



HIGH COURT OF AUSTRALIA

16 March 2022

NSW COMMISSIONER OF POLICE v TREVOR COTTLE & ANOR
[2022] HCA 7

Today, the High Court unanimously dismissed an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales. The appeal concerned whether the first respondent, who had been retired on medical grounds as a non-executive police officer by the appellant ("the Police Commissioner") under s 72A of the *Police Act 1990* (NSW), could make an unfair dismissal application to the Industrial Relations Commission of New South Wales ("the IR Commission") pursuant to s 84(1) of Pt 6 of the *Industrial Relations Act 1996* (NSW) ("the IR Act").

The High Court held that s 72A of the *Police Act* did not expressly, or by necessary implication, exclude or modify the operation of Pt 6 of Ch 2 of the IR Act. Accepting that the NSW Police Force performs unique functions within the community, the plurality concluded that that characterisation must yield to the express terms of Pt 6 of Ch 2, and ss 85 and 218 of the *Police Act*. Relevantly, Pt 6 of Ch 2 applied to the dismissal of "any public sector employee", which was further defined to include a member of the NSW Police Force; s 85 provided that the Police Commissioner was to be the employer of non-executive police officers for proceedings dealing with industrial matters; and s 218(1) evinced a parliamentary intention that, subject to sub-s (2), the IR Act was not affected by the *Police Act*. The majority distinguished s 72A from the power to dismiss probationary police officers in s 80(3) of the *Police Act*, which was found to be inconsistent with s 84(1) of the IR Act in *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1. Section 72A was also distinguishable from the very similar power under s 50 to cause the retirement of executive police officers, which was expressly immunised from the reach of Pt 6 of Ch 2.

The High Court therefore held that the Court of Appeal was correct to conclude that the IR Commission had jurisdiction to hear and determine the first respondent's application for unfair dismissal. The plurality concluded that, although the Police Commissioner was under no obligation to give reasons for an exercise of power under s 72A of the *Police Act*, the three objective criteria in s 72A provided a stable basis for the IR Commission to assess whether a non-executive police officer's retirement was "harsh, unreasonable or unjust". A similar power to s 72A existed in respect of other public sector employees, who enjoyed rights to seek review in the IR Commission for unfair dismissal. Even where the primary remedies for unfair dismissal – reinstatement or re-employment – were not apt to be applied in respect of non-executive police officers, the IR Commission would still have the power to order compensation.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*