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PB:DP 17-11177

Mr Mark Ritter SC
C/- Review Secretariat

By Email: irreviewsecretariat@dmirs.wa.gov.au

Dear Mr Ritter

RE: SSTUWA SUBMISSION TO THE MINISTERIAL REVIEW OF THE STATE INDUSTRIAL RELATIONS SYSTEM

Thank you for the invitation to the State School Teachers' Union of Western Australian Inc. (SSTUWA) to make submission to the Review. We understand that Unions WA will make a submission on behalf of unions generally, and we provide this submission in relation to issues of particular concern to our members.

Background

SSTUWA is the industrial and professional organisation representing more than 17,000 school leaders, teachers, TAFE (Technical and Further Education) lecturers and school psychologists working in WA public schools and TAFE colleges.

Issues of particular concern that are addressed in this submission are:

- access to unfair dismissal remedies in cases where employment has been terminated on the basis of a negative working with children notice;
- consideration of a 'general protections' regime in the state system; and
- retention of the WAIRC's contractual benefits jurisdiction.

Submissions

TOR2: Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.

Section 41 of the Working *with Children (Criminal Record Checking) Act 1984* (WA) (WWC Act) operates as a statutory bar to a claim for unfair dismissal, in a case where the reason for termination is to comply with the WWC Act, for example where a teacher has received a negative WWC notice. This bar applies even where:

- the employee is subsequently found not to have committed any misconduct and their WWC assessment is restored; and
- the employer had alternatives to termination and unreasonably failed to explore the alternatives.

The Industrial Appeal Court (IAC) considered the operation of section 41 of the WWC Act in *Brett v Sharyn O'Neill, Director General, Department of Education* (the *Brett* decision). In essence, the IAC decided that:

- An employer does not need to dismiss an employee in order to comply with the WWC Act – it may alternatively suspend the employee or transfer the employee to non-child-related employment until such time as the negative notice is removed.
- However, if the employer does dismiss the employee because of the negative notice, the employee is precluded from seeking an unfair dismissal remedy.

The effect of the WWC Act is that an employee can be summarily dismissed from their employment, with no effective remedy, in circumstances where they have not engaged in any conduct of a kind that would warrant termination of their employment.

This is a plainly unjust outcome that does not appear to achieve any benefit in terms of child protection that could not be otherwise achieved by suspending the employee or transferring them to other employment while the circumstances are properly investigated.

The situation is not limited to teachers and would capture any employee who is covered by the state industrial relations system.

This particular problem does not exist in the national industrial relations system, where it is established that the Fair Work Commission (FWC) has the jurisdiction to deal with unfair dismissal cases on their merits, even when the employer asserts that the reason for the dismissal was to comply with child protection laws.

It seems to us that this approach does not create any appreciable risk in terms of child protection. The employer will always be able to ensure that an employee who receives a negative WWC notice does not work with children while that notice is in place (which could involve suspending the employee or transferring them to other duties). Ultimately, if sufficiently serious misconduct is proved through a fair and just process, the employer may fairly dismiss the employee.

Clearly the national system approach does not work against the objectives of the WWC Act. It simply protects the employee from unfair dismissal without removing the ability to prevent people from working in child-related employment until any relevant allegations are properly dealt with.

We would not argue with the principle that a precautionary approach should be taken in relation to child protection. We agree that the termination of employment can be an appropriate outcome in circumstances where there have been findings of serious misconduct following a fair and proper process.

However, we consider that section 41(3) of the WWC Act in its present form gives employers an unfettered right to summarily dismiss employees who have received an interim negative WWC notice, even when the employee is innocent of the alleged conduct that gave rise to the notice.

As the IAC observed in *Brett*, the WWC Act allows employers discretion to suspend or transfer (rather than dismiss) an employee pending a proper investigation of the matter. However, the statutory bar on unfair dismissal claims allows the employer to exercise this discretion in an unfair and unjust manner, without the employee having any effective recourse.

We believe that the legislation in its current form removes essential employment rights and is unnecessary for the purposes of protecting children.

SSTUWA believes that a suitable remedy would be to amend the WWC Act so that it does not intrude on employees' right to be protected against unfair dismissal.

TOR7: Review statutory compliance and enforcement mechanisms with the objectives of: (a) ensuring that employees are paid their correct entitlements; (b) providing effective deterrents to non-compliance with all State industrial laws and instruments; and (c) updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

Consideration of a General Protections Regime

The 'general protections' regime established in Part 3-1 of the Fair Work Act 2009 (Cth) (FW Act) establishes employment rights that arguably go beyond the protections offered by the IR Act and associated legislation, most notably by:

- establishing important basic rights in legislation that cannot be diluted by an award or order of the industrial tribunal or contracted out of; and
- establishing a reverse onus of proof on the employer to show that an adverse action related to these rights was not taken for a prohibited reason.

Western Australian state government employees are not able to make a general protections claim in the national system.

Arguably the state system does not provide as powerful or accessible a regime of enforcing workplace rights as the federal system. On this basis it seems reasonable to recommend that the state system is brought into line with the national standard, by including a suitable general protections regime.

SSTUWA believes that consideration of a general protections regime within the State industrial relations system would provide a better a more efficient means of protecting and enforcing employment rights.

The WAIRC's Contractual Benefits Jurisdiction

The ability of the WAIRC to determine denial of contractual benefits claims, rather than having to take such matters to court, provides an accessible and inexpensive means of dealing with such matters.

Previous reviews of the industrial relations system have sought to remove this jurisdiction from the WAIRC and leave such matters entirely to the courts.

SSTUWA believes that the WAIRC's contractual benefits jurisdiction should be retained, to ensure that employees continue to have an accessible and affordable mechanism to enforce their entitlements.

Yours sincerely

Pat Byrne
PRESIDENT