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ATTENTION: EVAN COLE/JULIE ANN BOND

Mr. S. Little,
General Secretary,
Public Service Association of NSW,
160 Clarence Street,
SYDNEY NSW 2000

Dear Stewart,

RE: BENCHMARKING MATTER

We have received instructions that members of the COVB sub-branch at Long Bay Correctional Centre have moved a series of motions that the deletion of the AS rank be brought before the Industrial Relations Commission as a separate matter in order to have the role retained.

We are requested to advise as to whether there is any merit in pursuing the deletion of the AS rank as a separate matter before the Industrial Relations Commission.

The proposed deletion of a rank by CSNSW is an exercise in managerial prerogative. The Industrial Relations Commission (IRC) will not entertain any dispute that attempts to trample upon the exercise of that prerogative, unless important issues are raised. The position of Assistant Superintendent, like any other position or role within CSNSW, is subject to any decision by the management of CSNSW as to whether they require the continuation of that position. An Assistant Superintendent does not have the security of

employment associated with tenure, like judges do. Their ongoing employment is subject to their ongoing good performance, or their employer requiring them in that role, or requiring that rank.

It is well recognized by the Fair Work Commission (FWC) and the IRC that an employer has the right to make decisions on how to manage their business and eliminating a particular class of employee is one of those rights, subject to the employer complying with any statutory requirements dealing with such situations. We are not aware of any statute, award or statutory agreement that prevents CSNSW from deleting the role of Assistant Superintendent.

The FWC has commented as follows:

[33] The general principles in relation to ***managerial prerogative*** *were considered by Vice President Lawler in Construction, Forestry, Mining and Energy Union v HWE Mining Limited 1 (HWE Mining) commencing at [7]:*

> *"[7] The law recognises that there is an area of* ***managerial prerogative*** *in which the employer has the right to make decisions on how to manage their business...*
>
> *[8] ...*
>
> *[9] As was observed by the Full Bench in Woolworths v Brown:*
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> > *"[24] ...employers face an often bewildering array of statutory obligations in relation to matters such as health and safety, discrimination, taxation, trade practices and fair trading to mention the most obvious examples. Employers face potential liability arising from their common law duty of care to their employees and to members of the public....it is entirely reasonable, and often necessary, for employers to put in place policies, with which employees must comply, to facilitate the employer's compliance with its obligations and duties."*
>
> ...
>
> *[11] If an employer's exercise of* ***managerial prerogative*** *is not prevented by statute, an award, a statutory agreement or the contract of employment, the basis for a tribunal such as Fair Work Australia, acting as an arbitrator of a dispute, interfering with what would otherwise be a lawful exercise of* ***managerial prerogative*** *(such as the making or varying of a policy which employees are required to observe) was laid down in Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales (XPT case):*
>
> > *"It seems to us that the proper test to be applied and which has been applied for many years by the Commission is for the Commission to examine all the facts and not to interfere with the right of an employer to manage his own*

business unless he is seeking from the employees something which is unjust or unreasonable..."

[12] I proceed on the basis that an exercise of ***managerial prerogative*** *will not be unreasonable in this sense if a reasonable person in the position of the employer, could have made the decision in question.*" (References omitted)

[34] The general principles of **managerial prerogative** outlined in HWE Mining were recently endorsed by Deputy President Sams in *Bruce Steenstra v J.J. Richards & Sons Pty Ltd*2 (Steenstra) at [186]:

"*[186] That an employer has a right to conduct and manage its business, as it sees fit, and without external interference, is not disputed. It is a well known and long held principle, stemming from such seminal cases as the XPT Case and Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd [1987] HCA 28; (1987) 163 CLR 117 ('Cram')...*

[187] ...

[188] The contemporary state of the law in respect to ***managerial prerogative*** *was considered by Lawler VP in CFMEU v HWE Mining. I cite a lengthy passage from His Honour's judgement below, which I respectfully adopt...*"

The appropriate principles that have been applied by the IRC over the years can be summarized in the following terms:

1. An employer has the right to manage his own business in his own way;

2. The Commission will not interfere with this right unless it is satisfied that intervention is justified because in the exercise of this right, unjust or unreasonable demands or conditions are imposed, the action of the employer has been taken in bad faith, or the actions of the employer amounts to victimisation, or oppression, or the like.

Similar views to those expressed by the FWC have also been expressed in the IRC. See below the extract from *Notification of a dispute under section 130 by the Ambulance Service of NSW of a dispute with HSU re threatened industrial action in Inner Hunter area (2008) NSWIRComm 1136 (12/12/2008):*

3. *"This case must necessarily be decided by reference to the notion of management prerogative. In consideration of the authorities raised in these proceedings, it is well recognised that an industrial tribunal will not lightly interfere with the right of an employer to manage its business as it sees fit,*

unless the work asked to be performed by the employees is unjust or unreasonable.

4.

180 By adopting such an approach, the Commission seeks to maintain a balance between the recognition of the autonomy of management to decide how best a business shall be efficiently conducted and the protection of employees against unjust or unreasonable demands. Of course, it is the employer who carries the burden of justifying that its conduct is reasonable in the circumstances of the case and it has not acted unjustly, harshly, or unreasonably."

We have also been asked to advise whether an injunction could be obtained from the Industrial Relations Commission to prevent the deletion of the Assistant Superintendent's role. No such injunction is available. Only the Supreme Court of NSW has jurisdiction to issue injunctions and an injunction can only be sought in association with proceedings arising from a recognisable cause of action having been instituted in the Supreme Court.

We note that one of the motions passed by the COVB was that they would withdraw from any further participation in the benchmarking exercise currently being undertaken by CSNSW. In our opinion, such an action would not be in the interests of the COVB or the other correctional officers employed by CSNSW, as it would allow CSNSW an unfettered right to do as it pleased in the benchmarking exercise without any impediment arising from the COVB's involvement. In those circumstances, the COVB could not complain about the course that the benchmarking had taken if they had walked away from the consultation process.

Please contact the writer if you wish to discuss this matter further.

Yours faithfully,
McNALLY JONES STAFF

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