Common Law Division
Supreme Court
New South Wales

Case Name:	The Development & Environmental Professionals' Association v Narrabri Shire Council
Medium Neutral Citation:	[2019] NSWSC 1444
Hearing Date(s):	15 November 2019
Date of Orders:	19 October 2020
Date of Decision:	19 October 2020
Jurisdiction:	Common Law
Before:	Harrison AsJ
Decision:	The Court orders that:: (1) The defendant's notice of motion filed 17 July 2019 is dismissed. (2) The matters raised in the plaintiff's statement of claim filed 19 June 2018 are referred to the Industrial Commission for conciliation. (3) The defendant is to pay the plaintiff's costs on an ordinary basis.
Catchwords:	PRACTICE AND PROCEDURE – Application to strike out pleadings – Uniform Civil Procedure Rules 2005 rr 13.4 and 14.28 – Whether the Court lacks jurisdiction to declare contracts unfair or void under section 106 of the Industrial Relation Act – Application dismissed
Legislation Cited:	*Industrial Relations Act 1996* (NSW), ss 6, 105, 106, 109, 146 *Local Government Act 1993* (NSW), ss 338, 340, 672, Uniform Civil Procedure Rules 2005 (NSW) rr 13.4, 14.28
Cases Cited:	*Bryant v Gunnedah Shire Council* [1998] NSWIRComm 51 *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297

	Depa v Blue Mountains City Council [2004] NSWIRComm 2169 *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125 *Nagle v Tilburg* (1993) 5 CLR 8 *O'Brien v Bank of Western Australia Ltd* [2013] NSWCA 71 *Paparo v Moree Plains Shire Council* [2005] NSWIRComm 4 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355(1998) 153 ALR 490 *Spencer v Commonwealth* [2010] HCA 28; (2010) 241 CLR 118 *Virtue v NSW Department for Education and Training* (1999) 92 IR 428 *Wentworth Securities Ltd and Another v Jones* [1980] AC 74
Texts Cited:	Andrew Hemming, 'When Is a Code a Code?' (2010) 15(1) *Deakin Law Review* 65
Category:	Procedural and other rulings
Parties:	The Development & Environmental Professionals' Association (Plaintiff) Narrabri Shire Council (Defendant)
Representation:	Counsel: I Latham (Plaintiff) A Britt (Defendant) Solicitors: Beston Macken McManis (Plaintiff) Williamson Barwick (Defendant)
File Number(s):	2019/189937
Publication Restriction:	Nil

JUDGMENT

1 **HER HONOUR:** By notice of motion filed 17 July 2019, the defendant seeks firstly, an order that the plaintiff's statement of claim filed 19 June 2018 be struck out for want of jurisdiction; and secondly, in the alternative, that the proceedings be permanently stayed.

2 The plaintiff is the Development & Environmental Professionals' Association. The defendant is Narrabri Shire Council ("the Council"). The plaintiff relied upon the affidavit of its solicitor, Hugh Ignatius Macken, dated 5 September 2019. The Council relied upon the affidavits of Christopher Fesel dated 15 July 2019 and Stewart Ralph Todd dated 24 September 2019. The parties relied upon their joint court book.

Background

3 The plaintiff is an industrial organisation which represents employees of NSW local governments. It is registered pursuant to s 223 of the *Industrial Relations Act 1996* (NSW), and is a party to the Local Government (State) Award.

4 The Council is constituted pursuant to s 219 of the *Local Government Act 1993* (NSW). It is a body politic of the State, with perpetual succession and the legal capacity and powers of an individual, both in and outside the State.

5 On 22 December 2015, the Council employed Anthony John Meppem ("Mr Meppem") in accordance with a contract of employment titled "Standard Contract of Employment Senior Staff (other than General Managers) of Local Council in New South Wales" ("the Contract"). Mr Meppem was employed under the Contract as a Director of Development & Economic Growth. On 4 January 2016, Mr Meppem commenced his employment with the Council under the Contract.

6 On 18 February 2019, the Council terminated Mr Meppem's employment, paying him 38 weeks' pay in lieu of notice.

The relevant terms of the Contract

7 Clause 4 of the Contract is headed "Contract operation and application". Clause 4.7 concerns how the Contract can be varied. It reads:

> "4.7 Subject to clauses 7 and 13, the terms of this contract, as varied from time to time in accordance with this contract, represent the entire terms of all agreements between the employee and the employer and replace all other representations, understandings or arrangements made between the employee and the employer that related to the employment of the employee in the position.
>
> Note: The contract authorises the making of agreements that are liked to the contract. Clause 7 requires the parties to sign a performance agreement. Clause 13 allows either party to require the other to sign a confidentiality agreement for the purposes of protecting property."

8 Clause 10 is headed "Termination". Clause 10.3 relevantly reads:

> "**10.3 Termination by either the employee or Council**
>
> This contract may be terminated before the termination date by way of any of the following:
> …
>
> 10.3.3 the employer giving 4 weeks' written notice to the employee, or alteratively by termination payment under subclause 11.1, where:
>
> (a) the employee has been incapacitated for a period of not less than 12 weeks and the employee's entitlement to sick leave has been exhausted, and
>
> (b) the duration of the employee's incapacity remains indefinite or is likely to be for a period that would make it unreasonable for the contract to be continued,
>
> 10.3.4 the employer giving 13 weeks' written notice to the employee, or alternatively, by termination payment under subclause 11.2 where the employer:
>
> (a) has conducted a performance review, and
>
> (b) concluded that the employee has not substantially met the performance criteria or the terms of the performance agreement,
>
> 10.3.5 the employer giving 38 weeks' written notice to the employee, or alternatively, by termination payment under subclause 11.3.
>
> …"

9 Mr Meppem was terminated under cl 10.3.5 of the Contract.

The pleading in the statement of claim

10 On 19 June 2019, the plaintiff filed the statement of claim in accordance with s 106 of the *Industrial Relations Act 1996* (NSW), by which it sought to vary the Contract to include from its commencement two terms. Those terms are set out at para [1] of the statement of claim as follows:

> "(a) Add a new clause 4.8 as follows:
>
> 4.8 Narrabri Council and Anthony Meppem will conduct their dealings with each other conduct [sic] in good faith.
>
> (b) Add a new clause 7.11 as follows:
>
> 7.11 The General Manager of Narrabri Council will not terminate Anthony Meppem for any reasons other than for grounds justifying summary dismissal under 10.4.1 and/or the expiry of the term of the contract without:
>
> (i) preparing and sending to him a written summary of his concerns as to his performance and hearing from him as to reasons why those concerns should not be accepted; and
>
> (ii) putting to him the prospect of termination and hearing from him as to reasons why termination should not take place; and
>
> (iii) participating in a mediation with him in circumstances where the General Manager intends to terminate him on the basis of concerns as to performance and those concerns were not accepted by him; [and]
>
> (iv) consulting with the councilors of Narrabri Shire Council collectively in accordance with s 337 of [the *Local Government Act*]."

11 In addition, the plaintiff seeks an order that the Council pay Mr Meppem in connection with the Contract (or by an arrangement so varied or avoided by the Court) the amount of $187,917, being the equivalent of 12 months' pay in lieu of notice ([2]). As the plaintiff has been already paid Mr Meppem 38 weeks' pay, only the payment of 14 weeks' pay is in dispute.

12 At para [21] of the statement of claim, the plaintiff pleads:

"21. The contract of employment between Anthony Meppem and the defendant under which Anthony Meppem performed work in the industry was and is unfair, harsh and unconscionable and contrary to the public interest in that:

(i) it failed to contain provisions that would protect Anthony Meppem from the unfair conduct of the defendant;

(ii) it failed to contain provisions that would afford procedural fairness to Anthony Meppem in particular through the failure to provide for:

1. the notification of concerns as to performance held by the defendant;

2. the ability of Anthony Meppem to be able to respond to any such concerns;

3. the requirement for the defendant to take those concerns into account;

4. the notification of the defendant's intention to terminate Anthony Meppem;

5. the ability of Anthony Meppem to respond to any such concerns;

(iii) it failed to contain provisions for Anthony Meppem and the defendant participate in a compulsory mediation in circumstances where the General Manager intended to terminate Anthony Meppem on the basis of concerns as to performance and those concerns were not accepted by Anthony Meppem;

(iv) it failed to contain a provision that required the General Manager to notify the Council (being the Councillors meeting collectively) of the General Manager's intention to terminate Anthony Meppem prior to the decision to terminate;

(v) it was otherwise unfair, harsh and unconscionable or contrary to the public interest upon such grounds and for such reasons as this Court may find."

The relevant legislation

13 Before I turn to consider the Council's application to strike out the plaintiff's statement of claim, it is convenient that I set out the relevant legislation.

14 It is not in dispute that under the Contract, Mr Meppem was employed as a "senior staff" member for the purposes of ss 338 and 340 of the *Local Government Act* (T 3.10).

15 Section 338 of the *Local Government Act* relevantly reads:

> "**338 Nature of contracts for senior staff**
>
> (1) The general manager and other senior staff of a council are to be employed under contracts that are performance-based.
>
> …
>
> (4) The Departmental Chief Executive may, by order in writing, approve one or more standard forms of contract for the employment of the general manager or other senior staff of a council.
>
> (5) A standard form of contract approved by the Departmental Chief Executive is not to include provisions relating to the level of remuneration or salary (including employment benefits) of the general manager or other senior staff of a council, performance-based requirements or the duration of the contract.
>
> (6) A council is not to employ a person to a position to which one or more standard forms of contract approved for the time being under this section applies or apply except under such a standard form of contract.
>
> …
>
> (9) However, subsection (6) does apply to the renewal of any such employment contract occurring after the standard form of contract is approved, amended or substituted and to all new contracts entered into after the standard form of contract is approved, amended or substituted.

16 It is also not in dispute that the Contract is a standard form of contract for the purposes of s 338(4) (T 3.36-39).

17 Section 340 of the *Local Government Act* reads:

> "**340 Industrial arbitration excluded**
>
> (1) In this section, a reference to the employment of the general manager or another senior staff member is a reference to--
>
> (a) the appointment of, or failure to appoint, a person to the vacant position of general manager or to another vacant senior staff position, or
>
> (b) the removal, retirement, termination of employment or other cessation of office of the general manager or another senior staff member, or
>
> (c) the remuneration or conditions of employment of the general manager or another senior staff member.

(2) The employment of the general manager or another senior staff member, or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of *the Industrial Relations Act 1996*.

(3) Subsection (2) applies whether or not any person has been appointed to the vacant position of general manager or another vacant senior staff position.

(4) No award, agreement, contract determination or order made or taken to have been made or continued in force under the *Industrial Relations Act 1996*, whether made before or after the commencement of this section, has effect in relation to the employment of senior staff members.

(5) No proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, lie in respect of the appointment of or failure to appoint a person to the position of general manager or to another senior staff position, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment."

18 Chapter 17 of the *Local Government Act* concerns enforcement of the Act. Sections 672, 673 and 676 relevantly read:

"**672 What constitutes a breach of this Act for the purposes of this Part?**

In this Part--

(a)
'a breach of this Act' means--

(i) a contravention of or failure to comply with this Act,

(ii) a threatened or an apprehended contravention of or a threatened or apprehended failure to comply with this Act, and

…

673 Remedy or restraint of breaches of this Act – the Minister, the Departmental Chief Executive and councils

(1) The Minister, the Departmental Chief Executive or a council may bring proceedings in the Land and Environment Court or such other court as may be specified in this Act for the purpose of the proceedings for an order to remedy or restrain a breach of this Act.

…

676 Functions of the Land and Environment Court

(1) If the Land and Environment Court is satisfied that a breach of this Act has been committed or that a breach of this Act will, unless restrained by order of

the Court, be committed, it may make such order as it thinks fit to remedy or restrain the breach.

…"

19 The plaintiff seeks to vary the terms of the Contract as set out earlier in this judgment, from its commencement, pursuant to s 106 of the *Industrial Relations Act*. Sections 105 to 106 relevantly read:

"**105 Definitions**

(1) In this Part —

contract means any contract or arrangement, or any related condition or collateral arrangement, but does not include an industrial instrument.

unfair contract means a contract —

(a) that is unfair, harsh or unconscionable, or

(b) that is against the public interest, or

(c) that provides a total remuneration that is less than a person performing the work would receive as an employee performing the work, or

(d) that is designed to, or does, avoid the provisions of an industrial instrument.

…

106 Power of Supreme Court to declare contracts void or varied

(1) The Supreme Court may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Supreme Court finds that the contract is an unfair contract.

(2) The Supreme Court may find that it was an unfair contract at the time it was entered into or that it subsequently became an unfair contract because of any conduct of the parties, any variation of the contract or any other reason.

…

(3) A contract may be declared wholly or partly void, or varied, either from the commencement of the contract or from some other time.

…

(5) In making an order under this section, the Supreme Court may make such order as to the payment of money in connection with any contract declared wholly or partly void, or varied, as the Supreme Court considers just in the circumstances of the case.

(6) In making an order under this section, the Supreme Court must take into account whether or not the applicant (or person on behalf of whom the application is made) took any action to mitigate loss."

20 Section 6 of the *Industrial Relations Act* reads:

"**6 Definition of industrial matters**

(1) … In this Act, industrial matters means matters or things affecting or relating to work done or to be done in any industry, or the privileges, rights, duties or obligations of employers or employees in any industry.

(2) **Examples**

Examples of industrial matters are as follows:

(a) the employment of persons in any industry (including the employment of minors, trainees, apprentices and other classes of employees),

(b) the remuneration (including rates of pay, rates for piece-work and allowances) for employees in any industry,

(c) the conditions of employment in any industry (including hours of employment, qualifications of employees, manner of work and quantity of work to be done),

(d) part-time or casual employment (including part-time work agreements),

(e) the termination of employment of (or the refusal to employ) any person or class of persons in any industry,

(f) discrimination in employment in any industry (including in remuneration or other conditions of employment) on a ground to which the Anti-Discrimination Act 1977 applies,

(g) procedures for the resolution of industrial disputes,

(h) the established customs in any industry,

(i) the authorised remittance by employers of membership fees of industrial organisations of employees,

(j) the surveillance of employees in the workplace,

(k) the mode, terms and conditions under which work is given out, whether directly or indirectly, to be performed by outworkers in the clothing trades.

…."

21 The Council has conceded that Mr Meppem performed work in an industry for the purposes of s 106 of the *Industrial Relations Act*.

Summary judgment generally

22 At the hearing of these proceedings, both parties agreed (T 8.44; T 20.30-4) that the test to apply in this application is that expressed in *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125 ("*General Steel*") per Barwick CJ at 129:

> "It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his cause of action—if that be the ground on which the Court is invited, as in this case, to exercise its powers of summary dismissal—is clearly demonstrated. The test to be applied has been variously expressed: 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'."

23 Rule 13.4(1) of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") provides that the Court may dismiss proceedings generally, or in relation to any claim for relief, in three circumstances. These are, if the proceedings are frivolous or vexatious, if no reasonable cause of action is disclosed or if the proceedings are an abuse of the process of the Court.

24 UCPR 14.28(1) provides that the Court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading firstly, discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading; secondly, has a tendency to cause prejudice, embarrassment or delay in the proceedings; or thirdly, is otherwise an abuse of the process of the court.

25 UCPR 14.28(2) provides that the Court may receive evidence on the hearing of an application for an order under subrule (1).

26 In *O'Brien v Bank of Western Australia Ltd* [2013] NSWCA 71 the Court of Appeal applied the High Court decision of *Spencer v Commonwealth* [2010] HCA 28; (2010) 241 CLR 118. In *Spencer,* the High Court was concerned with s 31A(2) of the *Federal Court Act 1976* (Cth) but the following principles are of general application:

(a) On a summary judgment application, the real issue is whether there is an underlying cause of action or defence, not simply whether one is pleaded (at [23]).

(b) The critical question can be expressed as whether there is more than a "fanciful" prospect of success (at [25]) per French CJ and Gummow J) or whether the outcome is so certain that it would be an abuse of the process of the court to allow the action to go forward (at [54]). Demonstration of the outcome of the litigation is required, not an assessment of the prospect of its success.

(c) Powers to summarily terminate proceedings must be exercised with exceptional caution (at [55]; see also French CJ and Gummow J at [24]).

The Council's application in this Court

27 At the hearing of these proceedings, counsel for the Council sought to strike out the plaintiff's statement of claim on the basis of three primary submissions. The first concerns s 338 of the *Local Government Act*. Both parties agreed that the relevant operation of this section has not previously been considered by this Court (T 2.20-22). The second submission concerns s 340(4) of the *Local Government Act*, and the third concerns s 340(2). Although the second and third submissions have been the subject of consideration by the Industrial Commission, it is the Council's view that those cases were wrongly decided.

28 I will consider first the submissions concerning s 340 of the *Local Government Act*, followed by those concerning s 338.

1) Sections 340(2) and (4) – Local Government Act

The Council's submissions

29 The Council contends that the Court does not have jurisdiction to make the orders sought by the plaintiff in its statement of claim. This is because it says that the source of the power of the Court to declare contracts unfair or void under s 106 of the *Industrial Relations Act* does not extend to a review of a contract of a general manager or another senior staff member coming within the ambit of s 340(1) of the *Local Government Act*.

30 The Council submitted that the matters pleaded in the statement of claim are specifically excluded from the provisions of Part 9 Chapter 2, "Unfair Contracts", of the *Industrial Relations Act* by the operation of s 340(2) of the *Local Government Act*, which stipulates that any dispute arising out of the Contract will not be an "industrial matter" for the purposes of the *Industrial Relations Act*. Subsections 340(1)(b) & (2) the *Local Government Act*, operate to limit or restrict the power of the Court by specifically excluding the application of that power with respect to industrial arbitration concerning the termination of employment of a general manager or another senior staff position.

31 The Council made detailed submissions concerning the proper statutory interpretation of s 340 of the *Local Government Act*. In considering the context of s 340 of the *Local Government Act,* the Court is to consider Chapter 11 of the Act. Specifically, s 332 of the *Local Government Act* requires the Council to determine the organisation structure, the positions within that structure that are senior staff positions, and the resources to be allocated towards the employment of staff. There are restrictions placed on which positions may be specified as senior staff positions.

32 Section 333 of the *Local Government Act* permits the Council to re-determine the organisation structure. Part 2 of Chapter 11 deals with the General Manager and other senior staff. Section 334 the *Local Government Act* requires the Council to appoint a person to be General Manager, and

specifies the General Manager as a senior staff position. Section 335 specifies that the General Manager is generally responsible for the efficient and effective operation of the Council's organisation and, by s 335(2), specifies particular functions to be exercised by the General Manager. Section 336 deals with the filling of a vacancy in the position of General Manager and s 337 states that the General Manager may appoint or dismiss senior staff only after consultation with the Council. Section 338 deals with the nature of contracts for senior staff.

33 Section 340 it headed, "Industrial arbitration excluded". Section 341 requires that a senior staff member who becomes a bankrupt or makes certain specified arrangements is to immediately give notice to the General Manager. Part 5 of Chapter 11 deals with a range of other matters concerning the appointment of employees and restrictions of payouts on termination pursuant to s 354A.

34 Section 340(4) of the *Local Government Act* refers to "order". The Council submitted that in considering the text, the use of the word "order" must be taken to encompass an order made under s 106 of the *Industrial Relations Act*. The word "order" is not confined and is to be given its ordinary meaning, which the Council submitted would include an order made under s 106.

35 The Council submitted that s 340(2) of the *Local Government Act* operates so that a dispute about the employment of a senior staff member is not an industrial matter for the purposes of the *Industrial Relations Act*. In effect, it prohibits industrial arbitration about such disputes. It is the Council's position that this construction is most consistent with the provisions of s 338 requiring senior staff to be employed according to certain approved contracts.

36 Section 340(4) of the *Local Government Act* provides that no award, agreement, contract determination or order made or taken to have been made or continued in force under the *Industrial Relations Act* has effect in relation to the employment of senior staff members. Employment of senior staff includes the termination and conditions of employment of senior staff.

37 The word "order" is not otherwise defined in the dictionary to the *Industrial Relations Act*. The relief granted pursuant to s 106 of the *Industrial Relations Act* is made by reference to orders in ss 106(1), (5) and (6). The term "order" is also referred to ss 107, 108, 108A and 108B of the *Industrial Relations Act*. The Council submitted that there is no basis to assert that the term "order" in s 340(4) should not be given its ordinary meaning to exclude orders made by the Court pursuant to s 106 of the *Industrial Relations Act*.

38 The Council conceded that the Industrial Relations Commission has in *Paparo v Moree Plains Shire Council* [2005] NSWIRComm 4 ("*Paparo*") determined that the use of the expression of "order" did not apply to orders under Part 9 Division 2 of the *Industrial Relations Act.* However, the Council submitted that by so doing, the Commission failed to consider the expression "order" from a consideration of the text. It is the Council's position that the meaning attributed to "order" in *Paparo* was such that was not reasonably open on the text and left the word "order" with no meaning.

39 Further, since this decision in *Paparo,* the *Industrial Relations Act* was amended by the *Local Government Amendment Act 2005* (NSW) to include s 338 in its current form. The Council submitted that the effect of s 338(4) is to operate as a code as to what a senior staff member's contractual entitlements are, so that the Court has no jurisdiction to order the variation or avoidance of those terms, and as such cannot entertain an application for an order to vary those contractual terms.

The plaintiff's submissions

40 In interpreting the operation of s 340 of the *Local Government Act*, the plaintiff submitted that the Court is entitled to take the heading of the section into account: see s 35 of the *Interpretation Act 1987* (NSW). The plaintiff submitted that the heading "Industrial arbitration excluded" is instructive, and indicates that the section excludes the possibility of industrial arbitration.

41 The Council relied upon the exception in s 340(2) of the *Local Government Act*. The plaintiff submitted that the exclusion prevents it from notifying the

existence of an industrial dispute for arbitration to the Industrial Relations Commission in relation to a senior staff member. That notification ordinarily occurs pursuant to s 130 of the *Industrial Relations Act*.

42 The plaintiff referred to *Depa v Blue Mountains City Council* [2004] NSWIRComm 2169, where Boland J held at [15]:

> "It may be seen that an 'industrial dispute' is a dispute about an industrial matter. It is clear from the terms of s 340(2) of the *Local Government Act* that any matter, question or dispute relating to the employment of a 'senior staff member' is not an industrial matter for the purposes of the *Industrial Relations Act 1996*. The power of the Commission, therefore, to deal with this current dispute by way of conciliation or arbitration is precluded by s 340(2) of the *Local Government Act*."

43 In *Bryant v Gunnedah Shire Council* [1998] NSWIRComm 51 ("*Bryant"*), Hill J held that:

> "Section 340(1) in effect defines, in expansive terms, the word 'employment' wherever it is used in the section in reference to the general manager or another senior staff member. Section 340(2) goes on to provide that such employment, or any matter, question or dispute relating thereto, is not 'an industrial matter for the purposes of the *Industrial Relations Act'*. The result is [to] remove the jurisdiction of the Commission to deal with and/or determine matters, questions or disputes relating to the employment of senior staff members of a Council - but only to the extent that the jurisdiction depends upon such a matter, question or dispute being an 'industrial matter' within the meaning of the Act...
>
> In my opinion, the primary provision of s 340 is subs (2). It is a substantive provision which prevents any matter, question or dispute relating to the employment of senior staff being an industrial matter under the Act. Its purpose is to give effect to the provisions of ss 332 and 338. It deprives the Commission of the jurisdiction it would otherwise have...."

44 Finally, the plaintiff referred to *Paparo* where Haylen held at [75]:

> "Section 340(2) operates so that a dispute about the employment of a general manager is not an industrial matter for the purposes of the *Industrial Relations Act 1996* - in effect, it prohibits industrial arbitration about such disputes... The operation of Ch 2 Pt 9 of the Act, dealing with unfair contracts, has not been regarded as 'industrial arbitration' in the traditional sense of making awards governing terms and conditions of employment."

45 The plaintiff submitted that the arbitration powers set out in the *Industrial Relations Act* are specifically reserved for the Commission. Section 146 of the *Industrial Relations Act* reads:

> "**146 General functions of Commission**
>
> (1) The Commission has the following functions:
>
> (a) setting remuneration and other conditions of employment,
>
> (b) resolving industrial disputes,
>
> (c) hearing and determining other industrial matters,
>
> …"

46 The plaintiff submitted that the exclusion for industrial matters in s 340(2) has the effect that the Commission cannot arbitrate matters involving senior officers. By contrast, the powers of the Supreme Court under s 106 of the *Industrial Relations Act* do not rely upon that definition, and are thereby not so limited. The touchstone to jurisdiction under s 106 is whether the contract is one whereby a person performs work in any industry: see s 106(1).

47 Finally, the plaintiff referred to the principle that legislation should not be read to cut down existing rights unless it purports to do so on unambiguous terms. As Hill J held in *Bryant*:

> "If the legislature had intended to exclude the application of the Act and its 1991 predecessor to senior staff positions and the holders thereof, under the *Local Government Act*, it would have been a simple matter for it to have done so in direct terms. A provision to the following effect could have been inserted in lieu of existing s 340(2):
>
> > 'The *Industrial Relations Act*... does not apply to the employment of the general manager or another senior staff member or to any matter or question arising in relation thereto."

48 To that effect, Haylen J found in *Paparo* at [74] that the same argument, if correct, would mean that:

> "…the entirety of the jurisdiction of the Commission has been excluded by s 340 without the section precisely providing for a general ouster of the

> jurisdiction. The legislative framework of Chapter 11, and in particular, Part 2 does not support such a construction."

49 The plaintiff noted that the process of express ouster was included in the equivalent Public Sector legislation. Section 72 of the repealed *Public Sector Employment and Management Act 2002* (NSW) provided for fixed term employment for senior executive employees in the Public Sector. Section 72(2) of the *Public Sector Employment and Management Act* reads:

> "(2) The employment of an executive officer, or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of the *Industrial Relations Act 1996."*

50 Section 72(4) of the *Public Sector Employment and Management Act* went on to expressly deny unfair contracts jurisdiction in relation to the employment of an executive officer. It stated that:

> "(4) Part 6 (Unfair dismissals), Part 7 (Public sector promotions and disciplinary appeals) and Part 9 (Unfair contracts) of Chapter 2 of the *Industrial Relations Act 1996* do not apply to or in respect of the employment of an executive officer."

51 The plaintiff submitted that the distinction between the *Public Sector Employment and Management Act* and the *Local Government Act* is telling. Parliament is assumed in drafting the former Act not to have added surplus meaningless words. The words used in s 72(4) of the *Public Sector Employment and Management Act* are to be assumed to have an effect additional to the words used in s 72(2). On the basis of the Council's submissions, s 72(4) would be unnecessary.

52 The plaintiff concluded by submitting that Parliament has expressly determined that the powers under s 106 of the *Industrial Relations Act* were not available to be exercised by the Court in relation to executive officers in the NSW public service. By necessary inference, they were available to be exercised in relation to senior officers in local government.

Resolution

53 The principles of statutory interpretation are well known. In determining the true meaning of a provision, the Court is to begin by considering the text, which must be read in context having regard to its statutory purpose or object. The central task is to discern the meaning of the legislative text, and give effect to the identified purpose which is reasonably open on the text. The interpretation which achieves the purpose or object of the statute is to be preferred: see, for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355(1998) 153 ALR 490.

54 Section 340(2) of the *Local Government Act* relevantly states that the employment of a senior staff member or any matter, question or dispute relating to any such employment is not an industrial matter for the purposes of the *Industrial Relations Act.*

55 Section 340(4) of the *Local Government Act* relevantly states that no award, agreement, contract determination or order made or taken to have been made or continued in force under the *Industrial Relations Act* has effect in relation to the employment of senior staff members.

56 The operation of s 340 has been considered by the Industrial Relations Commission in the cases referred to above by the plaintiff. Similar submissions to those advanced by the Council in these proceedings concerning the meaning of the word "order" were considered in *Paparo* at [74]. In *Paparo*, Haylen J held that s 340(2) prohibits industrial arbitration about disputes concerning the employment of a General Manager, as they are not "industrial matters" for the purposes of the *Industrial Relations Act.* This prohibition arises because the definition of "industrial dispute", set out earlier in this judgment, relies upon the existence of an "industrial matter". As such, the Industrial Relations Commission has not considered unfair contracts under the *Industrial Relations Act* to be "'industrial arbitration" in the sense of making awards governing terms and conditions of employment: see *Paparo* at [75].

57 It is the Council's position that these decisions were wrongly decided. I do not agree. The plaintiff brings its action under s 106 of the *Industrial Relations Act.* Section 106 does not limit the power of the Court to consider such claims with reference to "industrial matters", but rather by reference to any person "perform[ing] work in any industry". Both parties agree Mr Meppem is such a person. The Council's proposed construction of s 340(4) of the *Industrial Relations Act* would have the effect of preventing senior staff members like Mr Meppem from bringing proceedings in this Court pursuant to the Act's unfair contracts provisions. In my view, the construction which is to be preferred is that the effect of s 340(2) is to prohibit industrial arbitration in relation to such disputes, not to exclude them from the jurisdiction of this Court.

58 Contrary to the Council's submissions, and for reasons which are given in the next section, I also do not agree that the introduction of s 338(4) of the *Local Government Act* indicates that s 340 is intended to operate as a code setting out the contractual entitlements of senior staff members.

59 For these reasons, it is my view that the plaintiff has not failed to disclose a reasonable cause of action on the basis that this Court lacks jurisdiction. As such, it is not appropriate that the statement of claim be struck out.

2) Section 338(4) – Local Government Act

The Council's submissions

60 The Council submitted that under s 338(4) of the *Local Government Act*, the Departmental Chief Executive may, by order in writing, approve one or more standard forms of contract for the employment of the General Manager or other senior staff of a Council. As stated earlier, Mr Meppem was employed as a senior staff member pursuant to such a contract.

61 Under s 338(7), the Council was not able to employ senior staff other than in accordance with the standard form of contract described under s 338(4). The terms of s 338(7) can be enforced pursuant to Part 17 Division 1A of the *Local Government Act* in the Land and Environment Court*,* in addition in this Court.

62 The Council submitted that if the Court were to grant the plaintiff's application to amend the Contract to include the two additional terms, then Mr Meppem would no longer be employed by the Council in accordance with the standard form of contract for the employment of senior staff of a Council as approved by the Departmental Chief Executive. In other words, Mr Meppem could not have been employed by the Council on those terms. As such, the Court cannot grant the relief sought at paras [1(a)-(b)] of the plaintiff's statement of claim. Since the Court cannot vary the contract of employment, it cannot make a monetary order pursuant to s 106(5) of the *Industrial Relations Act* because any such order must have a real connection with the variation of the contract.

The plaintiff's submissions

63 The plaintiff referred to *Nagle v Tilburg* (1993) 5 CLR 8 at 11, where the Court held that a challenge to jurisdiction is only open at an:

> "appropriate stage... that is, where the facts, even established by evidence or plainly agreed in terms, enable the Court to determine what the contract or arrangement is or, at least the parameters of the contract or arrangement."

64 The plaintiff submitted that in these proceedings, striking out its statement of claim would be premature. The plaintiff further referred to *Virtue v NSW Department for Education and Training* (1999) 92 IR 428 at 447, where the Court held that a strike out application must be "conserved to a clear case where it is plain that the invocation of the jurisdiction impugned is wholly misconceived or, upon analysis, lacks an arguable legal foundation". The plaintiff submitted that this is not such a case.

65 The Council seeks to strike out the plaintiff's statement of claim on the basis that the variations to the Contract sought under [1(a)-(b)] would be prohibited by s 338(6) of the *Local Government Act*. The plaintiff submitted that this conclusion if far from self-evident. Section 338(6) states that "[a] council is not to employ a person to a position to which one or more standard forms of contract approved for the time being under this section applies or apply except under such a standard form of contract." The plaintiff submitted that in

the Macquarie Dictionary, "to prohibit" means "to forbid" a person from doing something. It is the plaintiff's case that s 338 of the *Local Government Act* does not expressly forbid the Court from doing anything.

66 Further, the plaintiff submitted that the Council's proposition, if accepted, would lead to an absurd conclusion. The plaintiff referred to *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 at 320-1, where the Court stated that it will be slow to accept an interpretation that is absurd.

67 It is the plaintiff's case that the Council's interpretation of s 338 of the *Local Government Act* would prevent variation by agreement, even though such variation is specifically contemplated under cl 19. The Council's interpretation would also prevent rectification by a Court, or the striking down of clauses even though that possibility is specifically contemplated under cl 16.

68 Further, the interpretation sought would require the implication of a significant number of words into the statute. The Court is not to do so unless certain conditions were satisfied. In *Wentworth Securities Ltd and Another v Jones* [1980] AC 74 at 105-6, the Court stated that implying words into statute is only permitted where the following conditions have been satisfied:

> "First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsmen and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsmen and approved by Parliament had their attention been drawn to the omission before the Bill passed into law."

69 The plaintiff submitted that this is not such a case. As such, this Court should dismiss the summons and refer the matter to the Industrial Relations Commission of NSW for a conciliation pursuant to s 109 of the *Industrial Relations Act*.

Resolution

70 I have set out the relevant provisions of s 338 of the *Local Government Act* earlier in this judgment. As stated, the parties agree that the Contract is one such standard form of contract as referred to under s 338(4). It is the Council's case that by operation of s 338(6) of the *Local Government Act*, had the Council employed Mr Meppem on the terms outlined in the statement of claim, the Council would have been in breach of the Act under s 672, and subject to proceedings in the Land and Environment Court under s 676 (set out earlier in this judgment). The Council says that the variations to the Contract which the plaintiff seeks are in addition to, and inconsistent with, the terms of the standard contract which Mr Meppem signed. In effect, the plaintiff seeks to vary the contract in terms on which the Council would never have employed Mr Meppem.

71 The plaintiff disputed the Council's characterisation of the operation of s 338 of the *Local Government Act*. As to the Council's submissions to the effect that s 338(4) of the *Local Government Act* is to operate as a code, the plaintiff submitted that a code is a complete statement of the law. Council for the plaintiff referred to Andrew Hemming, 'When Is a Code a Code?' (2010) 15(1) *Deakin Law Review* 65, where a code is described as a law such that "there are no *terrae incognitae*, no blank spaces: nothing is at least omitted, nothing unprovided for." Council for the plaintiff submitted that s 338 of the *Local Government Act* is not written on such terms. Section 338(5) prohibits the standard contract from including matters of remuneration, duration, salary and performance-based requirements. As s 338 does not attempt to completely state the law in relation to employment of senior officers, the plaintiff submitted that it is not a code, and does not generally displace common law or statutory rights.

72 This is an application to strike out the plaintiff's statement of claim on the basis that the effect of the operation of s 338(4) of the *Local Government Act* is that the plaintiff's claim is futile. In *Hospitals Contribution Fund of Australia v Hunt* (1982) 44 ALR 365, Master Allen (as he then was) stated at 373-374:

> "…It is not by any means rare in the history of the development of the common law that a high appellant court, in enunciating a novel development in the law, albeit one avowedly based on a miscellany of old cases, has chosen to use general words of imprecise limits in meaning to facilitate the arrival, in later cases, of the final form of the development without the need to overrule what earlier had been stated. That being so I am of opinion that a court at first instance should be particularly astute not to risk stifling the development of the law by summarily throwing out of court actions in respect of which there is a reasonable possibility that it will be found, in the development of the law, still embryonic, that a cause of action does lie. The risk of injustice to the plaintiff, which summary termination of his claim would entail, is real. One cannot predict, with firm assurance, what the future holds as the final formulation of the new development."

73 This passage has been quoted with approval by Badgery-Parker J in *Gibson v Parkes District Hospital* (1991) 26 NSWLR 9 at 35.

74 Section 338(4) of the *Local Government Act* is a provision the operation of which both parties agree has not been the subject of consideration in this Court. In my view, its operation is not an issue which can be properly ventilated in an application for summary judgment. It concerns complex issues of statutory interpretation and the interrelation of the *Local Government Act* more broadly with s 106 of the *Industrial Relations Act,* which was enacted to address the power imbalance inherent in employment contracts such as the Contract, in relation to which employees such as Mr Meppem have no power to negotiate terms.

75 I am conscious that the power to order summary judgment is to be exercised only where it is so manifestly untenable that it cannot possibly succeed: see, for example, *General Steel* per Barwick CJ at 129, set out earlier in this judgment. For the reasons given, I am not satisfied that the plaintiff's statement of claim in relation to s 338 discloses no reasonable cause of action. On this basis, I decline to strike out the plaintiff's statement of claim.

Result

76 The result is that the defendant's notice of motion filed 17 July 2019 is dismissed. As such, the appropriate order is that I refer the matter to the Industrial Relations Commission of NSW for conciliation pursuant to s 109 of the *Industrial Relations Act*.

Costs

77 Costs are discretionary. Costs usually follow the cause. The defendant is to pay the plaintiff's costs on an ordinary basis.

THE COURT ORDERS THAT:

(1) The defendant's notice of motion filed 17 July 2019 is dismissed.

(2) The matters raised in the plaintiff's statement of claim filed 19 June 2018 are referred to the Industrial Relations Commission of NSW for conciliation.

(3) The defendant is to pay the plaintiff's costs on an ordinary basis.

I certify that this and the 24 preceding pages are a true copy of the reasons for judgment herein of the Honourable Associate Justice Harrison.

Dated: Monday, 19 October 2020
S Amundsen
Associate

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