

Senate Finance and Public Administration Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
BUDGET ESTIMATES 2011-2012

Prime Minister and Cabinet portfolio

Department/Agency: Australian Public Service Commission

Outcome/Program:

Topic: Termination of employment of Ms Wolfe

Senator: Ronaldson

Question reference number: 100

Type of question: Hansard, F&PA, p 29, 24 May

Date set by the committee for the return of answer: 8 July 2011

Number of pages: 1

Question: The court notes indicate that 'procedural fairness was denied as pleaded in paragraphs 66A, 66B and 66C of the further amended statement of claim'. Can you provide me with a copy of that further amended statement of claim, and can you provide me with the full court order and any attached decision of the court?

Answer:

A copy of Ms Wolfe's Further Amended Statement of Claim, dated 14 December 2009, is provided at **Attachment A** and a copy of Justice Stone's Orders, dated 8 April 2010, is provided at **Attachment B**. These documents are available to the public on application to the Federal Court of Australia.

IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY

NOTICE OF FILING

This document was filed electronically in the Federal Court of Australia on 14 December, 2009

CASE DETAILS

Case Number: ACD 16 OF 2009
Case Description: JANE ALICE MARGARET WOLFE v DR STEPHEN GUMLEY & ANOR
District Registry: New South Wales
Document Type: Amended Document



Warrick Soden

Dated: 14 December, 2009

Registrar

Note

This Notice forms part of the document and contains information that might otherwise appear elsewhere in the application. The Notice must be included in the document served on each party to the proceeding.

IN THE FEDERAL COURT OF AUSTRALIA
REGISTRY: AUSTRALIAN CAPITAL TERRITORY } No. ACD16 of 2009

JANE ALICE MARGARET WOLFE
Applicant

DR STEPHEN GUMLEY
First Respondent

LYNELLE BRIGGS
Second Respondent

COMMONWEALTH OF AUSTRALIA
Third Respondent

FURTHER AMENDED STATEMENT OF CLAIM

(Order 4, rule 6 and Order 11)

MATERIAL FACTS

1. The Applicant was at all material times an employee of the Third Respondent and worked in the Department of Defence ("Defence") as part of an organisational element of that agency called the Defence Materiel Organisation ("DMO").
2. At all material times the applicant was employed in the DMO as an SES employee under the *Public Service Act 1999* ("the PS Act").
3. The First Respondent is and was at all material times the Chief Executive Officer of the DMO.

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4. The Second Respondent is and was at all material times the Public Service Commissioner (within the meaning of that term in the PS Act).
5. On or about late May 2007, the Applicant entered into a contract of employment with the Third Respondent ("the Contract").
6. On 1 June 2007 the Applicant entered into an Australian Workplace Agreement ("the AWA") with the Third Respondent.
7. On 2 July 2007 the Applicant commenced employment with the Third Respondent in the DMO with the title General Manager Corporate ("the Employment").
8. The Applicant entered into a performance agreement relating to the Employment.

PARTICULARS

- (a) On 23 November 2007 the First Respondent provided the Applicant with a document headed 'Key expected results for performance review 2007 – 2008' ("the performance agreement")
 - (b) In or about mid-February 2008 the Applicant signed the performance agreement and returned it to the First Respondent.
 - (c) On 16 May 2008 the Applicant received a copy of the performance agreement signed by the First Respondent.
9. The Applicant's employment with the Third Respondent was terminated at 7:00 a.m. on Monday 16 March 2009 summarily and without notice.

PARTICULARS

- (a) Minute dated 16 March 2009 from the First Respondent to the Applicant.

CLAIM

JUDICIAL REVIEW OF THE TERMINATION DECISION

10. The Applicant applies for review of the decision of the First Respondent of 16 March 2009 (as purported agent of the Third Respondent under a purported delegation from the Agency Head (within the meaning of that term in the PS Act) of Defence) to terminate the employment of the Applicant ("the First Respondent's Termination Decision") under either the *Administrative Decisions (Judicial Review) Act 1977* ("the ADJR Act") or, in the alternative, by the issuing of

prerogative writs of prohibition and certiorari under s.39B *Judiciary Act 1903* (“the Judiciary Act”).

11. The Applicant is aggrieved by the First Respondent’s Termination Decision because the Employment was terminated by that decision.

Failure to observe procedures required by law

12. For the reasons set out at paragraphs 13 – 27 below, the First Respondent and the Third Respondent (through its agent, the Agency Head of Defence) failed to observe procedures required by law to be followed in the making of the First Respondent’s Termination Decision.

13. The First Respondent was obliged to comply with the Commissioner’s Directions (within the meaning of that term in the PS Act).

PARTICULARS

- (a) PS Act, section 42(2).

14. Defence was, through measures put in place by the Agency Head of Defence, required to have in place within the DMO a fair and open performance management system that:

- 14.1 covered all APS employees in the DMO, including the Applicant; and
- 14.2 provided each APS employee in the DMO, including the Applicant, with a clear statement of performance expectations and an opportunity to comment on those expectations.

PARTICULARS

- (a) Direction 2.12(1) of the *Public Service Commissioner’s Directions 1999* (“the Commissioner’s Directions 1999”)

15. No such system was in place in the DMO at any time prior to the making of the Termination Decision.

PARTICULARS

- (a) There was no performance management system in place at any time prior to the making of the Termination Decision that applied to all APS employees employed in the DMO.

16. To the extent that the First Respondent purported to apply a performance management system to the management and appraisal of the Applicant’s employment, the procedures followed by the First

Respondent were determined by him from time to time in an *ad hoc* manner and outlined in correspondence from him to the Applicant, and applied only to the Applicant.

17. To the extent that the First Respondent purported to apply a performance management system to the management and appraisal of the Applicant's employment, the system did not include or provide for a clear or proper statement of performance expectations and an opportunity to comment on those expectations.

PARTICULARS

- (a) No details as to performance expectations or objective measures of performance were included in the performance agreement.
- (b) In the alternative to (a), those details were contained in the performance agreement but were not relied on by the First Respondent in managing or appraising the Applicant's performance.
- (c) On 1 April 2008 the First Respondent made written directions to the Applicant in relation to the Applicant's performance management without giving the Applicant an opportunity to be heard about those directions.
- (d) On 16 July 2008 the First Respondent made written directions in relation to the Applicant performance management without giving the Applicant an opportunity to be heard about those directions.

18. To the extent that the First Respondent purported to apply a performance management system to the management and appraisal of the Applicant's employment, the system was not open.

PARTICULARS

- (a) The Applicant was not informed about any established procedure to be followed in relation to the Applicant's alleged unsatisfactory performance.
- (b) The First Respondent did not facilitate or apply any established procedure in relation to the management and appraisal of the Applicant's performance.
- (c) The First Respondent took advice concerning the process that should be followed in relation to the alleged unsatisfactory performance but did not provide a copy of the advice to the Applicant or otherwise inform the Applicant about the substance of the advice until 18 December 2008.

19. To the extent that the First Respondent purported to apply a performance management system to the management and appraisal of the Applicant's employment, the system was not fair.

PARTICULARS

- (a) No details as to performance expectations or objective measures of performance were included or provided.
- (b) In the alternative to (a), those expectations or measures were contained in the performance agreement but were not relied on by the First Respondent in managing the Applicant's performance.
- (c) No independent assessment was made of the Applicant's performance.
- (d) No independent assistance was provided to the Applicant.
- (e) No counselling, coaching or mentoring was provided to the Applicant.
- (f) No independent scribe was provided to take written records of discussions between the First Respondent and the Applicant about the Applicant's performance.
- (g) No provision was made for independent mediation.
- (h) The dispute about the Applicant's alleged unsatisfactory performance remained unresolved at the time of the Termination Decision.
- (i) No real or proper opportunity to discuss the First Respondent's assessment of the Applicant's performance was provided.

PARTICULARS

- (A) On 13 June 2008 the First Respondent refused to discuss the Applicant's performance relative to the performance agreement.
- (B) On 29 August 2008 the First Respondent refused to discuss with the Applicant the Applicant's responses to the First Respondent's putative concerns about the Applicant's performance.
- (C) On 11 September 2008 the First Respondent refused to discuss with the Applicant the Applicant's self-assessment of her performance.
- (D) On 3 October 2008 the First Respondent wrote to the Applicant informing her that her performance assessment for 2007 – 2008 was closed.

20. The First Respondent was required, taking into account his duties and responsibilities within Defence generally and in particular in relation to the DMO, to:

- 20.1 facilitate a fair and open performance management system in the DMO that:
 - 20.1.1 covered all APS employees employed in the DMO, including the Applicant;
 - 20.1.2 provided each APS employee employed in the DMO, including the Applicant, with a clear statement of performance expectations and an opportunity to comment on those expectations; and
- 20.2 participate in the such performance management system in accordance with the objectives mentioned in paragraph 20.1.

PARTICULARS

(a) Direction 2.12(2) of the Commissioner's Directions 1999.

21. The First Respondent did not facilitate a performance management system in the DMO of the kind that he was obliged to facilitate under the Commissioner's Directions 1999.
22. Further and in the alternative, to the extent that the First Respondent purported to apply a performance management system to the management and appraisal of the Applicant's performance, the First Respondent's actions in relation thereto were disputed by the Applicant to the First Respondent throughout the period from 13 March 2008 until the Employment was terminated ("the Dispute").

PARTICULARS

- (a) Meeting on 13 March 2008 between the Applicant and the First Respondent.
- (b) Meeting on 13 June 2008 between the Applicant and the First Respondent.
- (c) Meeting on 29 August 2008 between the Applicant and the First Respondent
- (d) Email of 8 September 2008 from the Applicant to the Secretary of Defence.
- (e) Meeting on 11 September 2008 between the Applicant and the First Respondent.
- (f) Minute of 8 December 2008 from the Applicant to the First Respondent.
- (g) Minute of 15 December 2008 from the Applicant to the First Respondent.
- (h) Minute of 16 January 2009 from the Applicant to the First Respondent.
23. The Dispute was a dispute within the meaning of and arising under the AWA.

PARTICULARS

- (a) Section 3 of the AWA
- (b) Clause 7.5 of the AWA and section 353 and Part 13 of the *Workplace Relations Act 1996* as continued in force by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* ("the WR Act").
24. By reason of the foregoing, the First Respondent was obliged by law to refer the Dispute to mediation.

PARTICULARS

Section 353 and Part 13 of the WR Act

25. The Applicant requested the First Respondent that the Dispute be the subject of mediation.

PARTICULARS

- (a) Conversation between the Applicant and the First Respondent in about late August or early September 2008.

- (b) Minute of 15 September 2008 from the Applicant to the Secretary of the Department of Defence.
 - (c) Email in about the last week of September 2008 from the Secretary of the Department of Defence to the Applicant.
 - (d) Minute dated 8 December 2008 from the Applicant to the First Respondent.
26. The First Respondent refused to engage in any mediation of the Dispute.

PARTICULARS

- (a) Conversation between the Applicant and the First Respondent in about late August or early September 2008.
 - (b) Minute of 18 December 2008 from the First Respondent to the Applicant.
 - (c) Minute of February 2009 from the First Respondent to the Applicant.
27. The Dispute was not resolved prior to the Termination Decision.

Breach of the rules of natural justice

28. For the reasons set out at paragraphs 28A – 40 below, the First Respondent breached the rules of natural justice in the making of the Termination Decision.
- 28A. As at 30 August 2008, the First Respondent had already decided that the Applicant would cease employment with DMO as soon as possible.

PARTICULARS

- (a) Handwritten notes on General Manager Corporate Weekly Brief for the week ending 29 August 2008.
- 28B. By reason of the decision in paragraph 28A above, the First Respondent had prejudged the Termination Decision such that any subsequent events, and any opportunities to comment on the conduct of the Applicant after 30 August 2008, relating to her performance or any dispute about her performance would not affect the Termination Decision.
29. The Applicant repeats and relies on paragraphs 15 to 19, 22, 25 and 26 above.
30. Further, the First Respondent did not inform or did not properly inform the Applicant about the process to be followed in relation to the First Respondent's putative concerns about the Applicant's performance.

PARTICULARS

(a) The Applicant repeats and relies on the particulars stated at paragraph 18 above.

31. The First Respondent did not afford the Applicant an opportunity or a proper opportunity to be heard in relation to directions given by him to the Applicant concerning his management and appraisal of her performance.

PARTICULARS

(a) The Applicant repeats and relies on the particulars stated at paragraph 17 (c) and (d) above.

32. The Applicant had no opportunity or no proper opportunity to discuss with the First Respondent the First Respondent's assessment of the Applicant's performance.

PARTICULARS

(a) On 13 June 2008 the First Respondent refused to discuss the Applicant's performance relative to the performance agreement.

(b) On 29 August 2008 the First Respondent refused to discuss with the Applicant the Applicant's responses to the First Respondent's putative concerns about the Applicant's performance.

(c) On 11 September 2008 the First Respondent refused to discuss with the Applicant the Applicant's self-assessment of her performance.

(d) On 3 October 2008 the First Respondent wrote to the Applicant informing her that her performance assessment for 2007 – 2008 was closed.

33. The First Respondent caused written records of discussions with the Applicant about the Applicant's performance to be made and kept which were inaccurate and wrong in relation to material facts.

PARTICULARS

(a) First Respondent's Minute of 1 April 2008 to the Applicant.

(b) First Respondent's Minute of 1 September 2008 to the Applicant.

(c) First Respondent's Minute of 12 September 2008 to the Applicant

34. By reason of the matter set out at paragraph 33, the First Respondent failed to give the applicant an opportunity to have her views in relation to the First Respondent's putative concerns about her performance properly considered.

35. The First Respondent did not afford the Applicant any assistance or any proper assistance to respond to the First Respondent's putative concerns about her performance.

PARTICULARS

- (a) No independent assessment was made of the Applicant's performance.
 - (b) No independent assistance was provided to the Applicant in the performance management process.
 - (c) No counselling or coaching was provided to the Applicant in the performance management process adopted by the First Respondent.
36. Further, the Applicant applied for an SES Band 3 position in the Department of Immigration and Citizenship (respectively, "the DIAC position" and "DIAC") on or about 11 February 2009.
37. But for the Termination Decision in particular, the First Respondent's decision to terminate the Employment without notice ("the No Notice Decision"), the Applicant would have had good prospects of securing the DIAC position by way of transfer.

PARTICULARS

- (e) The Applicant was one of the applicants shortlisted for interview for the DIAC position.
38. By reason of the Termination Decision in particular, the decision to terminate the Employment without notice, the Applicant lost her opportunity to transfer to an alternative SES Band 3 position in the Australian Public Service ("APS").
39. The Applicant had a reasonable expectation that she would have an opportunity to be heard before any decision was made which would prejudice her opportunity to pursue the transfer into the DIAC position.

PARTICULARS

- (a) The First Respondent told the Applicant that he supported her application for the position.
40. The First Respondent did not give the Applicant any opportunity to be heard in relation to the decision to terminate the Employment without notice.

Improper exercise of power

41. For the reasons set out at paragraphs 42 – 59 below, the Termination Decision was an improper exercise on the part of the First Respondent of the power to terminate the Applicant's employment conferred by the PS Act.

Irrelevant considerations

42. For the reasons set out at paragraph 43, the First Respondent took irrelevant considerations into account in making the Termination Decision.

43. The First Respondent took into account the contents of written records of discussions with the Applicant that were inaccurate and wrong in relation to material facts.

PARTICULARS

(a) The Applicant repeats the particulars to paragraph 33 above.

Failure to take relevant considerations into account

44. For the reasons set out at paragraphs 45 - 50, the First Respondent failed to take relevant considerations into account in making the Termination Decision.

45. The First Respondent failed to take into consideration the fact that there was no performance management system in place within the DMO of the kind required by the Commissioner's Directions 1999 at any time prior to the Termination Decision.

PARTICULARS

(a) The Applicant repeats paragraphs 13 - 21 above.

46. The First Respondent failed to take into consideration that he was required to facilitate a performance management system in the DMO of the kind required by the Commissioner's Directions 1999 at any time prior to the Termination Decision.

PARTICULARS

(a) The Applicant repeats paragraphs 13 - 21 above.

47. It was a relevant consideration that the First Respondent and the Applicant were in dispute about material facts concerning the First Respondent's appraisal of the Applicant's performance and that the dispute had not been resolved.

48. The First Respondent failed to take into consideration that the dispute between himself and the Applicant about material facts concerning the First Respondent's appraisal of the Applicant's performance had not been resolved.

49. It was a relevant consideration that the First Respondent was obliged to consult with the Agency Head of Defence in exercising the power to terminate the Applicant's employment.

PARTICULARS

(a) *DMO HR Delegations Framework – August 2007*, page 16.

50. The First Respondent did not consult with the Agency Head of Defence in exercising the power to terminate the Applicant's employment.
51. For the reasons set out at paragraphs 52 - 55, the First Respondent failed to take relevant considerations into account in making the No Notice Decision.
52. It was a relevant consideration that the Applicant had applied for and was being considered for an alternative position at level at DIAC.

PARTICULARS

(a) The Applicant repeats paragraphs 36 - 40 above.

53. The First Respondent did not take into consideration the fact that the Applicant had applied for and was being considered for an alternative position at level at DIAC.
54. For the reasons stated at paragraphs 86 to 87, it was a relevant consideration that the Applicant was entitled to reasonable notice of termination.
55. The First Respondent did not take into consideration the fact that the Applicant was entitled to reasonable notice of termination.

Exercise of a power for a purpose other than a purpose for which the power was conferred

- 55A. The Termination Decision was the exercise of a power for a purpose other than the purpose for which the power was conferred.

PARTICULARS

(a) The Applicant repeats and relies on paragraphs 28A and 28B above.

56. The No Notice Decision was an exercise of a power for a purpose other than a purpose for which the power was conferred.

PARTICULARS

(b) The only effect of the No Notice Decision was to deprive the Applicant of the opportunity to pursue a transfer to the DIAC position.

Exercise of a discretionary power in bad faith

57. For the reasons set out at paragraphs 19(i), 26, 28A, 28B, 36, 39, 40, 50 and 92 to 94, the Termination Decision was an exercise of a discretionary power in bad faith.
58. For the reasons set out at paragraphs 36, 39, 40, 56, 92 to 94, the No Notice Decision was an exercise of a discretionary power in bad faith.

Exercise of a power that was so unreasonable that no reasonable person could have so exercised the power

59. For the reasons set out at paragraphs 12 to 58 above, the Termination Decision was an improper exercise of the power conferred by the enactment in that it was an exercise of a power on the part of the First Respondent that was so unreasonable that no reasonable person could have so exercised the power.

The First Respondent did not have jurisdiction to make the Termination Decision

60. For the reasons set out at paragraphs 61 to 63 below, the First Respondent did not have the jurisdiction to make the Termination Decision.
61. The First Respondent was not an Agency Head.
62. The First Respondent was required to consult with the Agency Head of Defence in exercising the power to terminate the Applicant's employment.

PARTICULARS

(a) *DMO HR Delegations Framework August 2007*, page 16.

63. The First Respondent did not consult with the Agency Head of Defence in exercising the power to terminate the Applicant's employment.

Error of law

64. For the reasons set out at paragraphs 12 - 63 above, the Termination Decision involved errors of law.

64A. The Applicant repeats paragraphs 28A and 28B above.

64B. The First Respondent had an obligation to comply with sections 10 and 13 of the PS Act in making the Termination Decision.

64C. By reason of 64A, the First Respondent breached sections 10 and 13 of the PS Act.

64D. By reason of paragraph 64A above the Termination Decision involved errors of law.

JUDICIAL REVIEW OF THE CERTIFICATE DECISION

65. The Applicant applies for review of the decision of the Second Respondent of 13 March 2009 to issue a Certificate under section 38 of the PS Act in respect of the Termination Decision (“the Certificate Decision”) under either the ADJR Act or in the alternative, by the issuing of prerogative writs of prohibition and certiorari under s.39B Judiciary Act.

66. The Applicant is aggrieved by the Certificate Decision because the making of the Certificate Decision permitted the Applicant’s Employment to be terminated.

Breach of the rules of natural justice

66A. For the reasons set out at paragraphs 66A – 66C below, the Second Respondent breached the rules of natural justice in the making of the Certificate Decision.

66B. The Second Respondent did not give the Applicant any, or any proper, opportunity to be heard in relation to the Certificate decision.

66C. The Second Respondent received material in writing and verbally which she considered in making the Certificate Decision and did not disclose that material or any of its content to the Applicant, or put that material or any of its content before the Applicant for the Applicant’s response.

PARTICULARS

- (a) First Respondent’s minute to the Second Respondent dated 20 October 2008
- (b) Second Respondent’s minute to the First Respondent dated 21 November 2008
- (c) First Repondent’s minute to the Second Respondent dated 18 December 2008
- (d) Second Respondent’s conversation with Mr Nick Warner on 19 December 2008

- (e) Second Respondent's telephone conversation with the First Respondent on 12 January 2009
- (f) Second Respondent's telephone conversation with Mr Kim Gillis on 12 January 2009
- (g) Second Respondent's telephone conversation with Mr Nick Warner on 12 January 2009
- (h) Second Respondent's telephone conversation with Mr Warren King on 12 January 2009
- (i) First Respondent's email to the Second Respondent dated 13 January 2009
- (j) Minute from Ms Karen Wilson to the Second Respondent dated 12 March 2009

No jurisdiction to make decision

67. For the reasons set out at paragraphs 68 to 71 below, the Second Respondent did not have jurisdiction to make the Certificate Decision.
68. It was a precondition to the making of the Certificate Decision that the requirements of Directions 2.12(1) and (2) of the Commissioner's Directions 1999 had been satisfied in respect of the Termination Decision.
69. Those requirements had not been complied with.

PARTICULARS

- (a) The Applicant repeats paragraphs 12 - 21 above.
70. In the alternative to paragraph 67, it was a precondition to the making of the Certificate Decision that the Second Respondent be reasonably satisfied that the requirements of Directions 2.12(1) and (2) of the Commissioner's Directions 1999 had been satisfied in respect of the Termination Decision.
71. The Second Respondent was not, and could not have been, so reasonably satisfied.

Error of law

72. The Second Respondent, in making the Certificate Decision, erred in law in forming the opinion that the requirements of Directions 2.12(1) and (2) of the Commissioner's Directions 1999 had been satisfied in respect of the proposed termination of the Applicant.

PARTICULARS

- (a) The Applicant repeats paragraphs 12 - 21 above.

Failure to take a relevant consideration into account

73. The precondition and the requirements in relation thereto referred to at paragraph 68 above were relevant considerations in the making of the Certificate Decision.
74. The Second Respondent, in making the Certificate Decision, failed to take into account the fact that that precondition and those requirements were not satisfied in respect of the proposed termination of the Applicant.

PARTICULARS

- (a) The Applicant repeats paragraphs 12 - 21 above.

BREACH OF AUSTRALIAN WORKPLACE AGREEMENT

- 74A. The Applicant repeats paragraphs 28A and 28B above.
75. To the extent that the First Respondent purported to apply a performance management system to the management and appraisal of the Applicant's performance, the First Respondent's actions in relation thereto were disputed by the Applicant to the First Respondent throughout the period from 13 March 2008 until time she was informed of the Termination Decision ("the Dispute").

PARTICULARS

- (a) Meeting on 13 March 2008 between the Applicant and the First Respondent.
- (b) Meeting on 13 June 2008 between the Applicant and the First Respondent.
- (c) Meeting on 29 August 2008 between the Applicant and the First Respondent
- (d) Email of 8 September 2008 from the Applicant to the Secretary of Defence.
- (e) Meeting on 11 September 2008 between the Applicant and the First Respondent.
- (f) Minute of 8 December 2008 from the Applicant to the First Respondent.
- (g) Minute of 15 December 2008 from the Applicant to the First Respondent.
- (h) Minute of 16 January 2009 from the Applicant to the First Respondent.

76. The Dispute was a dispute within the meaning of and arising under the AWA.

PARTICULARS

- (a) Section 3 of the AWA
- (b) Clause 7.5 of the AWA and section 353 and Part 13 of the *Workplace Relations Act 1996* as continued in force by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* ("the WR Act").

77. By reason of the foregoing, the First Respondent was obliged by law to refer the Dispute to mediation.

PARTICULARS

(a) Section 353 and Part 13 of the WR Act.

78. The Applicant requested the First Respondent that the Dispute be the subject of mediation.

PARTICULARS

(a) Conversation between the Applicant and the First Respondent in about late August or early September 2008.

(b) Minute of 15 September 2008 from the Applicant to the Secretary of the Department of Defence.

(c) Email in about the last week of September 2008 from the Secretary of the Department of Defence to the Applicant.

(d) Minute dated 8 December 2008 from the Applicant to the First Respondent.

79. The First Respondent refused to engage in any mediation of the Dispute.

PARTICULARS

(a) Conversation between the Applicant and the First Respondent in about late August or early September 2008.

(b) Minute of 18 December 2008 from the First Respondent to the Applicant.

(c) Minute of February 2009 from the First Respondent to the Applicant.

80. The Dispute was not resolved prior to the Termination Decision.

81. By reason of the matters set out at paragraphs 74A to 80, the Third Respondent breached the AWA.

82. By reason of the breach of the AWA the Third Respondent breached the provisions of an applicable provision under the WR Act.

83. As a result of the breach referred to at paragraph 82 the Applicant has suffered loss and damage.

PARTICULARS

(a) The Applicant's employment was terminated.

(b) The Applicant's reputation has been detrimentally affected.

(c) The Applicant's ability to find alternative employment in the APS has been detrimentally affected.

84. By reason of the matters set out at paragraphs 74A to 83, the Third Respondent is liable:
- (a) to pay a penalty under s.719(1) of the WR Act;
 - (b) to pay to the Applicant the amount of her loss and damage, under sections 719(5) and 721 of the WR Act.
 - (c) an order that the penalty be paid to the Applicant.

BREACH OF CONTRACT

85. In relation to the Employment, the First Respondent acted as the agent of the Third Respondent and was responsible for discharging obligations and exercising the powers of the Third Respondent under the Contract.

Duty to Give Reasonable Notice

86. It was an implied term of the Contract that if the Third Respondent was to terminate the Contract, it would give to the Applicant reasonable notice.

PARTICULARS

- (a) A term to that effect is implied in all ongoing contracts of employment, subject to express contrary terms.
 - (b) There was no contrary term in the Contract.
 - (c) There was no contrary term in the AWA.
87. By reason of the circumstances of the Applicant's employment, being,
- 87.1 her age
 - 87.2 her level of seniority and responsibility with the Third Respondent
 - 87.3 her level of experience in prior employment
 - 87.4 her academic qualifications
 - 87.5 her prospects of obtaining commensurate employment within a reasonable time
- the reasonable notice referred to in paragraph 86 was not less than 18 months.
88. In making the Termination Decision, the First Respondent failed to give to the Applicant reasonable notice as required by the matters set out in paragraphs 86 and 87.
89. By reason of the matters set out in paragraph 88, the Third Respondent breached the Contract.

90. By reason of the breach of the Contract alleged at paragraph 89, the Applicant has suffered loss and damage.

PARTICULARS

- (a) By reason of the matters set out at paragraph 9 and paragraphs 36 to 38 the Applicant lost the opportunity to transfer to the DIAC position whilst remaining an APS employee.
- (b) Loss of reputation.
- (c) Loss of 18 months' pay.

Duty of good faith

91. The Contract included an implied term to the effect that the Third Respondent owed to the Applicant a duty to act towards the Applicant in good faith ("the duty of good faith").

PARTICULARS

- (a) A term to that effect is implied in all contracts of employment.

91A. The Applicant repeats and relies on paragraphs 28A and 28B.

92. The Applicant repeats and relies on paragraphs 36 to 37.

93. The First Respondent represented to the Applicant that he would support the Applicant's application for the position as an SES Band 3 in DIAC ("the representation").

PARTICULARS

- (a) Telephone discussion between the Applicant and the First Respondent on 12 March 2009.
- (b) Telephone discussion between the Applicant and Mr Kim Gillis on 12 March 2009.

94. Contrary to the representation the First Respondent terminated the Employment with immediate effect.

PARTICULARS

- (a) Minute dated 16 March 2009 from the First Respondent to the Applicant.

95. By reason of the matters set out at paragraphs 91A and 93 to 94 the First Respondent breached the duty of good faith.

96. By reason of that breach, the Applicant has suffered loss and damage.

PARTICULARS

- (aa) Loss of employment

- (a) Loss of the opportunity to transfer to the DIAC position whilst remaining an APS employee.
- (b) Loss of reputation.

Duty of Trust and Confidence

97. The Contract included an implied term to the effect that the Third Respondent would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the Applicant and the Third Respondent (“the duty of trust and confidence”).

97A. The Applicant repeats and relies on paragraphs 28A and 28B.

98. In breach of the duty of trust and confidence the Third Respondent conducted an appraisal of the Applicant’s performance in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between the Applicant and the Third Respondent.

PARTICULARS

- (a) The Applicant repeats and relies on the matters set out at paragraphs 15 to 19, 22, 28A, 28B 25 to 26, 32 to 35.

99. But for the breach of the duty of trust and confidence set out at paragraph 98, any concerns, real or putative, which the First Respondent had concerning the Applicant’s performance would have been addressed and or remedied to the satisfaction of the First Respondent and Third Respondent.

100. By reason of the matters set out at paragraphs 98, the First Respondent formed the view that the Applicant’s performance was unsatisfactory and that there was no reasonable prospect or remedying said unsatisfactory performance.

101. By reason of the breach of the duty of trust and confidence set out at paragraph 98 the Applicant suffered loss and damage.

PARTICULARS

- (a) Loss of the opportunity to satisfy the First Respondent that there was no unsatisfactory performance on her part or to remedy any unsatisfactory performance.
- (b) Loss of reputation.
- (c) Loss of employment.

102. The Applicant repeats and relies on the matters set out at paragraphs 36 to 40 and 93.

103. In breach of the duty of trust and confidence the Third Respondent, terminated the Employment without notice in circumstances set out at paragraphs 36 to 40 and 93 and 98 to 100.

104. By reason of the breach of the duty of trust and confidence set out at paragraph 103, the Applicant suffered loss and damage.

PARTICULARS

(aa) Loss of employment

(b) Loss of reputation.

MISFEASANCE IN PUBLIC OFFICE

105. The Applicant repeats and relies on the matters set out at paragraphs 36 to 40 and 93 to 94.

106. By reason of the matters set out in paragraph 3, the First Respondent occupied a public office.

107. In making the Termination Decision, the First Respondent was actuated by malice.

PARTICULARS

(a) The First Respondent terminated the Applicant's employment without notice, knowing, and intending, that by doing so he was depriving the Applicant of the opportunity to pursue the transfer to the SES Band 3 position in DIAC whilst still an APS employee.

(b) The applicant repeats paragraphs 28A and 28B.

108. By reason of the matters set out at paragraphs 105 to 107 the Applicant suffered loss of expected earnings from the continuation of her career.

The applicant claims the relief specified in the application.

The amendment to this pleading was settled by Mr. Ian Neil of Senior Counsel.

Date: 14 December 2009



John Stephen Wilson
Solicitor for the Applicant

Form 15B Certificate of legal practitioner

(Order 11, rule 1B)

I, John Stephen Wilson, certify to the Court that, in relation to the pleading dated 10 August 2009 filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non-admission in the pleading.

Date: 14 December 2009



John Stephen Wilson
Solicitor for the Applicant

**IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY DISTRICT REGISTRY
GENERAL DIVISION**

No: (P)ACD16/2009

JANE ALICE MARGARET WOLFE
Applicant

STEPHEN GUMLEY
First Respondent

LYNELLE BRIGGS
Second Respondent

COMMONWEALTH OF AUSTRALIA
Third Respondent



ORDER

JUDGE: Justice Stone

DATE OF ORDER: 8 April 2010

WHERE MADE: Canberra

THE COURT NOTES THAT:

The respondents' concession that the decision of the first respondent made on 16 March 2009 and the decision of the second respondent made on 13 March 2009 are each vitiated by jurisdictional error in that the applicant was denied procedural fairness as pleaded in paragraphs 66A, 66B and 66C of the Further Amended Statement of Claim.

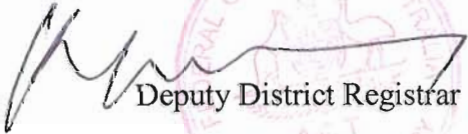
BY CONSENT THE COURT ORDERS THAT:

1. The application be allowed only to the extent that:
 - 1.1. The decision of the first respondent made on 16 March 2009, as delegate of the powers of the Secretary of the Department of Defence under section 29 of the Public Service Act 1999, being the decision to terminate the employment of the applicant, be set aside with effect from 16 March 2009 and the matter be referred to the Secretary of the Department of Defence for further consideration of the matter, in accordance with law, by the Secretary, or a delegate of the Secretary other than the first or second respondent.

- 1.2. The decision of the second respondent made on 13 March 2009, in the exercise of her powers under section 38 of the *Public Service Act* 1999 in her then capacity as the Public Service Commissioner, being the decision to issue a certificate under section 38 of the Public Service Act 1999 in respect of the termination of the employment of the applicant, be quashed and the matter be referred to the Public Service Commissioner for further consideration, in accordance with law, by the Commissioner or a delegate of the Commissioner other than the first or second respondent.
2. The third respondent pay the applicant's costs as agreed or taxed.
3. The applicant shall have leave to otherwise discontinue the proceedings, noting the applicant's undertaking that:
 - 3.1. She will forthwith discontinue the proceedings accordingly, and will
 - 3.2. Not commence fresh proceedings for the same or substantially the same, causes of action set out in the Amended Application and the Further Amended Statement of Claim, including in relation to paragraphs 3, 6, 7, 8, 9 and 10 in Part A of the Amended Application.

Date that entry is stamped:

12 APRIL 2010


Deputy District Registrar

