

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974

s29(1A) application for hearing of an industrial dispute

Raajiv Pratik Prasad

T14635 of 2019

and

Minister administering the State Service Act 2000/Department of Health

DEPUTY PRESIDENT ELLIS

30 July 2019

Industrial dispute - alleged unfair termination of employment - contract of employment - was there a valid reason - whether effluxion of time constitutes a termination of employment - fixed term contract - reasonable expectation of continuing employment - no valid reason - lack of procedural fairness - reinstatement - order issued

DECISION

[1] On 31 January 2018, Dr Prasad applied to the President, pursuant to s29(1A) of the *Industrial Relations Act* 1984 (the IR Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (Tasmanian Health Service) (THS) (the Respondent) arising from a dispute in relation to termination of the Applicant's employment.

[2] Dr Raajiv Pratik Prasad (the Applicant) was employed as a Medical Practitioner Level 1 (Intern) on a full-time fixed term contract in the Doctors-in-Training Program (Intern) 2018 at the Royal Hobart Hospital (RHH) with the Tasmanian Health Service.

[3] Dr Prasad took extended approved personal leave during his fourth and final clinical term rotation from 22 November 2018. This was as a result of his long term mental health impairment. Conditions had been imposed by the Australian Health Practitioners Regulatory Authority (AHPRA) for the period of his employment, predominantly requiring him to work only between the hours of 7am and 11pm, due to this impairment.

[4] Following telephone notification by Dr Prasad, in early January 2019 of his readiness to return to complete the Intern program, he received a letter from Dr King, Acting Executive Director Medical Services (A/EDMS), on 3 January 2019. She notified him that they were unable to support an extension of his employment and provisional AHPRA registration. A letter, dated 23 January 2019, from Suzanne McCavanagh, Chief People and Culture Officer with THS, confirmed the conclusion of his employment on 14 January 2019, in line with the expiration of his fixed term contract.¹

[5] The Applicant maintains he had a reasonable expectation of ongoing employment to complete the fourth term of the Intern program and that there was not a valid reason

¹ Exhibit A20.

to terminate his employment. Additionally, he alleges the process was unfair and his employment was terminated without proper cause and process. He is seeking reinstatement to the Doctors-in-Training Program (Intern) for completion of the medical internship in 2019.

[6] The THS relied on the Fixed Term Instrument of Employment (IOA) which had an operative date of 2 January 2018 and a specific expiration date of 14 January 2019. The Respondent submitted there could be no expectation of ongoing employment and his employment was not terminated by the THS, rather his employment concluded through the effluxion of time as set out in the fixed-term instrument of appointment.²

[7] The issues I must determine are:

- a) What was the nature of Dr Prasad's employment?
- b) Was his employment terminated?
- c) Did Dr Prasad have a reasonable expectation of continuing employment?
- d) If yes, was there a valid reason for the termination of his employment?
- e) If there was a valid reason, was the termination of his employment fair?
- f) If so, what is the appropriate remedy?

What was the nature of Dr Prasad's employment?

[8] Dr Prasad was selected on merit and successfully obtained an Intern position at the RHH, with the THS. His classification was a Medical Practitioner Level 1 (Intern).

[9] In the *Medical Practitioners (Tasmanian State Service) Award*, cl 20, Classifications, a Medical Practitioner Level 1 (Intern) is defined as;

"...a medical practitioner who holds conditional registration under the provisions of the *Health Practitioner Regulations National Law (Tasmania) Act 2010* (Tas) and is employed in a position normally occupied by an Intern."

[10] Mr Green representing the Applicant, submitted that following his non selection to the Intern program in 2016, Dr Prasad had pursued allegations of discrimination on the basis of age and disability through Equal Opportunity Tasmania, based on the advice that he had been unsuccessful due to the fact he was not a recent graduate.³

[11] In April 2017, a decision was handed down by the Anti-Discrimination Commissioner. A Record of Agreement⁴ was signed by the parties in June 2017. This agreement resulted in Dr Prasad being identified as a priority group 1 applicant resulting in a first round interview with the other priority group 1 applicants. He was successful in obtaining an Intern position for the 2018 program.

[12] The Letter of Appointment to the Intern program and attached annexures (LOA) from Suzanne McCavanagh, was dated 13 November 2017.⁵

[13] The LOA states;

"The position is offered on a fixed-term full time rotational basis (76 hours per fortnight) for the period Tuesday 2 January 2018 to Monday 14 January 2019."

² Exhibit R1, pages 71-73.

³ Exhibit A9.

⁴ Exhibit A10.

⁵ Exhibit A12.

[14] Annexures attached to the LOA, outlines the training requirement;

"As an intern you must complete the following clinical experience in order to be eligible for general registration:

- A term of at least 8 weeks that provides experience in emergency medical care
- A term of at least 10 weeks that provides experience in medicine
- A term of at least 10 weeks that provides experience in surgery, and
- A range of other approved terms to make up 12 months (minimum of 47 weeks full time equivalent service).

The Tasmanian Health Service will structure your employment to enable the completion of your training requirements."

[15] The IOA⁶ appointed Dr Prasad as a fixed term full time employee pursuant to s.37(3)(b) of the *State Service Act 2000* (the SS Act), "...to undertake duties within the Tasmanian Health Service for the purposes of participating in the Doctors in Training (Intern) Program 2018...", and set out the terms and conditions, in accordance with the relevant industrial instruments and legislation.

[16] The conditions were as follows:

1. Subject to the terms of this instrument the period of employment is effective from 2 January 2018 and, subject to the terms of this instrument, will expire on 14 January 2019.

The employee understands that the employee has been employed for the above period only and that following the expiration of that period there is no obligation on the Minister or the employee to enter into any further employment arrangements.

...

5. Notwithstanding clause 1 of this instrument, the employee or the Minister (or the Minister's delegate) may terminate this appointment as set out in Schedule 4."

[17] Schedule 4 enables the employee to terminate the appointment by the giving of four weeks and up to twelve weeks written notice, and a set of conditions where the employer may terminate the appointment. This includes termination of the appointment without notice if the employee is found to have engaged in serious and wilful misconduct or has abandoned the appointment.⁷

[18] It also outlined the termination of the appointment in accordance with s.45 of the SS Act:

" by the giving of no less than four(4) weeks and up to twelve (12) weeks' notice in writing if:

⁶ Exhibit A11.

⁷ Exhibit A11, Schedule 4(2).

- (a) It is determined in accordance with the relevant Employment Directions that the employee:
- (i) Is unable to effectively and efficiently perform the duties assigned to the employee, or,
 - (ii) Has breached the State Service Code of Conduct contained in the State Service Act 2000;
- ..."

[19] Section 37 (3) of the SS Act states;

"The appointment of a person as an employee is to be-

- a) as a permanent employee; or
- b) for a specified term or for the duration of a specified task."
(my emphasis added)

[20] Clause 8 of the *Medical Practitioners (Tasmanian State Service) Award* defines fixed term employment as:

'Fixed term full-time employee' means a person who is appointed to work the full ordinary hours each week (as defined) and is engaged for a specified term or for the duration of a specified task in accordance with section 37(3)(b) of the *State Service Act 2000*."

[21] Mr Green submitted that Dr Prasad was subject to conditions imposed by AHPRA in relation to the ongoing management of his health impairment. He said these conditions were known to the employer and relevantly restricted his practice to working between the hours of 7am to 11pm and limited his employment to the RHH.⁸

[22] Dr Prasad's evidence was that he graduated with a medical degree in 2008 from the University of Tasmania and commenced an internship at Liverpool Hospital in Sydney in 2009 but did not complete this internship. He has been in recovery from depression since 2009.

[23] Evidence of the training requirements required to be completed in order to be eligible for general registration were tendered, and included the Registration Standard of the Medical Board of Australia (MBA).⁹ This national standard outlines the required four terms as outlined in the LOA and the requirement of evidence of satisfactory completion of at least 47 weeks equivalent of full time supervised clinical experience within a period of no more than three years.

[24] Mr Green stated Dr Prasad's fixed term contract was for the duration of "a specified task" as stated in his IOA for; "the purposes of participating in the Doctors in Training (Intern) Program 2018". He submitted the Program consisted of four clinical rotations required to be eligible for general registration but he had only participated in three full rotations.

[25] The Respondent submitted that Dr Prasad was on a fixed term contract with the effective period of operation concluding 14 January 2019. Mr Johnston submitted that the

⁸ Exhibit A40, pages 8-9.

⁹ Exhibit A1.

fixed term contract was not for a specified task but was for a specified term as stated in his IOA.

[26] It has been established in decisions of this Commission that contracts providing a provision to enable either party to terminate the contract by the giving of notice, is not a fixed term contract, rather a contract for an indeterminate period, with a date beyond which the contract will not continue.¹⁰

[27] In *Australian Education Union, Tasmania Branch v The Minister Administering the State Service Act 2000*, Commissioner Shelley found that the contract conditions which enable the giving of notice;

“...does not alter the plain fact that if the contract can be ended at any time then its term of operation is not fixed.”¹¹

[28] I accept the IOA did state that there was no obligation on the employer to offer further employment. Dr Prasad gave evidence that he signed the IOA, as he “...wanted the job”, however the purpose to participate in the Intern program had not been fulfilled. Dr Prasad had not completed the time frame of 47 weeks of clinical practice nor completed the final term, which I consider the duration of the specified task. The specified task in his LOA and IOA was the participation and completion, either successfully or otherwise of the entire intern program, consisting of four clinical rotations or terms.

[29] The expiration date was a nominal date and the employer had the discretion to offer an extension of the fixed term contract to enable the completion of the final term. The Respondent submitted the discretionary authority to extend his contract was not exercised.

[30] Evidence given by Dr Prasad demonstrated an extension of six months had been offered to Dr Nicky Randriamahefa to allow continuation of her internship following her taking six months personal leave.¹² Dr King also provided evidence that other interns had been offered extensions.

[31] I am satisfied that Dr Prasad was appointed as an employee on a full-time fixed term IOA for the duration of a specified task being for the purpose of participating in the Doctors in Training (Intern) Program 2018. This purpose was expressed in both the IOA and the LOA and expressly stated the THS would structure his employment to enable him to meet the training requirements set out. It is the participation and completion of the four terms, with successful or an unsuccessful outcome, which is the Intern training program.

[32] The THS supported his employment to meet the conditions set by the regulatory body, AHPRA. The evidence demonstrates that employment for a normal internship program at the THS is undertaken in a twelve month period which includes 47 weeks of clinical rotations, 4 weeks annual leave and up to ten days of unplanned leave, including sick leave if required.¹³ Dr Prasad required extended approved personal leave during the last term of his rotation and due to the termination of his employment, was unable to complete that term.

[33] However, having established that Dr Prasad was an employee, the important questions are whether Dr Prasad’s employment was terminated and whether he had a reasonable expectation of continuing employment.

¹⁰ *Australian Education Union, Tasmania Branch v The Minister Administering the State Service Act 2000* T10628 of 2002, T10629 of 2002, T10632 of 2002, T10699 of 2003 [para 115].

¹¹ *Ibid* [para 116].

¹² Exhibit A8.

¹³ Exhibit A18.

[34] These criteria are required to be satisfied to enable jurisdiction pursuant to s.30(3) of the IR Act which states:

"The employment of an employee who has a reasonable expectation of continuing employment must not be terminated unless there is valid reason for the termination connected with-

(a) the capacity, performance or conduct of the employee; or

(b) the operational requirements of the employer's business."

(my emphasis added)

Was his employment terminated?

[35] Dr Prasad gave evidence that his employment was terminated prior to completing the intern program through a letter, dated 23 January 2019 from Suzanne McCavanagh.¹⁴

[36] The letter stated;

"Further to your email received on 18 January 2019, and the letter you have previously received from Dr King dated 3 January 2019, I write to confirm that your fixed term employment with the Tasmanian Health Service (THS) expired on 14 January 2019 and in accordance with Clause 1 of your fixed term Instrument of Appointment the Tasmanian Health Service does not intend to enter into any further employment arrangements."

[37] Reference to the letter from Dr King¹⁵ was made in the above letter, which outlined reasons for the refusal to support an extension of Dr Prasad's employment. The Applicant submitted that the reasons stated were the AHPRA conditions and concerns in relation to his work performance. Dr King stated:

"For these reasons, the THS are unable to support your application for an extension of your provisional registration with AHPRA and your employment with the THS will conclude on 13 January 2019."

[38] Mr Johnston stated that Dr Prasad's employment was not terminated by the employer. He submitted his employment concluded at the specified expiration date of 14 January 2019 in the IOA. This was due to the effluxion of time;

"The single fixed-term instrument of appointment relevant to this matter extinguished with the effluxion of time."¹⁶

[39] In the unanimous decision of the Full Court of the Supreme Court of Tasmania in *Port of Devonport Corporation Pty Ltd v Abey*,¹⁷ and the court's interpretation of s.30(3) of the IR Act, it was held that termination of employment by the effluxion of time fixed by a contract of employment, is a termination of employment. It was found that termination or ending employment by the employer is not required to be found, rather just that the termination of employment occurred.

[40] In the *Port of Devonport Corporation Pty Ltd v Abey*, Justice Evans found:

"Further the use of the phrase 'reasonable expectation of continuing employment' and the context in which it is used in s30 could suggest that where an employee

¹⁴ Exhibit A20.

¹⁵ Exhibit A18.

¹⁶ Exhibit R1, pages 71-73.

¹⁷ [2005] TASSC 97.

could satisfy the Commission that he or she had such an expectation, then contract or no contract, he or she may not be able to be terminated and therefore a dispute existed in respect of which the Commission had jurisdiction."¹⁸

[41] Accordingly, I find that Dr Prasad had his employment terminated. This was effected through the terms in the correspondence from Suzanne McCavanagh.

Did Dr Prasad have a reasonable expectation of continuing employment?

[42] Section 30(1) of the IR Act defines continuing employment as:

"...employment that is of a continuing or indefinite nature **or** for which there is no expressed or implied end date to the contract of employment."
(my emphasis added)

[43] Mr Green submitted Dr Prasad had formed a reasonable expectation of continuing employment in relation to participation and employment in the four rotations required for the Intern program.

[44] Dr Prasad gave evidence he had completed three of the four terms.¹⁹

- He said he received a mid-term pass and a borderline pass at the end of his first term in Emergency Medicine. A borderline pass was deemed to constitute a pass as agreed at a meeting where his sister was present, by his intern supervisor and Emergency Department Director.
- He passed both mid-term and final assessment for his Medical term in Geriatrics.
- His General Surgical term was difficult and he was provided with extra support. An Improving Performance Action Plan (IPAP) in relation to communication had been implemented. He received an unsatisfactory mid-term grade but passed at the end of this term.
- His fourth and final term was not completed due to his certified sick leave commencing on 22 November 2018. He stated he had received a "...very poor mid-term report in fourth term, consisting of some 1's and 2's out of a 5 point scale."²⁰

[45] He stated in evidence in relation to the final term performance:

"However, at this stage I was feeling ill and I feel illness affected my performance quite substantially, and having taken sick leave after this, I never did get the chance to improve on my performance."²¹

[46] Further, he stated:

"In general, my term supervisors were generally happy with my progress through their terms and were definitely so by the end of term, as indicated by the satisfactory end of term assessment reports."²²

¹⁸ Ibid [para 83].

¹⁹ Exhibit A7.

²⁰ Ibid [para 19].

²¹ Exhibit 7 [para 20].

²² Ibid [para 18].

[47] In evidence, he said that he needed to complete and pass one more term, which could be any type of term to fulfil the AHPRA requirements.

[48] He stated he was supported to take the sick leave by his Internship Supervisor, Dr Beswick. He advised Dr Harris, the Deputy Executive Director of Medical Services by email²³ on 22 November 2018;²⁴

"The Deputy EDMS

Dear Dr Harris,

Just to advise you, due to medical reasons, and after discussion with my GP and Psychiatrist, and Dr. Beswick (Director Intern Training) I have decided to take the rest of the term off (7 weeks). I plan on resuming after the 7 weeks when the new term starts. (my emphasis added)

Please find attached medical certificate.

I have notified my Supervisors and also Human Resources (Ms Hampson).

If I could please have a meeting with yourself to discuss these issues?

Thank you,

Yours sincerely,
Raajiv Prasad.
Intern"

[49] His evidence was he was taking personal leave for the remainder of the fourth term of the Doctors In Training Program, with the intention of resuming when the new term for the Doctors In Training Program started in 2019.

[50] On Friday, 23 November 2018, Dr King A/EDMS responded by email to Dr Prasad, with a cc to Dr Harris.²⁵

"Hello Dr Prasad

I thought I would take this opportunity to respond to your email regarding arranging a meeting before you take your sick leave for the rest of the term.

Firstly we are most concerned that you take care of yourself and receive the necessary support. I have caught up with Dr Beswick and I understand you are due to catch up with family in Sydney. I therefore think it is not necessary for you to catch up with us here at this time to discuss any future work plans.

We will be better placed to discuss your work situation once we understand the results of your recent health assessment and any decisions AHPRA may make on the basis of that assessment.

All the best

Jenny
Dr Jennifer King
MBBS MBA FRACMA FAICD"

[51] Dr Prasad said he relied on this advice and continued on his personal leave with the expectation of returning to continue and finish the final term.

Meetings with Dr King A/EDMS

²³ Exhibit A17.

²⁴ Ibid [para 30-31].

²⁵ Exhibit A17.

[52] Dr Prasad gave evidence outlining the five meetings with the Executive Director of Medical Services in relation to his medical internship. This position was initially occupied by Dr Doolan and then by Dr King, who was in an acting capacity.

[53] The first two meetings with Dr Doolan related to a breach of his AHPRA conditions. This breach was returning to the RHH after hours to use the internet. A notification was sent to AHPRA re the breach of the conditions.²⁶ The outcome from AHPRA, dated 15 January 2019, was a caution in relation to his failure to comply with his conditions of restricted hours of practice on three occasions.²⁷

[54] The first meeting with Dr King in September 2018 was to touch base regarding his progress through his third term in surgery, which he said he initiated. He requested additional support and they discussed the adverse nursing reports. The outcome of the meeting was a commitment to progress into his fourth term of the internship, "...regardless of the result of the third term end of term assessment."²⁸ He stated he passed the third term in surgery.

[55] The second meeting on 22 October 2018 with Dr King, was also initiated by Dr Prasad to seek the outcome of his application for the Resident Medical Officer (RMO) position.

"It was at this meeting that Dr King assured me that I would be either given an RMO position if I passed my fourth term or if I did not pass, the Royal Hobart Hospital would be very supportive and offer me a continuation of my internship, to enable me to finish my internship."²⁹

[56] Dr Prasad tendered an email dated Monday, 22 October to Dr King following this meeting, where he stated:³⁰

"Thank you very much for meeting today and confirming that you are still considering me for an RMO position or alternatively an extended internship into next year, depending on the progress of my final Gen Med term."

[57] In response to allegations that the email was not received by Dr King, Dr Prasad gave evidence that he denied he manufactured the email and that he believed it was in his sent box. He provided further commentary that he found the email in his sent box while he was looking for evidence in support of his case and copied and pasted the contents into a word document in January 2019.³¹

[58] In cross examination he conceded it was a surprise when he found out Dr King had not received the email and that the email was still in his "inbox" but amended his position to say it was in his sent folder, although he "couldn't guarantee" it wasn't in the draft folder.³²

[59] Dr Prasad was not provided with the notes from the meeting on 22 October but has since received the notes as part of this application.³³ These notes were drafted by Alison Hallam, the Recruitment Consultant- Doctors in Training Program who was present with Dr King and Dr Prasad at the meeting. The notes state:

²⁶ Exhibit A35.

²⁷ Exhibit A34.

²⁸ Exhibit A7 [para 28].

²⁹ Ibid [para 30].

³⁰ Exhibit A16.

³¹ Transcript, pages 26-27.

³² Transcript, pages 29-30.

³³ Exhibit A24.

- Dr Prasad provided his term 3 surgical assessment, which demonstrated that whilst he needed to work on his communication with nursing staff, he had passed the core surgery term;
- Dr King checked with Dr Prasad on how he was going and if his AHPRA conditions had changed;
- Discussion regarding the RMO positions and his current restrictions would make things difficult as an RMO but that Dr King
 - “...needs to see how he goes in his current medical term before deciding if he will be offered a RMO position for 2019 or a possible option was to extend his internship into 2019 for a term (would need to be an ED term)”
- Other specific workplace and clinical issues were discussed;

The notes conclude with:

“In closing Dr King advised Dr Prasad that she would be speaking to his term supervisors in medicine and this will decide if he is offered a RMO position or his internship extended.”

[60] Mr Green submitted that following the meeting Dr Prasad understood he would be offered a RMO position if he was successful in his final General Medicine term, or if he failed, his internship would be extended. Dr Prasad’s evidence was that he understood Dr King was supportive of him completing his internship.³⁴

[61] It was stated he did not receive any communication that if his internship timeframe expired he would not be permitted to complete his internship. As a result he felt confident about his ongoing employment as Dr King had consistently emphasised that they would be supportive of him finishing his internship.

[62] This was further supported in Dr Prasad’s view, in the email sent following his notification to Dr Harris about taking sick leave and his notification of his intention to return following sick leave to complete his internship in seven weeks.

[63] The third meeting with Dr King was on 3 January 2019 after he notified his intentions to return from sick leave to continue his internship in the New Year. Following this verbal notification, he received a letter from Dr King advising that his contract would finish and he would not be offered a continuation to complete his internship. His response was:

“This was in contrast to what my expectations were in terms of whether I might need one or two extra terms.”³⁵

[64] Dr Prasad said he expected to be offered a continuation in line with the offer to his fellow intern, Dr Nicky Randriamahefa of a further two terms due to a similar situation.³⁶ His evidence was that he had spoken to Dr Randriamahefa on Friday, 3 May 2019 and she confirmed she had taken 6 months off for personal leave and was allowed a further six month extension to complete her internship in 2018.³⁷

³⁴ Exhibit A41, A7.

³⁵ Ibid [para 38].

³⁶ Ibid [para 39].

³⁷ Exhibit A8.

[65] He stated Dr King asked him to put his appeal to his termination of employment in writing, which he tendered at the hearing.³⁸ In this letter dated 4 January 2019, he outlined his expectation of continuation and extension of the internship, at least on two instances:

"a) On or around 29 November 2018 in a meeting with yourself, a HR representative and myself where the topic of discussion was about RMO positions for this year I mentioned I had not received an offer for an RMO position. You advised that depending on my progress in the last term that you will be very supportive and continue my internship in 2019 as THS priority was to allow me to finish my internship. I followed this up with an email to you confirming our discussion in relation to this. I did not receive emails in return to advise me otherwise. Once I have access to my workplace mail I can produce the email in question for your verification of the above mentioned sequence of events.

b) Prior to going on leave I emailed you to express my desire to meet with you to sort out various issues. By this stage I had already submitted a valid medical certificate to HR and to you in relation to my sick leave and its expected duration. In a subsequent telephone conversation you advised me not to worry about the meeting and to just look after my health and a meeting would be arranged once I recovered. I did not receive any indication at this point in time that taking sick leave would place extension of my internship in jeopardy. In fact, from this conversation I understood that THS was being supportive of my need to take time off to recover from my sickness and that this would not affect my extension of internship as assured previously."³⁹

[66] Dr Prasad's sister, Ms Supreena Prasad was present at the meeting 3 January 2019 as a support person. Her evidence was:⁴⁰

- She is currently employed as a Dispute Resolution Specialist and has practised law previously.
- She assisted Dr Prasad in his dispute before the Equal Opportunity Tasmania and stated Andrew Conrad, representing the RHH, stated that Dr Prasad would be provided with any support he required to finish his internship and they would create a position for him to ensure he completes his internship in 2019.
- She had attended a previous meeting at the RHH regarding his first term marks in ED. She said that it was stated his borderline pass constituted a pass and he was deemed to have passed his first term.
- She attended a meeting following receipt of the letter from Dr King informing Dr Prasad of the conclusion of his contract and that he would not be offered a continuation or a new contract. She stated the reasons included her brother's level of performance and his AHPRA conditions.
- She stated:

"During the meeting Dr King still seemed undecided about whether to continue my brother's internship and at one point she said she might offer to continue his internship, but she wanted to know whether my brother felt he might need one or two extra terms."⁴¹

³⁸ Exhibit A19.

³⁹ Exhibit A19.

⁴⁰ Exhibit 37 and 39.

⁴¹ Ibid [para 18].

- Dr King stated there were financial restrictions and her brother offered to finish his internship working for free, which she stated Dr King thought that might be something they could consider.
- Her handwritten contemporaneous notes of the meeting supported her statements.
- She recalled that at the meeting that he raised his expectation of an extension with Dr King and she had reiterated that she had supported his leave with a priority on getting better and they would meet with him once he felt better.
- She stated Dr King asked if Dr Prasad would have her support and other support networks to finish his internship, to which she indicated positively.

[67] Mr Green in the application, stated that the Applicant's employment was based solely on participating in the Doctors in Training (Intern) Program 2018 and in Annexure A to the Letter of Offer, dated 13 November 2017⁴² under the heading "Training Requirement" it states;

"The Tasmanian Health Service will structure your employment to enable the completion of your training requirements"

Mr Green stated this therefore indicates emphasis on completing the training requirements of the four terms.

[68] Dr Prasad relied on information provided in the *National Standards; Medical Board of Australia Registration Standard*⁴³ and *Medical Board of Australia Intern training-National standards for programs and Intern Training-Assessing and certifying completion*.⁴⁴ He also tendered a variety of guidelines for intern training developed by the Postgraduate Medical Council of Victoria Inc.⁴⁵

[69] It was submitted that the Standards provide the framework for the accredited employer for the employment of Interns and that the IOA terms do not override the operation of the Registration Standard.⁴⁶

[70] These documents provide a mandatory requirement that feedback and performance review is an essential part of intern training as referred to in the national standard. It outlines:⁴⁷

"National standards 5.2.1-5.2.6 address feedback and performance review. Intern training providers must:

- Identify interns who are not performing to the expected level and organise early appropriate remediation [5.2.6]."

[71] Mr Green submitted that while the required term assessment forms and one Improving Performance Action Plan (IPAP) relating to communication were completed, the Respondent did not provide adequate feedback and remediation opportunities and the focus was mainly on non-compliance with attendance and communication.

⁴² Exhibit A12.

⁴³ Exhibit A1.

⁴⁴ Exhibit A2.

⁴⁵ Exhibit A4, A5, A6.

⁴⁶ Exhibit A41.

⁴⁷ Exhibit A2.

[72] He noted the standard outlines that if there are circumstances where the provider considers appropriate remediation is unlikely to be successful, this should be reported to the Medical Board of Australia immediately as notifiable conduct. He contended that the Respondent appears to have sought to, "pass the baton..." to Dr Prasad to argue his case to remain in the training program, rather than provide the necessary remediation.⁴⁸

[73] Mr Green submitted the above submissions form the basis for an equitable estoppel, where a party has failed to correct the other party's assumptions where they are aware of the detriment. This was allegedly demonstrated by the Respondent's conduct, silence and misrepresentation.⁴⁹

Respondent's position in relation to the alleged expectation of continuing employment.

[74] Mr Johnston submitted the IOA had a closed statement that the employment period was expressed as the date of effect and stated expiration date, which was just over twelve months employment. He stated that the contract expressed there is no obligation on the part of the Minister or the employee to enter into any further employment arrangements. Mr Johnston stated that no reasonable person could base an expectation of continuing employment on the operation of this contract which contained an expressed expiry date and the specific exclusion of any requirement to enter into future contracts with him.⁵⁰

[75] He stated that at the conclusion of this instrument, the employer did not wish to re-engage the Applicant and exercised that prerogative.

[76] In response to the arguments raised by the Applicant, Mr Johnston summarised the elements. The first element was the partial completion argument. It was agreed that the Applicant had completed some units of the course of study but it was the appointed delegates decision whether to execute their delegation to offer a further fixed term IOA pursuant to s37(3)(b) of the SS Act for the purposes of completion of the intern program.

[77] He submitted it was relevant to consider the quality of the Applicant's results and other extant factors associated with the intern's progress through the program. He stated it was reasonably open for the delegate to decline to exercise their authority to extend or offer further employment to the Applicant:

"...based on the fact that the Applicant had been assessed as satisfactory in some units of the program."⁵¹

[78] In relation to the second element, the representation argument, he relied on the meeting notes from the 22 October 2018, which stated Dr King needed to review Dr Prasad's progress in his medical term before deciding if he would be offered a RMO position or a possible option was to extend his internship into 2019 for a term.

[79] Mr Johnston submitted these notes indicate caveats to any offer or extension and indicate no guarantee of future employment. He submitted the email following that meeting which was allegedly sent from Dr Prasad to Dr King, was never received by Dr King and it appeared to be manipulated and designed to mislead the Commission.

[80] A witness for the Respondent, Mr Paul Enkelaar, Team Leader of the Digital Strategy and Services Division of DPAC, provided honest and reliable evidence. His evidence was that he was requested to investigate if the email in question was ever sent to Dr King. He concluded the email had not been sent to Dr King based on his search of

⁴⁸ Transcript, pages 5-10.

⁴⁹ Exhibit A42.

⁵⁰ Transcript, pages 34-35, Exhibit R1.

⁵¹ Exhibit R1, Transcript 35-36.

Dr Prasad's mailbox. He did find a copy of the original email sitting in his "Draft" folder, indicating Dr Prasad had created the email on 22 October 2018 which was not sent, but it had saved to the draft folder.

[81] His evidence was that the copy of the email, dated 22 October 2018 appears to have been manufactured in an attempt to make it look like he actually did forward the email.⁵² He stated the email content was the same as the draft but the time and date was in the header information and:

"The only time stamp information that's put is of the message that is sent and because this information was only evident in the email that was sent on the 8th of January, it just contained this text."⁵³

[82] His evidence concluded that this email could not be presented in the form tendered by Dr Prasad⁵⁴ and it had to be cut and pasted into a word document with the header entered manually.

[83] Mr Johnston submitted that Dr King was not aware that Dr Prasad had wrongly assumed he expected ongoing employment. It was submitted that had she received the above email, she would have clarified by way of reply.

[84] Mr Johnston submitted the notes which document the ongoing options were not an either/or statement and stated that "...no reasonable person could take from that there is a guarantee of future employment in some way or another..."⁵⁵

[85] He stated that the statement meant there could be ongoing employment based on conditions, or:⁵⁶

"...it was still an open proposition that the employer representative was exercising their prerogative to extend an internship as well but there is still the matter of contract of employment, that all the parties were cognisant of, that terminated the employment arrangement."

[86] Mr Johnston submitted that managers do not continue to remind employees they are on fixed term contracts during normal supervisory discussions as this could be construed as a form of bullying. He stated in every conversation around performance with Dr Prasad, the Applicant is saying the Respondent:⁵⁷

"...ought to have front footed the fact that he had no- he could have no expectation of ongoing employment that you might get an RMO contract or you might have your internship extended or, by the way, you might be unemployed. That proposition seems to underpin the entire argument around this representations line of argument from the Applicant, and that is a nonsense in our submission."

[87] Mr Johnston submitted there was no action taken by Dr Prasad based on any promise from the Respondent and he was supported to take his sick leave. "Notwithstanding an eventual decision not to offer a further contract of employment."⁵⁸

[88] Dr King has the overarching responsibility for the medical profession including the Doctors in Training program and Dr Prasad.

⁵² Exhibit R2.

⁵³ Transcript, page 51.

⁵⁴ Exhibit A6.

⁵⁵ Transcript, page 37.

⁵⁶ Ibid, page 38.

⁵⁷ Ibid.

⁵⁸ Ibid, page 39.

[89] Her evidence was that she:⁵⁹

"...made no unconditional statements around future employment to Dr Prasad during the course of any interactions I had with him, either in writing or in person, that could have lead him to reasonably believe he was continuing with the THS no matter what."

[90] Her evidence was she told him he would need to satisfactorily complete his internship to be offered a RMO position and: "...in the event he didn't complete his internship, I outlined internship contracts could be extended."⁶⁰

[91] Dr King gave evidence that she started her role in September 2018 and had identified that Dr Prasad required additional support.

[92] She stated the concerns were mostly around communications with other staff and he received relevant coaching. Her evidence regarding the meeting on 22 October 2018 with Dr Prasad was that it was a meeting offering support and she said she stressed the importance of the general medical term as; "...where to from here, as far as his ongoing employment." She noted he asked her about the RMO positions toward the end of the meeting and acknowledged there had been previous extensions to other intern contracts:

"I can't recall his next question but it basically, he was saying "Are there any other options," and I did acknowledge that interns, in the past, albeit not at my request, that interns in the past had been offered an extension and again I reiterated it all depended on how he went in his general medical term and, realistically, the summary appraisal of his progress throughout the year, so that's it."⁶¹

[93] An email dated 25 September 2018 written by Racheal Midson, HR Consultant Medical and Surgical Services, summarises the first meeting between Dr King and Dr Prasad, where Ms Midson was in attendance. Dr King agreed she had provided support and said that even a borderline pass in surgical term would enable him to progress to his final term. She agreed that in late September it was looking like Dr Prasad would complete his internship.⁶²

[94] Dr King's evidence was that she couldn't comment or presume to know what Dr Prasad thought in relation to the alleged offer of either an RMO position or an extension to his internship. She also acknowledged it was offered prior to his sick leave as an either/or offer but the significance of the general medicine term had been made clear:⁶³

"Realistically, at that time, it was prior to receipt of his unsatisfactory performance, mid-term in the general medicine term that we had come from the bias of "How can we not offer Dr Prasad a future position".

[95] Her evidence indicated it was possible his illness may have been a factor in his borderline result for the mid-term assessment for the general medicine term in mid-November.⁶⁴

[96] Under cross examination, Dr King conceded she was aware that Dr Prasad wanted to continue in his position and was asking for a RMO position in October and she did not have further information or had not asked Dr Prasad about his intentions since then. On

⁵⁹ Exhibit 3.

⁶⁰ Ibid.

⁶¹ Transcript, page 57.

⁶² Ibid, page 71.

⁶³ Ibid, page 73.

⁶⁴ Ibid, page 70.

further questioning, she acknowledged he had indicated in his email in November about taking seven weeks sick leave then he planned to resume when the new term starts.⁶⁵

[97] Dr King's evidence was that Dr Prasad had telephoned her in early January 2019 to request his return to work following his sick leave period. She said:⁶⁶

"I was quite surprised to receive his phone call to, which indicated to me he was presuming to just come back to work the following week. So, I was surprised about that. I recognised that he wasn't just wanting to see out the expiry of his contract period. So, the purpose of the meeting was simply, again, natural justice, not running away from where we were standing at that point in time. I also thought that he would want to have a discussion around the nature of the phone call was that he said, "Well, why is that," when I said, "No, well, you won't have a contract to come back to work next week," so it was really to clarify what his expectations were at that point in time."

[98] Dr King was aware of the national framework set by the Medical Council of Australia for intern programs and referred to the National Intern Training Assessment Guidelines/standards in her evidence.⁶⁷

[99] Mr Johnston submitted the employment was not an indefinite contract but a one year contract and the fixed term contract was only for a specified period and not a specified task to complete the program which could be indeterminate in terms of time. He stated it was incorrect to say Dr Prasad was on track to complete the course and the "...only thing that got in the way was an illness on his part."⁶⁸

[100] He stated the national standards did not indicate the employment of a Doctor must be extended under any circumstance as it is not an employment document. He also noted previous precedents should not bind the employer to exercise the discretionary authority. He contested the Applicant's argument that no practical barriers were present to returning Dr Prasad to employment as having no relevance.

[101] He noted Dr Prasad did not fail, rather he had not completed his internship and there is no obligation for the THS to allow extra time for completion.

"We'd say that the Applicant meeting his obligation to look after himself ... does not give rise to an obligation on the part of the Respondent, to offer further employment."⁶⁹

[102] Mr Johnston summarised that there could be no reasonable expectation of ongoing employment formed from the circumstances and a reasonable person having signed the contract would be aware of the explicit term of the employment.

Consideration and finding to Dr Prasad's expectation of continuing employment

[103] I have considered all the evidence and supporting material before me, and I am charged to determine if Dr Prasad had formed a reasonable expectation that he would have continuing employment to complete his participation of a further term in the intern program.

⁶⁵ Ibid, pages 65-67.

⁶⁶ Ibid, page 77.

⁶⁷ Ibid, page 59.

⁶⁸ Ibid, page 98.

⁶⁹ Ibid, page 100.

[104] As defined at s30(1) of the IR Act, "continuing employment" is either of a continuing or indefinite nature or for which there is no expressed or implied end date to the contract of employment. (my emphasis added)

[105] I am satisfied the employment was not characterised as one of an indefinite nature, rather as a continuing nature for the purposes of participating in the Intern Program, as specified in the training requirement of the four terms.

[106] It is not contested he signed the contract of employment including the IOA, which specified the expiration date of the period of employment as 14 January 2019. I have already determined the nature of the fixed term contract which was for the duration of a specified task, that is, the participation in the Doctors in Training (Intern) Program 2018.

[107] The Respondent contends that as the offer made to Dr Prasad had an express end date, the Applicant failed to meet the criteria set out in s30(3) of the IR Act and therefore, cannot proceed with a dispute in relation to the termination of employment. In my view this is an incorrect construction of the definition. I concur with the below findings and am satisfied a notional end date does not preclude the expectation of continuing employment in isolation.

[108] This is supported in *Dr Russell Everard McGregor v The Minister administering the State Service Act 2000* T14123 of 2013, where President Abey considered the term "continuing employment". This decision was subsequently overturned by a Full Bench, but not in relation to the matters found at Paragraph 113:

"Importantly, the definition contains the disjunctive 'or'. Properly read, this means that a contract which does not contain an "*expressed or implied end date*" automatically meets the definition of 'continuing employment'. Similarly, if an individual could demonstrate through evidence that their employment was of a continuing or indefinite nature,' even if their contract had a notional end date, they would similarly satisfy the definition."

[109] I am satisfied that Dr Prasad did have a reasonable expectation of continuing employment to complete the fourth term of the Intern Program as specified in the purpose and training requirement of his employment contract. There is not a requirement to either successfully or unsuccessfully complete the assessments for fourth term, as this is more relevant to his future registration and managed within the relevant frameworks, but in my view, his was an expectation to be able to complete the final fourth term.

[110] I have made this decision on the following grounds:

1. Meeting notes⁷⁰ indicated support from Dr King and discussions on either the options of an RMO position or an extension of the internship program based on his general medicine term performance, which he did not complete. I acknowledge these offers were not guaranteed and were conditional on satisfactory performance in his final term, which he did not complete due to sick leave, however Dr King's evidence was that if he didn't complete his internship, contracts could be extended to enable completion;⁷¹
2. The complete absence of discussions of potential termination at the expiration of his contract, which Dr Prasad only became aware of, during a telephone conversation when he informed Dr King of his intention to return in early January 2019.

⁷⁰ Exhibits A24, R1.

⁷¹ Exhibit R3.

3. The nature of the call in early January supports Dr Prasad's expectation of continuing employment;
4. There was no discussion or contact with Dr Prasad whilst he was on sick leave. I do not accept the Respondent's position that it may be considered a form of bullying to bring a discussion around ongoing employment openly to his attention. I am satisfied the lack of contact left Dr Prasad with the expectation of returning to complete the final term of the Intern program, which had not been contested following his email advice re sick leave in November. There is a requirement in the Medical Practitioners Award 2015, Clause 11, Workplace Health and Safety, to maintain regular contact with an employee who is absent from work for a period exceeding five days in subclause (c);

"Extended absence from the workplace through illness or injury

(i) Subject to any specific medical advice and consistent with employee well-being, a manager or an appropriate person nominated for this purpose, is to maintain regular contact with an employee who is absent from work for any period exceeding five working days due to personal injury, illness or workers' compensation.

(ii) The role of the designated person is to provide appropriate support, advice and assistance to the employee to enable their return to work at the earliest opportunity and if need be, offer advice as to entitlements and any impending workplace changes.

(iii) This sub-clause is part of a positive workplace culture in assisting the employee's return to the workplace.

(iv) Without limiting the Employer's obligations, where an employee indicates the contact is counterproductive the manager is to cease this approach."

There was no evidence before me to indicate that Dr Prasad or his medical practitioner had requested or advised not to be contacted during his sick leave and therefore the employer has breached the Award clause.

5. Email notification⁷² to Dr Doolan in November of his intention to take the rest of the term off as sick leave and his stated clear plan to return to complete his internship in seven weeks when the new term started ie January 2019. The response from Dr King to this email did not clarify his nominal end date of his contract rather was supportive and offered to discuss any future work plans, once recent health assessments and the AHPRA review were finalised.
6. I am satisfied that Dr King did not receive the email⁷³ from Dr Prasad, following up his understanding of the meeting in October, but do not find that it had malicious intent. The evidence from Mr Enkelaar was that the content of the email was typed following that meeting, but the email was still in the draft box. I am satisfied that Dr Prasad intended to send this email and had believed he had, expressing surprise when he found out she had not received the email. This gave him further weight to believe his stated understanding. This email confirmed that he was still being considered for a RMO position or alternatively an extended internship. While I do not support the manufactured copy and paste technique used by Dr Prasad, I find it indicates the desperation of Dr

⁷² Exhibit A17.

⁷³ Exhibit A16.

Prasad to prove his point that he had a reasonable expectation to complete the internship.

7. While it is acknowledged by both parties, Dr Prasad was struggling to meet the assessment criteria and required additional support, he had passed, albeit with a borderline pass in one, all completed terms to date. He had not failed his internship, but was informed his final term would be important. He did not complete his fourth term and his evidence was his performance was affected by his illness during this term. He notified Dr Doolan and Dr King of his intent to complete his internship in Term 1 of 2019. He was supported to take sick leave and in my view, relied on this support to continue his view of ongoing employment to complete his final term;
8. The only IPAP implemented was in relation to communication skills and not clinical skills and the AHPRA notification was in relation to an alleged breach of conditions related to afterhours work/access and not clinically related issues;
9. Reliance on the MBA national standards to support early remediation opportunities or if he had been identified as unlikely to be successful, there was a mandatory requirement to be reported to the MBA immediately. It appears Dr Prasad is unaware of any report to the MBA as he did not say he had been notified;
10. His knowledge of other interns being offered extensions which was confirmed by Dr King in evidence, gave weight to his expectation of that option. I concur with the Respondent's position that the case cannot be used as a precedent. Whether this was correct or not, I am satisfied it played a part in forming his understanding;
11. At this stage he was unaware of any decision making which was being undertaken in isolation, without any consultation with him;
12. His support person and sister gave unchallenged evidence⁷⁴ that Dr Prasad had an expectation of an extension of his internship;
13. The structure of the employment contract in Annexure A under Training Requirements, where the THS stated his employment will be structured to enable completion of his training requirements, in my view, indicates support will be offered to complete the program. I am satisfied this would lead an Intern to believe a period of long term sick leave would be supported and the employment could be restructured to meet completion of the final incomplete term without any contrary discussions re the potential expiration of his contract;
14. The Respondent could make a discretionary decision to offer further employment to enable Dr Prasad to complete the fourth term but declined to exercise the authority. Dr Prasad was aware this discretion was available and relied on it;
15. Dr King acknowledged Dr Prasad wanted to continue in his position. This lends weight to my understanding of the interactions between the parties. Furthermore, Dr Prasad had stated this intention to Dr King and her evidence supported she also understood he wanted to continue.

⁷⁴ Exhibit A37.

[111] The Applicant alleged promissory and equitable estoppel resulted from the Respondent's actions however, the Respondent submitted the Applicant could not meet the legal tests for promissory estoppel as outlined by Brennan J in *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. Based on the evidence and my finding that Dr Prasad did have a reasonable expectation of continuing employment, it is unnecessary to make a finding on the issue of estoppel.

[112] Having found the Applicant did have a reasonable expectation of ongoing employment to complete the fourth term of the Intern program, the criteria pursuant to s30(3) have been met to effect jurisdiction. Consideration of the valid reason for the termination of employment will be now given.

Was there a Valid Reason for the termination of his employment?

[113] To determine if there was a valid reason for the termination of his employment, the onus of proof rests with the Respondent.⁷⁵ Valid reasoning pertains to whether there was a sound, defensible, well founded reason⁷⁶ for the dismissal, in the context of the employee's capacity or conduct.

[114] Mr Johnston stated the reason for the termination of employment was based on the effluxion of time. In closing, when I asked for reiteration of the Respondent's valid reason for the termination of Dr Prasad's employment and whether it was based on capacity, performance or operational requirements, Mr Johnston stated:⁷⁷

"Yes so, we haven't exercised any rights under ED(6) and we don't purport to. We haven't exercised any rights under ED(5) and we don't purport to. It would be someone spurious to argue operational, an operational reason, even so I'm not prepared to put that in front of you. We don't think we need to go into valid reason."

[115] Mr Johnston submitted the relationship was irretrievably broken due to the misrepresentation by the Applicant around the email. He stated the employer has lost trust and confidence in the employee and it would be impracticable to require the employer to re-instate him. In the event the Commission finds for the Applicant, it was submitted s30(10) of the IR Act would be the most appropriate remedy and provided the relevant salary rate.⁷⁸

[116] However, the Applicant submitted the valid reason was not just the effluxion of time, rather a range of reasons as set out in the letter dated 3 January 2019 from Dr King, and her evidence which revealed review mechanisms in relation to Dr Prasad's capacity. Dr King's evidence was she agreed the reasons stated in her letter were behind the decision why no extension was offered⁷⁹. Dr Prasad did have a chance to respond to the allegations in the letter at a meeting and in writing, as an "appeal process". However, he received the final letter confirming no ongoing employment shortly after, without any of his responses or concerns being addressed or acknowledged.

[117] Dr King's letter outlined the reasons, which were the AHPRA imposed conditions, concerning midterm assessment for the general medicine term, not reaching a satisfactory standard on a global assessment across the whole year, not demonstrating sustained improvement, the required support and potential for any continued or changed conditions imposed by AHPRA.

⁷⁵ Section 30(5) of the *Industrial Relations Act 1984* (Tas) states the onus is on the employer to prove a valid reason for the termination. This context should be applied to the relationship between an employer and employee where both parties have rights, responsibilities and duties conferred and imposed on them. A common sense approach must be applied to ensure that the employee and employer are each treated fairly.

⁷⁶ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, page 373.

⁷⁷ Transcript, page 105.

⁷⁸ Exhibit R1.

⁷⁹ Transcript, page 78.

[118] It was discovered through cross examination of Dr King, that a Review Committee had been established in November to review Dr Prasad's progress without his knowledge and while he was on personal leave. This information was not included in Dr King's witness statement.

[119] The cross examination of Dr King regarding the review committee was as follows:⁸⁰

"MR GREEN: Can you tell the Commission, were you, was it your decision that no extension was offered to Dr Prasad in terms of the internship?.....No.

It wasn't your decision?.....No, the recognised process, accordingly to the National Intern Training Assessment Guidelines/standards, is that there'll be an administrative review committee formed. This indeed occurred in relation to Dr Prasad. What that means is that a range of inputs and views are put forward and we held such a meeting and the representatives on that committee included Human Resource Management consultants, the Director of Clinical Training, the Chair of the Post-graduate Medical Council of Tasmania, the Medical Workforce Unit, a representative from that unit as well and then, of course, myself and my deputy on behalf of Medical Administration.

So when did that committee meet?.....In November, late November."

[120] Dr King provided further evidence that it was considered inappropriate to request Dr Prasad to give his account to the Review Committee based on his health.

[121] In subsequent cross examination of Dr King:⁸¹

"MR GREEN: And that there are issues that require remediation, but then, in November this committee then forms a view that there should be no accommodation of Dr Prasad's illness or personal circumstances and what you're saying is that the committee would not ordinarily, in the normal course of events, hear from an employee if the issues was communication style; that this is a group that decides, without any reference, at all, to the employee. Is that how it operates? Correct, because it's to do with assessment of an individual's performance and, as I've said earlier, it per se, is not a decision-making authority."

[122] Mr Green submitted:⁸²

"Now, if that committee is meeting and making a decision that is potentially adverse to an employee, then they must advise that employee about that. I'm absolutely astounded, even if it is only a recommendation that an agency has a body that has the ability to make a recommendation, even if it is only a recommendation, about whether a person's employment can continue and there is no oversight about that, and I'd also say it is very surprising that it had not been picked up before, that committee exist in relation to this matter, because it clearly was influential in the decision making about the process."

[123] Mr Green referred to the lack of procedural fairness and his submissions that the decision appears to have been made by the decision maker based on a recommendation from the Review Panel which met in November 2018. Mr Green submitted that the broad principle within the State Service is that decisions relating to employment should not be made without an opportunity to have input and Dr Prasad did not have input into the Review Panel processes.

⁸⁰ Transcript, page 59.

⁸¹ Transcript, page 76.

⁸² Transcript, pages 91-92.

Findings

[124] I am satisfied this case is not an effluxion of time matter. There was a decision to review Dr Prasad's capacity and an outcome determined in November by the Review Committee, before the effluxion of time. This recommendation was based on his capacity and those recommendations were forwarded to the decision maker, Ms Cavanagh. Termination of employment by the effluxion of time alone may not always be a valid reason and should not have been relied upon in this case.

[125] The Respondent could not rely on the effluxion of time once a review and recommendation was forwarded to the decision maker on his capacity. Therefore, I find the effluxion of time was not a valid reason for his termination and it cannot be relied upon, as it is evident a recommendation on capacity had been formed.

[126] It is unfortunate for the Department of Health and Human Service (DHHS) advocate that the content of cross examination transpired and he appeared unaware of the Review Committee and the evidence of Dr King, which outlined the process implemented to review Dr Prasad's capacity. The Respondent acknowledged the Employment Directions had not been implemented, and the valid reason was not based on capacity or operational requirements.

[127] The MBA Intern Training National Standard for Programs, Standard 1.5 requires procedural fairness, timeliness, transparency and provides for a fair and reasonable opportunity to challenge the decision. It also states that written reasons for decisions are required to be issued. I cannot find any evidence of compliance with this standard.

[128] In my view, the process was grossly flawed pursuant to s30(7) of the IR Act, which provides for the right to respond and procedural fairness. He was not provided with the right to be informed and respond to the committee making the recommendation, as he was completely unaware of this process and denied that right by the committee.

[129] As I have determined, Dr Prasad had a reasonable expectation of continuing employment to complete the Intern program. I have found there was not a valid reason as required pursuant to Section 30(3) of the IR Act. I conclude Dr Prasad was unfairly dismissed.

Appropriate remedy

[130] Mr Johnston submitted that in the event that the Applicant's termination of employment was found to be unfair or invalid, the only acceptable remedy, consistent with public interest, would be an amount of compensation pursuant to s31(1B)(b) of the IR Act.

[131] The principal remedy is an order for reinstatement of the employee or if appropriate in all the circumstances of the case, an order for re-employment. Section 30, ss(9) and (10) of the IR Act state:

"The principal remedy in a dispute in which the Commission finds that an employee's employment has been unfairly terminated is an order for reinstatement of the employee to the job he or she held immediately before the termination of employment or, if the Commission is of the opinion that it is appropriate in all the circumstances of the case, an order for re-employment of the employee to that job.

(10) The Commission may order compensation, instead of reinstatement or re-employment, to be paid to an employee who the Commission finds to have been unfairly dismissed only if, in the Commission's opinion, reinstatement or re-employment is impracticable." (my emphasis)

[132] In my view, the Respondent did not lead evidence to demonstrate that reinstatement or re-employment was impracticable. There were submissions regarding the loss of trust and confidence in Dr Prasad and that it would be both inappropriate and impracticable to require the employer to reinstate the Applicant.

[133] I support the findings in *Australia Meat Holdings Pty Ltd v McLaughlin*⁸³ that an employer stating the loss of trust following allegations is not conclusive that reinstatement is inappropriate.

[134] The test to be considered is whether reinstatement or re-employment is impracticable. The Full Bench in considering all the individual circumstances in *Perkins v Grace Worldwide (Aust) Pty Ltd*⁸⁴ found accusations from employers caused some degree of a loss of trust but this was not always to the degree that made a return to the workplace impracticable. I support this finding that the process alone would not negate a return to participate in the final term of the Intern program at the RHH.

[135] The evidence from Dr Prasad is weighted accordingly and he stated he wished to return to complete his Intern program and that there would be no practical barriers to his return.

[136] Based on the submissions from the parties, I find that reinstatement would not be impracticable.

Order

Pursuant to s31 of the *Industrial Relations Act 1984*, I hereby order:

Dr Prasad is to be reinstated to the position of Medical Practitioner Level 1 (Intern) for the purpose of participating in the final term of the Doctors-in-Training (Intern) Program 2019.



N M Ellis
Deputy President

Appearances:

Mr C Green for the Applicant with Dr P Prasad in person and for the Applicant
Mr M Johnston for the Respondent

Date and place of hearing:

2019
9 May
HOBART

⁸³ (1998) 84 IR 1.

⁸⁴ (1997) 72 IR 186, page 191.