BEFORE THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES IN COURT SESSION.

No. IRC 3124 of 2000

VALDA JUNE KERRISON
Applicant

NEW SOUTH WALES TECHNICAL AND FURTHER EDUCATION COMMISSION
Respondent

RESPONDENT'S WRITTEN SUBMISSIONS

INDEX OF SUBMISSIONS

These submissions are organised as follows:

A. THE PROCEEDINGS

I. Pursuant to her application as amended on 3 January 2001 the Applicant seeks a declaration as to her employment status with the Respondent (claiming that her employment has never been terminated) and a further declaration as to her entitlements to be paid or emoluments pertaining to her position.

2. In the grounds and reasons provided in support of the application the Applicant alleges, inter alia, bad faith and/or malafides in relation to a range of actions taken by persons with in TAFE which related to her medical retirement. These matters were not particularised in the application when originally filed in August 2000 but were included in the amended application filed on 3 January 2001.

3. The events which are central to the proceedings occurred in 1995 and had their origins prior to this date.

4. Although the Applicant presumably relies on Section 154 of the Act, and possibly other statutory provisions, there has been no articulation of the jurisdictional basis for the declarations sought, i.e. the basis on which it is said that the declarations sought are in relation to a matter in which the Commission has jurisdiction.

5. As detailed below the Respondent will submit that, apart from the fact that no jurisdictional basis for the making of the declarations has been identified, such declarations would not be made.

6. In particular the Respondent submits that the basis for neither declaration has been made out on the evidence.

7. In any event it is submitted that the Commission, in the exercise of its discretion, would not grant the declarations in the circumstances of this case.

B. GENERAL

8. The Applicant comes to the Commission claiming that she has been grievously wronged by a large range of people both within and beyond TAFE. It is clear from her evidence and demeanour that she feels that she has been badly damaged by the actions of these people. These people include persons (such as Ms McGregor and Ms Walshaw) who have given sworn evidence of numerous steps taken by them to assist the Applicant both generally and with respect to the various problems that she experienced within TAFE prior to her medical retirement. They also include others such as Ms Robison and Mr Quinn both of whom were discharging duties to assist the Applicant in relation to rehabilitation efforts at different times. According to the Applicant these people are, however, involved in a web of decisions and actions which have been (presumably calculatedly) designed to damage her.

9. It is submitted that the Commission would have no difficulty forming the conclusion that the Applicant is a person who is completely unwilling or unable to take anything other than a myopic view of events which touch her. She appears able to distil or filter out of such events aspects which she construes as damaging to her without any apparent ability or willingness to consider the context in which those events have taken place. This has led the Applicant into the position of taking a completely selective view of events or documents affecting her as well as

leading her believe that other people's actions must have been taken with her (and specifically damage to her) in mind..

10. It is submitted that these characteristics had profound effects not only for the Applicant within TAFE (as the evidence demonstrates) but also for the approach taken by the Applicant to these proceedings. That approach has been either to distort or selectively interpret statements or correspondence, picking out or "focusing on" only those sentences or aspects which the Applicant perceived to be damaging to her, and ignoring or "backing off' from either a proper interpretation or the entirety of the relevant statement or document and or the context in which such statement or document was made or came into existence.

11. Although it is submitted that the above has characterised the Applicant's general approach to her employment at TAFE as well as this proceeding, some important examples should be noted.

(a) The Applicant has apparently seen the root of her problems in relation to medical retirement in the letter from Dr Ramsey to Dr Willmott of 17 January 1995 (annexure A to Exhibit 21) . This appears to be the basis of her bad faith allegation. She asserts that in that letter Dr Ramsey urged Dr Willmott to refer her to Healthquest. A proper reading of the letter shows that Dr Ramsey was doing no such thing. He was, in fact urging Dr Willmott to continue to provide support to the Applicant and merely suggesting that it might be appropriate to make arrangements to have her seen by Healthquest. The Applicant, other than misconstruing the letter -and suggesting that it permeated everything that followed - has completely ignored the fact

that Dr Willmott did not then refer the Applicant to Healthquest. The Applicant was only referred to Healthquest following events in April 1995 detailed in the evidence of the Respondents considered below.

(b) The cross-examination of the Applicant at pages 184.35 196.20 is a very significant pointer to the Applicant's approach to the evidence and to persons who were trying to assist her. The Applicant's position which she sought to include in her

affidavit Exhibit 29 paragraph 97 was that Mr Quinn in April 1994 was offering her only the options of retiring or resigning (ie threatening options). Objection was taken to this paragraph and Exhibit 26 was shown to the Applicant as plainly disclosing that rehabilitation efforts as well as other options were also being put forward. The Applicant's response when Exhibit 26 was placed before her is significant and symptomatic as showing that the Applicant said that she only focused on those aspects which she perceived as threatening to her and ignoring the rest. See in particular T page 185.55 to 186.5; 187.30, 188.20 (as to what "hit me in the eye") - 188.45, 189.10 188.45, 190.1 - 190.30,-191.1 - 191.30, 191.40 - 191.55 and 193.10 - 193.15 where the witness described why she only read the adverse aspects on the basis that it was "like trying to grasp something that is hot".

It is submitted that this extract from the transcript provides most graphic evidence of the Applicant's approach to matters affecting this case.

(c) In her affidavit Exhibit 29 paragraph 139.3 the Applicant referred to a briefing paper prepared by Ms O'Sullivan to Dr Willmott. The part quoted by the Applicant read:

> *"5: Recommendations*
> 5: I That option I be implemented...&is option may result In stress related leave by Ms Kerrison. However this In the long term may better position the Institute to refer Ms Kerrlson to the Government Medical Officer (Healthquest) for an assessment".

(d) The Applicant was cross-examined about this affidavit at pages 241 -242 and this cross-examination revealed that Ms Kerrison had selectively left out the last sentence of the document which made it quite clear that what Ms O'Sullivan was proposing was intervention that would be helpful in stabilising *Ms* Kerrison. See Exhibit 95 page 4.9.

12. These issues all assume importance in a context in which *Ms* Kerrison invites the Commission to accept that she has been deliberately harmed and to disbelieve the evidence of virtually all of the Respondent's witnesses. They also assume fundamental importance in relation to the Applicant's complaints based on alleged improper purpose and malafides.

13. The Commission would also be in a position to determine that, because of the Applicant's narrow focus on events concerning her, she is and has remained unable to perceive either that she has had a medical problem that other persons have been attempting to attend to or that it has played any role in relation to the events that have overtaken her.

14. The Applicant's resolute belief in the absolute correctness of her own position was amply demonstrated by her complete inability to understand why, in a case in which she had asserted bad faith on the part of may other persons, it was necessary to present and traverse any evidence in respect of these allegations (see T page 8.43; 9.57 to 10.23) **[these references direct attention to a (factually incorrect) monologue by Mr Kenzie**

C. THE SIGNIFICANT EVENTS

15. The Applicant was employed by the Respondent from 2 February 1988 until 13 September 1996. The Applicant's last day of attendance at work was 23 June 1995. The Applicant's termination became effective on the dismissal of her appeal to the Medical Appeal Panel on 13 September 1996.

16. The Applicant's employment was terminated when medical advice provided to the Respondent by Healthquest stipulated that she was medically unfit to continue in her employment and was suffering from a medical condition -"personality disorder".

17. The Applicant had, until late 1993 or early 1994 enjoyed good health and had few notable absences from the workplace due to illness.

18. It is clear however, that in late 1993, the Applicant's health was being adversely affected by unresolved tensions between herself and another employee, Ms Rhonda Hayes.

19. In exhibit 45, at paragraph 41, the Applicant stated *"I find it hard to remember when I have not spent every night waking up with nightmares and crying with Rhonda's behaviour I cannot take it anymore. I dread going to TAFE; I spend my time simply trying to cope and trying to survive. Life at TAFE is not worth living anymore "*
And at paragraph 46.7 : *"I **cannot** face talking to Elizabeth (or anyone else) anymore: Trying to make them understand the masons I think there is a problem, and have them look on with clinical interest as they see me crumble, out of control, crying. I*

have no self confidence at all now. It has affected my private life terribly over the years. "

20. In March 1994, the Applicant proceeded on a period of stress leave which was subsequently accepted for the purposes of worker's compensation. The Applicant had submitted medical certificates in support of her absence.

21. The Respondent submits that it is clear from the evidence of Ms Gail Robison, Ex 23 and Mr Michael Quinn, Ex 24 that the Applicant was unwell for a significant part of the absence. The evidence of Ms Robison in respect of this period was not seriously challenged in cross examination (T. 556 to 559) and in many respects confirmed the Applicant's own evidence as to her well being. See Applicant's evidence at T. 177 (sleepless nights, pacing the floor) and T 178 (unhappy about situation).

22. Similarly the evidence of Mr Quinn was not challenged in cross examination (T. 576 to 577).

23. The Applicant's evidence at paragraph 97 of Exhibit 29 was that she received a letter from Mr Quinn. (No questions were put to Mr Quinn about this letter). Her evidence was that that she was given only two options - resign or retire. The document, Ex 26 clearly shows this was not the case. In cross examination from T.I85 to 195 the Applicant's evidence is contradictory - at TI 87.44, the Applicant stated - *`No, I said when I rang Mr Lackwood earlier because no-one had come. I said; "well what are my options*"**.**

At T.187.50 the Applicant testified: " *I wouldn't be looking for options".* At T 188.5, the Applicant restated that she had in fact asked "***what are my options*** "

24. As previously submitted the Applicant's evidence in respect of Ex 26, is, most illuminating. It demonstrates the Applicant's selective recall of conversations and written materials (seeing only 2 options when several were listed). In addition Exhibit 26 was dated April 1994 and contained a reference to the possibility of referring Ms Kerrison for medical assessment at Healthquest to determine her fitness to continue. In Ex 16 p.51, the Applicant stated that on 14 May 1995 i.e. just over 12 months after she had been provided with Ex 26, "I did not know who or what Healthquest was."

25. Prior to the Applicant's return to work she attended a meeting on 7 July 1994, the minutes of which appear as Ex 46. No evidence was submitted by the Applicant to suggest that these minutes were an inaccurate record of the meeting. Upon the Applicant's return to work she was provided with support from the Commonwealth Rehabilitation Service and Ms Robison.

26. The Applicant experienced difficulties with Ms Hayes upon her return to work (see Ex 28). The Applicant refused to accept that the action taken by her manager, Ms McGregor was acceptable in resolving these difficulties, although at no time has the Applicant specified what would have been an acceptable resolution (see T. 210.52) referring only to abstract concepts such as "conciliation actions and physical problems" as being preferable to "words on paper".

27. Although the Applicant returned to work in mid 1994 she continued to receive medical attention for her stress condition. She obtained medication in the latter half of 1994 from a Dr Schofield (see Applicant's evidence at T. 175.30).

28. Throughout the first half of 1994 i.e. at the time that the Applicant was absent from the workplace on stress leave, an investigation into the Applicant's complaint (Ex 45) took place. The Applicant was provided with information about the outcome of the investigation, an outcome she did not, and still does not accept.

29. The Respondent submits that the Applicant's unwillingness or inability to accept the outcome of the investigation is not evidence that the investigation was in any way inadequate. It is however clear from the evidence that the Applicant remained disturbed by the issues which had formed the basis of her complaint in November 1993, and despite the efforts of her Manager (Ms McGregor -see T.212 to 223) and various other people to support her in the workplace (Ms Robison - Ex 25, and Mr Quinn Ex 24), she continued to display frustration; discomfort; distress; and general dissatisfaction with her day to day interaction with other staff, and in particular Ms Hayes.

30. At T.233 it was put to the Applicant that she considered that there had been no investigation or proper investigation of her complaint. The Applicant responded that "***I do not know what you regard as an investigation. If that includes talking to the parties concerned especially key witnesses, getting their version, working out who is mistaken and who is not, that to my mind is an investigation.***

31. The Respondent submits that it is clear from the evidence that until such time as an investigation was conducted that satisfied the Applicant in both process and outcome, no investigation of her complaint would have been regarded as suitable by the Applicant.

32. There is no evidence to suggest that the investigation was less than diligent. Other than the opinion of the Applicant, she has not submitted one piece of evidence to support her claims about the inadequacies of the investigation. The mere assertion that "key witnesses were not interviewed" is not evidence that the investigation was deficient. It is nothing more than the opinion of the Applicant.

33. It is clear that the Director-General of TAFE considered the matter to have been properly investigated by 2 Sydney based investigators with a subsequent referral of various matters to the Internal Audit division of TAFE.

34. The only person who appears to have been dissatisfied with the investigation was the Applicant.

35. The Respondent attempted to address the Applicant's dissatisfaction by inviting her to attend a meeting on 8 September. A report of that meeting appears as EX 56. When asked about this meeting (T.238 to 240) the Applicant demonstrated her unwillingness to accept that an investigation, and in particular this one, must eventually end.

36. The Applicant's allegation that she was threatened during the course of this meeting is at odds with the evidence of Ms McGregor who also attended the meeting. Whereas the Applicant stated she was "threatened with danger" by Ms O'Sullivan in the presence of Ms McGregor, Ms McGregor's recollection (see T471 & 472) of the meeting is that Ms O'Sullivan spoke firmly to the Applicant about the conclusion of the investigation and that the Managing Director would not allow the old issues to be reinvestigated. She at no time agreed that the Applicant had been "threatened with danger" as alleged.

37. The Respondent submits that this allegation is again an example of the Applicant's selective recall of words and facts to fit her perception of events. The Applicant is asking the Commission to accept she entered a room with 2 Managers to discuss the investigation report; the parties all hugged each other prior to the meeting (see T. 244) and during this meeting one of these managers threatened her with danger. She was, on her evidence, now frightened of Ms O'Sullivan and Ms McGregor, yet the next day, presumably with this threat clearly at the forefront of her mind, she approached the co-threatener, Ms McGregor (see Ex 29 p.135) to ask not -"Why was I threatened yesterday" but "How did you see the meeting yesterday?"

38. With respect to the Applicant, the allegation that she was "threatened with danger" is nothing more than a major distortion of what was said by Ms O'Sullivan on 8 September 1994 and what was said by Ms McGregor on 9 September 1994. At best for the Applicant she has perceived a threat when, on a proper view of things, one was not made.

39. In October 1994, Ms Hayes was transferred from the Kempsey campus of TAFE (see McGregor Ex 23).

40. The Applicant continued to receive support from the Commonwealth Rehabilitation Service (see Ex 23 at paragraph 17).

41. Despite the Applicant claiming that she was now fearful (see T. 2 51.2 7 and 2 51.4 3) having been "threatened with danger" on 8 and 9 September if she made further allegations about Ms Hayes, a little over a month after these alleged threats she wrote a letter voicing her discontent with the outcome of the investigation into her 1993 complaint - see Ex 5. This letter, addressed to the General Manager of TAFE made no reference to the threats of danger or to her purported fearfulness. She claimed only that there was more "uncomfortableness at work". Further, the Applicant confirmed at T.249.37 that she did not feel intimidated about writing to the General Manager.

42. In November 1994, the Applicant raised her discontent about the investigation into her complaint with Ms Kerry Walshaw, Human Resources Manager, North Coast Institute of TAFE. Ex 59, a memo from Ms Walshaw to the Applicant refers, inter alia, to the scope of the investigation being greater than the Applicant may have appreciated and the reasons why the Applicant could not be provided with a copy of the entire report.

43. The Respondent submits that at this point in time, the Applicant had been advised of the outcome of the investigation by the General Manager of TAFE; she had been provided with an extract of the investigation report; she had met with Ms O'Sullivan and

Ms McGregor to discuss the investigation process; she had been advised by Ms Walshaw that her concerns about the adequacy or otherwise of the investigation were unjustified and the person central to her original complaint had been transferred away from Kempsey. The Applicant however, remained dissatisfied about the investigation to the point of obsession and in fact claimed that in Ex 59 Ms Walshaw was telling her to "shut up" (see T255.13).

44. It is the Respondent's submission that it is open to the Commission to infer from the evidence that the stresses, real and otherwise that resulted in the Applicant taking a period of sick leave in the first half of 1994, continued to impact upon her health and well- being. This was apparent to those who worked with the Applicant on a day to day basis such as Ms McGregor. It was also apparent to others further removed from the Applicant such as Ms Walshaw (see EX 19 paragraph 7).

45. In January 1995, the Applicant received another letter from the General Manager - EX 8. The letter included a reference to victimisation not being tolerated within the workplace. At T. 262.11, the Applicant stated that this statement was nothing more than words on paper as she "had been victimised and threatened". When pressed to identify the victimisation to which she referred, the Applicant related to alleged events, involving the treatment of aboriginal students and Ms Hayes of course. Such events had occurred *prior to* her original complaint of 1993.

46. Another letter on this matter was sent to the Director of the North Coast Institute by Ramsay on 17 January 1995 - Ex 9.

47. As previously submitted the Applicant's reading of Exhibit 9, is yet another example of her selective reading of material whereby she identifies certain aspects of the document to suit her conspiracy theory, ignoring both the chronological context of the document and the actual context of the specific words she has seized upon. In the case of Exhibit 9, the Applicant has extracted the words "urge" and "make arrangements for Mrs Kerrison to be examined by Healthquest", and has concluded quite erroneously that -the General Manager was urging an examination by Healthquest, when in fact, the only thing he was urging was for the Director of the North Coast Institute, to continue to provide support to Mrs Kerrison.

48. The Respondent submits that this misinterpretation of EX 9 by the Applicant is intentional. At the very highest the Applicant's interpretation demonstrates a complete unpreparedness or inability to treat the document as saying what it actually does say. She has had a copy of the document for several years and despite the very clear meaning of the final paragraph, persists with the allegation that this letter was the catalyst for the referral to Healthquest. There is however, no evidence to support this . position. Indeed, all the evidence before the Commission clearly shows that neither the Director (Dr Wilmot) or the Human Resources Manager (Kerry Walshaw), responded in the way that the Applicant alleges the Managing Director was *urging* them to do. *(See* T. 426.18 Walshaw)

49. The decision to refer the Applicant to Healthquest occurred in April 1995 i.e over 3 months after the issue of EX 9. The evidence before the Commission clearly shows that there was growing concern about the health of the Applicant from those working

with or near her (McGregor - Ex 23 p.19 to 25; T. ; Quinn - Annexures 1,2,3,4 of EX 24; Walshaw- Ex 19 p. 13 to 16;).

50. This concern was justified as the Applicant attended her doctor just prior to the commencement of the April vacation period. (See T.304).

51. It would appear that the cause of this stress was the on-going and misguided belief of the Applicant that she was somehow under threat of danger and that the original issues she had raised in November 1993 remained unresolved. The Respondent submits that the evidence clearly shows that the Applicant was not in any' danger nor had she been threatened with danger. The evidence, undisputed, also shows that the person at the centre of the complaint had not worked with the Applicant at the Kempsey Campus for some 5 months, and the only person who considered that the matter had not been properly investigated was the Applicant. (see Applicant's evidence at T.275.54).

52. On or about April 10, the Applicant met with Mr Quinn and Ms Robison. Soon after this meeting, Mr Quinn forwarded a memo to Ms Scuglia recommending that the Applicant be referred to Healthquest (Annexure 3 to Ex 24). This coincided with Ms McGregor's concerns for personal safety when dealing with Ms Kerrison (see Ex 23 p.23 and T. 469.45 to 469.57).

53. As to the Applicant's assertion that a number of the Respondent's witnesses fabricated documents some time after the dates shown upon them, the Respondent submits that such an allegation borders on being scandalous and is without any foundation. The attachments to the affidavit of Mr Quinn (Exhibit 23) are among

the documents the Applicant continues to assert were "fabricated" notwithstanding the fact that the Applicant heard the evidence of Mr Quinn that he simply had no opportunity to produce false documentation owing to the injuries he suffered in a car accident on 1 May 1994, resulting in a lengthy absence from work; his relocation to the Grafton campus on restricted duties and ultimately, his own medical retirement in 1997. (See T. 575 - 576).

54. On 1 May 1995, following a recommendation by Mr Quinn, a letter was sent at the direction of Ms Walshaw to Healthquest asking that the Applicant be medically assessed (EX 19 Annexure C)

55. The Applicant willingly attended Healthquest on 16 May 1995. The Respondent submits that the Applicant's claims that she "did not know anything about Healthquest", are simply not true (see Ex 26 ; and also Mfidavit of the Applicant - Ex 16 paragraph 22.2).

56. The Applicant took a bundle of documents to her medical appointment (see Ex 20 Attachment A, notes of Dr Mandel and T. 290). These documents set out her complaints and correspondence about the investigation. The Applicant stated that the reason she took this material, and in particular EX 63, to the medical appointment was - (T.291.4) ***"Because the doctor sending me there spoke about rehabilitation and workers compensation. That document is a litany of the things that have been happening instead of rehabilitation in TAFE."***

57. The Applicant was not sent to Healthquest by a doctor as she testified, and it is submitted that EX 63 states nothing more than the Applicant's on-going misconceived frustrations about the investigation into her 1993 complaint (EX 45) and minor incidents that occurred upon her return to work from stress leave in July 1994 - the "tape recorder". Regardless of whether the Applicant considered the purpose of the medical appointment to be for rehabilitation or some other purpose, it was nonetheless a medical appointment. The Respondent submits that it is reasonable for the Commission to conclude that in taking the written materials to such an appointment, the Applicant's obsession with this matter was impacting upon health and well being.

58. Ex 20, Attachment D, report from DrJ. Holmes confirms not only the severity of the Applicant's illness in 1994, but also his view, as her treating psychiatrist in May 1995, that "***Her prognosis depends upon whether she perceives herself as receiving justice and 2) her willingness and ability to accept psychotherapy to make her self esteem endependent (from) achievement and approval. If she does not succeed in this, she may eventually need to retire from TAFE on medical grounds."***

59. On the Applicant's evidence to this Commission, as at May 1995, and continuing, she does not believe she has "received justice" in respect of her 1993 complaint. She has presented no evidence of undergoing psychotherapy, and on that basis the Respondent submits that the ultimate finding of Healthquest that the Applicant was medically unfit to continue in employment is overwhelmingly supported by the Applicant's then treating psychiatrist.

60. The Respondent submits that the fact that the Applicant was continuing to teach at the time she was referred for the medical examination and at the time she was determined to be medically unfit is of no relevance. The Applicant has asserted that *as* she was teaching, she could not be unfit to teach. In making such an assertion, the Applicant demonstrates again, her lack of insight into how she was presenting herself to her colleagues and supervisors as per the evidence of McGregor at T. 469.45 and Exhibit 23 p.20 - 25.; Quinn Ex 24; Robison Exhibit 25.

61. In her evidence to the Commission, Dr Jagger stated at T.486.9 :

> *"**The duties of teaching at TAFE are not merely face to face teaching in the classroom but being a member of an organisation that is providing a teaching service. It also requires interaction with the organisation with various other people and it was this area that at that time, Dr Mandel and myself believed Ms Kerrison was unable to effectively undertake."***

62. The Respondent submits that on any reasonable assessment of the evidence presented to the Commission in respect of this matter, there is !!Q evidence to support the Applicant's submission (page 12 of written submissions) that she was referred to Healthquest to get her out of TAFE "**...** because she had lodged credible and incriminating grievances about misconduct within TAFE". These so called grievances had been fully investigated.

63. The Respondent further submits that the Applicant's submission that officers of TAFE under instruction from Dr Wilmot and Dr Ramsay had acted in bad faith causing the Applicant ".. .harm and injury by discrediting her and therefore her allegations" is not supported by any evidence.

64. What the evidence does show is that there was genuine concern about the Applicant's health and well being and that, and only that, was the reason for the referral to Healthquest. As Ms Walshaw stated, at T. 409.25:

> **"The issue, was my concern for your - I thought you were very fragile and that I needed to have medical experts tell me, make the assessment to see how you were."**

65. An issue of great concern to the Applicant was the reference in some documents that the Applicant had made statements about using guns to solve her problems. The Applicant now vigorously denies that she said any such words and asserts that her good character has suffered as a result of these false allegations. The Respondent submits that the Applicant's contemporary version *(see* T. 278, 279 and 280) of what she did or did not say, is not supported by a series of documents written proximate to the time in question. In the letter to Healthquest, prepared by Ms Walshaw (Ex 19, Annexure C) at paragraph 5, Ms Walshaw noted: *""What is of greatest concern though is the fact that on a number occasions recently she has said that the only way to solve the situation is with a gun. This has been both in relation to herself and another staff member."*

At Annexure K, the Applicant refers to paragraph 5 of Annexure C and states: *""I can only recall one instance that this may apply to and that was in a conversation with Mike Quinn. And later - "Due to those factors, out of frustration, I uttered a four word statement. As this statement did not mention any person I would like the above clarified".*

66. For the Applicant to now suggest that this four word statement was in fact "no-one wants to know" is completely at odds with

the 1995 correspondence and is another example of the Applicant attempting to change history to suit her claims.

67. The document issued by Healthquest to the Applicant is titled "retirement certificate". Such nomenclature does not however, carry with it any legal meaning. The uncontested evidence of Dr Jagger at 496.7 to 27 provides the reasonable explanation for the title of the documents issued -to employees and government departments once the employee has been found to be medically . unfit. At no time has Healthquest ever asserted that it had the authority to terminate the employment of the Applicant or any other person, nor has it purported to do so. (See Jagger at T. 497.6) At no time has TAFE ever asserted that Healthquest had the authority to terminate the Applicant's employment.

68. Following the receipt of the retirement certificate Dr Willmott, the Institute Director of NCIT determined that the Applicant was to be terminated and gave instructions for this to be handled by Ms Wa1shaw. The validity of the decision taken to medically retire the Applicant in a manner consistent with her right of appeal to the Medical Appeal Panel is dealt with in Part F of these . submissions below.

69. Consistent with the fact that the Applicant's employment was terminated, pending the outcome of the appeal certain administrative steps were taken in respect of the Applicant's salary and entitlements (see Exhibit 18) and evidence of Ms Scuglia at T 525 to 559.

70. Ms Scuglia's evidence as to an administrative error in initially taking the Applicant off the payroll is explained at para 6 of

Exhibit 18 and T 529.17 and the remedial action taken to rectify this situation is explained at page 7 of Exhibit 18. The Applicant's unwillingness or inability to accept that this was a genuine administrative error which was correct in a manner as described by Scuglia is consistent with her approach to TAFE generally.

71. It is clear that the Applicant made an application for sick leave on 10 August 1995 (See Exhibit 94) and subsequent applications for sick leave were also made (See Scuglia T 538.29 - 538.43).

72. It is also clear, that from 15 April 1996 until 13 September 1996 the Applicant, having exhausted all paid leave entitlements, was regarded as being on sick leave without pay (See T 538.55 to 539.17).

D. ALLEGATIONS OF IMPROPER PURPOSE AND BAD FAITH

73. In the amended Application filed on 3 January 2001 (though not in the Application as originally filed) the Applicant has particularised specific allegations of improper purpose and/or bad faith. These allegations are found in the Application at: -

(a) paragraph E sub-paragraphs (2) - (6) where the Applicant asserts that the Managing Director (Dr Ramsey) in making a proposal re referral of the Applicant to Healthquest was acting for an improper purpose and in bad faith.

(b) paragraph E (5) - where it is asserted that the invalidity of the Managing Director's proposal of 17 January 1995 infected and vitiated all subsequent decisions and actions taken by the TAFE Commission in furtherance of that proposal.

(c) Further in paragraph E (15) the Applicant, in asserting that no decision based on statutory power or legislative authority has lawfully been made to dismiss the Applicant or take other action in relation to the Applicant, has detailed a large range of actions and asserted (at sub paragraph 59) that "all the decisions have involved denial of procedural fairness, improper purpose and bad faith".

74. Accordingly, other than the specific reference to the Managing Director's letter of 17 January 1995, the proposition appears to be that any decisions or actions taken by the TAFE Commission in furtherance of that proposal, regardless of the circumstances attending such actions or the intentions of those taking such actions, were ipso facto invalid as being based on an improper purpose of bad faith.

75. Unsurprisingly, the Applicant has referred to no authority supporting her far reaching contentions in this regard.

76. It can be accepted for present purposes that a decision taken by the Managing Director or a delegate pursuant to a particular statutory provision such as Section 20 might be amenable to attack on the basis of alleged bad faith or improper purpose. See *eg*
Werribee Council v Kerr (1928) 42 CLR 1
Arthur Yates & company v Vegetable Seeds Committee (1946) 72 CLR 37.
Porter v Davis(1989) 32 IR 110 at 117

77. However the basis of an entitlement to attack a suggestion put up for consideration by others on the basis of bad faith or improper purpose is difficult to discover.

78. More difficult again is the task of finding a legal basis for attacking actions taken by individual officers of TAFE in relation to the termination of the Applicant on such grounds. No such basis is suggested in the submissions of the Applicant.

79. In so far as the case is based on Dr Ramsey's letter of 17 January 1995 to Dr Willmott (Annexure A to Exhibit 21) it clearly fails at the outset. It is impossible to discern any proper basis for suggesting that this letter was activated by bad faith or improper purpose. Again the Applicant's interpretation of the letter (which she has emphasised throughout) is that it involved Dr Ramsey urging Dr Willmott to send the Applicant to Healthquest. Of course the letter says no such thing. The only "urging" found in the letter is for Dr Willmott to continue to provide support to the Applicant. The suggestion that it might be appropriate to have the Applicant medically examined (one that was not adopted by Dr Willmott at the time in any event) could not possibly be seen as malafide. Far less could it infect the numerous actions of other employees of TAFE in relation to the decision to send her to Healthquest some months later against a background of significant supervening circumstances including the recommendation of Mr Quinn referred to in paragraph 52 above.

80. Notwithstanding these difficulties, in her written submission the Applicant has attacked "the actions and decisions taken by officers of the TAFE Commission instructed by Dr Ramsey through Dr Willmott as being infected by improper purpose and bad

faith". *(See* page 12 of *20).* It is submitted that " the improper purpose" (apparently common to all) was to get rid of the Applicant because she had lodged grievances.

81. As a result the Applicant seems to allege that a large array of individuals have all been actuated by bad faith in relation to her position. In addition to Dr Ramsey these include Dr Jagger, Ms Gallagher, Ms McGregor, Mr Quinn, Ms Robison, Ms Walshaw and possibly Ms Scuglia. If the transcript of the cross- examination at page T 339.32 is accepted the Applicant makes no claim that Dr Willmott acted wrongly towards her. The Applicant's ultimate position developed in cross-examination at 338.14 - 341.39 seemed to be that anyone who had acted "wrongly" because they had caused her harm acted in bad faith. By her own admission (at 338.41 - 339.15) the Applicant has no real understanding of the concept of bad faith.

82. Little or no explanation has been offered as to why many of those people accused of acting wrongly would have had any interest in acting in bad faith or with an intention of damaging the Applicant. It is to be noted that those people included occupational health and safety officers who, on any view, were involved in the task of assisting her in relation to rehabilitation. They also included Ms McGregor who had obviously played a supportive role in relation to the Applicant over the years. They included Ms Walshaw who had had no involvement with the Applicant prior to late 1994 and who had no discernible interest in acting to her prejudice. They include Dr Jagger whose professional involvement was completely impersonal.

83. Despite the pleadings summarised in paragraph 73 above, the Applicant's conspiracy theory at least in relation to subordinate officers of TAFE such as Ms Robison, Mr Quinn and Ms McGregor appears from the written submissions to be based on the proposition that in late 1995 she notified TAFE of her intention to go to the Anti-Discrimination Board. Obviously this consideration would have been entirely and demonstrably irrelevant to the events in May 1995 when she was referred to Healthquest.

84. In her written submission, in which the Commission is invited to disbelieve the sworn evidence of all of the above persons and prefer either that of the Applicant or inferences which the Commission is invited to draw, the Applicant has been prepared to make serious allegations against various individuals. These allegations include various claims of fabrication of documents - allegations which are pressed notwithstanding the fact that it was not suggested in cross-examination (eg to Mr Quinn or Ms Robison) that such fabrication had occurred. It is also relevant that, although it is suggested by the Applicant that all of these people somehow decided to act in bad faith towards the Applicant, there appears to be little or no suggestion that there was evidence of some agreement to do so. Notwithstanding this, the Commission is invited to draw the conclusion that somehow this diverse group of people, not all of whom were employed within TAFE, determined to act improperly towards the Applicant.

85. In general the Respondent refers to and repeats its submissions as to the Applicant's obsessive approach the matters concerning her. These submissions are relevant to a consideration of the Applicant's case based on bad faith and/or improper purpose.

86. It is submitted that the appropriate finding for the Commission to make is that none of the contentions in relation to bad faith or improper purpose have been made out. Rather the fact that the Applicant has continued to make these allegations against a variety of people in the current circumstances is telling in terms of the Applicant's own inability to come to grips with the fact that:-

(a) in 1995 she had a major medical problem which was recognised by a host of others, whether professional or otherwise; and

(b) the Applicant exhibited a complete refusal to recognise the existence of such a problem, or the various and numerous attempts which were made by a variety of people to act in a manner which was not only consistent with their own responsibilities but in a manner supportive of her.

87. Rather than accept the reality, namely the above, the Applicant has continued to resort to excruciating processes of reasoning to support the possibility that an array of people have somehow inexplicably turned on her, with a view to damaging her. It is probably not helpful to exhaustively categorise the Applicant's attempts. However some examples in this regard include:

(a) suggestions that Mr Quinn, the OH & S officer who was badly injured in a motor vehicle accident on 1 May 1995 and who did not relevantly return to Kempsey TAFE (T.575 - 6) thereafter was somehow in a position thereafter to fabricate TAFE documents damaging to the Applicant - or that he had some reason for wanting to do so;

(b) the suggestion that somehow the Managing Director might have been responsible for the "threat of danger" said to

have been made to the Applicant on 8 September 1994 by O'Sullivan and McGregor (notwithstanding the complete absence of any evidence to support this - or any cross examination of Dr Ramsey to this effect); and (c) The Applicant's continued refusal to acknowledge the legitimacy of Ms Walshaw acting on the basis that the Applicant had threatened the use of a gun in circumstances demonstrated by the Applicant's own correspondence (Annexure K to Exhibit 19) which correspondence in turn refers to Annexure C of the same Exhibit.

88. As to Dr Jagger

(a) Notwithstanding the serious allegations made about Dr Jagger there is absolutely no evidence that could suggest that she was guilty of bad faith or acting wrongly. The fact that the Applicant was prepared to press her allegation against Dr Jagger in the written submission is telling in itself, particularly in light of the cross-examination of the Applicant at T 339.52 where the Applicant was at a loss to explain how Dr Jagger has acted wrongly towards her.

(b) References to the fact that there were demonstrations about practices in Healthquest re whistleblowers fall a long way short of establishing that Doctor Jagger acted in any way that was improper. Indeed the contrary was not suggested to her in cross- . examination.

(c) The evidence underlying Dr Jagger's medical opinion is found in Exhibit 20. She concurred with the recommendation of Dr Mandel who had examined the Applicant. The medical opinion reached was reached with the benefit of consideration of a report

supplied by the Applicant's own psychiatrist, Dr HolmesI who the Applicant later sued (T 341.44). That medical report dated 5 June 1995 is annexure D to Exhibit 20.

(d) She gave clear and concise evidence in support of her medical view in the witness box and her evidence was not damaged in any way by crossexamination.

89. <u>As to Ms McGregor</u>

(a) The evidence of her lengthy involvement with the Applicant is found in Exhibit 23.

(b) Any sensible reading of the written material relating to attempts made by *Ms* McGregor to come to grips with the Applicant's issues would disclose that *Ms* McGregor was acting in a caring and responsive way, although frequently unable to satisfy the Applicant because of an absence of specificity on the Applicant's part (see EX's 46;48;50;54;57;61 & 62).

(c) She gave cogent evidence of numerous attempts to provide assistance to the Applicant in relation to the Applicant's unresolved issues (see Exhibit 23; T 458.2 - .38, 459.32; 464.44; 466.4; 467; 468; 470.25).

(d) It is submitted that *Ms* McGregor's evidence as to her inability to respond to *Ms* Kerrison in the absence of some formal complaint was entirely credible and consistent. In no way is an inference that McGregor was somehow concealing things from the Applicant as a basis for refusing to act able to be properly drawn. It is noted in this regard (see page 3 of 9 of the Applicant's written submission) that the Applicant appeared to approach the

matter (and still appears to approach the matter) on the basis that any "approach by an employee on a work related issue" was ipso facto to be regarded as a grievance requiring the full force of the grievance procedure policy within the Enterprise Agreement to be applied regardless of the nature of the matter. This is an entirely untenable position - but it is repeated again and again by the Applicant in these proceedings.

90 The Applicant's repeated reference to the extract from Exhibit 89 where Ms McGregor stated that the Applicant's behaviour "did not exhibit any outward signs of aggression" (See page 3 of 9 of the submissions) is another example of the Applicant referring to matters regardless of the context. Perusal of the whole extract reveals that Ms McGregor was in fact concerned for the safety of others.

91 Reliance is also placed on the fact that no memorandum of understanding, which Ms McGregor thought had been brought into existence and signed, was produced. Perusal of the cross examination of Ms McGregor (pages 460 -462) shows that Ms McGregor had a clear recollection of a number of matters which she believed had been put to writing. It does not appear to have been suggested to her that she was not telling the truth or even that the memorandum of understanding did not exist.

92 Some point is made of the fact that Ms McGregor's name was not on Exhibit 95 - a briefing paper of 9th September 1994. The purpose of the Applicant raising this point is obscure but in no way helps the Applicant.

93. The Applicant then (at page 5 of 9) makes some attack on Ms McGregor's evidence at 443 - 445. This attack is difficult to comprehend. The fact that Ms McGregor could not recall some of the detail after seven years or so is hardly surprising and certainly does not support the conclusion that "she didn't know what she was supposed to say for the Respondent's case".

94. The Applicant then proceeds to assert that, because Ms McGregor could not produce any record of threats to personal safety, the inference is that she made up her allegations later. Just why Ms McGregor would want to do so, of course, remains quite obscure.

95. The submission then proceeds to "possible collusion between Ms McGregor and Ms Walshaw in fabrication of evidence" (at page 8 of 9) . This allegation is based on evidence from Ms Walshaw in which she said that she had based some of her evidence on what she had read in Ms McGregor's affidavit. Needless to say no allegation of collusion was put to either Ms McGregor or Ms Walshaw - and the fact that Ms Walshaw would have referred to a matter deposed to in an affidavit of Ms McGregor is entirely unsurprising.

96. Finally the Applicant's attempt to make something out of Ms McGregor's cross examination recorded at page 8 of 9 of the submissions, for the purpose of substantiating submissions about improper purpose, is nonsensical.

97. The submission made (at page 9 of 9) that "McGregor admitted that Mrs Kerrison had been threatened with danger in TAPE" is quite incorrect. Once again the Applicant has misunderstood the tenor of the evidence given. Perusal of transcript pages 470 –

473 demonstrates that Ms McGregor was roundly rejecting the notion that the Applicant was threatened with danger - see pages 472 line 3 in particular.

98. The Commission has had the benefit of seeing Ms McGregor in the witness box. The various attempts made by the Applicant, summarised above, to discredit her and provide the basis for a finding that she acted in bad faith or "wrongly" are entirely lacking.

99. The allegation that Ms McGregor fabricated Exhibit 88 (made separately in the section of the written submission re Mr Quinn at page 2 of 4) and the basis for this assertion are little short of staggering. It is seriously suggested by the Applicant that, because Exhibit 88 was used as evidence of adequate rehabilitation support, the implication is that it was fabricated to be used as purported evidence. The Applicant conveniently ignores the fact that Exhibit 88 was tendered by the Applicant herself, having been shown by her to Ms McGregor (at transcript page 453) and was subsequently shown by her to Mr Quinn. The Commission is asked to peruse Exhibit 88 and ask why anyone

would go through the motions of fabricating this document for the purpose of providing evidence later. This submission again only goes to confirm that the Applicant is fixed with the view that somehow everyone else's behaviour is directed at her.

100. As to Mr Quinn

(a) Between October 1993 and I May 1995 he was employed by TAFE and at the relevant time was the Acting Occupational Health and Safety Co-ordinator.

(b) His evidence of his attempts to address Ms Kerrison's concerns are found in Exhibit 24.

(c) These attempts included various options placed before the Applicant in 1994 - plainly designed to provide the widest scope for the resolution of difficulties facing the Applicant (T 191; 192; 194; 195).

(d) Following detailed attempts at rehabilitation of the Applicant in 1994 (detailed in paragraph 4 and 5 of Exhibit 24) Mr Quinn was involved in further events-relating to the Applicant in 1995. Unsurprisingly (having regard to the passage of time and his serious injuries sustained on I May 1995) he was unable to remember precisely what then occurred but identified various memoranda relating to difficulties concerning the Applicant in April 1995 (see paragraphs 7 - 11 of Exhibit 24).

(e) He had absolutely no reason to wish to harm the Applicant in any way, nor, given the injuries he suffered in the motor vehicle accident on 1 may 1995, did he have the opportunity to do so.

(f) Notwithstanding these matters it is asserted by the Applicant (at page I of 4) that, because Mr Quinn knew that there was no OH & S issue to address (apparently because he did not check with Mrs Kerrison first) "that leaves the only purpose of his writings was to cause Mrs Kerrison harm". On this basis it is asserted that the testimony of Mr Quinn, an OH & S officer with no perceivable basis to wish to harm the Applicant, should not be relied upon. This is despite the fact that it is consistent with other documentary evidence called by the Respondent (which is, according to the Applicant, apparently also not to be relied upon).

(g) The Applicant goes so far as to submit (at page I of 4) that Mr Quinn did not put Ms Kerrison's name on the attachments to his affidavit (Exhibit 24) because of her notification of TAFE that she had lodged a complaint with the Anti-Discrimination Board and that Mr Quinn was avoiding possible defamation action at the time he wrote them.

(h) The Applicant's far-fetched theories completely ignore the evidence that Mr Quinn simply had no relevant involvement with Kempsey TAFE after being seriously injured in a motor vehicle accident on I May 1995. Nor was it ever put to him in crossexamination that the documents annexed to his affidavit were fabricated.

(i) The Applicant's attempt (at page 3 of 4) to rely on the contents of MFI 6 (a document which was expressly withdrawn from tender by the Applicant (T page 583 line 31)) is entirely unmeritorious. The Applicant has previously been reminded by the Commission

(at T page 453 line 50) that a document simply marked for identification was not admitted into evidence unless tendered.

(j) The submission (at page 3 of 4) that there were no OH & S concerns regarding Mrs Kerrison as at September 1994 is in any event entirely beside the point. The fact remains that at this time Ms Robison, Ms McGregor and Ms Cook were clearly engaged in rehabilitation activity in relation to the Applicant.

101. <u>As to Dr Ramsey</u>

(a) He was the Managing Director of TAFE in 1995.

(b) The evidence discloses that he took the trouble to communicate with the Applicant on two occasions in relation to the investigation that had been ordered following her earlier concerns. He wrote on 5 August 1994 and again on 17 January 1995 and in the last letter assured the Applicant that TAFE would not tolerate any victimisation within the work place as well as urging the Applicant to report any details of such to the Institute Human Resources Manager.

(c) His view that the earlier matters had been finalised following a comprehensive investigation was understandable and reasonable. His letter to Dr Willmott written on 17 January 1995 urged Dr Willmott to "continue to provide support to Ms Kerrison".

(d) There is nothing at all to suggest that Dr Ramsey was in any way engaged in conduct designed to damage or harm the Applicant.

(e) In her written submissions the Applicant refers again to the Enterprise Agreement and to her letter to Dr Ramsey (Exhibit 5) .

Dr Ramsey gave credible evidence as to why he did not regard that letter as a grievance within the meaning of the Enterprise Agreement (T 519.10). The fact that the Managing Director had this view in no way undermines the credibility of his evidence. Nor is it suggestive of bad faith or improper purpose.

(f) The submission (at page 3 of 10) that the Managing Director "could have had input into the meeting 8 September 1995" is of course entirely supposition. Quite apart from the fact that the Commission would not be satisfied that there was any "threat of danger" made to the Applicant at that meeting (see again the evidence of Ms McGregor) there can be no suggestion that Dr Ramsey was involved in any relevant way.

(g) The submission (at page 4 of 10) that Dr Ramsey admitted he had received a grievance from Mrs Kerrison is entirely against the evidence of Dr Ramsey who went out of his way to give reasons why he did not regard the Applicant's letter as a grievance (T 519.10) . Once again the Applicant's case is based on the view that any work related issue raised by an employee immediately activates the full force of the Enterprise Agreement. This is a completely nonsensical approach and only serves to illustrate the completely untenable nature of the Applicant's position.

(h) It goes without saying that the issue is to be considered against a background of the comprehensive investigation that had earlier been ordered into the allegations earlier made by the Applicant.

(i) The Applicant's submission that Dr Ramsey's letter of 17 January 1995 (Annexure B to Exhibit 17) includes a false assurance that victimisation would not be tolerated because the Managing

Director tolerated victimisation against Mrs Kerrison, is, of course, completely circular and adds nothing.

(j) The further submission that Dr Ramsey did not want information from Mrs Kerrison and that this "could explain the reason for the meeting of 8 September 1994" is again baseless supposition.

(k) The allegation (at page 8 of 10) that Dr Ramsey singled out Mrs Kerrison for action to be taken against her is completely unsubstantiated. Dr Ramsey was responding to correspondence initiated by the Applicant and, inter alia, attempting to ensure that she be given appropriate support. Again, the making of this submission is indicative of the Applicant's view of the world, i.e. that she was somehow being singled out for adverse treatment by others.

(l) The assertion that Dr Ramsey (and others) "could not have expected/wanted the investigators to contact key witnesses" is entirely unsubstantiated. What had happened was that a comprehensive investigation had taken place and that Dr Ramsey expressed himself as having been satisfied that it was an appropriate investigation. The fact that the Applicant expected Dr Ramsey and others to protest after they read her letter (Exhibit 5) may be the Applicant's view but hardly provides a basis for rejecting the evidence of Dr Ramsey or implicating him in some process or conspiracy whereby the Applicant would be dealt with on a non bona fide basis.

102. <u>As to Ms Robison</u>

(a) Ms Robison was Rehabilitation Co-ordinator at Kempsey Campus. Her evidence of her meetings with the Applicant is contained in

Exhibit 25. She had absolutely nothing to gain by fabricating this evidence. The evidence was not shaken in any way in crossexamination.

(b) Notwithstanding this, once again it is suggested by the Applicant that documents produced through this witness have, in some sinister manner, been passed off as contemporaneous whereas, in truth, they could have been written in 1996.

(c) The Commission will note that (at page I of 4) the Applicant submits that the fact that Ms Robison has made allegations that are fabricated is consistent with fabricated allegations by others including Ms McGregor. In other words the Applicant's submission is said to gain support from her other assertions as to other fabricated documents.

(d) It is submitted (again at page I of 4) that Ms Robison, for some reason, deliberately wrote these documents in a format that could lead the reader to believe that they were written while Mrs Kerrison was in TAFE - ie deliberately written "in an attempt to conceal the factual time frame". No reason for Ms Robison going to these extraordinary lengths has been proffered.

(e) An attempt to suggest fabrication on the basis that the style departs from Ms Robison's normal style of efficient factual writing as per Exhibit 100 is an example of just how far the Applicant is ready to go in order to make out her case. Examination of Exhibit 100 is entirely unhelpful to the Applicant's case. Indeed if Ms Robison had been unwise enough to fabricate documents one would think that she would be taking care to follow her normal style and not depart from it.

(f) It is also to be noted that the date appearing on the top of Exhibits 98 and 99 is simply a facsimile entry as was pointed out by Robison during re-examination (T573.3I).

(g) Quite apart from the inherent improbability of Ms Robison joining the growing queue of people prepared to fabricate evidence against the Applicant, the allegations made against Ms Robison individually are entirely insufficient to make out a case of improper purpose or malafides - or indeed any case for disbelieving Ms Robison who had no reason to go to these extraordinary lengths to damage the Applicant.

(h) Finally the Commission will note the Applicant's persistent and deliberate attempt to rely on MFI 6 (at page 3 of 4) . This is in circumstances where the Applicant can be in no doubt of the illegitimacy of this approach as the matter had been carefully explained to the Applicant by the Commission. Again, this is telling in terms of the Applicant's grim determination to refuse to bow to reality and persist regardless of the circumstances.

103. <u>As to Ms Walshaw</u>

(a) The evidence of her involvement from the time of her appointment as Acting Human Resources Manager in September 1994 is found in Exhibit 19. She had had no involvement with the Applicant before her appointment. From the time of her appointment she was clearly supportive in relation to the resolution of the Applicant's problems. Her correspondence is absolutely at odds with any notion that she was out to damage the Applicant in some way. See eg annexure B to Exhibit 19. Her referral of the Applicant to Healthquest took place in circumstances where issues had subsequently been brought to her attention by those responsible for the welfare of the Applicant.

(b) Ms Walshaw gave cogent evidence as to the circumstances of the referral and the reasons therefor. See Exhibit 19 (paragraphs 1317) . The cross-examination did not produce any evidence which would assist the Applicant on this issue.

(c) Ms Walshaw was, in fact, of the view that the Applicant would be returned to duties following the Healthquest report (T page 399.54) but, in light of the report and the instruction given to her by the Institute Director, she took the administrative steps required. These included the notification to the Applicant of her rights of appeal to the Medical Appeal Panel.

(d) Her oral testimony showed her to be someone who remained concerned for the welfare of the Applicant and who was required to address the Applicant's employment situation in response to the circumstances as they developed. (See eg T 409.25)

(e) As previously stated the fact that Ms Walshaw acknowledged that she had relied on extracts from Ms McGregor's affidavit provides absolutely no basis for the allegation made (at page 3 of 8) that her testimony against the Applicant as a whole "should not be relied upon".

(f) The contorted theory advanced page 4 of 8 to explain why the Healthquest process was delayed - namely because of "possible embarrassment" in openly seeking a replacement head teacher is simply far fetched. It does not appear to have been put to Ms Walshaw in any event. Just why Ms Walshaw, with her range of responsibilities, would have conspired to damage the Applicant in this way for fear of the embarrassment of lodging an advertisement is difficult to comprehend. Even more far fetched is

the suggestion that this perceived embarrassment "could explain the removed information from Dr Ramsey's letter to Ms Kerrison" (see submissions at page 4 of 8) . It is probably unnecessary to add that there is no foundation whatsoever for the assertion that the Commission can assume that the form of Exhibit 8 is such as to warrant an assumption that there is missing information that is "extremely damaging to the Respondent's case".

(g) The evidence (referred to at page 6 of 8) that Ms Walshaw was surprised that Healthquest had medically retired the Applicant was entirely unsurprising and consistent with Ms Walshaw's own position. Contrary to the Applicant's position Ms Walshaw's acceptance of such surprise at the outcome did not demonstrate that Ms Walshaw did not play a role in the termination of the Applicant. As the evidence discloses Ms Walshaw took the administrative steps that she was required by the Institute Director to take in this regard.

(h) The assertions made (at page 7 of 8) that certain documents (Exhibit 88 and part of Exhibit 24) were fabrications has already been dealt with. What they have to do with Ms Walshaw's credibility, or the question of whether she was acting bona fide or not, is not made clear.

(i) It is submitted that absolutely no basis has been advanced for the assertion that Ms Walshaw was acting in bad faith.

E. NATURAL ,JUSTICE

104. At various stages in the written submission some suggestion is made that the Applicant was denied procedural fairness in relation to the decision to refer her to Healthquest. Implicit, if not explicit, in the Applicant's complaint is that, at the time she was medically examined information was available to others, though not to her, which bore on the decision in relation to medical retirement.

105. The Applicant's argument based on denial of natural justice is utterly without foundation. It is clear that at all times, the medical retirement process involved a full right of appeal to the Medical Appeals Panel, a right which the Applicant clearly exercised. (T 304 - 337)

106. The right of appeal was plenary in the sense that the Medical Appeals Panel was obviously able to consider and determine afresh all matters considered by Healthquest in the first instance.

107. The course of that appeal involved the Applicant being afforded every opportunity to advance any material in her possession which bore upon the appeal. The panel, at various points of time acceded to requests made by or on behalf of the Applicant for extensions of time to permit the Applicant's full case to be properly made out before the panel. In the event an inordinate amount of time elapsed to facilitate this process.

108. There is absolutely no doubt that, by the time of the finalisation of the appeal, the Applicant was fully appraised of each and every matter that had been considered by Healthquest.

See in particular Exhibits 65 - 82 and T pp 306-337 and especially at 329.11 re the Applicant's compilation of a package

of information about enclosed documents from Healthquest etc. It is quite clear that the Applicant is unable to identify any material which was before Healthquest that she had not gained access to by this time.

109. The Applicant, at various points of time, was legally advised and made submissions to the Medical Appeals Panel as to the proceedings. See in particular the Turco document Exhibit 79 and the correspondence from Szekely & Associates being Exhibits 71, 73 and 76.

110. At the time of the determination by the Medical Appeals Panel the Applicant was clearly in a position to make any submission that she desired to the Panel, including provision of any medical evidence that she saw fit to advance. In the result she proffered to the medical appeals panel no medical evidence other than Exhibit 70 to support any contention that the medical opinion arrived at by Healthquest was erroneous and should be reversed. The Applicant did this in the full knowledge that in the absence of any further material the medical appeals panel would go ahead and determine the matter on the materials available - a position that was entirely appropriate having regard to the very considerable time that had elapsed and the opportunities that had been given to the Applicant to provide material.

111. The principles involved here have been stated by the High Court in *Twist v Randwick Municipal Council* (1986) 136 CLR 324. In that case the Court considered the impact of the availability of a District Court appeal in relation to an alleged earlier denial of natural justice. The availability of such appeal was held to be conclusive. Mason J at 114 expressly referred to the nature of the appeal saying:

> "*. . . the appeal is not restricted in any way. It is a full appeal on facts and on law in which the appellant is entitled to call evidence. The appeal extends to such elements of discretion as may enter into the making of the order as well as to the existence or non-existence of the conditions which are to be satisfied before an order can be made"*

His Honour later observed at 116-7 that the appeal was an unrestricted appeal involving a hearing de novo. See also Barwick CJ at III and Jacobs J at 118.

In R v Marks(1981) 147 CLR 471 at 474 Mason J, in rejecting an application for prerogative relief pressed on denial of natural grounds said at 484:

> *`In any event, what happened before* Marks *J cannot constitute a basis for prohibition on the ground that there was a denial of natural justice. The BLF exercised Its right of appeal to the Full Bench. On an appeal the Full Bench may admit further evidence and it may* confirm, *quash or vary the a ward or decision under appeal or make an award or decision dealing with the subject matter of the decision under appeal (s 9f(9)(a), (c) and (d)). In Twist v Randwick Municipal Council (1976) 36 CLR 106, this Court held that the existence of a full statutory right o appeal on facts and law was indicative of a legislative intention that the citizens* only *right of redress against the counci'*s *failure to give him an opportunity to be heard before making a demolition order was by way of appeal. I refer to my Judgment in that case at 113-117. See also* <u>*Australian Workers' Union v Bowen No 21*</u> *(1948) 77 CLR 601.*

> *The present case has some similarities to* <u>*Twist*</u>*. There is there a full appeal on fact and la w under s 35. Moreover s 35.(9) (a) enables the Full Bench to admit further evidence. Further, by reason of their very nature and their capacity to create unemployment to dislocate industry and to disturb the life of the community including the essential services on which the community depends, industrial disputes call for speedy and final determination, an object which is best achieved by recognising that the remedy of a party complaining that he has been denied natural justice*

at first instance is to a exercise his right of appeal under s 35 to the exclusion of pursing relief by way of prerogative writ.

There is a problem in saying that a member of the Commission is not under a duty to observe the rules of natural justice and there is a further problem in saying that the Parliament can oust the jurisdiction of this Court under s7f(v) of the Constitution to grant relief against an office of the Common wealth by way of prohibition for denial of natural justice. Even so, the ELF exercised its right or appeal under s3f and the Full Bench examined the matter for itself. The BLF does not suggest that there was any denial of natural justice in the appeal, except hi so far as it submits that the Full Bench was wrong in upholding the decision not to issue the summons. In my opinion the BLF received a full and fair hearing in the appeal and in those circumstances any denial of natural justice before Marks was irrelevant. Calvin v Carr [1980] AC 574. "

(Underling added)

See also Hill *v Green (1999) 96 IR 371* at 401 - 4.

112. In these circumstances consideration of the question of what would have been the situation had there been no appeal rights available or exercised, is a completely arid one. Of course, if it had been necessary to consider that question, issues as to whether there would have been any entitlement to a full disclosure of all information arising out of a referral to Healthquest for a report based on Occupational Health and Safety concerns and not disciplinary matters or the like might have arisen. On any view the referral of the Applicant to Healthquest was undertaken in circumstances where the management of TAFE had legitimate concerns which transcended the interests of the Applicant alone. The evidence (which it is submitted would be accepted) was that Ms Walshaw, who clearly had responsibility for ensuring the general safety of employees of TAFE, had determined that it was

appropriate to approach Healthquest with view to getting the opinion of that body in relation to the suitability of the Applicant to continue in employment. It is also clear that the procedures adopted by Healthquest involved no report being forthcoming from that body until the Applicant had been interviewed and the report from the Applicant's own psychiatrist had come to hand and been considered.

113. However, it is submitted that these considerations do not arise for consideration in this case for the reasons given above.

F. VALIDITY OF THE DECISION TO RETIRE THE APPLICANT

114. The Applicant asserts that only the Managing Director of the TAFE Commission or another officer within the TAFE Commission exercising a valid delegation could cause an officer to be retired under Section 20 of the TAFE Act. No issue is taken with this contention.

115. The Applicant has (correctly) accepted at page 6 of the written submission that the Institute Director NOT had the power to make a decision to cause the Applicant to be retired under Section 20. The point taken by the Applicant is that the Institute Director NCIT (who was, at the time, Dr Willmott - see Exhibit 21 paragraph 2) did not make a decision to cause the Applicant to be retired under Section 20. This is asserted on the basis that no documents has been produced evidencing such a decision.

116. The basis for this assertion in the written submission is the mistaken identification of Exhibit 96 - (Notice to Admit Facts

22 August 2001 - initially marked as MFI 1 on 11 September 2001 (T page 145)). This document in fact contains no relevant reference to the Institute Director NCIT.

117. It is probable that the Applicant, in referring to Exhibit 96, was intending to refer to a later Notice to Admit Facts filed on 16 November 2001 which appears not to have been admitted into evidence. This document sought admissions as to whether the Institute Director NCIT had ever signed a document to authorise the termination of the Applicant's employment. The Notice also sought an admission that the attached Instrument of Delegation the delegation of personnel resignations/ retirements was limited to the Institute Director NCIT.

118. Whilst this material would appear not to have been admitted into evidence it explains why the Applicant understandably acknowledges that Dr Willmott as Institute Director NCIT had, at the relevant period of time, the power to make a decision to cause the Applicant to be retired under Section 20. This was a correct and proper approach.

119. The basic fallacy with the Applicant's argument, however, is that it assumes that no action could be taken by the Institute Director NCIT other than by means of a document.

120. In this case there is clear evidence that Dr Willmott did in fact make a decision following the receipt of the retirement certificate dated 16 June 1995 that the Applicant be terminated on the basis of the medical findings contained in that certificate. This decision was the one recorded by Ruth Gallagher, his Executive Assistant, in handwritten form appearing on Annexure A to Exhibit 22.

121. Although (unsurprisingly) in light of the considerable period of time that has since elapsed, and the scope of his responsibilities as Institute Director, Dr Willmott could not specifically recall sighting the retirement certificate (see paragraph 10 of Exhibit 2 I) he confirmed that it was his usual practice to have his Executive Assistant, Ms Gallagher forward documents after they had been brought to his attention.

122. In turn the evidence of Gallagher (found in Exhibit 22) confirms the normal practice of verbal advice being given to her by the Institute Director to direct the actions of other officers. (See paragraph 4 of Exhibit 22).

123. The cross examination of Gallagher at pages 479 -- 480, and particularly 480 lines 25-40 only served to reinforce the evidence of Gallagher as to the direction from the Institute Director to terminate the employment of the Applicant.

124. The above evidence is entirely supportive of the conclusion that the Institute Director NCIT made a relevant decision to terminate and that the task of implementing this was given to Ms Walshaw by means of the direction to terminate found in Annexure B to Exhibit 21.

125. The evidence also shows unequivocally that Ms Walshaw then proceeded on the basis of this instruction to deal with the administrative aspects of the termination.

126. It was in these circumstances that Walshaw wrote to the Applicant on 23 June 1999 referring to the Healthquest Report,

thanking Ms Kerrison for her contribution and offering her the opportunity to be briefed on her rights and entitlements (Annexure E to Exhibit 19). She subsequently wrote again on 30 June 1995 notifying that the Applicant had a period of 30 days either to accept the retirement or to lodge an appeal. This correspondence clearly notified the Applicant that her employment would be, and be regarded by TAFE, as having been terminated subject only to the exercise by the Applicant of any relevant rights of appeal.

127. Ms Walshaw's authority to take the steps that she did was not questioned by the Applicant during cross examination.

128. Further, the Applicant exercised her right of appeal to the Medical Appeals Panel in the wake of the communication from Ms Walshaw.

129. In addition to asserting (incorrectly) that no decision as to termination had been taken by the Institute Director NCIT - on the basis that there was no documentation - the Applicant also appears to be asserting that the circumstances demonstrated an invalid attempt to delegate the termination to a body outside TAFE namely Healthquest and/or the Medical Appeals Panel.

130. The Applicant's submissions in this regard are likewise entirely misconceived. Obviously Section 20 requires a relevant decision to be made by TAFE, namely a decision to "cause the member to be retired". However the Section does not suggest that a body such as Healthquest is to play no part in the process whereby the member is found to be unfit to discharge or incapable of discharging duties. The Section is entirely consistent with a

process whereby Healthquest is asked to provide medical advice to TAFE as to the capacity of a member of staff's unfitness or incapacity for the purpose of allowing TAFE to make a decision as to termination. That is what happened in this case.

131. Further it is entirely consistent with Section 20 for the employing authority to allow the member of staff to avail themselves of a right of appeal. Plainly it was open to TAFE to act, as it did, on the basis of the medical opinion that had been received in June 1995 but to afford the Appellant the right to seek a different result on appeal. Nonetheless the decision of TAFE was that, subject to some different result being arrived at on appeal, the Appellant was terminated, the effective date of termination being the date of dismissal of the appeal, namely 13 September 1996. In other words, in the event of the dismissal of the appeal the decision to terminate, having been effectively stayed by the appeal, became thereby effective.

132. None of this amounted to delegating the decision to terminate to an outside body.

133. Authorities such as *Wilson v Department of Education and Training* (2000) 100 IR 1 referred to by the Applicant are unhelpful to her case. Other than incorrectly asserting that the power to terminate had not in fact been exercised (because of the absence of a document) it has not been suggested that the employer has failed to comply with the terms of the statute. Likewise recourse to cases such as *Ward v Director General of School* ***Education*** (1998) 80 IR 175, dealing with allegations of improper conduct, are inapposite.

G. SECTION 154 - JURISDICTION AND DISCRETION

(I) JURISDICTION

134. In the amended Application the Applicant seeks declarations:

(a) as to her employment status with the Respondent (on the basis that she asserts that it was never terminated)

(b) as to her entitlements to be paid or emoluments pertaining to her position, subject to issues of mitigation.

135. The Applicant has made no submissions as to the jurisdiction of the Commission to make the declarations claimed.

136. The extensive nature of the jurisdiction of the Commission to make declarations under Section 154 of the Act was discussed in *Ford v SAS Trustee Corporation* (2000) 98 IR 443, 450-451 and 476-478. Whilst it is clear that this, and other authorities, recognise that the jurisdiction to make a declaration is wide and exists regardless of whether other proceedings are alive before the Court or the Commission the basis on which the Applicant contends that jurisdiction to make Order 1(a) exists in circumstances where it is alleged that no termination ever took place remains unclear. It may be that reliance could be placed on Section 175 of the Act in relation to the proper interpretation of Section 20 of the TAFE Act.

137. As to declaration I (b) again the basis of jurisdiction is not explained but it is conceivable that reliance is (or would be) placed on Sections 364(1) and (2), 365 and possibly Sections 367 and 368 of the Act.

138 In any event in the present case the legal and factual basis for declaration 1(a) has not been established. As submitted above,

the evidence discloses that the employment of the Applicant was validly terminated effective from the dismissal of the appeal to MAP, in September 1996.

(2) DISCRETION

139. In any event the Commission, in the exercise of its discretion, ought not to make the declarations sought.

140. In the present case the acts complained of occurred many years ago. The Applicant, with full knowledge of this, elected not only to take no proceedings before the Industrial Commission but actively pursued remedies against the Respondent in other tribunals seeking relief which was in some cases analogous to that sought in the present proceedings and in other cases quite inconsistent with the claim now made.

141. The Applicant commenced proceedings before the AntiDiscrimination Board seeking relief analogous to that sought in the present proceedings (See T p 164) .

142. In addition the Applicant commenced proceedings in the District Court of NSW against the Respondent and others actively asserting and relying on the fact that she had been terminated by the Respondent. (See Exhibit 83 final page and T 342.6 - 344.30).

143. It is inappropriate that the Applicant be now granted a declaration inconsistent with remedies sought against the Respondent in another forum.

144. The present proceedings were not commenced by the Applicant until August 2000. Even then the Applicant made no complaint

about malafides until the amendment of the Applicant's application on 3 January 2001. This amendment, in turn, gave rise to the need on the part of the Respondent to attempt to meet the case by calling a number of witnesses, some of whom had since left the employment of TAFE.

145. The Applicant's case, as amended, deals with a substantial number of factual allegations. In particular the Applicant's claim concerning malafides and absence of bona fides is a substantial factual case reaching back now over many years. Cross-examination has ranged over matters as far back as the early 1990s.

146. Delay is a consideration that is relevant to exercise of discretion under Section 154. See *Frost v Speaker of the Legislative Assembly of NSW* (2000) 97 IR 461, 467 as to the relevance of laches to the Commission jurisdiction.

147. In addition the Applicant, in seeking discretionary relief, is seeking to attack or avoid the decision of the Medical Appeals Panel to dismiss her appeal on health grounds. It is highly relevant, in this regard, that the Applicant chose not to co-operate with (or indeed ultimately recognise) the process of the Medical Appeals Panel. See:

(a) T 320.52 where the Applicant agreed she told the Panel that she would attend a medical examination whilst actively having no intention of doing so (See Exhibit 75);

(b) T 321.35 where the Applicant gave her views about the Medical Appeal Panel;

(c) T 321.49 - 321.52 re the Applicant finding an excuse not to go to the medical appointment (at a time when she was legally represented) (Exhibit 76);

(d) T 327.53 and Exhibit 77 - re the cancellation of a permit for the provision of any medical information on 20 March 1996 because of the "false documents being written and put in the medical files and passed around without my knowledge, damaging awful documents". (ie instead of meeting materials coming from Healthquest she actively chose to provide no response);

(e) T 328.26 election not to see Dr Dyball on the basis that "I had found out that I was not required to bearing in mind that I was receiving payslips";

(f) T 328.38 - refusal to co-operate with the Medical Appeal Panel process that she herself had instructed because she had come to the view "that this was not a medical matter".

148. In so far as the Applicant is seeking declaration 1 (b), namely that she is entitled to be paid all emoluments pertaining to her position, it is relevant that the Applicant has entirely failed either to identify any basis of jurisdiction or to particularise or stipulate in any way what those emoluments are or are claimed to be. This is of particular relevance in circumstances where this aspect was expressly referred to by the Commission on 7 December 2000 (T pp 2-3) and where the Commission made it abundantly clear to the Applicant that particularisation of this claim would be required. As things stand the Commission is in absolutely no position to attend to this aspect of the proceeding and this lies totally at the feet of the Applicant.

149. In these circumstances, even if it be assumed that the Commission is invested with jurisdiction to make the declarations, and that the Applicant's case on the merits was somehow made out, as a matter of discretion they ought not to be made.

CONCLUSION

The Application should be dismissed with costs.

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E. BRUS