Court of Appeal
Supreme Court
New South Wales

Case Name:	**Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary on behalf of the Department of Justice**
Medium Neutral Citation:	**[2015] NSWCA 386**
Hearing Date(s):	13 November 2015
Date of Decision:	4 December 2015
Before:	Basten JA at [1]; Ward JA at [19]; Emmett AJA at [22]
Decision:	1 Set aside the orders made by the Full Bench of the Industrial Relations Commission on 19 March 2015. 2 Dismiss the appeal to the Full Bench from the decision of the Commissioner. 3 Remit the matter to the Commissioner for determination of the application for reinstatement of Darren Rudd as a correctional officer, without prejudice to any application that may be made to the Full Bench with respect to the costs of the appeal to it. 4 Order the Industrial Relations Secretary to pay the costs of the applicant in this Court.
Catchwords:	INDUSTRIAL RELATIONS – workplace injury – receipt of both compensation under the *Workers Compensation Act 1987* (NSW) and work injury damages – application for reinstatement – whether a person who has obtained work injury damages is thereafter precluded from seeking reinstatement – *Workers Compensation Act*, Pt 8 STATUTORY INTERPRETATION – use of present tense – meaning of "injured worker" – *Workers Compensation Act*, s 240(2) – whether the present tense ("is entitled to receive compensation under this

	Act") connotes a temporal element
Legislation Cited:	*Industrial Relations Act 1996* (NSW), ss 91, 92, 179, 187, 188 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 5 *Supreme Court Act 1970* (NSW), s 69 *Trade Practices Act 1965* (Cth), s 66B *Workers Compensation Act 1987* (NSW), ss 33, 66A, 149, 151A, 151G, 151Z, 240, 241, 242, 243, 247, 248; Pt 8 *Workplace Injury Management and Workers Compensation Act 1998* (NSW), ss 280A, 281, 315
Cases Cited:	*Australian Salaried Medical Officers Federal v Central Sydney Area Health Service* [2005] NSWIRComm 339; 147 IR 56 *Brambles Constructions Pty Ltd v Helmers* [1966] HCA 3; 114 CLR 213 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 *Haynes v Bendall* [1991] HCA 15; 172 CLR 60 *Kirk v Industrial Court of New South Wales* [2010] HCA 1; 239 CLR 531 *Lapcevic v Collier* [2002] NSWCA 300 *Mikasa (NSW) Pty Ltd v Festival Stores* [1972] HCA 69; 127 CLR 617 *NRMA Insurance Ltd v Motor Accidents Authority* (NSW) [2004] NSWSC 567; 61 NSWLR 264 *OV and OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155; 79 NSWLR 606 *Public Service Association and Professional Officers' Association Amalgamated Union of NSW (on behalf of Darren Rudd) v Corrective Services NSW* [2014] NSWIRComm 1021 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* [1994] HCA 34; 181 CLR 96 *Speirs v Industrial Relations Commission of New South Wales* [2011] NSWCA 206; 81 NSWLR 348
Texts Cited:	D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (8th ed, LexisNexis, 2014)
Category:	Principal judgment
Parties:	Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (Applicant) Industrial Relations Secretary (First Respondent)

	Industrial Relations Commission of New South Wales (Second Respondent)
Representation:	Counsel: Mr M Gibian (Applicant) Mr M Robinson SC with Mr M Cahill (First Respondent) Submitting appearance (Second Respondent) Solicitors: W G McNally Jones Staff (Applicant) Crown Solicitor's Office (NSW) (First Respondent) Crown Solicitor's Office (NSW) (Second Respondent)
File Number(s):	2015/162626

Decision under appeal

Court or Tribunal:	Industrial Relations Commission of New South Wales
Jurisdiction:	Full Bench
Medium Neutral Citation:	[2015] NSWIRComm 11
Date of Decision:	19 March 2015
Before:	Walton J (President), Harrison DP, Tabbaa C
File Number(s):	IRC 603 of 2014

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **BASTEN JA**: A person who suffers an injury at work may become entitled to receive both compensation under the *Workers Compensation Act 1987* (NSW) and, where the injury was caused by the negligence of his or her employer, work injury damages from that employer. Further, if the worker is dismissed because he or she is not fit for employment as a result of the injury, the worker may be entitled to seek reinstatement.

2 The *Workers Compensation Act* provides for the consequences where a worker is entitled to or recovers both compensation and damages.[1] The question raised by this case is whether a person who has obtained work injury damages is thereafter precluded from seeking reinstatement.

3 In circumstances more fully described by Emmett AJA, a prison officer, Darren Rudd, suffered a work injury as a result of which he received compensation and, subsequently, an agreed award of damages. Three months after recovering the damages, Mr Rudd applied for reinstatement to his employment as a correctional officer. The refusal of that application by his employer led him to apply to the Industrial Relations Commission of New South Wales ("the Commission") for a reinstatement order. The Full Bench of the Commission determined that, having received an award of damages, he was no longer entitled to seek reinstatement. Accordingly, the Commission held it had no power to order his reinstatement.[2]

4 There is no appeal from a decision of a Full Bench of the Commission. Nevertheless, this Court has power, in its supervisory jurisdiction, to review a decision of the Full Bench for jurisdictional error.[3] If the Court accepted that the Full Bench was in error, there was no suggestion that the error was not jurisdictional in a sense permitting the grant of relief by this Court, despite the

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1 *Workers Compensation Act*, ss 151A and 151Z.

2 *The Industrial Relations Secretary on behalf of Department of Justice (Corrective Services NSW) v Public Service Association and Professional Officers Association Amalgamated Union of New South Wales (on behalf of Darren Rudd)* [2015] NSWIRComm 11 (Walton J, President; Harrison DP; Tabbaa C).

3 *Supreme Court Act 1970* (NSW), s 69; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1.

privative clause in s 179 of the *Industrial Relations Act 1996* (NSW). As explained below, the Full Bench was in error in determining it had no jurisdiction and, accordingly, the orders proposed by Emmett AJA should be made.

5 Part 8 of the *Workers Compensation Act* protects injured workers from dismissal. In particular, it creates an offence for an employer to dismiss a worker who becomes unfit for employment as a result of an injury within six months after the worker first becomes unfit.[4] Further, where the employer replaces an injured worker within two years after dismissing the worker, it must inform the new employee that the dismissed worker may be entitled to be reinstated.[5] The latter requirement reflects the provisions engaged in the present case, namely ss 241 and 242, which relevantly provide:

> **241 Application to employer for reinstatement of dismissed injured worker**
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> (1) If an injured worker is dismissed because he or she is not fit for employment as a result of the injury received, the worker may apply to the employer for reinstatement to employment of a kind specified in the application.
>
> ...
>
> (3) The worker must produce to the employer a certificate given by a medical practitioner to the effect that the worker is fit for employment of the kind for which the worker applies for reinstatement.
>
> **242 Application to Industrial Relations Commission for reinstatement order if employer does not reinstate**
>
> (1) If an employer does not reinstate the worker immediately to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), the worker may apply to the Industrial Relations Commission for a reinstatement order.
>
> (2) An industrial organisation of employees may make the application on behalf of the worker.
>
> (3) The Industrial Relations Commission may not make a reinstatement order, except in special circumstances, if the

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4 *Workers Compensation Act*, s 248(1) and (2)(a).
5 *Workers Compensation Act*, s 247.

> application to the employer for reinstatement was made more than 2 years after the injured worker was dismissed.

6 Certain facts were specifically agreed for the purposes of these proceedings including, (a) that Mr Rudd was "medically retired" on 25 October 2011 and (b) that his medical retirement constituted a dismissal on the grounds of unfitness for work for the purposes of Pt 8 of the *Workers Compensation Act*. It was also agreed that Mr Rudd is now fit to perform his pre-injury duties as a correctional officer and that he had produced a medical certificate complying with s 241(3). The applicant brought the proceedings pursuant to s 242(2).

7 Mr Rudd applied to his employer for reinstatement on 23 September 2013, that being within two years of his dismissal, for the purposes of s 242(3). The sole issue on which the jurisdiction of the Commission was said to turn was whether, at the date of his application for reinstatement, Mr Rudd was an "injured worker" for the purposes of s 242(1). That phrase is defined in s 240 in the following terms:

> **240 Definitions**
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> ...
>
> (2) For the purposes of this Part, an ***injured worker*** is a worker who receives an injury for which the worker is entitled to receive compensation under this Act ....

8 The parties agreed a further fact, namely that Mr Rudd's former employer, the Industrial Relations Secretary, "ceased to be liable and Mr Rudd ceased to be entitled to further compensation under the *Workers Compensation Act 1987* on 21 June 2013 by operation of s 151A(1)(a) of that Act." The date, 21 June 2013, was the day on which Mr Rudd was paid an amount on account of work injury damages, pursuant to a deed of release executed by Mr Rudd and his employer. Section 151A(1)(a) provides that where a person "recovers damages in respect of an injury from the employer liable to pay compensation under this Act ... the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned".[6] It therefore followed, the

[6] Section 151Z(1)(b) is to the same effect.

employer argued, that when Mr Rudd made an application for reinstatement three months after the payment of damages, he was no longer an "injured worker" because he was no longer entitled to receive compensation under the Act.

9 The use of a verb in the present tense need not connote a temporal element; it may merely indicate a state of affairs that has arisen. If it does involve a temporal element, it is important to identify the time at which that condition must be satisfied. In some circumstances use of the present tense indicates a continuing state of affairs, so that it will apply from time to time as required.[7]

10 When first used in the definition, following the defined term, ***injured worker***, "is" means "means", being a continuing present tense. The next verb "receives", also in the present tense, clearly identifies a characteristic of a worker which continues over time; it cannot be understood to refer to the worker only at the point in time when he or she suffers the injury. In that context, one might expect the second use of "is" to have a similar operation; that is, to refer to an injury of a kind for which the worker is entitled to receive compensation. Read in context, it is not sensibly understood as referring to a worker who receives an injury, for so long as the worker is entitled to receive compensation. That reading is also consistent with the legislative policy.

11 It is not consistent with the apparent legislative policy underlying Pt 8 for a worker who receives an injury resulting in him or her being unfit for employment, and who is dismissed on that basis, to be disentitled from seeking reinstatement when, in a matter of weeks or months, the effect of the injury has passed and the worker is again fully fit for employment. The fact that weekly payments are only made "during the incapacity"[8] and that, being fully fit for the former employment, the worker is no longer entitled to

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7 See, eg, *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213 at 219 (Barwick CJ) dealing with the phrase "if sued" in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW); *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617 at 661 (Stephen J referring to "supplied" in s 66B of the *Trade Practices Act 1965* (Cth)); *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606; [2010] NSWCA 155 at [9] and [36]; D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (8th ed, LexisNexis, 2014) at [4.61].

8 *Workers Compensation Act*, s 33.

compensation, would seem to be the paradigm case for reinstatement. To exclude that case on the basis that reinstatement cannot be sought once the worker is no longer entitled to receive compensation would seriously undermine the apparent legislative policy of Pt 8.

12 If that reasoning is correct, the next question is whether a different approach is required where compensation entitlements cease, not because of a return to fitness, but because of recovery of damages for the injury. There are several reasons for thinking that no different result should apply. First, the damages recoverable from an employer can only be damages for past economic loss due to loss of earnings and damages for future economic loss due to the impairment of the worker's earning capacity.[9] There would be no rational basis for depriving a worker of his or her entitlement to seek reinstatement where damages were limited to past economic loss because recovery of full capacity had been foreseen. On the other hand, there would be no inconsistency in providing, as ss 151A and 151Z do, for the cessation of compensation payments and the recovery of compensation paid, where such damages are recovered.

13 That is not to say that some clear-cut distinction can be made between past and future economic loss. With respect to any assessment of the future, there will be uncertainty and hence a degree of speculation. Putting that consideration to one side, damages for future economic loss are awarded for a loss of earning capacity only to the extent to which such a loss is demonstrated and for the period for which it is expected to continue. If accurate assessment were possible, there would be no overlap between the award of damages and the potential for the worker to be reinstated in his or her former employment.

14 In short, damages and reinstatement are directed to different sides of the same coin. One values in monetary terms the degree of incapacity; the other recognises the retained or recovered capacity.

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[9] *Workers Compensation Act*, s 151G(1).

15 Because assessments cannot be made accurately or with precision, there may be overcompensation for a worker whose earning capacity turns out to be less impaired than was thought when damages were awarded, or there may be under-compensation because the impaired turned out to be greater than had been anticipated. That uncertainty inheres in every settlement or judgment resolving a damages claim. There is no law by which a worker who has been overcompensated by way of damages can (or should) be restrained from engaging in future employment. Consistently, there is no reason why a provision such as s 151A, dealing with the interrelationship between damages recovered and a claim to compensation, should have any relevance for a reinstatement application. Nor is there anything in the language of s 151A which would allow such an operation.

16 This conclusion is consistent with the decision of a Full Bench of the Commission in *Australian Salaried Medical Officers' Federation (NSW) v Central Sydney Area Health Service*[10] in which the Full Bench reached a similar conclusion with respect to the predecessors to the present ss 241 and 242, beings ss 91 and 92 of the *Industrial Relations Act.* (Although Staunton J dissented in that case, she adopted a temporal element requiring an entitlement to worker's compensation at the time of dismissal,[11] a conclusion which would not have assisted the employer's submissions in the present case.) This decision was noted by the Full Bench in the present case in summarising the applicant's submissions, but was not discussed, distinguished or overruled in the course of the judgment.

17 A similar construction has been adopted in the same statute with respect to s 151Z(2)(b), referring to the situation where "the worker ... is entitled to take proceedings independently of this Act to recover damages from that employer". Thus, in *Lapcevic v Collier*[12] Beazley JA held that the word "is" did not refer to an existing entitlement to institute proceedings, but referred back to the time when the injury occurred.

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[10] [2005] NSWIRComm 339; 147 IR 56 (Wright J, President and O'Neil C; Staunton J dissenting).
[11] *Salaried Medical Officers'* at [157].
[12] [2002] NSWCA 300 at [68] (Davies and Barratt AJJA agreeing).

18 Accordingly, the decision of Commissioner Newall, rejecting the employer's motion to dismiss the proceedings, was correct.[13] The orders made by the Full Bench allowing the appeal from that decision should be set aside.

19 **WARD JA:** I have had the opportunity of reading in draft Emmett AJA's reasons with which I agree. I wish only to add the following observation.

20 It became apparent during the course of argument in this Court that the Secretary's grievance at the prospect that it may be ordered to reinstate Mr Rudd is that, to the extent that the sum paid pursuant to the Release represented settlement of a common law damages claim for loss of earning capacity over the balance of Mr Rudd's working life, an order for reinstatement made on the basis that he has now recovered that lost earning capacity would amount to over-compensation. It was in that sense that I understood the submissions as to the "once and for all" principle at common law and as to double recovery to be made. Whether or not such a grievance is well-founded in this particular case is not to the point.

21 As Emmett AJA notes, it may well be that over-compensation is a circumstance that can be taken into account by the Commission in the exercise of its discretion. Further, it was not suggested that the Release could not have included a provision of the kind that would permit, in effect, a "clawback" by the employer of part or all of the payment made by way of damages for loss of earning capacity if the worker were later (miraculously or otherwise) to recover the earning capacity medically determined to have been permanently lost and then sought successfully to be reinstated (whether pursuant to an order for reinstatement from the Commission or by agreement with the employer). If such an agreement is not precluded under the relevant legislation then that might provide a mechanism to address similar grievance arising in the future to that now felt by the Secretary in Mr Rudd's case. In any event, the potential for over-compensation is not relevant to the scope of the Commission's jurisdiction, for the reasons given by Emmett AJA.

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[13] *Public Service Association and Professional Officers' Association Amalgamated Union of NSW (on behalf of Darren Rudd) v Corrective Services NSW* [2014] NSWIRComm 1021.

22 **EMMETT AJA:** These proceedings are concerned with the meaning of the term "injured worker" when used in Pt 8 of the *Workers Compensation Act 1987* (NSW) (**the Compensation Act**). Part 8 is concerned with the protection of injured workers from dismissal. In particular, it confers a right, in s 241(1), for an injured worker to apply for reinstatement to employment if the injured worker has been dismissed because he or she is not fit for employment as a result of the injury. The question is whether a worker who received an injury ceases to be eligible to make an application for reinstatement after the worker has recovered damages contemplated by Pt 5 of the Compensation Act in respect of the injury.

The Relevant Facts

23 Mr Darren Rudd was employed by Corrective Services NSW (**Corrective Services**) as a correctional officer from 1988. On 6 April 2008, he sustained an injury to his left knee and back in the course of his employment for which he received compensation under the Compensation Act. Mr Rudd was unable to perform his pre-injury duties and underwent various surgical and other procedures. He was able to return to work only on light duties. On 25 October 2011, he was "medically retired". The first respondent concedes that that medical retirement constitutes a dismissal on the ground of unfitness for work for the purposes of Pt 8 of the Compensation Act.

24 However, on 4 August 2011, Mr Rudd had applied for lump sum compensation under the Compensation Act. That claim was settled on 25 October 2011, when Mr Rudd executed a complying agreement under s 66A of the Compensation Act. A complying agreement is, relevantly, a written agreement under which a worker who has received an injury, and an employer, agree as to either or both of the degree of permanent impairment that has resulted from the injury, and the amount of pain and suffering compensation to which the worker is entitled in respect of the injury. Under s 66A(2), if a worker enters into a complying agreement in relation to an injury, the permanent impairment compensation to which the worker is entitled

in respect of the injury is the compensation payable in respect of the degree of impairment so agreed; and the pain and suffering compensation to which the worker is entitled in respect of the injury is the amount so agreed.

25 On 30 April 2012, a pre-filing statement of claim, statement of particulars and evidentiary statement were served on Corrective Services on behalf of Mr Rudd. Those materials alleged that, as a result of an accident on 6 April 2008, Mr Rudd suffered injury, loss and damage. It was alleged that the accident was caused by the negligence of Corrective Services. The materials provided particulars of Mr Rudd's injury and particulars of his claim for economic loss.

26 Section 315(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (**the Management Act**) provides that, before a claimant can commence court proceedings for the recovery of work injury damages, the claimant must serve on the defendant a **pre-filing statement** setting out such particulars of the claim and the evidence that the claimant will rely on to establish, or in support of, the claim as the Rules of the Industrial Relations Commission of New South Wales (**the Commission**) may require.

27 Further, under s 315(2), the pre-filing statement cannot be served unless the person on whom the claim is made wholly disputes liability for the claim, or the person on whom the claim is made has made an offer of settlement and one month has elapsed since the offer was made, or the person on whom the claim was made has failed to determine the claim as and when required by s 281. Under s 281, the person on whom a claim for lump sum compensation or work injury damages is made must, within the time specified, determine the claim by accepting liability and making a reasonable offer of settlement or disputing liability. Section 280A provides that a claim for work injury damages in respect of an injury cannot be made unless a claim for lump sum compensation in respect of the injury is made before or at the same time as the claim for work injury damages.

28 On 4 June 2013, Mr Rudd's claim for workplace injury damages proceeded to a mediation at which both Mr Rudd and Corrective Services were represented by lawyers. On that day, Mr Rudd and Corrective Services signed an instrument entitled "Common Law Deed of Release" (**the Release**). The Release recited that Mr Rudd had been employed by Corrective Services from 28 November 1988 until 25 October 2011 and that on 6 April 2008 he sustained an injury to his left knee and back. The Release also recited that Mr Rudd had made a claim for work injury damages in respect of the injuries alleging negligence against Corrective Services and that such allegations were denied. The Release then recited that Corrective Services and Mr Rudd had agreed to resolve "these proceedings" and all other claims or possible claims for damages by or on behalf of Mr Rudd against Corrective Services.

29 By the Release, Corrective Services agreed to pay Mr Rudd the sum of $220,000 "inclusive of costs and clear of compensation paid to date for damages, with such damages being in full and final satisfaction of the injuries" described. That amount was paid on 21 June 2013. In consideration of the payment of $220,000, Mr Rudd released Corrective Services and each of its related bodies corporate, officers and employees, successors and assigns from all claims and liabilities of any nature connected with or incidental to "the proceedings" and any possible proceedings and the circumstances or allegations referred to in "the proceedings" and any possible proceedings or upon which "the proceedings" and any possible proceedings were, are or could be based. The Release did not identify "the proceedings" to which reference was so made. It is to be assumed that the intended reference was to proceedings contemplated by the pre-filing statement of 30 April 2012.

30 On 23 September 2013, Mr Rudd applied to Corrective Services for reinstatement to employment as a correctional officer. On 16 October 2013, Corrective Services refused the application for reinstatement on the basis that Mr Rudd had been medically retired. On 25 November 2013, on behalf of Mr Rudd, the Public Service Association of New South Wales and Professional Officers' Association Amalgamated Union of New South Wales (**the Union**) applied to the Commission for a reinstatement order under s 242

of the Compensation Act. The Union's involvement was contemplated by s 242(2). The respondent to the application was Corrective Services. Subsequently, the Industrial Relations Secretary on behalf of the Department of Justice (Corrective Services NSW) (**the Secretary**) was substituted as the respondent in the proceedings in the Commission. For the purposes of these proceedings, the Secretary concedes that Mr Rudd is fit to perform his pre-injury duties as a correctional officer.

31 By amended notice of motion filed in the Commission on 9 July 2014, the Secretary sought an order that the application for a reinstatement order be struck out or, alternatively, an order permanently staying the application. The grounds on which that application was made were as follows:

- Mr Rudd is not an "injured worker" for the purposes of Pt 8 of the Compensation Act;
- the provisions of Pt 8 do not authorise the Commission to make an order reinstating Mr Rudd;
- alternatively, the proceedings are an abuse of process.

The Relevant Legislative Provisions

32 The critical definition for the purposes of this appeal is that of "injured worker" in s 240(2) of the Compensation Act. That subsection provides as follows:

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

33 Section 241 of the Compensation Act relevantly provides that, if an injured worker is dismissed because he or she is not fit for employment as a result of the injury received, the worker may apply to the employer for reinstatement to employment of the kind specified in the application. The worker must produce to the employer a certificate given by a medical practitioner to the effect that

the worker is fit for employment of the kind for which the worker applies for reinstatement. It is common ground that Mr Rudd produced such a certificate.

34 Section 242(1) provides that, if an employer does not reinstate the worker immediately to employment of the kind for which the worker has so applied for reinstatement, the worker may apply to the Commission for a reinstatement order. Under s 242(2), an industrial organisation of employees may make the application on behalf of the worker. Under s 243, the Commission may, on such an application, order the employer to reinstate the worker. The Commission may order the worker to be reinstated to employment of the kind for which the worker has so applied for reinstatement, but only if the Commission is satisfied that the worker is fit for that kind of employment. Under s 243(4), if the Commission orders the worker to be reinstated, it may order the employer to pay to the worker an amount that does not exceed the remuneration that the worker would, but for being dismissed, have received after making the application for reinstatement and before being reinstated.

35 Apart from conferring entitlement to reinstatement, Pt 8 contains provisions creating offences. Those provisions may have a bearing on the construction of the definition of the term "injured worker". Thus, under s 247, an employer is guilty of an offence if the employer, within two years after dismissing an "injured worker", employs a person to replace the dismissed worker, without first informing the person that the dismissed worker may be entitled under Pt 8 to be reinstated to carry out the work for which the person is to be employed. Under s 248, an employer of an "injured worker" who dismisses the worker is guilty of an offence if the worker is dismissed because the worker is not fit for employment as a result of the injury and the worker is dismissed during the relevant period, as defined, after the worker first became unfit for employment. Unless s 248(2)(b), (c) or (d) applies, the relevant period is the period six months after the worker first became unfit for employment.

36 It will be apparent from the scheme briefly summarised above that the application of Pt 8 depends upon whether, at a particular time, a worker is an **injured worker** for the purposes of Pt 8. Thus, s 241 applies if an "injured

worker" is dismissed. In relevant circumstances, the worker may apply for reinstatement. Sections 242 and 243 are dependent upon s 241. In addition, s 247 applies only if an employer has dismissed an "injured worker" and s 248 applies where an employer dismisses an "injured worker". The question in these proceedings is whether the injury that Mr Rudd received was one "for which the worker is entitled to receive compensation" under the Compensation Act.

37 The relevance of the Release is demonstrated by s 151A of the Compensation Act. Section 151A(1), which is in Pt 5, provides as follows:

> If a person recovers damages in respect of an injury from the employer liable to pay compensation under this Act then [...]:
>
> (a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), and
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> (b) the amount of any weekly payments of compensation already paid in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation, and
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> (c) the person ceases to be entitled to participate in any injury management program provided for under this Act or the [*Workplace Management and Workers Compensation Act 1998* (NSW)]

Notably, there is no mention in that subsection of the ability to seek reinstatement under Pt 8.

38 In s 149(1), for the purposes of Pt 5 of the Compensation Act, **damages** is defined as including:

> (a) any form of monetary compensation, and
>
> (b) without limiting paragraph (a), any amount paid under a compromise or settlement of a claim for damages (whether or not legal proceedings have been instituted),
>
> but does not include:
>
> (c) compensation under this Act [...]

The effect of the Release was that Mr Rudd became entitled to the payment of "damages", for the purposes of Pt 5, in respect of his injury. The question in these proceedings is whether that had the effect that he was thereafter not an "injured worker" within the meaning of s 240.

The Decision under Review

39 On 25 July 2014, for reasons published on that day,[14] Commissioner Newall ordered that the Secretary's amended notice of motion filed on 9 July 2014 be dismissed. In doing so, he observed that the operation of the reinstatement provisions under Pt 8 of the Compensation Act is an adjunct to the compensation and workplace injury management provisions under the scheme.[15] He recorded that the Secretary contended that the maintenance of a cause of action for reinstatement, once a worker had recovered work injury damages, was inconsistent with the structure of the legislation and inconsistent with principle.[16] In particular, recovery of workplace injury damages was said to be a once and for all recovery of compensation under the Act and, accordingly, that brings to an end a worker's rights to compensation and other benefits and entitlements and participation in the work injury management and compensation scheme.[17]

40 Commissioner Newall observed that the Secretary's argument required a conclusion that a person who has recovered workplace injury damages is expressly and necessarily excluded from the operation of s 241 and s 242 of the Compensation Act, in circumstances where there is no express intimation to that effect in the Compensation Act.[18] Rather, s 151A goes to some length and detail in setting out exclusions that arise upon the recovery of workplace injury damages. Ability to apply for reinstatement under s 241 and for an order under s 242 is, clearly, not excluded by s 151A. Further, s 242 itself does not provide that a person who has recovered workplace injury damages

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[14] *Public Service Association and Professional Officers' Association Amalgamated Union of NSW (on behalf of Darren Rudd) v Corrective Services NSW* [2014] NSWIRComm 1021.
[15] [2014] NSWIRComm 1021 at [29].
[16] [2014] NSWIRComm 1021 at [32].
[17] [2014] NSWIRComm 1021 at [33].
[18] [2014] NSWIRComm 1021 at [40]–[41].

is excluded. There are no words of limitation in s 242, expressly or impliedly.[19]

41 Commissioner Newall characterised the right to apply for reinstatement to employment as one of "fundamental importance". The reinstatement remedy is intended to protect the employment of persons injured at work and is a means of returning workers to the workforce once they have recovered sufficiently from an injury to enable them to be medically certified as fit to resume duties.[20] It is a right that would not be removed for a particular class of injured workers who have received an injury, being those who have recovered workplace injury damages, without express provision to that effect.[21]

42 Commissioner Newall considered that the provisions appeared to operate so as to allow some workers, but not others, to be doubly benefited and that that may be an oversight. Nevertheless, the Commissioner was unable to find that such a fundamental right as that conveyed by Pt 8 was closed to some workers without an express, or even implied, legislative statement to that effect. He saw no warrant for reading into s 151A or s 242 an exclusion that is simply not there.[22]

43 On 15 August 2014, the Secretary applied for leave to appeal and appeal, pursuant to ss 187 and 188 of the *Industrial Relations Act 1996* (NSW) (**the IR Act**), to the Full Bench of the Commission. On 19 March 2015, for reasons published on that day,[23] the Full Bench ordered that the grant of leave to appeal was confirmed and ordered that the appeal be allowed. The Full Bench ordered that the order of the Commission made on 25 July 2014 be set aside and, in lieu thereof, that the relief sought in the amended notice

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19 [2014] NSWIRComm 1021 at [42].
20 [2014] NSWIRComm 1021 at [43].
21 [2014] NSWIRComm 1021 at [44].
22 [2014] NSWIRComm 1021 at [45]–[48].
23 *The Industrial Relations Secretary on behalf of Department of Justice (Corrective Services NSW) v Public Service Association and Professional Officers Association Amalgamated Union of New South Wales (on behalf of Darren Rudd)* [2015] NSWIRComm 11.

of motion filed on 9 July 2014 be granted and that the proceedings be dismissed.

44 The Full Bench of the Commission observed that, in order to come within the jurisdiction of Pt 8 of the Compensation Act, a person must be an "injured worker", being a person who "is entitled to receive compensation" under the Compensation Act. However, s 151A(1)(a) provides that, once a person recovers damages, the person "ceases to be entitled" to any further compensation under the Compensation Act. The Commission concluded that a literal reading of Pt 5 and Pt 8 produced the result that a person who has recovered damages under Pt 5 no longer falls within the definition of "injured worker" for the purposes of Pt 8 and that such a person is necessarily excluded from its operation as the Part only applies to those workers who fall within the definition of "injured worker" as contained in s 240(2).[24]

45 That is to say, the Commission held that, although a worker may be an "injured worker" for the purposes of Pt 8, such a person ceases to be an "injured worker" for the purposes of Pt 8 upon that person's recovering damages within the meaning of s 151A. The Commission held that there is a temporal element in the definition in s 240 and concluded that the effect of s 151A was to prevent a person who has recovered damages from applying for reinstatement under Pt 8.[25]

46 The Commission considered that a historical analysis of s 151A evidenced an intention on the part of the legislature that was in line with the interpretation that the Commission adopted. Thus, the Commission said, a person who decides to recover damages from an employer for an injury is necessarily prohibited from obtaining "further compensation, rehabilitation and reinstatement". The Commission considered that the history of the legislation demonstrated that the intention of the legislature was never to allow a person both to recover damages and to receive compensation under the Compensation Act. That was because, although the right to common law

[24] [2015] NSWIRComm 11 at [51]–[52].
[25] [2015] NSWIRComm 11 at [56].

damages was initially abolished, when it was re-enlivened, it required a worker to elect to claim either compensation or damages. The Commission observed that, while those election provisions have been removed, the substance of the election provisions remains in the current wording of s 151A of the Compensation Act.[26]

47 The Commission considered that the legislature did not intend that a worker would become entitled both to recover workplace injury damages under Pt 5 and to retain an entitlement to seek reinstatement to the pre-injury employment under Pt 8. The Commission considered that such an outcome would be contrary to the historical distinction drawn in the legislation between the availability of the compensation or damages, including the requirement of the injured worker to elect whether to recover damages or compensation.[27]

The Proceedings in this Court

48 By summons filed in this Court on 1 June 2015, the Union seeks orders under s 69 of the *Supreme Court Act 1970* (NSW) that the record of the proceedings in the Commission be brought into this Court and that the whole of the decision of, and the orders made by, the Full Bench on 19 March 2015 be quashed and that the proceedings then be remitted to the Commission to be decided according to law.

49 Section 179(1) of the IR Act provides that a decision of the Commission is final and may not be appealed against, reviewed, quashed or called into question in any court or tribunal. However, s 179 cannot prevent the grant of relief by this Court on account of jurisdictional error.[28] The Commission will fall into jurisdictional error if, amongst other things, it mistakenly denies that it has jurisdiction in a matter.[29] The substance of the Union's submissions is that the Commission fell into that error as a result of misconstruing s 243 (and related provisions, including s 240) and thereby concluding that it did not have jurisdiction to order the reinstatement of Mr Rudd.

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[26] [2015] NSWIRComm 11 at [75].
[27] [2015] NSWIRComm 11 at [76].
[28] *Kirk v Industrial Court of New South Wales* [2010] HCA 1; 239 CLR 531 at [100].
[29] See *Kirk v Industrial Court of New South Wales* at [72].

The Full Bench Erred

50 At the time when Mr Rudd applied for a reinstatement order, he was no longer entitled to receive compensation under the Compensation Act in respect of the injury that he had suffered in 2008. That was because he had recovered damages, as provided for in the Release, and, by the operation of s 151A, thereupon ceased to be entitled to any further compensation under the Compensation Act in respect of that injury. There could be no doubt that he was, immediately after he suffered his injury in 2008, an "injured worker" within the meaning of s 240 (and therefore ss 241, 242 and 243) of the Compensation Act. The question is whether, at the time when the application for a reinstatement order was made on 25 November 2013, or at any other time, Mr Rudd had ceased to be an injured worker within the meaning of those provisions of the Compensation Act.

51 The basis upon which the Full Bench allowed the appeal and ordered that the proceedings be dismissed was its conclusion that the Commission did not have jurisdiction to deal with the application for a reinstatement order, because it concluded that Mr Rudd, at the time of making that application, was not an injured worker for the purposes of Pt 8 of the Compensation Act. It would follow, if that conclusion is correct, that a worker who deferred settlement of a claim for common law damages until he had made an application for reinstatement would be entitled to do so, but a worker who settled his claim for damages would cease to be entitled to do so simply because he had recovered damages. There does not appear to be any rationale for such a distinction.

52 Thus, the construction adopted by the Full Bench leads to significant anomalies in the way in which Pt 8 would operate. The stance adopted by the Secretary is that if, at the time when an application is made under s 241, the worker has recovered damages in respect of an injury from the employer, so as to attract s 151A, the worker is not eligible to make such an application. On the other hand, if, at the time when an application is made by a worker under s 241, the worker has made or foreshadowed a claim for damages, for

example, by serving a pre-filing statement under s 315 of the Management Act, but has not yet recovered damages, the worker would be eligible to make a claim for reinstatement under s 241 of the Compensation Act.

53 Similarly, an employer who dismissed a worker who had received an injury but had not, at the time of dismissal, recovered damages in respect of that injury from the employer, would be exposed to prosecution under s 247 if the employer employed a person to replace the dismissed worker without first informing the person as required by s 247. On the other hand, if the worker who had been injured had recovered damages before being dismissed, the employer would not be so exposed. That distinction appears to be quite anomalous and arbitrary. Further, on the construction adopted by the Full Bench, the application of s 248 depends upon whether, at the time when a worker who had received an injury is dismissed, the worker had recovered damages in respect of that injury from the employer. That distinction also appears to be quite anomalous and arbitrary.

54 It is impossible to see any rationale for drawing the distinctions just outlined. The anomaly and arbitrariness, of course, disappears if the definition of "injured worker" is understood as describing the type of injury that is the criterion for a worker becoming an "injured worker", rather than its being understood as having a temporal operation in relation to the recovery of damages in respect of an injury that gave rise to an entitlement to compensation. If it did have such a temporal restriction, then, for example, a worker who had been injured but who had fully recovered, and who therefore was no longer entitled to compensation, would be precluded from applying to his or her former employer under s 241 for reinstatement. Yet that would appear to be the archetypal situation to which Pt 8 of the Compensation Act is directed.

55 Although the word "is" generally denotes present tense, that is not universally so. It is by no means an uncommon use of the present tense of the verb "to be" as specifying the character of something – in the present case, the

character of an injury. In an appropriate context, the word "is" can be used without any temporal significance such that, in other words, the use of the present tense does not relate to time.[30]

56 The more natural meaning of the definition in s 240 is that an injured worker is a worker who has received an injury **of a type** for which the worker is given an entitlement to receive compensation under the Compensation Act. That is to say, an injured worker is a worker who has received an injury as a result of which the worker became entitled to receive compensation, irrespective of whether the worker at any particular time continues to have an entitlement to compensation. That construction of the words "is entitled" also avoids an ambiguity raised by the Commission's construction, namely, the question as to what is the relevant time at which a worker must be entitled to compensation for the purposes of Pt 8. Although the Commission appears to have proceeded on the basis that the relevant time is the time at which the worker applies to the former employer pursuant to s 241, there is simply no indication in the text of Pt 8 to clarify that issue. Indeed, as the Union submitted, if there were a temporal restriction on the definition of "injured worker", it would make more sense for the relevant time to be the point of dismissal, being the time at which s 241(1) is engaged.

57 The relative, or adjectival, clause "for which the worker is entitled to receive compensation" qualifies the kind of injury that is necessary for the worker to have received before falling within the definition. A worker who suffers an injury for which the worker was not entitled to compensation will not be an "injured worker" for the purposes of Pt 8. However, once a worker falls within the definition, the worker does not cease to be an "injured worker", for the purposes of Pt 8, simply because the worker has recovered damages in respect of the injuries that originally gave rise to that entitlement. That construction removes the anomalous arbitrariness described above and is not inconsistent with the scheme of the legislation.

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[30] See *NRMA Insurance Ltd v Motor Accidents Authority* (NSW) [2004] NSWSC 567; 61 NSWLR 264 at [18]-[21] and the authorities there cited.

58 The Secretary contends that it was no part of the intention of the legislature that an injured worker, who has recovered work injury damages under Pt 5 of the Compensation Act, should retain an entitlement to seek reinstatement to his or her pre-injury employment under Pt 8. The Secretary contends that a worker who has recovered full damages in respect of an injury ought not to be entitled to reinstatement once he or she has recovered from the injuries. The Secretary asserts that, if the worker were so entitled, it would be contrary to both the general purpose and policy of the Management Act and the general purpose and policy of Pt 8 of the Compensation Act. Further, the Secretary says, it would be inconsistent with a fundamental principle of the common law that for one cause of action, one must recover all damages incidental to it once and for all.[31]

59 The Secretary also relies on the principle that a plaintiff cannot recover more than he or she has lost.[32] Thus, the Secretary contends, the law will not permit a plaintiff to recover more than the damages that have been suffered, no matter the cause of action upon which the plaintiff proceeds against various defendants. The Secretary asserts that the construction of s 240 should be consistent with such common law principles. Thus, the Secretary says, s 151A of the Compensation Act operates consistently with those principles.

60 In particular, the Secretary points to the operation of s 243(4) of the Compensation Act, under which the Commission may order the employer to pay the worker an amount for the remuneration that the worker would, but for being dismissed, have received after making the application for reinstatement and before being reinstated. The Secretary says that an order under that provision would result in double damages in favour of a worker who had already recovered damages in respect of the injury.

61 However, that contention ignores the language of s 241(2), which provides that the kind of employment for which the worker applies for reinstatement

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[31] Citing *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 132.
[32] Citing *Haynes v Bendall* [1991] HCA 15; 172 CLR 60 at 63.

cannot be more advantageous to the worker than that in which the worker was engaged when the worker first became unfit for employment because of the injury. Further, under s 241(3), the worker must produce to the employer a certificate given by a medical practitioner to the effect that the worker is fit for the employment of the kind for which the worker applies for reinstatement. Any damages that might be recovered by a worker in respect of an injury are to compensate for the loss of earning capacity. The effect of reinstatement is to enable the worker to earn **to the extent of** his or her **remaining** earning capacity.

62 There can be no suggestion of double recovery. The purpose of the damages to which s 151A refers is to compensate a worker who has been injured for the loss of capacity to earn in the future (or in the past). There is no inconsistency or double counting in providing that such a worker may be reinstated to employment of a kind for which the worker still has capacity. Thus, a worker who is injured and recovers damages in respect of the injury from an employer is not precluded from seeking employment in the future, either from the same employer or a different employer. If it be the fact that the worker has recovered damages in respect of loss of the capacity to earn in the future but nevertheless is able to earn in the future at the same rate as he or she was able to prior to the injury, that indicates only, if anything, that the damages overcompensated the worker. However, that is not a matter that renders the worker no longer an "injured worker".

63 Where an employer does not reinstate a worker and the worker applies to the Commission for a reinstatement order, the Commission has a discretion under s 243(1) as to whether or not to order the employer to reinstate the worker. No doubt, the capacity of the worker to earn is a factor that could be taken into account by the Commission. Further, that consideration (as well as the fact that the worker has recovered damages in respect of the injury that resulted in dismissal) would no doubt be taken into account, and perhaps should be taken into account, by the Commission in deciding whether to order the employer to make a payment of the kind contemplated by s 243(4). That,

however, is an entirely different matter from the question of whether the Commission has jurisdiction to make an order under s 243(1).

64 That conclusion is consistent with the decision of this Court in *Speirs v Industrial Relations Commission of New South Wales*.[33] In that case, a person who had been employed in the coal mining industry applied for a reinstatement order in the Commission. The question was whether the miner's claim to a reinstatement order was a "coal miner matter" under s 105(4A) of the Management Act so as to be within the exclusive jurisdiction of the District Court. The Full Bench of the Commission held that the Commission had no jurisdiction to make the order because such an order could only be granted to an "injured worker" within the meaning of s 240 of the Compensation Act and the Commission could not make a determination whether the applicant was an injured worker in a "coal miner matter", since only the District Court had jurisdiction to do so. The Court of Appeal quashed the Commission's decision. The Court of Appeal held that the words "entitled to" in the definition in s 240(2) of the Compensation Act did not mean an entitlement established by a determination of the Workers Compensation Commission or the District Court. The entitlement was a right subsisting in law where there had been an injury satisfying the requirements of the Compensation Act and it could be recognised and given effect without tribunal or court determination.[34]

65 The question in *Speirs* was not the same as that raised in the present proceedings. Nevertheless, the Court confirmed that a power vested in a court should not be construed as subject to limitations not clearly to be seen. The power vested in the Commission to order reinstatement should not lightly be construed as subject to a limitation that a necessary element must be determined elsewhere, rather than by the Commission as part of the exercise of the power.[35]

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[33] [2011] NSWCA 206; 81 NSWLR 348.
[34] *Speirs v Industrial Relations Commission* at [85].
[35] *Speirs v Industrial Relations Commission* at [89].

66 The above construction of the definition of "injured worker" in s 240 of the Compensation Act is also consistent with the construction given by the Full Bench of the Commission to the definition of a relevantly identical term ("injured employee") in the predecessor to s 240, s 91(1) of the IR Act, in *Australian Salaried Medical Officers' Federation (NSW) v Central Sydney Area Health Service*.[36] In that case, a majority of the Full Bench concluded that the clause "for which the employee is entitled to receive compensation" in s 91(1) did not "seek to impart or draw a temporal distinction between present or, for example, past entitlement". Instead, the clause should be understood as "descriptive of, or defining, the kind of injury received by the employee which qualifies the employee as an 'injured employee'".[37] The fact that legislative provisions are re-enacted following judicial consideration (in this case, with only very minor changes) gives rise to a presumption that Parliament has approved of that judicial consideration.[38]

Conclusion

67 For the foregoing reasons, I consider that Mr Rudd was, at the time when he applied to Corrective Services for reinstatement to employment under s 241 of the Compensation Act, an "injured worker" within the meaning of s 240. Since Corrective Services did not reinstate Mr Rudd, he was entitled to apply to the Commission for a reinstatement order under s 242. Since Mr Rudd had applied for a reinstatement order, the Commission had jurisdiction under s 243 to order Corrective Services to reinstate Mr Rudd on such terms as it considered appropriate. In dismissing the application made by the Union on behalf of Mr Rudd, the Commission wrongly refused to exercise jurisdiction. That refusal constituted jurisdictional error.

68 The Union is entitled to the relief claimed in the summons. The decision of the Full Bench should be quashed. The matter should be remitted to the Commission for further consideration in accordance with law and the reasons

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[36] [2005] NSWIRComm 339; 147 IR 56.
[37] [2005] NSWIRComm 339; 147 IR 56 at [70].
[38] *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* [1994] HCA 34; 181 CLR 96 at 106.

of this Court. The Secretary should pay the Union's costs of these proceedings. I therefore propose the following orders:

(1) Set aside the orders made by the Full Bench of the Industrial Relations Commission on 19 March 2015.

(2) Dismiss the appeal to the Full Bench from the decision of the Commissioner.

(3) Remit the matter to the Commissioner for determination of the application for reinstatement of Darren Rudd as a correctional officer, without prejudice to any application that may be made to the Full Bench with respect to the costs of the appeal to it.

(4) Order the Industrial Relations Secretary to pay the costs of the applicant in this Court.

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I certify that the preceding 68 paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Emmett and of the Court.

Date: 4 DEC 15

Associate: