HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

TREVOR KINGSLEY FERDINANDS APPELLANT

AND

COMMISSIONER FOR PUBLIC EMPLOYMENT RESPONDENT

Ferdinands v Commissioner for Public Employment [2006] HCA 5
2 March 2006
A15/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of South Australia

Representation:

S C Churches with S D Ower for the appellant (instructed by Iles Selley Lawyers)

C J Kourakis QC, Solicitor-General for the State of South Australia with C A Stevens for the respondent (instructed by Crown Solicitor's Office South Australia)

CATCHWORDS

Ferdinands v Commissioner for Public Employment

Industrial law – Police – Termination of appointment – Appellant member of South Australia Police – Appellant convicted of assault contrary to s 39 *Criminal Law Consolidation Act* 1935 (SA) – Appellant's appointment as member of SA Police terminated – Appellant applied to Industrial Relations Commission for relief against dismissal – Appellant alleged termination of appointment harsh, unjust or unreasonable – Jurisdiction of Industrial Relations Commission to entertain appellant's application.

Police – Termination of appointment – Appellant member of SA Police – Appellant convicted of assault – Appellant's appointment as member of SA Police terminated – Whether *Police Act* 1998 (SA) impliedly repealed provisions of the *Industrial and Employee Relations Act* 1994 (SA) providing for unfair dismissal.

Statutes – Implied repeal.

Statutes – International law – State statute – Incorporation of reference in State statute to international convention – Relevance of such incorporation – Whether such incorporation favours adoption of an interpretation favourable to the availability of the convention remedies in the particular case.

Statutes – Successive State statutes – Suggested inconsistency between statutory remedies for dismissal of police officers – Whether any such inconsistency or ambiguity resolved by the time sequence of enactment of the statutes – Whether resolved by reference to generality of language and identity of the particular and general character of the legislation – Whether beneficial character of statutory provisions relevant – Whether reference to international convention in a State statute a relevant consideration.

Words and phrases – "harsh, unjust or unreasonable".

Industrial and Employee Relations Act 1994 (SA).
Police Act 1998 (SA).
Police (Complaints and Disciplinary Proceedings) Act 1985 (SA).

1 GLEESON CJ. The *Industrial and Employee Relations Act* 1994 (SA)[1] ("the IER Act") provided a procedure whereby certain employees, including public employees, who were dismissed could seek, from the Industrial Relations Commission of South Australia, a determination that the dismissal was harsh, unjust or unreasonable, and an order for re-employment.

2 The *Police Act* 1998 (SA) ("the Police Act") established a scheme for the control and management of South Australia Police which included provision for termination of the appointment of police officers by the Police Commissioner in certain circumstances. The appellant was convicted of an offence of assault. His appointment was terminated by the Police Commissioner. He applied to the Industrial Relations Commission complaining of harsh, unjust or unreasonable dismissal.

3 The Full Court of the Industrial Relations Court held that the Industrial Relations Commission had no jurisdiction to entertain the application. The Full Court of the Supreme Court of South Australia, by majority, agreed[2]. Stated in broad terms, it was held that the legislative scheme relating to appointment, and termination of appointment, of police officers under the Police Act was not subject to review under the IER Act. Stated more precisely, it was held that the Police Act, in its application to persons in the position of the appellant, by necessary implication repealed the IER Act[3].

4 It was not suggested that there is repugnancy between the two State statutes, in the sense that they create conflicting commands, which cannot both be obeyed, or produce legal rights or obligations which cannot be reconciled; although the implications of a potential order under the IER Act for re-employment of a police officer were not fully explored. Rather, the contention, which was upheld in the South Australian courts, was that there is such contrariety in the two legislative schemes that, by necessary implication, the Police Act excluded the operation of the IER Act in its application to termination of the appointment of a person in the position of the appellant. The problem is one of statutory interpretation; a problem that arises only because the legislature did not state an intention either that the two statutory regimes should both apply in such a case, or that the second regime should apply to the exclusion of the first. The legislature may, by necessary implication, manifest an intention of the

---

1 This Act is now known as the *Fair Work Act* 1994 (SA), see *Industrial Law Reform (Fair Work) Act* 2005 (SA), s 4.

2 *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110.

3 *Goodwin v Phillips* (1908) 7 CLR 1; *Butler v Attorney-General (Vict)* (1961) 106 CLR 268.

latter kind, although partial repeal of an earlier statute by a later statute will only be inferred on "very strong grounds"[4]. An example of such implied repeal is found in *Butler v Attorney-General (Vict)*[5]. A Victorian statute of 1943 provided for preference in promotion in favour of discharged servicemen. A Victorian statute of 1946, relating specifically to the public service, provided that, in any appointment to an office in the public service, consideration should be given, first to relative efficiency, and then to relative seniority. A majority in this Court found that the later statute specified with "apparent exhaustiveness" the matters to be considered with respect to public service promotions and left "no room" for preference to discharged servicemen[6]. Kitto J said that it was in the nature of the later Act, as much as in its words, that its incompatibility with the earlier Act appeared[7]. The same, it seems to me, applies in the present case. The nature of the Police Act, and its appearance of exhaustiveness on the subject of termination, create the same kind of incompatibility.

5 The two legislative schemes, and the statutory provisions of particular relevance, are set out in the reasons of Gummow and Hayne JJ. The provisions of the Police Act concerning the control and management of the police force are to be understood in a context which includes the history and character of the police force; a context that was considered recently by this Court in *Jarratt v Commissioner of Police for New South Wales*[8], and earlier by Griffith CJ in *Enever v The King*[9].

6 The Police Act makes the Commissioner of Police responsible for the control and management of the police force, subject to the directions of the Minister (s 6). Significantly, however, the capacity for ministerial direction is excluded in certain cases. No ministerial direction may be given to the Commissioner in relation to the appointment, transfer, remuneration, discipline or termination of a particular person (s 7).

7 Section 40 of the Police Act confers a range of powers upon the Police Commissioner in the event that a member of the police force has been found guilty of an offence against a law of the State, the Commonwealth, or another

---

4 *Saraswati v The Queen* (1991) 172 CLR 1 at 17 per Gaudron J.

5 (1961) 106 CLR 268.

6 (1961) 106 CLR 268 at 281.

7 (1961) 106 CLR 268 at 280.

8 (2005) 79 ALJR 1581 at 1584 [4]; 221 ALR 95 at 96.

9 (1906) 3 CLR 969 at 975-976.

State or Territory, or in the event of a breach of the Code of Conduct established for the maintenance of professional standards of members of the police force. Such a breach may be found by a determination of the Police Disciplinary Tribunal. The powers include termination of appointment, suspension, reduction in pay, transfer, reduction in seniority, fine, reprimand and counselling. The present case concerns an exercise of the power of termination, but the existence of the other powers is relevant to the question whether, in the case of termination, the disciplinary regime set up by the Police Act is intended to be subject to the possible intervention of the industrial regime created by the IER Act.

8 In *Jarratt*[10], it was held that the requirements of procedural fairness applied to a statutory scheme relating to powers of discipline and removal under the *Police Service Act* 1990 (NSW). The principles applied in that case would operate in the case of the Police Act. A decision of the Commissioner to dismiss a member under s 40 of the Police Act is subject to judicial review by the Supreme Court of South Australia upon the ordinary common law grounds of judicial review of administrative action. We are presently concerned, however, with what is sometimes called merits review.

9 Under the Police Act, and the *Police (Complaints and Disciplinary Proceedings) Act* 1985 (SA), there is established a special statutory regime for complaints against, and discipline of, members of the police force. There is a Police Complaints Authority and a Police Disciplinary Tribunal. Findings of that Tribunal of a breach of discipline may lead to remittal to the Commissioner for the imposition of punishment[11]. There is also a Police Review Tribunal. An appeal to the District Court may lie in respect of a decision of the Commissioner to terminate the appointment of a member for physical or mental incapacity or unsatisfactory performance, or in respect of a decision by the Commissioner to terminate the appointment of a member on probation, or in respect of a finding by the Police Disciplinary Tribunal that a member is guilty of a breach of discipline, or in respect of a decision by the Commissioner imposing punishment for a breach of discipline. There is no such appeal available in respect of a decision to terminate the appointment of a member who has been convicted of an offence. Of course, the conviction itself is subject to the ordinary avenues of appellate review, which will vary according to the nature and seriousness of the offence.

10 There is an elaborate system of merits review of decisions relating to transfer, promotion, termination on certain grounds, and discipline. However, the Police Act reserves to the Commissioner the power to decide whether the

---

10 (2005) 79 ALJR 1581; 221 ALR 95.

11 *Police (Complaints and Disciplinary Proceedings) Act* 1985 (SA), s 39.

appointment of a member of the police force should be terminated following a conviction. The evident reason for that reservation lies in the disciplined nature of the police force, the Commissioner's responsibilities of control and management, and the range of information and considerations that would need to be taken into account in deciding whether, in a particular case, retention of appointment is consistent with such a conviction. In particular, issues of morale and integrity, perhaps extending beyond the circumstances of the individual officer, are likely to arise. The arrangements for control and management of the police force, and for merits review of some kinds of decision by the Commissioner, and the absence of merits review of others, have the appearance of exhaustiveness.

11 Having regard to the nature of the subject of police appointment, discipline, and termination, and to the scheme established by the Police Act to deal with that subject, the Industrial Relations Court and the Full Court of the Supreme Court of South Australia were right to conclude that it would be incompatible with that scheme to treat an exercise of the Commissioner's power under s 40(1)(a) of the Police Act as subject to the industrial regime of the IER Act.

12 The appeal should be dismissed with costs.

13 GUMMOW AND HAYNE JJ. The *Police Act* 1998 (SA) ("the Police Act") provided for the establishment and management of South Australia Police (referred to in that Act and in these reasons as "S.A. Police"). Section 40(1)(a) of the Police Act provided that "[i]f a member of S.A. Police … is found guilty of an offence under a law of this State, the Commonwealth or another State or a Territory of the Commonwealth" the Commissioner of S.A. Police ("the Police Commissioner") could take any of 12 different kinds of action in relation to that person. One of those actions was to terminate the person's appointment as a member of S.A. Police.

14 Part 6 of Ch 3 of the *Industrial and Employee Relations Act* 1994 (SA) ("the Industrial Act") provided for relief in certain cases of unfair dismissal of employees, including public employees. At the times relevant to this matter[12], an employee whose employment was governed by an industrial instrument, or whose remuneration was less than a specified sum[13], and who had been dismissed, might apply to the Industrial Relations Commission of South Australia ("the Industrial Commission") for a determination that the dismissal was harsh, unjust or unreasonable. If the Industrial Commission was satisfied that the dismissal was harsh, unjust or unreasonable it might order[14], among other things, that the employee be re-employed in his or her former position.

15 The appellant was a member of S.A. Police. In March 2001, he was convicted in the Adelaide Magistrates Court of the offence of assault contrary to s 39 of the *Criminal Law Consolidation Act* 1935 (SA). On 22 November 2001, the Police Commissioner terminated the appellant's appointment as a member of S.A. Police. The appellant applied to the Industrial Commission for relief against what he alleged was a dismissal that was harsh, unjust or unreasonable. The issue in the appeal to this Court is whether the Industrial Commission had jurisdiction to entertain the appellant's application, or, as the respondent contended, whether the Police Act impliedly repealed those provisions of the Industrial Act providing for unfair dismissal to the extent to which they otherwise would have applied to a member of S.A. Police.

---

12 References to the *Industrial and Employee Relations Act* 1994 are to the Act in the form it took in 2002, before the amendments made by the *Industrial Law Reform (Fair Work) Act* 2005 which, among other things, renamed the Act the *Fair Work Act* 1994.

13 s 105A(1).

14 s 109(1).

16 It is as well to sketch the history of the proceedings that give rise to this appeal and then to say something about the principles that are to be applied in deciding whether one statute impliedly repeals an earlier statute. It will then be necessary to make a detailed examination of both the Police Act and the Industrial Act and to refer as well to the *Police (Complaints and Disciplinary Proceedings) Act* 1985 (SA) ("the Discipline Act") and the legislative predecessor of the Police Act – the *Police Act* 1952 (SA).

The history of the proceedings

17 After the appellant made his application to the Industrial Commission for relief against what he alleged was his unfair dismissal, a Commissioner of the Industrial Commission, pursuant to s 214(1) of the Industrial Act, and at the request of the parties, referred certain questions to the Industrial Relations Court of South Australia. One of those questions was (in effect) whether the Industrial Commission had jurisdiction to entertain the appellant's application. The Full Court of the Industrial Relations Court answered that question, "No", and accordingly did not have to deal with the other questions that had been referred. The appellant gave notice of appeal to the Full Court of the Supreme Court of South Australia. That Court, by majority (Prior and Bleby JJ; Debelle J dissenting), treated the notice of appeal as an application for leave to appeal pursuant to s 191(1)(b) of the Industrial Act and ordered[15] that the application be refused. The majority of the Court concluded[16] that "the *Police Act* was intended by Parliament to deal exclusively with all terminations of employment" of members of S.A. Police.

Implied repeal

18 It has long been recognised[17] that even though one statute does not expressly repeal an earlier statute, the later statute must be read as impliedly repealing the earlier, if the two are inconsistent. Inconsistency lies at the root of

---

15 *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110.

16 (2004) 233 LSJS 110 at 119 [48].

17 *Foster's Case* (1614) 11 Co Rep 56 b [77 ER 1222]; *Garnett v Bradley* (1878) 3 App Cas 944 at 965-966.

this principle[18]. But, as Isaacs J pointed out in 1907[19], "[i]t is very hard to formulate a rule which will apply to every case of implied repeal". There are, however, two cardinal considerations. First, as Gaudron J said in *Saraswati v The Queen*[20], "[t]here must be very strong grounds to support [the] implication, for there is a general presumption that the legislature intended that both provisions should operate". Secondly, deciding whether there is such inconsistency ("contrariety"[21] or "repugnancy"[22]) that the two cannot stand or live together[23] (or cannot be "reconciled"[24]) requires the construction of, and close attention to, the particular provisions in question.

19 In the present case, that examination will reveal the following features of the two Acts. The unfair dismissal provisions in Pt 6 of Ch 3 of the Industrial Act (ss 105-111):

(a) were enacted[25] to give effect to principles stated in the Termination of Employment Convention[26];

---

18 *Goodwin v Phillips* (1908) 7 CLR 1 at 7 per Griffith CJ; *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 276 per Fullagar J, 290 per Windeyer J; *Rose v Hvric* (1963) 108 CLR 353 at 360 per Kitto, Taylor and Owen JJ; *Saraswati v The Queen* (1991) 172 CLR 1 at 17 per Gaudron J; *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]-[35] per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ.

19 *Mitchell v Scales* (1907) 5 CLR 405 at 416-417.

20 (1991) 172 CLR 1 at 17.

21 *Butler* (1961) 106 CLR 268 at 275 per Fullagar J.

22 *Butler* (1961) 106 CLR 268 at 290 per Windeyer J.

23 *Butler* (1961) 106 CLR 268 at 280 per Kitto J; *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 34 per Gibbs J.

24 *Butler* (1961) 106 CLR 268 at 290 per Windeyer J.

25 See *Industrial and Employee Relations (Harmonisation) Amendment Act* 1997 (SA), s 3(a).

26 Convention concerning Termination of Employment at the Initiative of the Employer, adopted by the General Conference of the International Labour Organisation on 22 June 1982.

(b) applied to some public employees[27]; and

(c) recognised[28] that an employee may have remedies for dismissal other than the remedies provided by the Industrial Act.

The Police Act, on the other hand:

(a) made the Police Commissioner (subject to the Act and any written directions of the Minister) responsible for the control and management of S.A. Police[29]; and

(b) provided for appointment and resignation of members of S.A. Police[30], dealt with misconduct and discipline of police[31], and made provision for the review of some, but not all, decisions concerning termination of appointment, transfer and promotion[32].

20 The provisions made by the Police Act for termination of appointment as a member of S.A. Police in consequence of conviction for an offence, coupled with the limited provisions made by that Act for review of some decisions concerning termination of appointment, were inconsistent with the wrongful dismissal provisions of the Industrial Act. The Police Act impliedly repealed the wrongful dismissal provisions of the Industrial Act to the extent to which they otherwise would have applied to the termination of appointment of a member of S.A. Police in consequence of conviction for an offence.

21 To demonstrate why that is so it is necessary to examine not only the particular provisions of the two Acts that we have identified as inconsistent but also some other provisions of each Act. It is convenient to conduct that examination by reference to the features of each Act identified above, and to begin with the Industrial Act.

---

27 s 4(1) definition of "employee".

28 s 105 definition of "adjudicating authority" and s 106(2).

29 s 6.

30 Div 1 of Pt 4 (ss 20-29).

31 Pt 6 (ss 37-44).

32 Pt 8 (ss 48-58).

Industrial Act and the Termination of Employment Convention

22 Section 111(1) of the Industrial Act (as originally enacted) provided that in enacting Pt 6 of Ch 3 "it is Parliament's intention to give effect to the *Termination of Employment Convention*". The text of the Convention was set out in Sched 7 to the Act. Section 111(2) (again, as originally enacted) provided that if in any respect Pt 6 of Ch 3 did not provide a remedy that was an adequate alternative remedy, within the meaning of what was then s 170EB of the *Industrial Relations Act* 1988 (Cth), to the remedy available to an employee in respect of termination of employment under the Commonwealth Act, Pt 6 was to be read subject to the modifications necessary to provide an adequate alternative remedy.

23 After the *Workplace Relations Act* 1996 (Cth) was enacted, the Industrial Act was amended by the *Industrial and Employee Relations (Harmonisation) Amendment Act* 1997 (SA) ("the Harmonisation Act"). The Harmonisation Act altered Pt 6 in a number of respects. For present purposes, it is to be noted that s 111 of the Industrial Act (with its statement of parliamentary intention and its provision for an adequate alternative remedy to the remedy available under Commonwealth legislation) was repealed.

24 Express reference was still made in the Industrial Act, however, to the Termination of Employment Convention. Three references may be noted. The Harmonisation Act amended the objects of the Industrial Act, stated in s 3, to include as one of the objects:

> "(j) to provide employees with an avenue for expressing employment-related grievances and having them considered and remedied including provisions for a right to the review of harsh, unjust or unreasonable dismissals –
>
> (i) directed towards giving effect to the *Termination of Employment Convention*; and
>
> (ii) ensuring industrial fair play".

Section 105A of the Industrial Act (which provided for the making of regulations exempting certain classes of employees from the unfair dismissal provisions) provided, in sub-s (3), that "[t]o the extent that a regulation under subsection 2(c), (d) or (e) is inconsistent with the *Termination of Employment Convention* it is invalid". And s 108(2) of the Industrial Act obliged the Industrial Commission, in deciding whether a dismissal was harsh, unjust or unreasonable, to have regard to the Termination of Employment Convention, as well as rules and procedures for termination of employment prescribed by or under Sched 8 to the Industrial Act.

25 The Industrial Act making these provisions referring to the Termination of Employment Convention, it is necessary, in construing the Industrial Act, to notice four aspects of the Convention, if only to put some of them aside from further consideration.

26 First, Art 2(1) provided that the Convention "applies to all branches of economic activity and to all employed persons". Although Art 2(2) went on to provide that a Member (of the International Labour Organisation) might exclude certain categories of employed persons from all or some of the provisions of the Convention, those categories are not now relevant; they were restricted to probationers and casuals. The Convention applied, therefore, to employment of public officials.

27 Secondly, Art 4 provided that:

> "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."

On its face, criminal conduct by a police officer may be a valid reason for terminating that officer's service and would be a reason connected with that officer's conduct.

28 Thirdly, Art 7 provided that:

> "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

This provision is directed to what is to be done *before* termination, not to the remedies that are to be available for allegedly wrongful termination.

29 Finally, Art 8(1) provided that:

> "A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."

Article 9(1) amplified the provisions of Art 8(1) by providing that:

> "The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified."

And Art 5 of the Convention stated a number of matters that may not constitute valid reasons for termination – union membership or activities; seeking office or acting as a workers' representative; filing a complaint or participating in proceedings against an employer involving alleged violation of laws or regulations; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; or absence from work during maternity leave. But the Convention did not further specify what was or was not justification for termination beyond its reference, in Art 4, to a reason connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. In particular, it made no reference to termination that was "harsh, unjust or unreasonable". And as five members of the Court held in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[33], the "harsh, unjust or unreasonable" criterion is a criterion which has a content different from that for which the Convention provided. It is, for that reason, a criterion the inclusion of which "does not implement the terms of the Convention but goes beyond its requirements"[34].

Industrial Act – application to public employees

30 The Industrial Act dealt with much more than questions of unfair dismissal. As the earlier references to the Industrial Commission and the Industrial Relations Court suggest, the Industrial Act established means for the settlement of industrial disputes[35], provided for the making of awards[36] and enterprise agreements[37], provided for the enforcement of awards and enterprise agreements[38], made general provisions regulating the conditions of employment

---

33 (1996) 187 CLR 416 at 517-518 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

34 (1996) 187 CLR 416 at 518 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

35 Ch 2 (ss 7-65); Ch 5 , Pt 3, Div 3 (ss 197-205).

36 Ch 3, Pt 3 (ss 90-99).

37 Ch 3, Pt 2 (ss 73-89).

38 Ch 3, Pt 5 (ss 102-104).

of workers[39], and provided for the formation and registration of industrial associations[40].

31 The Industrial Act defined[41] a "public employee" as:

> "(a) a person employed under, or subject to, the *Government Management and Employment Act 1985*; or
>
> (b) any other person employed for salary or wages in the service of the State".

"[E]mployee" was defined[42] as "a person employed for remuneration under a contract of employment and includes a public employee". Although s 6(b) provided that the Industrial Act did not apply to "employment excluded by regulation from the ambit of this Act", no regulation had been made excluding employment as a member of S.A. Police from the ambit of the Act.

32 The present matter was argued on the footing that a police officer is a public employee and, for that reason, an employee for the purposes of the Industrial Act. It must then be recognised that, if that is so, members of S.A. Police would fall within those other provisions of the Industrial Act that deal with "employees". In particular, provisions such as those dealing with awards or enterprise agreements or those dealing with industrial disputes could be engaged. Yet the respondent contended that the wrongful dismissal provisions of the Industrial Act could not be engaged because they had been impliedly repealed in their application to members of S.A. Police.

Wrongful dismissal – other remedies

33 The Industrial Act recognised that an employee who has been dismissed may have more than one way in which to challenge the dismissal. Section 106(2) provided that:

> "If an employee takes proceedings seeking a remedy for dismissal either under this Part or another law, the employee –

---

39 Ch 3, Pt 1 (ss 66-72).

40 Ch 4 (ss 115-147).

41 s 4(1).

42 s 4(1).

(a) is taken to have elected to pursue that remedy to the exclusion of other remedies that may be available on the same facts either under this Part or under other laws; and

(b) is estopped from taking proceedings for other remedies based on the same facts,

unless the proceedings fail for want of jurisdiction or the adjudicating authority decides not to proceed on the ground that proceedings have been brought, or might more appropriately be brought, under this Part or another law (as the case requires)."

The unfair dismissal provisions of the Industrial Act were, therefore, not intended to constitute the only way in which questions concerning the legitimacy of termination of employment might be considered.

Police Act – the Police Commissioner

34 As noted earlier, the Police Act provided[43] that, subject to the Act and any written ministerial direction, the Police Commissioner was responsible for the control and management of S.A. Police. Section 7, however, provided that no ministerial direction could be given "in relation to the appointment, transfer, remuneration, discipline or termination of a particular person". It follows that the powers given to the Police Commissioner by s 40(1) to take any of a number of different actions in relation to a member of S.A. Police who had been found guilty of an offence under the law of South Australia, the Commonwealth or another State or Territory, were subject to the Act, but not subject to ministerial direction. The steps the Police Commissioner might take in such a case ranged from the termination of the person's appointment to steps such as an "unrecorded reprimand", "counselling", or "education or training".

35 The steps specified in s 40(1) were available not only in cases where a member of S.A. Police had been found guilty of an offence, but also in cases where the member admitted a breach of the Code of Conduct, established by regulation made under s 37(1), "for the maintenance of professional standards by members of S.A. Police" or the member was found guilty of a breach of that Code in proceedings before the Police Disciplinary Tribunal. Again, the Police Commissioner's power to take any of the prescribed steps in consequence of a member admitting or being found guilty of a breach of the Code of Conduct was a power exercisable subject to the Act.

---

43 s 6.

36 These disciplinary powers of the Police Commissioner given by s 40(1) should be understood as being conditioned upon observance of the requirements of procedural fairness[44]. It is not necessary to examine the content to be given to those requirements in a case like the present. It is enough to say that to read the powers of the Police Commissioner as conditioned in this way would mean that a member of S.A. Police would have what Art 7 of the Termination of Employment Convention referred to as "an opportunity to defend himself against the allegations made". (The allegation relevant to the exercise of power under s 40(1) would be that the member had been convicted of an offence, admitted a contravention of the Code, or been found guilty of contravention of the Code; the relevant allegation would not be constituted by the facts lying behind the relevant conviction, admission, or finding.)

37 The Police Act provided[45] that the purpose of S.A. Police is "to reassure and protect the community in relation to crime and disorder by the provision of services", among other things, to "uphold the law … preserve the peace … and … prevent crime". The powers given to the Police Commissioner were to be exercised having regard to that purpose of reassuring and protecting the community by providing services to uphold the law. Further, with respect to personnel management, the Police Commissioner was bound[46] to "ensure that practices are followed under which [among other things] employees are treated fairly and consistently and are not subjected to arbitrary or capricious administrative decisions … and … employees are afforded reasonable avenues of redress against improper or unreasonable administrative decisions".

38 The reference to "employees" in s 10(2) may be contrasted with the reference in s 10(1) to the Police Commissioner ensuring that management practices are followed "with respect to S.A. Police and the police cadets and police medical officers". It may further be contrasted with repeated references elsewhere in the Police Act to "appointment as a member of S.A. Police" and "appointment to a position in S.A. Police". Nonetheless, there being no reference

---

44 *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 40 per Brennan J; *Annetts v McCann* (1990) 170 CLR 596 at 598-600 per Mason CJ, Deane and McHugh JJ, 604-605 per Brennan J; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 591 per Brennan J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 99-100 [38]-[39] per Gaudron and Gummow JJ; see also at 89 [5] per Gleeson CJ, 142-143 [168] per Hayne J.

45 s 5.

46 s 10(2).

elsewhere in the Police Act to "employees" as a class distinct from those appointed as members of S.A. Police, police cadets, or police medical officers, s 10(2) is not to be read as excluding members of S.A. Police from those in respect of whom the Police Commissioner was to ensure practices were followed which met the criteria stated in the sub-section. It follows that the power, given to the Police Commissioner by s 40(1), to terminate the appointment of a member of S.A. Police was a power to be exercised not only for the purpose earlier identified by reference to s 5 (with its reference to the purposes of S.A. Police) but also within the statutory boundaries provided by s 10(2).

Police Act – appointment, resignation, misconduct and discipline

39 As might be expected, the Police Act made detailed provisions regulating appointment to and resignation from S.A. Police and dealt with the subject of misconduct by, and discipline of, police officers.

40 Separate provision was made in the Act for appointment of the Police Commissioner[47], a Deputy Commissioner of Police[48] and Assistant Commissioners[49]. Separate provision was also made[50] for termination of the appointments of these officers.

41 Other members of S.A. Police were appointed by the Police Commissioner[51]. A person appointed as a member of S.A. Police was obliged to make a prescribed form of oath or affirmation[52]. A person who was appointed a member of S.A. Police, and had made the prescribed oath or affirmation, was to be "taken to have entered into an agreement to serve in S.A. Police in each position that the person may hold until he or she lawfully ceases to be a member of S.A. Police"[53]. A member of S.A. Police, other than the Police Commissioner,

---

47 s 12.

48 s 14.

49 s 15.

50 s 17.

51 Section 20 provided for the appointment of officers; s 21 provided for the appointment of sergeants and constables.

52 s 25.

53 s 26(1).

the Deputy Commissioner, or an Assistant Commissioner, might resign by not less than a stated period of written notice[54].

42 Part 6 of the Police Act (ss 37-44) dealt with misconduct and discipline of police. Some of those provisions made reference to the Discipline Act and two bodies established under that Act – the Police Complaints Authority[55] and the Police Disciplinary Tribunal[56]. At the times relevant to this matter, however, the Discipline Act referred in a number of provisions to the *Police Act* 1952; it made no reference to the 1998 legislation referred to in these reasons as the Police Act. It was not suggested by either party that, for the purposes of this appeal, anything turned on this disconformity in the provisions dealing with S.A. Police. Rather, attention was directed in argument principally to those provisions of Pt 8 of the Police Act which provided for and regulated the review of some, but not all, decisions to terminate the appointment of a member of S.A. Police and to those provisions of the Discipline Act which provided for review of certain kinds of disciplinary decision.

43 The chief point made about Pt 8 of the Police Act was that s 48 gave a member, or former member, of S.A. Police a right to seek review of only two kinds of decision to terminate the member's appointment: termination during a period of probation, or termination on a ground for termination under Pt 7 of the Act. (Part 7 dealt with termination because of incapacity by reason of physical or mental disability or illness[57] or because of unsatisfactory performance where it was not practicable to transfer the member to a position of the same or lower rank with duties suited to the member's capabilities or qualifications[58].) Section 48 of the Police Act made no provision for review of a decision to terminate a member's appointment under s 40(1).

44 The Discipline Act was treated in argument as dealing with breaches of the Code of Conduct established pursuant to s 37 of the Police Act. That is, breaches of that Code were treated in argument as meeting the definition of "breach of discipline" given in s 3(1) of the Discipline Act[59]. It is not necessary

---

54 s 29.

55 Pt 2 (ss 5-12).

56 Pt 6 (ss 37-45).

57 s 45(1).

58 s 46.

59 "[A] breach that may be the subject of a charge by the Commissioner under the *Police Act 1952*".

to consider the validity of this assumption. What is important, for present purposes, is that if a breach of the Code is a "breach of discipline" as defined in the Discipline Act, the Police Disciplinary Tribunal established under the Discipline Act[60] may hear and determine that charge[61] and if satisfied that the member was guilty of the breach of discipline "remit the proceedings to the Commissioner for the imposition of punishment on the member in accordance with the *Police Act 1952*"[62]. Part 7 of the Discipline Act[63] then made provision for appeals in respect of discipline. First, a party to proceedings before the Tribunal might appeal to the Administrative and Disciplinary Division of the District Court[64] against a decision made by the Tribunal in the proceedings. Secondly, a member of the police force might appeal to that Court against an order of the Police Commissioner imposing punishment on him or her for a breach of discipline[65].

45 These provisions for appeal (particularly the provision for an appeal against an order of the Police Commissioner terminating the appointment of a member of S.A. Police for breach of the Code of Conduct, but the absence of provision for an appeal against an order terminating appointment upon conviction for an offence) were said to demonstrate that the Police Act is inconsistent with the application of the wrongful dismissal provisions of the Industrial Act to members of S.A. Police. This conclusion was said to be reinforced by reference to the provisions made by the Police Act for the review of decisions to transfer a member of S.A. Police[66] and decisions about who should be promoted[67].

46 In order to examine these contentions it is necessary to say more about inconsistency and implied repeal.

---

60 Pt 6 (ss 37-45).

61 s 39.

62 s 39(3).

63 s 46.

64 s 46(1).

65 s 46(2).

66 s 52.

67 s 55.

Inconsistency

47 No conclusion can be reached about whether a later statutory provision contradicts an earlier without first construing both provisions. If, upon their true construction, there is an "[e]xplicit or implicit contradiction"[68] between the two, the later Act impliedly repeals the earlier. One example that may be given of an explicit contradiction is provided by the legislation considered in *Michell v Brown*[69] where the later Act gave the same definition of an offence as had been stated in the earlier Act, but specified a different punishment, and varied the procedure to be followed for its prosecution. It was not possible to comply with both Acts simultaneously.

48 In *Rose v Hvric*[70], a distinction was drawn between explicit or implicit contradiction on the one hand and "merely 'inferential contradiction', as Lord Hatherley called it in *Attorney-General v Great Eastern Railway Co*[71]" on the other. Thus, it was said[72] that to show that provisions of the later Act would ground a conclusion that the train of thought of those who drafted that later Act, if logically pursued, would have led the drafters to enact an exception to the operation of the former Act, would not suffice to demonstrate implicit contradiction. It would show only an inferential contradiction. It would not show implicit contradiction because, as Gaudron J said in *Saraswati*[73], the general presumption is that there is no contradiction between two Acts of the one legislature.

49 Reference to "implicit contradiction" may suggest that it is both permissible and useful to resort to "covering the field" tests developed in the application of s 109 of the Constitution[74] in deciding whether a later Act impliedly repeals an earlier. It is, however, necessary to recognise that s 109 concerns the paramountcy of a law of the Commonwealth over a law of a State. The question in the present case is not whether one law enacted by one

---

68 *Rose v Hvric* (1963) 108 CLR 353 at 358.

69 (1858) 1 El & El 267 [120 ER 909].

70 (1963) 108 CLR 353 at 358.

71 (1873) LR 6 HL 367 at 375.

72 (1963) 108 CLR 353 at 358.

73 (1991) 172 CLR 1 at 17.

74 *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J.

legislature prevails over a law enacted by another legislature; it is whether the presumption that two laws made by the one legislature are intended to work together is displaced. It is unnecessary to decide in this case whether, or how much, guidance is provided in cases of allegedly implied repeal by the law that has developed in the application of s 109[75].

50 In the present case there would be difficulties in accommodating provisions of the Police Act with the application of the wrongful dismissal provisions of the Industrial Act. What would happen if the Industrial Commission were empowered to order re-employment of a member of S.A. Police whose appointment had been terminated? Would that person have to make a fresh oath or affirmation under s 25 of the Police Act? Upon re-employment of a member of S.A. Police by order of the Industrial Commission, could the Police Commissioner take some other less severe action against that member on account of the conviction that led the Police Commissioner to terminate his or her appointment? Or would the Police Commissioner's powers under s 40(1) be spent upon the Police Commissioner's deciding that the appointment should be terminated? In deciding whether a termination of appointment of a member of the police force was harsh, unjust or unreasonable, would the Industrial Commission be bound to take account of, and be limited to considering, matters the Police Commissioner was bound to consider when exercising the power given by s 40(1) of the Police Act? Or would the Industrial Commission be guided by those considerations that are usually grouped together under the description the "industrial justice" of the matter[76]?

51 These difficulties in reconciling the two Acts stem from two features of the legislation which, although it is convenient to deal with them separately, are linked one to the other. First, different considerations inform the exercise of power under the Police Act from those that inform the exercise of power under the wrongful dismissal provisions of the Industrial Act. Secondly, the Police Act appears intended to deal comprehensively with questions of termination of appointment of a member of S.A. Police.

52 As is pointed out earlier in these reasons, the Police Commissioner must decide whether to exercise the powers given by s 40(1) of the Police Act having regard to the purpose and objects of the Act which confers those powers. Two of

---

75 *Butler* (1961) 106 CLR 268 at 276 per Fullagar J.

76 cf *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 466-467 per McHugh and Gummow JJ; *Termination, Change and Redundancy Case* (1984) 8 IR 34 at 43.

those statutory purposes[77] are that S.A. Police reassure and protect the community in relation to crime and disorder by the provision of services to uphold the law and prevent crime. That is, the power given by s 40(1) to the Police Commissioner to take action against a member of S.A. Police who has contravened the criminal law is to be exercised having regard to the Police Act's purpose of establishing and maintaining a police force (or service) whose members are not only sworn to uphold and enforce the criminal law, but do so in fact.

53 Moreover, the Police Commissioner is obliged to ensure that personnel management practices are followed in S.A. Police under which employees are treated fairly and consistently, and are not subjected to arbitrary or capricious administrative decisions[78]. Performance of this obligation would, at least for the most part, if not entirely, avoid harsh, unjust or unreasonable termination of a member's appointment. What is fair and consistent and is not arbitrary or capricious will usually not be harsh, unjust or unreasonable. But if there are considerations encompassed by the expression "harsh, unjust or unreasonable" or the "industrial justice" of the case which would fall outside the principles which the Police Act requires the Police Commissioner to take into account in deciding whether to terminate a member's appointment, it would follow that the exercise of powers under the wrongful dismissal provisions of the Industrial Act would be informed by different considerations from those which are to be derived from the Police Act.

54 Standing alone, the considerations just mentioned would not demonstrate explicit or implicit contradiction between the two Acts. The two Acts could be accommodated by reading the requirements which the wrongful dismissal provisions of the Industrial Act would require an employer to take into account in exercising the power to terminate an employee's services, as additional considerations to be taken into account by the Police Commissioner when exercising the powers under s 40(1) of the Police Act. There are, however, two further matters that must then be taken into account in deciding whether the two Acts are contradictory. Again, they are linked.

55 First, it is important to recognise that "affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise"[79]. Secondly, when read as a whole, the Police Act

---

77 Police Act, s 5(a) and (c).

78 Police Act, s 10(2)(b).

79 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.

reveals an intention to deal comprehensively not only with questions of appointment and termination of appointment of members of S.A. Police, but also with what decisions of the Police Commissioner to terminate appointment of a member are to be subject to review apart from the general supervisory jurisdiction of the Supreme Court, a general supervisory jurisdiction exercised principally by the grant of relief in the nature of prohibition, mandamus and certiorari.

56 Termination of appointment is only one of 12 actions which the Police Commissioner may take against a member who has been convicted of an offence. It would indeed be strange if the Police Commissioner's action of terminating an appointment could be measured by the Industrial Commission, against the standard of "harsh, unjust or unreasonable", without also committing to the body required to make that assessment the power to decide what *other* form of action, short of termination of appointment, the conviction warranted. Yet that is the step which would have to be taken if the two Acts are to be read as operating together.

57 That is not the better construction of the Police Act. Rather, the Police Act should be read as a comprehensive statement of (a) the powers of the Police Commissioner to terminate the appointment of a member of S.A. Police (powers that are conditioned upon affording procedural fairness to the member concerned); (b) the matters that are to be taken into account in exercising those powers (including the need to treat employees fairly and consistently, and not arbitrarily or capriciously); (c) the kinds of termination decision that are to be subject to review apart from the general processes of judicial review; and (d) the ways in which those termination decisions that are amenable to review are to be reviewed. The affirmative words of these provisions of the Police Act are to be read as also having a negative force and forbidding the doing of the thing otherwise under the Industrial Act. It follows that the Police Act explicitly or implicitly contradicts the wrongful dismissal provisions of the Industrial Act.

58 The appeal should be dismissed with costs.

59 KIRBY J. Resolving suggested inconsistency, contrariety[80] or conflict[81] between legislation is a staple activity of Australian courts. In a society in which the quantity, variety and sources of law made by or under parliaments (already great) expands at a significant rate[82], it is unsurprising that suggested incompatibilities frequently need to be resolved.

60 In a federal polity, such conflicts can easily arise between laws made by the Federal Parliament and those made by the legislatures of the States and Territories. For a conflict with State laws, s 109 of the Constitution affords an explicit provision to resolve the clash by upholding the paramountcy of the federal law[83]. However, problems also arise within the same jurisdiction. To some extent, the ambit of conflicts of the latter type is confined by a technique of express textual amendments generally observed in Australia by those who draft and enact legislation and laws made under it. Yet cases arise where there is no express provision in successive laws of the same polity to inform those subject to them as to how such laws are intended to inter-relate. The present appeal, from a divided decision of the Full Court of the Supreme Court of South Australia[84], is such a case.

61 The courts have devised maxims and canons of construction in an attempt to ensure (so far as human reasoning permits) consistent approaches to the resolution of suggested conflicts. Yet such rules, whilst sometimes helpful, only take the mind part of the way in the process of reasoning. As Higgins J remarked in an early case, *Bank Officials' Association (South Australian Branch) v Savings Bank of South Australia*[85] ("the *Bank Officials' Case*"), "[t]hese maxims merely aid us in taking our bearings in the movement of our reason". Before the maxims and canons of construction are deployed, there remain duties of close analysis of

---

80 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 275 per Fullagar J.

81 *Butler* (1961) 106 CLR 268 at 285 per Taylor J.

82 See McHugh, "The Growth of Legislation and Litigation", (1995) 69 *Australian Law Journal* 37 at 37-39.

83 Both in cases of operational inconsistency and in cases of inconsistency from intrusion into a field covered by federal legislation: *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 488-489; *Ex parte McLean* (1930) 43 CLR 472 at 485-486. A like resolution exists in the case of repugnancy of Territory laws: *Northern Territory v GPAO* (1999) 196 CLR 553 at 582-583 [59]-[60], 636-638 [219]-[222].

84 *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110.

85 (1923) 32 CLR 276 at 299.

the legislation, side by side as it were, to see whether it can "stand together" or "live together"[86]. When this is done there will often (but not always[87]) be division of opinion on the part of appellate judges, either as to the approach that is proper to resolve the suggested conflict[88] or as to whether there is a relevant inconsistency at all[89].

62 In the Full Court in the present case, the judges in the majority concluded that the *Police Act* 1998 (SA) ("the Police Act"), empowering the Commissioner of South Australia Police to terminate the appointment of a member of the Force, excluded the operation of the *Industrial and Employee Relations Act* 1994 (SA) ("the Industrial Act"), which affords relief to employees against "harsh, unjust or unreasonable"[90] dismissal. The dissenting judge concluded that the two enactments could operate together. Now, by special leave, the question comes before this Court.

The facts and issues

63 *The facts*: Before 22 November 2001, Mr Trevor Ferdinands ("the appellant") was a police officer serving with the South Australia Police. In December 1999, at the Adelaide City Watch House, he was involved in an incident that led to his being charged with an offence of assault contrary to s 39 of the *Criminal Law Consolidation Act* 1935 (SA)[91]. The appellant was found guilty of the offence and convicted. The Police Commissioner terminated the appellant's appointment as a member of the South Australia Police[92].

---

86 *Butler* (1961) 106 CLR 268 at 280 per Kitto J; cf *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 34 per Gibbs J.

87 *Shergold v Tanner* (2002) 209 CLR 126 at 137 [35].

88 See eg *Travinto* (1973) 129 CLR 1 – as between the approach of Barwick CJ, McTiernan and Stephen JJ and that of Menzies and Gibbs JJ. The latter invoked the maxim *leges posteriores priores contrarias abrogant*.

89 See eg *Bank Officials' Case* (1923) 32 CLR 276, in which Higgins and Starke JJ dissented, *Cobiac v Liddy* (1969) 119 CLR 257 where McTiernan J dissented and *Saraswati v The Queen* (1991) 172 CLR 1 where Deane and Dawson JJ dissented.

90 Industrial Act, s 108(1). The Industrial Act was renamed the *Fair Work Act* 1994 (SA) by the *Industrial Law Reform (Fair Work) Act* 2005 (SA), the relevant provisions of which commenced on 16 May 2005. The amending Act preserved the appellant's rights in relation to the Act as it stood at the relevant times.

91 (2004) 233 LSJS 110 at 120 [54].

92 Pursuant to s 40 of the Police Act.

64 The appellant initiated an appeal against his conviction to the Supreme Court of South Australia[93]. This was not pursued. He also initiated proceedings in the District Court of South Australia to seek judicial review of his termination[94]. However, these proceedings were rejected for want of jurisdiction, a decision that the appellant does not now contest.

65 The appellant then commenced proceedings in the Industrial Relations Commission of South Australia ("the Commission") claiming relief pursuant to s 106 of the Industrial Act. The relief was sought on the basis that his dismissal from the Police was "harsh, unjust and unreasonable".

66 Pursuant to s 214(1) of the Industrial Act, the Commission, at the request of both parties, referred two questions to the Full Court of the Industrial Relations Court of South Australia ("the Industrial Relations Court")[95]. The first was whether the Commission could extend the time within which the appellant could apply for the relief that he had sought under the Industrial Act. The second question, assuming the answer to the first to be in the affirmative, was whether the Commission was deprived of jurisdiction to determine the appellant's application because the Police Act, and associated police legislation, operated to the exclusion of s 106 of the Industrial Act, or because the appellant's failed application to the District Court had estopped him from claiming the remedy that he later sought under the Industrial Act[96].

67 In the Commission, the appellant named the Commissioner for Public Employment ("the respondent") as the respondent to the proceedings. In these proceedings, he has been taken to represent the Commissioner of South Australia Police. No point has been raised as to the correctness of naming the respondent as the proper party for the issues that have been argued.

68 On 24 March 2003, the Industrial Relations Court unanimously concluded that the police legislation, specifically the Police Act, excluded the jurisdiction of the Commission under s 106 of the Industrial Act. That Court gave effect to

---

93 See reasons of South Australian Industrial Relations Court: *Ferdinands v Commissioner for Public Employment* [2003] SAIRC 19 at [4].

94 Pursuant to the *Police (Complaints and Disciplinary Proceedings) Act* 1985 (SA), s 46(2).

95 [2003] SAIRC 19 at [1].

96 Pursuant to s 106(2) of the Industrial Act.

earlier decisions of its own on the point[97]. The appellant then sought to appeal to the Full Court of the Supreme Court of South Australia. By majority[98], that Court refused leave to appeal, holding that the decision of the Industrial Relations Court was correct.

69 The appellant applied in person for special leave to appeal to this Court. Special leave was granted and arrangements were made for the appellant to be legally represented *pro bono*. The assistance of counsel is appreciated. It would have been difficult or impossible for a self-represented litigant to argue the issues without it.

70 *Matters not in issue*: The following matters are not in contention in these proceedings:

(1) This Court is not concerned with the factual merits of the Police Commissioner's termination of the appellant's appointment as a member of the South Australia Police. Nothing in these proceedings touches that issue. The sole question is one of law concerned with the jurisdiction and power of the Commission to hear and determine the appellant's claim under s 106 of the Industrial Act.

(2) Nor is this Court concerned with the first question which was reserved by the Commission, namely whether the Commission has the power to extend the time within which the appellant might apply for relief. That issue remains outstanding because both the Industrial Relations Court and the Full Court of the Supreme Court proceeded directly to the more fundamental second question reserved by the Commission, relating to the jurisdiction and powers of the Commission to determine the application under the Industrial Act. This Court heard no argument on the first reserved question of law, which remains undetermined.

(3) During argument of the appeal, a third question of law arose. Section 106(1) of the Industrial Act provides for applications for relief in a case where "an employer dismisses an *employee*"[99]. By s 4 of the Industrial Act ("Interpretation") the word "employee" is defined to include "public employee". At the relevant time, that expression was, in turn, defined to mean "a person employed under, or subject to, the *Government*

---

97 *McQuillan v Commissioner for Public Employment (Department of Correctional Services)* (1993) 51 IR 356; *Stone v Commissioner for Public Employment* (2002) 124 IR 120.

98 Prior J and Bleby J; Debelle J dissenting.

99 Emphasis added.

Management and Employment Act 1985"[100] or "any other person employed for salary or wages in the service of the State".

In *Enever v The King*[101], a question arose in this Court whether it was competent for a plaintiff to bring an action against the Government of Tasmania for wrongful arrest by a police constable in the intended performance of his duties. Legislation in Tasmania permitted an action against the Government by any person having a claim against the Crown for an actionable wrong in respect of "any act or omission, neglect or default of any officer, agent or servant of the Government of Tasmania"[102]. This Court held that, because the police constable held an office and was not, as such, an "agent or servant" of the governmental appointing body that engaged him, he alone was responsible in law for his acts and omissions. The Government was not.

The decision in *Enever*, inconvenient as it was[103], has never been overruled by this Court. It has been followed and applied in many cases[104]. Extensive legislation has been enacted throughout the Commonwealth to overcome its effect and to provide for governmental liability for defined acts and omissions of police officers[105]. The appellant did not contend that *Enever* was incorrectly decided. Instead, he submitted that it had no operation in the context of s 106 of the Industrial Act.

Neither by a notice of contention nor in written or oral submissions did the respondent argue that (because of *Enever* or on any other grounds) the appellant's application to the Commission was doomed to fail for want of an employment relationship and because the appellant held an independent office equivalent to a constable. In my view, this was a correct approach to the issue. *Enever* does not require a different

---

100 See now *Public Sector Management Act* 1995 (SA), s 3.

101 (1906) 3 CLR 969.

102 *Crown Redress Act* 1891 (Tas), s 4.

103 See Fleming, *The Law of Torts*, 9th ed (1998) at 418-419.

104 See eg *Blom v The Commonwealth* (1917) 17 SR (NSW) 469; *Cradock v Mackenzie* (1920) 37 WN (NSW) 280; *R v Lorenzo* [1921] SASR 55; *Fisher v Oldham Corporation* [1930] 2 KB 364.

105 Australian Law Reform Commission, *Complaints Against Police*, Report No 1, (1975) at 58-59 [213]-[216].

approach[106]. I am content to consider the issues in this appeal as they were argued by the parties, whilst noticing the possible problem for the appellant presented by the *Enever* decision.

The intersecting legislation

71 *The Police Act*: The provisions of the legislation of South Australia need to be noticed. By s 40 of the Police Act, it is provided:

> "(1) If a member of SA Police or police cadet –
>
> (a) is found guilty of an offence under a law of this State, the Commonwealth or another State or a Territory of the Commonwealth; or
>
> (b) admits in accordance with this Act a breach of the Code with which he or she has been charged; or
>
> (c) is found guilty of a breach of the Code in proceedings before the Police Disciplinary Tribunal,
>
> the Commissioner may take action, or order the taking of action, of one or more of the following kinds in relation to the person:
>
> (d) termination of the person's appointment;
>
> (e) suspension of the person's appointment for a specified period;
>
> (f) reduction of the person's remuneration by a specified amount for a specified period …
>
> (g) where the person is a member of SA Police, transfer of the member to another position in SA Police (whether with or without a reduction in rank, seniority or remuneration);
>
> (h) where the person is a member of SA Police, reduction in the member's seniority;
>
> (i) imposition of a fine not exceeding the amount prescribed by regulation;

---

106 Cf Kirby, "Controls over Investigation of Offences and Pre-trial Treatment of Suspects", (1979) 53 *Australian Law Journal* 626 at 641; Luntz and Hambly, *Torts: Cases and Commentary*, 5th ed (2002) at 940-941 [17.3.23]-[17.3.24].

(j) where the person is a police cadet, withdrawal of specified rights or privileges for a specified period;

(k) a reprimand recorded in the person's conduct and service history …

(l) an unrecorded reprimand;

(m) counselling;

(n) education or training;

(o) action of any other kind prescribed by regulation."

72 *The Industrial Act*: The appellant's application to the Commission was purportedly brought under Pt 6 of Ch 3 of the Industrial Act ("Unfair Dismissal"). By s 105A, provision is made in the first division of that Part concerning its application. Thus, s 105A(1) provides that the Part does not apply to a "non-award employee" whose remuneration, immediately before the dismissal took effect, is not less than the specified, indexed annual amount. Clearly, that provision is intended to exclude senior employees from relief under the Part. It was not suggested that the appellant came within this exception.

73 Section 105A also provides for the exclusion by regulation of various categories of employee from the operation of the Part, or specified provisions of the Part. These include probationers (s 105A(2)(a)); certain casual employees (s 105A(2)(b)); employees whose terms of employment are governed by special arrangements giving rights of review of, or appeal against, decisions to dismiss from employment which provide protection "that is at least as favourable to the employees as the protection given under this Part" (s 105A(2)(c)); employees to whom application of the Part "would cause substantial difficulties" because of the conditions of their employment or the size or nature of the undertakings in which they are employed (s 105A(2)(d)); and "employees of any other class" (s 105A(2)(e)).

74 The result of s 105A is that it would have been a simple matter, had it been the purpose of the Executive Government of the State, to exclude by regulation police "employees", such as the appellant, from the remedies provided in Pt 6 of Ch 3 of the Industrial Act. No such regulation or exclusion has been made. The respondent argued that doing so was not necessary because of the focus and detailed provisions of the Police Act which constituted an entire regulation of the incidents of police service, including termination, without any external avenue of merits review on the ground that termination was "harsh, unjust or unreasonable".

75 By s 106 of the Industrial Act, provision is made for an employee, within the stated time, to apply to the Commission for relief under the Part (s 106(1)).

This section clearly contemplates that, in some instances, the employee will have additional and different remedies under other laws. Thus, at the relevant time, it was provided in s 106(2) that, where an employee took proceedings seeking a remedy for dismissal under Pt 6 or another law, he or she was taken to have elected to pursue that remedy to the exclusion of others and was estopped from taking other remedies based on the same facts[107]. The Act gives as an example the case of an employee who brings proceedings under the *Equal Opportunity Act* 1984 (SA).

76 *The incorporated ILO Convention*: The Industrial Act then relevantly provided, in s 108, for the determination of the application:

> "(1) At the hearing of an application under this Part, the Commission must determine whether, on the balance of probabilities, the dismissal is harsh, unjust or unreasonable.
>
> (2) In deciding whether a dismissal was harsh, unjust or unreasonable, the Commission must have regard to –
>
> (a) the *Termination of Employment Convention*; and
>
> (b) the rules and procedures for termination of employment prescribed by or under Schedule 8."

77 By s 109, provision is made for remedies for unfair dismissal from employment. Under s 109(1), if the Commission is satisfied that the employee's dismissal is harsh, unjust or unreasonable, it may "order that the applicant be re-employed in the applicant's former position without prejudice to the former conditions of employment" or, if this would be impracticable, "order that the applicant be re-employed by the employer in some other position (if such a position is available) on conditions determined by the Commission" or, where this would not be an appropriate remedy, "order the employer to pay to the applicant an amount of compensation determined by the Commission".

78 By s 109(2), if the Commission makes an order for re-employment, subject to any contrary direction of the Commission, the employee "must be remunerated for the period intervening between the date that the dismissal took effect and the date of re-employment as if the employee's employment in the position from which the employee was dismissed had not been terminated". Provision is also made by s 109(2) for adjustment of payments to take into account leave and any payments made to the employee upon his or her dismissal.

---

107 See now *Fair Work Act* 1994 (SA), s 106(2).

79 The "*Termination of Employment Convention*" referred to in s 108(2) of the Industrial Act is the Convention concerning Termination of Employment at the Initiative of the Employer adopted by the International Labour Organisation in June 1982. The Convention has been ratified by Australia[108]. The Convention appears in its entirety in Sched 7 to the Industrial Act. Article 4 of the Convention states:

> "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."

80 Article 7 of the Convention states that:

> "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

81 Article 8.1 of the Convention provides, in terms which the appellant suggested were applicable to his case:

> "A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."

82 Article 9.1 provides:

> "The bodies referred to in Article [8.1] of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified."

The parties' arguments

83 *The respondent's arguments*: Substantially, the parties before this Court supported the respective approaches to the intersection of the Police Act and the Industrial Act expressed by the majority and minority in the Full Court. The respondent supported the majority, arguing that the two statutory regimes were incompatible unless Pt 6 of Ch 3 of the Industrial Act were read down to exclude any application to a member of the Police Force such as the appellant.

---

108 [1994] *Australian Treaty Series*, No 4. See also *Workplace Relations Act* 1996 (Cth), Pt VIA, Div 3.

84 The respondent laid emphasis on what he claimed to be the inaptness, in the context of termination under the Police Act, of the remedy provided under s 109 of the Industrial Act, namely "re-employment". That remedy, it was suggested, did not mesh appropriately with the Police Act. Specifically, it did not provide for the quashing of the Police Commissioner's earlier decision to terminate the appointment. Nor did it expressly reactivate the Commissioner's powers to take action, other than termination of the person's appointment, as provided by s 40(1)(e) to (o) of the Police Act. Neither did it provide expressly for a "re-employed" member of the South Australia Police or police cadet to take a fresh oath, appropriate to what was said to be the *new* employment relationship created by "re-employment" pursuant to an order made under s 109(1)(a) of the Industrial Act.

85 In the alternative, the respondent submitted that the Police Act, being a statute of 1998, impliedly repealed, to the extent of the inconsistency, provisions of the Industrial Act, a statute of 1994[109]. This argument lost much of its force because the lineage of the relevant provisions in the Industrial Act and the Police Act[110] makes it difficult to infer from the maxim giving priority to a later law which law was relevantly earlier and which later, in point of time. Thus, the first statutory remedy in South Australia for unfair dismissal was enacted by the *Industrial Code* 1967 (SA). Section 26(2) provided for the President of the Commission to determine whether the dismissal was harsh, unjust *and* unreasonable and to direct re-employment as he or she thought fit. This power was temporarily transferred to the Industrial Court by the *Industrial Conciliation and Arbitration Act* 1972 (SA), s 15(1)(e). It was returned to the Commission in 1984 by the *Industrial Conciliation and Arbitration Amendment Act* 1984 (SA).

86 At the time these laws were enacted, police appointment and termination was regulated in South Australia under the *Police Regulation Act* 1952 (SA). Section 22(6) of the last-mentioned Act provided for the making of regulations with respect to discipline and s 22(7) for the making of regulations governing disciplinary inquiries. Regulation 28 of the Police Regulations 1982, made under the 1952 Act, empowered the Commissioner to impose penalties, including dismissal, with the approval of the Governor or Chief Secretary. These provisions were later replaced by the *Police (Complaints and Disciplinary Proceedings) Act* 1985 (SA) and the Police Act.

---

109 Invoking *Goodwin v Phillips* (1908) 7 CLR 1 at 7.

110 It is a mistake for this purpose to consider only the dates of the original enactment of the statutes said to be in conflict. It is more helpful to consider when the respective provisions in question were enacted: *Royal Automobile Club v Sydney City Council* (1992) 27 NSWLR 282 at 287.

87 The appellant contested these propositions. However, the strength of the respondent's case in this regard lay in the suggested disharmony between the sections of the Police Act providing various avenues of review, but not for the case of termination of a member's appointment where that member was found guilty of an offence against the penal law. The respondent supported the policy which, he suggested, lay behind this exception, by reference to the character of the South Australia Police as a disciplined force, with duties to enforce the penal law, and the need to accept the decisions of the Commissioner of Police in such matters without external interference.

88 *The appellant's arguments*: The appellant's submissions supported the approach of the dissenting judge in the Full Court. In addition, the appellant placed emphasis on the provisions of the international Convention which, unusually, is scheduled to the Industrial Act, a State law, and which, by the terms of that Act, must be taken into account by the Commission in deciding whether an applicable dismissal is harsh, unjust or unreasonable. The other arguments advanced by the appellant will be identified later in these reasons.

89 As appears from the competing approaches of the judges in the Full Court and the arguments of the parties, this is another case where, for default of expressly enacted provisions resolving the intersection of the two statutes, the resulting law is uncertain. I acknowledge that there are good arguments to support the conclusions successively reached by the Industrial Court, the majority in the Supreme Court and now the majority of this Court. Nevertheless, I have concluded that the better view is that the two statutes should be read together so that a member of the South Australia Police, such as the appellant, whose appointment is terminated after being found guilty of an offence, has a right of access to the Commission. I will explain the main considerations that have led me to this conclusion.

Access to the Commission is available

90 *The language of the law*: The first thing to be noticed is that there is nothing in the language, either of the Police Act or the Industrial Act, to take members of the South Australia Police, such as the appellant, as a class or in particular cases, outside the protective provisions afforded by the language of s 106 of the Industrial Act. That language is expressed in perfectly general terms. On its face, it applies to a person, like the appellant, who claims that his termination by the Police Commissioner amounts to unfair dismissal. The foundational rule for ascertaining the purpose (sometimes called "intention") of a

parliament or other law-maker is that the search must begin in the language of the law itself[111].

91 Given the strong tradition, in the drafting of Australian legislation, of noting amendments or exceptions to earlier legislation expressly in a later text (and assuming that, for this particular purpose, the Police Act is to be treated as later in time than the Industrial Act) it would have been a simple thing for the drafter to make unambiguously clear that termination by the Police Commissioner in the case of a member of the South Australia Police, who is found guilty of an offence, excludes remedies afforded for unfair dismissal in Pt 6 of Ch 3 of the Industrial Act. The passage of the latter remedies in an enactment of the South Australian Parliament was only four years earlier. Yet express amendment was not attempted.

92 Even easier would have been the utilisation of regulations under s 105A of the Industrial Act to exclude members of the Police as a class. This might have been achieved by the Executive Government without any need for legislation. However, this too was not done. These omissions fall to be considered in the light of the serious consequences that attend unreviewable decisions involving the harsh, unjust or unreasonable termination of a person's employment.

93 *Construing beneficial laws*: The provisions in Pt 6 of Ch 3 of the Industrial Act for remedies against unfair dismissal are clearly important and beneficial privileges, expressed in unqualified language[112]. By their nature, being protective of valuable legal rights, they would not ordinarily be read down to exclude a particular class of "employees". At least, this would not be done without clear provisions indicating that such was the purpose of the legislature[113].

94 In its reasons, the Industrial Court cited a passage in the earlier decision of the Commission in *Mislov v Port Lincoln Health Services Inc*[114]. There the Commission said, correctly:

> "Termination of employment is often a very significant and traumatic event for the affected employee. It can have profound

---

111 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; cf *Butler* (1961) 106 CLR 268 at 276 per Fullagar J.

112 Cf *Colley v Futurebrand FHA Pty Ltd* (2005) 63 NSWLR 291 at 298 [30]-[33].

113 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260-261; *Colley* (2005) 63 NSWLR 291 at 293 [4].

114 (2001) 110 IR 45 at 52 [41]: see [2003] SAIRC 19 at [12].

> consequences that can go well beyond the immediate economic impact resulting from the loss of paid employment."

95 Part 6 of Ch 3 of the Industrial Act was enacted in recognition of this feature of employment termination. It reflects an appreciation that the common law, by its substantive rules and expensive procedures, does not provide adequate protection to employees from arbitrary, capricious and unfair decisions to terminate an employee's services.

96 As the Industrial Court recognised in this case[115], and as Debelle J emphasised in the Full Court, the Police Commissioner was not *obliged* to terminate the appointment of the appellant, notwithstanding that the appellant had been found guilty of an offence against the law. By s 40(1), a wide panoply of powers was conferred on the Commissioner. In Debelle J's words[116]:

> "The very width of these powers highlights the possibility that the Commissioner might on some occasion terminate an officer's appointment when another form of discipline would have been entirely adequate."

97 The Industrial Court judges also said[117]:

> "[T]he Commissioner was not obliged to do anything and having resolved to act, he could have chosen from any of a number of lesser sanctions, including suspension, demotion, a fine, a reprimand or counselling."

98 Given the then recent enactment by the South Australian Parliament of such important beneficial and protective legislation as Pt 6 of Ch 3 of the Industrial Act, it is scarcely a satisfactory resolution of the suggested intersection of such provisions with the Police Act to hang the outcome on the sequence of the provisions in time or the alleged particularity of the Police Act when compared to the Industrial Act.

99 On one view, it is the Industrial Act that has expressed the command of Parliament, in broad and specific language, protective of employees against the serious injustice of unfair dismissal. Without express exclusion by Parliament of members of the Police Force, the arguments that such an exclusion should be read into the Industrial Act are not persuasive. The many potential injustices that are repaired by that Act suggest that a court should not struggle to diminish the Act's apparently general field of operation. Whilst a Police Force is indeed a

---

115 [2003] SAIRC 19 at [13].

116 (2004) 233 LSJS 110 at 111 [3].

117 [2003] SAIRC 19 at [13].

disciplined service, it is impossible to suggest that a Police Commissioner, in a termination decision, is somehow immune from reaching erroneous conclusions and assessments. The fact that so many other decisions of the Police Commissioner, including in cases of termination other than for offences, are subject to judicial reassessment in the District Court, indicates that the disciplined character of the South Australia Police can survive *ex post* judicial scrutiny of the Commissioner's decisions, including to terminate an appointment.

100 *The wide variety of offences*: Notwithstanding the foregoing, it is necessary to consider whether there is something in the case of termination under s 40(1)(d) of the Police Act, following a finding of guilt of an offence, of such a character that it rationally repels the opportunity of review by the Commission. In support of this approach, there were suggestions that recent troubles in the nation's police services warranted a strict and unreviewable power in the Police Commissioner where guilt of an offence was made out, although a similar power was not required where the infraction was of the Code of Conduct applicable to police members[118].

101 This is also an unconvincing proposition for the reasons expressed by Debelle J in the Full Court[119]. The Police Act refers to offences not only against the law of South Australia but against the law of any State or Territory or of the Commonwealth. A huge variety of offences is thereby incorporated by reference in s 40(1)(a), thus legally authorising a decision to terminate the appointment of a member of the Force. The offences extend from serious criminal offences of the kind that would unquestionably merit termination to a vast range of regulatory provisions that are nonetheless offences because supported by penal sanctions, even if only those of a fine[120].

102 Debelle J pointed to the offence of exceeding the speed limit which, at least in many, perhaps most, circumstances, would fall short of providing proper grounds for termination of the member's appointment[121]. The same might be said of jaywalking and even more so of regulatory "offences". The risk of casting such a wide net, thrown over tens of thousands of offences under State, Territory or federal law in this country, is that an offence might, in a particular case, be

---

118 This is the Code of Conduct established by regulation under Pt 6 of the Police Act. See ss 3, 37.

119 (2004) 233 LSJS 110 at 111 [3].

120 *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 168-170 [95]-[99].

121 (2004) 233 LSJS 110 at 111 [3].

used as a pretext for getting rid of a member of the Police unwanted for a reason other than that of conviction for such offence.

103 Although it is true that it could normally be expected that a Police Commissioner would not abuse his or her powers, this is precisely the reason why, in cases of termination of employment (dismissal), remedies for the exceptional case where the dismissal is "harsh, unjust or unreasonable" are commonly provided by Australian law[122]. Reposing statutory and other powers in a Police Commissioner is not a fail-safe guarantee that such powers will be used correctly. The misuse of Commissioners' powers is revealed from time to time in official reports and court proceedings[123]. Wrongs happen. For unfair dismissals and terminations remedies in independent courts and tribunals are sometimes needed.

104 It follows that there is a principle to be satisfied here. Parliaments can, within their respective powers, abolish, reduce or confine such remedies as they decide. But where they express them in general and unqualified terms, courts should not perform the necessary surgery by reference to supposed implications[124]. On the basis that members of the South Australia Police are employees, they are by the Industrial Act apparently entitled to have claims of such unfair dismissal reviewed by the Commission where no other review is available and taken. I am unconvinced that such review was excluded by implication in the circumstances of this case.

105 *Battle of the maxims*: The respondent, however, relied heavily on various maxims that express canons of construction deployed by the courts when faced with problems of the present kind. I have already mentioned the maxim favouring preference for a later law over an earlier one: *leges posteriores priores contrarias abrogant*[125]. The difficulty with applying this maxim is the constantly changing character of the State laws on the respective subjects of police discipline and termination and industrial relief from unfair dismissal. As here, it is difficult to discern which law relevantly came first and is hence purportedly

---

122 See eg *Workplace Relations Act* 1996 (Cth), s 170CE(1)(a).

123 Some of the reports are mentioned in the reasons of Callinan J at [160]; cf Whitrod, *Before I Sleep: Memoirs of a Modern Police Commissioner*, (2001) at 138-191.

124 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396; *Coco v The Queen* (1994) 179 CLR 427 at 436; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 562-563 [43], 575-576 [84]-[88], 593 [134].

125 Later laws abrogate prior contrary laws.

repealed by implication[126]. Certainly, it is difficult to attribute an implied repeal to Parliament where the legislators themselves have refrained from clearly so enacting.

106 Another maxim emphasised for the respondent was that a statute of general provision will not normally be taken to override one with special provisions governing the circumstances with greater particularity: *generalia specialibus non derogant*[127]. It is true that this maxim is sometimes helpful in classifying the intersecting laws and deciding which of them must be taken to have priority[128]. In particular circumstances, I have myself approached such problems in this way[129].

107 However, a difficulty of applying this maxim is that it is sometimes contestable as to which enactment is the *special* and which the *general* provision[130]. Those more attuned to notions of industrial justice, and its importance in society and for vulnerable individuals, might regard the Industrial Act in this respect to be *special* and the Police Act (which deals with many and varied matters of police regulation) a *general* statute, not enacted to expel the particular beneficial remedies afforded against the special mischief of unfair dismissals. This is why Higgins J cautioned about the limited use that might be made of such rules of thumb[131].

108 The most enduring of the canons of construction that have been applied throughout the history of this Court is that which enjoins the decision-maker, faced with apparent statutory intersection, to endeavour, to the fullest extent permitted by the language, to read the two statutes so that each, within its own

---

126 See above these reasons at [85].

127 General expressions do not derogate from special expressions.

128 *Bank Officials' Case* (1923) 32 CLR 276. That was a case in which this rule was invoked by the majority but contested by the minority. See also *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29.

129 See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 420-422 [156]-[159].

130 See, eg, *Bank Officials' Case* (1923) 32 CLR 276 at 297 per Higgins J.

131 See above, these reasons at [61]. See also in relation to this maxim *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553-554.

sphere, can continue to operate, such that no part of either is taken to be repealed or inoperative, for Parliament has not said so[132].

109 It is this rule that helps to explain many old and recent decisions of this Court. Thus, in *Saraswati v The Queen*[133], Gaudron J, in words that have often been quoted, observed[134]:

> "It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other".

110 It is this approach to legislative intersection that was again quoted and applied by the recent and unanimous decision of this Court in *Shergold v Tanner*[135]. It was important for this Court's resolution of the supposed intersection and implied repeal that was rejected in that case. The same rule should be given effect in the present case. There were three express restrictions enacted by the South Australian Parliament in respect of the jurisdiction of the Commission in applications under s 106 of the Industrial Act[136]. None of those restrictions applies to the present case. There is no reason for this Court to invent and add a fourth restriction.

111 *Powers of an independent tribunal*: Moreover, this Court has said on many occasions that it is inappropriate to read down the provisions of statutory language conferring jurisdiction and granting powers to a court according to

---

132 *Bank Officials' Case* (1923) 32 CLR 276 at 285 per Knox CJ, 292 per Isaacs and Rich JJ. The rules of international law governing the interpretation of treaties illustrate the same problems and adopt analogous solutions: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-256, 294-296.

133 (1991) 172 CLR 1 at 17; cf *Goodwin v Phillips* (1908) 7 CLR 1 at 11; *Rose v Hvric* (1963) 108 CLR 353 at 360. There is a need to "import a contradiction": *Garnett v Bradley* (1878) 3 App Cas 944 at 966. See also *R v Champneys* (1871) LR 6 CP 384 at 394.

134 Citing *Butler* (1961) 106 CLR 268 at 276 per Fullagar J, 290 per Windeyer J.

135 (2002) 209 CLR 126 at 137 [34].

136 The exceptions are employment excluded by regulation (ss 6 and 105A), election of remedies (s 106(2) and (3)) and employees on higher remuneration (s 105A(1)).

implications not found in the express words of the law[137]. Whilst, in the past, this principle has been repeatedly expressed by reference to courts and not quasi-judicial independent tribunals, such as the Commission, a functional analysis of the principle would suggest that it applies to the jurisdiction and powers of the Commission, constituted in the way relevant to this case.

112 The Industrial Relations Commission of South Australia shares many of the ordinary features of a court. Its members are guaranteed by statute tenure and independence in their decision-making[138]. The Commission's decisions are final[139]. The Commission is empowered to punish persons for contempt[140]. An order made by the Commission, pursuant to s 109 of the Industrial Act, may be registered in a civil court. It may be enforced as a judgment of that court[141]. In such circumstances, it is clear that the Commission enjoys, and should enjoy, wide powers to deal with the variety of matters coming before it, in the confidence that it will do so with complete independence and will not misuse such powers[142].

113 Thus, in reviewing a decision by the Police Commissioner to terminate the appointment of a member of the South Australia Police, it is unimaginable that the Commission would not give weight to the special character of this form of employment; to the need for discipline and high repute on the part of members of the Police; and to the purposes of the Police as a service established to combat offences against applicable State, Territory and federal laws rendering the absence of findings of guilt of such laws a norm of such service, at least where the law in question expresses offences relevant to the capacity of the member to discharge the functions of his or her appointment with the confidence of fellow police officers, the judiciary and the community.

114 Nonetheless, for the exceptional case of an ill-considered, hasty or disproportionate decision to terminate the appointment of a member of the Police, the facility of review of a dismissal impugned as "harsh, unjust or

---

137 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

138 Industrial Act, s 32.

139 Industrial Act, s 206.

140 Industrial Act, ss 176-177.

141 Industrial Act, s 230; cf *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

142 Cf *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 at 499-500 [84].

unreasonable"[143] is unsurprising. It is unquestionably available across a wide spectrum of public employment by virtue of the express provisions of the Industrial Act. This makes the reliance of the respondent on the suggested uniqueness of this variety of public employment, and its insusceptibility to such measures, impossible to accept in the present context[144].

115 As Windeyer J pointed out in *Cobiac v Liddy*[145], the ultimate resolution of the inter-relationship of statutes such as the Industrial Act and the Police Act is not achieved by maxims. It depends on "a comparison of the actual language of each [statute], to see whether they do stand together or whether the latter has … abrogated the former".

116 Because of the assumption that Parliament normally intends two statutes to work harmoniously together, so that each operates within its respective field of application[146], courts entrusted with making a judgment about the operation of the two statutes do not look at the problem in a quest to find hypothetical or possible conflicts[147]:

> "Legislation being concerned with the highly practical business of lawmaking, the issue in every case of a suggested conflict will be the practical ways in which the legislation operates together and whether, in that context, an irreconcilable conflict of duties really arises."

I am unconvinced that a conflict of that order has been shown in this case.

117 *The effect of re-employment*: Consider, for example, the respondent's complaint that the Industrial Act does not mesh with the Police Act because it omits to provide expressly for the quashing of the Commissioner's decision to terminate the appointment of a member of the Police Force; to provide for the administration of a new oath or affirmation upon "re-employment"; to provide expressly for practical details such as restoration of insignia and equipment; to

---

143 Industrial Act, s 108(1).

144 Cf *North West County Council v Dunn* (1971) 126 CLR 247 at 251.

145 (1969) 119 CLR 257 at 268.

146 *Hack v Minister for Lands* (1905) 3 CLR 10 at 23-24; *Maybury v Plowman* (1913) 16 CLR 468 at 473-474, 480; *Lukey v Edmunds* (1916) 21 CLR 336 at 341, 352; *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 623.

147 *Royal Automobile Club* (1992) 27 NSWLR 282 at 294.

provide for the displacement of newly appointed employees; and to afford alternative responses to the proved offence short of termination.

118 These arguments have a superficial attractiveness. But when close attention is paid to the language of s 109 of the Industrial Act, the attraction melts away. It is clear from s 109 (and its provision for restoration to the former conditions of employment; for determination by the Commission exceptionally of other conditions; for the restoration of intervening salary and adjustment of payments) that the "re-employment" contemplated by the Industrial Act is to the position exactly as it was before the dismissal determined by the Commission to be "harsh, unjust or unreasonable". The fact that other persons have been employed in the position previously occupied by the re-employed member is specifically provided for in s 109(1)(b) of the Industrial Act. The case where re-employment would not be appropriate is dealt with by s 109(1)(c). But where "re-employment" is ordered, despite arguments deserving of weight concerning the Police Commissioner's powers and the disciplined character of the Police, the Industrial Act provides for restoration of the employee to the employment status which the employee held before the dismissal. He or she is then necessarily subject, in this employment, to the former oath or affirmation and to all the requirements of the Code previously applicable. Indeed, the police member who has been "re-employed" is subject to any action that the Police Commissioner may take under s 40(1) of the Police Act.

119 Thus, if it were found that the termination of the person's employment was because of unfair procedures, such as a failure to hear the police member or to consider the evidence, there is no reason why, acting in a just and lawful way, the Police Commissioner could not proceed once again to terminate the employment of the police member, but to do so without the procedural defects that led to the order for re-employment under s 109(1) of the Industrial Act.

120 Alternatively, if the re-employment were ordered because the previous action of the Police Commissioner was judged harsh or unreasonable, by virtue of being disproportionate to the offence found, I see no reason why the Police Commissioner could not proceed to a decision and action, short of termination, within the large range of powers afforded to the Commissioner under s 40(1) of the Police Act. "Re-employment" in this context means no more than reinstatement in the position previously held by the employee concerned[148]. In the cases to which it applies, the Industrial Act must be given effect.

121 Relief of this kind, afforded by industrial tribunals in cases of unfair dismissal, has been conventional in Australia for nearly a century. There is

---

148 *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 79 ALJR 975 at 978 [14], 980 [28], 989 [68]-[69]; 215 ALR 87 at 90-91, 93, 104-105.

nothing in Pt 6 of Ch 3 of the Industrial Act that suggests that it is different in this case. The re-employed employee is not guaranteed an appointment for life. He or she is not immune from the ordinary incidents of the employment to which the employee is restored. It is true that the earlier action of the Police Commissioner is not quashed. But, in effect, the order for re-employment under s 109 of the Industrial Act has the same consequence. No other reading of the two Acts would give the language of each its full force and effect according to its terms.

122 Discipline in a police service is important. But, according to the Industrial Act, fairness in termination decisions is also important for the affected employees in South Australia. The two objectives of the respective Acts are not irreconcilable. Upon one view, a harsh, unjust or unreasonable termination of the appointment of a police officer, unrepaired by any opportunity of external review, may undermine, rather than promote, discipline within the South Australia Police.

123 *Consistency with the Convention*: Finally, it is important to remember the unusual provisions of s 108(2)(a) of the Industrial Act instructing the Commission, in deciding whether a dismissal was harsh, unjust or unreasonable, to have regard to the Convention. Although it is not uncommon to see references to such Conventions in federal legislation[149], their appearance in State and Territory laws in Australia is much less common. It must thus be assumed that the Parliament of South Australia took the course of scheduling the Convention deliberately and for the high purpose of ensuring, throughout the State, conformity of State law, and relevant State decision-making, with the provisions of international law stated in the Convention.

124 Where an enactment has been adopted by an Australian legislature, with a view to implementing an international Convention as part of municipal law, it is normal to construe any ambiguous provisions in the enactment in such a way, so far as possible, as to ensure compliance with the Convention, that being the imputed purpose of the legislature concerned[150]. In so far as there is an ambiguity in the language of ss 106, 108 and 109 of the Industrial Act, or uncertainty as to whether that Act applies to the case of termination of the employment of a member of the South Australia Police, it would conform to

---

149 See, eg, *Workplace Relations Act* 1996 (Cth), ss 93A, 170BA-170BC, 170BG, 170CA-170CB, 170CK, 170FA, 170GC, 170KA, 170KC.

150 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97]; *Coleman v Power* (2004) 220 CLR 1 at 27-28 [19], 92-96 [242]-[249]; *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100 at 112-115 [56]-[79].

normal principles for the construction of statutes of this character to prefer the interpretation that fulfils the objects of the Convention to an interpretation that would involve a departure from the Convention.

125 It was suggested in argument, faintly, that there would be no derogation from the norms of the Convention if s 40(1)(d) of the Police Act were construed to uphold an unreviewable termination of the "employment" appointment of a member of the Police because such a member would still have a facility to approach the Supreme Court for judicial review, invoking the modern equivalents of the prerogative writs[151].

126 Given the language of the Convention, this is an unpersuasive argument. Article 8 requires that the worker whose employment has been terminated should be entitled to "appeal" to "an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator". But Art 9 makes it clear that mere access to a court, for the type of remedies typically available on judicial review, would not suffice. Judicial review is normally limited to relief for errors of jurisdiction and law. Such errors can include departures from the requirements of natural justice. However, in the ordinary case, the review is confined to considerations of power and lawfulness. As such, as this Court has said repeatedly, judicial review is not addressed to reconsideration of the factual merits[152].

127 Article 9 makes it clear that the Convention is concerned with the merits and not simply formalities, procedures or matters of jurisdiction. The "bodies referred to in Article 8", including the "court" there mentioned, must be "empowered to examine the reasons given for the termination and the other circumstances relating to the case". Judicial review for errors of jurisdiction and law would not authorise a court to do what Art 9 requires. Consideration of "whether the termination was justified" clearly demands consideration of the merits of the termination. This means consideration of whether the termination was, as s 108 of the Industrial Act puts it, "harsh, unjust or unreasonable". Such consideration is not normally possible, at least directly, in proceedings analogous to the prerogative writs.

128 The consequence is that, if an employee, such as a member of the South Australia Police whose appointment had been terminated by the Police Commissioner, had access to the Commission to hear and decide a complaint,

---

151 The Supreme Court of South Australia has jurisdiction to make orders in the nature of *certiorari*. See Supreme Court Rules 1987 (SA), r 98.01(2).

152 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 597-600; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 571 [168], 579-580 [195].

claiming relief under s 106 of the Industrial Act, the requirements of the Convention would be satisfied. Its provisions would be fulfilled in South Australia, as was the purpose of the Parliament of that State in enacting s 108 of the Industrial Act. If, however, a person such as the appellant were confined to judicial review in the Supreme Court, there would be a departure from the remedies contemplated by the Convention, particularly when Art 8 is read with Art 9.

129 It follows that the normal rule for the construction of legislation upholding the implementation of an international treaty favours the interpretation advanced by the appellant[153]. This Court should uphold that interpretation. It should do so because it is the only way to give effect to the Convention in this case as the Parliament indicated was its purpose and objective.

Conclusion and orders

130 The result is that, whilst, as in virtually every case, in default of express provision clarifying the intersection, there are arguments both ways, the preferable interpretation of the interaction of the Police Act and the Industrial Act is that submitted for the appellant.

131 Each Act is important. The two Acts can, as a matter of practicality, operate together. Adopting this course conforms to the regular and recent practice of this Court in similar cases. It gives effect to the language of both Acts, according to their terms and operating in their respective spheres. It upholds an important and beneficial provision enacted by the South Australian Parliament to repair instances of unfair dismissal and to remedy shortcomings of common law remedies. Instances of unfair dismissal are inherent, as possibilities, in an uncontrolled interpretation of the Police Act.

132 The appellant's interpretation also fulfils the objective of the South Australian Parliament to ensure the availability of a substantial review of the justification of a termination of employment in the case of police members that would not otherwise be achieved on the respondent's argument. Express exemptions of such police members would have been readily available but were not taken. This Court should not imply an exemption from the operation of the Industrial Act in this case where the State Parliament has refrained from expressly so providing.

133 The appeal should be allowed with costs. Orders 2 and 3 of the orders of the Full Court of the Supreme Court of South Australia should be set aside. In place of those orders, the appellant's application for leave to appeal to the Full

---

153 Cf *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29].

Court should be granted and the appeal to that Court should be allowed with costs. The matter should be remitted to the Industrial Relations Court of South Australia to be determined according to law.

CALLINAN J.

Issue

134 This appeal raises a question whether legislation enacted with respect to the establishment and administration of the Police Force of South Australia should be read as subject, so far as the termination of members of the Police Force is concerned, to industrial legislation of general application throughout the State.

Facts and earlier proceedings

135 The appellant was a police constable in the South Australian Police Force. On 27 March 2001 he was convicted of assault in the Adelaide Magistrates Court. He filed, but did not pursue an appeal to the Supreme Court of South Australia against his conviction. The Commissioner of Police terminated his service in the Police Force on 22 November 2001 as a result of it. He unsuccessfully sought to have the District Court of South Australia review the termination.

136 Next, on 22 May 2002 the appellant made an application to the Industrial Relations Commission of South Australia ("the Commission") purportedly under s 106 of the *Industrial and Employee Relations Act* 1994 (SA) ("the IER Act")[154] for a determination, pursuant to s 108 of that Act, that his termination from the Police Force was harsh, unjust or unreasonable. He sought a further order, for re-employment or other relief, provision for which was made by s 109 of the IER Act[155].

137 An Industrial Relations Commissioner referred the following question of law to the South Australian Industrial Relations Court pursuant to s 214(1) of the IER Act:

> "1. ...

---

154 The IER Act was renamed the *Fair Work Act* 1994 (SA) by the *Industrial Law Reform (Fair Work) Act* 2005 (SA). The appellant's rights under the IER Act had continued as at the date of his application to the Commission.

155 Section 109 empowers the Commission to order re-employment in another position or payment of compensation if re-employment in the original position is impractical or inappropriate.

2. Is the Industrial Relations Commission of South Australia deprived of jurisdiction to determine the applicant's application on any of the following grounds:

2.1 That the *Police Act 1998*, the *Police Regulations 1999* and the *Police (Complaints and Disciplinary Proceedings) Act 1985* provide a complete code in respect of the applicant's dismissal such that section 106 of the *Industrial and Employee Relations Act 1994* has no application; or

2.2 That the applicant's application No DCAAT 60 of 2001 to the District Court of South Australia is a remedy for dismissal and that the applicant is thereby estopped by section 106(2) of the *Industrial and Employee Relations Act 1994* from bringing this application?"

138 The Full Court of the Industrial Relations Court (Senior Judge Jennings, Judge Parsons and Judge Gilchrist) unanimously held that it did not have jurisdiction to entertain the appellant's application for relief under Ch 3, Pt 6 of the IER Act.

139 The principal basis of the decision of the Industrial Relations Court was that the *Police Act* 1998 (SA) manifested a clear intention by Parliament to render decisions made by the Commissioner of Police to terminate serving members of the Police Force immune from review by the Commission, notwithstanding the breadth of its jurisdiction with respect to harsh, unjust or unreasonable dismissals from employment generally. This decision was consonant with earlier decisions of that Court[156].

140 The appellant then filed a notice of appeal to the Full Court of the Supreme Court of South Australia. The appeal was held to be incompetent by the Full Court but as the appellant was not legally represented, it exercised its discretion to treat the matter as an application for leave to appeal, and heard full argument from both the appellant and the Commissioner for Public Employment who responded to the notice of appeal.

The Full Court's reasons

141 The Full Court was constituted by Prior, Debelle and Bleby JJ. Bleby J wrote the leading judgment with which Prior J agreed. Debelle J dissented.

---

156 *McQuillan v Commissioner for Public Employment (Department of Correctional Services)* (1993) 51 IR 356; *Stone v Commissioner for Public Employment* (2002) 124 IR 120.

142 The majority accepted that the Commissioner of Police acted under s 40(1)(a) of the *Police Act* in dismissing the appellant. Section 40 relevantly provided:

> "(1) If a member of SA Police or police cadet –
>
> (a) is found guilty of an offence under a law of this State, the Commonwealth or another State or a Territory of the Commonwealth; ...
>
> the Commissioner may take action, or order the taking of action, of one or more of the following kinds in relation to the person:
>
> (d) termination of the person's appointment;
>
> (e) suspension of the person's appointment for a specified period;
>
> (f) reduction of the person's remuneration by a specified amount for a specified period (but not so that the total amount forfeited exceeds the amount prescribed by regulation);
>
> (g) where the person is a member of SA Police, transfer of the member to another position in SA Police (whether with or without a reduction in rank, seniority or remuneration);
>
> (h) where the person is a member of SA Police, reduction in the member's seniority;
>
> (i) imposition of a fine not exceeding the amount prescribed by regulation;
>
> (j) where the person is a police cadet, withdrawal of specified rights or privileges for a specified period;
>
> (k) a reprimand recorded in the person's conduct and service history kept under the regulations;
>
> (l) an unrecorded reprimand;
>
> (m) counselling;
>
> (n) education or training;
>
> (o) action of any other kind prescribed by regulation."

143 In the Full Court, Bleby J also found that the *Police Act* excluded the operation of the more general provisions of the IER Act. After referring to the reasons of Griffith CJ in *Goodwin v Phillips*[157] and of Gaudron J in *Saraswati v The Queen*[158], his Honour identified the relevant authorities and principles and said this[159]:

> "It follows that if the two Acts can be read as being able to operate together they should be allowed to do so: *Trade Practices Commission v BP Australia Ltd*[160]. In other words, every attempt should be made to reconcile the competing statutes before holding that there has been an implied repeal.
>
> What I have said relates to the position where a later Act dealing with a specific situation is said to repeal, by implication, the earlier Act of more general application. Another similar situation can sometimes arise where a later Act of general application is said to have no effect on a situation covered by an earlier specific Act. The classic exposition of this canon of construction is contained in the judgment of the Earl of Selborne LC in *Seward v Vera Cruz*[161]:
>
> > 'Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.'"

144 His Honour then turned to the Acts in question. The issue, his Honour said, was whether there was an implied partial repeal of the IER Act by the *Police Act*. After examining the relevant provisions he said[162]:

---

157 (1908) 7 CLR 1.

158 (1991) 172 CLR 1.

159 *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110 at 115-116 [26]-[27].

160 (1985) 7 FCR 499 at 506.

161 (1884) 10 App Cas 59 at 68.

162 *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110 at 119-120 [48]-[55].

"[I]n my opinion the *Police Act* was intended by Parliament to deal exclusively with all terminations of employment of members of the South Australian Police. That intention is manifested by a number of factors.

In the first place, there are the possibly limited grounds on which the Commissioner is able to terminate a member of the police force in any event. Those grounds are much narrower than grounds available to an employer at common law. Next, there are procedural obligations required to be observed in ascertaining whether the relevant grounds exist for the termination. In that sense the *Police Act* has made its own express provisions for the application of procedural fairness for disciplinary terminations to the exclusion of those contained in the [IER Act].

The fact that Parliament has provided for a system of review of determinations to terminate an officer on some grounds but not on others is, in itself, significant. The review is prescribed only for non-disciplinary terminations. Put another way, termination taken for disciplinary reasons under s 40 of the *Police Act* is the only type of termination not subjected to some form of review in the *Police Act*.

The police force, like the armed services, but unlike any other body of employees, must at all times be and remain a highly disciplined force if it is to achieve its objective of reassuring and protecting the community in relation to crime and disorder by the sort of service it is required to provide: see s 5 *Police Act*. Section 6 of the *Police Act* vests responsibility for the control and management of the South Australian Police in the Commissioner, subject only to any written directions of the Minister. However, s 7 specifically provides that no ministerial direction may be given to the Commissioner in relation to 'the appointment, transfer, remuneration, discipline or termination of a particular person'. Thus, the Commissioner's power to control and manage the police force in those particular areas is to be absolute and without interference. Nevertheless, by s 10 of the *Police Act* the Commissioner is required to ensure that management practices, particularly those relating to personnel management, are followed and are directed towards certain objectives stated within the section. To that end, the Commissioner is empowered by s 11 to give general or special orders for the control and management of the South Australian Police. These are all detailed statutory obligations. If there is a failure to observe them, the Commissioner will be open to judicial review.

In my opinion, Parliament has manifested the clear intention that, within those statutory parameters, the Commissioner should have complete control over the police force – a control which cannot be compromised by a determination of the Industrial Relations Commission

that, according to generally accepted community standards, a dismissal is harsh, unjust or unreasonable.

It is not surprising that Parliament should have set up a dedicated system of review of a decision of the Commissioner to terminate a member of the police force where questions of discipline are not involved. Equally, it is not surprising that Parliament should wish to confer such apparently wide powers on the Commissioner, without any right of review, in respect of matters of discipline which are fundamental to the satisfactory operation of a disciplined police force. It has, nevertheless, ensured that necessary safeguards of proof of the underlying facts, according to acceptable standards, have been built into the *Police Act* to ensure that termination cannot be effected without satisfactory proof of those underlying facts. In my opinion, there is a necessary implication in the terms of the *Police Act* that the provisions of Chapter 3, Part 6 of the [IER Act] are repealed, at least to the extent that they might otherwise apply to members of the South Australian Police.

The Commissioner terminated Mr Ferdinands' employment because he had been found guilty of a charge of assault, contrary to s 39 of the *Criminal Law Consolidation Act*. That is sufficient justification for the Commissioner to have acted under s 40 of the *Police Act*. It was therefore a valid termination, but one which is not subject to review under Chapter 3, Part 6 of the [IER Act].

Accordingly, I do not consider that Mr Ferdinands has an arguable case that the Industrial Relations Court was wrong in its decision in *Stone* or *McQuillan* or that it was wrong in this case. For these reasons I would refuse leave to appeal from the Industrial Relations Court."

145 Justice Debelle's reasons for reaching a different opinion appear from the following paragraphs[163]:

"The very width of these powers [under s 40(1) of the *Police Act*] highlights the possibility that the Commissioner might on some occasion terminate an officer's appointment when another form of discipline would have been entirely adequate. For example, a police officer might be found to have been guilty of exceeding the speed limit. Whilst that might be a poor example for police officers to set to the public, it is unlikely to warrant termination of appointment as a police officer. One can readily identify a large number of offences where, according to circumstances, termination of the police officer's appointment would be unjustified.

---

163 *Ferdinands v Commissioner for Public Employment* (2004) 233 LSJS 110 at 111-112 [3]-[6].

> Although the *Police Act* 1998 deals with issues affecting the administration of SA Police including discipline and in that respect might be considered to be a special Act in contrast with the more general application of the [IER Act], it was nevertheless enacted against the legislative background of the [IER Act] and the provisions of Part 6 of that Act relating to unfair dismissal. It is, therefore, reasonable to infer that it was not intended to deny a police officer a right to make an application under Part 6 for unfair dismissal. The absence, therefore, from the *Police Act* of a right of review of a decision terminating appointment under s 40 does not I think have the consequence that it was not intended that a police officer could not [*scil*, could] make an application under Part 6 of the [IER Act]. If Parliament had intended that the rights available under Part 6 should not be available to police officers, it could easily have so provided in the *Police Act*.
>
> The fact that the termination of employment under s 40 is the only kind of termination of employment under the Act is not, standing alone, a sufficient reason for concluding that the intention of the *Police Act* is to invest the Commissioner with a non-reviewable authority under s 40 to terminate employment. In addition, I do not think that the powers of the Industrial Relations Commission to determine that a dismissal is harsh, unjust or unreasonable compromises the disciplinary powers of the Commissioner. The question whether a dismissal is harsh, unjust or unreasonable will be determined by reference, among other things, to the need for proper standards of conduct in and the overall discipline of the police force.
>
> In my view the provisions of the *Police Act* 1998 do not have the consequence that a police officer may not apply under Part 6 of the [IER Act] for relief where his employment as a police officer has been terminated pursuant to s 40 of the *Police Act*. One consequence of this conclusion is that there is a remedy available if the Commissioner terminates appointment but not if he exercises any of his other powers listed in s 40(1). However, termination of appointment is such an extreme remedy that the intention is to enable a remedy for that but not for the exercise of any of his other powers of discipline in s 40(1)."

The appeal to this Court

146 The appellant's principal submission in this Court is that the jurisdiction of the Commission under the IER Act extends to all employees in the State of South Australia except those specifically exempted; that it extends to police officers terminated under s 40(1) of the *Police Act*; and that there is no statutory language in the IER Act that reduces its apparently very broad jurisdiction.

147 An alternative submission was put by the appellant. It is, that even if the jurisdiction of the Commission can be read down by implication, there is no reason in this case why such a reading down should occur as the two Acts under examination can operate in a consistent fashion.

148 The respondent's submission substantially adopts the reasoning of the majority in the Full Court, that the *Police Act* constitutes a self-contained scheme for challenges to decisions of the Police Commissioner. That submission should be accepted. That it is correct follows from the detailed provision that the *Police Act* makes for all aspects of the engagement and disciplining of members of the force, and by reason of the nature of the duties and obligations of police officers to which Bleby J made reference, and which need no repetition. It may be observed at this point that neither party sought to rely on *Enever v The King*[164] in which the Court[165] discussed the independent position of police officers, and the absence of vicarious liability at common law, of the State for them. Therefore, the case falls to be decided on the basis that its outcome depends entirely on the proper construction of the relevant enactments.

149 It is not irrelevant that the *Police Act* is a later enactment. I would have thought that if the legislature had intended the IER Act to apply to police officers it would have said so in terms in the *Police Act* making clear in doing so the extent to which the earlier was to operate in relation to probationary officers, cadets, commissioned officers and other officers respectively, and the relationship between the Tribunal to which I will refer later, and the Commissioner. It is not to the point that like provisions to the relevant ones in the two enactments may have appeared in earlier enactments. What is to the point is that the legislature, in enacting the *Police Act* in 1998 must be taken to have rejected the subjection of any part of it to the IER Act, by making no reference in it to the matters to which I have referred.

150 The effect of the relevant provisions of the *Police Act* may be summarized. By ss 20, 21, 23, 24, 27 and 29 the Commissioner is empowered to appoint, promote, transfer and to dismiss officers, in certain circumstances. Section 27 is concerned with the probationary appointment of police officers. Under s 27(3), the Commissioner may terminate the employment of a member appointed on probation, "having regard to the person's suitability for permanent appointment". Section 37 provides for the making, by regulation, of a police Code of Conduct ("the Code"). Such a code has been made by regs 11-24 of the Police Regulations 1999 (SA). Under s 39 of the *Police Act* the Commissioner may charge a member with a breach of the Code. If the breach is not admitted by

---

164 (1906) 3 CLR 969.

165 (1906) 3 CLR 969 at 975-976 per Griffith CJ, 992 per O'Connor J.

the member, it must be determined by the Police Disciplinary Tribunal, which is established by s 37 of the *Police (Complaints and Disciplinary Proceedings) Act* 1985 (SA).

151 Part 6 of the *Police Act*, which is headed "Misconduct and discipline of police and police cadets" deals with misconduct by, and the disciplining of members of the Police Force and cadets. Section 40(1), which is in Pt 6, states a catalogue of measures available to the Commissioner, from counselling, training or an unrecorded reprimand, a recorded reprimand, a fine or reduction in seniority or rank, to a suspension or termination of the employment of a member, or a cadet, in certain circumstances. Those circumstances are, if a member or a cadet is found guilty of an offence under a law of South Australia, the Commonwealth or another State or Territory, or admits in accordance with the *Police Act* a breach of the Code with which he or she has been charged, or is found guilty of a breach of the Code in proceedings before the Police Disciplinary Tribunal.

152 Part 7 of the *Police Act*, which is headed "Termination and transfer of police", relates to the termination and transfer of officers for reasons unrelated to misconduct. Under s 45(1), which is in Pt 7, the Commissioner may terminate the employment of a member by reason of incapacity owing to physical or mental disability or illness. Under s 46(1), which is also in Pt 7, the Commissioner may terminate the employment of a member by reason of unsatisfactory performance if it is not practicable to transfer that member to a position of equal or lower rank with duties suited to the member's capabilities or qualifications.

153 Section 48 provides that a member may apply to the Police Review Tribunal[166] for review of a decision to terminate the member's appointment during a period of probation, or on a ground for termination under Pt 7 of the *Police Act*. There is force in the respondent's submissions that it follows that it is a likely inference that no application may be made to the Police Review Tribunal for review of a decision to terminate a member's appointment under Pt 6. Similarly, a decision to terminate the employment of a police cadet may not be reviewed by that Tribunal.

154 Section 51 of the *Police Act* provides that, following a decision by the Police Review Tribunal, the applicant or the Commissioner may appeal to the Administrative and Disciplinary Division of the District Court.

155 Section 46 of the *Police (Complaints and Disciplinary Proceedings) Act* provides that a party to proceedings in the Police Disciplinary Tribunal, or a

---

166 The Police Review Tribunal is established by Sched 1 to the *Police Act*.

member against whom the Commissioner of Police makes an order imposing punishment for a "breach of discipline"[167] may appeal to the District Court. Under the Police Regulations 1982 (SA), which were made under the *Police Act* 1952 (SA), the Commissioner could lay a charge only for a breach of the Regulations (which charge, if not admitted, would be determined by the Police Inquiry Committee), although the Commissioner could impose a penalty upon a member found guilty of a breach of the Regulations, or of an offence against "the Act or any other Act".

156 It is right and relevant, as the respondent submits, that the effect of the *Police Act*, the *Police (Complaints and Disciplinary Proceedings) Act* and the Police Regulations is that an appeal to the District Court is available from each of the following decisions: a decision of the Police Review Tribunal affirming a decision of the Commissioner to terminate the employment of a member under Pt 7 of the *Police Act* for physical or mental incapacity or unsatisfactory performance; a decision of the Police Review Tribunal affirming a decision by the Commissioner to terminate the appointment of a member on probation; a finding by the Police Disciplinary Tribunal that a member is guilty of a breach of discipline; and a decision by the Commissioner imposing punishment for a breach of discipline, but not, it may be observed, of the Commissioner to terminate the service of a member of the Police Force on his or her conviction of an offence of the kind of which the appellant was convicted.

157 The respondent also points out that a convicted member does have rights of recourse to courts beyond the court entering the conviction (which conviction operates as the jurisdictional precondition to the exercise of the Commissioner's power). The member may appeal in accordance with the statutory regime governing an appeal in South Australia. In this case the appellant apparently chose to abandon an appeal which he had filed in the Supreme Court against the conviction.

158 It seems to me that it is unlikely in particular, that the legislature, having made express provision for a review of a termination of a probationer, or a termination under Pt 7 of the *Police Act* for disability or illness (s 45), or unsatisfactory performance (s 46), would have intended that members of the Police Force otherwise terminated, have an entirely different, totally unmentioned (in the *Police Act*) right of recourse to the Commission. Nor can I accept that the legislature could have failed to make appropriate provision for a

---

167 "[B]reach of discipline" is defined in s 3 of the *Police (Complaints and Disciplinary Proceedings) Act* to mean "a breach that may be the subject of a charge by the Commissioner under the *Police Act 1952*". The parties argued on the basis that this definition applied to actions by the Commissioner under the *Police Act* 1998 (SA).

review of a member's termination on conviction by oversight. The better view is that the legislature deliberately armed the Commissioner with a generally unreviewable right of termination for criminal conduct by a member. I say "generally unreviewable" because a decision of the Commissioner to dismiss a member under s 40 of the *Police Act* may be subject to judicial review upon appropriate grounds, in the Supreme Court of South Australia[168].

159 It may also be – and I express no concluded view on this – that an officer might be entitled to seek relief by way of mandatory injunction, or an order in the nature of certiorari or mandamus by reason of a breach by the Commissioner of ss 10(2)(b), 10(2)(c) and 10(2)(f) of the *Police Act*[169]. Those sections may, in any event, in an appropriate case, be relevant to an application to the Supreme Court for certiorari or a like remedy.

160 That this may be so is not of itself sufficient reason to construe the *Police Act* as I do. It does however open up the possibility of the availability of a remedy in a case of serious injustice, a matter of which the legislature may be

---

168 The Supreme Court of South Australia has jurisdiction to make orders in the nature of certiorari: Supreme Court Rules 1987, r 98.01(2). Review of the Commissioner's decision may be available on grounds of, *inter alia*, improper purpose, *Wednesbury* unreasonableness, *ultra vires* and breach of the rules of procedural fairness.

169 Those paragraphs provide as follows:

"**General management aims and standards**

...

(2) With respect to personnel management, the Commissioner must ensure that practices are followed under which –

...

(b) employees are treated fairly and consistently and are not subjected to arbitrary or capricious administrative decisions; and

(c) there is no unlawful discrimination against employees or persons seeking to become employees; and

...

(f) employees are afforded reasonable avenues of redress against improper or unreasonable administrative decisions".

taken to have been aware in enacting the *Police Act* in the form in which it has. It is not difficult to understand why, having regard to the number of public inquiries and the misconduct by police officers that they have uncovered[170], a legislature might take the view that criminal conduct, the subject of a conviction after due process, and the exhaustion of all avenues of appeal, should result in the liability of a police officer to termination without any further right of challenge.

161 That the definition of "employee"[171] in s 4 of the IER Act may appear capable of embracing a police officer does not require any different conclusion. The *Police Act*, taken with the *Police (Complaints and Disciplinary Proceedings) Act*, is a specific statutory scheme, clear, explicit and comprehensive with respect to the matters with which it deals. The subject matter with which these enactments are concerned includes not only all aspects of the disciplining of police officers, but also their engagement, promotion and termination. Public employees they may be, but public employees of a kind for whom specific provision is unnecessary and has not been made, they are not.

162 The appellant places reliance upon s 105A(2)(c) of the IER Act which provides as follows:

> "(2) The regulations may exclude from the operation of this Part or specified provisions of this Part –
>
> ...
>
> (c) employees whose terms and conditions of employment are governed by special arrangements giving rights of review of, or appeal against, decisions to dismiss from employment which, when considered as a whole, provide protection that is at least as favourable to the employees as the protection given under this Part".

163 He points out that the legislature by mere regulations could, and should, if it wished to put police officers clearly beyond the reach of the IER Act, have

---

170 Recent examples include: Wood, *Royal Commission into the New South Wales Police Service: Final Report*, 1997 (the Wood Royal Commission) and Fitzgerald, *Report of a Commission of Inquiry pursuant to Orders in Council*, 1989 (the Fitzgerald Inquiry).

171 Section 4 provides: "'**employee**' means a person employed for remuneration under a contract of employment and includes a public employee; ... '**public employee**' means – (a) a person employed under, or subject to, the *Government Management and Employment Act 1985*; or (b) any other person employed for salary or wages in the service of the State".

excluded police officers by regulation in terms under that section. The short answer is that, by the *Police Act*, this has been differently but clearly done, and an excluding regulation would therefore be otiose. Nor is there anything else in Pt 6 of the IER Act to indicate an intention to bring police officers within its purview.

164 That the IER Act, in s 108 requires that regard be had to the Convention concerning Termination of Employment at the Initiative of the Employer 1982 ratified by Australia, and referred to in detail in the judgment of Kirby J, does not compel any different a conclusion. Its relevance is to applications duly made to and to be decided by the Commission. It is not relevant to acts done by the Commissioner of Police under express authority conferred upon him by the *Police Act*.

165 It is unnecessary to explore in detail the difficulties to which an attempted reinstatement of a police officer dismissed by the Commissioner could give rise. Even if they were surmountable, the fact that they undoubtedly exist tends to lend force to the construction of the relevant enactments that I prefer. In any event, for the other reasons that I have given, the appeal should be dismissed.

166 I would order that this be done with costs.