive". On the face of it, it is the notice which effects the termination. Nomination of the date of termination may be required in the notice because the notice must be given "at least one month before it is to take effect". Presumably then, the date upon which the notice must take effect should appear in the notice.

[77] However, s 74(5) qualifies s 74(4). Notwithstanding that by the express words of s 74(4), it is the notice which terminates the appointment and contract of employment, the termination is not "effective" until approved by the Minister. It is difficult then to see how a termination date can be included in the termination notice, it being beyond the knowledge of the chair of the board, at the time the notice is given, as to when the Minister may approve the termination, if in fact the Minister ever does.

[78] It is clear that Mr Pennington's contract of employment was entered into pursuant to the command in s 74(1) of the HHB Act. The contract of employment refers to the HHB Act.[71] Clause 7.1 of the contract of employment is consistent with s 74(4) and clause 8 is consistent with s 74(3).

[79] Clause 7 of the employment contract is an attempt to work around the limitations in s 74(4) and 74(5). It provides for a "proposed termination date" in the termination letter. That accommodates s 74(5). Clause 7.2 follows s 74(5).

[80] Clause 7.7 of the contract of employment provides that the termination notice may be revoked. This is not inconsistent with s 74(4).[72] Clauses 7.3, 7.4 and 7.5 provide a mechanism whereby Mr Pennington may be heard on that issue. None of that is inconsistent with the HHB Act.[73]

[81] Terms and conditions of any employment under modern industrial systems come from a variety of sources; the contract of employment, the relevant industrial instruments and statutes.[74] In the case of a health executive, industrial instruments are excluded,[75] but terms and conditions apply by force of the contract of employment contemplated by s 74(1) and by statutory provisions such as ss 74(4) and 74(5) of the HHB Act.

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71 Recitals B, C, clause 1.1 definition of "the Act", definition of "department", paragraph (d) in the definition of "end date", definition of "health service directive", and "Minister" and "service agreement", clause 2.2, clause 2.4, clause 2.5, clause 4.1(a)(ii), clause 4.1(d), clause 5.2, clause 5.3, clause 14.9, clause 15.2.

72 *Acts Interpretation Act 1954*, s 24AA.

73 Clause 7.6 deals with an issue completely divorced from s 74(4) and 74(5).

74 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 419-421 and *Ex parte McLean* (1930) 43 CLR 472 at 479.

75 *Hospital and Health Boards Act 2011*, s 75(2).

[82] In *Director-General of Education v Suttling*,[76] the High Court considered the relationship between contractual and statutory provisions pertaining to the employment of a school teacher.

[83] Mr Suttling had been appointed to a particular position within the education system of New South Wales. That appointment was made pursuant to the *Education Commission Act* 1980 (NSW). The appointment was made for a fixed term. Mr Suttling then entered into a contract of employment relevant to that position. After he commenced his new job, administrative reorganisation within the department rendered him redundant and he was then employed in another position on a lower salary. He sued to recover his financial loss being the difference in the two salaries. He submitted that by the provisions of the legislation, once he was appointed for a fixed term, he could not be earlier removed except in circumstances provided by the legislation. Redundancy was not such a circumstance.

[84] The department relied on Mr Suttling's employment contract which gave a right to dismiss Mr Suttling at will. Justice Brennan (as his Honour then was)[77] held that the real issue was "whether Mr Suttling's appointment conferred an enforceable right to the salary and conditions and emoluments" of the position to which he had been appointed and whether the termination of the appointment was valid. That, his Honour held, turned on the proper construction of the legislation. His Honour held:

> "Members of the Service are appointed pursuant to the Act and their rights must be ascertained by reference to its provisions. The relationship between a civil servant of the Crown and the Crown has often been described as contractual, though the civil servant has been appointed pursuant to statute: see, eg, *Gould v Stuart*; *Carey v The Commonwealth*; *Lucy v The Commonwealth*. However, the contractual nature of the relationship has not been universally accepted: see, eg, *Monckton v The Commonwealth*; *Lucy v The Commonwealth*; *Geddes v Magrath; Morgan v Geddes*; *The Commonwealth v Welsh*; and cf *Ryder v Foley*. And sometimes an espousal of one view rather than the other has been avoided: see, eg, *Reilly v The King*; *Kodeeswaran v Attorney-General (Ceylon)*. If the relationship is contractual, the contract must be consistent with any statutory provision which affects the relationship. No agent of the Crown has authority to engage a servant on terms at variance with the statute. To the extent that the statute governs the relationship, it is idle to inquire whether there is a contract which embodies its provisions. The statute itself controls the terms of service: *McVicar v Commissioner for Railways (NSW)*.[78] (emphasis added; citations omitted)

[85] The primacy of the statutory provisions over any contract operating collaterally will be relevant to various questions such as whether the contract and actions taken under it are within power,[79] whether procedural fairness must be afforded before

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76 (1987) 162 CLR 427.

77 With whom Mason ACJ and Deane J agreed; Wilson and Dawson JJ in dissent.

78 At 437 and 438. And see *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at [10].

79 *Boswell v Secretary of Department of Foreign Affairs and Trade* (1993) 118 ALR 719.

actions are taken affecting the employment relationship,[80] whether terms are implied into the contract of employment,[81] and whether steps taken contrary to the contract but authorised by a statute are actionable.[82]

[86] Whatever Mr Pennington's contract of employment provided, it could not remove or limit the statutory right of Ms Jamieson to terminate his appointment and contract of employment pursuant to the power conferred upon her by s 74(4) of the HHB Act.[83] Clause 7 of the employment contract is consistent with s 74(4) and, in my view, is just a machinery provision giving effect to the power there given. For example, the statutory power is subject to procedural fairness[84] and clause 7 provides how that is to be afforded.

[87] The termination, while expressed in terms of the contractual provisions, was in my view an exercise of the statutory power under s 74(4) of the HHB Act.

[88] If I am wrong about that, and there is an independent contractual power to terminate conferred by clause 7 of the employment contract, the result is the same. By s 282(6), the question is whether the "action" is "authorised under … [s 74(4) of the HHB Act]". The "action" is the termination of Mr Pennington's appointment and employment contract. If that "action" was authorised by s 74(4), then the "action" is not "adverse action", whether or not the power actually exercised was a contractual one.

[89] If Ms Jamieson exercised the contractual power under clause 7.1, then she did so consistently with the statutory power vested upon her under s 74(4) and it follows that her action in terminating Mr Pennington's appointment and employment contract was "authorised" by s 74(4).

[90] The third submission made in support of ground 1 ought to be rejected.

Ground 1 - fourth submission: *When read together, s 282(6) of the Industrial Relations Act 2016 and s 74(4)(c) of the Hospital and Health Boards Act 2011 do not authorise adverse action*

[91] The submission here is that as a matter of construction, s 74(4)(c) of the HHB Act does not "authorise" what would be "adverse action". In other words, s 282(6) of the IR Act does not exclude from "adverse action" an act authorised by conduct which would constitute adverse action.

[92] Such a construction flies in the face of the statutory provisions. I have already considered the relationship between s 282(6) of the IR Act and ss 74 and 75 of the HHB Act.[85]

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80 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44.

81 *Arthurson v Victoria* (2001) 140 IR 188, State of South Australia v McDonald (2009) 104 SASR 344 and *Lennon v State of South Australia* [2010] SASC 272.

82 *Litchfield v Chief Executive, Department of Manufacturing, Innovation, Trade, Resources and Energy* (2014) 119 SASR 293.

83 Subject to the Minister's role under s 74(5).

84 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44.

85 Paragraphs [34]-[53] of these reasons.

[93] Section 282(1) defines "adverse action". The "action" is constituted by an "act", ie to "dismiss",[86] to "injure",[87] to "alter the position of the employee",[88] or to "discriminate".[89] Such acts are not "adverse action", if "authorised" by a " law of the State", of which s 74(4)(c) of the HHB Act is.

[94] Section 285 of the IR Act prohibits the taking of adverse action if the act constituting the adverse action is motivated by prescribed reasons.

[95] Section 74(4)(c) authorises the act, namely the dismissal. The motivation for the dismissal does not render the dismissal "adverse action". The motivation renders the adverse action unlawful. Therefore, if the dismissal is "authorised", it is not "adverse action".

[96] There is nothing in either s 282 of the IR Act, or s 74 of the HHB Act, or anything else in the two statutes to suggest that the adverse action (the dismissal) is not "authorised" by s 74(4) of the HHB Act. It clearly is. As explained later, whether acts[90] other than dismissal are "authorised" raises other issues.

[97] The fourth submission in support of ground 1 fails.

Ground 1 - fifth submission: *Section 282(6) of the Industrial Relations Act 2016 does not operate to exclude an action which has been taken for an improper purpose or in bad faith*

[98] Mr Pennington argues that any exercise of the power vested by s 74(4) taken in bad faith is not action which is authorised for the purpose of s 282(6) of the IR Act.

[99] When this submission was made below, the Industrial Commissioner held:

1. Mr Pennington's argument attempts to place a "gloss" or qualification upon s 282(6), namely that an action is only authorised if not taken in bad faith.[91]
2. If such a qualification was to be added, clear words of Parliament would be required.[92]
3. "The legislative command in this case requires only that the action be authorised under a law of the State. There is no capacity in the language of s 282(6) of the IR Act for restricting or limiting its application to actions which are authorised to be taken for certain reasons. I have found that the termination was so authorised."[93]
4. Any issue as to bad faith for improper purpose would be for another court, not the QIRC.[94]
5. Mr Pennington does not, in any event, properly raise bad faith.[95]

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86 Section 282(1)(a).
87 Section 282(1)(b).
88 Section 282(1)(c).
89 Section 282(1)(d).
90 Identified in paragraph [2] of these reasons.
91 At [27].
92 At [28].
93 At [29].
94 At [30].
95 At [31].

[100] Ms Jamieson, on appeal, submitted that even if bad faith was made out, such a claim is not justiciable as any decision under s 74(4) is an excluded matter and therefore not subject to review by the QIRC or by the Supreme Court of Queensland on judicial review.

[101] The WBH&HS submits that the reason for the action (dismissal) is irrelevant. As there was authorisation for the dismissal, the action of dismissal is not adverse action.

[102] Section 74(4) provides for a discretionary power to terminate without cause. That the power is obviously a discretionary one comes from its plain words. The appointment and contract of employment "may be terminated … by … for a health service chief executive - the chair of the board for the service".

[103] The fact that s 74(4) gives a power which, on its face, is unfettered, is not the end of the matter. As Kirby and Callinan JJ[96] observed in *Gerlach v Clifton Bricks Pty Ltd*:[97]

> "All repositories of public power in Australia, certainly those exercising such power under laws made by an Australian legislature, are confined in the performance of their functions to achieving the objects for which they have been afforded such power. No Parliament of Australia could confer absolute power on anyone. Laws made by the Federal and State Parliaments are always capable of measurement against the Constitution. Officers of the Commonwealth are always answerable to this Court, in accordance with the constitutional standard. Judges within the integrated judicature of the Commonwealth are answerable to appeal and to judicial review. This does not mean that a discretionary power given to a judge, should be narrowly confined or hemmed about with restrictions and limitations, whether called principles or 'guidelines' or anything else. But it does mean that there are legal controls which it is the duty of courts to uphold when their jurisdiction is invoked for that purpose."[98]

[104] *Jarratt v Commissioner of Police (NSW)*,[99] was a case concerning the dismissal of a Deputy Commissioner of Police of New South Wales. The removal was made pursuant to s 51 of the *Police Service Act* 1990 (NSW). That section provided that the Governor of New South Wales could remove a Deputy Commissioner upon a recommendation of the Commissioner and with the approval of the Minister of Police. At least on its face, s 51 bestowed an unfettered discretion.

[105] The case turned on whether or not natural justice had to be afforded to Mr Jarratt before the power under s 51 was exercised. However, Gleeson CJ observed:

> "The power of removal given by s 51 is not qualified by reference to grounds for removal. In that respect, s 51 may be contrasted with

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96 In dissent in the result of the appeal, but not on this point.

97 (2002) 209 CLR 478.

98 At [70], and see also *XA v Minister for Home Affairs* (2019) 274 FCR 289 at [90]-[91] and *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [55].

99 (2005) 224 CLR 44.

> s 181D. The grant of a power to remove a Deputy Commissioner from office at any time is, therefore, significant, not only in what is said, but also in what is not said. The validity of the removal does not depend upon the existence of any particular cause for removal, except to the extent that the statutory power must be exercised in good faith and for the purpose for which it is given."[100] (emphasis added)

[106] It is now clear in Australia that any challenge to the exercise of administrative power involves consideration of jurisdictional error, namely whether the statutory authority to make the decision has been exceeded.[101] The exercise of a power in bad faith constitutes jurisdictional error.[102]

[107] There is nothing in s 74(4) to suggest that the power of termination might be validly exercised for some purpose other than that for which it was bestowed or otherwise in bad faith. Section 282(6) refers to actions which are "authorised under … any … law of the State". The "action" is the termination. An action to terminate, if taken in bad faith, is not "authorised" by s 74(4) of the HHB Act. Therefore, such an action could constitute "adverse action" for the purpose of s 282(1).

[108] Such a construction does not limit s 282(6) and does compromise the operations of ss 282 and 285. The construction is an inevitable consequence of Australia's constitutional arrangements and basic principles of administrative law.

[109] If Mr Pennington was to allege that the act of adverse action, being the act of dismissal, was not "authorised" because the purported termination was invalid as beyond the power conferred by s 74(4) of the HHB Act, then he would have to do so clearly.[103]

[110] In Mr Pennington's Points of Claim, there is no suggestion that:

1. the termination was effected in excess of power;
2. the decision was made in bad faith.

[111] The Points of Claim allege that each action said to be adverse action were done and fell within the definition of "adverse action" and that they were done in circumstances contravening s 285 of the IR Act.[104]

[112] The Industrial Commissioner held that Mr Pennington's application did not raise a bad faith claim[105] and has, it seems (although not expressly), relied on that as a reason not to entertain it. To the extent that decision is one of case management, it

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100 At [22], and see also the joint judgment of McHugh, Gummow and Hayne JJ at [50]. See also *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [55].

101 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, *Hossain v Minister for Immigration and Border Protection & Anor* (2018) 264 CLR 123 at [24]-[31].

102 *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 at [458].

103 *VDAE v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1557 at [18] followed in *Isbester v Knox City Council* [2014] VSC 286 at [78].

104 Points of Claim, paragraphs 17-45.

105 *Pennington v Jamieson & Anor (No 2)* [2021] QIRC 426 at [31].

is not manifestly wrong and no error of law is demonstrated in the exercise of discretion.[106]

[113] Even if Mr Pennington had raised bad faith, he would not necessarily be successful on the appeal. He would only be successful if he also established ground 3 and showed that the bad faith argument was justiciable in the QIRC, which, in my view, it is not.

Ground 2: The written notice was invalid

[114] As already observed,[107] s 74(4) and 74(5) of the HHB Act are not without difficulty. Because of the terms of s 74(5), it is, as already observed, impossible for the chair of the board to specify a date in the notice of termination when the termination will occur. That is because the date of termination is dependent upon an action by the Minister approving the termination under s 74(5). The Minister chooses the time to approve the termination if he in fact does so.

[115] By the contract of employment, a "proposed date" of termination must be inserted in the notice.[108] That provision is not inconsistent with s 74(4). Therefore, a failure to state a proposed termination date which is "at least one (1) month" after the date of service, might sound in some contractual remedy but could not invalidate a notice which has effect pursuant to statute.

[116] By s 74(4), the notice must be "given to [Mr Pennington] at least 1 month before it is to take effect".[109] By both s 74(5) and clause 7.2 of the contract, the termination is "not effective until it is approved by the Minister". In other words, as a matter of law, it is to take effect upon the Minister's approval.

[117] The approval of the Minister was given on 16 December 2019. Therefore:

1. while the proposed date of termination specified in the notice may have been one day shy of "at least one (1) month after" the notice was given;
2. the termination was to have effect upon the approval by the Minister;
3. the date of approval by the Minister is the date the termination "is to take effect". That is clear from both s 74(5) and clause 7.2 of the employment contract and the notice;
4. the notice was given on 30 September, well more than one month before termination;
5. therefore, s 74(4) has been complied with;
6. therefore, the notice is valid.

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106 *Industrial Relations Act 2016*, s 557(1).
107 Paragraphs [76]-[77] of these reasons.
108 Clause 7.1.
109 Emphasis added.

Ground 3: The Commission erred in concluding that the jurisdiction of the Commission was excluded by the *Hospital and Health Boards Act* 2011

[118] As already observed,[110] the alleged adverse action consists of the act of termination of the appointment and employment and other actions. Only the act of dismissal is authorised by s 74(4) of the HHB Act. The other actions, the threats of dismissal, the threats to injure and the acts allegedly injuring Mr Pennington in his employment, are all capable of constituting adverse action.

[119] If the QIRC had jurisdiction to hear those other claims, then the appeal should be allowed so as to enable Mr Pennington to litigate those claims.

[120] Section 75 of the HHB Act is a privative clause. It purports to exclude the jurisdiction of the QIRC[111] and of the Supreme Court of Queensland by excluding review under the JR Act.[112]

[121] Section 75 ought to be read so as to maintain the supervisory jurisdiction of the Supreme Court of Queensland over the limits of jurisdiction of the QIRC.

[122] The QIRC is an inferior court.[113] This Court is a superior court[114] but one of limited jurisdiction. The Supreme Court of Queensland is a "Supreme Court of a State" as recognised in the Commonwealth Constitution[115] and which possesses a supervisory jurisdiction to enforce the limits of the exercise of State executive and judicial power.[116] That jurisdiction is a defining character of the Supreme Court.[117] Any provision purporting to remove that jurisdiction is invalid.

[123] While this Court has the prerogative powers of the Supreme Court exercisable over the QIRC,[118] its jurisdiction is otherwise limited by s 424 of the IR Act and it holds no general prerogative jurisdiction over other decision-makers such as Ms Jamieson.

[124] The QIRC has, by s 450 of the IR Act, exclusive jurisdiction in relation to "industrial matters", but s 450 does not exclude the jurisdiction of the Supreme Court of Queensland to review an exercise of executive power where that power has been manifested by a decision under an enactment.[119]

[125] While it is within the legislative power of a State Parliament such as the Queensland Legislative Assembly to limit the jurisdiction of the QIRC (and this Court), it is beyond power to remove from the Supreme Court of Queensland the jurisdiction to

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110 Paragraph [2] of these reasons.
111 Section 75(1).
112 Section 75(3).
113 *Industrial Relations Act 2016*, s 429.
114 *Industrial Relations Act 2016*, s 407.
115 *Constitution of Australia*, s 73.
116 Including decisions by superior courts of limited jurisdiction such as the Industrial Court of Queensland; see *Harrison v President, Industrial Court* [2017] 1 Qd R 515 at [27]-[37].
117 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76.
118 *Industrial Relations Act 2016*, s 424(1)(e).
119 *Judicial Review Act 1991*, s 4 and *Wittham & Ors v Chief Executive of Hospital and Health Services and Director General of Queensland Health; Johnstone & Ors v Commissioner of Police & Ors* [2021] QCA 282.

strike down an exercise of administrative power which is beyond jurisdiction.[120] That would include a decision made in bad faith. Section 75(3) would be read accordingly.

[126] Mr Pennington's approach in assuming that he has no avenue of review if the QIRC has no jurisdiction, is, in my respectful submission, wrong, at least to the extent that he can establish jurisdictional error.

[127] The term, "industrial matter" is defined by the IR Act and appears at paragraph [48] of these reasons.

[128] Clearly enough, a dispute about termination of a contract of employment is an "industrial matter". The QIRC's jurisdiction is granted by s 448 which provides, relevantly here:

> "**448 Commission's jurisdiction**
>
> (1) The commission may hear and decide the following matters—
>
> (a) …
>
> (b) all questions—
>
> (i) arising out of an industrial matter; or
>
> (ii) involving deciding the rights and duties of a person in relation to an industrial matter; or
>
> (iii) it considers expedient to hear and decide about an industrial matter …
>
> (e) all matters referred to the commission under this Act or another Act. …"

[129] Also relevant is s 449. That is in terms:

> "**449 Limitations on jurisdiction**
>
> The commission does not have jurisdiction to hear and decide a matter about which another Act excludes—
>
> (a) the jurisdiction of the commission about the matter; or
>
> (b) the application of a decision under this Act about the matter."

[130] The QIRC held that the current dispute is an industrial matter for which the QIRC has jurisdiction by force of s 448(1)(b), but by force of s 449 of the IR Act and s 75 of the HHB Act, the jurisdiction is excluded. At least as the dispute concerns the act of termination of Mr Pennington's employment, so much is not really contentious. Mr Pennington points to a grant of jurisdiction independently of that case being an "industrial matter".

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120 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

[131] Mr Pennington submits that s 448(1)(e) of the IR Act recognises independent referral of jurisdiction and then he points to s 309. That is in terms:

> "**309 Application for commission to deal with a dispute**
>
> (1) This section applies if—
>
> (a) a person has been dismissed or has been affected by another contravention of this part; and
>
> (b) the person or an organisation that has a right to represent the industrial interests of the person claims that the person has been dismissed or has been affected by another contravention of this part.
>
> (2) The person or organisation may apply to the commission for the commission to deal with the dispute."

[132] It would be a truly extraordinary result if Mr Pennington's submission was correct. It would mean that the legislative intention in making s 75 was to exclude cases concerning the appointment and contract of employment of a health executive from one part of the jurisdiction of the QIRC but not another so that the "excluded matter" is still justiciable in the QIRC.

[133] That, in my view, is not the result.

[134] Sections 448(1)(c) and 449 operate so that a general jurisdiction exists in the QIRC over all "industrial matters" except those excluded. Section 448(1)(e) refers to specific grants of jurisdiction from either within the IR Act or other Acts. As the dispute here is an "industrial matter", it is capable of exclusion from jurisdiction by a provision such as s 75. That is what has happened.

[135] Section 309 does not operate so as to confer jurisdiction upon the IR Act independently of s 448. Neither does s 313.

[136] Chapter 8 confers various rights and responsibilities upon employees, employers and employee organisations. Part 1 concerns general protections. Part 2 concerns dismissals. Disputes concerning such things are quintessentially "industrial matters".

[137] These can be distinguished from conferrals of jurisdiction upon the QIRC beyond "industrial matters". Examples of conferrals of such jurisdiction beyond the IR Act are:

1. The *Trading (Allowable Hours) Act* 1990. By that legislation, the QIRC is given jurisdiction to make rulings about trading hours for shops and other matters.[121]

2. The *Workers' Compensation and Rehabilitation Act* 2003. It provides for appeals to the QIRC from administrative decisions made under the legislation.[122]

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121 See ss 5, 21 and 31.

122 See Chapter 13 Part 3.

[138] Conferral of jurisdiction by the IR Act in relation to disputes which are not "industrial matters" can be seen in Chapters 10 and 12. Chapter 10 empowers the QIRC to make orders concerning the fees of a private employment agent.[123] Chapter 12 empowers the QIRC to make orders in relation to the regulation of industrial organisations.

[139] Section 309(2) refers to the "dispute". The "dispute" must be one identified by reference to s 309(1), namely one that arises where "the person has been dismissed or has been affected by another contravention of [Part 1 or Chapter 8]". As already observed, that dispute would be an "industrial matter".

[140] Once that is understood, it can be seen at ss 309 to 314 are machinery provisions governing the exercise of existing jurisdiction:

1. Section 309 identifies what parties can make an application for relief.
2. Section 310 governs the timing of the application.
3. Section 311 concerns the payment of application fees in relation to any application.
4. Section 312 limits the jurisdiction to the extent that a conciliation conference must be held before a hearing.
5. Section 313 complements s 312 such that the jurisdiction may be exercised once the conciliation procedure envisaged by s 312 is completed.
6. Section 314 identifies the orders which may be made in exercise of the jurisdiction.

[141] Therefore, the QIRC has no jurisdiction to hear an adverse action claim based on the dismissal of Mr Pennington. Most of the other actions alleged as adverse actions are incapable of founding a claim for adverse action under Part 1 Chapter 8 of the IR Act.

[142] As already observed, "adverse action" is defined in s 282. The protection in s 285 is against adverse action taken because of the exercise of a "workplace right".

[143] "Workplace right" is defined by s 284. A "workplace right" must emerge from either an "industrial law", or an "industrial instrument", or "an order made by an industrial body". The third of these can be ignored because an "industrial body" is defined as the QIRC, this Court or some other court or commission exercising industrial jurisdiction.[124]

[144] Mr Pennington is not subject to any industrial instrument.[125] The contract of employment is not a "industrial instrument".[126]

[145] In his Points of Claim, Mr Pennington alleges that he made numerous complaints about Ms Jamieson[127] and says he was thereby exercising a "workplace right".

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123 Sections 403 and 405.
124 *Industrial Relations Act 2016*, s 284(2).
125 *Hospital and Health Boards Act 2011*, s 75(2).
126 *Industrial Relations Act* 2016 Schedule 5, Dictionary, set out at paragraph [49] of these reasons.
127 Points of Claim, paragraph 5.

However, any "right" to complain has not arisen from an "industrial law" or "industrial instrument"; at least none are identified in the Points of Claim. The adverse action claim based on the alleged reprisals for making complaints against Ms Jamieson appears misconceived.

[146] Mr Pennington's allegations based on his claim under the *Workers' Compensation and Rehabilitation Act* 2003 (the Workers' Compensation Act) and discrimination claim are different. His right to make claims under the Workers' Compensation Act legislation is arguably a right under an "industrial law",[128] and so is the right under s 295 of the IR Act.

[147] However, in his Points of Claim, Mr Pennington alleges how each of the actions offended his workplace rights. The only action which is alleged to offend Mr Pennington's right to make a Workers' Compensation Act claim and his right not to be discriminated against is the dismissal.[129] For reasons already explained, the dismissal cannot form the foundation of an adverse action claim by Mr Pennington.

[148] Even if Mr Pennington can overcome these problems, he is still faced with s 75 of the HHB Act. It excludes from the jurisdiction of the QIRC "a matter affecting or relating to … the contract of employment of [Mr Pennington]".

[149] Obviously the act of terminating the contract of employment is such a matter. The claim based on the Workers' Compensation Act and s 95 of the IR Act only concern the dismissal so they need not be considered further.

[150] That leaves the other threats and acts injuring Mr Pennington. To be caught by the exclusions of jurisdiction effected by s 75 of the HHB Act, these acts would have to be ones "relating to … the contract of employment" of Mr Pennington.[130]

[151] The term "relating to" is a term of extension. It captures not only the subject matter but also things "relating to" the subject matter.

[152] In *Minister for Home Affairs v DLZ18*[131] the High Court said of the term "in relation to":

> "[43] Each paragraph of s 494AB(1) is directed to 'proceedings relating to' an identified subject matter. The phrase 'relating to', in each paragraph of s 494AB(1), directs attention to the connection between the 'proceedings' and the subject matter of the paragraph. This Court has often said that the phrase 'relating to' is one of wide import. It can refer to a direct or indirect connection between two subject matters, and one subject matter can 'relate to' another subject matter even though the first subject matter also relates to other things. The degree of connection required between two subject matters joined by the words 'relating to' is ordinarily to be determined by reference to the text, context, legislative purpose and

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128 Definition of "industrial law", *Industrial Relations Act* 2016, Dictionary, Schedule 5.
129 Points of Claim, paragraphs 41-45.
130 *Hospital and Health Boards Act* 2011, ss 75(1) and 75(4)(b).
131 (2020) 270 CLR 372.

> history of the provision, and, of course, the facts of the case." (citations omitted)

[153] The actions alleged by Mr Pennington relate to his contract of employment. The actions all allegedly occurred while he was employed pursuant to the contract of employment. The actions all concern issues arising in the course of his employment pursuant to the contract of employment. For the reasons already explained, the legislative purpose is to remove health executives from the general protections of the IR Act and have their employment governed primarily by the contract of employment entered into pursuant to s 75 of the HHB Act. Against that context, s 75(1) must be read.

[154] There is no jurisdiction in the QIRC to entertain Mr Pennington's claims.

Conclusions and orders

[155] All grounds of appeal have failed. The appeal should be dismissed.

[156] At the hearing of the appeal, all parties agreed that I should make directions to facilitate the question of costs being determined on written submissions. I will do so.

[157] It is ordered:

1. The appeal is dismissed.
2. The respondents file and serve by email upon the appellant by 4 August 2022 any written submissions on the costs of the appeal.
3. The appellant file and serve by email upon the respondents by 15 August 2022 any written submissions on the costs of the appeal.
4. Each party have leave to file and serve by 22 August 2022 any application for leave to make oral submissions as to the costs of the appeal.
5. In the absence of any application to make oral submissions on costs of the appeal being filed by 22 August 2022, the question of costs will be decided on any written submissions filed and without further oral hearing.