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NOTICES—Application for General Order—

2020 WAIRC 00173

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

111 St Georges Terrace, Perth

Submissions for the 2020 WA Minimum Wage

The Western Australian Industrial Relations Commission is required to set the minimum wage to apply to employers and employees covered by the WA industrial relations system. It must do this before 1 July each year. The current minimum wage for an adult employee of $746.90 per week was set in June 2019 to apply from 1 July 2019.

The Commission invites interested persons and organisations to make a submission to the Commission on what minimum wage should be set in 2020. The Commission will hear oral submissions on Thursday, 21 and if necessary, a half day on Friday, 22 May 2020. The proceedings are open to the public and will be webcast. Any person who wishes to make an oral submission at that time should notify the Registrar of the Commission stating the basis of their interest. This must be done by Tuesday, 12 May 2020.

Written submissions are also welcome. Any person or organisation who wishes to make a written submission should do so by Tuesday, 12 May 2020. Copies of written submissions may be made public. Anonymous submissions will not be considered.

In making its decision, the Commission is required to consider the need to —

- ensure that Western Australians have a system of fair wages and conditions of employment; and
- meet the needs of the low paid; and
- provide fair wage standards in the context of living standards generally prevailing in the community; and
- contribute to improved living standards for employees; and
- protect employees who may be unable to reach an industrial agreement; and
- encourage ongoing skills development.

It is also required to consider:

- the state of the economy of Western Australia and the likely effect of its decision on that economy and, in particular, on the level of employment, inflation and productivity in Western Australia; and
- to the extent that it is relevant, the state of the national economy; and
- to the extent that it is relevant, the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration; and
- the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment; and
- relevant decisions of other industrial courts and tribunals; and
- any other relevant matters.

People interested in making a submission are invited to address those issues.

Further particulars may be obtained from the Registry of the Commission and from the Commission's website at www.wairc.wa.gov.au.

All correspondence should be addressed to the Registrar at the above address or by email to registry@wairc.wa.gov.au quoting matter number APPL 1 of 2020.

DATED at Perth, Tuesday, 10 March 2020.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

FULL BENCH—Appeals against decision of Commission—

2020 WAIRC 00115

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 152/2018 GIVEN ON 10 OCTOBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00115
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 10 FEBRUARY 2020
DELIVERED	**:**	MONDAY, 24 FEBRUARY 2020
FILE NO.	**:**	FBA 12 OF 2019
BETWEEN	**:**	ANNIE DERKACS Appellant AND TETYANA PODKAS TRADING AS PHOENIX PODIATRY Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	**:**	**COMMISSIONER T WALKINGTON**
Citation	**:**	**2019 WAIRC 00749**
File No	**:**	**U 152 OF 2018**

CatchWords	**:**	Industrial law (WA) – Appeal against a decision of the Commission – Commission's decision to dismiss claim of harsh, oppressive or unfair dismissal at first instance – Case management – Directions for witness statements to be filed – Witness summonsed – No statement of evidence filed for witness – Witness did not give evidence – Full Bench found witness ought to have been permitted to give evidence – Witness evidence may make different to findings of credibility and facts – Applicant alleged Commission erred in accepting witness evidence – Evidence in witness statement and under cross-examination compared – Appeal upheld – Operation of decision at first instance suspended – Matter remitted to Commission for further hearing and determination
Legislation	**:**	*Industrial Relations Act 1979* (WA) – s 26(1)
Result	**:**	Operation of Decision suspended, Matter remitted to Commission
Representation:		
Counsel:		
Appellant	**:**	In person
Respondent	**:**	Mr J Nicholas (of counsel)

Case(s) referred to in reasons:

Director General of the Department of Education v Mr Patrick Guretti [2014] WAIRC 00074; (2014) 94 WAIG 425

Queensland v JL Holdings Pty Ltd [1997] HCA 1; (1997) 189 CLR 146

Stead v State Government Insurance Commission [1986] HCA 54; (1986) 161 CLR 141

Reasons for Decision

SCOTT CC and MATTHEWS C:

1 Ms Annie Derkacs appeals against the Commission's decision to dismiss her claim of harsh, oppressive or unfair dismissal (2019 WAIRC 00749).

Background

2 Ms Derkacs is a podiatrist. She worked for the respondent, Ms Tetyana Podkas, for a number of years. The arrangement came to an end following an exchange between them over the signing of a contract.

The matter at first instance

3 There were two major issues in contention at first instance. The first was whether Ms Derkacs was an employee of the respondent or an independent contractor. That matter is not the subject of this appeal. The second, based on the conclusion of the Commissioner that Ms Derkacs was an employee, was the circumstances under which the employment came to an end. What happened in the exchange between Ms Derkacs and Ms Podkas became the central issue for determination.

The reasons for decision

4 The issues in the appeal arise from the question of whether the dismissal was unfair and essentially relate to the way the evidence was dealt with and the credibility of witnesses.

5 The Commissioner dealt with a number of conflicts between the evidence of Ms Derkacs and that of Ms Podkas. The Commissioner resolved those differences by preferring the evidence of Ms Podkas. She said that 'Ms Podkas' written and oral evidence was consistent and not diminished under cross-examination. Ms Derkacs' evidence was muddled and inconsistent and, at times, evasive' [68].

6 The Commissioner then went on to find:

> In response to being told she was not to see clients, Ms Derkacs raised her voice to the level of a shout and swore at Ms Podkas. Ms Derkacs shouting for another member of staff to witness their exchange loudly demanded Ms Podkas say she was firing her (TP 108-110]). A client who overheard the exchanges says Ms Derkacs was yelling at Ms Podkas in a disrespectful, abusive, intimating and threatening manner. (Witness Statement of Kerry Valentine).
>
> Ms Podkas responded by asking Ms Derkacs to return her keys to the clinic and leave the premises (TP [111]). Ms Derkacs briefly left the clinic to retrieve her keys from her vehicle remarking with profanities to a client as she passed through the waiting area that she had been sacked (TP [114]) (ts 66).
>
> In this matter I conclude that Ms Derkacs was not dismissed unfairly, harshly or unreasonably in the circumstances. Ms Derkacs did not comply with a lawful direction from her employer to not attend clients of the clinic, in order to use that time to consider a revised draft Agreement and further discuss any issues in response to Ms Podkas' instructions. Ms Derkacs used abusive language to directly challenge her supervisor and employer. I find Ms Derkacs' conduct was destructive of the necessary confidence between employer and employee.
>
> I find that Ms Podkas was entitled to summarily terminate the contract of employment and I dismiss the application.
>
> Paragraphs [69] – [72].

7 Therefore, the dismissal was found to be justified on the basis that Ms Derkacs did not comply with a lawful instruction, used abusive language to directly challenge her employer and that her conduct was destructive of the necessary confidence between employer and employee.

Grounds of appeal

8 We think it is fair to summarise Ms Derkacs' grounds of appeal as being that the Commissioner's conclusions regarding the conflict in the evidence were in error. Ms Derkacs pointed to a number of matters.

9 Firstly, the Commissioner is said to have wrongly refused to allow Ms Derkacs to call a witness, Ms Christina Hewitt, she had summonsed. Ms Hewitt was the member of staff referred to in [69] of the Reasons who was called to witness the exchange. She was present when the exchange which resulted in the dismissal occurred. The respondent says that the issue is one dealt with in ***Stead v State Government Insurance Commission*** [1986] HCA 54; (1986) 161 CLR 141, of whether the evidence of Ms Hewitt would have brought forth further information that could possibly have made any difference. The respondent says there was no practical injustice by the refusal to hear Ms Hewitt's evidence.

10 Secondly, the appeal alleges that the Commissioner erred in finding that Ms Derkacs' evidence was 'muddled, inconsistent and at times, evasive' [68]. However, she found that Ms Podkas' written evidence and oral evidence were consistent and not diminished in cross-examination [68]. Ms Derkacs points to a number of instances in the evidence which she says demonstrate that this was an error. The respondent says that an examination of the evidence supports the Commissioner's conclusion regarding both Ms Derkacs' and Ms Podkas' evidence, and there was no error.

11 Thirdly, the appellant says that the finding that Ms Derkacs did not comply with a lawful order results from a misunderstanding of the evidence. Ms Derkacs says the direction was not lawful and Ms Podkas' actions were unfair and excessive. The respondent says that this appeal ground is an attempt to re-litigate the claim and does not raise an appealable error. Ms Derkacs' and Ms Valentine's evidence demonstrate Ms Derkacs' abusive conduct and language, and that they were destructive of the necessary confidence in the employment relationship.

12 Fourthly, Ms Derkacs says that the evidence demonstrated that there was no urgency in Ms Derkacs finalising the contract. Ms Podkas allegedly feared for the security of her business by Ms Derkacs wanting more time to finalise the contract. However, Ms Derkacs says Ms Podkas had already removed Ms Derkacs' access to the patient records system a week or so before the exchange. The respondent suggests that even if this were so, it does not alter the situation as the issue is Ms Derkacs' conduct which led to the dismissal.

13 Fifthly, Ms Podkas also says that the Commissioner's finding about her use of what was described as explicit language was in error because it was in response to the dismissal, not the cause of it. The respondent says that this is contrary to the evidence at first instance, including Ms Valentine's evidence both about Ms Derkacs' abusive language and its timing. The respondent also says that this is an attempt to re-litigate the matter.

14 Finally, Ms Derkacs says that the Commissioner erred in accepting Ms Valentine's characterisation of Ms Derkacs' manner towards Ms Podkas as being disrespectful, abusive, intimidating and threatening, when Ms Valentine gave a very different characterisation in cross-examination (ts 138).

15 For the reasons set out below, we would uphold the appeal, suspend the operation of the decision at first instance and remit the matter for further hearing and determination. We do so by reference to the first and last grounds of appeal as, in our respectful view, the errors concerned affect the foundation stones of the reasons and consequently, affect the remainder of findings about credibility and the facts. In our view, it is not necessary or appropriate for the Full Bench to deal with the remainder of the grounds because the issues they raise may be affected by what is found when the matters in grounds 1 and 2 are reconsidered. They are matters for the re-hearing.

The refusal to allow Ms Hewitt's evidence

16 On 6 March 2019, the Commissioner held a directions hearing for the purposes of preparation for the substantive hearing of the matter and issued directions (2019 WAIRC 00112). They included directions that evidence-in-chief be by witness statement and they were to be filed and served by specified dates.

17 The matter was listed for hearing for one day on Wednesday, 15 May 2019.

18 The Commissioner's Associate received a telephone call from Ms Derkacs on 11 March 2019. One of the matters it covered was that Ms Derkacs said that her 'witness does not want to write a witness statement as she still works for the respondent and is concerned that she will be fired. She would prefer to give oral evidence as she feels that it looks less like she is giving evidence willingly'.

19 On Friday 15 March 2019, the Commissioner's Associate sent an email to Ms Derkacs. Amongst other things, the email informed Ms Derkacs that she was able to summons a witness and that 'this meant that a written witness statement would not be required'. She was referred to the appropriate form and to the Registry regarding procedures or any other questions.

20 On 4 April 2019, Ms Derkacs filed a number of witness summonses including one for Christina Hewitt, to attend before the Commission to give oral evidence.

21 The parties filed their documents. On 24 April 2019, Ms Derkacs filed a witness statement for herself and for a Ms Anne Edwards.

22 At the commencement of the hearing on 15 May 2019, counsel for the respondent, Mr Beetham, raised with the Commission a number of issues relating to documents that had been filed. He noted that a summons had been issued to Ms Hewitt but that no statement of evidence had been filed for her, contrary to the directions issued in March, and he opposed her being permitted to give evidence. If she were permitted to do so, then the respondent would like her to be made available for cross-examination.

23 Mr Beetham also noted that the respondent did not know what Ms Hewitt would say, its plausibility and possible relevance. In those circumstances, he said there would be serious prejudice to the respondent (ts 3, 4).

24 At p 5 of the transcript, Ms Derkacs responded that:

> Um, Ms Hewitt still actually works at Phoenix, and was reluctant to give evidence for obvious reasons, because, um, she obviously feels that her job can be at risk and she didn't want to be a part.

25 In response to a question from the Commissioner, Ms Derkacs confirmed that it was not possible to file witness statements for Ms Hewitt and another witness, Ms Logan, because they did not want to provide statements because they were concerned that it would cause them problems in their current employment with the respondent (ts 7).

26 The Commissioner asked Ms Derkacs the purpose of her seeking to adduce that evidence. Ms Derkacs replied that Ms Hewitt was present and a witness to what had happened on the day of her dismissal. She could also give evidence of the hours Ms Derkacs worked and other aspects of her employment (ts 7).

27 The Commissioner then sought clarification from Ms Derkacs about the purpose of the evidence to be adduced from other witnesses Ms Derkacs had summonsed. Some of that evidence was about propensity in relation to the contractual arrangements. The Commissioner heard from the parties about other procedural issues and then adjourned to consider her decision.

28 On resuming, the Commissioner dealt firstly with the summons to another witness, Ms Edwards, and about the issue of the nature of the relationship between the parties and whether there was an employer-employee relationship. A summons issued to Ms Podkas was determined to fall away in light of the Commissioner's determination regarding the summons to Ms Edwards.

29 We set out the above matters because they demonstrate the context in which the Commissioner then moved to deal with the summons to Ms Hewitt. The Commissioner and Ms Derkacs then had the following exchange:

> **WALKINGTON C:** Ms Hewitt's statement and Ms Logan's, similarly, their – in your submissions, you did not outline any other reason or rationale for the adducement of their evidence, other than likelihood – or past likelihood of behaviour occurring in your particular relationship, being that of a similar ilk to other persons in

> this matter. What you need to be showing is what the relationship is between the two of you, and what it was at the time of the termination.
>
> And I find that the admission of propensity evidence, in the absence of any other rationale, that that purpose of that evidence would be prejudicial to the respondent. So likewise, I will not be admitting those into (indistinct) 11.18.31 to provide witness statements.
>
> **DERKACS, MS:** Sorry, Commissioner, is that – are you saying, ah, Tina – ah, Ms Hewitt as well?
>
> **WALKINGTON C:** Yes, Ms Hewitt and Ms Logan.
>
> **DERKACS, MS:** Cos, ah, Ms Hewitt was present on the day when Ms Podkas dismissed me, and so, um, that was evidence to the – what actually happened on that day. So she actually saw how I was dismissed.
>
> **WALKINGTON C:** Yes, I understand that that's what you're saying part of the evidence you wish to adduce - - -
>
> **DERKACS, MS:** Yeah.
>
> **WALKINGTON C:** - - - concerns. In the absence of filing the witness statement and providing an opportunity for the respondent to file a response to that, that presents a problem in terms of the management of this case and in terms of being fair to all parties.
>
> So therefore, on that matter as well, I'll not be allowing that evidence to be - - -
>
> **DERKACS, MS:** Okay.
>
> **WALKINGTON C:** - - - submitted in the Court.
>
> So I think that deals with all matters in the application? (ts 10, 11)

30 It is clear from this exchange and the Commissioner's ruling that her initial conclusion regarding Ms Hewitt's evidence was that it would not be relevant because it related only to the 'past likelihood of behaviour occurring in your particular relationship' rather than the behaviour at the time of termination. We take this to refer to the question of whether that relationship was one of employer and employee, not about the interactions between them. The Commissioner described it as propensity evidence and that its purpose would be prejudicial to the respondent. On that basis, it would not be received. The Commissioner's reasons for refusing to allow Ms Hewitt to be called included that no witness statement had been filed, that this denied the respondent an opportunity to file a response, this presented a problem in terms of case management and providing fairness to all parties.

31 The hearing proceeded for the full day for which it was listed and a further day was required. It was then listed for 6 June 2019. In this context, any concern for the benefit of case management confining the hearing to one day fell away.

32 The Commission's files indicate that between the two hearing dates, Ms Derkacs again corresponded with the Commissioner's Associate and also with a Registry officer indicating that she wished to pursue the issue of Ms Hewitt being called to give oral evidence, notwithstanding that the Commissioner had rejected her request. She sought an explanation for why her summons to Ms Hewitt had been dismissed, saying the Commissioner's reasoning went over her head due to her being unwell on the day. She also asked if she could again summons Ms Hewitt, that her testimony was relevant for a number of reasons being:

> -Ms Hewitt worked alongside myself at Phoenix for the duration of my time period and can provide testimony to my duties, designated uniform, shift times and more
>
> -Ms Hewitt was also called to witness the termination of my employment by Ms Podkas and will provide an un-bias account of the events that transpired
>
> Due to the sensitive nature of Ms Hewitt's relationship with Ms Podkas, I believed the best course of action would have been to subpoena her, however if I was aware of the prospect that she may have been dismissed, I would have at very least, submitted a statement from her into evidence.

33 The Commissioner's Associate responded by email, saying that she could not provide legal advice but that Ms Derkacs was able to obtain independent legal advice or representation should she wish to. She informed Ms Derkacs that the transcript of the hearing so far was available and how to obtain a copy. She also referred Ms Derkacs to the section of the *Industrial Relations Act 1979* (WA) dealing with the calling of witnesses.

34 When the hearing resumed, neither Ms Derkacs nor the Commissioner raised the issue of Ms Hewitt giving evidence.

35 Ms Derkacs says that Ms Hewitt's evidence would have assisted her case. The Commissioner made findings as to credibility in which she found that Ms Derkacs' version of events was not to be preferred to that of Ms Podkas and cited a number of reasons for doing so, saying '[t]he difference in the recollections of these exchanges are important and I find Ms Podkas's version is preferable. Ms Podkas's written and oral evidence was consistent and not diminished under cross-examination. Ms Derkacs's evidence was muddled and inconsistent and, at times, evasive' [68].

36 Ms Derkacs says that the decision to not allow her to call Ms Hewitt had a negative impact on the weight given to her own evidence. Ms Derkacs said Ms Hewitt was a receptionist at the business at the time of her termination. Ms Hewitt witnessed the events that led up to Ms Podkas' decision to terminate her employment, as corroborated by both Ms Podkas and Ms Valentine. Ms Derkacs said in her witness statement that she called Tina (Ms Hewitt), the receptionist, to act as a witness to the events which she believed was unlawful [24]. Ms Podkas' witness statement also recorded this ([108] – [110]). Ms Derkacs says that she believed Ms Hewitt's testimony would have substantiated her claims that Ms Podkas was acting in an intimidatory manner, pointing her finger in Ms Derkacs' face, prior to Ms Derkacs using explicit language. She says that she feared for Ms Hewitt's job security if Ms Hewitt had provided a written statement and that she had made enquiries about having Ms Hewitt summonsed to give evidence to protect her interests in her employment.

Conclusion regarding Ms Hewitt's evidence

37 The Commission is required to deal with matters according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (*Industrial Relations Act 1979,* (WA) s 26(1)(a)). Further, the Commission is not bound by any rules of evidence but may inform itself on any matter in such a way as it thinks just (s26(1)(b)). The Commission is also required to have regard to the interests of persons immediately concerned, whether directly affected or not (s 26(1)(c)). The Commission is entitled to determine its own procedure.

38 The Commission generally applies a case management approach to matters before it and regularly issues directions for the efficient and fair conduct of proceedings. Much has been said over the years about the benefits of case management as a means of courts and tribunals operating as efficiently as possible and in the interests of justice. However, as noted by the High Court in ***Queensland v JL Holdings Pty Ltd*** [1997] HCA 1; (1997) 189 CLR 146 per Dawson, Gaudron and McHugh JJ:

> Case management is not an end in itself. It is an important and useful aid for insuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management should be allowed to supplant that aim.
>
> …
>
> Justice is the paramount consideration in determining an application such as the one in question. Save insofar as costs may be awarded against the parties seeking the amendment, such an application is not the occasion for punishment of a party for a mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary Judge was, in our view, in error in the exercise of her discretion (155).

39 In ***Director General of the Department of Education v Mr Patrick Guretti*** [2014] WAIRC 00074, (2014) 94 WAIG 425 A/President Smith noted at [75] – [76]:

> Whilst the Commission is not a court of pleadings, the principles of case management demand that parties be bound by their particulars unless those particulars are amended. In *Palermo v Rosenthal* [2011] WAIRC 00069; (2011) 91 WAIG 129, Beech CC and I held that the provisions of object s 6(c), s 22B, s 26(1)(a), s 26(1)(b), s 26(1)(c), s 27(1)(ha) and s 27(1)(v) of the Act, together with the requirements of procedural fairness and the provision of a fair hearing, establish the following statutory case management regime that:
>
> (a) Matters should be dealt with in a way that eliminates delay with a minimum of legal form and technicality but allows for a proper and just consideration of matters;
>
> (b) When managing a matter the Commission should have regard not only to the interests of each party but to interests of the public in the efficient use of resources of the Commission;
>
> (c) There should be a fair and reasonable opportunity to both parties to each present their case. A determination of what is fair and reasonable in the circumstances of a matter should have regard to the matters raised in (a) and (b) above and:
>
> (i) The parameters of relevant matters set by the particulars given by each party in the application, notice of answer and any other particulars.
>
> (ii) What is reasonably required for the efficient presentation by each party of their case.
>
> (iii) The principle that each party should not be left in any doubt about what is alleged against them and the opposing case they are required to meet ([80](a) – [80](c)).

40 The purpose of directions issued within a case management system, for the filing of witness statements, must not be to prevent relevant evidence from being called in circumstances where the witness concerned is reluctant or refuses to come voluntarily. Where a person refuses to come voluntarily, then a summons enables that evidence to be presented and considered. The ultimate purpose of the evidence is to enable the court or tribunal to do justice.

41 Where there may be prejudice to the other side, where they may be taken by surprise by the evidence, that prejudice can often be mitigated or remedied by an adjournment for instructions to be sought, or for other evidence to be obtained. Most counsel would be able to take the situation that arose in their stride, especially when they are opposed to a self-represented person.

42 The respondent is correct in saying that the question also requires consideration of whether the denial of procedural fairness by the refusal to hear Ms Hewitt's evidence would entitle Ms Derkacs to be successful in the appeal. In ***Stead v State Government Insurance Commission*** (op cit), the High Court unanimously held:

> The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Park L.JJ.) in Jones v National Coal Board (1957) 2 QB 55, at p 67, in these terms:
>
> > 'There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. … No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.'
>
> That general principle is, however, subject to an important qualification which Bollen J. plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making

> of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility [9].
>
> For this reason not every departure from the rules of natural justice at a trial will entitled the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial [10].
>
> Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. True it is that an appeal to the Full Court from a judgment or order of a judge is by way of rehearing and that on hearing such an appeal the Full Court has all the powers and duties of the primary judge, including the power to draw inferences of fact (Supreme Court Rules 0.58 rr.6 and 14). However, when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial [11].

43 Ms Derkacs made clear to the Commissioner that Ms Hewitt had been present during the conversation between her employer and herself during her dismissal. Ms Podkas agreed that Ms Hewitt was 'part of the event' (ts 119) – (ts 120). This made her evidence relevant. No witness statement had been filed for good reason.

44 Given the relevance of the evidence, Ms Hewitt ought to have given evidence. This is particularly so given the conflict between Ms Derkacs' and Ms Podkas' evidence. Without Ms Hewitt having provided a witness statement or having given evidence, it is not possible to speculate about what she would say. However, it may have been very significant in the Commissioner determining the credit of the two protagonists. Taken with the issues arising from Ms Valentine's evidence, which we will deal with next, there is the real possibility that Ms Hewitt's evidence would have made a difference to the findings of credibility and of the facts.

45 We would uphold this ground of appeal.

Ms Valentine's evidence

46 The respondent called Ms Kerry Valentine to give evidence and she gave that evidence by telephone. The transcript records that she was affirmed.

47 Ms Valentine was asked by Mr Beetham for the respondent whether she recalled making a witness statement in these proceedings and she said yes, she had. However, she did not have a copy with her. She had not looked at it recently. She was asked if she was able to tell the Commissioner whether, to the best of her recollection, what is in the witness statement is true and correct. She said that she had received it by email, read it and had some amendments made and then signed it. Her witness statement was not formally received into evidence.

48 The questioning in cross-examination and her answers suggest Ms Valentine may have made a statement for the purposes of a complaint by Ms Podkas about Ms Derkacs to a professional body. Given the exchange between Ms Valentine and Mr Beetham, it is clear that whilst she said a statement was true and correct to the best of her recollection, it cannot be known whether the witness affirmed the statement that was filed in the Commission and quoted by the Commissioner.

49 Further, in cross-examination, Ms Valentine said that she did not write it but corrected a version sent to her and ultimately signed it. This raises a serious question about whether the words used were her own words, particularly if she used different words in cross-examination.

50 In her Reasons for decision, the Commissioner relied on what was described as Ms Valentine's witness statement. However, with respect, given Ms Valentine's oral evidence and the fact that no statement was in front of her, it was an error to rely on it. Further, the Commissioner referred to that statement saying that 'Ms Derkacs was yelling at Ms Podkas in a disrespectful, abusive, intimidating and threatening manner' [69]. This is at odds with her oral evidence under cross-examination when she described Ms Derkacs as being 'angry and upset' (ts 138), that she 'looked very upset' and 'quite distraught' (ts 139). The descriptions attributed to the statement are quite different from those used in cross-examination. Therefore, even if the Commissioner had before her a witness statement properly and formally attested to by the witness, the evidence it contained was severely undermined in cross-examination. It was no longer safe to rely on what was said in the purported statement.

51 We would uphold this ground of appeal.

Conclusion

52 As we noted earlier, given the significance of these two grounds of appeal and the effect they may ultimately have on the Commissioner's assessment of the evidence, we find it unnecessary and inappropriate to express a view on the remaining issues raised in the appeal. They are matters for the Commissioner on remittal.

EMMANUEL C:

53 I have read the Reasons for decision of the Chief Commissioner and Commissioner Matthews. I agree and have nothing to add.

2020 WAIRC 00114

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNIE DERKACS
	APPELLANT
	-and-
	TETYANA PODKAS TRADING AS PHOENIX PODIATRY
	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	MONDAY, 24 FEBRUARY 2020
FILE NO/S	FBA 12 OF 2019
CITATION NO.	2020 WAIRC 00114

Result	Operation of Decision suspended, Matter remitted to Commission
Appearances	
Appellant	In person
Respondent	Mr J Nicholas (of counsel)

Order

This appeal having come on for hearing before the Full Bench on Monday, 10 February 2020, and having heard Ms Derkacs, and Mr Nicholas of counsel on behalf of the respondent, and reasons for decision having been delivered on Monday, 24 February 2020, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders THAT —

1. The decision made by the Commission in matter U 152 of 2018 given on 10 October 2019 be and is hereby suspended.
2. The matter be and is hereby remitted to the Commission at first instance for further hearing and determination.

By the Full Bench

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

2020 WAIRC 00117

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 95/2018 GIVEN ON 17 JANUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00117
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
HEARD	**:**	MONDAY, 10 JUNE 2019
DELIVERED	**:**	TUESDAY, 25 FEBRUARY 2020
FILE NO.	**:**	FBA 4 OF 2019
BETWEEN	**:**	KAY HEALD Appellant AND METLABS (AUSTRALIA) PTY LTD Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	**:**	**COMMISSIONER D MATTHEWS**
Citation	**:**	**2019 WAIRC 00013**
File No	**:**	**B 95 of 2019**

CatchWords	:	Industrial law (WA) – Appeal against decision of the Commission – Application barred by deed – Unlawful duress – Unconscionable conduct – Actual or threatened breaches of contract of employment – Discretionary decision – Alleged threat under Criminal Code to issue 'Show Cause' letter – Alleged failure to consider or properly consider implied contractual duty to act with good faith – Whether in the public interest to dismiss matter – Issues not raised at first instance cannot be raised on appeal – No relief on general grounds of unfairness – Alleged tort of deceit not raised at first instance – Appeal dismissed
Legislation	:	*Industrial Relations Act 1979 (WA) s 26(1), s 27(1), s 29(1)(b)(i); Criminal Code (WA) s 338, s 338A(a), (b) and (d)*
Result	:	Appeal Dismissed
Representation:		
Appellant	:	Mr G McCorry (agent)
Respondent	:	Ms R Harding (of counsel) and with her, Ms B Swanson (of counsel)

Case(s) referred to in reasons:

Australia and New Zealand Banking Corporation Ltd v Karam [2005] NSWCA 344

Bradbury v Great Western Real Estate [1995] WAIRC 12927; (1995) 75 WAIG 2927

Civil Service Association v Department of Justice [2019] WAIRC 00713; (2019) 99 WAIG 1531

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194

Commercial Bank of Australia Limited v Amadio [1983] HCA 14

Commonwealth Bank of Australia v Barker [2014] HCA 32; (2014) 253 CLR 169

Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1

Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors [2013] WASCA 36

House v The King (1936) 55 CLR 499

Jacqueline Healey v Amadeus Australia [2006] WAIRC 04575; (2006) 86 WAIG 1521

Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service [2010] NSWCA 268

Metwally v University of Wollongong [1985] 60 ALR 68

Michael v Director General, Department of Education and Training [2009] WAIRC 01180; (2009) 89 WAIG 2266

The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927* (WA) *as the hospitals formerly comprised in the Metropolitan Health Services Board v Denise Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Outlook Management v Foxtel Management Pty Ltd [2002] NSWSC 17

Re Queensland Electricity Commission and Ors; ex parte Electrical Trades Union of Australia [1987] HCA 27

Regulski v State of Victoria [2015] FCA 206

Suttor v Gundowda Pty Ltd (1950) 81 CLR 418

Thorne v Kennedy [2017] HCA 49

Tracey v R [1999] WASCA 77

University of Wollongong v Metwally (2) [1985] HCA 28

Water Board v Moustakas [1988] HCA 12; (1988) 180 CLR 419

Whooley v Shire of Denmark [2019] WASCA 28; (2019) WAIG 87

Cases also cited:

Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194

Crescendo Management v Westpac

Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653

Gronow v Gronow [1979] HCA 63; (1979) 144 CLR 513

House v The King [1936] HCA 40; (1936) 55 CLR 499

***Jago v District Court** (NSW)* [1989] HCA 46; (1989) 168 CLR 23

Monteleone v The Owners of the Old Soap Factory [2007] WASCA 79

Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 AC 366

Texts cited:

Dicey AV, *An Introduction to the Study of the Law of the Constitution*, (10th ed, 1959)

Heydon JD, *Heydon on Contract*, Lawbook Co. 2019

Reasons for Decision

SCOTT CC:

1 This is an appeal against the Commission's decision to grant an application, made by the respondent at first instance, to dismiss a claim for denied contractual benefits on the basis that the application is barred by a Deed of Settlement and Release (the Deed) between the parties. I would dismiss the appeal for the reasons set out below.

Background

2 Ms Kay Heald was employed by Metlabs (Australia) Pty Ltd (Metlabs) as an administration manager, commencing in July 2012.

3 In 2018, Metlabs engaged Ms Jodee Martine Beeson, a human resources consultant, to undertake what Ms Beeson described as 'a full workplace review' (Exhibit 2 at [9]) and she met with staff individually on 2 July 2018. Ms Beeson had discussions with Metlabs' managing director, Mr Kristopher Townend, and a number of issues were raised regarding Ms Heald's performance and conduct in her employment. Ms Beeson was to deal with that matter on behalf of Mr Townend.

4 Ms Beeson then met with Ms Heald on 20 July 2018. The Commissioner at first instance found that at that meeting, Ms Beeson dealt with Ms Heald in a way that was unfair, and with the intent of having her sign the Deed. The Deed provided that in exchange for a settlement sum, Ms Heald would resign. The parties agreed to release and discharge each other from all existing or future actions, claims or proceedings whatsoever, and that the Deed may be pleaded as a bar against any action or suit arising out of or in connection with her employment.

5 Ms Beeson indicated to Ms Heald that unless she signed the Deed, she, Ms Beeson, would immediately prepare a "Show Cause" letter requiring Ms Heald to address matters relating to Ms Heald's conduct and performance and that Ms Heald's employment may be brought to an end as a consequence of that process. Ms Heald was sent home immediately following the meeting and was expected to sign the Deed and return it to Metlabs within a very short timeframe or the disciplinary process, to be commenced by the issuing of the Show Cause letter, would commence.

6 Ms Heald obtained advice from an industrial agent. She then wrote to Ms Beeson saying that she would sign the Deed but would do so under duress. Ms Beeson responded, advising her in clear terms not to sign the Deed if she felt she was under duress. On 21 July 2018, Ms Heald signed the Deed, returned it to the employer, and, it appears, was paid the sum agreed between the parties.

7 On 7 August 2018, Ms Heald referred to the Commission a claim that she had not received a benefit under her contract of employment with Metlabs, under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act). Metlabs sought that the Commission dismiss the claim under s 27(1)(a)(ii) and (iv) of the Act because the Deed barred Ms Heald from bringing the claim.

Metlabs' case at first instance

8 Metlabs produced evidence from Ms Beeson and Mr Townend. Metlabs says it complied with its obligations to pay Ms Heald according to the Deed. It also provided her with a copy of the Deed. Ms Heald had and took the opportunity to obtain advice before signing the Deed. She had other options available than to sign the Deed, and Ms Beeson told her not to sign the Deed under duress or if she felt railroaded into signing it. Ms Heald went ahead and signed the Deed and therefore it should not be set aside. The application ought to be dismissed pursuant to s 27(1) of the Act.

Ms Heald's case at first instance

9 Ms Heald gave evidence. She also produced evidence from David Taylor, principal solicitor of a law firm for which Ms Heald had carried out bookkeeping work. Ms Heald relied on arguments that the Deed was procured by duress and unconscionable conduct of Metlabs.

10 In respect of duress, she pointed out the elements of compulsion of will and illegitimate pressure. The illegitimate pressure was said to be limited to threatened or actual unlawful conduct of Metlabs.

11 She defined a threat as 'a declaration or determination of intent to do something that inflicts punishment or pain or loss or damage on someone in retaliation for or conditional upon some action or course taken by another' (Applicant's Submissions filed 27 November 2018).

12 Ms Heald noted that the definition of 'threat' contained in s 338 of the *Criminal Code*, 'a statement or behaviour that expressly constitutes or may reasonably be regarded as constituting a threat' is circular and not helpful. However, she cited s 338A(a), (b) and (d) of the *Criminal Code* dealing with the particular threats that are unlawful. She noted that the unlawfulness of a threat has been held to arise if the threat is made 'without reasonable cause' (***Tracey v R*** [1999] WASCA 77 per Wallwork J at [92]).

13 In respect of unconscionable conduct, Ms Heald noted that its essence lies in the party's abuse of a superior bargaining position, taking unconscientious advantage of the claimant's 'disabling condition or circumstances' (***Commercial Bank of Australia Limited v Amadio*** [1983] HCA 14 per Mason J at [6]) or the 'unfair or unconscientious disadvantage resulted in knowing exploitation by one party, of another's position of disadvantage, in such a manner that the former could not in good conscience retain the benefit of the bargain' per Dawson J at [22]. (See also ***Thorne v Kennedy*** [2017] HCA 49).

14 Ms Heald examined the evidence and submitted that she had been subjected to unlawful duress and unconscionable conduct. In those circumstances, she said, the Deed ought to be set aside. She said that, in essence, Metlabs threatened her with a process by which she would be required to show cause why she should not be dismissed, or sign the Deed and resign.

15 Ms Heald says there was nothing in her conduct which would have justified her dismissal either summarily or on notice. There was no reasonable cause for the threat to issue a Show Cause letter and therefore, Metlabs would procure a benefit or she would incur a detriment through the execution of the Deed, constituting a threat under the *Criminal Code*.

16 Ms Heald said that this constituted a threat to breach the contract and was unlawful conduct for the purposes of the economic duress doctrine.

17 Despite advice from her industrial agent, Ms Heald signed the Deed. She said that, due to her circumstances, there was no reasonable alternative. She said Metlabs knew of this and thereby exerted illegitimate pressure, inducing her to sign the Deed. She says that in doing so, Metlabs applied duress.

18 In respect of unconscionable conduct, Ms Heald said that Metlabs knew of her financial position. This amounted to a special disabling condition or circumstance, and Metlabs knowingly took unconscientious advantage of it. She also said that Metlabs knew that she did not have the opportunity to obtain legal or other professional advice, nor was she given reasonable time to consider the matter before she signed the Deed.

Decision at first instance

19 The learned Commissioner set out in detail the evidence before him and examined the law regarding unconscionable dealing, that 'an actual or threatened breach of contract is unlawful conduct' and cited ***Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors*** [2013] WASCA 36 at [26]. He examined the concept of economic duress and undue pressure and noted that the New South Wales Court of Appeal in ***Australia and New Zealand Banking Corporation Ltd v Karam*** [2005] NSWCA 344 at [62] – [65] 'did not seem keen on the idea that, in relation to the equitable doctrine, an actual or threatened breach of contract was 'unlawful''. The learned Commissioner noted that at [66] of its judgment, the Court had found that 'where the power to grant relief is engaged because of a contravention of a statutory provision … the Court may be entitled to take into account a broader range of circumstances than those considered relevant under the general law'.

20 The Commissioner then noted that s 26(1)(a) of the Act required him to act according to equity and good conscience. He further noted that a court of equity will not exercise its jurisdiction 'to set aside a deed on the basis that there was simply some inequality of bargaining power between the parties to the deed (citation omitted) … More is needed'.

21 The learned Commissioner went on to find that in deciding whether or not to enforce the Deed, equitable principles apply, and that they guided him in what it means to act 'according to good conscience and equity'.

22 The learned Commissioner said that he 'found it unnecessary to decide whether it is enough to establish unlawfulness for the purpose of the equitable doctrine, to establish an actual or threatened breach of contract'.

23 The learned Commissioner then made findings about the particular circumstances. Firstly, he found that while he accepted that Ms Heald was stressed from the time of the meeting with Ms Beeson to the time when she signed the Deed, she was not under any special disadvantage. He described her emotional reaction as normal given what was happening. There was nothing to cause Ms Beeson to consider that Ms Heald was experiencing an actual psychological or emotional state beyond what would be normal. Importantly, the learned Commissioner described Ms Heald as remaining strong and articulate throughout the meeting. She 'was able to obtain professional advice and to communicate clearly, and strongly, with Ms Beeson by email'. Ms Heald had not displayed characteristics normally associated with a special disadvantage. Again, the learned Commissioner described Ms Heald as remaining 'lucid, intelligent and strong'.

24 The learned Commissioner then examined whether there was undue pressure on Ms Heald, from the commencement of the meeting until she signed the Deed. He noted a number of aspects of Ms Beeson's treatment of Ms Heald during the meeting, which he described as unfair. They were:

> [106] …
>
> (1) Ms Beeson told Ms Heald at the start of the meeting on 20 July 2018 that she had committed serious breaches of discipline, rather than that there was an allegation or allegations that she had done so;
>
> (2) Ms Beeson rebuffed Ms Heald's attempts to tell her side of the story by referring to "evidence" of the breaches, without producing that evidence, and repeated that the "breaches", and not the "allegations", were serious (of course, such a discussion and the production of such evidence would have been, all things being equal, quite premature; but all things were not equal, Ms Beeson was telling Ms Heald she had committed "breaches", supported by evidence, and that she had to make a decision about what happened next against that background);
>
> (3) Ms Beeson signalled to Ms Heald, by the above, that Ms Beeson, on behalf of Metlabs Australia Pty Ltd, had no real interest in Ms Heald's side of the story;
>
> (4) Ms Beeson referred at any early stage in the meeting to a "deal", that is to Ms Heald resigning and receiving payment upon doing so, and characterised the "deal" as a way to avoid the consequences of Ms Heald's serious breaches;
>
> (5) Ms Beeson returned throughout the meeting to the "deal", even going so far as to provide Ms Heald with a pro forma copy of a deed, thus giving the "deal" clear primacy in a meeting that Ms Beeson would have us believe was about discussion of "next steps" and "options";
>
> (6) Ms Beeson mentioned only that immediate termination without payment was a possible outcome if Ms Heald did not take the "deal" when, of course, there were many other possible outcomes, including full exoneration and the happy continuation of the employment relationship;
>
> (7) Ms Beeson made it clear that the employment relationship was "over" and that "you just have to move on", which again emphasised the worst for Ms Heald and accentuated the virtues of the "deal" as an alternative;

(8) Ms Beeson made it clear that a decision whether or not to take the "deal" had to made quickly by Ms Heald, with the unpalatable alternative likely to occur soon, and quickly, if the "deal" was not taken;

(9) Ms Beeson's commented that she had family commitments over the weekend, a comment which was really quite unkind and unreasonable given that Ms Beeson's and Ms Heald's situations were completely different with Ms Heald being required to make a big decision about her future while Ms Beeson was choosing to work to a timetable of her making in the context of a paid engagement; and

(10) Ms Heald was told by Ms Beeson to leave work despite it being mid-morning, something that was apparently inconsistent with any thought or belief that Ms Heald might somehow survive the planned process if she chose to participate in it rather than resign.

[107] The meeting was ostensibly about Ms Heald being informed that her employer had some suspicions about her conduct and that a process would be commencing in relation to them. This was, however, by no means its content or tenor.

[108] This was a meeting at which Ms Beeson was trying to get Ms [Heald] to take a deal to resign her employment, and receive money for doing so, against a clear background that if she did not resign she might end up with no job and no money.

[109] That is exquisite pressure for most people and was for Ms Heald.

[110] Ms Beeson kept up the pressure after the meeting.

25 The learned Commissioner noted that while it was no small matter for Ms Heald, compared with other cases of setting aside agreements involving 'large sums of money and ruinous life consequences', its 'seriousness … from Ms Heald's point of view should not be underestimated'. She left work 'that day facing a choice between agreeing to end her employment for five [weeks'] pay, or remaining in that employment with the prospect, looming large, of that employment being ended for her with no payment'.

26 Ms Beeson continued the pressure by reference to a quick disciplinary process. This included that if Ms Heald did not sign the Deed by the next morning, Ms Beeson would immediately get to work on a Show Cause letter, that taking the deal would avoid 'unpalatable and imminent consequences'.

27 The learned Commissioner found that there was no satisfactory explanation as to why it had to be finalised so quickly, except to keep up the pressure.

28 When Ms Heald emailed Ms Beeson saying that she would sign the Deed 'under duress', Ms Beeson responded that Ms Heald should not sign if she was under duress. However, the email returned to point out the result of not signing being the quick prosecution of the disciplinary process. The learned Commissioner referred to the 'naked exertion of further pressure'. Ms Heald then signed the Deed.

29 The learned Commissioner found that 'the pressure was not 'undue' in the relevant sense' because 'it did not involve any actual or threatened unlawful conduct by the respondent. There was no actual or threatened criminal act. It involved no actual or threatened breach of contract by reference to the common law doctrine or the equitable doctrine'. He noted that Ms Heald did not clearly identify any term or terms of the contract allegedly breached or threatened to be breached by Metlabs. The learned Commissioner said that this was 'because Ms Heald's arguments went off on a hopeless tangent about Ms Beeson having breached the criminal law'.

30 The learned Commissioner found that there was no contractual right to only face disciplinary proceedings where there is a basis for them. He commented that while such an action might be brought to the Commission (in what I take to be reference to a claim of unfair dismissal) he found that this was entirely different from a contractual term to that effect.

31 The learned Commissioner noted that there is no contractual duty on an employer to act with good faith towards employees.

32 As to the issue of disciplinary action, the learned Commissioner found that Ms Beeson did have a basis for this action. Although the allegations against Ms Heald were not tested at hearing, the Commissioner noted that there was no argument that they were completely illusory and he formed the view that they were not invented. They were matters that could properly give rise to a suspicion that Ms Heald had breached discipline. He found that 'there could very well have been a relevant suspicion'.

33 The learned Commissioner found that Ms Beeson did not say that if Ms Heald did not resign, she would be summarily dismissed, nor did she suggest that it would occur. 'She singled it out as a possibility but did not go so far as to intimate that it would occur'. It was a possibility but not necessarily the result or the only option if Ms Heald did not resign. If such a statement had been made and it did induce entry into the Deed, the Commissioner found, it might 'have been within the territory of an unlawful threat but no such statement was made and no such thing occurred'. He concluded that there was no threatened breach of contract.

34 The learned Commissioner noted that there was unfairness towards Ms Heald but it was not sufficient to cause him to set aside the Deed. The learned Commissioner recognised the difference in bargaining strength between the parties; that Ms Heald was stressed; that Metlabs through Ms Beeson had little regard for Ms Heald's stress or situation and 'prosecuted its purpose unremittingly and forcefully'. However, Ms Heald was under no special disadvantage, and Metlabs did not breach or threaten to breach the contract.

35 The Commissioner found that according to equitable principles and the public interest, the Commission should enforce the deal struck between the parties in this case. He granted the application pursuant to s 27(1) of the Act and the substantive claim was dismissed.

The grounds of appeal

36 The ground of appeal is that the learned Commissioner, taking account of nine particular facts found, erred in law in failing to consider or to properly consider whether:

(i) actual and threatened breaches of the Appellant's contract of employment had occurred and thus constituted unlawful conduct for the purposes of the common law economic duress doctrine;

(ii) the threats of Ms Beeson in relation to what would happen if the Appellant did not execute the Deed constituted unlawful conduct by reason of being threats that contravened statutory provisions;

(iii) a threat could be conveyed other than by an express statement of intending to cause a detriment if a certain thing did not occur and this encompassed the doing of otherwise lawful acts if done for an improper purpose;

(iv) the actions of Ms Beeson on behalf of the Respondent constituted unlawful conduct by reason of it amounting to the tort of deceit;

(v) there was a contractual duty upon the Respondent to act with good faith towards the Appellant;

(vi) there was any legitimate reason for the Respondent to have any suspicion of wrong doing by the Appellant as a basis for commencing disciplinary proceedings, and if not, whether a pretence that there was, amounted to acting in bad faith such as to constitute a breach of contract; and

(vii) in all the circumstances, it was properly in the public interest for the WAIRC to enforce unfair deals such as those struck here solely because they were not obtained by taking unfair advantage of a special disadvantage or achieved through actual or threatened unlawful conduct.

37 Ms Heald seeks the following orders:

1. The appeal be upheld.
2. The decision of the Commission at first instance be set aside.
3. The Respondent's section 27(1)(a) application be dismissed.
4. A declaration that the Deed executed by the Appellant was procured by duress.
5. The Deed be declared void or it otherwise be ordered that the Deed may not be relied upon by the Respondent in the substantive proceedings.
6. The Appellant's substantive claim be restored and heard and determined on its merits.

The approach to an appeal to the Full Bench

38 The matter before the Commissioner at first instance required a discretionary decision. The approach to be taken by the Full Bench in considering an appeal against the discretionary decision is set out in ***Michael v Director General, Department of Education and Training*** [2009] WAIRC 01180; (2009) 89 WAIG 2266 at [140] – [143], per Ritter AP, by reference in particular to ***House v The King*** (1936) 55 CLR 499 and ***Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*** (2000) 203 CLR 194:

> The relevant principles were set out in the joint reasons of Dixon, Evatt and McTiernan JJ in ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499 at 504-505 as follows:
>
> > The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred [140].
>
> As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in ***Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission*** [2000] HCA 47; (2000) 203 CLR 194 at [19]- [21]. At [19] their Honours explained by reference to the reasons of Gaudron J in ***Jago v District Court*** *(NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 76, that a discretionary decision results from a "decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result'". Instead "the decision-maker is allowed some latitude as to the choice of the decision to be made". At [21] their Honours said that because "a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be

> challenged by showing error in the decision-making process". Their Honours then quoted part of the passage of ***House v King*** which I have quoted above [141].
>
> Similarly, Kirby J in ***Coal and Allied*** at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with "caution and restraint". His Honour said this is "because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view". (See also ***Norbis v Norbis*** [1986] HCA 17; (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535) [142].
>
> These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in ***Gronow v Gronow*** [1979] HCA 63; (1979) 144 CLR 513 at 519. There, his Honour explained that although "error in the proper weight to be given to particular matters may justify reversal on appeal, ... disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge". This is because, in considering an appeal against a discretionary decision it is "well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion", and that when "no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight". (See also Aickin J at 534 and 537 and ***Monteleone v The Owners of the Old Soap Factory*** [2007] WASCA 79 at [36]) [143].

The appellant's characterisation of the findings

39 The learned Commissioner is said to have erred in law, in having made certain findings but then having failed to consider or properly consider certain matters in light of those findings. The ground of appeal sets out the learned Commissioner's findings and identifies them as (a) to (i). The errors are identified as (i) to (vii). I think it is important to note at the outset that the manner in which some of Ms Heald's characterisations of the Commissioner's findings constructs conclusions which are not actually made by the Commissioner or not made explicitly; which conflate issues and findings or ignore other findings.

The issues – consideration and conclusions

Threat, improper purpose and cause

40 I intend to deal with those items (i) – (vii) in groups as there is some inter-relationship and commonality. The first group of issues which the learned Commissioner is said to have erred in law in failing to consider or properly consider relate to the issue of actual or threatened breaches of Ms Heald's contract of employment, and whether this constituted unlawful conduct for the purposes of the common law economic duress doctrine, as well as threats that contravened statutory provisions.

41 Ms Heald says that there was a threat to issue a Show Cause letter, which meant that Metlabs would take action against her if she did not resign. This is said to constitute an unlawful threat, a breach of the *Criminal Code*.

42 With respect, the evidence demonstrates that Ms Beeson went to the meeting with the intent of giving Ms Heald two options – to sign the Deed and resign and therefore be paid in lieu of notice, or face a disciplinary process which would commence by a letter, the Show Cause letter, setting out allegations to which she was to respond. The Commissioner found that the subsequent emails' explicit reference to 'this deal' would allow Ms Heald to avoid what he described as 'the unpalatable, and imminent, consequences'.

43 Although he described it as an 'unfair characterisation of what a fair process would involve or, perhaps more accurately, a fair characterisation of an unfair process', the learned Commissioner gave the idea of an actual or threatened criminal act short shrift. He rejected the submission that there was a 'threat' as the term is used in the *Criminal Code*. He noted that the argument about a breach or threatened breach of contract 'went off on a hopeless tangent about Ms Beeson having breached the criminal law'. The learned Commissioner found that Ms Beeson did have a basis for telling Ms Heald that disciplinary action might be taken against her. He said there was no argument that the allegations against her were illusory. He found they 'were not invented and that the matters could properly have given rise to a relevant suspicion on the part of Ms Heald's employer that she had breached discipline'.

44 While the learned Commissioner was rightly critical of both Ms Beeson's credibility and of the fairness of the process, he was quite clear that there were valid issues raised as allegations against Ms Heald. He found that 'there could very well have been a relevant suspicion'.

45 In my respectful view, Metlabs was entitled to put to its employee, Ms Heald, that she could avoid the process of those allegations being dealt with and reach an agreement with her employer to bring her employment to an end in circumstances that may be favourable to her. In my view, this does not constitute a threat. It is certainly not a threat which meets the definitions contained within the *Criminal Code*. It is a not unusual practice in employment relationships for employers to give employees an option rather than to either proceed to a disciplinary process or to be dismissed. In this case, Ms Heald had an option and that was to face the disciplinary process.

46 Two things are significant. The first is that Ms Heald sought advice from an industrial agent, and received advice but made up her own mind. Secondly, Ms Beeson's email in response to Ms Heald saying she would sign the Deed and resign under duress is significant. She said:

> Please do not under any circumstances sign the Deed of Settlement and Release under duress or if you feel that you have been railroaded.
>
> I do not want you to feel that you had no option other than to resign. It was one option but the other option is to commence the process which we discussed today.

> I think it is best that I prepare the Show Cause Letter and we commence the disciplinary management process. You will be required to meet with me on Monday to respond to the Show Cause Letter and we will then consider your response.
>
> You must not under any circumstances resign and / or sign a Deed of Settlement and Release under duress. It was simply an option available to you and you must not feel that you had no option or choice to sign the form. (Appeal Book page 80).

47 Ms Beeson then went on to say that she would forward the Show Cause letter shortly and arrange a meeting for the Monday. She encouraged Ms Heald to carefully respond to the Show Cause letter. This clearly indicates that at the time Ms Heald signed the Deed, it had been made clear to her that she must not sign it under duress and in fact, she was encouraged not to, and Ms Beeson's intention was to then draw up the letter and arrange a meeting time for the Monday.

48 Although the learned Commissioner found that Ms Beeson's purpose in conducting the meeting was to procure Ms Heald's signature to the Deed, the next day, Ms Beeson backed away from that purpose in her email, advising Ms Heald to not sign under duress and saying that she would go ahead with the disciplinary process.

49 Even if there had been a threat in the meeting, which is not clear to me on the evidence, the email from Ms Beeson the next day removed that threat.

50 The learned Commissioner also considered whether the so-called threat breached the contract of employment in that this was said to be a threat to dismiss, and he found that there was no such threat. He found that Ms Beeson singled out the possibility of dismissal 'but did not go quite so far as to intimate that it would occur', but there was no threat that this would necessarily result if Ms Heald did not resign. I respectfully agree with those findings, and they were findings open on the evidence.

51 The transcript of proceedings makes quite clear that Ms Heald knew and understood that she was not being threatened with dismissal, but that the risk she faced was of an investigation. At page 68 of the transcript, the learned Commissioner asked Ms Heald about her understanding:

> **MATTHEWS C:** What did you understand by reference to show cause? Show cause about what?---From her explanations, just that I had to explain myself as to why I did what I did, um, and then that was it - - -
>
> Okay - - -?--- - - - just - - -
>
> - - - thank you?---Yeah.
>
> **HARDING, MS:** So that email is proof that you had another option other than resigning, didn't you?---Yes.
>
> Yes. And that was to go through this process of responding to their concerns, correct?---Of which I thought I'd be terminated anyway, so - - -
>
> You thought that, but she never said you'd be terminated, did she?---She said it was a option, yes.
>
> Yes, she said it was an option, but she never said - - -?---Yeah.
>
> - - - you were being terminated or that you would be terminated, did she?---No.
>
> And she said she would consider your response before they made a decision as to what the next steps would be, didn't she?---Oh, she said they would consider my response, my - and if my excuses weren't good enough, I'd be terminated anyway.
>
> So said, "You will be terminated anyway" - - -?---Anyway - - -
>
> - - - did she?---Yeah.
>
> Or did she said - or did say, "You may be terminated"?---No, she said, "You'll be terminated - you could be terminated anyway".
>
> "You could be terminated"?---The exact words were, yes.
>
> "You could be terminated" - - -?---Yes.
>
> - - - "anyway". So not, "You would be terminated anyway"?---Ah, "You could be".
>
> In her email, she doesn't say that you have to resign, does she?---Ah, no, I don't believe so [ts 68].

52 At page 83 of the transcript, in an exchange between the learned Commissioner and Mr McCorry for Ms Heald, the Commissioner put to Mr McCorry that Ms Heald did not understand Ms Beeson to be saying to her that the Show Cause letter was for Ms Heald to show why she should not be dismissed or sacked, rather to show why Metlabs should not undertake a disciplinary process.

53 It was not clear at that point what Metlabs would require Ms Heald to respond to and what it was considering. What is clear is that the process would involve a number of allegations being put to her for her answer. Metlabs would consider her answers. What was to happen as a consequence was not at that point determined, presumably on the basis that it would be determined taking account of her answers.

54 It seems to me that the thing that Ms Heald says was a threat was that if she did not sign the Deed, resign or receive a sum of money, that Metlabs would provide her with procedural fairness. It would put allegations to her about her conduct and performance and she would have an opportunity to answer them. If Metlabs found that her conduct warranted summary dismissal, then she would have her employment terminated without notice or pay in lieu of notice. Alternatively, the investigation may exonerate her and find that she had not misconducted herself. Therefore, if a threat were the options which I have discussed above, of providing an employee with an opportunity to resign or face a disciplinary process where procedural fairness would come into play, constituting an unlawful threat for the purposes of the criminal law, then frequently-used human resources processes would constitute criminal acts. Ms Heald had a real option to face procedural fairness. She chose the other option. She did so in the face of advice and of urging by Ms Beeson not to sign if she felt under duress.

55 The grounds for the investigation are in the email from Mr Townend. There may have been innocent explanations, as the Commissioner found, but the issues were worthy of investigation. The learned Commissioner found that there was reasonable cause for allegations to be put to Ms Heald. He found that the allegations were not illusory and were not invented. They were matters that could properly give rise to a suspicion.

56 Therefore, in my view, the learned Commissioner considered the issues of threat for the purposes of the question of an unlawful threat and breach of contract. He dismissed without much consideration the issue of threat for the purposes of breach of contract in the context of the facts, not the context erroneously portrayed in the ground of appeal. There was no justification for a conclusion that there was a threat in the context used by Ms Heald. Certainly, there was not a threat 'without reasonable cause'.

57 Ms Heald did not demonstrate that there was a threat for the purposes of the first three aspects of the ground of appeal, and the learned Commissioner did not err as submitted. Without a threat, the first three aspects fall away.

Tort of deceit

58 The fourth point is that Ms Beeson's actions on behalf of Metlabs constituted unlawful conduct by reason of it amounting to the tort of deceit. I note that this matter was not raised at first instance and is not appropriate to be raised on appeal.

59 Section 49 of the Act provides that an appeal shall be conducted on the basis of the matters raised by the parties at first instance. See also ***University of Wollongong v Metwally (2)*** [1985] HCA 28; (1985) 60 ALR 68 and ***Whooley v Shire of Denmark*** [2019] WASCA 28; (2019) 99 WAIG 87. The importance of finality of litigation is an important principle of public policy (***Coulton v Holcombe*** [1986] HCA 33; (1986) 162 CLR 1).

60 A new argument may be considered in exceptional circumstances (***Water Board v Moustakas*** [1988] HCA 12; (1988) 180 CLR 419).

61 As noted by Smith A/P and Beech CC in ***The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927* (WA) *as the hospitals formerly comprised in the Metropolitan Health Services Board v Denise Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203 at [73], in conducting an appeal, the Full Bench does 'so by reviewing the evidence and matters raised before the Commission at first instance for itself to ascertain whether an error has occurred' (see also ***Metwally v University of Wollongong*** [1985] 60 ALR 68 at [7], per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ and ***Suttor v Gundowda Pty Ltd*** (1950) 81 CLR 418 at [438], per Latham CJ, Williams and Fullager JJ).

62 As this was not raised at first instance and there is no argument or justification for it being raised on appeal, this aspect ought to be dismissed.

A contractual duty to act with good faith

63 In the fifth point in the ground of appeal, Ms Heald says the learned Commissioner erred in failing to consider or properly consider that there was a contractual duty on Metlabs to act with good faith.

64 However, the argument as it developed at the hearing of the appeal was based on a requirement to act honestly, said to arise in ***Commonwealth Bank v Barker*** [2014] HCA 32; (2014) 253 CLR 169 at [41] per French CJ, Bell and Keane JJ. The issue in that matter was about the requirement for trust and confidence in the employment relationship. ***Outlook Management v Foxtel Management Pty Ltd*** [2002] NSWSC 17 and ***Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*** [2010] NSWCA 268, referred to by the appellant, were cases involving commercial contracts between parties where the contracts expressly contained obligations to act in good faith.

65 The learned Commissioner was, with respect, correct that there is no implied term of good faith and fidelity in employment relationships. In ***Regulski v State of Victoria*** [2015] FCA 209 at [219], Jessup J noted that there is no authority for the proposition that there is an implied term that parties would act in good faith towards each other in contracts of employment as compared with commercial contracts.

Legitimate reasons for suspicion

66 The sixth point submits that the learned Commissioner failed to consider or properly consider whether there was a legitimate reason for Metlabs to have any suspicion of wrong-doing by Ms Heald as the basis for commencing disciplinary proceedings.

67 The learned Commissioner considered this matter and found that there was no real challenge to there being no basis for suspicion. Given the nature of the hearing at first instance, it was not appropriate for the Commission to consider whether the allegations were true. Rather, it involved consideration of whether there was a basis for suspicion as part of the consideration of the issue of threat. He found that there were issues raised which were appropriate to be investigated. They were the issues raised by Mr Townend about Ms Heald's conduct and performance. He concluded that there was no pretence that there were grounds for a suspicion of wrong-doing by Ms Heald. It has not been demonstrated that the learned Commissioner erred in this conclusion. I would dismiss this point.

The Public Interest

68 The seventh point is that the Commissioner failed to consider or properly consider whether in all the circumstances, it was properly in the public interest for the Commission to enforce unfair deals such as those struck in this case solely because they were not obtained by taking unfair advantage of a special disadvantage or achieved through actual or threatened unlawful conduct.

69 Ms Heald's case at first instance was not about general unfairness. It was about being released from the Deed because of, in particular, duress and unconscionable conduct. This aspect of the ground of appeal seeks to add a general element of unfairness. As with the issue of the tort of deceit raised in the fourth point, it is not open to the appellant to raise a new argument on appeal.

70 In any event, unfairness in agreement making will not generally justify overturning an agreement. Something more, such as duress or unconscionable conduct, is necessary.

71 Further, the learned Commissioner did properly consider the public interest. In the early part of his Reasons for Decision, he dealt with the issue of the public interest in the need to enforce agreements reached between parties. He noted the authorities regarding providing relief against unconscionable dealing to set aside a deed of settlement and release by reference to ***Commercial Bank of Australia Ltd v Amadio*** and in respect of a contract, regarding a party entering into the contract where the pressure involves an actual or threatened unlawful act (***Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd & Ors***). He couched the question as being 'what approach do I use in deciding whether or not to enforce the Deed to bar the substantive denied contractual benefits claim' [88].

72 The Commission is a creature of statute and therefore has powers according to, and is constrained by, the statute. The Commission's powers include s 27(1)(a) which provides:

> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) …
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) …
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

73 The Commission is also bound to exercise its jurisdiction 'according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms' (s 26(1)(a) of the Act).

74 Consideration of whether it is in the public interest to dismiss a matter 'will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree' (***Re Queensland Electricity Commission and Ors; ex parte Electrical Trades Union of Australia*** [1987] HCA 27 at [7], per Mason CJ and Wilson and Dawson JJ). In the same matter, Deane J dealt with the issue of a court or tribunal refraining from hearing in the public interest. At [3], his Honour noted:

> The right to invoke the jurisdiction of courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise of jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person or organisation, regardless of rank, condition or official standing, is 'amenable to the jurisdiction' of the courts and other public tribunals (cf Dicey *An Introduction to the Study of the Law of the Constitution,* 10th ed (1959), (193)). In the rare instances where a particular court or tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise.

75 The decision required of the Commissioner at first instance was a discretionary one, of whether it was in the public interest to allow the pursuit of a case in circumstances where Ms Heald had entered into a deed with Metlabs in which she expressly 'and mutually with the respondent' agreed not to do so. The Commissioner was required to decide whether to set aside the Deed in the context of whether it is in the public interest for parties to be bound by their agreements or to be able to be relieved of them in particular circumstances.

76 The Commission has long taken the view that where parties expressly settle all matters between them and agree not to take further action against each other, either generally or by entering into a Deed of Settlement and Release, it constitutes a bar to the pursuit of a claim of, for example, unfair dismissal or for a denied contractual benefit. In ***Bradbury v Great Western Real Estate*** [1995] WAIRC 12927; (1995) 75 WAIG 2927, Sharkey P, with whom Gifford C agreed, said:

> As a matter of equity, good conscience and the substantial merits of the case, it would have been quite unfair to allow a person (the appellant), having entered into an agreement and not performed it, to proceed with his application in breach of it. Indeed, it would have been open to the respondent to take action to prevent this at law. *It is certainly not in the public interest, too, that the Commission should have proceeded to hear something which had been settled by agreement, even if, as a matter of law, the Commission could have heard the matter, which it could not have* (2928). (Emphasis added).

77 There have been many decisions following this line since that time, including those dealing with claims to set aside formal deeds (see ***Jacqueline Healey v Amadeus Australia*** [2006] WAIRC 04575; (2006) 86 WAIG 1521).

78 In this case, the arguments raised by Ms Heald at first instance did not include a ground of general unfairness. In any event, as the learned Commissioner noted, more is needed such as duress or unconscionable conduct. Ms Heald was unsuccessful on those two issues, and can obtain no comfort or relief on general grounds of unfairness, even if that had been squarely raised at first instance.

Conclusion

79 No error has been identified in this appeal. I would dismiss it.

KENNER SC:

80 The background to this appeal, the contentions of the parties, and the findings at first instance have been helpfully set out in the reasons of the Chief Commissioner, which I have had the benefit of reading and need not repeat. I am also in general agreement with the Chief Commissioner's conclusions that the appeal should be dismissed and for the reasons she gives. I add the following observations of my own.

Deceit

81 As to the tort of deceit point, this matter was not raised or argued in the proceedings at first instance. Recently, in ***Civil Service Association v Department of Justice*** [2019] WAIRC 00713; (2019) 99 WAIG 1531, I said at par 33:

> As to the written and oral submissions of the appellant in relation to the history of cl 37, it was conceded when the matter was raised by the Full Bench, that such issues had not been raised or argued before the learned Industrial Magistrate at first instance. Whilst the issue does not relate to a matter that may have been met by the other side with additional evidence, nonetheless, the well settled principle is that except in very exceptional circumstances, a party may not raise a point or issue on appeal, that was not taken in the proceedings at first instance: ***Whooley v Shire of Denmark*** [2019] WASCA 28; (2019) 99 WAIG 87 citing ***Suttor v Gundowda*** *Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418; ***University of Wollongong v Metwally*** (No 2) [1985] HCA 28; (1985) 59 ALJR 481; ***Water Board (NSW) v Moustakas*** [1988] HCA 12; (1988) 180 CLR 491. No exceptional circumstances were raised by the appellant and in my view, none are apparent, in terms of the interests of justice, that would warrant departing from this principle.

82 There is no basis to conclude and no exceptional circumstances were demonstrated in this matter, as to why the appellant should be able, in the interests of justice, to now raise an allegation amounting to the tort of deceit. This is especially so in circumstances where such an allegation may have been met with further evidence from the respondent. Therefore, the appellant should not be permitted to now raise this matter for the first time.

Duress

83 The essence of duress in relation to contracts is discussed in J D Heydon, *Heydon on Contract*, Lawbook Co. 2019 as follows at par [16.10]:

> [16.10] Definition of "duress"
>
> The doctrine of duress operates both in contract and in other fields. Of late its significance in relation to the law of contract has grown. So far as it operates in contract, duress is a form of pressure: which is regarded by the law as illegitimate; which is usually created by a threat coupled with a demand; which has the purpose of inducing the plaintiff to enter into a contract or a variation to a contract; which leaves the plaintiff no reasonable alternative but to do so; and which operates as a cause of the plaintiff's entry into the contract or the variation.[1] There can be overlap between the ingredients of pressure, illegitimacy and causative effect.[2] There are enactments which are derived from duress but which are not discussed in this chapter.[3]
>
> Duress is conventionally grouped into three categories: duress to the person, duress of goods and economic duress. The first two are of some antiquity. Their operation is relatively clear. The third, at least under the name "economic duress", is novel. The courts have endeavoured to develop it in order to meet what they perceive as evils. But in many respects the applicable principles are quite unclear, both in formulation and application. For this reason it has attracted much attention from writers.

84 For the purposes of economic duress, the relevant threat involves harm to the economic interests of the affected parties. There could be little doubt that the loss of employment, as a means of obtaining an income in order to meet the necessities of life, could amount to economic harm.

85 In ***Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors*** [2013] WASCA 36 Murphy JA considered the principles of economic duress as follows at par 174:

> Both parties in their submissions relied upon the judgment of McHugh JA in ***Crescendo Management v Westpac*** (at 45 - 46):
>
> > The rationale of the doctrine of economic duress is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate: ***Universe Tankships Inc of Monrovia v International Transport Workers Federation*** [1983] 1 AC 366 at 384 per Lord Diplock. As his Lordship pointed out, the consequence is that the 'consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind' (at 384). In the same case Lord Scarman declared (at 400) that the authorities show that there are two elements in the realm of duress: (a) pressure amounting to compulsion of the will of the victim and (b) the illegitimacy of the pressure exerted. 'There must be pressure', said Lord Scarman 'the practical effect of which is compulsion or the absence of choice'.
> >
> > The reference in ***Universe Tankships Inc of Monrovia v International Transport Workers Federation*** and other cases to compulsion 'of the will' of the victim is unfortunate. They appear to have overlooked that in ***Director of Public Prosecutions for Northern Ireland v Lynch*** [1975] AC 653, a case concerned with duress as a defence to a criminal proceeding, the House of Lords rejected the notion that duress is concerned with overbearing the will of the accused. The Law Lords were unanimous in coming to the conclusion, perhaps best expressed (at 695) in the speech of Lord Simon of Glaisdale 'that duress is not inconsistent with act and will, the will being deflected, not destroyed'. Indeed, if the true basis of duress is that the will is overborne, a contract entered into under duress should be void. Yet the accepted doctrine is that the contract is merely voidable. In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.

86 In this case, on this issue, the appellant falls at the first hurdle. The onus was on the appellant to establish that the conduct of the respondent, through its agent Ms Beeson, in relation to the appellant's entry into the Deed, resulted from an illegitimate threat or illegitimate pressure. On the basis of Murphy JA's analysis in ***Woodside Energy*** the illegitimate pressure is confined to unlawful conduct by reference to some external standard.

87 As to the alleged breach of contract or threatened breach, resulting from the proposed show cause letter, the learned Commissioner found, and the appellant did not challenge, that the appellant understood in the meeting with Ms Beeson that a show cause letter, in the context of this case, did not mean that the appellant was to be dismissed. The appellant understood that what was to occur would be a process whereby the respondent's allegations would be put to the appellant and she would be given an opportunity to answer them. There was no doubt that the appellant was told that a possible outcome of such a process could be summary dismissal.

88 There is no breach or threatened breach of a contract of employment for an employer to put to an employee in a meeting, that the employer considers that the employee engaged in misconduct and a process would follow by which those matters would be put to the employee to answer, even if this may lead to a dismissal. In this case, the learned Commissioner concluded there was a basis for the respondent's suspicion of misconduct and that the appellant would be given an opportunity to answer them in due course. Despite finding also that Ms Beeson acted forcefully and clearly wanted to achieve an outcome favourable to the respondent, on the evidence there was no threat by the respondent to break the contract of employment constituting an unlawful act: ***Walmsley v Christchurch City Council*** [1990] 1 NZLR 199 at 208. As the learned Commissioner recognised, the situation may have been different if there was no evidence at all of any basis upon which the respondent may have had legitimate suspicions about the appellant's conduct, but nonetheless, threatened summary dismissal anyway, unless the appellant signed the Deed.

89 In this matter however, it appears from the transcript at first instance at p 83, that reliance was placed by the appellant on Ms Beeson's comment that the appellant could have had her employment terminated, as the relevant threatened breach of contract. That is not so. By merely saying that dismissal may follow a show cause letter and a disciplinary process does not constitute a threat of a breach of the contract of employment. Indeed, a dismissal, even summary, may be entirely consistent with the terms of a contract of employment, on the facts. There is no contractual obligation on an employer to never dismiss an employee. A dismissal, albeit lawful, may be harsh, oppressive or unfair, but that is an entirely different question.

Criminal Code

90 As to the alleged contravention of s 338A of the *Criminal Code* (WA), the appellant maintained that the learned Commissioner did not consider or properly consider this point. This is also not so. Whilst the learned Commissioner dealt with this matter very shortly, he did not consider that the respondent's conduct could be so described. Having regard to the definition of "Threat" in s 338 of the *Criminal Code*, and the terms of s 338A, there can be no foundation to the appellant's argument in this respect.

91 For the purposes of Chapter XXXIIIA of the *Code*, a "threat" is "a statement or behaviour that expressly constitutes or may reasonably be regarded as constituting, a threat to (a) kill, injure etc … (b) destroy, damage, endanger or harm any property … (c) take or exercise control of a building, structure … (d) cause a detriment of any kind to any person, whether a particular person or not…" In terms of the case of the appellant, the provisions relied on at first instance under s 338A, for the purposes of criminal responsibility, were that a person commits a crime if they "make a threat with intent to (a) gain a benefit, pecuniary or otherwise, for any person; or (b) cause a detriment, pecuniary or otherwise, to any person…" (AB 35). Having regard to the approach to these provisions by Kennedy, Wallwork and White JJ in ***Tracey v R*** [1999] WASCA 77, it is with respect, difficult to see how the relevant conduct could be so characterised, even if it was appropriate for the Commission to have regard to such matters, being one ultimately for the criminal courts to resolve.

WALKINGTON C:

92 I agree with the Reasons for Decision of the Chief Commissioner and have nothing to add. The appeal should be dismissed.

2020 WAIRC 00116

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAY HEALD
	APPELLANT
	-and-
	METLABS (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 25 FEBRUARY 2020
FILE NO/S	FBA 4 OF 2019
CITATION NO.	2020 WAIRC 00116

Result	Appeal Dismissed
Appearances	
Appellant	Mr G McCorry (agent)
Respondent	Ms R Harding (of counsel) and with her, Ms B Swanson (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 10 June 2019, and having heard Mr G McCorry as agent on behalf of the appellant, and Ms R Harding (of counsel) and with her, Ms B Swanson (of counsel) on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

INDUSTRIAL MAGISTRATE—Claims before—

2020 WAIRC 00118

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2020 WAIRC 00118
CORAM	:	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	:	FRIDAY, 17 JANUARY 2020
DELIVERED	:	WEDNESDAY, 26 FEBRUARY 2020
FILE NO.	:	M 94 OF 2019
BETWEEN	:	DAVID JONES
		CLAIMANT
		AND
		ODYSSEY MARINE PTY LTD
		RESPONDENT

CatchWords	:	INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Claim for unpaid annual leave allegedly owed – Application by respondent for summary judgment or, in the alternative, strike out of the amended statement of claim – Construction of annual leave clauses in enterprise agreements – Consideration of even time rostering – Whether there is a real issue of fact or law to be tried
Legislation	:	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA) *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (WA)
Instruments	:	*Go Inshore Port Hedland Agreement 2009* (Cth) *Go Inshore Port Hedland Enterprise Agreement 2013* (Cth) *Go Inshore Port Hedland Enterprise Agreement 2016* (Cth) *Seagoing Industry Award 2009* (Cth) *Curtis Island Services Pty Ltd Enterprise Agreement 2014* (Cth)
Case(s) referred to in reasons:	:	***The Australian Maritime Officers' Union v Curtis Island Services Pty Ltd*** [2015] FWC 1836 ***The Australian Institute of Marine and Power Engineers v Curtis Island Services Pty Ltd*** [2015] FWCFB 6093 ***United Voice WA v The Minister for Health*** [2011] WAIRC 01065 ***Fancourt v Mercantile Credits Ltd*** (1983) 154 CLR 87 ***Mary v Schon*** [2015] WADC 92 ***Edenham Pty Ltd v Meares*** (No 2) [2016] WASC 302 ***Lewkowski v Bergalin Pty Ltd*** (Unreported, WASCA, Library No 7675, 26 May 1989)

Whitehall Holdings Pty Ltd v Ravi Nominees Pty Ltd (Unreported, WASCA, Library No 9189, 13 December 1991)
Dey v Victorian Railways Cmrs (1949) 78 CLR 62
Theseus Exploration NL v Foyster (1972) 126 CLR
Burton v Shire of Bairnsdale (1908) 7 CLR 76
Shilkin v Taylor [2011] WASCA 255
ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association [2017] HCA 53
Armacell Australia Pty Ltd and others [2010] FWAFB 9985
Aldo Becherelli v Mediterraneus Pty Ltd trading as Lucioli [2017] WAIRC 65
Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate [2015] FCAFC 99
James Turner Roofing Pty Ltd v Peters [2003] WASCA 28
Barclay Mowlem Construction Ltd v Dampier Port Authority [2006] WASC 281
Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd [2006] WASC 161
Chappell v Goldspan Investments Pty Ltd [No 3] [2015] WASC 277
Heseltine v Investment Planners Australia Pty Ltd [2007] WADC 14
Mildren v Gabbusch [2014] SAIRC 15
Miller v Minister of Pensions [1947] 2 All ER 372
Briginshaw v Briginshaw [1938] HCA 34
Fedec v The Minister for Corrective Services [2017] WAIRC 00828
City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union [2006] FCA 813
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd [2013] FCA 638

Result	:	The Application granted in part
Representation:		
Claimant	:	Mr P. Mullally (agent) from Workclaims Australia
Respondent	:	Mr A. Pollock (of counsel) as instructed by Mills Oakley

REASONS FOR DECISION

1 David Jones (Mr Jones) was employed by Odyssey Marine Pty Ltd (Odyssey) as a Master on an even time roster of 28 days on and 28 days off where the parties were covered by the *Go Inshore Port Hedland Agreement 2009* (Cth), *Go Inshore Port Hedland Enterprise Agreement 2013* (Cth) and *Go Inshore Port Hedland Enterprise Agreement 2016* (Cth) (2009 Agreement, 2013 Agreement and 2016 Agreement or collectively the Agreements) (the Even Time Roster).

2 Mr Jones has withdrawn two alleged entitlements (long service leave and notice period) sought in his claim with the remaining alleged entitlement limited to an amount for untaken annual leave.

3 Mr Jones claims Odyssey:

- failed to provide him with paid annual leave during his employment by incorrectly describing part of the 28 days off (on the Even Time Roster) as being paid annual leave; and
- therefore, failed to pay him untaken paid annual leave of 37.90 weeks upon termination of his employment contrary to s 90(2) of the *Fair Work Act 2009* (Cth) (FWA).

4 Odyssey denies the claim and lodged an amended Application filed on 11 December 2019 seeking for:

- summary dismissal on the ground that the claim has no real prospect of success; and
- in the alternative, that the amended Statement of Claim and Further and Better Particulars of Case Outline be struck out (and re-pleaded).

5 In support of the Application, Odyssey has lodged:

- two Affidavits of Wesley John Van Der Spuy (Mr Van Der Spuy), a Chief Executive Officer of Odyssey, sworn on 18 October 2019 and 11 December 2019;
- an affidavit of Daniel Leigh White (Mr White) sworn on 11 December 2019;
- Mr Jones' pay slips for the period 17 May 2012 to 16 August 2018; and
- submissions regarding the appropriate construction to be given to the annual leave clauses in the Agreements.

6 In response to the Application, Mr Jones relies upon submissions regarding an alternative construction to be given to the annual leave clauses in the Agreements.

7 Schedule I outlines the jurisdiction and practice and procedure relevant to the Industrial Magistrates Court of Western Australia (IMC).

8 Schedule II outlines the principles relevant to construction of an industrial instrument.

Background Facts

9 Mr Jones was employed by Odyssey as a casual Deckhand from 5 January 2011 to 9 December 2011 and as a permanent full time Master from 6 May 2012 to 15 August 2018.

10 While Mr Jones' original claim referred to the *Seagoing Industry Award 2009* (Cth), it appears the parties now agree that the Agreements apply to and cover Mr Jones' employment.

11 The dispute between the parties is the application of the clauses of the Agreements applicable to annual leave in the context of the Even Time Roster.

12 Odyssey paid annual leave as it accrued with the taking and payment of annual leave occurring during the 28 days off period. The effect of Odyssey's payment of accrued annual leave during the off roster period is that annual leave did not accrue beyond the immediately preceding on duty roster period. In that sense it was a zero-sum balance with, on Odyssey's view, there being no (or little) accrued entitlement to paid annual leave or remaining unpaid annual leave at the time of Mr Jones' employment termination. Odyssey says this is entirely consistent with the application of the relevant clauses of the Agreements on the Even Time Roster.

13 Mr Jones maintains that he never took annual leave and that the 28 days off cannot be, and was not, taken as annual leave.

14 Schedule III is a table of two sample periods from a review of Mr Jones' payslips for the periods 30 April 2012 to 10 June 2012 and 23 May 2016 to 31 July 2016. The sample periods reflect the position with respect to the entirety of Mr Jones' employment. This demonstrates that from Odyssey's perspective all annual leave was taken and paid on an ongoing basis.

15 The Agreements contain clauses relevant to annual leave as follows:

2009 Agreement

> *15.3.1. Annual leave will accrue in accordance with the National Employment Standards but will be taken during the rostered off duty periods and incorporated into the paid off duty time with the net effect being that no annual leave will be taken during duty periods and there being no impact from the accrual and utilisation of annual leave on the Company as result of the operation of an equal time roster.*

2013 Agreement

> *22.0 Annual leave will accrue in accordance with the National Employment Standards but will be taken during the rostered off duty periods and incorporated into the paid off duty time with the net effect being that no annual leave will be taken during duty periods and there being no impact from the accrual and utilisation of annual leave on the Company as a result of the operation of the equal time roster. Therefore, there shall effectively be no accruals or payment of annual leave as these provisions are included in the rates of pay set out in clause 14.0.*

2016 Agreement

> *24.1 Full-time Employees are entitled to paid annual leave … under the NES.*
>
> *24.2 For each year of service the NES entitles Full-time Employees to:*
>
> *24.2.1 4 weeks of paid annual leave; or*
>
> *24.2.2 5 weeks of paid annual leave if the Full-time Employee is a "continuous shiftworker" as defined in clause 11.4 of this Agreement.*
>
> *24.3 Annual leave entitlements accrue on the basis of 38 ordinary hours of work per week and are paid at the Base Hourly Rate of Pay. Full-time Employees are not entitled to annual leave loading.*
>
> *24.4 Full-Time Employees are entitled to paid annual leave in accordance with the FW Act. It is acknowledged and agreed that accrued paid annual leave is taken during off duty periods not at work as part of the Even Time Roster.*
>
> *24.5 The Company and Full-Time Employees shall work together to ensure annual leave balances are maintained at reasonable levels to alleviate staffing disruptions and the need for additional resources.*
>
> *24.6 An Employee may cash out any portion of accrued annual leave that is in excess of four (4) weeks.*

16 The Agreements were approved pursuant to s 186 of the FWA.

Issues For Determination

17 The following issues require determination:

(a) What is the effect of the Even Time Roster as it relates to annual leave?

(b) What is the proper construction of the annual leave clauses in the Agreements?

(c) Should summary judgment be applied to Mr Jones' claim?

(d) If the answer to (c) is no, should Mr Jones' claim be struck out with liberty to re-plead?

Odyssey's Contentions

18 Odyssey contends that:

(a) Mr Jones' claim assumes he did not take annual leave during the course of his permanent full-time employment, when the Agreements deemed him to have taken his annual leave during the off duty periods of the Even Time Roster. That is, annual leave accrued and was taken in the same ratio;

(b) the requirement to take annual leave during off duty periods as part of the Even Time Roster was reasonable and, therefore, consistent with s 88(1) and s 93(3) of the FWA;

(c) consideration of the Agreements as a whole in the context of the particular industry demonstrates that annual leave was to be taken and paid during the off duty periods;

(d) therefore, there can be no claim for unpaid annual leave under the Agreements;

(e) taking Mr Jones' case at its highest, he has been paid an amount referrable to his annual leave balance entitling Odyssey to 'set off' the same balance if he was successful. Even on this case, the application for summary judgment should be granted where to pursue the claim to a hearing would not result in an award to Mr Jones; and

(f) alternatively, Mr Jones' claim, as it relates to the entitlement to annual leave, should be struck out (with leave to re-plead) where it fails to disclose a reasonable cause of action or the foundation upon which any cause of action can be reasonably supported.

Mr Jones' Contentions

19 Mr Jones contends that:

(a) his right to annual leave arises under the National Employment Standards (NES) contained in the FWA or in the Agreements;

(b) while the relevant clauses in the Agreements provide that annual leave will be taken during the rostered off duty periods, this does not mean he will be deemed to be on annual leave during those same periods;

(c) had the Agreements intended to deem paid annual leave during the off duty periods, then it should have been expressly stated. Odyssey's argument can only succeed if the Court accepts that the relevant clauses intends there to be a deemed accrual and payment of annual leave in the off duty periods;

(d) the off duty period in the Even Time Roster cannot be classified as leave in the NES context and, at the very least, the relevant clauses in the Agreements are ambiguous and capable of more than one meaning. Therefore, Mr Jones is entitled to a hearing to introduce evidence going to the formation and negotiation of the Agreements and information provided to employees prior to the Agreements being approved by the Fair Work Commission (FWC); and

(e) he was paid no more than an annualised salary under the Agreements and he cannot be paid both annual leave and off duty time. Therefore, unless he applied for and took annual leave during the off duty period, annual leave has continued to accrue and was not taken during the off duty period.

How Is The Even Time Roster Intended To Apply?

20 Odyssey refers to the FWC decision ***The Australian Maritime Officers' Union v Curtis Island Services Pty Ltd*** [2015] FWC 1836 (***Curtis Island***). The dispute in this case concerned the payment or other entitlement applicable to an employee recalled to duty on a day that an employee would not have been rostered to work in accordance with the relevant even time roster.[1]

21 Similar to the Even Time Roster (in Mr Jones' claim), Commissioner Cambridge noted in ***Curtis Island*** that an even time roster provides considerably more time off duty than would be the case for the majority of working arrangements described as ordinary day work or rotating shift work rostering arrangements. Importantly, Commissioner Cambridge noted at [41] '[a]*s a logical consequence of the significant periods of absence from duty which are generated by the even time rostering arrangement, other periods of leave which would usually apply, are deemed to be included in the non-duty or off-roster periods of the even time rostering*'.

22 Commissioner Cambridge acknowledged that the ordinary concepts of leave, including annual leave, do not easily translate to an even time roster, but that it is a mistake to equate the days off on an even time roster with paid leave (including annual leave). Further, the days off on the even time roster cannot properly be construed as days of leave, as ordinary understood, notwithstanding these periods are deemed to satisfy requirements in respect of the provision of leave.[2]

23 However, these statements needs to be seen in the context of cl 22.2 of the relevant agreement in ***Curtis Island***, and in the context of that agreement as a whole, where it was clearly intended to deem that the non-duty or off-roster periods satisfy the taking of all leave that would otherwise apply.[3] Following on from this, Commissioner Cambridge concluded that the work arrangements created by the even time roster included all leave in the non-duty or off roster periods.[4]

24 Clause 22.2 of the *Curtis Island Services Pty Ltd Enterprise Agreement 2014* (Cth) (Curtis Island Agreement) states:

> *Full-time or part-time Employees shall be entitled to a period of leave at the rate of one (1) day's leave for each day of duty, such leave to be taken in lieu of five weeks annual leave, public holidays and weekends worked (while working the roster defined in clause 11.2* [12.2]*, all Employees are deemed shiftworkers for the purposes of the NES), with the first 5 weeks of non-duty period in any 12 month period being deemed to have satisfied and* [sic] *Employees' entitlement to annual leave in accordance with the NES*.

25 On appeal to the Full Bench of the FWC,[5] it was concluded that the construction given of the even time roster was correct and, further, '[t]*he 21 day off duty period is not leave in the National Employment Standards context … a day in this period is not "…a day of paid leave which is preserved or otherwise incapable of being extinguished by virtue of payment being made for the time worked*"'.[6]

26 As there are three Agreements covering the span of Mr Jones' employment, it is necessary to look at the terms of each Agreement separately so as to:

(1) determine the effect of the Even Time Roster in each case; and

(2) construe the intended meaning of the particular clauses relevant to annual leave.

2009 Agreement

27 Clause 7 of the 2009 Agreement provides the annual wage for Masters and Deckhands. From 1 July 2012, the aggregate wage for a Master was $132,135.

28 Notably, cl 7 states that incorporated into the aggregate wage are '*payments for shift work, weekend work, public holiday work, meal allowances, telephone allowances, travel in Hedland, water subsidy, clothing allowance (other than that supplied) and private medical insurance. As such, the aggregated wage listed above represents the total of remuneration payable to the employee'*.

29 Odyssey, in oral submissions, suggested that cl 7 of the 2009 Agreement accounted for all payments to be made to Mr Jones. However, it is clear from what cl 7 expressly incorporates into the aggregate wage and that the Agreement otherwise makes provision for other types of leave, the aggregate wage does not incorporate annual leave, personal leave, compassionate leave, parental leave and long service leave. These categories of leave are separately provided for under the 2009 Agreement,[7] as are other subsidies such as a living subsidy for residing in Port Hedland.[8] The aggregate wage appears to incorporate certain allowances which might otherwise give rise to other entitlements under other industry agreements.

30 The standard hours of work are 12 with core hours specified.[9] The standard roster is 28 days on and 28 days off.[10]

31 Planned medical absences and annual leave are required to be taken during the rostered off duty periods in recognition of the operation of the Even Time Roster.[11]

32 However, Odyssey relies on the words '*incorporated into the paid off duty time*' and '*there being no impact from the accrual and utilisation of annual leave on the Company as result of the … equal time roster*' in cl 15.3.1 of the 2009 Agreement, which it says operates in a similar way to that referred to by Commissioner Cambridge in ***Curtis Island***. That is, these words operate to deem annual leave accrued and taken in the 28 days off duty period.

33 Clause 22.2 of the Curtis Island Agreement expressly states that the first five weeks of off-duty time is taken to satisfy any annual leave entitlements. Therefore, under the terms of Curtis Island Agreement, annual leave accrues in total and is taken in the first five weeks of off duty in any 12 month period.

34 Clause 15.3.1 of the 2009 Agreement is not couched in exactly the same terms as cl 22.2 of the Curtis Island Agreement. However, when regard is had to the words used in the context of the Agreement and the Even Time Roster, the question is whether the effect of cl 15.3.1 is the same as that expressed in cl 22.2 of the Curtis Island Agreement.

35 For the following reasons, I conclude that the intention and the effect of cl 15.3.1 of the 2009 Agreement is to provide work arrangements created by the Even Time Roster, which includes all annual leave, accrued and taken, in the off duty roster periods:

- the 2009 Agreement is designed to operate with minimum impact upon Odyssey's business. To that end, certain leave entitlements, including annual leave, are required to be taken during the off duty roster period consequential on there being greater than ordinary periods of extended time off duty;
- however, the inclusion of the words *and incorporated into the paid off duty time* in cl 15.3.1 of the 2009 Agreement must have relevance and work to do in the context of the accrual of annual leave and the taking of the annual leave in the off duty time;
- the work that these words have to do is associated with the stated intended effect of any annual leave arrangement on Odyssey and its business, which is that:
  - no annual leave is to be taken during the on duty period; and
  - there is no impact upon Odyssey from the accrual and taking of annual leave, as a result of the Even Time Roster; and
- the words used and the meaning and purpose intended by the words are not ambiguous.

36 Therefore, the effect of cl 15.3.1 of the 2009 Agreement and the Even Time Roster, it is not limited to an employee taking annual leave only during the off duty period, but extends to the accrual and taking of annual leave having no impact on Odyssey. The stated way in which this is done is by *incorporating* annual leave into the paid off duty time. The practical way in which this was done by Odyssey was to incorporate into each off duty pay period the payment of annual leave that had accrued in the preceding period.

2013 Agreement

37 Clause 14 of the 2013 Agreement provides the annual wage for Masters and Deckhands from 1 January 2013 to 1 July 2014.

38 The ordinary hours of work are 38 hours per week over a defined eight week roster cycle.[12] The working hours are up to and including 12 hours per day.[13] The standard roster is 28 days on and 28 days off.[14]

39 The 2013 Agreement is otherwise in similar terms to the 2009 Agreement, although, relevantly, cl 14.3 of the 2013 Agreement includes the incorporation of *annual leave* in the aggregate rate of pay and cl 22 of the 2013 Agreement includes the additional words [t]*herefore, there shall effectively be no accruals or payment of annual leave as these provisions are included in the rates of pay set out in clause 14.0*' after the otherwise same words contained in cl 15.3.1 of the 2009 Agreement.

40 Therefore, to the extent that it was required, cl 22 of the 2013 Agreement reinforces the annual leave position in the 2009 Agreement by the incorporation of annual leave into the paid off duty time where the practical way this was done was to pay any accrued annual leave in the off duty period. The effect of this was no impact upon Odyssey.

2016 Agreement

41 While many of the terms in the 2016 Agreement are similar to the 2009 and 2013 Agreements, there are a number of significant differences, including:

- clause 17.2 as it relates to the payment of annual salary; and
- clause 24 as it relates to annual leave.

42 Clause 24 of the 2016 Agreement demonstrates a substantial re-drafting of the annual leave clause to that in cl 15.3.1 of the 2009 Agreement and cl 22 of the 2013 Agreement.

43 As a result, and notwithstanding that accrued paid annual leave is to be taken during the off duty periods, cl 24 of the 2016 Agreement appears to anticipate two possible scenarios:

(1) there may be annual leave balances requiring Odyssey and full-time employees to maintain them at reasonable levels for business reasons;[15] and

(2) employees may have accrued annual leave in excess of four weeks capable of being cashed out.[16]

44 One possible effect of the combination of cl 24.5 and cl 24.6 of the 2016 Agreement is that paid annual leave is an entirely separate consideration to off duty time, albeit to be taken during off duty time.

45 Further to this, there is no reference, express or otherwise, to annual leave being incorporated into the off duty periods or for there to be no impact of the accrual and taking of annual leave on Odyssey.

46 This represents a significant departure from the annual leave position adopted in the 2009 and 2013 Agreements.

47 Additionally, while an annualised salary is paid, the annual salary does not include entitlements otherwise specifically included in the 2016 Agreement,[17] but is inclusive of all notional allowances, overtime and penalty rates other than those specifically included in the 2016 Agreement.[18]

48 There may be two potential reasons for the amendment to the annual leave clause in the 2016 Agreement from the 2009 and 2013 Agreements:

(1) clarify any ambiguity (if it existed); or

(2) the purpose and intention of the effect of the clause changed for some other reason.

Outcome

Principles relevant to summary judgment applications

49 The IMC has the power to summarily dispose of a claim on the basis that there is no reasonable prospect of success.[19] The IMC's duties in dealing with cases are set out in r 5 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (the Regulations).[20] Regulation 7 of the Regulations sets out what the IMC may do for the purpose of controlling and managing cases and trials, including, at r 7(1)(h) '*order that an issue not be tried*', and at r 7(1)(r) '*take any other action or make any other order for the purpose of complying with regulation 5*'.

50 Therefore, the IMC has the power to make the orders sought by Odyssey if it concludes that Mr Jones' claim is so clearly untenable that it could not possibly succeed and, if that circumstance exists, to dismiss the claim so as to deal with the case efficiently, economically and expeditiously and to ensure that the IMC's resources are used as efficiently as possible.[21]

51 The power to order summary judgment is one that should be exercised with great care.[22] An application for summary judgment should be determined on the material before the Court, not based on the prospect that, given the opportunity, the other party might be able to remedy a deficiency.[23] The persuasive onus rests on the applicant for judgment, but the respondent to the application bears an evidentiary onus.[24] The claim or defence put forward should not contain bare allegations unsupported by material facts.[25]

52 The other party has an obligation to provide particulars of an arguable defence or claim (as the case may be) and to provide a statement of facts which go to show that it is arguable.[26] The summary judgement procedure is not confined to cases which are immediately plain and obvious.[27]

53 While the Court may determine a difficult question of law on a summary judgment application, usually it is appropriate to leave the determination of such a question for trial.[28]

54 Disposal of a claim or a defence summarily '*will never be exercised unless the* [party's claim or defence] *is so obviously untenable that it cannot possibly succeed*'.[29]

Should summary judgment apply to the 2009 Agreement and 2013 Agreement?

55 The dispute between the parties concerned the construction of the annual leave terms in the Agreements. To that end, Odyssey relies upon Mr Van Der Spuy's affidavit, Mr White's affidavit, the tendered pay slips and on submissions made in respect of the appropriate interpretation of the clauses. Mr Jones did not adduce any evidence (including by reference to any extrinsic materials) in response and relied upon submissions made in respect of an alternate interpretation of the clauses.

56 In my view, the proper construction of cl 15.3.1 of the 2009 Agreement and cl 22 of the 2013 Agreement is that they operated not only to require paid annual leave to be taken during the off duty period, but deemed any annual leave to be included in the off duty periods of the Even Time Roster such that Odyssey had no ongoing annual leave liability.

57 The effect of this is that there is no outstanding unpaid annual leave owing to Mr Jones during the operation of the 2009 Agreement and 2013 Agreement, where accrued annual leave was taken and paid on the same ratio as and when it accrued.

58 That one party considers the operation of these clauses to be unfair, or wishes that a different bargain had been struck, is not the point. An enterprise agreement comes into operation in the sense of creating rights and obligations between an employer and employees in relation to the work performed under it only after it has been approved by the FWC. After that time the agreement applies to the employers and employees who are covered by it.[30]

59 In terms of the assessment of 'better off overall test', it may be that if the same assessment was applied by a differently constituted forum a different conclusion may result.[31] It is not for the IMC to reassess what might have been, had a different bargain been struck or if different action had been taken concerning the approval of the 2009 Agreement and 2013 Agreement. The IMC's jurisdiction is limited by the FWA, relevant to Mr Jones' claim.

60 Given the dispute concerned the construction of cl 15.3.1 of the 2009 Agreement and cl 22 of the 2013 Agreement, and in light of the interpretation given, notwithstanding that questions of law are usually left to trial, Odyssey has satisfied the persuasive onus that there is no issue or question in dispute which ought to be tried or that there ought for some other reason be a trial of Mr Jones' claim for unpaid annual leave for the period covered by the 2009 Agreement and 2013 Agreement. Where Mr Jones' interpretation is not accepted and there is no other evidence (such as material that may manifest a different intention to that borne out by the words of the 2009 and 2013 Agreements) upon which to assess the evidentiary burden he now has, I am satisfied that Mr Jones' claim relevant to the 2009 and 2013 Agreements has no reasonable prospect of success.

61 Therefore, judgment will be entered against Mr Jones relevant to that part of Mr Jones's claim covered by the 2009 Agreement and 2013 Agreement as it relates to the claim for unpaid annual leave.

62 The period of time of operation of the 2009 Agreement and 2013 Agreement was from on or around 6 April 2010 to 16 May 2016 (the operation date of the 2016 Agreement).

Should summary judgment apply to the 2016 Agreement?

63 Unlike the annual leave clauses in the 2009 Agreement and the 2013 Agreement, cl 24 of the 2016 Agreement raises the possibility of the ongoing accrual of annual leave. In these circumstances, it is, for the purposes of summary judgement, arguable that, notwithstanding annual leave was to be taken during the off roster period, annual leave was not incorporated into the off duty period. This then at least suggests it may have been intended that annual leave be applied for and taken.

64 Bearing in mind Mr Jones need only demonstrate an evidentiary basis to resist summary judgment and where the application for summary judgment is grounded in the construction of a term of an agreement, Odyssey has not satisfied the persuasive onus that there is no issue or question in dispute which ought to be tried of Mr Jones' claim for unpaid annual leave for the period covered by the 2016 Agreement.

65 Therefore, the application for summary judgment as it relates to Mr Jones's claim covered by the 2016 Agreement is unsuccessful and will be dismissed.

66 The period of operation of the 2016 Agreement was from 16 May 2016 until Mr Jones' termination of employment on 15 August 2018.

Odyssey's alternative argument concerning set-off

67 If the Application is unsuccessful as it relates to summary judgment on the construction of the Agreements, Odyssey says that any amounts paid in annual leave is capable of being set off against the amount sought by Mr Jones. Accordingly, the effect of any successful set off argument is that there will be no award to Mr Jones and a trial would be contrary to the economical use of the Court's time and resources and incur unnecessary costs for the parties.

68 In a recent decision (***Aldo Becherelli v Mediterraneus Pty Ltd trading as Lucioli*** [2017] WAIRC 65 [23]) Industrial Magistrate Flynn noted that in ***Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*** [2015] FCAFC 99 (***Linkhill Pty Ltd***), the Full Court of the Federal Court reviewed the law on this issue. The review included an assessment of the decision of the Western Australian Industrial Appeal Court (Anderson, Scott and Parker JJ) in ***James Turner Roofing Pty Ltd v Peters*** [2003] WASCA 28 (***James Turner Roofing***). The judgment of North and Bromberg JJ placed emphasis on the following passage of the judgement of Anderson J from ***James Turner Roofing***:

> *The payment of an amount as wages for hours worked in a period can be relied on by the employer in satisfaction of an award obligation to pay wages for that period whether in relation to wages for ordinary time, overtime, weekend penalty rates, holidays worked or any other like monetary entitlement under the award. This is so, whether the payment of the wages is made in contemplation of the obligations arising under the award or without regard for the award. However, if a payment is made expressly or impliedly to cover a particular obligation (whether for ordinary time, overtime, weekend penalty rates, fares, clothing or any other entitlement whether arising under the award or pursuant to the contract of employment) the payment cannot be claimed as a set off against monies payable to cover some other incident of*

> *employment. A payment made on account of say ordinary time worked cannot be used in discharge of an obligation arising on some other account such as a claim for overtime. Whether or not the payment was for a particular incident of employment will be a question of fact in every case* [45].

69 In ***Linkhill Pty Ltd*** the joint judgment proceed to state:

> [W]*hat is required is a close correlation between the award obligation and the contractual obligation in respect of which the payment was made. It is not the monetary nature of the payment made under the contract that must correlate with the award. It is the subject matter of the contractual obligations for which the payment was made that must be examined and be found to closely correlate with the obligations in the award said to be discharged by the payment.* … [98].

70 Applied to the known facts of this case, the claim is for alleged unpaid annual leave where Odyssey says that it has, in fact, paid accrued annual leave on an ongoing basis and where the pay slips for the period covered by the 2016 Agreement shows that payments were made for annual leave. In terms of set off, I am satisfied that the payments made to Mr Jones may be capable of setting off any agreements entitlements, although this is predicated on a determination as to whether there are, in fact, any unpaid annual leave entitlements and the status of the purported annual leave entitlements already made.

71 These issues go to the heart of Mr Jones' claim as it relates to the period covered by the 2016 Agreement and it is appropriate that they be the subject of a trial.

Odyssey's application for strike out

72 Further, if the Application as it relates to summary judgment is unsuccessful, Odyssey says Mr Jones' amended Statement of Claim should be struck out with liberty to re-plead.

73 In part, the Application, as it relates to the striking out of the amended Statement of Claim, is no longer applicable as Mr Jones has abandoned part of his claim and summary judgment has been granted in favour of Odyssey for the period of Mr Jones' claim covered by the 2009 Agreement and 2013 Agreement.

74 However, the Application striking out the amended Statement of Claim as it relates to the period of Mr Jones' claim covered by the 2016 Agreement still requires consideration and determination.

75 As already stated, the broad power in r 7(1)(r) of the Regulations would enable an order of this type to be made.

76 Caution is required in considering applications of this type and should be considered '*only where the criticisms of a pleading significantly impact upon the proper preparation of the case and its presentation at trial*'[32] and '*if the time and expense involved in their resolution is proportionate to the significance of the dispute to the just and effective resolution of the case*'.[33]

77 These comments are particularly pertinent in the IMC where the Court's duties include ensuring that cases are dealt with efficiently, economically and expeditiously and that the Court's judicial and administrative resources are used as efficiently as possible.[34] Further, the FWA limits an award of costs.[35]

78 ***Chappell v Goldspan Investments Pty Ltd [No 3]*** [2015] WASC 277, at [10] to [16], summarises the principles to be applied in strike out applications:

- where it is contended that the pleading does not disclose a reasonable cause of action, 'reasonable' means reasonable according to law. If the facts pleaded conceivably give rise to relief, then the cause of action should be held to be reasonable;
- the Court will only strike out in a clear case;
- while there is a need for a Statement of Claim to state the material facts to support the claim for relief, and for the pleadings to define with clarity and precision the issues or questions which are in dispute between the parties and are to be determined by the Court, it is also necessary to consider the role of pleadings in the context of case management, including the pre-trial exchange of witness statements;
- what is needed to satisfy the requirement for a clear statement of case will depend upon the nature of the allegation and the statement of case must be sufficiently clear to allow the other party a fair opportunity to meet it; and
- provided a pleading fulfils its basic function by identifying the issues, disclosing an arguable cause of action, and apprising the other party of the case it has to meet at trial, then the action should proceed.

79 Further and relevant to the IMC, the IMC is not a superior Court of record and while the parties are entitled to know the case put against them, the applicable Court rules do not require the rules of pleading to be followed.[36]

80 Relevant to the period covered by the 2016 Agreement, Odyssey contends that the amended Statement of Claim fails to:

- disclose the terms of an alleged oral contract of employment that Mr Jones says gives rise to an entitlement to annual leave;
- properly distinguish what industrial instrument applies to Mr Jones' employment giving rise to an alleged entitlement of unpaid or untaken annual leave; and
- plead the elements of award coverage and application or enterprise agreement coverage and application necessary to establish the relevant obligations and entitlements said to underpin Mr Jones' purported cause of action.

81 Mr Jones' amended Statement of Claim (or Further and Better Particulars of Claim) lodged on 11 September 2019 states the following relevant to the period covered by the 2016 Agreement:

- Odyssey is a National Systems Employer and employed Mr Jones as a Master between 13 January 2011 and 12 August 2018 on the Even Time Roster;

- Mr Jones' annual salary at the time of the termination of his employment was $148,016.18;
- the employment relationship was subject to the FWA, the NES and the 2016 Agreement;
- Mr Jones alleges Odyssey has not complied with obligations which existed for it to pay him untaken annual leave at the time of the termination of employment;
- Mr Jones refers to cl 24 of the 2016 Agreement and to the statutory obligation arising from s 90(2) of the FWA;
- Mr Jones alleges Odyssey did not provide him with paid annual leave during the period of employment and says it incorrectly described part of the off-time roster as being paid annual leave; and
- Mr Jones claims total untaken annual leave of 37.9 weeks (noting this amount was for the entire period covered by the Agreements).

82 Therefore, while the amended Statement of Claim could be drafted more precisely, the gravamen of Mr Jones' claim for the period covered by the 2016 Agreement is that Odyssey has an obligation under cl 24 of the 2016 Agreement to pay annual leave in accordance with the NES. Upon termination of employment, Odyssey failed to pay accrued and untaken annual leave entitlements contrary to s 90(2) of the FWA.

83 Taking into account the determination with respect to the 2009 Agreement and 2013 Agreement, and rather than ordering the strike out of the remaining amended Statement of Claim with liberty to re-plead, the remedy to cure this lack of precision in drafting is to require Mr Jones to lodge an amended Further and Better Particulars of Case Outline identifying the following with respect to the period 16 May 2016 to 15 August 2018:[37]

- the identity and nature of any relevant statutory instrument such as an award, industrial agreement or statute applying to the employment relationship between Mr Jones and Odyssey;
- the basis upon which it is asserted that the relevant statutory instrument applies;
- the identity and nature of the provisions of the statutory instrument alleged to have been not complied with; and
- the particular circumstances occurring at the time of the alleged failure to comply.

Proposed Orders

84 Subject to hearing further from the parties, I intend to make the following orders:

1 Pursuant to r 5 and r 7(1)(r) of the Regulations, for the period 6 May 2012 to 15 May 2016, the respondent's application for summary judgment is granted and the claimant's claim for unpaid annual leave as it relates to this period is dismissed.

2 The respondent's application for summary judgment is otherwise dismissed.

3 The respondent's application to strike out the claimant's claim for the period 16 May 2016 to 15 August 2018 is dismissed.

4 Pursuant to r 5 and r 18(2) of the Regulations, within 28 days of the date of this order, the claimant is to lodge and serve an amended Further and Better Particulars of Case Outline for the period 16 May 2016 to 15 August 2018 identifying the following:

- the identity and nature of any relevant statutory instrument such as an award, industrial agreement or statute apply to the employment relationship between Mr Jones and Odyssey;
- the basis upon which it is asserted that the relevant statutory instrument applies;
- the identity and nature of the provisions of the statutory instrument alleged to have been not complied with; and
- the particular circumstances occurring at the time of the alleged failure to comply.

D SCADDAN
INDUSTRIAL MAGISTRATE

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[1] The even time roster in ***Curtis Island*** was 21 days on and 21 days off.

[2] ***Curtis Island*** [supra] [50] - [51].

[3] ***Curtis Island*** [supra] [42].

[4] ***Curtis Island*** [supra] [43].

[5] ***The Australian Institute of Marine and Power Engineers v Curtis Island Services Pty Ltd*** [2015] FWCFB 6093.

[6] ***Australian Institute of Marine and Power Engineers*** [supra] [14].

[7] Clause 15 of the 2009 Agreement.

[8] Clause 14 of the 2009 Agreement.

[9] Clause 12.2 of the 2009 Agreement.

[10] Clause 13.1 of the 2009 Agreement.

[11] Clause 15.1.6 and cl 15.3.1 of the 2009 Agreement.

[12] Clause 12.1 of the 2013 Agreement.

[13] Clause 12.2 of the 2013 Agreement.

[14] Clause 12.3 of the 2013 Agreement.

[15] Clause 24.5 of the 2016 Agreement.

[16] Clause 24.6 of the 2016 Agreement.

[17] Clause 17.2 of the 2016 Agreement.

[18] Schedule 1 of the 2016 Agreement.

[19] ***United Voice WA v The Minister for Health*** [2011] WAIRC 01065.

[20] The IMC is exercising federal jurisdiction in respect of Mr Jones' claim and the Regulations apply to govern the practice and procedure of the IMC in this regard.

[21] Regulation 5(2)(a) and (c) of the Regulations.

[22] ***Fancourt v Mercantile Credits Ltd*** (1983) 154 CLR 87.

[23] ***Mary v Schon*** [2015] WADC 92 [43] - [44].

[24] ***Edenham Pty Ltd v Meares*** (No 2) [2016] WASC 302 [18].

[25] ***Lewkowski v Bergalin Pty Ltd*** (Unreported, WASCA, Library No 7675, 26 May 1989).

[26] ***Whitehall Holdings Pty Ltd v Ravi Nominees Pty Ltd*** (Unreported, WASCA, Library No 9189, 13 December 1991).

[27] ***Dey v Victorian Railways Cmrs*** (1949) 78 CLR 62, 91.

[28] ***Theseus Exploration NL v Foyster*** (1972) 126 CLR 507, 514 - 515.

[29] ***Burton v Shire of Bairnsdale*** (1908) 7 CLR 76, 92 (see also ***Shilkin v Taylor*** [2011] WASCA 255, 29).

[30] ***ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association*** [2017] HCA 53 [34].

[31] ***Armacell Australia Pty Ltd and others*** [2010] FWAFB 9985 [41].

[32] ***Barclay Mowlem Construction Ltd v Dampier Port Authority*** [2006] WASC 281 [8] (Martin CJ).

[33] ***Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd*** [2006] WASC 161 [2] (Martin CJ).

[34] Regulation 5 of the Regulations.

[35] Section 570(1) and s 570(2) of the FWA.

[36] ***Heseltine & Anor v Investment Planners Australia Pty Ltd*** [2007] WADC 14 [36] per Commissioner Ellis.

[37] Consistent with the IMC's Practice Direction No 1 of 2017 – Case Outlines/Further and Better Particulars of Case Outline.

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court Of Western Australia Under The *Fair Work Act 2009* (Cth): Alleging Contravention Of Enterprise Agreement

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.

[2] The IMC, being a Court constituted by an industrial magistrate, is '***an eligible State or Territory court***': FWA, s 12 (see definitions of '***eligible State or Territory court***' and '***magistrates court'***); *Industrial Relations Act 1979* (WA), sections 81 and 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.

[4] The civil penalty provisions identified in s 539 of the FWA include the terms of an enterprise agreement where the agreement *applies* to give an entitlement to a person and to impose an obligation upon a respondent employer: FWA, s 51(2). The agreement *applies* if it *covers* the employee or the employee organisation and the employer, the agreement is in operation and no other provision of the FWA provides that the agreement does not apply: FWA, s 52(1) (when read with s 53 of the FWA).

[5] An obligation upon an '***employer***' covered by an agreement is an obligation upon a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 42, s 53, s 14 and s 12. An entitlement of an employee covered by an agreement is an entitlement of an '***employee***' who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed … by a national system employer*': FWA, s 42, s 53 and s 13.

Contravention

[6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for an *employer* to pay to an employee an amount that the employer was required to pay under the modern award: FWA, s 545(3)(a).

[7] The civil penalty provisions identified in s 539 of the FWA include:

- Contravening a term of an enterprise agreement: FWA, s 539 and s 50.
- Contravening a NES.

[8] An '***employer***' has the statutory obligations noted above if the employer is a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 14 and s 12. The obligation is to an '***employee***' who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed … by a national system employer*': FWA, s 13

[9] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for:

- An *employer* to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3).
- A *person* to pay a pecuniary penalty: FWA, s 546.

In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: ***Mildren v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

[10] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

> *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

[11] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336, 362:

> *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

[12] Where in this decision I state that 'I am satisfied' of a fact or matter I am saying that 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

Schedule II – Relevant Principles Of Construction

[1] This case involves construing industrial agreements and statutes. Similar principles apply to both. The relevant principles to be applied when interpreting an industrial instrument are set out by the Full Bench of the Western Australian Industrial Relations Commission in ***Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828 [21] - [23]. In summary (omitting citations), the Full Bench stated:

a. 'The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement';

b. '[T]he primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument. [I]t is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean';

c. '[T]he objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context. [T]he apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances';

d. '[A]n instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ';

e. '[A]n instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation'; and

f. 'Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect'.

The following is also relevant:

g. Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed. ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813 [53] - [57] (French J) (***City of Wanneroo***).

h. Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate. ***City of Wanneroo*** [53] - [57] (French J); ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638 [28] - [30] (Katzmann J).

Schedule III – Table of Sample Weeks from Pay Slips

	On duty	**Annual Leave (A/L)**	**Off Duty**	**Balance**
	Days	*Days*	*Days*	*Days*
30/04/12-13/05/12	8			Paid time off – 7.1208 A/L - .8792
14/05/12-27/05/12	14			Paid time off – 19.5822 A/L 2.4178
28/05/12-10/06/12	7	3.1871	3.8129	Paid time off – 22 s A/L - 0
23/05/16-05/06/16	4	3.0772	6.9228	Paid time off – 18 A/L - 0
06/06/16-23/06/16			14	Paid time off – 4 A/L - 0
20/06/16-03/07/16	10		4	Paid time off – 8.9010 A/L – 1.0990
04/07/16 – 17/07/16	14			Paid time off – 21.36 A/L – 2.6376
11/07/16-24/07/16	14			Paid time off – 21.36 A/L – 2.63
18/07/16-31/07/16	4	3.0772	6.9228	Paid time off – 18 A/L – 0

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2020 WAIRC 00162

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00162
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	FRIDAY, 6 MARCH 2020
FILE NO.	**:**	U 152 OF 2019
BETWEEN	**:**	AIDEN BILCICH Applicant AND GLS ENTERPRISES PTY LTD AS TRUSTEE FOR THE GLEN SIMS FAMILY TRUST AND BATHURST PTY LTD AS TRUSTEE FOR THE ROSE FAMILY TRUST Respondent

CatchWords	**:**	Industrial Law (WA) - termination of employment - Harsh, oppressive or unfair dismissal claim - name of respondent - Whether Commission has jurisdiction - Trusts and trustees - Trading activities of respondent
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Fair Work Act 2009*
Result	**:**	Application dismissed for want of jurisdiction.
Representation:		
Applicant	**:**	Mr A Bilcich
Respondent	**:**	Mr D Rose

Case referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) V Lawrence [No 2] [2008] WASCA 254; (2008) 89 WAIG 243

Case(s) also cited:

Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd (1982) 150 CLR 169

Bevanere Pty Ltd v Lubidineuse (1985) 7 FCR 325

Commonwealth of Australia v The State of Tasmania (1983) 158 CLR 1

E v Australian Red Cross Society (1991) 27 FCR 310

Fencott v Muller (1983) 152 CLR 570

Fowler v Syd-West Personnel Ltd [1998] AIRComm 904 (Unreported, McIntyre VP, 30 June 1998)

Hardeman v Children's Medical Research Institute [2007] NSWIRComm 189; (2007) 166 IR 196

Hughes v Western Australian Cricket Association Inc (1986) 19 FCR 10

Mid Density Development Pty Ltd v Rockdale Municipal Council (1992) 39 FCR 579

Pellow v Umoona Community Council Inc [2006] AIRComm 426 (Unreported, O'Callaghan SDP, 19 July 2006)

Quickenden v O'Connor [2001] FCA 303; (2001) 109 FCR 243

R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc) (1979) 143 CLR 190 ***(Adamson)***

R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533

Re Ku-ring-gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134

State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282

Reasons for Decision

1 Mr Aiden Bilcich was employed by GLS Enterprises Pty Ltd as trustee for the Glen Sims Family Trust and Bathurst Pty Ltd as trustee for the Rose Family Trust (**Family Trusts**) from 29 January 2019 to 25 October 2019 when he was notified of the termination of his employment effective on that day. The Family Trusts objects to the Commission dealing with this matter because it says it is a national system employer and the Commission does not have the necessary jurisdiction.

2 The application names the respondent as 'Stockman Paper Merchants' which is a business trading name. The Family Trusts submits that Mr Bilcich's employer was the trustee for the Glen Sims Family Trust and the trustee for the Rose Family Trust. The two trusts are in partnership as the registered business trading name of Stockman Paper Merchants. The trustee for the Glen Sims Family Trust is GLS Enterprises Pty Ltd ACN 085 476 599. The trustee for the Rose Family Trust is Bathurst Pty Ltd ACN 057 689 460.

Question to be decided

3 The questions to be decided in this matter are the correct name of Mr Bilcich's employer, whether the employer is incorporated, the character of the activities carried on by it at the relevant time and whether or not it was engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.

Background and Evidence

4 On 27 November 2019 the Western Australian Industrial Relations Commission **(Commission)** wrote to the parties proposing to hear the matter of the objection to the jurisdiction of the Commission on the papers unless one party objected. Neither party objected and the parties were invited to make submissions and file material relevant to the issues.

5 On 5 February 2020 the Family Trusts submitted, on a confidential basis pursuant to s 33(3) of the *Industrial Relations Act 1979* (WA) **(IR Act)**, a letter from a partner of BDO Australia confirming that the Family Trusts are a partnership that carries on business of Stockman Paper Merchants and that the entity consists solely of trading activities associated with the conduct of a commercial enterprise. A copy of the Stockman Paper Merchants annual financial report for the year end 30 June 2019 and copies of the trust deeds for the Glen Sims Family Trust and the Rose Family Trust were submitted.

6 In the *Form 2A – Employer Response to Unfair Dismissal Application*, the Family Trusts included an extract from the ABN Lookup website displaying the current details, as at 18 November 2019. For ABN 72 770 426 173 the trustee for the Glen Sims Family Trust and the trustee for the Rose Family Trust trading as Stockman Paper Merchants dated from 1 July 2000. In addition, the extracts from the ASIC database as at 18 November 2019 for GLS Enterprises Pty Ltd and Bathhurst Pty Ltd were included.

7 Mr Bilcich was allowed time to make submissions and obtain the advice and assistance from his union, an industrial agent or lawyer. Mr Bilcich did not make any submissions.

Principles

8 Section 14(1)(a) of the *Fair Work Act 2009* **(FW Act)** defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines constitutional corporations as corporations which are trading, or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or

employer including the FW Act. If the Family Trusts is a trading corporation the jurisdiction of the Commission to deal with the applicant's claim is therefore excluded.

9 ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)*** [2008] WASCA 254; (2008) 89 WAIG 243, sets out the principles to be applied by the Commission when considering whether an entity is a trading corporation [68].

(1) A corporation may be a trading corporation even though trading is not its predominant activity: ***Adamson*** (239); ***State Superannuation Board*** (303 – 304); ***Tasmanian Dam case*** (156, 240, 293); ***Quickenden*** [49] - [51], [101]; ***Hardeman*** [18].

(2) However, trading must be a substantial and not merely a peripheral activity: ***Adamson*** (208, 234, 239); ***State Superannuation Board*** (303 - 304); ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 20; ***Fencott*** (622); ***Tasmanian Dam case*** (156, 240, 293); ***Mid Density*** (584); ***Hardeman*** [22].

(3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: ***Ku-ring-gai*** (139, 159 - 160); ***Adamson*** (235); ***Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*** (1982) 150 CLR 169, 184 - 185, 203; ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Quickenden*** [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: ***St George County Council*** (539, 563, 569); ***Ku-ring-gai*** (140, 167); ***Adamson*** (219); ***E*** (343, 345); ***Pellow*** [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: ***St George County Council*** (543, 569); ***Ku-ring-gai*** (160); ***State Superannuation Board*** (304 – 306); ***E*** (343). Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': ***St George County Council*** (543) (Barwick CJ); ***Tasmanian Dam case*** (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: ***Adamson*** (234) (Mason J); ***State Superannuation Board*** (304); ***Fencott (***589); ***Quickenden*** [52], [l01]; ***Mid Density*** (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: ***State Superannuation Board*** (294 - 295, 304 - 305); ***Fencott*** (588 - 589, 602, 611, 622 - 624); ***Hughes*** (20); ***Quickenden*** [101]; ***E*** (344); ***Hardeman*** [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: ***Adamson*** (209, 211); ***Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere*** (330); ***Hughes*** (19 - 20); ***E*** (343); ***Fowler***; ***Hardeman*** [26].

10 Business trading names do not have an identifiable legal personality and cannot be employers.

11 A trust is also not a legal entity and it is the trustee, the person/entity responsible for administering the trust, who enters into the employment contracts. If the trustee is a company, it may be a constitutional corporation and a national system employer.

Who is the Employer and is the Employer a Trading Corporation?

12 'Stockman Paper Merchants' which is a business trading name, has no identifiable legal personality and cannot have been Mr Bilcich's employer.

13 The Family Trusts submits that Mr Bilcich's employer was the trustee for the Glen Sims Family Trust and the trustee for the Rose Family Trust. The two trusts are in partnership as the registered trading business name of Stockman Paper Merchants. The trustee for the Glen Sims Family Trust is GLS Enterprises Pty Ltd ACN 085 476 599. The trustee for the Rose Family Trust is Bathurst Pty Ltd ACN 057 689 460.

14 On the undisputed information and documentation provided by the Family Trusts I am satisfied that Mr Bilcich's employer was the two trustees.

15 I have formed the view that it is appropriate, in accordance with s 27(1)(l) and s 27(1)(m) of the IR Act, to order that the name of 'Stockman Paper Merchants' be amended to 'GLS Enterprises Pty Ltd as trustee for the Glen Sims Family Trust and Bathurst Pty Ltd as trustee for the Rose Family Trust'.

16 On examination of the materials submitted by the Family Trusts, I am satisfied that the Family Trusts engages in trading activities associated with the conduct of a commercial enterprise of the nature set out in ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)***.

Conclusion

17 The Family Trusts, the employer, is incorporated, and carries on trading activities of a commercial nature such that it can be described as a trading corporation and is a trading corporation. Mr Bilcich was employed by a national system employer and this Commission does not have jurisdiction to deal with Mr Bilcich's application for unfair dismissal.

18 An order will issue that the name 'Stockman Paper Merchants' be deleted and that there be substituted therefore the name 'GLS Enterprises Pty Ltd as trustee for the Glen Sims Family Trust and Bathurst Pty Ltd as trustee for the Rose Family Trust'.

19 An order will issue dismissing this application for want of jurisdiction.

2020 WAIRC 00163

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AIDEN BILCICH
	APPLICANT
	-v-
	GLS ENTERPRISES PTY LTD AS TRUSTEE FOR THE GLEN SIMS FAMILY TRUST AND BATHURST PTY LTD AS TRUSTEE FOR THE ROSE FAMILY TRUST
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 6 MARCH 2020
FILE NO/S	U 152 OF 2019
CITATION NO.	2020 WAIRC 00163

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr A Bilcich
Respondent	Mr D Rose

Order

HAVING HEARD the applicant on his own behalf and Mr D Rose on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

(1) THAT the name of the respondent be amended to 'GLS Enterprises Pty Ltd as trustee for the Glen Sims Family Trust and Bathurst Pty Ltd as trustee for the Rose Family Trust'; and

(2) THAT this application be, and by this order is, dismissed for want of jurisdiction.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2020 WAIRC 00167

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FIONA HEATHER DOUGLAS
	APPLICANT
	-v-
	KATRINA HITHERSAY
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 9 MARCH 2020
FILE NO/S	U 7 OF 2020
CITATION NO.	2020 WAIRC 00167

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms J Grant of counsel

Order

HAVING heard the applicant on her own behalf and Ms J Grant of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2020 WAIRC 00148

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00148
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	FRIDAY, 2 AUGUST 2019
DELIVERED	**:**	TUESDAY, 3 MARCH 2020
FILE NO.	**:**	B 24 OF 2019
BETWEEN	**:**	KIERAN KNIGHT
		Applicant
		AND
		FINAL TRIM OPERATORS PTY LTD
		Respondent

CatchWords	**:**	Denied benefit under contract of employment – Dismissed on grounds that no real question to be tried – Breach of contract – Unfair dismissal
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr C M Beetham (of counsel) and with him Ms L Chen (of counsel)

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Mark James Lawrence (No 2) [2008] WASCA 254; (2008) 89 WAIG 243

Automatic Fire Sprinklers Propriety Limited v Watson (1946) 72 CLR 435

Byrne v Australian Airlines Limited (1995) 185 CLR 410

Hotcopper Australia Ltd v David Saab [2001] WAIRC 03827; (2001) 81 WAIG 2704

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited (2007) 233 CLR 115; (2007) 241 ALR 88

Sandra Tye v Care Services Administration Pty Ltd [2017] WAIRC 00689; (2017) 97 WAIG 1319

Talbot & Olivier (A Firm) v Glenys June Witcombe [2006] WASCA 87; (2006) 32 WAR 179

Reasons for Decision

1 Mr Kieran Knight commenced this application as a claim for payment of $5,000 made pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (**IR Act**) for a benefit under a contract of employment that his former employer had denied him. Mr Knight's former employer, Final Trim Operators Pty Ltd/FT Workforce (**Final Trim Operators Pty Ltd**) refute Mr Knight's claim and seek that the application be dismissed because Mr Knight has not identified a benefit under a contract of employment that has been denied.

Background

2 Mr Knight was first employed by Final Trim Operators Pty Ltd from 28 November 2016 on full time hours for an annual salary of $65,000 (**2016 Contract**). Subsequently Mr Knight entered a second contract for the period from 16 November 2018 to 16 January 2019 on part time hours for an annual salary of $75,000 (**2018 Contract**). On 7 January 2019 Mr Knight notified Final Trim Operators Pty Ltd in writing his agreement to work full time hours from 14 January 2019 (**2019 Contract**).

3 On 13 February 2019 the General Manager notified the payroll officer by email that Mr Knight's annual salary was to be reduced by $5,000 effective from that day:

> Pls note effective today …….Keiran's salary is 70k plus super……..Note this will take effect for next week's pay run.

Mr Knight was courtesy copied into the email.

4 Mr Knight emailed the General Manager the following morning advising that his written contract stipulates an annual salary of $75,000 and that he had not been consulted about the reduction of salary prior to the decision being made, that he did not agree with the reduction, and that he considers the action of Final Trim Operators Pty Ltd to be in breach of the contract between them. Mr Knight stated in the email:

> Please consider this my written 2 weeks' notice effective immediately.

5 He further advised that he would utilise his accrued leave until the end of his notice period.

6 The General Manager, responded by email advising him that she understood, thanking Mr Knight for his work over the years, and requesting a letter of resignation with his signature.

7 Mr Knight responded by email:

> Technically I am not resigning – The current contract is considered null and void between myself and the company.
>
> This is a breach of contract which is different to resigning my position.
>
> The company has breached the contract by not complying with our agreed terms as stipulated in the contract.

8 The General Manager emailed Mr Knight:

> So you will finish up with us then? I still need a letter and pls confirm the date.

9 Mr Knight responded by reiterating that he was currently employed under contract and the circumstances surrounding his leaving are as a result of a breach of contract by Final Trim Operators Pty Ltd and not a voluntary resignation. Mr Knight repeated that he was not resigning and that the company had intentionally or unintentionally made a serious breach of the agreed contract and that he was choosing to terminate the contract due to the breach.

10 Subsequently Mr Knight emailed the General Manager on 14 February 2019 with an attachment of a letter with his signature dated 14 February 2019. The letter stated:

> Please find attached my signature confirming the termination of the Employment Contract between myself and Final Trim Operators Pty Ltd/FT Workforce (Common name FTWorkforce/Final Trim Operators) effective immediately. This is due to breach of conditions as stipulated and agreed upon in the contract.

11 On 18 February 2019 Mr Knight lodged an application pursuant to s 29(1)(b)(ii) of the IR Act alleging Final Trim Operators Pty Ltd had breached the contract of employment by reducing his salary from $75,000 to $70,000 without consultation, seeking payment of $5,000.

12 On 5 June 2019 Mr Knight filed and served further and better particulars of his claim, being for:

- $2500 dollars penalty for breaching a (sic) agreed employment contract under WA law
- $2500 dollars for lost wages/pay drop per annum.

13 At the hearing on 2 August 2019 Mr Knight submitted a different claim for $68,750 being for the payment of the benefit of the salary that he says he would have been entitled to under a contract 'entered into by affirmation'. Mr Knight says that the contract of employment he was engaged under at the time he terminated his employment on the grounds that Final Trim Operators Pty Ltd had breached their contract, would have been for a fixed term and for a period of 12 months or longer based on his previous work history with Final Trim Operators Pty Ltd.

14 Mr Knight says that he relies on a contract of employment that he says came into existence by the conduct of Final Trim Operators Pty Ltd continuing to employ him past the date of the expiry of the 2018 Contract, rescinding the 2018 Contract and reverting to the 2016 Contract terms.

15 Mr Knight says he had an ongoing contract that entitled him to the benefit of a salary, at the rate of the 2018 Contract, for a minimum of 12 months as he would have continued employment for a period of up to 24 months had Final Trim Operators Pty Ltd not unilaterally reduced his salary. Mr Knight contends that these were the terms of a contract at the time the employment relationship ended because Final Trim Operators Pty Ltd affirmed this to be the case by their conduct. Final Trim Operators Pty Ltd, he says, failed to take action to issue a further contract and acted as if the 2018 Contract continued.

16 Final Trim Operators Pty Ltd refutes that Mr Knight has been denied a contractual benefit and contends that Final Trim Operators Pty Ltd accepted Mr Knight's decision to terminate the contract of employment and paid Mr Knight's notice and entitlements in accordance with the rates of the 2018 Contract.

17 Final Trim Operators Pty Ltd says Mr Knight has failed to identify the benefit under the contract of employment he claims he has been denied, despite ample opportunity to do so, and seeks that the application be dismissed pursuant to s 27(1)(a)(iv) of the IR Act.

Question to be Determined

18 The first question to be answered is whether the application ought be dismissed because there is no real question of fact or law to be tried?

19 If the answer to the first question is no, the second question to be answered is whether the applicant was denied a benefit under this employment contract?

Principles

20 Section 29(1)(b)(ii) of the IR Act provides that:

> (1) An industrial matter may be referred to the Commission —
>
> (a) in any case, by —
>
> (i) an employer with a sufficient interest in the industrial matter; or
>
> (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or
>
> (iii) the Minister;
>
> and
>
> (b) in the case of a claim by an employee —
>
> (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or

(ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,

by the employee.

…

21 The principles that apply to denied contractual benefit claims are set out in ***Hotcopper Australia Ltd v David Saab*** [2001] WAIRC 03827; (2001) 81 WAIG 2704 [34]. It is necessary for the applicant to establish this relates to an 'industrial matter'; that he is an employee; that he is employed under a contract of service; that the benefit claimed is an entitlement under his contract of service; that the benefit does not arise under an award or order of the Western Australian Industrial Relations Commission (**Commission**); and that the benefit must have been denied by Final Trim Operators Pty Ltd .

22 Section 27(1)(a) of the IR Act provides that:

(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

(a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —

(i) that the matter or part thereof is trivial; or

(ii) that further proceedings are not necessary or desirable in the public interest; or

(iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or

(iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

…

23 In ***Sandra Tye v Care Services Administration Pty Ltd*** [2017] WAIRC 00689; (2017) 97 WAIG 1319 [30], the Full Bench of this Commission affirmed the principles to be applied when determining applications made under s 27(1)(v) of the IR Act to dismiss a matter on grounds that it cannot possibly succeed or there is no real question of fact or law to be tried as those set out by Steytler J in ***Talbot & Olivier (A Firm) v Glenys June Witcombe*** [2006] WASCA 87; (2006) WAR 179 [22]:

> ... it is only in cases in which it can be seen from the outset that, however the facts be found, there is no basis for the legal conclusion contended for by the plaintiff that the pleading should be struck out. …

24 In the same matter, the Full Bench held that where the Commission is satisfied, after hearing from the parties, that the preconditions of s 27(1)(a) of the IR Act are met, the Commission is authorised to exercise the discretion conferred to dismiss the claim [40].

25 The doctrine of repudiation involves a circumstance where a party to a contract evinces an unwillingness or inability to render substantial performance of the contract or a breach of a term of a contract occurs: ***Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited*** (2007) 233 CLR 115; (2007) 241 ALR 88 [44] – [49]. Repudiation by one party gives the party not in breach, known as the innocent party, the option to affirm the contract or to accept the repudiation and regard the contract as at an end. This step, by an innocent party, known as the election, is required for employment contracts as with other species of contracts: ***Automatic Fire Sprinklers Propriety Limited v Watson*** (1946) 72 CLR 435**;** ***Byrne v Australian Airlines Limited*** (1995) 185 CLR 410.

Consideration

26 There is no issue that Mr Knight was an employee and the subject matter of his claim is an industrial matter for the purposes of s 7 of the IR Act.

27 Mr Knight's employment terminated as a result of Mr Knight electing to treat the contract as ended as a result of his view that Final Trim Operators Pty Ltd conduct was in breach of their contract.

28 Mr Knight's assertion that the 2019 Contract continued for a further twelve months is not supported by any evidence. Mr Knight says the contract 'would have' continued, however he has not submitted any evidence that shows the contract would continue. Mr Knight's contention that the 2019 Contract between the parties was a reversion to the terms of the 2016 Contract is not sustainable given his claim is for the higher rate of salary under the 2018 Contract.

29 Even if it could be found that the 2019 Contract was a continuation of the 2018 Contract with the variation to full time hours, the 2018 Contract provided a clause for either party to terminate the contract with notice:

> 16.2 Notice of termination during the Term
>
> Subject to clause 1.7(b), during the Term, either you or the Company may terminate your employment by giving notice in accordance with the National Employment Standards. Notice of termination must be writing. If the Company gives notice, it may elect to make payment in lieu of all or part of your notice period.

30 Mr Knight does not dispute that he received payment of four weeks' notice and accrued leave entitlements at the rates set by the terms under the 2018 Contract. That is the salary rate of $75,000 and not the reduced rate of $70,000.

31 As in ***Hotcopper Australia Ltd v David Saab*** it is necessary for Mr Knight to establish the benefit claimed is an entitlement under his contract of employment. Mr Knight has not established that neither his initial claim for $5,000 nor his revised claim for $68,750 are entitlements under a contract of employment.

32 As in ***Sandra Tye v Care Services Administration Pty Ltd***, there is no basis under the IR Act for the contentions of Mr Knight and having heard from both parties I find that the provisions of s 27(1)(a) of the IR Act are met.

33 Mr Knight contents that Final Trim Operators Pty Ltd repudiated the contract of employment by its decision to reduce his annual salary by $5,000 without his agreement. Mr Knight elected to accept the repudiation and regard his employment as ended, similar to ***Koompaahtoo Local Aboriginal Land Council v Sanpine Pty Ltd***. It may also constitute a dismissal at law. In addition, Mr Knight contends Final Trim Operators Pty Ltd intended that the reduction of his salary would force him to terminate his employment. Mr Knight has not demonstrated that his claim in this respect is founded on a benefit under his contract of employment. Mr Knight's claim concerns the fairness or otherwise of the termination, it does not concern a benefit of an employment contract and the failure to provide that benefit. This Commission is precluded from considering and determining the fairness of the termination as Final Trim Operators Pty Ltd is a national system employer: ***Aboriginal Legal Service of Western Australia (Inc) v Mark James Lawrence (No 2)*** [2008] WASCA 254; (2008) 89 WAIG 243.

Conclusion

34 In the circumstances, the application will be dismissed pursuant to s 27(1)(iv) of the IR Act on the basis that I am satisfied there is no real question of fact or law to be determined.

2020 WAIRC 00149

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIERAN KNIGHT
	APPLICANT
	-v-
	FINAL TRIM OPERATORS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 3 MARCH 2020
FILE NO/S	B 24 OF 2019
CITATION NO.	2020 WAIRC 00149

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr C M Beetham (of counsel) and with him Ms L Chen (of counsel)

Order

HAVING HEARD the applicant on his own behalf and Mr C M Beetham (of counsel) and with him Ms L Chen (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT this application be, and by this order is, dismissed

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2020 WAIRC 00123

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00123
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	THURSDAY, 27 FEBRUARY 2020
FILE NO.	**:**	U 136 OF 2019
BETWEEN	**:**	TROY HERMES-SMITH
		Applicant
		AND
		RUC CEMENTATION MINING CONTRACTORS PTY LTD
		Respondent

CatchWords	:	Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal claim - Whether Commission has jurisdiction - Trading activities of respondent
Legislation	:	*Fair Work Act 2009*
Result	:	Application dismissed for want of jurisdiction
Representation:		
Applicant	:	In person
Respondent	:	Mr David Heldsinger (of counsel)

Case referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] [2008] WASCA 254; (2008) 89 WAIG 243

Case(s) also cited:

Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd (1982) 150 CLR 169

Bevanere Pty Ltd v Lubidineuse (1985) 7 FCR 325

Commonwealth of Australia v The State of Tasmania (1983) 158 CLR 1 (***Tasmanian Dam case)***

E v Australian Red Cross Society (1991) 27 FCR 310

Fencott v Muller (1983) 152 CLR 570

Fowler v Syd-West Personnel Ltd [1998] AIRComm 904 (Unreported, McIntyre VP, 30 June 1998)

Hardeman v Children's Medical Research Institute [2007] NSWIRComm 189; (2007) 166 IR 196

Hughes v Western Australian Cricket Association Inc (1986) 19 FCR 10

Mid Density Development Pty Ltd v Rockdale Municipal Council (1992) 39 FCR 579

Pellow v Umoona Community Council Inc [2006] AIRComm 426 (Unreported, O'Callaghan SDP, 19 July 2006)

Quickenden v O'Connor [2001] FCA 303; (2001) 109 FCR 243

R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc) (1979) 143 CLR 190 ***(Adamson)***

R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533

Re Ku-ring-gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134

State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282

Reasons for Decision

1 Mr Troy Hermes-Smith was employed by RUC Cementation Mining Contractors Pty Ltd (**RUC Cementation**) from 29 July 2019 until his employment terminated on 11 September 2019. Mr Hermes-Smith claims he was unfairly dismissed and applied to the Western Australian Industrial Relations Commission (**Commission**) for compensation. RUC Cementation objects to the Commission dealing with this matter because it says it is a national system employer and the Commission does not have the necessary jurisdiction.

Question to be decided

2 The question to be decided is whether Mr Hermes-Smith's employer is a trading corporation and a national system employer.

Principles

3 Section 14(1)(a) of the *Fair Work Act 2009* **(FW Act)** defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines constitutional corporations as corporations which are trading, or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or employer including the FW Act. If the respondent is a trading corporation the jurisdiction of the Commission to deal with the applicant's claim is therefore excluded.

4 The issues to be determined in this matter when deciding whether the respondent is a trading corporation is whether it is incorporated, the character of the activities carried on by it at the relevant time and whether or not it was engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.

5 ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)*** [2008] WASCA 254; (2008) 89 WAIG 243, sets out the principles to be applied by the Commission when considering whether an entity is a trading corporation [68].

(1) A corporation may be a trading corporation even though trading is not its predominant activity: ***Adamson*** (239); ***State Superannuation Board*** (303 - 304); ***Tasmanian Dam case*** (156, 240, 293); ***Quickenden*** [49] - [51], [101]; ***Hardeman*** [18].

(2) However, trading must be a substantial and not merely a peripheral activity: ***Adamson*** (208, 234, 239); ***State Superannuation Board*** (303 - 304); ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 20; ***Fencott*** (622); ***Tasmanian Dam case*** (156, 240, 293); ***Mid Density*** (584); ***Hardeman*** [22].

(3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: ***Ku-ring-gai*** (139, 159 - 160); ***Adamson*** (235); ***Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*** (1982) 150 CLR 169, 184 - 185, 203; ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Quickenden*** [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: ***St George County Council*** (539, 563, 569); ***Ku-ring-gai*** (140, 167); ***Adamson*** (219); ***E*** (343, 345); ***Pellow*** [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: ***St George County Council*** (543, 569); ***Ku-ring-gai*** (160); ***State Superannuation Board*** (304 - 306); ***E*** (343). Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': ***St George County Council*** (543) (Barwick CJ); ***Tasmanian Dam case*** (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: ***Adamson*** (234) (Mason J); ***State Superannuation Board*** (304); ***Fencott (***589); ***Quickenden*** [52], [l01]; ***Mid Density*** (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: ***State Superannuation Board*** (294 - 295, 304 - 305); ***Fencott*** (588 - 589, 602, 611, 622 - 624); ***Hughes*** (20); ***Quickenden*** [101]; ***E*** (344); ***Hardeman*** [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: ***Adamson*** (209, 211); ***Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere*** (330); ***Hughes*** (19 - 20); ***E*** (343); ***Fowler***; ***Hardeman*** [26].

Is RUC Cementation Mining Contractors Pty Ltd a tradition corporation?

6 On 21 October 2019 RUC Cementation submitted an Annual Financial Report for the year end 30 June 2019, copies of pay slips for Mr Hermes-Smith, a contract of employment between RUC Cementation and Mr Hermes-Smith dated 29 July 2019, a copy of the RUC Mining Contractors Enterprise Agreement 2016, an extract of the company details held by ASIC and Mr Hermes-Smith's termination notice.

7 Mr Hermes-Smith was invited to provide submissions and allowed time to obtain the advice and assistance from his union, an industrial agent or lawyer. Mr Hermes-Smith did not make any submissions.

8 On the undisputed information and documentation provided by the respondent I am satisfied that RUC Cementation is an incorporated entity and its main purpose is to trade with the aim of generating a profit.

9 Mr Hermes-Smith's claim erroneously named the respondent as 'Ruc Cememtation'. The correct legal name of his former employer is 'RUC Cementation Mining Contractors Pty Ltd'. The Commission notified the parties of the proposal, in accordance with s 27(1)(m) of the *Industrial Relations Act 1979* to amend the name of the respondent.

Conclusion

10 RUC Cementation is a trading corporation and Mr Hermes-Smith was employed by a national system employer and this Commission does not have jurisdiction to deal with Mr Hermes-Smith's application for unfair dismissal.

11 An order will issue that the name 'Ruc Cememtation' be deleted and that there be substituted therefore the name 'RUC Cementation Mining Contractors Pty Ltd'.

12 An order will issue dismissing this application for want of jurisdiction.

2020 WAIRC 00124

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TROY HERMES-SMITH
	APPLICANT
	-v-
	RUC CEMENTATION MINING CONTRACTORS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 27 FEBRUARY 2020
FILE NO/S	U 136 OF 2019
CITATION NO.	2020 WAIRC 00124

Result	Application dismissed for want of jurisdiction
Representation	**(by correspondence)**
Applicant	In person
Respondent	Mr David Heldsinger (of counsel)

Order

HAVING HEARD the applicant on his own behalf and Mr D Heldsinger (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

(1) THAT the name of the respondent be amended to 'RUC Cementation Mining Contractors Pty Ltd'; and

(2) THAT this application be, and by this order is, dismissed for want of jurisdiction.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2020 WAIRC 00113

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 9 AUGUST 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BROCK DELFANTE
	APPELLANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 21 FEBRUARY 2020
FILE NO.	PSAB 25 OF 2019
CITATION NO.	2020 WAIRC 00113

Result	Direction issued
Representation	
Appellant	In person
Respondent	Ms C Drew (as agent)

Direction

HAVING heard from the appellant in person and Ms C Drew as agent on behalf of the respondent about programming the hearing of the preliminary matter of whether to accept the appellant's appeal out of time, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the appellant file his outlines of evidence and the documents on which he intends to rely by 5 March 2020.
2. THAT the respondent file the outlines of evidence and documents on which it intends to rely by 19 March 2020.
3. THAT the appellant file a written outline of his submissions by 26 March 2020.
4. THAT the respondent file a written outline of its submissions by 2 April 2020.
5. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2020 WAIRC 00107

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 5 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GIUSEPPE (JOE) PINTO
	APPELLANT
	-v-
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MS M MARSH - BOARD MEMBER
DATE	MONDAY, 17 FEBRUARY 2020
FILE NO	PSAB 26 OF 2019
CITATION NO.	2020 WAIRC 00107

Result	Respondent name amended
Representation	
Appellant	Mr M Amati (as agent)
Respondent	Mr R Andretich (of counsel)

Order

HAVING heard from Mr M Amati, as agent, for the appellant and Mr R Andretich, of counsel, for the respondent on Monday, 17 February 2020 and by consent:

The Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that the respondent in this matter be "Director General, Department of Education".

(Sgd.) D J MATTHEWS,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2020 WAIRC 00140

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELEESHA COOTE
	APPLICANT
	-v-
	SHIRE OF BROOKTON
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 28 FEBRUARY 2020
FILE NO.	U 126 OF 2019
CITATION NO.	2020 WAIRC 00140

Result	Direction issued
Representation	
Applicant	Ms Michelle McDiarmid (of counsel)
Respondent	Ms H Millar (of counsel)

Direction

WHEREAS the parties conferred, and a consent order was issued on 14 February 2020 directing:

1. THAT the respondent is to file and serve written submissions with respect of the issue of jurisdiction to deal with this application and any evidence upon which it relies in support of its contentions (by way of affidavit) by 4:00pm on 18 February 2020;
2. THAT the applicant is to file and serve written submissions with respect of the issue of jurisdiction to deal with this application and any evidence upon which she relies in support of her contentions (by way of affidavit) by 4:00pm on 21 February 2020;
3. THAT the parties provide notice to the Commission as to whether they intend to cross examine any person that has provided a statutory declaration by 26 February 2020; and
4. THAT the matter is listed for a one-day hearing on 4 March 2020;

AND WHEREAS the applicant now applies to the Commission to strike out an affidavit filed and served by the respondent on the grounds that:

a) There is a paucity of evidence contained in the affidavit and it is vague;

b) The affidavit contains documents that are meaningless as a result of some of the content being redacted;

c) The affidavit is defective in that it does not comply with the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) because each page is not signed by the respondent; and

d) The affidavit is defective in that it misdescribes or mis references some annexures;

AND WHEREAS the applicant further submits that the respondent has provided insufficient evidence for the Commission to make findings concerning jurisdiction;

AND WHEREAS the respondent submits that s 26(1)(a) of the *Industrial Relations Act 1979* (WA); provides that the Commission shall act without regard to technicalities and legal forms and therefore the defects that the applicant identifies, if accepted, do not warrant the striking out of the affidavit;

AND WHEREAS the respondent submits that, notwithstanding their submissions that it is not necessary, the affidavit may be resubmitted in accordance with the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) and will submit a supplementary affidavit addressing some of the issues identified by the Applicant;

NOW THEREFORE having heard from Ms M McDiarmid (of counsel) on behalf of the applicant and Ms H Millar (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the respondent resubmits and serve the affidavit;
2. THAT the respondent file and serve a supplementary affidavit that includes the following matters:
    a) The proportion of income or revenue derived from each source;
    b) Identifies any contractual arrangements which result in income or revenue:
        i) at the time of the applicant's termination;
        ii) at the date of this Direction;
    c) Details of any arrangements or contracts, attaching any relevant documents or materials, by which the Shire of Brookton is engaged to provide services or operations for another entity and receives payment or revenue from that entity or another entity;
    d) Details of the method by which the Shire of Brookton is engaged to provide services described in (c), e.g. by way of competitive tender; and
    e) Any other matter considered relevant by the respondent.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2020 WAIRC 00171

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	HANSSEN PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 13 MARCH 2020
FILE NO.	OSHT 2 OF 2018, OSHT 3 OF 2018, OSHT 4 OF 2018, OSHT 3 OF 2019
CITATION NO.	2020 WAIRC 00171

Result	Direction issued
Representation	
Applicant	Mr L Swanson (of counsel)
Respondent	Mr D McDonnell (of counsel)

Direction

HAVING heard from Mr L Swanson (of counsel) on behalf of the applicant and Mr D McDonnell (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984*, hereby directs –

1. THAT the respondent is to file and serve upon the applicant written submissions on the issue of costs by 19 March 2020; and
2. THAT the applicant is to file and serve upon the respondent written submissions on the issue of costs by 26 March 2020.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Education (School Support Officers) CSA Agreement 2019 PSAAG 2/2020	02/18/2020	Department of Education	Community and Public Sector Union, Civil Service Association	Commissioner D J Matthews	Agreement registered
Department of Justice (Jury Officers) CSA Agreement 2019 PSAAG 1/2020	02/27/2020	Department of Justice	Civil Service Association	Commissioner T Emmanuel	Agreement registered
Shire of Yalgoo Employees Enterprise Agreement 2018 - 2021 AG 15/2019	03/09/2020	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Shire of Yalgoo	Senior Commissioner S J Kenner	Agreement registered
WA Labor Enterprise Agreement 2020 AG 4/2020	03/03/2020	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Australian Labor Party (Western Australian Branch)	Commissioner D J Matthews	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2020 WAIRC 00119

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 30 APRIL 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00119
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER- CHAIRMAN MR R WARBURTON- BOARD MEMBER MS BETHANY CONWAY- BOARD MEMBER
HEARD	**:**	WEDNESDAY, 13 NOVEMBER 2019, THURSDAY, 14 NOVEMBER 2019, FRIDAY, 15 NOVEMBER 2019, WRITTEN SUBMISSIONS 19 AND 25 NOVEMBER 2019
DELIVERED	**:**	WEDNESDAY, 26 FEBRUARY 2020
FILE NO.	**:**	PSAB 8 OF 2019
BETWEEN	**:**	JULIE ANDERSON Appellant AND MANAGING DIRECTOR, DEPARTMENT OF TRANSPORT Respondent

Catchwords	:	*Industrial Law - Appeal against the decision to terminate employment on 30 April 2019 - Whether the appellant's performance was substandard - Whether the appellant was afforded procedural and substantive fairness - Whether the penalty of dismissal was disproportionate or harsh and unfair - Principles applied - Appellant had reasonable opportunity to demonstrate improvement in performance - Appellant's error rate was high and performance was not attained or sustained at a reasonably expected level - Appeal Board should not interfere with respondent's decision - Appeal dismissed*
Legislation	:	*Industrial Relations Act 1979* (WA)
		Public Sector Management Act 1994 (WA) s 79
Result	:	Appeal dismissed. Order issued.
Representation:		
Appellant	:	Mr M Amati
Respondent	:	Mr J Carroll of counsel
Appellant	:	The Civil Service Association of WA (Inc)
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728; (2017) 97 WAIG 1525

Reasons for Decision

The appeal and brief background

1 These are the unanimous reasons of the Appeal Board.

2 The appellant was employed by the respondent, the Department of Transport, from 31 May 2005 as a Customer Service Officer (CSO) in the Midland Licensing Centre (MLC), and from 2012 in the Rockingham Licensing Centre (RLC). The appellant's role was a level 2 position covered by the *Public Service Award 1992* and the *Public Service and Government Officers CSA General Agreement 2017*, and its previous iterations. For about an 18-month period, immediately preceding the appellant's move to the RLC in 2012, the appellant worked as a CSO Supervisor at the MLC, which was a level 3 position. In April 2019 the appellant's employment was terminated by the respondent on the grounds that her performance was substandard, for the purposes of Division 2 of Part 5 of the *Public Sector Management Act 1994* (WA). The appellant now appeals against that decision.

3 The appellant contended that at no time was her performance substandard and that the Performance Improvement Action Plan (PIP) implemented by the respondent raises major procedural and substantive concerns, specifically that:

Procedurally -

(i) it falls short of wider public sector best practices as reviewed and articulated by the Public Sector Commission- *inter alia* e.g. failure to establish clear and achievable targets; disregard or give no sufficient consideration to either responses or improvements in performance attained; failure to provide a reasonable opportunity to respond to the adverse findings and foreshadowed penalty.

(ii) Erratic and arbitrary PIP process, including unreasonable and arbitrary targets.

(iii) Failure to act consistently with the terms of its own Departmental policy on substandard performance

Substantively –

(iv) No clear targets of performance.

(v) Failure to convey purpose of the PIP – whether my job was in jeopardy.

(vi) Having set unreasonable targets of job 'completion' with any consultation with me or my union as it is compelled to do in introducing new work practices.

(vii) Failed to take into account the specific vulnerable conditions affecting me [or my performance – possible but not conceded] when I returned to work following the end of rehabilitation by insisting on the necessity of attaining unduly rigid and arbitrary targets; even though, as I understand it, Ms Tindall has never performed the duties of a CSO.

4 The appellant also submitted that procedural fairness and natural justice had been denied, the investigation process was unduly secretive as the entire investigation report was not disclosed, and the penalty of dismissal was disproportionate or harsh and unfair in consideration of the appellant's unblemished employment record. The respondent submitted that the appellant had opportunities to respond during the investigation; that requirements of the appellant were clear and reasonable; that the appellant had access to the support required to overcome barriers to meeting expectations; that the appellant had a reasonable opportunity to demonstrate improvement; and that the process was conducted in a fair and unbiased manner.

5 The appellant seeks a declaration that the appellant's performance was consistent with expected standards of performance, that the respondent's adverse findings are set aside, and an order that the respondent reinstate the appellant with continuity of service and reimbursement of loss.

The evidence and issues

6 As a CSO, the appellant provided customer service, predominantly face to face, to a range of customers including the general public, interstate and overseas customers and other external stakeholders. The CSO Job Description Form that applied to the appellant's employment from 2014 was tendered as exhibit A3. The appellant was required to assist customers by answering queries, processing applications and performing other transactions, ensuring compliance with legislative requirements and the respondent's policies and procedures. The appellant undertook financial and non-financial transactions, verified documents and processed monies received into the licensing database. Some specific tasks that the appellant completed on a typical working day included issuing learner's permits, renewing or transferring driver's licenses, completing vehicle registrations and verifying the identification of a person. An important component of the appellant's role was to ensure the accuracy of the respondent's records by creating, updating and maintaining customer records in TRELIS, the respondent's licensing database, by entering information from customer applications or transactions.

The Rockingham Centre

7 At the RLC, on average, there were approximately seven CSOs working at any one time, one of which would be in the Concierge role. This number would differ depending on factors such as leave bookings or customer demand. The Concierge worked on reception as the first point of contact for customers visiting the RLC, assisted customers with their preliminary questions and checked the customer had the correct documentation with them before allocating them a ticket. This ticket would then be called by a CSO, who would provide further assistance to the customer. Once a CSO had assisted a customer and completed the required work for that transaction, if any, the ticket would be closed, and recorded as completed by that CSO.

8 CSOs reported directly to Ms Anderton, the Team Leader at the RLC, who is responsible for the management of staff. Ms Anderton reported directly to the RLC Manager, Ms Tindall. The RLC had two Supervisors who were responsible for overseeing the customer service area, assisting CSOs with any queries or issues that arose during the working day, and auditing CSO work and transactions. The RLC used a rotation method, where in addition to the two substantive Supervisor positions, CSOs would rotate through and act as Supervisor. The appellant gave evidence that because of this, there were a total of six potential Supervisors that might audit CSO work.

Auditing process

9 The respondent uses an auditing process to maintain the accuracy of information and calculate error rates on completed transactions enabling corrective remedial action and employee training. When a CSO completes a transaction such as, for example, an application for a driver's licence, the completed paperwork is placed into that CSO's tray. The paperwork from that day is collected by a Supervisor or Acting Supervisor who conducts an audit on a percentage of each form type. For example, a DLA1 Form is a multipurpose form that must be completed for a variety of driver's licence applications including for an initial grant of a driver's licence, an extraordinary licence, a learner's permit or a lapsed licence. This form is 100 percent audited, meaning every form of this type completed by a CSO will be subject to audit. Other transactions such as a change of name or date of birth are audited 50 percent and driver's licence concessions are audited 25 percent. A document titled Business Rules, which sets out the audit process, including the percentage of each document type subject to audit, was tendered as exhibit A6.

10 Errors found in audited documents are categorised as recordable or non-recordable. A recordable error is logged against the name of the CSO who made that error, which ultimately forms part of the RLC's statistics and "error rate". A non-recordable error is not recorded, however the CSO may still be notified that the error occurred and be asked to remedy it. The respondent's Process Manual – Driver Vehicle Services Transaction Audit, which shows what a recordable and non-recordable error is for each of 27 form types, was tendered as exhibit A7. For a DLA1 Form, for example, a recordable error can include omitting to fill in the health and medical conditions of the customer or failing to complete the customer and witness declarations. Non-recordable errors include omitting to complete or update personal details. Examples of other errors include missing information, omitting to tick a box or fill out a section on a form, entering an incorrect digit into a phone number or concession number, and omitting to sign or correctly witness a form. Other documents are non-auditable, meaning they are not audited for errors.

11 The appellant gave evidence that errors made by CSOs largely had no consequence or impact, as the document to which the error related would remain at the RLC for some time, during which the error could be corrected. The respondent submitted that it was not the case that errors had no consequence, and provided examples of when a customer had to be contacted, for example, to return to the RLC to pay the balance of an incorrect amount charged or to provide additional documentation. The respondent's position was that the appellant disagreed that errors should be marked against her and that this highlighted a critical issue, which was the respondent's concerns regarding the appellant's attitude towards her errors.

12 The appellant gave evidence that each Supervisor who conducts the auditing process can have a different opinion on what constitutes an error. According to the appellant, this is partly due to there being no formal training on how to identify an error and individual approaches taken to recording. The appellant recalled Supervisors asking her to correct an error, such as a missing signature, and not recording this as an error because the appellant was able to remedy it, whereas other Supervisors would record this as an error because the error had been made. The appellant gave evidence that she raised concerns of the inconsistency of Supervisors' approaches to auditing with Ms Tindall, who subsequently attempted to apply consistency without success. The respondent's argument was that most of the errors identified were not the type of errors for which reasonable minds could differ, for example omitting to fill in a section on a form, sign a document or filling in a number incorrectly.

Workers compensation leave

13 From 11 April 2016, the appellant took an extended period of leave covered by workers compensation, following a customer aggression incident in the RLC. The appellant gave evidence that this incident caused her to fear dealing with customers. From November 2016, the appellant commenced working at the respondent's head office in Osborne Park, dealing with customers on the telephone but not face to face. In around May or June 2017, the appellant returned to the RLC on a part-time basis. The appellant was on a graduated Return to Work Program, initially working one day per week in the RLC and four at the head office call centre. This increased to three days per week at the RLC and on 18 December 2017, after clearance from her General Practitioner, the appellant recommenced full-time employment at the RLC.

Circumstances leading to the appellant's dismissal

14 The respondent submitted that after the appellant's return to the RLC in May 2017, the appellant's managers were aware that the appellant's error rates were above that of what was expected for the standard performance of an experienced CSO, however due to the appellant's recent return to work, no formal performance management process took place at this time.

15 In around late October 2017, Ms Tindall commenced informal meetings with the appellant on a regular basis to discuss the appellant's error rates and to inform her that the errors needed to be addressed. The appellant's Return to Work Program, dated 24 May 2017, was tendered as exhibit A4. This document stipulated the conditions of the appellant's return to work, which included that work completed by the appellant was to be 100 percent audited and where possible, all errors were to be shown to the appellant. The appellant could not perform the Concierge role and the respondent positioned another CSO and a Supervisor on desks close to the appellant, to provide support and facilitate the transition back to work.

16 The Return to Work Program document began recording errors from 23 October 2017. The respondent submitted that the same errors were often repeated. The respondent concluded that by February 2018, the appellant had not demonstrated a sustained improvement in reducing her error rates and consequently, at a scheduled six-month performance review meeting on 7 February 2018, an internal Action Plan was implemented. The AP was tendered as exhibit A5 and involved reviewing the appellant's work over a three-month period, which was later extended to four months due to the appellant taking leave, to determine whether further training was required. The AP set a target for the appellant to achieve 90 percent compliance of audited work and to be within 10 percent of the RLC's average for number of customers served per day. The appellant's "error rates" for 2017, in comparison to the RLC, were set out as follows:

2017

	Julie	**Centre**	**% of Centre**
June	8	40	20%
July	3	19	16%
Aug	10	22	45%
Sept	14	27	52%
Oct	15	30	50%
Nov	13	45	29%
Dec	11	26	42%

17 The AP stated that if the appellant's error rate did not improve within three months, a formal Performance Improvement Program would commence. As part of the AP, the appellant was required to meet with Ms Tindall or Ms Anderton weekly to receive feedback on her progress.

18 The respondent submitted that on 13, 15 and 16 March 2018, an acting Supervisor at the RLC, Ms Turner, sat with the appellant to provide on the job coaching. During this period, the appellant was able to observe Ms Turner and Ms Turner was able to observe the appellant, to see if any issues could be identified and coaching provided to minimise the appellant's error rates. The appellant gave evidence that this occurred for at most, one and a half days, as Ms Turner got bored of providing this support. Ms Turner gave evidence that this process lasted for at least three days and that she remained available and approachable after this, for whenever the appellant required assistance. Ms Turner said that the appellant was sometimes receptive of feedback and other times not, and that progress did occur but was not always sustained. The appellant did not consider that this process constituted training as her transactions were still being audited, with errors recorded, and she was performing the same tasks as she did any other day. Ms Tindall gave evidence that for the period that the appellant was working with Ms Turner, the appellant's errors were removed and did not form part of her error rate.

19 Ms Turner gave evidence that there was an issue with the appellant conducting eyesight tests that were required to assess individual eyesight acuity, required for all applications to grant a driver's licence, as the appellant did not agree with the reasoning behind this and therefore would not consistently perform this test as directed by Supervisors. The appellant gave evidence that due to the acuity test stating that an individual with one eye, without an eye or with one eye blind, could still be eligible for a driver's licence, the appellant did not see the reason for conducting individual eye-sight tests, and despite being required and instructed to conduct them, the appellant would not. The appellant would then fill out the form as though she had completed the test as directed. Ms Tindall gave evidence that she had ongoing concerns with the appellant's lack of accountability and ownership for her errors.

Performance Improvement Action Plan

20 The respondent concluded that the appellant did not demonstrate sustained improvement during the AP and from February to June 2018, the appellant's percentage of reportable errors remained high, constituting 18-55 percent of the RLC's total error rate. Exhibit R17 sets out the appellant's errors during this time, which the respondent says include reoccurring types of errors. Following a meeting held on 16 July 2018, the appellant was placed on a PIP. The PIP included a schedule of review meeting dates and following each meeting, an email was sent to the appellant outlining the meeting outcome and strategies for

improvement. These emails were tendered as exhibit R9. The appellant's recorded errors during the PIP were tendered as exhibit R11.

21 The appellant submitted that focusing on the "error rate" of the appellant was a vague and unreliable indicator of the appellant's overall performance. The target given was unclear and changed over time. For example, the appellant argued that in February 2018, she was told that she ought to aim at achieving 90 percent compliance, and that she was very close to achieving the expected number of customers served, which is around 40 tickets per day. The appellant calculated that spreading this rate across four weeks or 20 working days, the expectation equated to a CSO serving around 800 customers with a 90 percent "correct rate", equating to 80 as an admissible margin of substantive reportable errors over the four-week period, or four substantive errors per day. In contrast, the expectation in July 2018, when the PIP was implemented, changed to five substantive reportable errors for the four-week period, which the appellant calculated as a "correct rate" of 99.99375. The appellant submitted this expectation was impossible to achieve and maintain. Further, the fact that the appellant was being audited 100 percent, and could not complete the Concierge role which produces no auditable transactions, as other CSOs did, meant that the appellant's error rate would be higher than other CSOs.

22 On 25 October 2018, the Managing Director of the respondent advised the appellant by letter, that her performance issues had been referred to the Managing Director to commence action under s 79 of the *Public Sector Management Act 1994* (WA), as the improvements outlined in the PIP had not been met. The letter, formal parts omitted, read as follows:

> I refer to your Performance Improvement Plan (PIP), concluded on 20 September 2018 and discussions with your line manager. I understand that your PIP was primarily focused on improving your error rates and increasing the number of customers you served each day.
>
> Ms Belinda Tindall, Centre Manager Rockingham, has provided me with a copy of the report on your performance in the role of Customer Service Officer. The report advises me that while you did improve in the initial period of the PIP, overall, you did not attain or sustain the required level of improvement. I attach a copy of this documentation for your reference.
>
> Following due consideration of the documents outlined above, I am initiating action in accordance with section 79 'Substandard Performance' of the *Public Sector Management Act 1994* (the *Act).* Please find attached a copy of the section of the Act and the Performance Management Policy and Procedure for your reference.
>
> I require information from you to determine what further action, if any, is to be taken. I am seeking your views on whether you agree or disagree with the following statements in relation to the PIP Process you have participated in. If you disagree with any of these statements, please be specific about why you disagree.
>
> 1. The requirements were clear and reasonable;
> 2. You had access to the support required to overcome any barriers to delivering on expectations;
> 3. You had reasonable opportunity to demonstrate improvement; and
> 4. The process was conducted in a fair and unbiased manner.
>
> I require you to submit your response by close of business **Wednesday, 7 November 2018.** Please include in your response any other relevant information you feel should be taken into consideration.
>
> Once I have received your written response, I will determine what further action will be taken. If you fail to respond by the date set out above or you deny that your performance is substandard, I may refer the matter for investigation as outlined in section 79(5) of the Act.
>
> You should be aware that an outcome of the process may be that I impose a sanction, which may include one of the following:
>
> (a) withhold for such period as the department thinks fit an increment of remuneration otherwise payable to you; or
> (b) reduce your level of classification; or
> (c) terminate your employment in the Public Sector.
>
> I appreciate this may be a difficult time for you and advise that the department's Employee Assistance Program is available on 1300 66 77 00.
>
> Should you require any clarification on this matter, please contact Mr Scott Barrett, Manager, Employee Relations on 6551 6052.

23 On 7 November 2018, the appellant's union wrote to the respondent denying that the appellant's performance was substandard. This letter was tendered as exhibit R2. On 28 November 2018, the respondent notified the appellant, by letter, tendered as exhibit R3, that in accordance with s 79(5) of the PSMA, an independent investigator had been appointed to determine whether the appellant's performance was substandard. On 22 February 2019, the respondent informed the appellant that a conclusion, that the appellant's performance was substandard, had been reached and the proposed outcome was that the appellant's employment be terminated. This letter was tendered as exhibit R4. Relevantly, the letter read as follows:

> On 25 October 2018, Ms Nina Lyhne, Managing Director at the time, advised you that she was initiating action in accordance with section 79 'Substandard Performance' of the *Public Sector Management Act 1994.*
>
> Ms Lyhne provided you with an opportunity to submit a response to the allegations. In your response of 7 November 2018, you denied that your performance was substandard. After considering your response, I appointed Mr Keith Chilvers from The Futures Group to investigate the matter.

Mr Chilvers has completed the investigation and provided me with a report. Having examined the report and associated evidence, I find that your performance is substandard. I have enclosed the investigation report for your information.

The Act provides me with the following actions that I may apply in respect to this matter:

(a) withholding of an increment of remuneration;

(b) reduction in classification; or

(c) termination of employment.

I note that Mr Chilvers has found that:

- The performance requirements for you to meet were both clear and reasonable.
- That you had access to support, provision of assistance to overcome barriers and to deliver on.
- You had reasonable opportunity to demonstrate improvement.
- You were afforded reasonable opportunity to demonstrate improvement.
- The process to assist you to address your errors and serve customer statistics

was done in a fair and unbiased manner.

In considering Mr Chilvers report I also note that:

- You appear to be unwilling at times to follow instructions and procedures unless convinced that you should do so.
- You do not appear to have responsibility for your poor performance.

Therefore, I have decided to propose the termination of your employment.

I have not made a final decision on this action. I am providing you until **8 March 2018** to provide a written submission to me on this proposed course of action. In the event that no submission is received by this date, I will take the above action and notify you accordingly.

24 On 21 March 2019, the appellant's union responded to this letter stating that termination of employment was unduly harsh and requested access to the full investigation report (exhibit R5). On 2 April 2019, the respondent wrote to the appellant and stated that the full investigation report, as requested, would not be provided and gave the appellant a further chance to respond. This letter was tendered as exhibit R6. The appellant's union responded to this letter on 11 April 2019 (exhibit R7). On 17 April 2019, the respondent advised that he did not consider that the appellant's response raised any significant issues to warrant reconsideration and he dismissed the appellant from her employment on the basis that the appellant's performance was substandard (exhibit R8).

Consideration

25 It is common ground that an appeal of the present kind is a de novo proceeding. Accordingly, any defects in the manner of the appellant's dismissal are able to be cured in the proceedings and in the disposition of the appeal by the Appeal Board: *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525.

26 The nature of the CSO position occupied by the appellant and its overall responsibilities have been set out above. It goes without saying that given the nature of the work, attention to detail and accuracy are important. The fact that the respondent undertakes auditing processes affirms this. The appellant was an experienced CSO who had been performing this work for many years. Despite a period of absence on workers compensation, the respondent was entitled to regard the appellant, for the assessment of performance purposes, as a senior and experienced CSO, especially as she had previously worked as a supervisor for a substantial period. The appellant was far from being a novice.

27 It is also the case, that contrary to the appellant's assertions, reportable errors made by CSOs employed by the respondent have real consequences. For example, in cases where licences are involved, errors such as incorrect names etc, may lead to problems with proof of identity. Equally, and more concerningly, licences granted to persons who may not have been properly tested for eyesight, may involve significant community risk. As the respondent points out in its submissions, continued errors, many of which were repeated and of the same type, can lead to customer inconvenience and the levying of incorrect charges (e.g. stamp duty assessments). Also, there is the obvious risk to other road users when persons are driving in circumstances where they should not be in possession of a licence.

28 Whilst in the appellant's submissions, criticism was raised against the respondent's focus on the appellant's actual and absolute error rates, compared to the RLC average, it is important to note that in the PIP (see pp 79-85A TB) in July 2018, the appellant agreed to the goal of no more than five reportable errors per month. This was against the background of an average reportable error rate for CSOs at the RLC in the prior six months of no more than about three and a half per month. This target was the subject of discussion between the appellant and Ms Tindall. The appellant was made aware of her required level of performance compared to other CSOs in the RLC, including attending to 40 customers per day, and she received regular feedback on how she was performing, relative to those agreed standards and targets. On the evidence, the appellant had ample opportunity to consider the terms of the PIP and by her signature, must be taken to have accepted the work standards required and the means by which they would be measured. This included the timeframe over which an improvement was expected by the respondent.

29 I also do not accept the assertions made by the appellant that in some fashion the performance standards imposed by the respondent were vague and uncertain. The appellant had discussions with Ms Tindall at the conclusion of the AP and prior to the commencement of the PIP in July 2018. On the evidence of Ms Tindall, the appellant was given information as to the PIP Process and she was encouraged to speak to human resources representatives if she was not sure of any aspect of it. Specific and regular feedback was given to the appellant on a weekly basis during the PIP. Exhibit R11 (pp 202 – 204 TB) is the PIP results document. This shows results over the period from 2 July 2018 through to 21 September 2018, including the nature and number of errors identified and the actions arising as a result. This document identifies many of what can only be described as basic errors continuing to be made by the appellant.

30 Without descending to the detail of all of them, many fell into the category of simply incorrect entry of information into the respondent's TRELIS database or not entering information at all. These are rudimentary record keeping tasks that for someone with the appellant's level of experience, demonstrated either a lack of attention or a lack of interest, or both. Other types of errors made included incorrect licence classes issued; failing to record medical information; incorrect or not updating addresses on the system; not recording correct selling prices for vehicles for the purposes of stamp duty assessment and not licencing a vehicle in the correct name.

31 As identified by the respondent in its submissions, the error rate of the appellant in this formal performance process, was about five per week as opposed to the RLC average referred to above. This was a marked contrast. It was not merely a marginal difference. Whilst these actual reportable errors were substantial in number, proportionately, the appellant's errors represented a significant proportion of the overall error rate for the RLC. In the period from January to August 2018, the appellant's proportion ranged from 13 to 55 percent of the overall RLC error rate (see exhibit R18 p 85A TB). In the period January to June 2018, prior to the commencement of the PIP, the appellant's reportable error rate per month was well in excess of the other CSOs, including in terms of total number of errors for the overall period (see p 84 TB).

32 However, what was revealed by the evidence of the appellant's performance against the agreed criteria was that this performance over the period of the PIP was not atypical. In the period prior to February 2018, from the commencement of the appellant's Return to Work Program (see exhibit R16 pp 132-147 TB) concerns were raised as to the level of the appellant's error rate and her contribution to the RLC's overall error rate. Ms Tindall's evidence was that she was not just developing concerns as to the actual rates of errors and the type, being repeated errors of similar kinds, but equally importantly, the appellant's apparent lack of accountability for them. The appellant's view seemed to be that the errors could be corrected by Supervisors and were not of any great consequence. The appellant was also reminded of the need to audit her own work which, as an experienced CSO, should have been second nature.

33 What is quite clear from the evidence, was that the type of errors made during and following the Return to Work Program, and prior to the AP commencing in February 2018, were similar in type and number to those made by the appellant in the PIP process from July to September 2018. These include recording errors and spelling mistakes; medical details not being properly recorded; the "office use" sections of forms not being completed; not recording eyesight test results; errors in stamp duty assessments etc. These are all set out with particularity in exhibit A4 (pp 115-118 TB) and I do not propose to traverse them in detail.

34 Regrettably, this trend continued in the subsequent AP from February 2018 to June 2018, as noted earlier in these reasons. Exhibit R17 (pp 125-128 TB) sets out in detail the appellant's results over this period. Significantly, over this time, weekly meetings were held with the appellant in order to discuss the prior week's work and the errors made. The appellant was receiving some support from Ms Turner during this period. The number of actual errors were substantial and in one week alone (14-17 May 2018) the appellant made some 14 errors. The nature of the errors made bore a striking resemblance to those made by the appellant prior to the AP and subsequent to it, in the PIP. Relative to other CSOs in the RLC, these could only be reasonably described as high rates of errors. Given the nature of them, again, from an experienced CSO, they can only be explainable as a result of a lack of attention to detail, a lack of interest or both. No other real explanation was proffered. There was some suggestion by the appellant that some of the errors resulted from a difference of opinion between Supervisors as to matters of interpretation. However, the evidence reveals that the bulk of the errors made by the appellant in her CSO role, are not errors of the kind resulting from differences of opinion.

35 I do not propose to go through the appellant's cross-examination in any detail, where several of the transactions resulting in errors over the period January to October 2018 were put to the appellant. Suffice to say that the appellant did not dispute the fact of these errors, although she did seek to downplay the consequences of some of them. One of the transactions, a driver's licence application made on 18 July 2018, contained several errors of major significance. One, which reflected the appellant's attitude to this issue generally, was the eyesight test. Despite it being a requirement of the respondent for both eyes of a person seeking a driver's licence to be tested individually, which was emphasised as a requirement by Supervisors, the appellant did not test candidates' eyesight in each eye separately. Regardless, the relevant part of the application form records a "6" score for the applicant's left eye, right eye and for both eyes. As the individual eye testing was not performed by the appellant, this misrepresented the actual test administered by her. It was a false record. The appellant was somewhat argumentative on this issue when it was put to her in cross-examination.

36 Despite being told by Supervisors to perform the eyesight test properly, the appellant refused, as she did not consider it was necessary. However, the appellant also agreed that it was not her decision as to what types of eye tests were required to be performed in order to obtain a driver's licence. The appellant had to concede, somewhat grudgingly, that this particular applicant for a driver's licence (and no doubt others in respect of whom the appellant failed to administer eye tests properly), was issued with a driver's licence without having their eyesight tested fully as required (see bundle of audited transactions as exhibit R10, put to the appellant in cross-examination). That this is unacceptable and may pose a risk to community safety is to state the obvious in my view.

37 Whilst evidence was also led by the appellant from two former co-employees who had worked as CSOs at the same licencing centre for a period of time with the appellant, Ms Hosie and Ms Farthing, neither were able to give specific evidence as to the appellant's work performance. Ms Hosie had been at the RLC for some time between 2011 and 2017. Whilst Ms Hosie made some general observations about some transactions being complex and subject to Supervisor's differing views as to requirements, she did not work closely with the appellant in terms of commenting on her actual work performance, as assessed by the respondent. Similarly, whilst Ms Farthing had worked with the appellant at the MLC, including during their initial training together, her evidence did not touch on the specifics of the appellant's performance. She certainly considered the appellant to be good with customers, as did Ms Hosie. Ms Farthing did agree that some errors, such as licencing a vehicle in the wrong name and issuing a person with the wrong licence (errors made by the appellant) were "big" and significant" errors. However, some of Ms Farthing's evidence, such as her view that the eyesight testing issue may not be that important, somewhat in sympathy with the appellant's view, led me to treat some of her evidence with a note of caution.

38 A contention put by the appellant was that she was not afforded appropriate support by the respondent in the course of the performance management process. This proposition must be rejected. Firstly, the appellant was not a new or inexperienced CSO. She had some 14 years in the role. Whilst the appellant may have been absent from the workplace for a period of time on workers compensation, and there may have been some changes to office procedures, the Return to Work program was put in place to enable her to gradually return to full CSO duties. Whilst it commenced in May 2017, the respondent did not record errors in the appellant's work until October 2017. From this time, in the informal process put in place by Ms Tindall, the appellant was given regular feedback and assistance. This included Ms Tindall providing another employee as a "neighbour" who could help the appellant if needed. Supervisors were also available to do the same.

39 In the AP the appellant had weekly meetings as shown on exhibit R17 and as dealt with by Ms Tindall in her testimony. This included the nature of the errors being made by the appellant and ways to correct them. It is to be noted that the AP was extended for a further three weeks beyond the original timeline, to enable the appellant a reasonable opportunity to demonstrate an improvement in her performance. Additionally, as a part of the AP, the appellant worked side by side with Ms Turner for several days to assist the appellant in processing transactions. No errors were recorded by the respondent over this time. The respondent also submitted, which was not contested by the appellant, that Ms Tindall informed the appellant that the respondent would provide other assistance to her that she considered she may need.

40 Given the entirety of the informal and formal processes put in place by the respondent from the Return to Work Program to the conclusion of the PIP were over a period from late 2017 to September 2018, it could not be concluded in my view, that the appellant did not have a reasonable opportunity to demonstrate an improvement in her level of overall performance. The appellant relied upon the fact that she was audited on 100 percent of her work and not strictly in accordance with the percentages identified in the respondent's "DVS Transaction Audit Process" document (Exhibit A6). It is to be accepted that this may have had some impact on the appellant's overall error rate. However, several of the DVS processes performed by CSOs are audited on a 100 percent basis anyway (e.g. extraordinary driver's licences; driver's licence applications; photo card applications; driver's licence sanctions – see p 165 TB). As revealed in the PIP, the appellant's reportable error rate for these kinds of transactions (where all CSOs are audited) was very high at about 10 per month. Additionally, it was the sheer type and number of basic errors, committed over a sustained period, that was of legitimate concern to the respondent.

41 Having regard to the circumstances of this case, the appellant's performance was not attained or sustained at a reasonably expected level. I am not persuaded that the Appeal Board should interfere with the respondent's decision to terminate the appellant's employment on the grounds of substandard performance. Accordingly, the appeal must be dismissed.

2020 WAIRC 00121

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 30 APRIL 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE ANDERSON
	APPELLANT
	-v-
	MANAGING DIRECTOR, DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR ROBERT WARBURTON - BOARD MEMBER
	MS BETHANY CONWAY - BOARD MEMBER
DATE	WEDNESDAY, 26 FEBRUARY 2020
FILE NO	PSAB 8 OF 2019
CITATION NO.	2020 WAIRC 00121

Result	Order issued
Representation	
Appellant	Mr M Amati as agent
Respondent	Mr J Carroll of counsel

Order

HAVING heard Mr M Amati as agent on behalf of the appellant and Mr J Carroll of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2020 WAIRC 00164

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	**:**	2020 WAIRC 00164
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	FRIDAY, 6 DECEMBER 2019
DELIVERED	**:**	FRIDAY, 6 MARCH 2020
FILE NO.	**:**	OSHT 8 OF 2019
BETWEEN	**:**	HALIFAX CRANE HIRE PTY LTD
		Applicant
		AND
		WORKSAFE
		Respondent

CatchWords	**:**	Improvement Notice - reg 3.23(2) of the *Occupational Safety and Health Regulations 1996* (WA) - Powers of the Occupational Safety and Health Tribunal (WA) - Employer obligations
Legislation	**:**	*Industrial Relations Act 1979* (WA)
		Occupational Safety and Health Act 1984 (WA)
		Occupational Safety and Health Regulations 1996 (WA)
Result	**:**	Improvement Notice revoked
Representation:		
Applicant	**:**	Mr N De Marte
Respondent	**:**	Ms F Reading (of counsel)

Case referred to in reasons:

The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd [2007] WAIRC 01273; (2008) 88 WAIG 22

Reasons for Decision

1 This matter concerns the referral to the Occupational Safety and Health Tribunal (**Tribunal**) for review of an improvement notice issued to Halifax Crane Hire Pty Ltd for contravening reg 3.23(2) of the *Occupational Safety and Health Regulations 1996* (WA) (**OSH Regulations**) in that there was no system of traffic management in place. Halifax Crane Hire Pty Ltd submit that the crane driver dispatched to the site decided to park the crane on the road, resulting in a major road into Bunbury CBD being closed down. The directors of Halifax Crane Hire Pty Ltd contend that they ought not be held totally responsible for the actions of the crane driver and the management of traffic on the site.

2 On 4 September 2019 a Worksafe Inspector issued Improvement Notice 46800287 in relation to a breach of reg 3.23(2) of the OSH Regulations at Lot 64 Austral Parade East Bunbury. The improvement notice sets out that Halifax Crane Hire Pty Ltd was the employer of the crane driver who had set up the crane from the verge to the white centre line of the road. He required

a system of preventing traffic entering the work area to be set up and that no traffic management system was in place. The improvement notice required the situation to be remedied by 1700 hours on 13 September 2019.

3 On 6 September 2019 Halifax Crane Hire Pty Ltd applied to the Worksafe Commissioner (**Commissioner**) for a review of the improvement notice under s 51 of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**). On 25 October 2019 the Commissioner affirmed the improvement notice and modified the time to comply with the notice to 5:00 pm on Friday, 1 November 2019.

4 On 29 October 2019, Halifax Crane Hire Pty Ltd referred a request for a review of the improvement notice by the Tribunal under s 51A of the OSH Act.

5 Worksafe submits that proceedings before the Tribunal concerning improvement notices are limited to three possible outcomes: affirmation, affirmation with modification or revocation of the improvement notice. Worksafe submit that the improvement notice ought to be revoked on the basis that neither it's affirmation nor affirmation with modification can be given effect.

6 Halifax Crane Hire Pty Ltd sought the continuation of the proceedings so that the Tribunal may determine the requirements of the OSH regulations and the obligations of them as employers should a similar situation occur in the future.

Questions to be Answered

7 The first question to be determined is whether the improvement notice issued ought be affirmed, modified or revoked?

8 The second question to be determined is whether the Tribunal ought proceed to further hear and determine the general obligations of the respondent in similar situations in the future?

Improvement Notices – Principles

9 In respect of the application for review of the improvement notice, s 51A of the OSH Act provides:

> **51A. Review of notices by Tribunal**
>
> (1) A person issued with a notice of a decision under section 51(6) may, if not satisfied with the Commissioner's decision, refer the matter in accordance with subsection (2) to the Tribunal for further review.
>
> (2) A reference under subsection (1) may be made within 7 days of the issue of the notice under section 51(6).
>
> (3) A review of a decision made under section 51 shall be in the nature of a rehearing.
>
> (4) The Tribunal shall act as quickly as is practicable in determining a matter referred under this section.
>
> (5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may –
>
> (a) affirm the decision of the Commissioner; or
>
> (b) affirm the decision of the Commissioner with such modifications as seem appropriate; or
>
> (c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,
>
> and the notice shall have effect or, as the case may be, cease to have effect accordingly.
>
> *[(6) deleted]*
>
> (7) Pending the decision on a reference under this section, irrespective of the decision of the Commissioner under section 51, the operation of the notice in respect of which the reference is made shall –
>
> (a) in the case of an improvement notice, be suspended; and
>
> (b) in the case of a prohibition notice, continue, subject to any decision of the contrary made by the Tribunal.

10 The Full Bench of the Western Australian Industrial Relations Commission in ***The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd*** [2007] WAIRC 01273 [93]; (2008) 88 WAIG 22, held that s 51A(5) of the OSH Act requires that the Tribunal inquire into the circumstances relating to the improvement notice. Having inquired into the circumstances the Tribunal may affirm the decision of the Commissioner, affirm the decision of the Commissioner with such modifications as are appropriate, or revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit.

11 Regulation 3.23(2) of the OSH Regulations require:

> (2) If an area of a construction site where any material or gear is being lifted, lowered or otherwise moved from or onto the area is open to the public or if an inspector so requires it then a person who, at the site, is the main contractor, an employer, or a self-employed person must ensure that there is either in place or available in the area a system or device that would prevent persons or vehicles entering the area when the material or gear is being lifted, lowered or otherwise moved.

12 Regulation 1.4(a) of the OSH Regulations states the employer's duty:

> (a) relates only to a matter over which, and the extent to which, the employer has control or can reasonably be expected to have control having regard to the workplace and the work done or caused to be done by the employer or his or her employee.

13 Section 27(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**) provides:

> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be.

Improvement Notices - Consideration

14 Worksafe submit that the improvement notice issued required Halifax Crane Hire Pty Ltd to ensure that a system of traffic management be set up at the site by 1 November 2019. It is not possible to give effect to affirm or modify the requirements of the improvement notice as the site for which the improvement notice concerned no longer exists. Worksafe submit that the improvement notice ought to be revoked on the basis that neither it's affirmation nor affirmation with modification can be given effect.

15 The legislative power to review improvement notices set out in s 51A of the OSH Act clearly references the specific improvement notices subject of referral applications. It does not confer on the Tribunal a power to inquire generally into similar circumstances that may arise in the future. The directors of Halifax Crane Hire Pty Ltd may benefit from the advice of persons with a good knowledge of the OSH Act and the obligations of employers. The continuation of these proceedings would not result in a determination of the nature sought by Halifax Crane Hire Pty Ltd. I am of the view that pursuant to s 27(1)(a)(iv) of the IR Act the Tribunal ought to refrain from further hearing and determining this matter and the hearing be discontinued.

16 I am of the view that the improvement notice ought to be revoked as neither affirmation nor affirmation with modification can be given effect.

2020 WAIRC 00166

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	HALIFAX CRANE HIRE PTY LTD
	APPLICANT
	-v-
	WORKSAFE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 6 MARCH 2020
FILE NO/S	OSHT 8 OF 2019
CITATION NO.	2020 WAIRC 00166

Result	Improvement Notice revoked
Representation	
Applicant	Mr N De Marte
Respondent	Ms F Reading (of counsel)

Order

HAVING HEARD the applicant on his own behalf and Ms F Reading (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders:

THAT by this order, the Improvement Notice is revoked.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2020 WAIRC 00110

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	T & H WILKES PTY LTD
	APPLICANT
	-v-
	CERTA PLANT HIRE PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 18 FEBRUARY 2020
FILE NO/S	RFT 1 OF 2020
CITATION NO.	2020 WAIRC 00110

Result	Order issued
Representation	
Applicant	Mr J Collier as agent
Respondent	Mr L Eynon

Consent Order

HAVING heard Mr J Collier as agent on behalf of the applicant and Mr L Eynon on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the *Owner-Drivers (Contracts and Disputes) Act 2007* hereby orders by consent –

THAT the matter herein is resolved on the basis that the respondent pay to the applicant the sum of $5,632.70 inclusive of GST by no later than 26 February 2020.

(Sgd.) S J KENNER,

[L.S.] Senior Commissioner.