QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Together Queensland, Industrial Union of Employees v State of Queensland (Queensland Corrective Services)* [2020] QIRC 073
PARTIES:	**Together Queensland, Industrial Union of Employees** (Applicant) v **State of Queensland (Queensland Corrective Services)** (Respondent)
CASE NO:	B/2019/49
PROCEEDING:	Application for declaration
DELIVERED ON:	20 May 2020
MEMBERS:	O'Connor VP Knight IC Dwyer IC
HEARD AT:	Brisbane
ORDER:	**1. The application is refused.**
CATCHWORDS:	INDUSTRIAL LAW – APPLICATION FOR DECLARATION – INTERPRETATION OF A DIRECTIVE – OTHER MATTERS – where Applicant is a registered industrial organisation of employees with coverage of correctional employees – where correctional employees are covered by an award and certified agreement – where certified agreement wage rates ordinarily prevail – where the State Wage Case has had the effect of increasing award wage rates above wage rates contained in certified agreement – where

	State Government Directive 12/12 provides that award wages prevail in circumstances when higher than certified agreement wages – whether an inconsistency exists between directive and certified agreement – whether correctional employees are entitled to award wages – collective bargaining regime – public interest
LEGISLATION:	*Industrial Relations Act* 1999 (Qld) s 687 *Industrial Relations Act* 2016 (Qld) s 3, s 4, s 19, s 163, s 218, s 463 *Public Service Act* 2008 s 52 *Correctional Employees Award – State 2015* *Queensland Corrective Services – Correctional Employees' Certified Agreement 2016*
CASES:	*Ardino v Count Financial Group Limited* (1994) 57 IR 89 *Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland and Others v Brisbane City Council* [2017] QIRC 087 *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142 *Director of Public Prosecutions v Smith* [1991] 1 VR 63 *O'Connor v The Electroboard Administration Pty Ltd* [2001] QIC 53; (2001) 168 QGIG 90 *O'Sullivan v Farrer* (1989) 168 CLR 210
APPEARANCES:	Mr C. Massy of Counsel instructed directly by the Applicant Mr C. J. Murdoch of Queens Counsel instructed by Crown Law for the Respondent

Reasons for Decision

The Application

[1] The Applicant is seeking a declaration the Respondent pay a group of corrective services officers' award rates in accordance with the *Correctional Employees Award – State 2015* ('the Award'), instead of pay rates set out in the *Queensland Corrective Services – Correctional Employees' Certified Agreement 2016* ('the 2016 Agreement'). The terms of the proposed declaration are as follows:

> Employees engaged by the State of Queensland in Queensland Corrective Services pursuant to the CORRECTIONAL EMPLOYEES AWARD – STATE 2015 in classifications GS Level 1.1-1.7 inclusive are entitled to be paid the rates specified in the CORRECTIONAL EMPLOYEES AWARD – STATE 2015 for these classifications in lieu of the rates in Queensland Corrective Services – Correctional Employees' Certified Agreement 2016.

[2] The Respondent opposes the declaration being granted.

The Question to be Determined

[3] The sole issue for determination is whether Directive 12/12 'State Wage Case and Certified Agreements' has the effect of requiring the Respondent to pay the rates of pay specified in the Award, to employees performing roles within classifications GS 1.1 to 1.7 inclusive.

The Legislative Scheme

[4] Section 19 of the *Industrial Relations Act* 2016 ('IR Act 2016') deals with the relationship between a modern award and a certified agreement and is in the following terms:

> **19 Relationship of modern award with certified agreement**
>
> (1) A modern award may apply to an employee in relation to particular employment at the same time as a certified agreement applies to the employee in relation to the employment.
>
> (2) If both a modern award and certified agreement apply to an employee in relation to particular employment, the certified agreement prevails to the extent of any inconsistency.
>
> (3) While a project agreement operates, it operates to the exclusion of any certified agreement.

[5] Section 218 of the IR Act details that contravening a bargaining instrument is a civil penalty provision and is in the following terms:

> **218 Contravening bargaining instruments**
> A person must not contravene a bargaining instrument.
>
> *Notes—*

1 This section is a civil penalty provision.
2 A person does not contravene a bargaining instrument unless the instrument applies to the person—see section 219.

[6] Section 52 of the *Public Service Act 2008* ('the PS Act') provides:

> **52 Relationship between directives and industrial instruments**
>
> (1) This section applies if a directive deals with a matter all or part of which is dealt with under an industrial instrument.
>
> (2) The industrial instrument prevails over the directive to the extent of any inconsistency between the directive and the industrial instrument.
>
> (3) For subsection (2), a directive is not inconsistent with an industrial instrument to the extent that the remuneration **and** conditions of employment provided for in the directive are at least as favourable as the remuneration and conditions of employment provided for in the industrial instrument.
>
> (emphasis added)

[7] Directive 12/12 relevantly provides:

2. PURPOSE:	This ruling provides that State Wage Cases do not increase the wages paid under certified agreements.
6. RULING:	A State Wage Case does not increase the wages paid under a certified agreement. However, where a State Wage Case has the effect that an award provides for wages which are greater than a certified agreement that applies to the employees covered by the award, the award wages prevail.
9. INCONSISTENCY:	Sections 52 and 54 of the *Public Service Act* 2008 and sections 686 and 687 of the *Industrial Relations Act* 1999 apply where there is an inconsistency between an act, regulation or industrial instrument.

Background to the Application

[8] As part of its log of claims for the 2016 Agreement, the Applicant sought a 2.5% headline wage increase per annum over 3 years *and* changes to the classification structure in the 2016 Agreement to remove educational barriers for officers.[1] One of the key priorities for the Applicant's members was the removal of the progression barriers within the classification structure that effectively reduced the achievable salary range of a base-grade correctional officer without an undergraduate degree.[2]

[1] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November, [12].
[2] Exhibit 1 - Affidavit of Michael Silvanus Thomas affirmed 28 October 2019, [4].

[9] The proposed changes to the classification structure was a "big ticket item on the EB shopping list"; had been a long running issue for corrective service officers; and was the subject of negotiations during the last four enterprise bargaining agreements.[3]

[10] Although the Respondent was able to agree to a headline wage increase of 2.5%, it could not, in addition, accept the changes to the classification structure as it would have exceeded the amount of funds available under the State wage policy.[4] The Respondent was open to considering the changes to the classification structure, so long as it was within the 'envelope' of funding available, being approximately $30 million (pending ultimate government approval). In order to try to 'fit' the cost of the changes to the classification within the funding envelope, several financial models were developed which essentially involved *inter alia* limiting the headline pay increases for particular cohorts of employees.

The Proposal

[11] In May 2016 the Applicant proposed a 'model' that it wished to pursue as part of the 2016 Agreement.

[12] The proposal, at its core, involved the removal of educational barriers to allow employees to accelerate more quickly within the structure.[5] The model pursued by the Applicant was as follows:

a. Custodial officers between classifications C01-1 to C01-7 being able to progress to C01-7 with a Certificate III;

b. Custodial officers between C01-8 to C01-9 being able to progress to C01-9 with a Certificate IV;

c. Trade Instructors being able to progress up to C02-4 with a Diploma;

d. Supervisors being able to progress up to C03-4 with a Diploma;

e. To offset the costs of the new classification structure, custodial officers in classifications C01-1 to C01-7 receive wage increases of 0.5% in Year 1 of the 2016 Agreement, 0.5% in Year 2 of the Agreement and 0% in Year 3 of the 2016 Agreement;

f. All other officers covered by the 2016 Agreement would receive 2.5% wage increases in each of the three years of the 2016 Agreement.

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[3] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November 2019, [15].
[4] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November, [12].
[5] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November 2019, [10].

[13] Prior to the 2016 Agreement the classification structure was such that:

a. Custodial officers were not able to progress beyond GS1-2 without a Certificate III;
b. Custodial officers were not able to progress beyond GS 1-4 without a Certificate IV;
c. Custodial officers were not able to progress beyond GS 1-7 without a Diploma;
d. Trade Instructors were not able to progress beyond GS 2-2; and
e. Supervisors were not able to progress beyond GS 3-1.[6]

[14] Ultimately, the proposal was accepted by the Respondent and formed part of the draft 2016 Agreement. However, during the negotiations the Respondent raised concerns with the Applicant about the potential impact of future State Wage Cases, namely, the potential for wage rates under the Award to increase and surpass the wage rates contained in the 2016 Agreement in respect of officers within classifications C01-1 to C01-7.

Impact of the State Wage Case

[15] The potential impact of the State Wage Case on wage rates in the 2016 Agreement was in the contemplation of the parties at the time of the negotiations. At the enterprise bargaining meeting held on 11 May 2016, the Respondent discussed a way in which the parties to the 2016 Agreement could be insulated from the findings of the State Wage Case.[7]

[16] The parties agreed to deal with the potential impact of the State Wage Case on the wage rates in the 2016 Agreement by including the following clause:

> **1.7 No Further Claims**
>
> 1.7.1 This agreement is in full and final settlement of all parties' claims for its duration, it is a term of this agreement that no party will pursue any extra claims relating to wages or conditions of employment whether dealt with in this agreement or not.
>
> 1.7.2 Subject to sub-clause (1.7.3) herein, the following changes may be made to employees' rights and entitlements during the life of this agreement:
>
> a) General Rulings and Statements of Policy issued by the Queensland Industrial Relations Commission that provide conditions that are not less favourable than current conditions;
> b) Reclassifications.

[6] *Correctional Employees Award – State* 2015, cl 12.
[7] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November 2019, [36].

> 1.7.3 The Queensland Industrial Relations Commission State Wage Increases awarded during 2016 and thereafter will not be in addition to the wage increases provided by this agreement.
>
> 1.7.4 Further, in recognition of the enhanced classification progression arrangements introduced as a result of this agreement, the parties have agreed that where the Queensland Industrial Relations Commission State wage case increases awarded during 2016 and thereafter increase the Award rates for classification level GS Level 1.1 to classification level GS Level 1.7 inclusive, to rates higher than the rates provided for by this Agreement, the rates within this agreement are to prevail and continue to prevail over the Award rates.

[17] The 2016 Agreement was certified by the Commission on 11 November 2016 under the *Industrial Relations Act* 1999 ('IR Act 1999'). In doing so, Deputy President Bloomfield was satisfied that the requirements for certification under the IR Act 1999 had been complied with, in particular, there was no disadvantage to anyone who would be covered by the 2016 Agreement.

[18] From 1 September 2017, as a result of the State Wage Case, the Award rates for the employees under classification GS Level 1.1 exceeded those payable under the 2016 Agreement.

[19] From 1 September 2018, the effect of the State Wage Case was that the Award rates for the employees under classification GS Level 1.2 to 1.7 exceeded those payable under the 2016 Agreement.

[20] The issue, central to this matter, began to emerge on 2 October 2018 when the Minister for Education and Minister for Industrial Relations issued correspondence to public servants covered by a separate certified agreement stating *inter alia* that the effect of Directive 12/12 was that where there was a difference between the underlying award rate and the certified agreement rate, the higher award rate would be paid.

[21] On 31 January 2019, Mr Alex Scott, the Secretary of Together Queensland wrote to the Corrective Services Commissioner, Mr Peter Martin, initiating negotiations for the replacement of the 2016 Agreement. Mr Scott's correspondence also raised some concerns about the legal status of the No Further Claims clause in the 2016 Agreement where he maintained the Minister had previously stated:

> The no disadvantage provisions in the Public Services Directive 12/12…ensure that where there is a difference between the award rate and the agreement rate, the higher level will be paid.[8]

[22] In response, Deputy Commissioner, Mr James Koulouris noted:

> … a key initiative of the current Agreement has resulted in significant changes to the progression arrangements for staff in the classification levels GS1-1 to GS1-7. This initiative has resulted in

[8] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November, p 279.

> many staff progressing to higher classification levels and receiving the higher rate of pay associated with those classification levels.
>
> …both QCS and the Together Union were mindful to ensure that any increases to Award wages would not apply where these Award rates exceed the Agreement for classification levels GS1-1 through to GS1-7. This understanding is specifically enshrined in clause 1.7.4 of the Agreement.[9]

[23] Negotiations for a replacement agreement have been underway since 2019. A resolution of this controversy is said by the Applicant to be necessary to aid those negotiations.

Applicant's submissions on s 52 of the PS Act

[24] The Applicant's submission correctly recites the principles of the statutory scheme insofar as it relates to the interrelationship between the legislation and industrial instruments such as the 2016 Agreement and the directive.

[25] The Applicant notes that, under the statutory scheme, s 19(2) of the IR Act provides that a certified agreement will ordinarily prevail over an award to the extent of any inconsistency.

[26] The Applicant further refers to s 52(2) and s 52(3) of the PS Act and notes the 'ordinary' position pursuant to s 52(2) is that an industrial instrument will prevail over a directive, to the extent of any inconsistency, but has drawn attention to the exception contained at s 52(3).

[27] Relying on the language contained in s 52(3), the Applicant submits that 'if the remuneration and conditions of employment provided for in a directive are at least as favourable' as what is in the industrial instrument, the industrial instrument does not prevail, and the directive must be honoured.[10]

[28] The Applicant submits that in circumstances where there is no dispute the relevant Award wages are higher than the rates contained in the 2016 Agreement, then the remuneration and conditions of employment provided for in the directive, are at least as favourable and the Respondent is bound to comply with the directive, and pay the rates specified in the Award[11].

[29] It is the Applicant's contention that because of this and s 218 of the IR Act, the Respondent is obliged to comply with the Certified Agreement in all respects, including the enhanced progression scheme; and also pay the higher rates of pay in the Award.

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[9] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November, p 282-283.
[10] Applicant's submissions dated 18 November 2019, [38].
[11] Applicant's submissions dated 18 November 2019, [43]-[44].

Respondent's submissions on s 52 of the PS Act

[30] The Respondent contends that s 52(3) of the PS Act has no application. The Respondent submits that, for Directive 12/12 to have the effect contended by the Applicant, it must satisfy the terms of s 52(3).

[31] To support that contention, the Respondent referred the Full Bench to Explanatory Notes to the IR Act which include reference to the insertion of s 52(3) in the PS Act. Relevantly, the Explanatory Notes provide:

> …
>
> At subsection (2) it provides that if a directive is inconsistent with an industrial instrument, the industrial instrument prevails to the extent of the inconsistency between the directive and the industrial instrument. Inconsistency between directives and instruments was previously contemplated in legislation, including section 687(2) of the *Industrial Relations Act* 1999 and is intended to have the same meaning in this provision, being substantive inconsistency for the cohort of employees contemplated by the directive or part thereof. Subsection (3) clarifies further the meaning of inconsistent, making it clear that where remuneration and conditions of employment are at least as favourable as the remuneration and conditions of employment provided in the industrial instrument, they will not be considered inconsistent. Conditions of employment is wider than remuneration and includes rates of pay, hours or work or leave or other similar employee entitlements. It is not anticipated that reasonable employer administrative measures or processes or matters of managerial prerogative contemplated in a directive from time to time would be inconsistent with an industrial instrument.[12]

[32] The Respondent submits that the enhanced classification progression contained in the 2016 Agreement were of 'considerable value' to the employees in those classifications and as such, the wages under the 2016 Agreement (including the additional wages accessed through the enhanced classification progression) put those employees in a 'considerably better off position'[13].

[33] The Respondent therefore contends there is an 'inconsistency' between the 2016 Agreement and the Directive and as such, neither s 52(3) of the PS Act or the Directive have application. On the Respondent's submission it is not bound to pay the Award rates of pay as alleged by the Applicant.

Are employees in classifications GS Level 1.1-1.7 entitled to be paid award rates?

[34] The Applicant's argument put in its simplest form is that Directive 12/12 gives rise to an entitlement for employees covered by the relevant classifications to be paid at the relevant Award rate as opposed to the rates agreed in the 2016 Agreement. For the reasons which follow, we disagree.

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[12] Explanatory Notes, Industrial Relations Bill 2016 (Qld) 146; Respondent's submissions dated 27 November 2019, [36].
[13] Respondent's submissions dated 27 November 2019, [38-43].

[35] It is not in contention that the 2016 Agreement is anything other than a valid certified agreement. Importantly, there is no suggestion that, at the time of certification (or after), there was any aspect of the 2016 Agreement that would have caused the Commission to refuse to certify it in accordance with Chapter 4, Subdivision 3 of the IR Act 1999.

[36] In the oral evidence of Mr Thomas[14] and Mr Clarke[15] it is made clear that the parties did not specifically turn their mind to the Directive during negotiations for the proposed 2016 Agreement.

[37] However, the parties did consider the possibility that the State Wage Case might produce higher rates of wages for employees employed under classifications GS Level 1.1 to 1.7 over the life of the 2016 Agreement. Clauses 1.7.3 and 1.7.4 were developed by the Respondent to address this.[16] They were inserted into the 2016 Agreement by mutual agreement and as a direct result of those negotiations.

[38] Two things can be inferred from the Applicant's conduct during bargaining: first, the Applicant was cognisant of the limited funding available as part of the state wages policy; and second, that notwithstanding the reduced annual headline wage increase there was clearly a tangible financial benefit for those employees as part of the changes in the classification structure. Mr Clarke, in his affidavit of 11 November 2019 spoke to both the costs incurred by the employer with a classification restructure and the financial benefit for employees as part of the expedited progression:

> From an employer's perspective, changing a classification structure, particularly moving educational barriers to allow employees to accelerate more quickly within the structure, will be an expensive exercise. Accordingly, where TQU had sought to change the classification structure in previous bargaining cycles, these changes were not agreed due to the cost.
>
> …
>
> The 'speedier' progression would not have otherwise been available and the amount of increment increase that would be received by being able to achieve a quicker progression to the next increment level wold be approximately equivalent to the headline 2.5% wage increase received by other officers under the 2016 Agreement.[17]

[39] Mr Walker's[18] evidence was consistent with that of Mr Clarke in that it spoke to the financial cost associated with the changes to the classification structure:

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[14] Mr Michael Thomas is a Director of Industrial Services for Together Queensland, Industrial Union of Employees.
[15] Mr Raymond Clarke was previously employed as the Director, Public Sector Industrial Relations, Office of Industrial Relations.
[16] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November 2019, [34]-[36].
[17] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November 2019, [10], [19].
[18] Mr Scott James Walker is the Acting Assistant Commissioner – Financial services and Strategic Sourcing Command of Queensland Corrective Services.

> I am also aware that if the employees subject to this application had not received a change in classification structure but had received 2.5% increases over the lift of the 2016 Agreement then their projected current rates of pay would be higher than the Award rates.[19]

[40] In a later affidavit Mr Walker clarified that as a result of the 2019 State Wage Case (which increased award wages by 3%) that if the employees subject to this application had not received a change in classification structure but had received 2.5% increase over the life of the 2016 Agreement then their projected current rates of pay under the Award would now be *higher* than the rates under the 2016 Agreement.[20]

[41] Relevantly, both parties during bargaining recognised the potential issue with respect to the State Wage Case raising the award rates above the certified agreement and that issue was the basis for including clause 1.7 in the 2016 Agreement. Mr Thomas' evidence under cross-examination is unequivocal in that the Applicant agreed to the inclusion of clause 1.7 in exchange for the 'improvements to progression':

> Mr Thomas: Because the agreement before this one was negotiated had a similar clause that exists in a lot of agreements that said…
>
> Mr Murdoch QC: Yes?
>
> Mr Thomas: Where award rates, I think it was 1.7.4, where award rates overtake, they would be paid.
>
> Mr Murdoch QC: Yes?
>
> Mr Thomas: I think it was either Mr Casey or Mr Clarke that identified that that would be a problem leaving that clause in if – and I don't think anyone at the table expected the national wage cases to be quite as big as they were for the following years. They'd actually sat around 2.5 anyhow for the previous couple of years. But yes, that was identified so we couldn't – we would have to change the agreement for the purposes of 1.7.4 and that was a problem identified by the department.
>
> Mr Murdoch QC: Yes, and that problem was identified, we can see, in the same meeting that the department confirmed the union's model?
>
> Mr Thomas: Yes.
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> Mr Murdoch QC: So the issue is raised very – it was raised in the very next meeting to the union putting forward its crystallised model, wasn't it?
>
> Mr Thomas: Yes, but bear in mind there had been meetings before that and swapping of models back and forth.
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> Mr Murdoch QC: Yes?

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[19] Exhibit 3 - Affidavit of Scott James Walker affirmed 11 November 2019, [10].
[20] Exhibit 4 - Affidavit of Scott James Walker affirmed 6 December 2019, [2].

Mr Murdoch QC: So it was not like there was just one meeting where a model came up out of the blue, then the next meeting it was confirmed. There was a lot more back and forth and sharing of models that occurred in between meetings as well.

Mr Murdoch QC: Now, if we – just go back to, please, page 63. I took you to the second new dot point. If you go to the third dot point?

Mr Thomas: Yeah.

Mr Murdoch QC: The union suggested that this would not matter:

> *... as the State wage case would not take into consideration any classification restructure and additionally, there may be wording which could be included in the agreement to circumvent any negative implications by pointing out that no one would have their entitlements reduced, as such, but that some would benefit more in the light of the agreement than others.*

Mr Murdoch QC: Who made that comment on behalf of the union, Mr Thomas?

Mr Thomas: That was me. So when it was raised, the issue is the award rates just overtook, that was a problem with the purpose of 1.7.4. I made the point that, you know, when you looked at the agreement as a whole, there was – because of the progression barriers, that would make some improvements because the key to the agreement was everyone was going to get 2.5 each year through either – a barrier that they – or an increment that they hadn't previously been able to get or the straight 2.5 wage increase. So that comment was based on the conversation about, you know, if the award overtook – that's just looking at one side of the ledger. You had to look at the other side as well.

Mr Murdoch QC: And as we see from clause 1.7.4, the union agreed to the state wage case increases not being passed on in recognition of the enhanced classification progression arrangements introduced, didn't it?

Mr Thomas: We agreed that if – if – if it came to pass that the state wages increases took the award above the agreement, then yes, it wouldn't flow on because of the progression – the increases. Or the improvements to progression is probably a better way of saying it.

Mr Murdoch QC: And – and you understood that the basis upon which the government agreed to the progression arrangements was that the state wage increases would not apply; correct?

Mr Thomas: Yes.[21]

[42] The evidence before the Commission is that the Applicant promoted the 2016 Agreement to its members on the basis that the enhanced classification progressions would deliver at least a 2.5% pay increase each year which would make them "considerably better off"

[21] T1-13 Ll.12-21.

under the 2016 Agreement.[22] On 20 May 2016, the Applicant posted on its website the following:

> In the CO1-1 to 1-7 receive a total of 1% over two years, but will receive at least 2.5% each year through access to increments but, over 5 years will be considerably better off than they would be otherwise. The proposal also creates a genuine career path for Correctional Officers through to CO3-4 and for Trade Instructors to CO2-4.[23]

[43] As the following exchange between Mr Murdoch QC and Mr Thomas illustrates, there was a distinct advantage flowing from the adoption of the enhanced classification progression for the cohort covered by the 2016 Agreement:

> Mr Murdoch QC: Now, is it the case, therefore, that the union pursued that model, which came without those 2.5 per cent headline wage increases, because the union had a preference for enhanced progression for that cohort of employees?
>
> Mr Thomas: I think it was actually agreed as a shared problem because what had happened with the barriers, when the Cert 4 at one four was put in the diploma at one seven, was put in way back before the national trading framework happened. So people were progressing a lot more, but by the time we get to this point and if you look at one of the exhibits it's got Walker's first affidavit, there was something like 600 people that were stuck at one four. There was another log jam of around 300 that were stuck at one seven and no one was progressing. There was about 20 people a year were unable to progress so whilst we had, on paper, a classification structure that went to one nine, in effect the progression ceiling for the vast majority of all CCOs was one four and they just hired a bunch of new people. So at the table we recognise that there was a problem that you couldn't progress, and that problem was only going to get worse over time. So certainly it was something that we were keen to address but I think it's something the department acknowledged as a problem as well.
>
> Mr Murdoch QC: The union was prepared to put to one side its claim for 2.5 per cent over three years in order to achieve enhanced progression for that cohort, correct?
>
> Mr Thomas: Yes.[24]

[44] The Directive does not, in our view, have the effect contended by the Applicant. It will only have effect in circumstances where the Directive satisfies s 52(3) of the PS Act.

[45] Section 52(2) provides that an industrial instrument (such as the 2016 Agreement) will prevail over a directive where their respective terms on all or part of the same matter are inconsistent.

[46] Section 52(3) qualifies the term 'inconsistency'. The section has application in circumstances where a directive provides for remuneration and conditions of employment more favourable than those provided for in the industrial instrument. In

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[22] Respondent's written submissions dated 27 November 2019, [40].
[23] Exhibit 5 - Affidavit of Raymond Francis Clarke affirmed 11 November 2019.
[24] T.1-9 Ll. 18-36

other words, in order to be 'not inconsistent' with an industrial instrument, a directive must provide remuneration and conditions that are at least as favourable as the instrument. The Explanatory Note to s 52 (3) speaks to the inconsistency between directives and instruments as requiring there to be a "substantive inconsistency for the cohort".[25]

[47] Fundamental to the application of s 52(3) is the requirement that a directive deal with remuneration and conditions of employment.

[48] The term 'remuneration' is ordinarily recognised as including payments to an employee that go beyond wages.[26] Remuneration as defined in Schedule 4 of the PS Act provides that remuneration "*includes salary*". This is not an exhaustive definition. It does not confine the otherwise broader meaning attributable to the term, nor does it limit it to just 'salary' for the purposes of the PS Act. The IR Act, for example, contains a definition consistent with this, albeit for a limited purpose under that Act.[27]

[49] The PS Act does not define 'salary'. The term 'salary' is generally synonymous with 'wages'. Schedule 5 of the IR Act, for example, defines 'wages' to mean *inter alia '*a salary'.

[50] Directive 12/12 deals only with 'wages'. The Award uses the term 'wages' and 'salary' interchangeably[28].

[51] Whilst it is accepted that the term 'wages' is synonymous with 'salary', and that 'remuneration' for the purposes of s 52(3) *includes* salary, we are nevertheless of the view that remuneration in s 52(3) contemplates a broader concept involving payments to employees which go beyond wages.

[52] In dealing with the interrelationship between the Directive and the 2016 Agreement, s52(3) requires more than an assessment of the remuneration offered under the Directive compared to the 2016 Agreement. What is required is an assessment not only of the remuneration but also the conditions of employment provided for in the Directive compared to that offered under the 2016 Agreement.

[53] The phrase 'conditions of employment' is not defined in the PS Act. However, the explanatory notes to the IR Act 2016 provide some assistance as to the meaning to be given to the phrase:[29]

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[25] Explanatory Notes, Industrial Relations Bill 2016 (Qld) 146.
[26] *Ardino v Count Financial Group Limited* (1994) 57 IR 89, 94; *O'Connor v The Electroboard Administration Pty Ltd* [2001] QIC 53; (2001) 168 QGIG 90
[27] See Schedule 5 of the IR Act.
[28] See generally Part 4 of the Award.
[29] Explanatory Notes, Industrial Relations Bill 2016 (Qld) 146.

> *Conditions of employment is wider than remuneration and includes rates of pay, hours or work or leave or other similar employee entitlements*

[54] The International Labour Principles refer to collective agreements including generally terms and conditions of work and the relationship between the employer, workers and their industrial organisations. In this sense:

> "conditions of work" covers not only traditional working conditions (the working day, additional hours, rest periods, wages etc.), but also subjects that the parties decide freely to address, including those that are not normally included in the field of terms and conditions of employment in the strict sense (promotion, transfer, dismissal without notice, etc.).[30]

[55] The Directive 12/12 is, on any view, limited in scope, providing only for wages.

[56] Consistent with the submission of the Respondent,[31] we do not consider that the comparison is the simple 'dollar for dollar' exercise as contended by the Applicant. In comparing wages in the Award as against those in the 2016 Agreement, it is necessary to consider the full effect of the 2016 Agreement as it pertains to wages.

[57] The 2016 Agreement provides for enhanced progression through classifications, and the expedited access to higher wages for those covered by those classifications. For a fair comparison with the Award wages to be undertaken it is necessary to consider the wages paid to those employees over the life of the 2016 Agreement, as opposed to a 'snapshot' at a single point in time.

[58] We do not accept the Applicant's argument that the wages provided for in the 2016 Agreement are less favourable than the wages provided for in the Directive. Rather, we accept that the wages of employees in classifications GS Level 1.1 to 1.7 include the value and additional wages these employees receive through the enhanced classification progression arrangements.

[59] The enhanced classification progression arrangements give employees in these classifications the capacity to benefit from a higher wage rate over the life of the 2016 Agreement, as they progressed through the classification structure to higher levels than they would otherwise would have achieved under the Award.

[60] In the circumstances, we consider Directive 12/12 is inconsistent with the 2016 Agreement and accordingly neither s52(3) of the PS Act or Directive 12/12 have application. It follows therefore that the Respondent is not required to pay the rates of pay as provided for by the Award.

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[30] International Labour Office, *Giving Globalization a Human Face, General Survey and Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Internal Labour Conference, 101st Session 2012, Report III (Part 4B), Geneva at para [215].
[31] At paragraphs 39-44 of the Respondent's written submissions dated 27 November 2019.

Other matters

[61] The Respondent makes several further submissions. The submissions are premised on the assumption the Commission may take a different approach to s52(3) and conclude that the Directive applies in the manner contended for by the Applicant.

[62] The first involved an argument that if the Directive does apply, then the Respondent would be entitled to a *set off* of the value of the higher progression against any backpay. However, in light of the reasons above it is not necessary to determine that issue.

[63] The remaining submissions deal with why the Commission should refuse the granting of the declaration. The three grounds advanced by the Respondent for refusing to grant the declaration are: the conduct of the Applicant is unconscionable; the declaration undermines the collective bargaining regime under the IR Act; and, the public interest.

[64] While it is not necessary for the disposition of this matter to deal with each of the submissions advanced by the Respondent, it nevertheless provides the Commission with an opportunity to make some general observations. In particular, in the context of this application, the role of the collective bargaining regime under the IR Act and how that regime, in turn, serves the public interest.

[65] The legislative scheme of the IR Act, so far as this matter is concerned, is primarily contained within Chapter 4. The purpose of the Act, as outlined in s 3, is two-fold. First, is to provide for a framework for cooperative industrial relations that is fair and balanced; and, secondly, supports the delivery of high-quality services, economic prosperity and social justice for Queenslanders.

[66] The way in which those purposes are achieved is set out in s 4, which, relevantly, provides:

> (h) promoting collective bargaining, including by—
>
> (i) Providing for good faith bargaining; and
>
> (ii) Establishing the primacy of collective agreements over individual agreements….
>
> …
>
> (n) encouraging representation of employees and employers by organisations that are registered under this Act…

[67] The legislative scheme established under Chapter 4 is reflected in s 163 of the IR Act.

[68] The collective bargaining regime is the cornerstone of industrial relations in the Queensland public sector. As a Full Bench of this Commission said in *Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland and Others v Brisbane City Council*:

> "It is tolerably clear that an important purpose of the [Chapter 4] is to facilitate and encourage collective bargaining and to give the process primacy in the setting of wages and conditions of employment." [32]

[69] There is no dispute that both parties extensively negotiated the terms of the 2016 Agreement. Neither party was at any disadvantage through the process of negotiation, and each was experienced in the process.

[70] An agreement was clearly reached with respect to the question of progression and pay rates for the GS Level 1.1 -1.7 classifications. The particulars of that bargain are reflected in clauses 1.7.3 and 1.7.4 of the 2016 Agreement. The mutual benefit to each party is obvious.

[71] The 2016 Agreement is, in every way, the product of healthy and robust negotiations between two equally matched and experienced parties. The parties have abided by the terms of the 2016 Agreement and, in October 2017, the Applicant demonstrated its ongoing commitment to the 2016 Agreement by correcting an error of the Respondent with respect to pay rates.

[72] Parties to a negotiated agreement ought to have confidence that the terms of any agreement they enter into will not be disturbed, without mutual agreement, for the life of that agreement. Significant financial and operational commitments depend on this. It is in the public interest[33] for this to happen.

[73] If the 2016 Agreement, or agreements more broadly, were capable of being disturbed in this manner, the cost consequence for the State of Queensland could be significant and could arise at times incapable of prediction. This level of uncertainty would make entering into such agreements untenable. Employees of the State of Queensland would also be disadvantaged because the likely consequence of such uncertainty would be an abandonment of collective bargaining and all of the benefits that go with it.

Order

[74] The Application is dismissed.

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[32] *Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland and Others v Brisbane City Council* [2017] QIRC 087, [28].

[33] *O'Sullivan v Farrer* (1989) 168 CLR 210, [13]; *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142 per Tamberlin J (at 245).See also: *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at 75), per Kaye, Fullagar and Ormiston JJ.