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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2020 WAIRC 00225

DEPARTMENT OF JUSTICE (JURY OFFICERS) CSA AGREEMENT 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	APPLICANT
	-v-
	CIVIL SERVICE ASSOCIATION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 29 APRIL 2020
FILE NO	P 3 OF 2020
CITATION NO.	2020 WAIRC 00225

Result	Order issued
Representation (on the papers)	
Applicant	Ms T Borwick (as agent)
Respondent	Mr J Robb (as agent)

Order

WHEREAS this is an application under s 43 of the *Industrial Relations Act 1979* (WA) (**IR Act)** to vary the Department of Justice (Jury Officers) CSA Agreement 2019 (**Agreement**) by substituting the current 'Schedule 2. Rates of pay' with a replacement 'Schedule 2. Rates of pay';

AND WHEREAS I am satisfied the parties to the Agreement agree to the variation proposed in the applicant's application and ask the Public Service Arbitrator to hear and determine this matter on the papers;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT the page of the Agreement titled 'Schedule 2. Rates of pay' be replaced with the page titled 'Schedule 2. Rates of pay' attached to this Order.

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

NOTICES—Award/Agreement matters—

2020 WAIRC 00284

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 7 OF 2020

APPLICATION FOR A NEW AGREEMENT TITLED

"CITY OF KALAMUNDA OPERATIONAL WORKFORCE AGREEMENT 2019"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Road Boards, Parks And Racecourse Employees' Union Of Workers, Perth* and *City Of Kalamunda* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

1. TITLE

This agreement is the *City of Kalamunda Operational Workforce Agreement 2019* **(Agreement).**

2. DATE OF OPERATION

2.1 This Agreement shall operate

(a) from the first calendar day on registration by the Western Australian Industrial Relations Commission;

(b) and until 30 June 2021, being the nominal expiry date.

2.2 The Agreement will continue to operate after the nominal expiry date, unless it is terminated or replaced in accordance with the Western Australian Industrial Relations Act (1979).

2.3 The parties to this agreement shall be:

(a) City of Kalamunda 2 Railway Road Kalamunda Western Australia 6076;

(b) All employees of the City of Kalamunda employed in the classifications set out in Part 9 - Classifications of this agreement;

(c) This Agreement shall apply to approximately 55 employees

(d) Western Australian Municipal, Roads Boards, Parks and Racecourse employees union of workers, Perth.

2.4 The parties to this Agreement acknowledge that this Agreement can be varied by consent of both parties and subject to approval by the Western Australian Industrial Relations Commission (the Commission), at any time during its operation.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

18 May 2020

INDUSTRIAL MAGISTRATE—Claims before—

2020 WAIRC 00273

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00273
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	FRIDAY, 15 MAY 2020
FILE NO.	**:**	M 230 OF 2019
BETWEEN	**:**	BERNARD CHIPADZA
		CLAIMANT
		AND
		FREO GROUP PTY LTD
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Determination of application to dismiss claim – Refusal of application to amend prior claim between the same parties – Res judicata - Abuse of process
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Industrial Magistrates Court (General Jurisdiction) Regulations 2005 (WA)
		Workplace Relations Act 1996 (Cth)
		Industrial Relations Act 1979 (WA)
Instrument	**:**	*Freo Group Pty Ltd Wheatstone Project Agreement 2013* (Cth)
		Freo Group Pty Ltd Maintenance and General Services Agreement 2016 (Cth)

Case(s) referred to in reasons	**:**	***Chipadza v Freo Group Pty Ltd*** [2019] WAIRC 342
		Neil Pearson & Co Pty Ltd v Comptroller-General of Customs (1995) 38 NSWLR 443
		Jackson v Goldsmith (1950) 81 CLR 466
		Kuligowski v Metrobus (2004) 220 CLR 363
		United Voice WA v Minister for Health [2011] WAIRC 1065
		Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd [2009] HCA 43
		Walton v Gardiner (1992) 177 CLR 378
		D A Christie Pty Ltd v Baker [1996] 2 VR 582
		Mineralogy Pty Ltd v Sino Iron Pty Ltd [2020] WASC 40
		Patrick Jebb as trustee for the Trafalgar West Investments Trust, Superior Lawns Australia Pty Ltd [2019] WASC 121
		Nominal Defendant v Manning [2000] NSWCA 80
		Citigroup Pty Ltd v Mason [2008] FCA 389
		Nikoloski v Molak Plastics Pty Ltd [2005] WAIRC 2110
		Mildren v Gabbusch [2014] SAIRC 15
		Miller v Minister of Pensions [1947] 2 All ER 372
		Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Result	**:**	Application determined
Representation:		
Claimant	**:**	Mr P. Mullally (agent) from Workclaims Australia
Respondent	**:**	Ms J. Flinn (of counsel) as instructed by Minter Ellison

REASONS FOR DECISION

1 The Respondent, Freo Group Pty Ltd, employed the Claimant, Bernard Chipadza, in various roles from 2009. On 26 September 2015, the Claimant was offered employment as a mechanical fitter on the Wheatstone Project.

2 On 12 November 2016, the Respondent notified the Claimant that the Respondent's contract on the Wheatstone Project would finish by 31 December 2016. Consistent with the terms of the offer of employment, the Claimant was also informed that his employment on the Wheatstone Project would end at the same time and there was an opportunity to transfer his employment on the Wheatstone Project to Bechtel.

3 On 13 November 2016, the Claimant lodged an expression of interest seeking employment with Bechtel, but he was not offered employment. The Respondent offered the Claimant three further positions (not on the Wheatstone Project), which were not accepted by the Claimant.

4 The Claimant resigned from his employment on 6 December 2016 with a finish date on 22 December 2016. The Respondent's contract on the Wheatstone Project terminated on 31 December 2016.

5 On 30 December 2016, the Claimant was paid accrued entitlements in the amount of $52,445.14, including $6,949.12 as 'severance'.

6 On or around 3 August 2018, the Claimant lodged an Originating Claim in the Industrial Magistrates Court of Western Australia (IMC) alleging the Respondent failed to comply with the *Freo Group Pty Ltd Maintenance and General Services Agreement 2016* (Cth) (EBA 2016) by failing to pay the Claimant a redundancy payment under cl 20.8 of EBA 2016 and failing to pay in lieu of notice under cl 18.1 of the EBA 2016 (M 126 of 2018).

7 On 30 May 2019, the IMC considered two issues in respect of M 126 of 2018:

   a. an application by the Claimant to amend his Originating Claim, which was opposed by the Respondent (the Claimant's Application); and

   b. at the parties' request, a preliminary issue regarding the application of EBA 2016 (the Preliminary Issue).

8 On the same day the IMC refused the Claimant's Application and, on 4 July 2019, the IMC delivered its Reasons for Decision[1] with respect to the Preliminary Issue.

9 On 15 July 2019, the Respondent lodged an application to dismiss M 126 of 2018.

10 On 21 October 2019, the Claimant lodged a notice of discontinuance withdrawing M 126 of 2018.

11 On 14 November 2019, the Claimant lodged a second Originating Claim alleging the Respondent contravened the *Fair Work Act 2009* (Cth) (FWA) by failing to pay a redundancy payment contrary to s 119 of the FWA and failing to pay *in lieu* of notice contrary to s 117 of the FWA (M 230 of 2019) referrable to the National Employment Standards (NES).

12 On 6 December 2019, the Respondent lodged an application to strike out or dismiss M 230 of 2019 (the Respondent's Application).

13 As a result of the situation concerning novel coronavirus, COVID-19, the parties requested and agreed for the Respondent's Application to be heard on the papers and the parties lodged written submissions.

M 126 Of 2018 And M 230 Of 2019

14 M 126 of 2018 was a claim limited to alleged breaches of EBA 2016 and, if proven, the Claimant also sought a civil penalty pursuant to the FWA. While the face sheet of the Originating Claim indicated, with a 'tick the appropriate box', a contravention of another written law, namely the FWA, no other particulars of this alleged contravention were provided until the Claimant's Application was lodged on 21 May 2019.

15 Further to this, the particulars of claim of M 126 of 2018 alleged that the Respondent refused or neglected to pay a redundancy payment contrary to cl 20.8 of EBA 2016 and refused or neglected to pay in lieu of notice under cl 18.1 of EBA 2016.

16 The Claimant claimed $35,071.34 in respect of these alleged failures.

17 The Respondent denied the claim and denied that EBA 2016 applied to the Claimant's employment. Rather, the Respondent contended that *Freo Group Pty Ltd Wheatstone Project Agreement 2013* (Cth) (EBA 2013) applied to the Claimant's employment during the claimed time period.

18 Further, the Respondent stated that the Claimant's offer of employment specified the employment on the Wheatstone Project would end on completion of the task for which the Claimant was employed, namely the operation of the warehouse and storage facility.

19 Therefore, in respect of M 126 of 2018, the Claimant was on notice from an early stage that the Respondent denied liability under EBA 2016, leaving aside any other contentions raised by the Respondent in its response.

20 A hearing of M 126 of 2018 was listed for trial on 30 May 2019. A number of programming orders were made following a pre-trial conference and the parties complied with the programming orders, including lodging with the IMC an agreed statement of facts relevant to M 126 of 2018.

21 On 15 May 2019, the IMC conducted a directions hearing for M 126 of 2018 to determine any issues, if they arose, prior to the hearing.

22 During the directions hearing, the IMC identified a number of issues concerning the application of EBA 2016 and that M 126 of 2018 did not concern a claim for redundancy under the relevant provisions of the FWA. The Respondent raised concerns about the Claimant amending his claim at trial.

23 On 21 May 2019, the Claimant lodged the Claimant's Application, along with an Affidavit of Patrick Mullally, Industrial Advocate for the Claimant, sworn on 21 May 2019 (Mr Mullally's Affidavit). The Claimant's Application sought:

> *That there be added to the claim as follows: '8. In the alternative the respondent failed to pay notice and redundancy to the claimant (as particularised above) pursuant to s 117 and s 119 of the Fair Work Act 2009.'*

24 The reasons for the amendment were contained in Mr Mullally's Affidavit and included (relevantly):

> *2. On viewing the material for hearing I formed the view that if the EBA* [2016 EBA] *did not apply to the Claimant then the notice and redundancy provisions of the Fair Work Act 2009 can be relied upon.*
>
> *3. I have previously (on the 17th May 2019) given notice of the Claimant's intention to apply for this amendment.*

25 The Respondent opposed the Claimant's Application.

26 The Claimant's Application was heard before the trial on 30 May 2019.

27 The Claimant's Application was refused and oral reasons were given by the IMC, which included:

- the Claimant sought to introduce a new cause of action;
- the Claimant had been on notice since the Respondent lodged its response that the Respondent denied EBA 2016 applied to the Claimant's employment;
- the Claimant gave no reason for the delay in applying to amend M 126 of 2018 or why the provisions of the FWA had been overlooked until the Claimant's advocate had viewed '*the material for hearing*';
- the Claimant's Application contained no basis for why the amendment sought may apply to the Claimant;
- the need to balance the potential prejudice suffered by the parties in terms of delay and preparation of its case (relevant to the Respondent) and not having the claim determined on all fairly arguable grounds (relevant to the Claimant);
- considering case management principles, but also that the ultimate aim is the attainment of justice and a party should not be shut out of litigating an issue which is fairly arguable;
- considering whether the amendments sought were fairly arguable and determining on the information before the IMC that they were not where:
    - the Claimant was employed for a specified task for, arguably, a specified period of time and was, thus, not entitled to a redundancy payment under s 119 of the FWA under s 123 (1)(a) of the FWA; and
    - the Claimant was given at least five weeks' written notice prior to the proposed termination of his employment at the completion of the contract between the Respondent and the third party in compliance with s 117 of the FWA.

28 In M 230 of 2019 the Claimant claims the Respondent contravened another written law, namely the FWA, by failing to pay the Claimant a redundancy payment under s 119 of the FWA and failing to make a payment in lieu of notice under s 117 of the FWA.

29 The Claimant claims $26,819.26 in redundancy payment and $8,252.08 for four weeks' pay in lieu of notice, being a total of $35,071.34.

30 In M 230 of 2019, the Claimant alleges the Respondent's course of conduct between 13 November 2016 and 6 December 2016 'forced' the Claimant to resign and he then particularises five 'dot points' of the course of conduct he alleges 'forced' him to tender his resignation.

31 The Respondent lodged its response to M 230 of 2019 repeating the same reasons for the denial of the claim to that contained in M 126 of 2018.

32 The Respondent says the Claimant is not entitled to payment *in lieu* of notice under s 117 of the FWA, where the Claimant received seven weeks' notice that his employment would be ending upon the termination of the Respondent's contract with a third party.

33 The Respondent also says the Claimant is not entitled to redundancy pay under s 119 of the FWA, where s 123(1) of the FWA provides that div 2 (of s 119 of the FWA) does not apply to an employee employed for a specified time period for a specified task.

The Respondent's Application

34 The Respondent's Application seeks M 230 of 2019 be struck out or dismissed for the following reasons:

- it does not disclose any reasonable grounds for any claim that was known to the Claimant after the hearing on 30 May 2019 in respect of M 126 of 2018;
- its purpose is to cause the Respondent delay and detriment by causing it to further expend resources, and incur legal costs, where the substantive merits have been determined in favour of the Respondent in M 126 of 2018;
- it is an abuse of the Court's process and a waste of the Court's resources where M 230 of 2019 is essentially a resubmission of arguments that the Claimant has had determined by the Court and is *res judicata*; and
- it is frivolous and vexatious in nature.

35 The Respondent's Application is supported by an Affidavit affirmed by Jennifer Joan Flinn, lawyer, on 6 December 2019 with various annexures (Flinn Affidavit). The Flinn Affidavit summarises the procedural history of M 126 of 2018 and M 230 of 2019.

36 The Claimant opposes the Respondent's Application and lodged written submissions containing reference to evidence not in a proper format before the IMC (that is, affidavit evidence).

The Respondent's Contentions

37 The Respondent contends:

- a case may be struck out or otherwise dismissed under the IMC's broader power conferred by reg 7(r) of the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (WA) (Regulations), which permits the Court to '*take any other action or make any other order for the purpose of complying with regulation 5*'. Regulation 5 of the Regulations contains the IMC's overarching duties when dealing with cases;
- the parties have already participated in litigation and the IMC has handed down judgment in favour of the Respondent;
- the Claimant's Application was dismissed;
- the Claimant is now estopped from continuing M 230 of 2019 on the basis of the doctrine of *res judicata* where there has been a final decision regarding the Claimant's entitlement to payment *in lieu* of notice and redundancy payment under the FWA and where the IMC is a judicial tribunal having competent jurisdiction of the cause or matter in litigation;
- the facts and law raised by the Claimant in M 230 of 2019 are the same as that determined in the Claimant's Application in M 126 of 2018 and were determined against the Claimant. Therefore, the certainty of outcome exists in M 230 of 2019 and, accordingly, there is no prospects of success; and
- M 230 of 2019 has been instituted for an improper purpose to circumvent the Respondent's application to dismiss in M 126 of 2018 before it could be determined by the IMC. M 230 of 2019 has been couched in slightly different terms so as to afford the Claimant a second opportunity in respect of an aspect of a claim that has already been dismissed.

The Claimant's Contentions

38 The Claimant contends:

- he was constructively dismissed when he resigned on 6 December 2016 and that this is a reasonable ground for a claim and it was not litigated on 30 May 2019;

- the subject matter of M 230 of 2019 has never been finally litigated as the IMC refused to allow the Claimant's Application to amend M 126 of 2018 and, thus, the Claimant's current claim has not been determined at all. The only issue determined by the Court in M 126 of 2018 was that EBA 2016 did not apply to the Claimant's employment;
- the doctrine of *res judicata* does not apply to M 230 of 2019 because there was no final judgment in M 126 of 2018 where a preliminary issue was determined. M 126 of 2018 was withdrawn following determination of the preliminary issue and no final judgment was given in respect of the issues in M 230 of 2019; and
- he is pursuing his lawful rights under the FWA and it would be a miscarriage of justice to strike out M 230 of 2019 and deny him the opportunity to litigate his claim.

What Was Determined In M 126 of 2018?

39 There were two determinations made in M 126 of 2018:

1. the Preliminary Issue – that is, EBA 2013, not EBA 2016, applied to the Claimant's employment by the Respondent; and
2. the Claimant's Application – that is, the Claimant's application to amend M 126 of 2018 was dismissed.

40 Following these determinations, the Claimant lodged a notice of discontinuance in M 126 of 2018 after the Respondent's application to dismiss M 126 of 2018. That is, the Claimant did not appeal the two determinations and did not proceed to final judgment.

41 In determining the Claimant's Application, the IMC considered, amongst other things, whether the Claimant had a fairly arguable case with respect to the amendments sought based on the information before the IMC in support of the Claimant's Application (that is, Mr Mullally's Affidavit) and the statement of agreed facts. The amendments sought by the Claimant mirror the Originating Claim in M 230 of 2019.

42 In determining the Preliminary Issue, the IMC was requested, as a matter of construction, to give a ruling on which of two enterprise agreements applied to the Claimant's employment. The IMC determined it was EBA 2013.

Does The Doctrine Of *Res Judicata* Or Issue Of Estoppel Apply To M 230 of 2019?

43 The doctrine of *res judicata* applies where an action has been brought and the action has been finally determined by a competent tribunal, whereupon the parties cannot challenge the adjudication in subsequent litigation as between the same parties.[2]

44 Therefore, the requirements which need to be established for *res judicata* to take effect include:

- the action is between the same parties (or their privies);
- the judicial decision which is said to create the estoppel is final; and
- the same cause of action has been decided.

45 The parties in M 230 of 2019 are the same parties in M 126 of 2018. The judicial decision determined in M 126 of 2018 was the refusal of the Claimant's Application and the Preliminary Issue. The reasons for refusing the Claimant's Application included reference to whether the Claimant's proposed amendments were fairly arguable. The Preliminary Issue determined the application of an enterprise agreement. Neither of these determinations finally determined the Claimant's cause of action, which was a claim for redundancy payment and payment *in lieu* of notice under EBA 2016, albeit that the determinations may have resulted in the Claimant lodging a notice of discontinuance.

46 Issue of estoppel, on the other hand, is based on a determination of an issue (that is, the same question) where the judicial decision creating the estoppel is final and the parties to the judicial decision are the same (or their privies).[3] Relevant to the Claimant and the Respondent, the determination of the Preliminary Issue would constitute an issue estoppel if the Claimant sought to re-litigate the application of EBA 2016.

47 However, while the determination of the Claimant's Application involved consideration of whether the amendments sought, namely the addition of alleged contraventions of s 117 of the FWA and s 119 of the FWA, was fairly arguable, it cannot be said that this involved the IMC making a final decision about the application of s 117 of the FWA and s 119 of the FWA to the Claimant's circumstances. The ultimate decision concerned whether the Claimant ought to be granted leave to amend M 126 of 2018 and, as part of that decision, the IMC expressed a view on whether, for the purposes of determining the Claimant's Application, the Claimant's proposed amendments were fairly arguable, having regard to the information it had for the purposes of making a determination.

48 Thus, in my view the doctrines of *res judicata* and issue estoppel do not apply to M 230 of 2019.

Does M 230 of 2019 Disclose Any Reasonable Grounds For The Claim?

49 The IMC has the power to summarily dispose of a claim on the basis that there is no reasonable prospect of success.[4] Further, the IMC's duties in dealing with cases are set out in reg 5 of the Regulations.[5] Regulation 7 of the Regulations sets out what the IMC may do for the purpose of controlling and managing cases and trials, including, at reg 7(1)(h) of the Regulations '*order that an issue not be tried*', and at reg 7(1)(r) of the Regulations '*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 the Respondent if it concludes that the Claimant's 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. Further, the IMC has the power to make the orders sought by the Respondent if it otherwise concludes, in the alternative, that M 230 of 2019 has been commenced for an improper purpose, is oppressive, frivolous or vexatious.[6]

51 The balance of the Respondent's Application, in essence, seeks to have M 230 of 2019 dismissed as an abuse of process.

52 A limited form of estoppel occurs when a Court prevents a party from litigating an issue because to do so would amount to an abuse of process.

53 The categories of abuse of process are not closed,[7] but this does not mean that the concept of an abuse of process is without meaning or at large. Further, it does not mean '*that any conduct of a party … in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party … however … abuse of process extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment"*.[8]

54 Proceedings may be characterised as an abuse of process if, '*notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings'*.[9]

55 Categories may include:[10]

(a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;

(b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

(c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

56 An abuse of process argument may apply to repeated interlocutory proceedings.[11] However, there appears to be no reason why an abuse of process argument, not involving *res judicata* or *issue of estoppel*, could not apply to a current claim from interlocutory proceeding in another prior claim, where the two claims involve the same parties and ostensibly the same issue. Of course, whether there is abuse of process is a different question.

57 I also note that a recent Western Australian Supreme Court case, ***Mineralogy Pty Ltd v Sino Iron Pty Ltd*** [2020] WASC 40, discussed in detail general principles relevant to abuse of process.[12] I do not intend to recite the general principles referred to by Kenneth Martin J, however, two principles identified by His Honour are relevant, albeit not of themselves necessarily determinative:

(g) An abuse of process event can extend beyond a mere situation of a party seeking to relitigate matters or issues which have been finally decided. There may be an abuse of process found by a person seeking to litigate matters which could and should have been litigated in earlier proceedings, as was observed by Lord Bingham of Cornhill in an important House of Lords decision concerning abuses of process, namely ***Johnson v Gore Wood & Co*** *[2000] UKHL 65; [2002] 2 AC 1, 31. See also* ***Tomlinson*** *[26], where four members of the High Court of Australia had observed:*

> *…[M]aking a claim or raising an issue which was made or raised and determined in an earlier proceeding,* ***or which ought reasonably to have been made or raised for determination in that earlier proceeding****, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel.*

(h) Vaughan J observed in ***Jebb v Superior Lawns*** *[119] by reference to* ***UBS AG v Tyne****, that an abuse of process can be ascertained notwithstanding (1) the factual merits of the underlying claim having not been determined and (2) the delay in prosecuting the claim not rendering a potential fair trial as impossible.* (original emphasis)

58 Importantly, the power of a court to dismiss proceedings as an abuse of process must be exercised with caution and only in exceptional cases.[13]

59 There is no formula or general rule in determining whether an abuse of process applies, either in respect of interlocutory or in other proceedings, but the types of factors that may be considered in determining whether an abuse of process applies include:[14]

- an explanation for any delay (if delay applies);
- a change of circumstances or the discovery of new evidence;
- if evidence existed previously, any explanation for the failure to refer to the evidence earlier;
- whether the Court is invited to revisit questions of law or facts which have been fully argued;
- the availability of other remedies, including appeal rights and costs orders;
- public policy reasons in finality of litigation and preventing parties from presenting the same material to the same or a different Court in the hope the outcome will be different, or failing or avoiding putting their best case forward and then later seeking to remedy the position; and
- all the circumstances of the case, including considerations of fairness and justness in closing the gate to litigants and whether a trial is just and fair for all parties can be carried out.

60 For the following reasons, M 230 of 2019 ought to be dismissed as an abuse of process:

- M 126 of 2018 was a narrowly pleaded claim, which at all times was disputed by the Respondent on the basis that EBA 2016 did not apply to the Claimant's employment;

- the Claimant provided no explanation for the delay in applying to amend M 126 of 2018 beyond preparing for hearing;
- when the application to amend M 126 of 2018 was refused, the parties requested the IMC to rule on the applicable EBA;
- pursuant to s 565(1) of the FWA, the Claimant was entitled to appeal the determinations of the Claimant's Application and the Preliminary Issue and, pursuant to s 565(2) of the FWA, leave to appeal is not required (albeit leave may be required to admit new evidence on appeal);[15]
- following determination of the Preliminary Issue, the Respondent applied to dismiss M 126 of 2018, but before the application could be heard the Claimant lodged a notice of discontinuance;
- approximately one month later the Claimant lodged M 230 of 2019 claiming the exact same amount of money for the exact same reasons as provided in the Claimant's Application, namely a failure to comply with s 117 of the FWA and s 119 of the FWA, which had been refused;
- the reasons particularised in M 230 of 2019 must have been in the Claimant's knowledge at the time of commencing M 126 of 2018, given the subject matter, and was never raised in M 126 of 2018 and never part of the Claimant's Application;
- the Claimant has not in any way explained why the subject matter in M 230 of 2019 was never pursued in M 126 of 2018; and
- given the limitations of any costs award under the FWA, an award of costs, arguably, cannot remedy the Respondent's position: s 570(2) of the FWA.

61 The Claimant seeks to overcome the loss of an application to amend (the Claimant's Application) by commencing a new action in circumstances where the Claimant had an opportunity to run the whole of his claim, but did not seek to do so until the last minute and failed to explain the delay involving circumstances that must have been within his knowledge at the commencement of M 126 of 2018. This exposes the Respondent to the prejudice that refusing the Claimant's Application sought to avoid.

62 I have paid particular regard to the Claimant's position where the decision will operate harshly, acknowledging that in M 126 of 2018 and M 230 of 2019, from the Claimant's perspective, there is no final judgment.

63 However, having regard to all of the circumstances, including the Claimant's decisions with respect to litigating both claims, in my view, M 230 of 2019 constitutes an abuse of process where it seeks to litigate the same issue against the same party in circumstances where that issue was refused by the IMC in the Claimant's Application in M 126 of 2018. In that sense I am satisfied M 230 of 2019 is oppressive and unfairly revives previous failed litigation, and it is not efficient, economical and expeditious for the claim to continue.

The Respondent's Application Of Costs

64 The Respondent submits that if the Respondent's Application is granted the IMC ought to make an order as to costs, pursuant to s 570(2)(a) of the FWA.

65 The Claimant disputes that M 230 of 2019 is vexatious or frivolous.

66 Section 570(2) of the FWA provides that a party *may* '*be ordered to pay costs only if: (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause*'.

67 Vexatiousness imports intent on the part of one party to abuse the process.[16] While I found that M 230 of 2019 ought to be dismissed an abuse of process, similar to the IMC decision in ***Nikoloski*** (citation below), I cannot conclude the Claimant has *intended* to abuse the process. An abuse of process can result from other misguided reasons without an intention to harass or embarrass. Therefore, it cannot be said that it is axiomatic that once there has been a finding of an abuse of process, a finding of vexatiousness follows. I do not find that the Claimant intended to abuse the process. He was of the view that he could start again following the refusal of the Claimant's Application. In my view, he was wrong, but that does not amount necessarily to his actions being vexatious, nor does it amount the claim being frivolous in all the circumstances.

68 For those reasons I decline to exercise the discretion to award costs as sought by the Respondent.

Outcome

69 For the reasons given, the Respondent's Application is granted and the whole of the claim M 230 of 2019 is dismissed pursuant to reg 5 and reg 7(1)(r) of the Regulations.

70 Further, there be no order as to costs.

D. SCADDAN
INDUSTRIAL MAGISTRATE

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[1] ***Chipadza v Freo Group Pty Ltd*** [2019] WAIRC 342.

[2] ***Neil Pearson & Co Pty Ltd v Comptroller-General of Customs*** (1995) 38 NSWLR 443, 450 (referring to ***Jackson v Goldsmith*** (1950) 81 CLR 466).

[3] ***Kuligowski v Metrobus*** (2004) 220 CLR 363.

[4] ***United Voice WA v Minister for Health*** [2011] WAIRC 1065.

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

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

[7] ***Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*** [2009] HCA 43 [28].

[8] ***Jeffrey*** [28].

[9] ***Walton v Gardiner*** (1992) 177 CLR 378, 393.

[10] ***Jeffrey*** [27].

[11] ***D A Christie Pty Ltd v Baker*** [1996] 2 VR 582; ***Nominal Defendant v Manning*** [2000] NSWCA 80.

[12] Paragraph 68(a) to (r). In doing so, at [67], His Honour Kenneth Martin J also referred to, and adopted, applicable legal principles identified by His Honour Vaughan J in ***Patrick Jebb as trustee for the Trafalgar West Investments Trust, Superior Lawns Australia Pty Ltd*** [2019] WASC 121 [102] - [118].

[13] ***Walton v Gardiner***, 392-393.

[14] ***Nominal Defendant*** (Mason P, dissenting), (Heydon JA) (also referring to ***D A Christie*** (Charles JA)).

[15] ***Citigroup Pty Ltd v Mason*** [2008] FCA 389. ***Citigroup*** discussed similar provisions under the *Workplace Relations Act 1996* (Cth).

[16] ***Nikoloski v Molak Plastics Pty Ltd*** [2005] WAIRC 2110 [12].

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The *Fair Work Act 2009* (Cth)

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 Industrial Magistrates Court (WA) (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), s 81 and s 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 contravening National Employment Standards: FWA, s 44(1).

[5] An obligation upon an '***employer'*** 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 12, s 14, s 42 and s 47. A National Employment Standard entitlement of an employee 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 13, s 42 and s 47.

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:

- The National Employment Standards set out in Part 2-2 of the FWA: FWA, s 44(1) and s 539. Those standards include obligations of employers to employees with respect to notice of termination or payment in lieu of notice as set out s 117 of the FWA and redundancy pay as set out in s 119 to s 123 of the FWA.
- 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 12 and s 14. 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.

[8] 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.

[9] 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:

> *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* [362].

2020 WAIRC 00275

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00275
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 20 NOVEMBER 2019, THURSDAY, 21 NOVEMBER 2019, WEDNESDAY, 15 JANUARY 2020, WEDNESDAY, 8 APRIL 2020
DELIVERED	**:**	FRIDAY, 15 MAY 2020
FILE NO.	**:**	M 130 OF 2018
BETWEEN	**:**	GAVIN SMITH
		CLAIMANT
		AND
		SILKWOOD HOLDINGS (WA) PTY LTD AS TRUSTEE FOR THE DIABLO DISCRETIONARY TRUST T/A DOUGLAS JONES FINANCIAL SERVICES
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Modern award coverage – Financial services – Application of *Clerks – Private Sector Award 2010* (Cth) – Alleged contravention of terms of a modern award on award pay – Payment of untaken paid annual leave upon termination of employment – Contravention of National Employment Standards and *Fair Work Act 2009* (Cth) – Payment of long service leave under *Long Service Leave Act 1958* (WA)
Legislation	**:**	*Fair Work Act 2009* (Cth) *Long Service Leave Act 1958* (WA) *Corporation Act 2001* (Cth) *Fair Work Regulations 2019* (Cth) *Long Service Leave Act 1955* (NSW)
Instrument	**:**	*Clerks – Private Sector Award 2010* (Cth)
Case(s) referred to in reasons	**:**	***Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 148 ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** (2006) 153 IR 426 ***Kucks v CSR Ltd*** (1996) 66 IR 182 ***Amcor Ltd v CFMEU*** [2005] HCA 10 ***Ghimire v Karriview Management Pty Ltd (No 2)*** [2019] FCA 1627 ***Cigna Insurance Asia Pacific Ltd v Packer*** [2000] WASCA 415 ***Dean v Weir Minerals Australia Ltd*** [2018] FCCA 108 ***Matus v Australia Wide Computer Resources Pty Ltd (No 2)*** [2015] FCCA 2055 ***Australasian Meat Industry Employees Union v Australian Meat Holdings Pty Ltd*** (1999) 93 IR 308 ***Concut Pty Ltd v Worrell*** [2000] HCA 64 ***North v Television Corporation Ltd*** (1976) ALR 599 ***Wall v Westcott*** (1982) 1 IR 252 ***Mildren v Gabbusch*** [2014] SAIRC 15 ***Miller v Minister of Pensions*** [1947] 2 All ER 372 ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336

Result	:	Claim proven in part
Representation:		
Claimant	:	Mr P. Mullally (industrial agent)
Respondent	:	Mr D. Jones (Director) on behalf of the Respondent

REASONS FOR DECISION

Introduction

1 Gavin Smith (Mr Smith) was employed by Silkwood Holdings (WA) Pty Ltd as the trustee for the Diablo Discretionary Trust t/as Douglas Jones Financial Services (the Company) from 7 February 2008 to 8 December 2017.

2 The role Mr Smith was employed to do is a fact in dispute and forms one of the central issues for determination. Mr Smith says that he was employed as a Portfolio Manager and Client Liaison Officer carrying out administration and clerical duties consistent with a level 5 employee under the *Clerks – Private Sector Award 2010* (Cth) (the Award), which he says was applicable to his employment by the Company.

3 Mr Smith claims a sum of $49,243.33[1] from the Company, alleged to be:

- $4,487.74 for a shortfall of award wages from 1 July 2015 to 8 December 2017 under the provisions of the Award;
- $36,791.72 for the non-payment of annual leave not taken during the course of employment pursuant to s 90(2) of the *Fair Work Act 2009* (Cth) (FWA); and
- $7,964.33 for the non-payment of accrued long service leave under the *Long Service Leave Act 1958* (WA) (LSL Act).

4 Mr Smith claims the Company contravened the FWA and the Award in failing to pay him the entitlements referred to above and failing to comply with certain other requirements, relating to the provision of pay slips, of the FWA. Arising from this, Mr Smith also claims a pecuniary penalty for contraventions of the FWA and pre-judgment interest.

5 The Company disputes the claim. First, the Company denies the Award (or any award) applied where Mr Smith was employed as a graduate accountant and a para-planner and was 'award free'.

6 Secondly, the Company claims that Mr Smith was paid all entitlements owed under the relevant employment contracts, including annual leave.

7 Thirdly, the Company claims Mr Smith is not owed long service leave where his employment was terminated for 'serious misconduct'.

8 In Schedule I of this decision I have set out the law relevant to the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC) in determining this case. Relevant to matters identified under the heading, 'Jurisdiction' in Schedule I of this decision, I am satisfied: the Company is a corporation to which paragraph 51(XX) of the *Constitution* applies and it is a '***national system employer***'; and Mr Smith was an individual who was employed by the Company and is a '***national system employee***'.

9 There are potentially seven issues for determination:

a. Whether Mr Smith and the Company are covered by the Award (or no award)?

b. If Mr Smith and the Company are covered by the Award, what was the appropriate classification of Mr Smith's role under the Award?

c. If Mr Smith and the Company are covered by the Award, what are Mr Smith's entitlements under the Award?

d. Is Mr Smith entitled to the payment of untaken accrued annual leave?

e. What, if any, contraventions of the FWA have occurred?

f. Whether Mr Smith is entitled to long service leave payment under the LSL Act?

g. Orders and the payment of a pecuniary penalty (if any).

First Issue – Is The Award Applicable To Mr Smith's Employment By The Company?

The Award Coverage

10 A modern award made by the Fair Work Commission does not impose an obligation or give an entitlement unless the award *applies* to the employer and the employee: s 46 of the FWA. An award *applies* to the employer and the employee if the award *covers* each of them: s 47 of the FWA. An award *covers* an employer and an employee if the award is expressed to cover each of them: s 48(1) of the FWA. It follows that the starting point to determine award coverage are the words of the award itself. More specifically, it is '*the objective meaning of the words used* [in the relevant award] *bearing in mind the context in which they appear and the purpose they are intended to serve*': ***Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 148 [22].

11 The interpretation of an award begins with consideration of the natural and ordinary meaning of the words used.[2] An award is to be interpreted in light of its industrial context and purpose, and must not be interpreted in a vacuum divorced from industrial realities.[3] An award must make sense according to the basic conventions of English language.[4] Narrow and pedantic approaches to the interpretation of an award are misplaced.[5]

12 Clause 4.1 of the Award provides that '[t]*his award covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work, including administrative duties of a clerical nature, and to those employees. However, the award does not cover:*

(a) an employer bound by a modern award that contains clerical classifications; or

(b) an employee excluded from award coverage by the Act'.

13 Clauses 4.2 and cl 4.3 of the Award provides that the Award does not cover:

- employees who are covered by a modern enterprise award or an enterprise instrument or employers in relation to those employees; and
- employees who are covered by a State reference public sector modern award or a State reference public sector transitional award, or employers in relation to those employees.

14 Clause 4.6 of the Award details several industry awards where the Award does not cover the employer. None of these awards are relevant to this claim.

15 Clause 4.7 of the Award provides that '[w]*here an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work*'.

16 Clause 3.1 of the Award defines '**clerical work**' to include '*recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard and attending a reception desk*'.

17 Similarly, cl 3.1 of the Award defines '**employee**' to mean '*national systems employee*' under the FWA and '**employer**' to mean 'national systems employer' under the FWA.

Is the Company an employer in the private sector?

Evidence

18 'Private Sector' is not defined in the Award or the FWA. The dictionary meaning of '**private sector**' includes '*businesses or industries not owned or controlled by the government*'.[6]

19 Mr Smith and Mr Lyall Jones (Mr Jones), Director of the Company, agree on two things:

(1) Mr Jones is a Director of a proprietary limited company, which owns and operates a business providing financial services (according to Mr Smith) or accounting and tax agent services (according to Mr Jones) to clients for commercial gain; and

(2) the Company employed Mr Smith.

20 Regardless of how the service to clients is characterised, for the purposes of determining whether the Company is an employer in the private sector it is safe to say that the Company is not owned by the government and, beyond any statutory requirements, such as those under the *Corporations Act 2001* (Cth), it is not controlled by the government. Further, the Company operates a business and the business provides a service to clients in return for money.

21 Therefore, I am satisfied to the requisite standard that the Company operates its business in the private sector and is an employer in the private sector.

Was Mr Smith engaged wholly or principally in clerical work, including administrative duties of a clerical nature?

22 To answer this question, it first needs to be determined what, in fact, Mr Smith's role was when he was employed by the Company.

Evidence

23 Mr Smith has a Bachelor of Business with majors in finance and accounting. He has an accreditation as an ASX Accredited Listed Products Adviser and has attained various other qualifications relevant to financial planning.[7]

24 According to Mr Smith, save for the first two weeks of his employment when he was employed as an Accountant, he was employed as a Portfolio Manager and Client Liaison Officer. Mr Smith refers to the Company's website which he says continues to refer to his position as Portfolio Administrator and Client Liaison Manager after his employment was terminated.[8]

25 On 7 February 2008, Mr Smith was offered employment as an Accountant.[9]

26 On 27 August 2009, Mr Smith was offered employment as an Accountant.[10]

27 On 1 March 2010, Mr Smith was offered employment as an Accountant.[11]

28 On 20 October 2016, Mr Smith was offered employment as an office administrator.[12]

29 Mr Smith's income tax returns for 2008, 2009 and 2012 refers to his main salary and wage occupation as 'Financial adviser'.[13]

30 On 8 December 2017, following the termination of his employment, Mr Smith was provided with a reference from Mr Jones stating that his duties included '*financial planning, statement of advice compilation and accounting*'. Further to this, Mr Smith was described as the '*client liaison manager and implements the approved recommended strategies to client's investment portfolios and superannuation fund accounts*'.[14]

31 Mr Smith says that from July 2013 he worked from home so that Mr Jones could rent out the business premises located in the Perth CBD. Prior to this, Mr Smith worked at the Company's office located at 12 St George's Terrace, Perth (Perth Office). Consistent with this, Mr Smith referred to an email from Mr Jones.[15] Mr Smith says that following this email, all of the

business records and the Company's office equipment was re-located to his home address in Harrisdale until it was collected on 5 April 2018.[16] Thereafter, he says he regularly met Mr Jones at the Perth Office.

32 A list of items collected by Mr Jones on 5 April 2018 shows that it includes two keys to a mail box, various stationary, client records and other financial documents and various computer items and other office equipment.[17]

33 Mr Smith says that his duties and tasks included:[18]

a) Answering client phone calls and liaising with them

b) Answering phone calls from investment, superannuation and insurance companies

c) Diary bookings and management of the financial adviser's events and meetings

d) Regular mail collection from all mail boxes, including the PO Box at St George's Terrace and sorting of the documentation

e) Electronic and manual generation of portfolio reports for clients on a quarterly basis

f) Facilitation of the required tasks within the computer software programs

g) Sending and receiving emails to clients as well as investment, superannuation and insurance companies

h) Filing of client records and documentation in alphabetical order

i) Completion of application forms for clients

j) Photocopying and scanning of documents

k) Records management of bills

l) Stationary ordering

m) Word processing of client letters

n) Accompanying the financial adviser to client meetings and making notes in client files.

34 In his oral evidence, Mr Smith clarified that he also facilitated investment portfolios for clients according to statements of advice, which included the preparation of financial documents for clients, reporting for clients on a quarterly basis, preparing compliance documents for clients and maintaining files for each client. Further, he also made applications for insurance cover and superannuation for clients, liaised with investment companies and stock brokers for maintaining client portfolios.

35 Mr Smith said that, in effect, his home became the Company's office and he had all of the client files at his home and met with clients' neighbouring offices at the Perth Office and at his home. Mr Smith also said Mr Jones would come to his home and he would communicate with Mr Jones by telephone, email and in person.

36 Further, he said that all client communication was diverted to his mobile telephone.

37 In cross-examination, Mr Smith acknowledged that he carried out many other tasks that were not referred to in paragraph 7 of his witness statement (Exhibit 1), including:

- the preparation of taxation returns;
- discussions with clients in person and on the telephone;
- actioning clients' instructions;
- liaising with stock brokers for share transactions and insurance companies for applications;
- preparation of statements of advice; and
- analysing clients' financial situation where the statement of advice was prepared for clients' needs and financial situation and advice specific to clients and getting clients to approve the advice.

38 Mr Smith described the task and duties in paragraph 7 as a summary and said that he performed many other roles. Mr Smith acknowledged that he applied for one of two positions at the Company, including an accounting position and a financial planning position. His goal was to put into practice the skills he had from his degree and to assist clients having completed a double major. He said he adopted a confidential and positive approach to client needs and used accounting functions and transactions, including financial reporting for clients.

39 Mr Smith trained and supervised three people, who, as I understand it, assisted Accountants employed by the Company in clerical and administrative duties. He said that his duties did not change from those carried out at the Perth Office to those carried out at his home. That is, his duties remained the same after July 2013 when, in effect, the business relocated to his home.

40 Mr Smith said that the Company sold its accounting business in 2011 and retained its financial planning business, although Mr Smith denied being a financial adviser (contrary to the income taxation records), saying that the word 'financial' was there to reflect the industry that he worked in. Up to 2011, and prior to the sale of the accounting business, the Company employed a receptionist at the Perth Office. As I understood it, there may have been some sharing of services after the sale of the business with another business who occupied the same location.

41 Mr Smith acknowledged that his employment contract contained a bonus component for new clients who engaged with the Company.

42 Mr Smith acknowledged that the Company is a small business, and, as I understood it, from 2013 he and Mr Jones were the sole employees.

43 Mr Smith said his main role at the Company was Portfolio Manager and Client Liaison Officer, requiring him to keep in constant contact with clients to keep them informed and answer their questions, manage their investments for superannuation and other investments (which required a certain level of qualification including financial planning). His degree enabled him to prepare reports for clients regarding their investments.

44 Mr Smith agreed that he was involved in para-planning, which involved the preparation of statements of advice for clients and involved analytical skills, which he accepted was more involved than clerical skills and was an in-depth process. He also accepted that clerical duties formed part of the duties for financial planning, but said his main duties were clerical and administration.

45 Mr Smith accepted that he undertook courses for his professional employment, including working towards his Certified Practising Accountant. He accepted the Company provided no other services other than accounting and professional services.

46 Mr Smith prepared the statements of advice which were signed off by Mr Jones as the licensed financial adviser. Mr Smith accepted that he wrote his own reference,[19] anticipating future employment and Mr Jones signed the document. Mr Smith agreed it was a fair description of his employment, but he said these roles were clerical roles.

47 Mr Smith relied on witness evidence from Ms Nancy Vos, Ms Michelle D'Roza, Ms Leslie Ross, Mr Wayne Hand and his mother, Ms Avril Smith. The relevance of their evidence was limited, and I place significantly less weight on their evidence. The purpose of their evidence was to corroborate Mr Smith's opinion of his role, however, it was apparent that each of the witnesses had limited knowledge of Mr Smith's role, or did not work with Mr Smith, or relied upon what he had told them his opinion of his role was.

48 Mr Jones said Mr Smith was employed as a graduate accountant and then worked as an internal para-planner with ancillary administrative duties. Mr Jones said Mr Smith was a junior member of the team working under his direction and performed several of the necessary tasks in developing a financial plan for a client, including:[20]

a. preparing and gathering of clients' financial reports and records;

b. reviewing the clients' financial records and create or model different possible financial scenarios and make recommendations on which financial plan should be followed;

c. preparing a statement of advice or review of financial advice;

d. assisting Mr Jones in presenting the information to clients by producing charts, graphs and histograms;

e. answering clients' questions and follow up with clients and any other staff to ensure that the financial plan was followed and make changes to any plan; and

f. where necessary, meeting with clients.

49 Mr Jones said most 'firms' require a para-planner to have an associate degree with industry experience or a bachelor's degree with some relevant certification.

50 Mr Jones said that he employed other staff members to attend to administrative duties.[21]

51 Mr Jones also referred to Mr Smith's employment contracts and income taxation documents, which he says corroborates his characterisation of Mr Smith's role.

52 In respect of the employment contract signed by Mr Smith in October 2016 where Mr Smith is described as an 'office administrator', Mr Jones says that from 2011 onwards the business comprised of him and Mr Smith, and Mr Smith's contract was altered to take into account a bonus entitlement for him to bring new business. Mr Jones says that Mr Smith's role altered as a result. Further, in relation to the Company's website, Mr Jones says Mr Smith determined his role for the website, which was a marketing tool and was established in August 2017.[22]

53 In cross-examination, Mr Jones confirmed that he is a qualified accountant and financial adviser. He holds the licence to carry out financial advising as an authorised licensee. He said the Company provides financial advice services to clients.

54 Mr Jones acknowledged that Mr Smith obtained an order in the Western Australian Industrial Relations Commission with respect to the payment of a contractual entitlement related to bonus payments. In that regard, Mr Jones says that this demonstrates that the Company never had an intention to remunerate Mr Smith for clerical duties (by the bonus) and to remunerate him for 'higher duties'.

55 Mr Jones denied Mr Smith was an 'office administrator' as described in the contract of employment dated 20 October 2016. While Mr Jones agreed that Mr Smith did carry out the tasks identified in Mr Smith's witness statement,[23] he said that he carried out additional duties to those tasks, including the preparation of statements of advice. Mr Jones would then review the advice prepared by Mr Smith and sign off on the advice because he has the licence.

56 Relevant to the issue of whether the Award applies to Mr Smith, Mr Jones relied on the witness evidence of Mr Shane Pye (Mr Pye) and Mr Simon Lau (Mr Lau). Similar to the evidence relied upon by Mr Smith, the relevance of their evidence was limited. The purpose of their evidence was to corroborate Mr Jones' opinion of Mr Smith's role, however, it was apparent that Mr Pye had limited knowledge of Mr Smith's role, or did not work with Mr Smith, or relied upon what he was told about Mr Smith's role. Initially, Mr Lau had some oversight of Mr Smith's employment during the early years of their employment by the Company, although this ceased in around 2010 when the accounting and taxation component of the Company was sold. Thereafter Mr Lau's involvement and knowledge of Mr Smith's employment was limited to infrequent observations. However, his observations and knowledge of Mr Smith's role at the Company from approximately 2008 to 2010 is consistent with the role of a trainee accountant.

Determination

57 In my view, Mr Smith and Mr Jones tailored their evidence to suit their respective positions on various issues.

58 In particular, if regard was had only to the duties and tasks listed in paragraph 7 of Mr Smith's witness statement,[24] and if the Award applied, Mr Smith's duties and tasks would be characteristic of a level 1 classification under the Award. This is inconsistent with the claim made by Mr Smith. Thereafter, Mr Smith clarified in his oral evidence his duties by expanding the duties to incorporate more sophisticated duties of a financial nature. Cross-examination elicited further expansion of his duties, such that it was apparent that Mr Smith was performing his role in a predominantly independent manner with little supervision in a financial planning and/or financial advice business operated by two people, he and Mr Jones. Furthermore, it was also apparent that his duties went well beyond that originally outlined by him.

59 By way of example, Mr Smith did not merely receive and answer telephone calls from clients or financial organisations. It is apparent that where he communicated with clients and financial organisations by telephone, he did so for the purpose of advising clients in financial matters, obtaining their instructions and preparing financial documents in accordance with their instructions.

60 While Mr Jones was responsible for authorising and signing off on any work undertaken as the licensee for the business operated by the Company, it is apparent that Mr Smith was the person undertaking the majority of the client work.

61 Most relevantly, this is consistent with the Company's employment reference authored by Mr Smith and signed by Mr Jones, where Mr Smith characterised his duties significantly different to the bland clerical work he referred to in paragraph 7 of this witness statement. It is reasonable to infer that he did so because he wanted to secure future employment beyond that of an actual clerical worker, consistent with his qualifications and stated aspirations.

62 This is not to say that I found Mr Jones' evidence persuasive on all issues, but in regard to his evidence concerning Mr Smith's duties and role, his evidence was consistent with expansion of duties referred to by Mr Smith in his oral evidence, both in evidence-in-chief and cross-examination and consistent with other evidence, such as the reference written by Mr Smith and signed by Mr Jones.

63 Therefore, I find the *function* of Mr Smith's role as Portfolio Manager and Client Liaison Officer was to support the licensee in providing financial advice to, and management of, the Company's clients.

64 The *tasks* performed by Mr Smith as Portfolio Manager and Client Liaison Officer in discharging this function were:

a. taking instructions from clients and obtaining financial documents and other records to assess clients' financial needs;

b. preparing financial reports and advice and analysing client financial needs in the context of the information obtained;

c. ongoing managing and reviewing of clients' financial position;

d. liaising with other staff and third parties as required; and

e. clerical and administrative duties as required.

65 For my purposes - identifying the relevant award (if any) and, if necessary, the appropriate classification - it is sufficient to make the findings below on the tasks of a Portfolio Manager and Client Liaison Officer in the position of Mr Smith during the relevant period. A Portfolio Manager and Client Liaison Officer:

a. communicated with clients and financial organisations so as to give financial advice and prepare financial documents in accordance with that advice and the clients' instructions;

b. applied knowledge and skill in order to prepare statements of advice, financial reports and undertake an analysis of clients' financial requirements;

c. carried out other financial duties from time to time, including preparation of taxation returns, maintaining client files, investments and portfolios and client compliance;

d. carried out other duties, including clerical duties, in order to complete the tasks referred to in a, b and c; and

e. completed other administrative duties where required.

66 The time involved by a Portfolio Manager and Client Liaison Officer in the respective tasks outlined above is difficult to quantify with accuracy, but, having regard to the evidence, I am satisfied that tasks a, b, and c comprised most of Mr Smith's work time and was the principal work that he was engaged to perform and did perform. That he also carried out work of a clerical nature is hardly surprising given the business was a two man operation, but I am not satisfied that Mr Smith was engaged in wholly, or even principally, '**clerical work**' (as defined) where it is apparent that his principal role was much more than this.

67 Mr Smith carried out the functions and tasks (i.e. his work) at an office in the Perth Office from 2008 to July 2013 and thereafter carried out the same functions and tasks at his home address in Harrisdale until the termination of his employment in December 2017.

68 Therefore, while his contracts of employment refer to him as an accountant and in December 2016 as an officer administrator, his duties and tasks, and therefore his role, did not, in fact, change over the course of his employment. It is the functions and tasks undertaken, rather than nomenclature, that is important.

69 Mr Smith was employed by the Company and undertook work tasks and functions as an employee of the Company. His role as a Portfolio Manager and Client Liaison Officer did not wholly or principally require him to be engaged in '**clerical work**', as that term is defined by the Award.

70 Where I am not satisfied to the requisite standard that the role engaged in by Mr Smith was wholly or principally clerical work, I am not satisfied the Award covered the Company's employment of Mr Smith.

71 Where I am not satisfied the Award covered Mr Smith's employment by the Company, it is unnecessary to consider his classification under the Award or what entitlements may have applied (as sought by him in the claim). That is, the second and third issues for determination do not require consideration in light of the conclusion reached regarding the application of the Award.

Fourth Issue – Is Mr Smith Entitled To Alleged Untaken Accrued Annual Leave?

Evidence

72 Mr Smith says that he never took annual leave during the entire time of his employment by the Company,[25] evidence he maintained in cross examination. Further, Mr Smith says that Mr Jones informed him that he [Mr Jones] would pay out his entitlements upon the termination of Mr Smith's employment upon Mr Smith writing to him to ask him to do so.[26]Therefore, pursuant to s 90(2) of the FWA, Mr Smith claims the payment of untaken paid annual leave he says was owing at the time of the termination of his employment.

73 One of the facts in dispute in respect of this issue is whether the Company implemented a Christmas shut down during the period of Mr Smith's employment.

74 At the outset, I note the Company did not maintain or provide any employment records[27] for Mr Smith, save for PAYG payment summaries and profit and loss statements for the Company, including pay slips required to be provided pursuant to s 536(1) of the FWA.

75 Further, the Company did not have any process of reconciling annual leave taken or accrued and did not make or keep any record relevant to annual leave.[28]

76 Therefore, when Mr Jones says that Mr Smith was paid all of his contractual and annual leave entitlements, but cannot and did not produce any employment records on behalf of the Company, particularly those records required by the FWA to be provided and maintained by an employer,[29] his evidence is not supported by any corroborating documents.[30]

77 Section 557C(1) of the FWA provides that, relevantly, if '*in proceedings relating to a contravention by an employer of a civil remedy provision referred to in subsection (3)* … [a claimant] *makes an allegation in relation to a matter*' and the employer *was* required (by specified provisions) to keep a record in relation to the matter and '*the employer failed to comply with the requirement*' (and there is no reasonable excuse as to why there has not been compliance), the employer '*has the burden of disproving the allegation*'.[31] A civil remedy provision includes s 44(1), which involves a contravention of a NES.[32]

78 Section 557C of the FWA positively requires a defaulting employer to disprove such an allegation and there is more than an evidentiary burden on the employer as it relates to the absence of records.[33]

79 The potential effect of s 557C of the FWA for a defaulting employer is that a claim will be upheld, notwithstanding there may be issues of credibility with respect to the employee's account.[34]

80 Mr Jones' evidence, consistent with Mr Smith's and Mr Lau's evidence, is that the Company did not provide pay slips, including leave reconciliation records, to Mr Smith. Mr Jones' explanation for not doing so was, in essence, that the Company's employees were aware of what they were paid and what they were owed, and the PAYG records were sufficient. He says that he is now aware of the requirement to provide, keep and maintain employment records under the FWA.

81 Mr Smith alleges that he did not take any annual leave during the course of his employment and was, in essence, required to be available for clients all year round. Mr Jones says that the Company enforced a Christmas shut down period each year and that employees, including Mr Smith, took annual leave during the Christmas shut down period. Mr Jones relies on evidence from Mr Lau[35], Mr Pye[36], Mr Mathew Clune[37] (Mr Clune) and Ms Irene Jones[38] (Ms I. Jones) corroborating the observance of a Christmas shutdown period.

82 However, their evidence is of limited weight where none of the witnesses were able to specify the exact dates of any Christmas shut down,[39] nor did they work with Mr Jones or Mr Smith for any length of time and they often made assumptions about Mr Smith taking annual leave during this period.[40] Further, while Ms I. Jones and Mr Lau[41] also refer to the Mr Smith taking time off to attend funerals, they do not specify when this was or profess any knowledge of any arrangements that may have been made between Mr Smith and Mr Jones to attend a funeral.[42]

83 In addition, the letters from the Company to clients[43] purportedly informing clients of an office closure in various years does not inform the IMC of what, if any, arrangements were made with respect to the taking of annual leave during a purported Christmas shutdown period. Further, Mr Smith did not commence employment with the Company until February 2008, therefore, the letter[44] regarding a Christmas shutdown in 2007 / 2008 is irrelevant.

84 Mr Smith's evidence that he took no annual leave while working for the Company might seem somewhat extraordinary, something referred to by Mr Jones in his evidence, but simply put there is little, if any, evidence before the IMC that enables a positive rejection of his evidence that he worked during the Christmas and New Year periods over the course of his employment.

85 For a substantial period of time Mr Smith worked from home where the Company's registered office was Mr Smith's home address. Whatever might have been the arrangement with respect to the Company's telephone service, Mr Smith appears to have been expected to be available by mobile telephone to answer client queries. Any arrangements between Mr Smith and Mr Jones were ad hoc and Mr Smith was expected to work independently with little supervision by Mr Jones.

86 The Company's evidence that Mr Smith took all of his annual leave and was paid all of his annual leave entitlements during his employment, principally because of an enforced annual Christmas shutdown period, is based on assumptions and purported casual observations made by people who had no real knowledge of Mr Smith's working arrangements. Similarly, Mr Jones'

evidence on this issue lacked cogency and while he purports to give the dates of the alleged annual shutdown period, there is no employment records which otherwise verify that annual leave was, in fact, taken by Mr Smith.

Determination

87 Where the Company failed to keep the requisite annual leave and other employment records, I am not satisfied the Company has proven on the balance of probabilities that Mr Smith did not work during any Christmas shutdown period, or, even, that there was a Christmas shutdown period applicable to Mr Smith and to his employment. Further, I am not satisfied the Company has proven on the balance of probabilities that Mr Smith took other ad hoc annual leave while employed by the Company.

88 Additionally, having regard to all of the evidence there is nothing to suggest that Mr Smith's allegation concerning the failure to pay untaken annual leave was not bona fide.

89 Therefore, notwithstanding some surprise might be express about Mr Smith's assertion that he did not take any annual leave while employed by the Company, Mr Smith's claim as it relates to the failure by the Company to pay him untaken accrued annual leave must succeed.

90 Mr Smith claims 197 days of untaken accrued annual leave from 7 February 2008 to 8 December 2017.[45] Nothing controverts this number of days of untaken annual leave and I accept this number. However, Mr Smith calculates the amount owing to him based on the Award rates. I did not accept that the Award applied to Mr Smith's employment.

91 I calculate the amount applied for untaken accrued annual leave, based on Mr Smith's contracts of employment, as follows:

- 7 February 2008 to 26 August 2009 at $38,000 per year based on 7.5 hours of work per day[46] or $146 per day;
- 27 August 2009 to 28 February 2010 at $45,000 per year based on 7.5 hours of work per day[47] or $173 per day;
- 1 March 2010 to 19 October 2016 at $45,000 per year based on 7.5 hours of work per day[48] or $173 per day; and
- 20 October 2016 to 7 December 2017 at $45,000 per year based on 7.5 hours of work per day[49] or $173 per day.

92 Accordingly, using the above figures the amounts owed are as follows:

Year	Days	Amount per day	Total
2008	18	$146	$2,628
2009	20	$146 (13 days)	$1,898
		$173 (7 days)	$1,211
2010	20	$173	$3,460
2011	20	$173	$3,460
2012	20	$173	$3,460
2013	20	$173	$3,460
2014	20	$173	$3,460
2015	20	$173	$3,460
2016	20	$173	$3,460
2017	19	$173	$3,287
Total:			**$33,244**

93 Therefore, the total amount of untaken accrued annual leave owed to Mr Smith is $33,244.

Limitation Period

94 One final issue was raised by Mr Jones during the hearing relevant to limitation, where the Company referred to Mr Smith being time barred from making a claim relevant to annual leave when, in part, his claim related to alleged untaken annual leave from dates outside of a six year limitation period.

95 Section 544 of the FWA provides:

> *A person may apply for an order under this Division in relation to a contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:*
>
> *(a) a civil remedy provision;*
>
> *(b) a safety net contractual entitlement;*
>
> *(c) an entitlement arising under subsection 542(1).*

96 The Division referred to in s 544 of the FWA is div 2 in ch 4, pt 4.1, which contains the power of courts to make orders.

97 The IMC has limited powers to make orders under the FWA. Relevant to Mr Smith's claim, the orders the IMC can make are contained in s 545(3) of the FWA. That is:

> [the IMC] *may order an employer to pay an amount to … an employee … if the court is satisfied that:*
>
> *(a) the employer was required to pay the amount under this Act or a fair work instrument; and*
>
> *(b) the employer has contravened a civil remedy provision by failing to pay the amount.*

98 Further to that, the IMC must not make an order under s 545(3) of the FWA '*in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced*' (emphasis added): s 545(5) of the FWA.

99 Mr Smith's claim alleges the failure to pay untaken paid annual leave upon termination of employment: s 90(2) of the FWA (a civil remedy provision pursuant to s 44(1) of the FWA).

100 '*A cause of action accrues when all the facts have occurred which …* [the claimant] *must prove in order to succeed*': ***Cigna Insurance Asia Pacific Ltd v Packer*** [2000] WASCA 415 [31] (Malcolm CJ) (other references omitted).

101 The principle issue for determining when a cause of action arises is identifying the date on which any cause of action accrued with respect to the alleged failure to pay untaken paid annual leave.

102 In Mr Smith's case this was at the time his employment was terminated and the Company failed to pay any untaken paid annual leave that was owing to Mr Smith at this time. Therefore, the cause of action started to accrue at the date of termination of employment, or 8 December 2017, notwithstanding that untaken paid annual leave had accrued prior to 8 December 2011.

103 The alleged contravention by the Company occurred when it failed to pay untaken paid annual leave upon termination of employment. In this sense the failure does not relate to any underpayment but the non-payment of untaken paid annual leave. The whole of any amount owed was due at the time of termination of employment, again, notwithstanding that the annual leave had accrued over a longer period than six years prior to the commencement of the claim.

104 A similar issue arose in ***Dean v Weir Minerals Australia Ltd*** [2018] FCCA 108 (***Weir Minerals***) where Jarret J referring to *obiter* reasons in ***Matus v Australia Wide Computer Resources Pty Ltd (No 2)*** [2015] FCCA 2055 (***Matus***), also concluded that s 545(5) of the FWA does not include non-payment of an entitlement. Notably, ***Matus*** concerned a claim for unpaid annual leave entitlements that became due upon the termination of an employee's employment pursuant to s 90(2) of the FWA.

105 Accordingly, in my view, consistent with the decisions in ***Weir Minerals*** and ***Matus***, the limitation period in s 544 and s 545(5) of the FWA do not apply in respect of Mr Smith's claim for untaken accrued annual leave not paid following the termination of his employment.

Fifth Issue – Has There Been Any Contraventions Of The FWA?

106 Section 44(1) of the FWA provides that '[a]*n employer must not contravene a provision of the National Employment Standards* [NES]'.

107 Section 61(1) of the FWA provides that pt 2 - 2 '*sets minimum standards that apply to the employment of employees which cannot be displaced*'. Section 61(2) of the FWA lists the minimum standards, which includes at s 61(2)(d) '*annual leave (Division 6)*'.

108 Section 90(2) of the FWA is included in div 6 and requires the employer to pay to the employee untaken paid annual leave upon termination. The failure by the Company to pay Mr Smith the untaken paid annual leave amount of $33,244 upon the termination of Mr Smith's employment contravenes a provision of the NES.

109 Accordingly, the Company has contravened s 44(1) of the FWA and any contravention of s 44 of the FWA is a contravention of a civil remedy provision, pursuant to s 539 of the FWA (Item 1).

110 Section 535(1) of the FWA requires an employer to '*make, and keep for 7 years, employee records of the kind prescribed*' by the *Fair Work Regulations 2009* (FWR). The employee records required to be made and kept for 7 years include records related to pay (or pay slips) pursuant to reg 3.33(1) of the FWR. The failure by the Company to make, and keep for 7 years, pay slips for Mr Smith's employment contravenes s 535(1) of the FWA. Further, the Company failed to provide pay slips to Mr Smith during the course of his employment contrary to s 536(1) of the FWA.

111 Accordingly, the Company has contravened s 535(1) of the FWA and any contravention of s 535(1) of the FWA is a contravention of a civil remedy provision, pursuant to s 539 of the FWA (Item 29). Further, the Company has contravened s 536(1) of the FWA and any contravention of s 536(1) of the FWA is a contravention of a civil remedy provision, pursuant to s 539 of the FWA (Item 29).

Sixth Issue – Is Mr Smith Entitled To A Pro-Rata Long Service Leave Payment?

112 Relevantly, s 8(3) of the LSL Act provides:[50]

> *Where an employee has completed at least 7 years of such continuous employment since the commencement thereof, but less than 10 years, and the employment is terminated —*
>
> *(a) by his death; or*
>
> *(b) for any reason other than serious misconduct,*
>
> *the amount of leave to which the employee is entitled shall be a proportionate amount on the basis of 8 2/3 weeks for 10 years of such continuous employment.*

113 Mr Jones says he terminated Mr Smith's employment on 16 November 2017 and that he did so because Mr Smith failed to attend an alternative office to undertake work and this amounted to a refusal to carry out a lawful and reasonable direction by his employer.[51] The Company says that such conduct amounts to 'serious misconduct' such that it is not required to pay Mr Smith pro-rata long service leave entitlements pursuant to s 8(3)(b) of the LSL Act.

What does 'serious misconduct' mean?

114 'Serious misconduct' is not defined in the LSL Act. In ***Australasian Meat Industry Employees Union v Australian Meat Holdings Pty Ltd*** (1999) 93 IR 308, Dowsett J considered authorities discussing the meaning of 'serious' and 'misconduct', although it should be noted that this was in the context of the meaning of 'serious or wilful misconduct' in the relevant award.

115 Distillation of His Honour's reasons appear to do no more than say that whether misconduct can be considered 'serious' is a question of fact in the context of the employment relationship, albeit that he noted the meaning of the words were in the context of entitlement to pro-rata long service leave payments. His Honour noted that '*an employee's alleged misconduct could be such as to justify his or her dismissal whilst not being serious or wilful misconduct for the purposes of the provision relating to loss of long-service leave benefits*' [87].

116 In ***Concut Pty Ltd v Worrell*** [2000] HCA 64 (***Concut***) Kirby J, at [51], sets out a number of points as it relates to summary dismissal for misconduct (noting that the employee/employer relationship was not governed by any statute, regulation or industrial award):

> *The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust.*
>
> …
>
> *It is … only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily. Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability, it cannot be disputed (statute or express contractual provision aside) that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer. Some breaches may be judged irrelevant to the duties of the particular employee and an ongoing relationship with the employer*. (footnotes omitted)

117 Relevantly, the majority in ***Concut*** at [17] stated:

> *The issues which must be determined are to be understood in the context of the law respecting employment relationships. It would be unusual for this to be purely contractual. Statute may impose obligations to observe industrial awards and agreements, and in some instances the relevant terms of the employment relationship may be found in the industrial award which binds the parties at the relevant time. Further, as Mason J pointed out in* ***Hospital Products Ltd v United States Surgical Corporation****, the relationship between employee and employer is one of the accepted fiduciary relationships; their critical feature is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense.* (footnotes omitted)

118 Further, at [25] in ***Concut*** (citations omitted):

> *In* ***Pearce v Foster****, Lord Esher MR stated it to be a 'rule of law' that 'where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him'. In* ***Blyth Chemicals Ltd v Bushnell****, in the course of considering the position of the respondent, who was the manager of the appellant's business, Starke and Evatt JJ said:*
>
> > *'As manager for the appellant, the respondent was in a confidential position. And it is clear that he might be dismissed without notice or compensation if he acted in a manner incompatible with the due and faithful performance of his duty, or inconsistent with the confidential relation between himself and the appellant'.*
>
> *In the same case, Dixon and McTiernan JJ said:*
>
> > *'Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal'.* (footnotes omitted)

119 In ***North v Television Corporation Ltd*** (1976) ALR 599 (***North***) Smithers and Evatt JJ stated (in the context of summary dismissal without notice):

> *It is of assistance to consider the expression 'misconduct' by reference to subject matter to which it is related and the context in which it appears. The subject matter is the termination by one party against the will of another of a continuing contract of employment on the ground of breach of one of the terms of the contract. And the context is such as to indicate that certain breaches of a non-serious nature, some of which would be within the connotation of misconduct, are not regarded as grounds for termination. In such a situation it is reasonable to interpret the expression 'misconduct' as referring to conduct so seriously in breach of the contract that by standards of fairness and justice the employer should not be bound to continue the employment.*

120 Furthermore, arguably, the burden of proving the relevant misconduct is on the respondent: ***North*** at 599. The standard of proof being on the balance of probabilities.

121 In ***Wall v Westcott*** (1982) 1 IR 252 (Industrial Relations Commission of New South Wales, 12 March 1982), Watson J considered the meaning of 'serious and wilful misconduct' in the context of the *Long Service Leave Act 1955* (NSW) stating, at 256, (omitting citations):

> *Misconduct justifying termination of employment includes misconduct outside the particular employment which is incompatible with the continuance of the employment relationship. The misconduct must be at least such as would justify termination, to be relevant under s 4(2)(a)(iii) of the Long Service Leave Act, but with a further element, comprehended by the terms 'serious and wilful'. The category of misconduct thus intended is a particular type of misconduct which, in terms of gravity, must be capable of being described as serious beyond circumstances which would simply justify termination. Secondly, it must be subjectively considered in view of the requirement that it be 'wilful'.*

122 'Serious misconduct' in s 8 of the LSL Act does not include the word 'wilful'. Further, s 8 of the LSL Act does not refer to an employee's termination in the context of summary dismissal. Therefore, in my view, for an employee to have engaged in 'serious misconduct' for the purposes of the LSL Act, the employer need not have summarily dismissed the employee so as to highlight the gravity of the misconduct. Otherwise a careful and prudent employer will be prejudiced by a sense of fair play before deciding to terminate an employee.

123 For the purposes of the LSL Act, the misconduct must be of sufficient gravity such as to justify termination of the employment relationship in the context of beneficial legislation. That is, the misconduct must be of a type that justifies not only termination, but is of a gravity capable of denying the employee an entitlement to a statutory benefit where they have worked for an employer for a lengthy period of time.

124 Having regard to this framework, did Mr Smith's purported conduct amount to 'serious misconduct' in the context of s 8 of the LSL Act?

Evidence of 'serious misconduct'

125 Mr Smith says Mr Jones have him a termination letter on 17 November 2017 and has not paid him his alleged long service leave entitlement.[52]

126 In his oral evidence, Mr Smith clarified that he had continuous employment with the Company and Mr Jones never informed him that his employment was terminated for 'serious misconduct'.

127 In summary, Mr Jones says Mr Smith breached 'prevailing regulations' by failing or refusing to attend the Ashstead Street residence at Morley (Morley Address) when requested to do so and this was a direct failure or refusal to comply with a lawful and reasonable instruction by the employer about where to work. Mr Jones described this as representing a serious and imminent risk to the profit and the Company's revenue where he says the Company could not maintain sufficient control and supervision over its employee, Mr Smith, and client information.[53]

128 In cross-examination, Mr Jones said that leading up to Mr Smith's dismissal Mr Smith was not doing his job properly and he needed to monitor Mr Smith. Further, Mr Smith did not work from the Morley Address when he was told to, preferring to work from his home address in Harrisdale.

129 Mr Jones said that in his mind this amounted to 'serious misconduct' where he considered there was a risk to the profitability of the business and for 'litigation reasons'.

130 Mr Jones clarified that Mr Smith attended the Morley Address for two days around 16 November 2017 and then refused to re-attend. Mr Jones confirmed that Mr Smith continued to be employed by the Company until mid-December 2017. Mr Jones said he secured the Company's records before Mr Smith was dismissed, although he left the client files at Mr Smith's home address in Harrisdale until April 2018. In the meantime, Mr Jones said that he used electronic client files rather than the hard copy files in Mr Smith's possession.

131 Mr Jones said that his goal was to decrease the risk to clients and the hard copy files were not a priority and he considered that he had mitigated any risk even though the hard copy files remained with Mr Smith.

132 Mr Jones agreed that the letter of termination provided to Mr Smith did not refer to the reason for termination being 'serious misconduct' because he did not want to exacerbate Mr Smith's position or to make matters worse for him. His goal was not to not assist Mr Smith in getting a new job. Mr Jones accepted that the contents of the letter of termination and reference he signed was inconsistent with an allegation of 'serious misconduct', but he did not want to hinder Mr Smith in gaining future employment.

133 Mr Jones also agreed that the Employment Separation Certificate[54] referred to the '[s]*hortage of work*' as the reason for termination, rather than stating '[m]*isconduct as an employee*'. Mr Jones maintained that the dominant reason for the termination of Mr Smith's employment was 'serious misconduct', but it was not the sole reason and he was being truthful when he identified in the Employment Separation Certificate that there was a '[s]*hortage of work*'.

134 Mr Jones did not recall having a conversation with Mr Smith where he informed Mr Smith of any 'serious misconduct'.

135 Relevant to the issue of long service leave entitlement, Mr Jones also relied on evidence of Ms I. Jones, his former wife, and Mrs Norma Jones (Mrs N. Jones), his mother. With respect to Ms I. Jones and Mrs N. Jones, their evidence was of limited utility beyond informing the IMC that Mr Jones worked from home and that Mr Smith attended the Morley Address on 14 November 2017 and 15 November 2017. Mrs N. Jones saw Mr Smith working at the Morley Address on 14 November 2017 and for part of the following day and then he left.

Determination on issue of 'serious misconduct'

136 In determining this question, the following is relevant:

- on 16 November 2017, Mr Jones gave Mr Smith a letter of termination informing him that his final date of employment was 8 December 2017. The reason for termination provided in the letter was '*restructure issue and funding pressures*'. Further, in the same letter, Mr Jones advised Mr Smith that if he required a reference to be forwarded that he was to advise any prospective employer of Mr Jones' contact details '*whereupon I will be delighted to make contact to attest to your employ with me*';[55]
- on 12 December 2017, Mr Jones prepared an employment separation certificate for Centrelink and the reason provided for separation was '[s]*hortage of work*';[56]
- on 8 December 2017, Mr Jones signed a reference, albeit authored by Mr Smith, stating '*Gavin is a polite, considerate person who is very organised and has a practical and positive approach to the task at hand. In recommending Gavin, I would cite his maturity, commitment, initiative and unassuming address, will surely achieve great things during his lifetime*';[57]

- the Company's client files remained at Mr Smith's home address in Harrisdale until they were obtained by Mr Jones in April 2018;
- Mr Jones did not identify what risk to clients existed or what serious and imminent risk existed to the Company related to Mr Smith, where Mr Smith remained employed after he was issued with a letter of termination; and
- Mr Jones agreed that the written documents were not consistent with termination for alleged 'serious misconduct'.

137 Having regard to the all of the evidence, I do not accept that Mr Smith's employment was terminated for 'serious misconduct'. I find that Mr Smith's employment was terminated because there was either a shortage of work or because the Company was restructuring its business.

138 However, even if Mr Smith had been terminated because he did not attend the Morley Address in mid-November 2017, I do not consider that this, of itself, would amount to 'serious misconduct' of such gravity to deny Mr Smith long service leave entitlements under the LSL Act.

139 There is no evidence that Mr Smith was not otherwise performing the role that was expected of him and there is no evidence of what risk existed to the Company, the business or to clients related to Mr Smith's work conduct.

Is Mr Smith entitled to payment on account of pro rata long service leave?

140 Mr Smith was employed on a continuous basis by the Company from 7 February 2008 to 8 December 2017. That is, for nine years and 10 months.

141 Section 8(1) of the LSL Act provides that '[a]*n employee is entitled … to long service leave on ordinary pay in respect of continuous employment with one and the same employer*'.

142 Section 8(3) of the LSL Act applies,

> [w]*here an employee has completed at least 7 years of such continuous employment since the commencement thereof, but less than 10 years, and the employment is terminated —*
>
> *(c) by his death; or*
>
> *(d) for any reason other than serious misconduct,*
>
> *the amount of leave to which the employee is entitled shall be a proportionate amount on the basis of 8 2/3 weeks for 10 years of such continuous employment.*

143 Where s 8(3) of the LSL Act applies, pursuant to s 9(2) of the LSL Act, where the employee's employment is terminated before long service leave is taken or fully taken, the employer is to pay to the employee '*a sum equivalent to the amount which would have been payable in respect of the period of leave to which he* [or she] *is entitled or deemed to have been entitled and which would have been taken but for such termination*'.

144 Section 4 of the LSL Act defines, relevantly, '***ordinary pay***' to mean,

> *subject to subsection (2), remuneration for an employee's normal weekly number of hours of work calculated on the ordinary time rate of pay applicable to him* [or her], *as at the time when any period of long service leave granted to him* [or her] *under …* [the LSL Act] *commences, or is deemed to commence … but does not include … overtime, penalty rates, allowances, or the like*.

145 At the time of his termination of employment, Mr Smith's annualised salary was $45,000 or $807.70 per week. By reason of s 8(3) and s 9(2) of the LSL Act, Mr Smith would have been entitled to a proportionate amount of 8.52 weeks of long service leave.

146 Therefore, pursuant to s 9(2) of the LSL Act, the equivalent amount the Company was required to pay upon termination of employment was $6,881.60

147 The Company is required to pay to Mr Smith the amount of $6,881.60 on account of unpaid pro rata long service leave.

Issue Six – Penalties and Orders

148 Mr Smith claims *compensation* for *loss and damage* arising from the breaches of the FWA and the Award pursuant to s 545(3) of the FWA.

149 IMC cannot make orders for *compensation* for *loss and damage* under s 545(3),[58] but '*may order an employer to pay an amount to, or on behalf of, an employee … if the court is satisfied that:*

> *(a) the employer was required to pay the amount under …* [the FWA] *or a fair work instrument* [the Award]*; and*
>
> (b) *the employer has contravened a civil remedy provision by failing to pay the amount*'.

150 In this case, notwithstanding Mr Smith's erroneous nomenclature of the orders capable of being made by IMC, I will make an order requiring the Company to pay the following amount to Mr Smith where I am satisfied the Company is required to pay this amount under the FWA and the Company has contravened a civil penalty provision, namely s 44 of the FWA when read with s 90(2) of the FWA, by failing to pay the amount of:

- $33,244 in accrued untaken paid annual leave.[59]

151 Mr Smith also claims payment for unpaid pro rata long service leave and I will make an order for the Company to pay the following amount where I am satisfied the Company is required to pay the amount of:

- $6,881.60 for pro rata long service leave

152 I also make an order for pre-judgment interest of $5,517.66[60] where interest on the judgment amount is sought by the Claimant.

153 I will now hear from the parties concerning the issue of penalties and any other orders.

D SCADDAN
INDUSTRIAL MAGISTRATE

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[1] The total amount claimed in the Claimant's Further and Better Particulars does not equate to the individual amounts claimed, which is $49,243.79.

[2] ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** (2006) 153 IR 426, 438.

[3] ***City of Wanneroo*** (438 and 440).

[4] ***City of Wanneroo*** (440).

[5] ***Kucks v CSR Ltd*** (1996) 66 IR 182; ***Amcor Ltd v CFMEU*** [2005] HCA 10.

[6] Cambridge Dictionary.

[7] Exhibit 1 - Witness Statement of Gavin Stanley Smith dated 11 June 2019 at attachment 'GS22'.

[8] Exhibit 1 at attachment 'GS1'.

[9] Exhibit 1 at attachment 'GS6'.

[10] Exhibit 1 at attachment 'GS7'.

[11] Exhibit 1 at attachment 'GS8'.

[12] Exhibit 1 at attachment 'GS9'.

[13] Exhibit 1 at attachment 'GS10' and 'GS11' and 'GS14'.

[14] Exhibit 1 at attachment 'GS4'.

[15] Exhibit 1 at attachment 'GS23'.

[16] Exhibit 1 [37] and [38].

[17] Exhibit 1 at attachment 'GS21'.

[18] Exhibit 1 [7].

[19] Exhibit 1 at attachment 'GS4'.

[20] Exhibit 7 - Witness Statement of Lyall Jones dated 9 October 2019 [3].

[21] Exhibit 7 [3].

[22] Exhibit 7 [3.6] and [3.7].

[23] Exhibit 1 [7].

[24] Exhibit 1.

[25] Exhibit 1 [8] and [14].

[26] Exhibit 1 [13] and [33] and attachment 'GS20'.

[27] Including pay slips in accordance with reg 3.33 of the *Fair Work Regulations 2009.*

[28] Contrary to reg 3.36 of the *Fair Work Regulations 2009*.

[29] Sections 535(1) and 536(1) of the FWA.

[30] Exhibit 7 [9].

[31] ***Ghimire v Karriview Management Pty Ltd (No 2)*** [2019] FCA 1627 [13].

[32] Section 90(2) of the FWA applies as it constitutes a minimum standard under s 61(2) of the FWA.

[33] ***Ghimire*** [14].

[34] ***Ghimire*** [16].

[35] Exhibit 13 - Witness statement of Simon Lau [16] - [19].

[36] Exhibit 8 - Witness statement of Shayne Pye [4] - [9].

[37] Exhibit 9 - Witness statement of Mathew Clune [3].

[38] Exhibit 11 - Witness statement of Irene Jones [6] - [9].

[39] Exhibit 8 [8]; Exhibit 9 [3]; Exhibit 11[5].

[40] Exhibit 13 [19].

[41] Exhibit 13 [20].

[42] Exhibit 11 [14] and [15]; Exhibit 13 [20].

[43] Exhibit 7 at 'R1' and 'R2'.

[44] Exhibit 7 at 'R1'.

[45] Exhibit 1 at 'GS24'.

[46] Exhibit 1 at 'GS6'.

[47] Exhibit 1 at 'GS7'.

[48] Exhibit 1 at 'GS8'.

[49] Exhibit 1 at 'GS9'.

[50] Section 8(1) and s 8(2) of the LSL Act are applicable for the purposes of determining the principle entitlement to long service leave, but are not the relevant sections of the LSL Act determining in this case whether an entitlement to long service leave exists and, if so, the amount to be awarded.

[51] Exhibit 7 [9][q].

[52] Exhibit 1 [12] and [14].

[53] Exhibit 7 [9.q].

[54] Exhibit 1 at 'GS3'.

[55] Exhibit 1 at 'GS2'.

[56] Exhibit 1 at 'GS3'.

[57] Exhibit 1 at 'GS4'.

[58] See s 545(2) of the FWA relevant to the Federal Court and Federal Circuit Court.

[59] Contravening s 44 of the FWA as it relates to accrued annual leave by failing to comply with the NES.

[60] Interest calculated at 6% per annum for the period 8 December 2017 to 15 May 2020 with a daily rate of $6.60 per day.

Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA) under the *Fair Work Act 2009* (Cth): Alleging Contravention of Modern Award

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 Industrial Magistrates Court of Western Australia (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), s 81 and s 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 a modern award where the award *applies* to give an entitlement to a claimant employee and to impose an obligation upon a respondent employer: FWA, s 45 and s 46. The award *applies* if it *covers* the employee and the employer and there are no relevant statutory exceptions (for example, high income employees such as $138,900 per annum from 1 July 2016): FWA, s 47. The award *covers* the employee and the employer if it is expressed to cover the employee and the employer: FWA, s 48(1).

[5] An obligation upon an '***employer'*** covered by an award 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 12, s 14, s 42 and s 47. An entitlement of an employee covered by an award 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 13, s 42 and s 47.

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:

- The National Employment Standards set out in pt 2 - 2 of the FWA: FWA, s 44(1) and s 539. Those standards include obligations of employers to employees with respect to annual leave as set out s 86 to s 94 of the FWA.
- Other terms and conditions of employment as set out in pt 3 - 6 of the FWA: FWA, s 535, s 536 and s 539. Those terms and conditions include obligations of employers to employees with respect prescribed records under the FWR.
- 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 12 and s 14. 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.

[8] 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.

[9] 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:

> *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.* [362]

[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.

2020 WAIRC 00276

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00276
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	TUESDAY, 7 APRIL 2020
DELIVERED	**:**	FRIDAY, 15 MAY 2020
FILE NO.	**:**	M 122 OF 2019
BETWEEN	**:**	HENRY C AVELING

CLAIMANT

AND

TRADE HOUZZ P/L AS TRUSTEE FOR FRANCIS FAMILY TRUST TRADING AS SOLOMONS FLOORING CANNINGTON

RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Small Claim under the *Fair Work Act 2009* (Cth) – Claim for unpaid wages alleged to be owed under an oral contract of employment – Whether the Claimant was employed by the Respondent – Whether the Claimant is an '***employee***' for the purposes of the *Fair Work Act 2009* (Cth) – Turns on its own facts
Legislation	**:**	*Fair Work Act 2009* (Cth) *Corporation Act 2001* (Cth) *Industrial Relations Act 1979* (WA)
Case(s) referred to in reasons	**:**	***Nield v Matheson*** [2014] FCAFC 74 ***Dietrich v Dare*** (1980) 30 ALR 407 ***Mildren v Gabbusch*** [2014] SAIRC 15 ***Miller v Minister of Pensions*** [1947] 2 All ER 372 ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336
Result	**:**	Claim is dismissed
Representation:		
Claimant	**:**	Self-represented
Respondent	**:**	Mr A. Francis on behalf of the Respondent (as a director)

REASONS FOR DECISION

1 The Claimant, Mr Henry C. Aveling (Mr Aveling), alleges he was employed by the Respondent, Trade Houzz Pty Ltd as Trustee for Francis Family Trust trading as Solomon Flooring, Cannington, from 5 June 2018 to 22 September 2018 pursuant to an oral agreement with Mr Anthony Francis (Mr Francis), an owner of the business.

2 Mr Aveling claims $13,350 in alleged unpaid wages and $1,268.50 in superannuation where he says the Respondent contravened an unspecified section of the *Fair Work Act 2009* (Cth) (FWA). Mr Aveling elected the Small Claims procedure under s 548 of the FWA. Mr Aveling says he had an oral agreement with Mr Francis to assist in getting started in a new business where Mr Francis had no experience in operating a flooring shop or knowledge in how to sell flooring to customers. Mr Aveling makes no other reference to any employment instrument, such as a modern award or an enterprise agreement.

3 Mr Aveling claims he assisted Mr Francis to get the business up and running, and passed on his knowledge to make the business a success. He says that his claim for unpaid wages is justified as he was essentially doing the work of a salesperson and store manager for an extended period of time and was relied upon to manage the shop and produce sales.

4 The Respondent denies the claim. The Respondent says Mr Aveling was never employed by the Respondent, and was given a total of $5,500 by Mr Francis personally as a goodwill gesture for introducing a customer and for providing advice on how to improve the business.

5 Schedule I of these reasons for decision outline the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC).

Background

6 The Respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operates a flooring business known as Solomon Flooring, Cannington. Accordingly, the Respondent is a constitution corporation within the meaning of that term in s 12 of the FWA, which *may* mean it is a '*national system employer*' within the meaning of that term in s 14(1)(a) of the FWA.

7 Whether Mr Aveling was employed by the Respondent is a fact in dispute and the determination of that fact will also determine whether Mr Aveling is a '*national system employee*' within the meaning of s 13 of the FWA.

8 The Respondent purchased the business in October 2017. Mr Aveling had previous experience in the flooring business having operated other Solomon Flooring stores and there was some arrangement for Mr Aveling to assist Mr Francis in improving the business in some unspecified way.

9 The primary issue for determination is whether Mr Aveling is an '*employee*' for the purposes of the FWA. This requires consideration of whether there was a contract of employment between Mr Aveling and the Respondent.

Is Mr Aveling An '*Employee*' For The Purposes Of The FWA?

10 Mr Aveling's claim makes no reference to a modern award or an enterprise agreement relevant to his alleged employment by the Respondent. Mr Aveling says that he is entitled to be paid his wages pursuant to an alleged oral contract of employment between him and Mr Francis. Accordingly, any claimed entitlement is, arguably, limited where the National Employment Standards (NES) do not include or relate to the payment or non-payment of wages: s 61(2) of the FWA.

11 It is not for the IMC to run a party's claim, however, for the purposes of resolving the claim, pt 2 - 9 of the FWA refers to other terms and conditions of employment, including s 323(1)(a) of the FWA, which states '*an employer must pay an employee amounts payable to the employee in relation to the performance of work in full*'.

12 If, for the purposes of resolving the claim, it is accepted that a claim for unpaid wages owed under a contract of employment gives rise to an entitlement under s 323(1) of the FWA, Mr Aveling would need to prove on the balance of probabilities that he was a '*national system employee*' and the Respondent was a '*national system employer*': s 322 and s 323(1) of the FWA.

13 A '*national system employee' is an individual so far as he or she is employed, or usually employed, as described in the definition of* ***national system employer*** *in section 14, by a national system employer, except on a vocational placement*': s 13 of the FWA.

14 Relevant to the Respondent, a '*national system employer' is: (a) a constitutional corporation, so far as it employs, or usually employs, an individual*': s 14(1) of the FWA.

15 Leaving aside whether the Respondent employs or usually employs an individual, Mr Aveling is required, at the very least, to prove on the balance of probabilities that he was employed or usually employed by the Respondent.

16 If Mr Aveling cannot prove that threshold requirement, he has no other applicable entitlement, having regard to the basis of his claim, under the FWA.

Was Mr Aveling employed by the Respondent?

17 This threshold question is determined by resolving whether there was an oral contract of employment between Mr Aveling and the Respondent. If there was no *agreement* between Mr Aveling and Mr Francis for Mr Aveling to undertake work for the Respondent, then Mr Aveling cannot have been employed by the Respondent.

Evidence

18 Mr Aveling states that he was engaged by the Respondent as an employee from 5 June 2018 to 22 September 2018 via a verbal agreement with Mr Francis where the Respondent agreed to pay him $25 per hour.[1] There are no documents or other material corroborating Mr Aveling's evidence of when this alleged verbal agreement was entered into or any other terms of the alleged verbal agreement.

19 However, Mr Aveling states that a text message sent by Mr Francis on 24 September 2018 supports his evidence that he *was* employed by the Respondent.[2] The content of the text message is as follows:

> *Hi Henry. Nicholas & myself have decided to handle the business on our own. You do not need to come to the shop from tomorrow onwards. We want the reduce running cost to keep the business afloat. Anthony.*

20 I note Mr Aveling's response to this text message was '[t]*hats great news n wish you good luck n all the best.Thank you for everything*'.[3]

21 From Mr Aveling's perspective the significance of the text message from Mr Francis is that it indicates the Respondent did not want to keep paying for his services as a cost cutting exercise, which is consistent with him being in paid employment.[4]

22 Mr Aveling also states that he had keys to the store and a business card in his name, which stated his position within the business,[5] and he attached to his witness statement a number of quotes or orders he says he completed while employed by the Respondent.[6]

23 Mr Aveling states he followed the direction of his employer as to when to open the store and when to attend for work. He says that he was expected to take sales orders and to attend to customers' orders, including measures and quotes. He was provided with sample books and used a desk at the Respondent's premises to complete the tasks he was required to do.[7]

24 Mr Aveling claims he worked 534 hours and refers to a 'Time Sheet' he says accounts for time worked and the amount he claims.[8] I note this document is dated 15 May 2019. Mr Aveling said that he worked Monday to Friday from 9.00 am to 3.00 pm and Saturday from 9.00 am to 2.00 pm.

25 Mr Aveling thereafter admitted that he was given $5,500 by Mr Francis as a gesture of goodwill to be paid before 31 May 2018. However, $3,000 was paid at the end of June 2018 and $2,500 was paid at the end of September 2018. Mr Aveling admitted that he held onto the money from a customer as he was waiting to see what the Respondent would do. Mr Aveling denies taking orders or plans from the Respondent's office and says that he may be mistaken about the store opening until 2.00 pm on Saturdays.

26 Mr Aveling admitted looking at Facebook while at the store and admitting going out to buy lotto tickets, but says he did this on his lunch break. He also admitted that the 'Time Sheet'[9] was given as part of the Court proceedings and not provided to the Respondent.

27 Mr Aveling relies upon witness evidence of Mr Mark Francis van der Lee (Mr van der Lee), previously a sales representative for Proline Floors Pty Ltd, who states that his *understanding* was that Mr Aveling was a sales representative employed by the Respondent. He further states that he attended the store approximately once per month and saw Mr Aveling serving customers and dealing with enquiries.[10] Mr van der Lee maintained that he attended the store more than once and met Mr Francis more than once.

28 Mr van der Lee's evidence was limited to observations he says he made of Mr Aveling at the store, rather than professing any knowledge of the terms of any oral agreement between Mr Aveling and Mr Francis. Accordingly, in that sense, Mr van der Lee's evidence is of limited weight.

29 Mr Aveling also relies upon witness evidence of Ms Marianne Aveling (Ms Aveling), his wife, who states that her husband worked as a full-time salesperson for the Respondent and that she dropped off lunches at the store.[11] She also alleges that she worked at the store in June 2018 and was not paid.[12]

30 Leaving aside the Respondent's denial that Ms Aveling was employed by the Respondent, Ms Aveling's evidence is of limited weight where she says she worked in the store for one month and then dropped off lunches, thus making no observation of what her husband did, if anything, and she clearly had no independent knowledge of any purported oral agreement between Mr Aveling and Mr Francis.

31 Mr Francis denied ever agreeing, either in writing or verbally, to employ Mr Aveling. Further, he denied ever discussing or agreeing upon wages, scope of work, duties or reporting times with Mr Aveling. Mr Francis expressed surprise at Mr Aveling describing himself as a Senior Sales Consultant, which Mr Francis says he never discussed or agreed with Mr Aveling.[13]

32 Mr Francis states that Mr Aveling commenced the claim against the Respondent after the Respondent recovered monies from Mr Aveling, which Mr Aveling had deposited into a bank account for 'Henry Flooring'. This money was paid by a customer for services provided by the Respondent and erroneously withheld by Mr Aveling.[14] The gravamen of Mr Francis' evidence is that Mr Aveling deposited into a bank account operated by him money owed to the Respondent.

33 Mr Francis states this money was recovered on 4 June 2019 by a debt collector and the claim was commenced on 8 July 2019.[15]

34 In reference to the content of the text message dated 24 September 2018, Mr Francis says that he was trying to be polite, but he wanted to prevent Mr Aveling from attending the store and talking to customers.[16]

35 Mr Francis states that the Respondent only provided business cards to family members, including himself, Ms Jessica Han, Mr Francis' daughter, Mr Nicholas Francis (Mr N. Francis), Mr Francis' son, Mr Marcus Francis (Mr M. Francis), Mr Francis' son, and the previous owners of the business, Mr Andrew Mcleod and Ms Heather Mcleod (Ms Mcleod). Mr Francis says that Ms Mcleod was the only other employee employed by the Respondent and her employment ceased on 31 May 2018.[17]

36 Mr Francis states he gave a total of $5,500 in cash to Mr Aveling as a goodwill gesture from his personal funds. This was for introducing a customer to the business and advising on how to improve the business.[18] The payment of $5,500 was in two payments.

37 To the extent that Mr Aveling says that his wife, Ms Aveling, was at the store, Mr Francis says that he was helping Ms Aveling prepare price tags for her art exhibition. Mr Francis also states that it was convenient for Ms Aveling to have Mr Aveling at the store and not at home.[19]

38 Mr Francis referred to a number of attachments in his witness statement, including text messages between himself and Mr Aveling dated 4 October 2018 demonstrating the issue with respect to the recovery of monies owed to the Respondent and a letter from the Respondent's accountant confirming Ms Mcleod as the Respondent's employee.[20]

39 The Respondent also relied upon evidence of Ms Han Cui Yee (Ms Yee), Mr Francis' wife and co-owner of the Respondent, Mr M. Francis and Mr N. Francis.

40 Similar to Ms Aveling's evidence, Ms Yee's evidence was of limited weight given she had limited involvement in the business, albeit she says she had a conversation with Mr Aveling where Mr Aveling said that he would help the family as they were new to the flooring business.[21]

41 The relevance of Mr M. Francis's evidence was limited to him seeing Mr Francis give Mr Aveling money and Mr Aveling crying and thanking Mr Francis.[22]

42 Mr N. Francis' evidence was also limited, save that Mr N. Francis said he did some work with Mr Aveling and to his knowledge Mr Aveling attended the store to show the family the 'flooring trade'. Further, when Mr Aveling was in the store, Mr N. Francis only saw him using his mobile telephone to access Facebook or going out to buy lotto tickets and to attend to other personal tasks.[23] Mr N. Francis denied Mr Aveling worked as a salesperson or did any other work in the store. While he accepted Mr Aveling helped him to learn the flooring trade, Mr N. Francis denied that Mr Aveling helped or mentored him further or helped him with customers. Mr N. Francis said that he designed the business card and did not approve the business card for Mr Aveling.

Determination

43 A contract of employment requires no particular form, and unless required by legislation, a contract of employment need not be in writing.

44 In an employment context, it may be formed by a verbal offer of work and by the other party agreeing to and performing the work. In the absence of written evidence as to the agreement a Court may imply the agreement by the parties' conduct.

45 However, a contract of employment must comply with certain requirements with respect to its formation, like any other contract. Irrespective that the purported contract was an oral agreement, to be enforceable as a contract the oral agreement must comply with the usual elements required for the formation of a contract. Those formal requirements are:

- an intention to create contractual relations;
- an offer and acceptance of that offer of an agreement (that is, an agreement); and
- consideration.

46 An intention to create legal relations is assessed on an objective basis, based on all of the circumstances.[24] While the intention to create legal relations is often assumed if the other elements of the contract are present, it is a separate formal element. In the context of arrangements involving the performance of work, the absence of an intention to create legal relations has prevented the existence of any binding and enforceable contract. By way of example, this may include where the work was performed on a voluntary basis, for a family business or as work experience, even where some form of payment is made.[25]

47 An agreement is usually evidenced by an offer being made and acceptance of the offer by the person to whom the offer is made where the acceptance is communicated to the offeror. The fundamental question is to determine whether the parties have in fact reached an agreement. It will ultimately be a question of objectively assessing the words and conduct of the parties in order to determine if an agreement has been reached.

48 For the following reasons, I am not satisfied that Mr Aveling has proven on the balance of probabilities that there was any contract of employment between he and Mr Francis for Mr Aveling to perform work for the Respondent:

- Mr Aveling's evidence lacked specificity with respect to what, and when it, was agreed with Mr Francis beyond Mr Aveling saying he was to be paid $25 per hour and that he says he worked from 9.00 am to 3.00 pm Monday to Friday and from 9.00 am to 2.00 pm on Saturday (bearing in mind that he agreed he may be mistaken about the store opening hours on Saturday). Beyond that there was no evidence about the nature of the employment, what work was to be carried out, the role he was employed for, or any other usual employment entitlements such as annual leave and sick leave;
- the goodwill payment was for assistance provided by Mr Aveling prior to 31 May 2018, albeit that it was paid later, consistent with Mr Francis' evidence of the purpose of the goodwill payment;
- the 'Time Sheet' tendered by Mr Aveling was not provided to the Respondent prior to the Court proceedings and the hours recorded on the 'Time Sheet' are inconsistent with Mr Aveling's evidence of the purported hours he allegedly worked. By way of example, Mr Aveling says he worked 23 hours the week of 30 July 2018 to 4 August 2018, save that he did not work Monday. On his oral evidence he apparently worked six hours per day each weekday and five hours on a Saturday, which would be 29 hours worked. The 'Time Sheet' also records Superannuation, but nowhere in the claim, his witness statement or in oral evidence does Mr Aveling mention that the payment of Superannuation was a term of the agreement discussed with Mr Francis. The 'Time Sheet' records 35 hours per week for most weeks, but Mr Aveling accepts that the he may be mistaken about the number of hours the store was open on Saturdays. This strongly indicates that the 'Time Sheet' was reconstructed prior to the claim being lodged for the purposes of making the claim and I have significant doubt about whether it reflects actual time worked (if he did work) at the business;
- notwithstanding the content of the text message from Mr Francis dated 24 September 2018, the response from Mr Aveling is instructive. Mr Aveling does not raise an issue with respect to wages or being terminated from his purported employment, and does not raise any issue until after the Respondent recovers monies relating to a former customer; and
- to the extent that Mr Aveling provided assistance in the store, this had the hallmarks of an ad hoc arrangement suitable to Mr Aveling, rather than to the Respondent. However, there came a time that Mr Francis no longer wanted Mr Aveling attending the store and informed him as much.

49 These factors demonstrate not only a lack of credibility in respect of Mr Aveling's evidence and his claim, but, in my view, they also objectively show that there was not an intention to create legal relations between Mr Aveling and the Respondent

involving the performance of work. That is, I accept Mr Francis' evidence that there was never a discussion with Mr Aveling concerning work to be performed by Mr Aveling and on what terms that work would be carried out. In that sense I find that there was no agreement between Mr Aveling and Mr Francis or Mr Aveling and the Respondent for Mr Aveling to perform work for $25 per hour, let alone what that work might or did entail.

50 Mr Francis' closing submissions accurately reflect the situation; that is, this was an unfortunate situation involving a friendship that had soured where Mr Aveling initially provided some assistance to a fledgling business, which was rewarded by the payment of $5,500. There was never any intention for Mr Aveling to go beyond that initial assistance, albeit it may have suited him to attend the store for personal reasons.

Outcome

51 I am not satisfied that Mr Aveling has proven on the balance of probabilities that a contract of employment existed between him and the Respondent. Therefore, I am not satisfied that Mr Aveling has proven on the balance of probabilities that he was employed by the Respondent.

52 Accordingly, where I am not satisfied that the Respondent employed Mr Aveling, Mr Aveling is not a '*national system employee*' pursuant to s 13 of the FWA. Where I find that Mr Aveling is not a '*national system employee*', no entitlement arises under s 323 of the FWA (if any entitlement existed).

53 Further, Mr Aveling's claim does not identify any or any other entitlement under the FWA applicable to him and the Respondent.

54 Section 545(3) of the FWA enables an eligible State court (the IMC is an eligible State court) to '*order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:*

(a) the employer was required to pay the amount under this Act or a fair work instrument; and

(b) the employer has contravened a civil remedy provision by failing to pay the amount'.

55 Therefore, there are three preconditions to an order by the IMC under s 545(3) of the FWA:

(1) an amount payable by the employer to the employee;

(2) a requirement to pay the amount by reference to an obligation under the FWA or a fair work instrument; and

(3) the failure to pay constitutes a civil remedy provision under s 539(1) and s 539(2) of the FWA.

56 Where I am not satisfied Mr Aveling is an employee employed by the Respondent and there is no obligation to pay an amount referrable to the, the IMC does not have jurisdiction to make an order for payment of alleged unpaid wages.

57 Therefore, Mr Aveling's claim fails for two reasons:

(1) he has failed to prove he was employed by the Respondent and is not a '*national system employee*'; and

(2) the IMC cannot make an order under s 545(3) where the Respondent has no obligation under the FWA to pay the amount sought by Mr Aveling.

58 I note further that Mr Aveling elected the Small Claim procedure. However, in my view, the relative informality of the Small Claim procedure does not assist Mr Aveling where the amount referred to in s 548(1)(a) and s 548(1A) of the FWA refers to '*an amount … an employer was required to pay to … an employee:*

(i) under [the FWA] *… or a fair work instrument; or*

(ii) because of a safety net contractual entitlement; or

(iii) because of an entitlement of the employee arising under subsection 542(1)' of the FWA.

59 For the reasons already given, the amount claimed by Mr Aveling is not an amount required to be paid by an employer to an employee under the FWA.

60 Further, '*safety net contractual entitlement*' means '*an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in*' (relevantly) s 61(2) of the FWA (that is, the NES): s 12 of the FWA.

61 The minimum standards listed in s 61(2) of the FWA, forming the NES, do not include or relate to the alleged non-payment of wages and, therefore, the payment or non-payment of wages under a contract of employment is not a '*safety net contractual entitlement*' (for the purposes of s 548(1A)(ii) and s 548(1A)(iii) of the FWA).

62 Accordingly, notwithstanding Mr Aveling elected the Small Claim procedure, the amount he claims is also not an amount within s 548(1A) of the FWA.

Result

63 For the reasons given above, Mr Aveling's claim is dismissed.

INDUSTRIAL MAGISTRATE
D. SCADDAN

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[1] Exhibit 1 - Witness Statement of Henry Aveling dated 28 February 2020 [3].

[2] Exhibit 2.

[3] Exhibit 2.

[4] Exhibit 1 [4a].

[5] Exhibit 1[4b].

[6] Exhibit 3.

[7] Exhibit 1 [4e] - [4i].

[8] Exhibit 4.

[9] Exhibit 4.

[10] Exhibit 5 - Witness Statement of Mark Francis van der Lee dated 28 February 2020 [4] - [6].

[11] Exhibit 6 - Witness Statement of Marianne Aveling date 28 February 2020 [7] and [8].

[12] Exhibit 6 [4].

[13] Exhibit 7 - Witness Statement of Anthony Francis dated 27 March 2020, 3.2.

[14] Exhibit 7, 1.0.

[15] Exhibit 7, 1.0.

[16] Exhibit 7, 1.0.

[17] Exhibit 7, 4.0 and 4.1.

[18] Exhibit 7, 5.0.

[19] Exhibit 7, 6.0.

[20] Exhibit 7 at attachment 5 - 7 and 8.

[21] Exhibit 9 - Witness Statement of Han Cui Yee dated 27 March 2020.

[22] Exhibit 10 - Witness Statement of Marcus Francis dated 27 March 2020.

[23] Exhibit 11 - Witness Statement of Nicholas Francis dated 27 March 2020.

[24] ***Nield v Matheson*** [2014] FCAFC 74 [42].

[25] ***Dietrich v Dare*** (1980) 30 ALR 407.

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The *Fair Work Act 2009* (Cth)

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 Industrial Magistrates Court (WA) (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), s 81 and s 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 contravening National Employment Standards: FWA, s 44(1); and contravening other terms and conditions of employment: FWA, s 323(1).

[5] An obligation upon an '***employer'*** 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 12, s 14, s 42 and s 47. A National Employment Standard entitlement of an employee 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 13, s 42 and s 47.

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:

- The National Employment Standards set out in pt 2 - 2 of the FWA: FWA, s 61(2) and s 539.
- Other terms and conditions of employment set out in pt 2 - 9 of the FWA: FWA, s 323(1) and s 539.
- 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 12 and s 14. 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.

[8] 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).

[9] 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:

> *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* [362].

2020 WAIRC 00250

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00250
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 11 SEPTEMBER 2019, THURSDAY, 12 SEPTEMBER 2019
DELIVERED	**:**	WEDNESDAY, 6 MAY 2020
FILE NO.	**:**	M 183 OF 2018
BETWEEN	**:**	JANINE CALLAN, DEPARTMENT OF MINES, INDUSTRY REGULATION & SAFETY **CLAIMANT** AND UBIQUITOUS HOLDINGS PTY LTD (ACN: 072 254 301) **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW (WA) – *Long Service Leave Act 1958* (WA) – Whether casual employee entitled to long service leave – Meaning of 'employee' – Meaning of 'continuous employment' – Meaning of 'absence authorised by employer' – Meaning of 'termination of employment' – Meaning of 'ordinary pay'
Legislation	**:**	*Long Service Leave Act 1958* (WA) *Labour Relations Legislation Amendment Act 2006* (WA)
Case(s) referred to in reasons	**:**	***United Construction Pty Ltd v Birighitti*** [2002] 82 WAIG 2409 ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24 ***David Kershaw v Sunvalley Australia Pty Ltd*** [2007] WAIRComm 520 ***Hollis v Vabu Pty Ltd*** [2001] 207 CLR 21 ***Marshall v Whittaker's Building Supply Company*** [1963] 109 CLR 210 ***Commissioner of State Revenue v Mortgage Force Australia Pty Ltd*** [2009] WASCA 24 ***WorkPac Pty Ltd v Skene*** [2018] FCAFC 131 ***Fair Work Ombudsman v Ramsey Food Processing Pty Ltd and Stewart Ramsey*** [2011] FCA 1176 ***Re Printing and Kindred Industries Union and Christopher Harvey v Davies Bros Ltd*** [1986] FCA 455 ***Wingate v Causeway Holdings Pty Ltd*** (2017) FWC 6247 ***Port Noarlunga Hotel v Stewart*** (1981) 48 SAIR 220 ***R v Industrial Appeals Court and Automatic Totalisers Limited; Ex parte Raymond John Kingston*** (Unreported, VSC, 26 February 1976) ***Melbourne Cricket Club v Francis Clohesy*** [2005] VSC 29 ***Caratti v Mammoth Investments Pty Ltd*** [2016] WASCA 84 ***Fix WA Pty Ltd Pty v City of Armadale*** [2019] WASC 356 ***Federated Clerks Union of Australia v Automated Totalisators Limited*** (1978) WAIG 1452 ***Melrose Farm Pty Ltd (t/as Milesaway Tours) v Milward*** [2008] WASCA 175 ***The casual employee in Port Noarlunga Hotel v Stewart*** (1981) 48 SAIR 220
Result	**:**	Judgment for the Claimant
Representation:		
Claimant	**:**	Mr S. King (of counsel) as instructed by Department of Mines, Industry Regulation and Safety
Respondent	**:**	Mr J. O'Carroll (Director)

REASONS FOR DECISION

1 Ubiquitous Holdings Pty Ltd (the Company) operates a business in the aged care sector. The Company maintains a list of allied health professionals (Workers) who have successfully applied to the Company in anticipation of being allocated work by the Company. The Company also maintains a list of hospitals and similar institutions (Clients), each of whom has expressed interest in being allocated a Worker by the Company. The business of the Company is placing Workers with Clients.

2 Ms Wendy Derwort (Ms Derwort), a personal care assistant, successfully applied to the Company to join the list of Workers. Over a 13 year period between July 2001 and November 2014, she was placed with Clients for periods that varied between one day and five months. Ms Derwort worked for four or five days in most weeks during this period on a shift of between six and seven hours. She informed the Company in advance if she was not available for work. On two occasions, Ms Derwort informed the Company that she was not available for over two months. The Company considered Ms Derwort to be its casual employee. She was paid an hourly rate that was calculated by the Company's assessment of an 'industry standard' and applying a 25% loading.

3 Section 8 of the *Long Service Leave Act 1958* (WA) (LSL Act) provides for an *employee* entitlement to long service leave of 8 2/3 weeks on *ordinary pay* in respect of *continuous employment* of 10 years with one and the same *employer*.

4 The Claimant contends that Ms Derwort was an '***employee***' who had completed at least 10 years of 'continuous employment' with one and the same employer, the Company, and that she is entitled to long service leave on ordinary pay. The Claimant calculates Ms Derwort's entitlement to long service leave in the amount of $7,626.18.

5 The Company's response to the claim is two-fold. First, the Company questions whether Ms Derwort was an employee of the Company or an employee of each of the several Clients in which Ms Derwort was placed by the Company (**the Employee Issue**). Secondly, the Company disputes whether, given her *casual employment* status, Ms Derwort has been *continuously employed* as required by the LSL Act (**the Continuous Employment Issue).** Resolution of the Continuous Employment Issue will require determination of the significance of s 6(2) of the LSL Act providing that employment is deemed to be continuous notwithstanding specified events.

6 If the Claimant is successful on the Employment Issue and the Continuous Employment Issue, it will be necessary to determine the *ordinary pay* of Ms Derwort given the definition of that phrase found in s 4 of the LSL Act (**the Ordinary Pay Issue**).

7 The Claimant is an Industrial Inspector. An Industrial Inspector may institute proceedings in relation to disputes on whether and to what extent an employee is entitled to long service leave under the LSL Act.[1] This Court has jurisdiction to hear and determine this dispute.[2] The onus of proving the claim is upon the Claimant. The claim must be proven on the balance of probabilities.

Facts

8 On 19 June 2001, Ms Derwort attended the business premises of the Company in West Leederville. She was interviewed by Ms Carol Powell, whom she knew from a previous workplace, and signed a document entitled 'Atlantic Healthcare Services Employment Application' (the Employment Application). The Employment Application contained a handwritten notation indicating an application for a casual personal care assistant. A tax file declaration signed by Ms Derwort on the same day identified the 'Basis of payment' as 'Casual employment' and the registered business name of the payer as 'Ubiquitous Holdings Pty Ltd'.

9 Mr John O'Carroll (Mr O'Carroll), the sole Director of the Company at all relevant times, gave evidence of his belief that on or around 19 June 2001 Ms Derwort had been provided (and signed) a document entitled 'contract of services' (the Alleged Written Contract Document). Mr O'Carroll's belief was based upon his knowledge of the work practices of the Company; he was not personally involved with Ms Derwort in June 2001. The Company did not produce the Alleged Written Contract Document. Mr O'Carroll observed that 18 years have elapsed since June 2001. He stated that the record keeping systems of the Company have had a number of iterations over that period. He had been unable to locate the document. However, Mr O'Carroll produced a template document (the Template Contract) that was said by him to be commonly in use by the Company in 2001 and believed by him to be identical to the Alleged Written Contract Document, save that no name or signatures appeared in the Template Contract.

10 I infer from Ms Derwort's testimony that she does not recall signing or sighting the Alleged Written Contract Document. A document entitled 'Employment Checklist' (the Checklist) containing a handwritten heading 'Wendy Derwort 19/6/01' is in evidence. The Checklist comprises items associated with commencing new employment under headings, 'Receive', 'Give', and 'Explain'. The Checklist contains accurate reference to other documents that are in evidence, for example, the Employment Application. I am satisfied that the Checklist was completed in the ordinary course of the business of the Company for the purpose of recording matters related to the Company. I infer from the notation in the Checklist and am satisfied that Ms Derwort was supplied with a copy of the Alleged Written Contract Document. The column 'Give' includes, in a single row, handwritten notations, 'Contract', 'X' and '19/6/01'. I am also satisfied that the Template Contract is identical in all material respects to the Alleged Written Contract Document. I am not satisfied that Ms Derwort signed the Alleged Written Contract Document or that there was any conversation between her and any representative of the Company as to the contents of the document. The Checklist records the Alleged Written Contract Document as having been 'given' to Ms Derwort and does not record it as being signed and returned i.e. 'Received'.

11 The contents of the Template Contract on work arrangements are consistent with Mr O'Carroll's evidence of the usual arrangements between the Company, Workers (called 'Temporary Workers' in the Template Contract) and Clients. The contents are not inconsistent with the evidence of Ms Derwort as to the same arrangements. The Template Contract is entitled 'Contract for Services' and commences with a sentence, 'This Contract of Services takes effect upon commencement of employment and finishes on completion of assignment'. Clause 1 provides that 'a Temporary Worker is engaged under a contract of service' on terms stated in the Template Contract and 'which apply to each and every assignment'. The Company

agrees to offer to Temporary Workers opportunities to work where there is a suitable assignment with a client (cl 2 of the Template Contract). There is no obligation to offer 'any normal number of hours in any day or week' (cl 5 of the Template Contract) and there may be periods between assignments when there is no work at all (cl 8 of the Template Contract). Although the Temporary Worker is not obliged 'to accept the offer of an assignment' (cl 4 of Template Contract), the Company may terminate the contract if an offer is declined (cl 5 of the Template Contract). The Company will pay to the Temporary Worker wages at an hourly rate (less tax) and superannuation (cl 3 of the Template Contract). The Company will not pay any entitlements 'normally associated with employment such as holidays (including statutory holidays), sick leave, long service leave etc' (cl 6 of the Template Contract). If the Company purports to terminate the contract, the Temporary Worker may request a senior manager of the Company to review the termination (cl 12 of the Template Contract).

12 Also, in evidence is a document entitled 'Ubiquitous Holdings Pty Ltd - Terms and Conditions of Business for the Supply of Temporary / Contract Staff' (the Company/Client Template Document). The contents of the Company/Client Template Document on work arrangements are consistent with the Template Contract. I am satisfied that a document akin to the Company/Client Template Document was expressly or impliedly adopted by a number of Clients of the Company. Retaining the nomenclature used in the Company/Client Template Document, a 'Temporary Worker' such as Ms Derwort, is stated to be an employee of the Company (cl 2 of the Company/Client Template Document). The Client agrees to pay the invoice of the Company for the hours worked by the Temporary Worker (cl 3 of the Company/Client Template Document). Mr O'Carroll gave evidence that the invoice identified (inter alia): hours on placement; an hourly rate; a 25% loading; an insurance fee; and a fee for the Company services. The hourly rate is set by the Company with the knowledge of hourly rates being paid by a Client directly to the Client's own employees. Mr O'Carroll had received advice that a 20% loading was the minimum required by law to be paid to a casual employee and that a 25% loading would forgo any argument about casual employees not being properly compensated for forgone entitlements. The Client must pay a fee to the Company if the Client engages the temporary worker within a period of six months from the termination of any temporary assignment (cl 6 of the Company/Client Template Document). The fee was to be calculated in accordance with a separate agreement, also in evidence.

13 The Company has placed approximately 4,300 Workers with Clients over a 20 year period and the total amount invoiced was over $100 million. Mr O'Carroll observed that the situation of Workers varied. Some Workers used a placement with a Client to help decide whether to seek employment directly with the Client. Some Clients used a placement for the same purpose; to help decide on whether to offer direct employment to a Worker. Many Workers appreciated the flexibility of choosing the precise number of placements each week that suited their circumstances. Some Workers never sought or accepted a placement, apparently registering with the Company was to their advantage in dealings with government on social security matters.

14 On 4 July 2001, at the request of an employee of the Company, Ms Derwort attended Sandstrom Nursing Home in Mount Lawley and worked an afternoon shift. This was her first placement. The following findings about subsequent placements are supported by 'time entries for employment from 1 January 2003 to 21 November 2014' (the Placement Spreadsheet) and 'pay advice from 11 June 2007 to 30 November 2014 (the Pay Advices). I also have reproduced the information in the Placement Spreadsheet onto an annual calendar for each year between 2003 to 2014 (Placement Calendars 2003 - 2014) so as to clearly delineate:

1. days worked by Ms Derwort (highlighted orange in 'Annexure A' to these reasons);
2. days not worked by Ms Derwort and stated by Ms Derwort to be her holidays, notified in advance by her to the Company (highlighted blue in 'Annexure A' to these reasons); and
3. days not worked (marked in a different manner as indicated by the 'Key').

15 The Placement Calendars 2003 - 2014 are included as 'Annexure A' to these reasons.

16 The Placement Spreadsheet was supplied to the Claimant by solicitors for the Company. Mr O'Carroll questioned the reliability of the Placement Spreadsheet. He noted that, for a range of reasons, a Worker may not actually attend to work as indicated on the Placement Spreadsheet. He stated, for example, that Workers were known to 'swap' shifts. He stated that certain records (now no longer available) were a more reliable indicator of placements of a Worker than the Placement Spreadsheet. Notwithstanding his evidence, I consider the Placement Spreadsheet to be a reliable basis for my findings. It is consistent with the evidence of Ms Derwort insofar as she attests to having been placed with a number of Clients for periods ranging between one day and a number of months. I have also compared a selection of the contents of the Placement Spreadsheet with the relevant pages from the Pay Advices and found the contents of each to be consistent with the other.

17 The length of each placement with a Client ranged in duration between a single day and a number of months. There was no consistent pattern in the identity of the Client where a placement was made. Some placements were with one Client for a period of up to six months without 'interruption'. An alternative pattern of placements involved a relatively long period with one Client 'interrupted' with shorter placements to a number of other Clients.[3] A significant proportion of Ms Derwort's work involved relatively short placements with different Clients. For example, between August 2006 and January 2007, Ms Derwort was placed with at least ten different Clients for time periods ranging between one day and one month.

18 There was no consistent pattern in the days of the week that Ms Derwort worked. Ms Derwort was usually placed for at least four days each week and often for at least five days each week. The days were often, though not invariably, consecutive. Not infrequently, those working days included a Saturday or a Sunday (or both). Ms Derwort worked on public holidays. There were occasional periods when Ms Derwort worked fewer than four days per week. There were occasions when Ms Derwort worked more than five days of a week, including occasions when she worked every day of the week and into the following week. There was no consistent pattern in the length of each shift. Each placement was for a shift of between four and eight hours and more usually between six and seven hours. There is no evidence as to the starting time of each shift. Occasionally, Ms Derwort worked a 'split shift' of four hours each with different Clients on the one day.

19 The procedure for allocating placements involved two processes. First, Ms Derwort was required to advise the Company, on a weekly basis, of her availability for placements in the following week. Secondly, the Company would initiate contact with Ms Derwort by telephone to advise of a placement commencing or a placement ending. It was sometimes expedient for a Client to inform Ms Derwort of the end or commencement of a placement with that Client. If Ms Derwort was unable to attend to an allocated placement because of illness, she would inform the Company of this fact. Communication between Ms Derwort and the Company involved telephone conversations between Ms Derwort and an employee of the Company located in the 'call centre' of the Company. Over time, Ms Derwort came to have many conversations with a particular call centre staff member known to Ms Derwort as 'Madge'.

20 When Ms Derwort proposed to go on a holiday (or could not work for any reason) she contacted the call centre in advance and advised of her unavailability for work during a specified period of time (Leave Procedure). The Placement Spreadsheet (and the blue highlighted dates on the 'Annexure A') correlate with the evidence of Ms Derwort that this occurred on 11 occasions for periods between seven and 16 days and on four occasions for periods of 33 days, 40 days, 68 days and 88 days.

21 Ms Derwort's gross pay was calculated on the basis of the number of hours that she worked each day for the Client and an hourly rate that varied according to whether she worked on a weekday, Saturday, Sunday or public holiday. The Company deducted income tax from the total gross pay and remitted the net amount to Ms Derwort. Ms Derwort was paid fortnightly by bank transfer from the Company to her bank account. Contributions were made by the Company to a superannuation account in the name of Ms Derwort. Ms Derwort's gross income, revealed by the PAYG Payment Summaries supplied by the Company to the Claimant was as follows: $45,291 in 2008; $30,991 in 2009; $39,009 in 2010; $35,415 in 2011; $40,727 in 2012; $43,930 in 2013; $35,942 in 2014; and $12,666 in 2015.

22 While working at the premises of a Client, Ms Derwort wore a uniform supplied by the Company and displaying insignia of the Company. Ms Derwort contributed to the cost of the uniform. From time to time Ms Derwort undertook training, arranged by the Company, relevant to the duties that she performed when working in a placement. If Ms Derwort was unable to resolve a complaint about a workplace issue, a manager of the Company was available to intervene with the Client on behalf of Ms Derwort.

23 Ms Derwort's last placement was at St Vincent's Nursing Home in Guildford on 21 November 2014 when she worked a shift of 7.75 hours. There is a dispute about the circumstances of the end of the relationship between Ms Derwort and the Company.

24 Mr O'Carroll gave evidence that sometime *after* 21 November 2014, 'Madge' recognised the voice of Ms Derwort when Ms Derwort telephoned in the capacity of an employee of a Client, namely, Aegis Aged Care at Lakeside. I infer that the basis of Mr O'Carroll's evidence is a conversation that he had (on an unknown date) with 'Madge'.

25 Ms Derwort gave evidence that, before her last placement she was offered alternative employment and she determined that she would cease to be available to the Company for placements with Clients. Her evidence was that she attended at the office of the Company in person and attempted to speak to a representative of the Company. Finding no-one was in attendance, she telephoned the 'call centre' of the Company and spoke to 'Madge'. Ms Derwort gave evidence that she informed 'Madge' of having been offered a job and proposing to resign.

26 In the absence of the direct evidence of 'Madge', I prefer the direct evidence of Ms Derwort over the hearsay evidence of Mr O'Carroll. I am satisfied that Ms Derwort gave notice to 'Madge', before 21 November 2014, of the termination of her relationship with the Company.

The Employee Issue

27 The effect of s 8 of the LSL Act is that Claimant must prove that, at all relevant times, Ms Derwort was an '***employee***' and that the Company was her '***employer***'.

28 The definition of '***employee***' and '***employer***' is stated in s 4(1) of the LSL Act:

> **employee** *means, subject to subsection (3) —*
>
> *(a) any person employed by an employer to do work for hire or reward including an apprentice;*
>
> *(b) any person whose usual status is that of an employee;*
>
> *(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or*
>
> *(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee;*
>
> **employer** *includes —*
>
> *(a) persons, firms, companies and corporations; and*
>
> *(b) the Crown and any Minister of the Crown, or any public authority, employing one or more employees;*

29 The Claimant contends that, between July 2001 and November 2014, Ms Derwort was a casual employee of the Company; she was not a full-time or part-time employee or an independent contractor. The Company agrees with the characterisation of Ms Derwort as a casual employee. In circumstances where each party conducted their case on the basis of Ms Derwort being a casual employee, it is not appropriate to contradict this characterisation of her legal status without notice to the parties and, for the reasons given in the following two paragraphs, it is not necessary to do so.

Ms Derwort is not an independent contractor

30 Authorities upon the meaning of '***employee***' and '***employer***' for the purposes of the LSL Act have drawn upon the distinction, well known at common law, between an employee and an independent contractor.[4] An employee is a party to a contract of employment (also named a contract of service), supplying labour to an employer. An independent contractor is a party to a contract of service, supplying labour to a client.[5] It is the substance or reality of the totality of the relationship between the parties that determines the character of the legal relationship.[6]

31 I am satisfied that the contents of the Alleged Written Contract Document evidenced the terms of a contract between Ms Derwort and the Company. Although Ms Derwort did not sign the document, the circumstances by which Ms Derwort came into possession of the document and the circumstances of her subsequently commencing work are evidence that both parties intended to be bound by the terms of the document. The terms of the contract, save for the title ('Contract for Services'), are consistent with a contract of employment (i.e. a contract of service) and inconsistent with Ms Derwort being an independent contractor. She was subject to direction by the Company as to the performance of her relatively unskilled duties and she was paid at an hourly rate. The Company deducted income tax and paid superannuation. The work practices of the parties were inconsistent with Ms Derwort having the status of an independent contractor. Personal service was required and delivered. She wore the uniform of the Company. The contractual label of 'Contract for Services' is not significant; it does not reflect the reality of the relationship between the parties.

Ms Derwort is a casual employee of the Company

32 Full-time and part-time employment is characterised by an employer commitment to on-going employment according to an agreed pattern of ordinary time for an indefinite term; casual employment is characterised by the *absence* of an employer commitment of continuing and indefinite work and the *absence* of an employee obligation to provide labour upon request.[7] The terms of the contract of employment between Ms Derwort and the Company, contained in the Alleged Written Contract Document and evidenced by Template Contract, are explicit: there is no obligation to offer any normal number of hours in any day or week. The subsequent work practices of the parties did nothing, by implication, to alter this term.

33 On behalf of the Company, Mr O'Carroll observed that, when carrying out her duties on the premises of a Client, Ms Derwort was subject to the direction of that Client. Accordingly, he suggested, it was arguable that Ms Derwort became a casual employee of each Client for the period of each placement. If this argument is accepted, Ms Derwort was not an employee of the Company during the period of each placement and has no entitlement, as against the Company, to long service leave.

34 The argument invites comparison with similar 'labour hire' arrangements considered in other cases. A review of cases was undertaken by Buchanan J in ***Fair Work Ombudsman v Ramsey Food Processing Pty Ltd and Stewart Ramsey*** [2011] FCA 1176 [47] - [66] (***Ramsey's Case***). Of significance are the following conclusions (citations omitting):

1. At common law, 'an employee of one business entity [the first entity] might be hired, loaned or seconded to another person or business [the second entity], without any change in employment relationship occurring. This is so even if a good measure of practical control is exercised over the work of the employee by' the second entity: ***Ramsey's Case*** at [47].

2. At issue is the substance and reality of the relationship between each entity and the worker. The first entity may be in a contract *of* service (employment) or a contract *for* services (independent contractor) with the worker. Of relevance will be 'indications of commercial practicality in the arrangement' and whether the true primary relationship (employment or independent contract) is between the first entity and the worker: ***Ramsey's Case*** at [63].

3. In the following case, a worker supplies services to the first entity while attending at the site and working under the direction of the second entity: (1) an agreement exists between the first entity and the second entity for the supply of a worker to the second entity to do certain work on terms that the second entity remunerate the first entity; and (2) an agreement exists between the first entity and the worker, whereby the worker agreed to perform work at the direction of the second entity for remuneration to be paid by the first entity: ***Ramsey's Case*** at [66].

4. In the example in (c), when 'attending [the site of the second entity] ... and doing work, [the worker] supplies services to [the first entity] … for the purpose of its business, notwithstanding that [the worker] also at the same time supplies the same services to the [second entity] … for the purpose of' second entity's business: ***Ramsey's Case*** at [66].

35 Applying the observations in ***Ramsey's Case*** to my findings of fact above, I am satisfied that Ms Derwort was a casual employee of the Company and that Ms Derwort was *not* an employee of any Client of the Company where she worked on a placement. Ms Derwort was subject to a measure of practical control by a Client when working on the premises of the Client. So much was a term of her contract of employment with the Company, reflected in cl 4 of the Template Contract. She was required to afford to the Client 'such faithful service as would be expected by the Client from a Contract of Employment' and '[t]o comply with any policies or procedures in force at the premises' of the Client. However, the 'substance and reality' of the relationship between Ms Derwort, the Company and a Client was succinctly and accurately described by Mr O'Carroll as offering Workers and Clients a 'try before you buy' opportunity. The Company, from the perspective of Clients, assumed the usual risks and responsibilities of an employer until a Client requested a permanent placement. From the perspective of the Worker, there was no obligation to a Client other than to complete a placement. Ms Derwort was a casual employee of the Company.

Continuous Employment Issue

36 The Claimant contends that, as a casual employee of the Company, Ms Derwort was an '***employee***' and that the Company was her '***employer***' within the meaning of the words as defined in s 4(1) of the LSL Act. There is nothing in the definition (or elsewhere in the LSL Act) to suggest that the ordinary meaning of the word 'employee', which may be taken to include permanent employees *and* casual employees,[8] should be given any different meaning. Ms Derwort is an '***employee***' and the Company is her '***employer***' within the meaning of those terms as defined by s 4(1) of the LSL Act. The significance of Ms Derwort's status as a 'casual employee' is the implication of that legal status upon calculations of her period of 'continuous employment' by the Company.

37 The effect of s 8 of the LSL Act is that the Claimant must prove that Ms Derwort had completed at least seven years of 'continuous employment' with the Company.[9] Although s 6 of the LSL Act is entitled, '[w]hat constitutes continuous employment', the section does not define the phrase 'continuous employment':

> ***6. What constitutes continuous employment***
>
> *(1) For the purposes of this Act employment of an employee whether before or after the commencement of this Act shall be deemed to include —*
>
> *(a) any period of absence from duty for —*
>
> *(i) annual leave;*
>
> *(ii) long service leave; or*
>
> *(iii) public holidays or half-holidays, or, where applicable to the employment, bank holidays;*
>
> *(b) any period of absence from duty necessitated by sickness of or injury to the employee but only to the extent of 15 working days in any year of his employment;*
>
> *(c) any period following any termination of the employment by the employer if such termination has been made merely with the intention of avoiding obligations under this Act in respect of long service leave or obligations under any award or industrial agreement in respect of annual leave; and*
>
> *(d) any period during which the employment of the employee was or is interrupted by service —*
>
> *(i) as a member of the Naval, Military or Air Forces of the Commonwealth of Australia …*
>
> *but only if the employee, as soon as reasonably practicable after the completion of any such service, resumed or resumes employment with the employer by whom he was last employed prior to the commencement of such service.*
>
> *(2) For the purposes of this Act, the employment of an employee whether before or after the commencement of this Act shall be deemed to be continuous notwithstanding —*
>
> *(a) the transmission of a business as referred to in subsections (4) and (5);*
>
> *(b) any interruption referred to in subsection (1) irrespective of the duration thereof;*
>
> *(c) any absence of the employee from his employment if the absence is authorised by his employer;*
>
> *(d) any standing-down of an employee in accordance with the provisions of an award, industrial agreement, order or determination —*
>
> *…*
>
> *(e) any absence from duty asrising directly or indirectly from an industrial dispute if the employee returns to work in accordance with the terms of settlement of the dispute;*
>
> *(f) any termination of the employment by the employer on any ground other than slackness of trade if the employee is re-employed by the same employer within a period not exceeding 2 months from the date of such termination;*
>
> *(g) any termination of the employment by the employer on the ground of slackness of trade if the employee is re-employed by the same employer within a period not exceeding 6 months from the date of such termination;*
>
> *(h) any reasonable absence of the employee on legitimate union business in respect of which he has requested and been refused leave;*
>
> *(i) any absence of the employee from his employment after the coming into operation of this Act by reason of any cause not specified in subsection (1) or in this subsection unless the employer, during the absence or within 14 days of the termination of the absence, gives written notice to the employee that the continuity of his employment has been broken by that absence, in which case the absence shall be deemed to have broken the continuity of employment.*
>
> (3) *Any period of absence from, or interruption of employment referred to in subsection (2)(c) to (i) inclusive shall not be counted as part of the period of an employee's employment.*

38 The effect of the section is to provide for the consequences (at law) of three categories of events. First, the time period that an employee is absent from duty because of events described in s 6(1)of the LSL Act is deemed to be included as time in employment. For example, absence from duty for annual leave is deemed to be included in employment. Similarly, absence from duty (to a maximum of 15 days per year) necessitated by sickness is deemed to be included in employment. Secondly, employment is deemed to be 'continuous employment' notwithstanding interruption, absence or termination of employment by reason of any of the events set out in s 6(2) of the LSL Act. For example, employment is deemed to be continuous notwithstanding any authorised absence or any absence from employment by reason of any cause not otherwise specified in s 6(1) or 6(2) of the LSL Act. Thirdly, although s 6(2) of the LSL Act provides that employment is deemed to be continuous in the circumstances prescribed, any period of absence by reason of the circumstances in s 6(2)(c) to s 6(2)(i) of the LSL Act will not be included in calculating whether an employee has reached seven years of continuous employment.

39 The Claimant's case is that Ms Derwort was in continuous employment with the Company from 4 July 2001 until November 2014. It is said that, subject to comments in the following paragraph on those non-working time periods subject to the Leave Procedure (described above), the ordinary meaning of the phrase 'continuous employment' is an apt description of the nature and circumstances of Ms Derwort's casual employment over the whole of this period. Supporting this interpretation of the LSL Act, it is noted that the statutory formula for calculating pay during long service leave expressly requires taking account of time spent working as a 'casual employee'.[10]

40 The Claimant accounts for 15 separate non-working time periods subject to the Leave Procedure as 'authorised absences' (s 6(2)(c) of the LSL Act) with the consequences noted above on the effect of s 6(2) (employment deemed continuous) and s 6(3) (absences not included when calculating length of service) of the LSL Act. Ms Derwort's employment is deemed to be continuous notwithstanding the absence from work (s 6(2)(c) of the LSL Act). However, the Claimant does not include each of the 15 time periods when calculating whether Ms Derwort has reached seven years of continuous employment (s 6(3) of the LSL Act).

41 The Company does not agree with the Claimant on the proper construction of the LSL Act. Emphasis is placed upon the incongruency, in fact and in law, of equating the 'casual employment' of Ms Derwort with the 'continuous employment' requirement of the LSL Act. The Company contends that there was no obligation to offer *any* placement to Ms Derwort and observes that Ms Derwort was free to accept or reject each offer of a Client placement. The Company's case is that the contingent and intermittent nature of the casual employment relationship between Ms Derwort and the Company was inconsistent with a characterisation of 'continuous employment'; it was unlikely that Parliament intended to impose a statutory obligation upon the Company which may or may not crystallise upon an unknown future date.

42 In particular, invoking s 6(2)(f) of the LSL Act, the Company argues that, by reason of the nature of casual employment, any period of 'continuous employment' of Ms Derwort was terminated on a 'ground other than slackness of trade' at the end of each Client placement. No legal relationship subsisted with the Company unless and until a further Client placement was offered by the Company and accepted by Ms Derwort. If this argument is accepted, two consequences follow.

43 First, as a result of s 6(2)(f) of the LSL Act, in each case where more than two months elapsed between Client placements, Ms Derwort ceased to be continuously employed. Ms Derwort was placed with a Client on 4 July 2001. The Company argues that Ms Derwort was continuously employed for (by coincidence) seven years, until, on 4 July 2008, Ms Derwort ended a Client placement and commenced a non-working period in excess of two months (5 July 2008 - 29 September 2008).

44 Secondly, as a result of s 6(3) of the LSL Act, each non-working period of *any* length between Client placements, was not to be counted as part of Ms Derwort's employment. For example, in June 2008, Ms Derwort did not work at all on the following dates: 8 June 2008, 9 June 2008, 16 June 2008, 21 June 2008, 22 June 2008, 23 June 2008, 28 June 2008, and 29 June 2008. The Company argues that there was no legal relationship between the Company and Ms Derwort on these eight days. There was no continuous employment. Those days must not be counted as part of Ms Derwort's employment.

45 As a result of the two consequences identified in the two preceding paragraphs, the Company argues that Ms Derwort will not have completed at least seven years of employment.

46 An alternative argument might have been made by the Company, invoking s 6(2)(c) of the LSL Act on 'authorised absences' or s 6(2)(i) of the LSL Act on absence from employment for 'any other reason'. If, between each Client placement, no legal relationship subsisted between Ms Derwort and the Company, those non-working periods might be characterised as 'authorised absences' or 'absences for an unspecified reason'. If this argument is accepted, as a result of s 6(3) of the LSL Act, each non-working period *of any length* between Client placements, is not to be counted as part of Ms Derwort's employment. The resulting calculation may or may not result in an entitlement to long service leave, depending upon the total number of non-working days in the period between July 2001 and November 2014.

47 The relationship between casual employment and continuous employment has not previously been addressed by a court in Western Australia.[11] The issue has been considered by courts in other States. In South Australia, it has been held that the text of the relevant statute, in using the phrase 'continuous *work*' (emphasis added), favoured an entitlement to long service leave for a casual employee.[12] In Victoria, the opposite conclusion was reached when considering the (different) language of the relevant statute; a casual employee was not entitled to long service leave.[13] The text of the South Australian and the text of the Victorian statutes were different from each other and different from the text of the LSL Act. Those decisions serve to emphasise that, as in any case requiring interpretation of a statute, the starting point in resolving the issue in this case is consideration of the ordinary meaning of the words of the LSL Act in the context of the whole of the LSL Act and the evident purpose of the Act.

48 In ***Caratti v Mammoth Investments Pty Ltd*** [2016] WASCA 84 at [390] - [392], Buss JA (as he then was) states:

> *The modern approach to statutory construction is purposive. The statutory text is the surest guide to Parliament's intention. A decision as to the meaning of the text requires consideration of the context, in its widest sense, including the general purpose and policy of the provision.*
>
> *The context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed.*
>
> *The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose.* (citations omitted)

49 Similarly, in ***Fix WA Pty Ltd Pty v City of Armadale*** [2019] WASC 356 at [70], Hill J notes:

> *The starting point in considering the meaning of the Act is to consider the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and legislative purpose. Extrinsic materials can be considered to confirm the ordinary meaning conveyed by the text of the provision, or to determine the meaning of a provision where the provision is ambiguous or obscure, or where the ordinary meaning gives rise to a result that is manifestly absurd or unreasonable (Interpretation Act 1984 (WA), s 19(1)).*

50 The definition of '***ordinary pay***' found in s 4 of the LSL Act, used for the purposes of calculating the quantum of a long service leave payment, contains a formula to be used 'where the normal weekly number of hours have varied over the period of employment of a full-time, part-time or *casual employee'* (emphasis added). The Claimant argues that the express reference to the weekly number of hours of a *casual employee* is an indication of a statutory purpose of the LSL Act consistent with casual employees being entitled to long service leave. An examination of the history of this provision confirms this indication:

1. The definition of '***ordinary pay***' quoted above was introduced by the *Labour Relations Legislation Amendment Act 2006* (WA), inserting the words 'full-time, part-time or casual' before the word '***employee***' in s 4(2)(c) of LSL Act. The explanatory memorandum to the *Labour Relations Legislation Amendment Bill 2006* (WA) (the Amending Bill) provides helpful context to the occasion for the amendment. The Amending Bill was intended to ensure consistency between the LSL Act and an order made by the Commission in Court Session on 27 January 1978 (LSL General Order).[14] Clause 2(1) of the LSL General Order provided for long service leave for a worker based on continuous service with one and the same employer. Clause 4(2) of the LSL General Order provided that a worker entitled to long service leave was to be paid at the 'rate applicable … for the standard weekly hours which are prescribed by [the] award … but in the case of casuals and part-time workers [was to be paid] … the rate for the number of hours usually worked up to but not' including the prescribed standard. The explanatory memorandum explicitly makes a link between cl 4(2) of the LSL General Order and the (new) definition of '***ordinary pay***' in the LSL Act.[15]

2. In ***Federated Clerks Union of Australia v Automated Totalisators Limited*** (1978) WAIG 1452 (***Sloans* case**), the Industrial Appeal Court considered whether the LSL General Order provided for an entitlement to long service leave in the case of a casual employee. Casual employment may arise from a series of separate and distinct contracts of employment for each and every engagement (a Series of Casual Contracts). Alternatively, casual employment may arise from a single contract of employment on terms that include working on days and times when requested by the employer (a Single Casual Contract). Whether casual employment is evidenced by a Series of Casual Contracts or a Single Casual Contract is a question of fact.[16] In ***Sloans*** case, the casual employment relationship was created by a Single Casual Contract made at the commencement of employment and subject to termination on reasonable notice. The employee promised to be available for work. The employer promised to provide *some* work, subject to the right not to provide work at any particular time. The employee worked each week for 12 years except for two weeks when the employer informed the employee that he was not required. The Court held that there was continuous employment 'under one contract and that was the one created' at the commencement of the employment. The Court also considered the effect of the LSL General Order upon casual employment arising from a Series of Casual Contracts, holding that an employee remains continuously employed for so long as the employee has provided work to the employer.

3. The explanatory memorandum to the Amending Bill cites an expert review of industrial relations legislation in connection with the explanation for a provision repealing the LSL General Order: Commissioner G.L. Fielding, *Review of Western Australian Labour Relations Legislation* (July 1995)[17] (the Fielding Review). The Fielding Review included a number of observations on the question of the entitlement of casual employees to long service leave. Commissioner Fielding expresses the view that there is no reason in principle why a casual employee could not be said to be in continuous employment or service of one employer for a long period. '[Many employees] are frequently rostered for work on a regular basis, albeit that the roster is liable to constant change, depending on the requirements of the employer. In those circumstances, despite being described as casual, the employment is essentially continuous.'[18] The Fielding Review recommended consistency between the LSL General Order and the LSL Act in this issue.

51 Section 6(1) of the LSL Act does not shed light on the status of casual employees; the proscribed events may (for example, military service) or may not (for example, annual leave) be capable of application to a casual employee. In the result, s 6(1) neither supports nor detracts from an interpretation of 'continuous employment' that includes employment as a casual employee.

52 The Company's argument that the end of a Client placement marked the termination of employment (or the commencement of an absence from employment) is not an accurate characterisation of Ms Derwort's employment relationship with the Company. Like the casual employee in ***Sloans*** case,[19] Ms Derwort's casual employment was created by a Single Casual Contract. The contract was created by the exchange of communications on or after 19 June 2001 and Ms Derwort subsequently attending her first Client placement on 5 July 2001. The Alleged Written Contract Document is a source of the terms of the contract. The employment is 'casual' because there is no obligation upon the Company to offer any normal number of hours and there is an acknowledgement of the possibility of no work at all 'between assignments'. However, two features of the contract are worthy of comment.

53 First, the Company's contention of having no on-going obligation to Ms Derwort is inaccurate. The Company has an obligation to offer work to Ms Derwort 'where there is a suitable assignment with a Client'. If and when a suitable Client placement arose, the Company was obliged to offer the placement to Ms Derwort. Secondly, the Company's contention that Ms Derwort was free to refuse an offer of a Client placement is also inaccurate. The Company was entitled to terminate the contract if Ms Derwort declined the offer of a placement. Unless and until the contract was terminated by the Company, it remained on foot.

54 It follows from these two features of the contract of employment that Ms Derwort remained in a contractual relationship of employment with the Company during non-working periods between Client placements. No termination occurred. So long as Ms Derwort was available for work, no question of absence from work arises. It is a short step from these observations to a conclusion that, so long as Ms Derwort was available for employment, as required by her contract, she was in continuous employment.

55 'Continuous employment' is not relevantly defined by s 6 of the LSL Act to expressly include or exclude casual employment arising from a Single Casual Contract. The ordinary meaning of the word '***employee***' in s 8 of the LSL Act and the definition of '***ordinary pay***' in s 4 of the LSL Act suggests a statutory purpose that casual employees have the same entitlement to long service leave as full-time and part-time employees. The history of s 4 of the LSL Act and the mischief to which the Amending Bill was directed tend to confirm this statutory purpose. I conclude that the phrase 'continuous employment' in s 8 of the LSL Act is capable of including a period of casual employment arising from a Single Casual Contract in the circumstances of Ms Derwort. The Company undertook to make offers of employment if a suitable assignment arose and did, in fact, make such offers. Ms Derwort undertook to accept such offers and she did, in fact, accept such offers.

56 I agree with the submission of the Claimant, summarised above, that the 15 separate non-working time periods subject to the Leave Procedure constitute 'authorised absences' with the consequence that those absences are not included when calculating Ms Derwort's length of service. The Leave Procedure was, in effect, an agreement between Ms Derwort and the Company to suspend so much of the contract of employment that imposed an obligation upon the Company to offer employment and imposed an obligation upon Ms Derwort to accept an offer of employment. Ms Derwort identifies those periods as 'holidays'. Her evidence of advising the call centre of the Company in advance of each holiday was not effectively challenged. Those non-working periods were each an 'authorised absence'. The Claimant calculates the period of continuous employment of Ms Derwort as being in excess of 10 years, giving rise to an entitlement to 8 2/3 weeks of leave. The calculation is done on the basis of continuous employment of in excess of 13 years, being employment between 4 July 2001 and 21 November 2014, reduced by 353 days being the periods of 'authorised absence'. The Claimant was not cross-examined on the veracity or the accuracy of the calculation. I am satisfied as to the accuracy of the calculation.

The Ordinary Pay Issue

57 The Claimant has been successful on the Employment Issue and the Continuous Employment Issue. Ms Derwort is entitled to 8 2/3 weeks long service leave 'on ordinary pay'. It is necessary to determine the *ordinary pay* of Ms Derwort in light of the definition of that phrase found in s 4 of the LSL Act (**the Ordinary Pay Issue)**.

58 The term '***ordinary pay***' is defined in s 4(1) and s 4(2) of the LSL Act.

> *(1) In this Act unless the context requires otherwise —*
>
> …
>
> **ordinary pay** *means subject to subsection (2), remuneration for an employee's normal weekly number of hours of work calculated on the ordinary time rate of pay applicable to him, as at the time when any period of long service leave granted to him under this Act commences, or is deemed to commence, and where the employee is provided with board and lodging by his employer, includes the cash value of that board and lodging, where such board and lodging is not provided and taken during the period of leave, but does not include shift premiums, overtime, penalty rates, allowances, or the like.*
>
> *(2) For the purpose of the interpretation of* ***"ordinary pay"*** *in subsection (1) —*
>
> …
>
> (c) *where the normal weekly number of hours have varied over the period of employment of a* full-time, part-time or casual *employee the normal weekly number of hours of work shall be deemed to be the average weekly number of hours worked by the employee during that period of employment (calculated by reference to such hours as are ascertainable if the hours actually worked over that period are not known)* (emphasis added)

59 It is apparent that Ms Derwort's entitlement is 8 2/3 weeks multiplied by the product of:

1. Ms Derwort's 'normal weekly number of hours of work' i.e. the ascertainable average weekly number of hours worked during her period of employment; and

2. Ms Derwort's 'ordinary time rate of pay applicable' at 21 November 2014.

60 The Claimant contends that the 'normal weekly number of hours of work' of Ms Derwort was 28.367 hours. The calculation reflects the total hours stated in the Placement Spreadsheet for the period 1 January 2003 to 21 November 2014 and the total weeks in the same period. The method of calculation is consistent with s 4(2) of the LSL Act. The Company did not make a contrary submission. One alternative, resulting in a more generous entitlement to Ms Derwort, would be to reduce the total weeks in the period by the periods of 'authorised absences'. However, this alternative is inconsistent with the fact that s 4(2) of the LSL Act does not, for this calculation, distinguish between full-time and casual employment.

61 The Claimant contends that the 'ordinary time rate of pay' at 21 November 2014 was $25.85 per hour. The Pay Advices, and particularly the pay advice for the period 17 November 2014 to 30 November 2014 confirms the accuracy of this contention. The Company did not make a contrary submission.

Conclusion

62 The rights and obligations of Ms Derwort and the Company on the question of long service leave fall to be determined by the application of the LSL Act to the circumstances of the employment of Ms Derwort. Of limited weight are the submissions of the Company on the absence of complaint by similarly circumstanced casual employees of the Company. It may be observed that whether or not other employees of the Company are similarly situated to Ms Derwort was *not* the subject of evidence in this case (beyond a bare assertion by Mr O'Carroll). Similarly, the long service leave entitlements of casual employees of the employer operating Royal Perth Hospital is necessarily of limited relevance.

63 I have resolved the Employment Issue by concluding that, as a casual employee of the Company, Ms Derwort satisfied the LSL Act requirement that she was an '***employee***' of the Company. I have resolved the Continuous Employment Issue by concluding that, the Alleged Written Contract Document was evidence of the terms of the contract of employment between Ms Derwort and the Company. Properly construed, the effect of this contract was that Ms Derwort was continuously employed for the whole of the period of the contract, namely, 4 July 2001 to 21 July 2014. I have resolved the Ordinary Pay Issue by concluding that Ms Derwort worked, on average, 28.367 hours each week. It follows that Ms Derwort's entitlement is $7,626.18. I will hear from the parties on the precise form of orders to reflect this conclusion.

M FLYNN
INDUSTRIAL MAGISTRATE

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[1] *Long Service Leave Act 1958* (WA) s 11 and s 12.

[2] *Long Service Leave Act 1958* (WA) s 11(1).

[3] For example, between February and July 2008, WD was placed at St Michaels except for occasional days at Annesley, St Vincents, Koh-I-Noor and Archbishop Goody Hostel.

[4] ***United Construction Pty Ltd v Birighitti*** [2002] 82 WAIG 2409; ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24; ***David Kershaw v Sunvalley Australia Pty Ltd*** [2007] WAIRComm 520.

[5] ***Hollis v Vabu Pty Ltd*** [2001] 207 CLR 21, [40] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) citing ***Marshall v Whittaker's Building Supply Company*** [1963] 109 CLR 210, 217 (Windeyer J).

[6] ***Commissioner of State Revenue v Mortgage Force Australia Pty Ltd*** [2009] WASCA 24 (Buss JA, Steytler P and Le Miere AJA concurring).

[7] ***WorkPac Pty Ltd v Skene*** [2018] FCAFC 131 [171] - [172].

[8] ***Re Printing and Kindred Industries Union and Christopher Harvey v Davies Bros Ltd*** [1986] FCA 455.

[9] Section 8(1) of the *Long Service Leave Act 1958* (WA) provides for an entitlement to long service leave of 8 2/3 weeks for an employee who has completed at least 10 years of such continuous employment and s 8(2) provides for a proportionate entitlement where an employee has completed at least 7 years of such continuous employment and the employment is terminated before reaching 10 years.

[10] *Long Service Leave Act 1958* (WA) s 4(2).

[11] I have identified a decision of the Fair Work Commission where it was assumed that a casual employee was entitled to long service leave under the LSL Act: ***Wingate v Causeway Holdings Pty Ltd*** (2017) FWC 6247 [44].

[12] ***Port Noarlunga Hotel v Stewart*** (1981) 48 SAIR 220.

[13] ***R v Industrial Appeals Court and Automatic Totalisers Limited; Ex parte Raymond John Kingston*** (Unreported, VSC, 26 February 1976); ***Melbourne Cricket Club v Francis Clohesy*** [2005] VSC 29.

[14] See (1978) 58 WAIG 1, 116, 120.

[15] Western Australia, *Labour Relations Legislation Amendment Bill 2006*, Explanatory Memorandum [249].

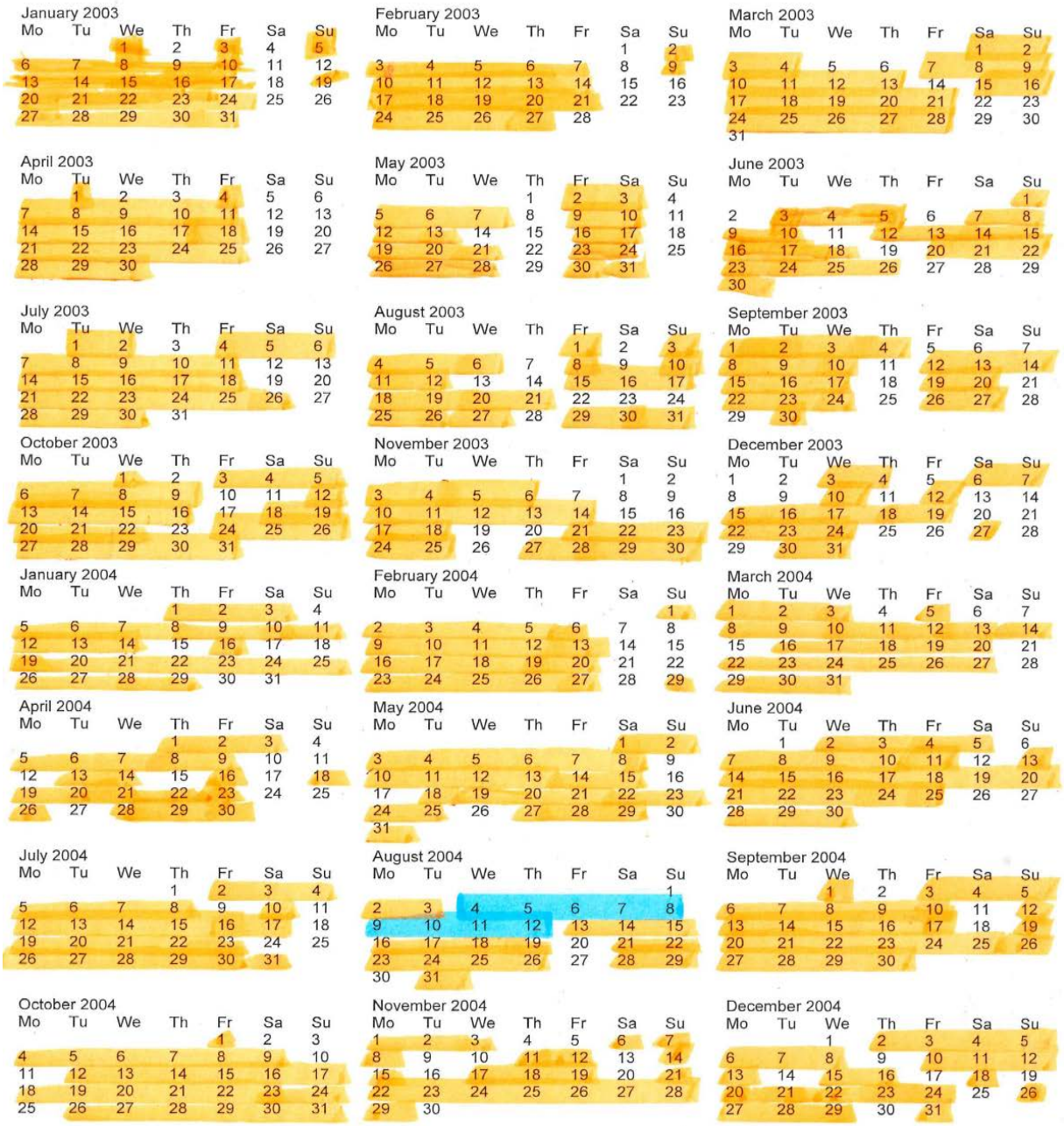
[16] ***Melrose Farm Pty Ltd (t/as Milesaway Tours) v Milward*** [2008] WASCA 175 [110].

[17] Commissioner G.L. Fielding, *Review of Western Australian Labour Relations Legislation*, A Report to the Hon. G.D. Kierath, MLA, Minister for Labour Relations, July 1995.

[18] Fielding Review (411 - 412).

[19] The casual employee in ***Port Noarlunga Hotel v Stewart*** (1981) 48 SAIR 220.

Annexure A: Placement Calendars 2003-2014



January 2003

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November 2004

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December 2004

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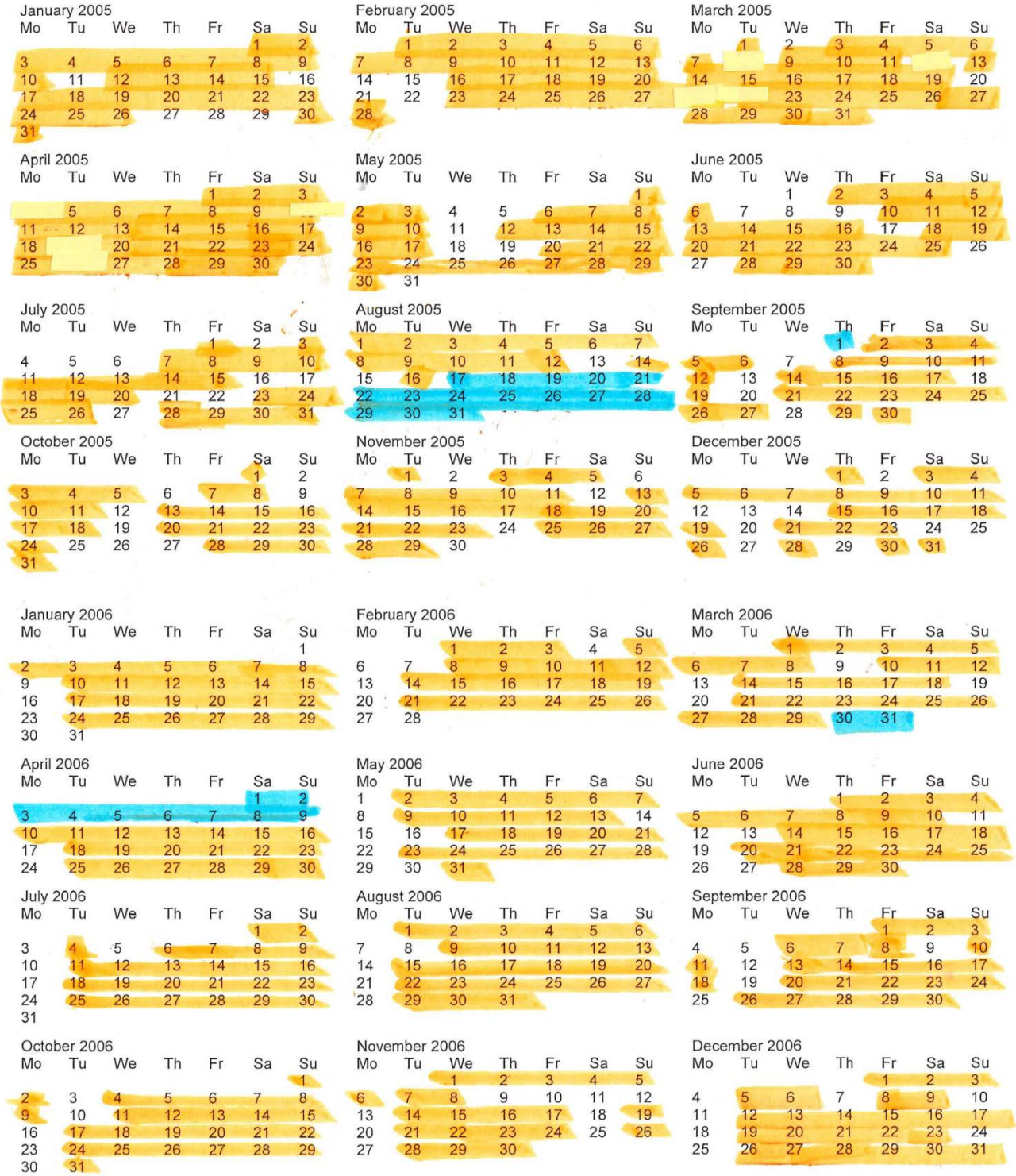
Key: Days worked by Ms Derwort are shaded orange. Days stated by Ms Derwort to be on leave are shaded blue. Days not worked by Ms Derwort are not shaded.

A.1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February 2005
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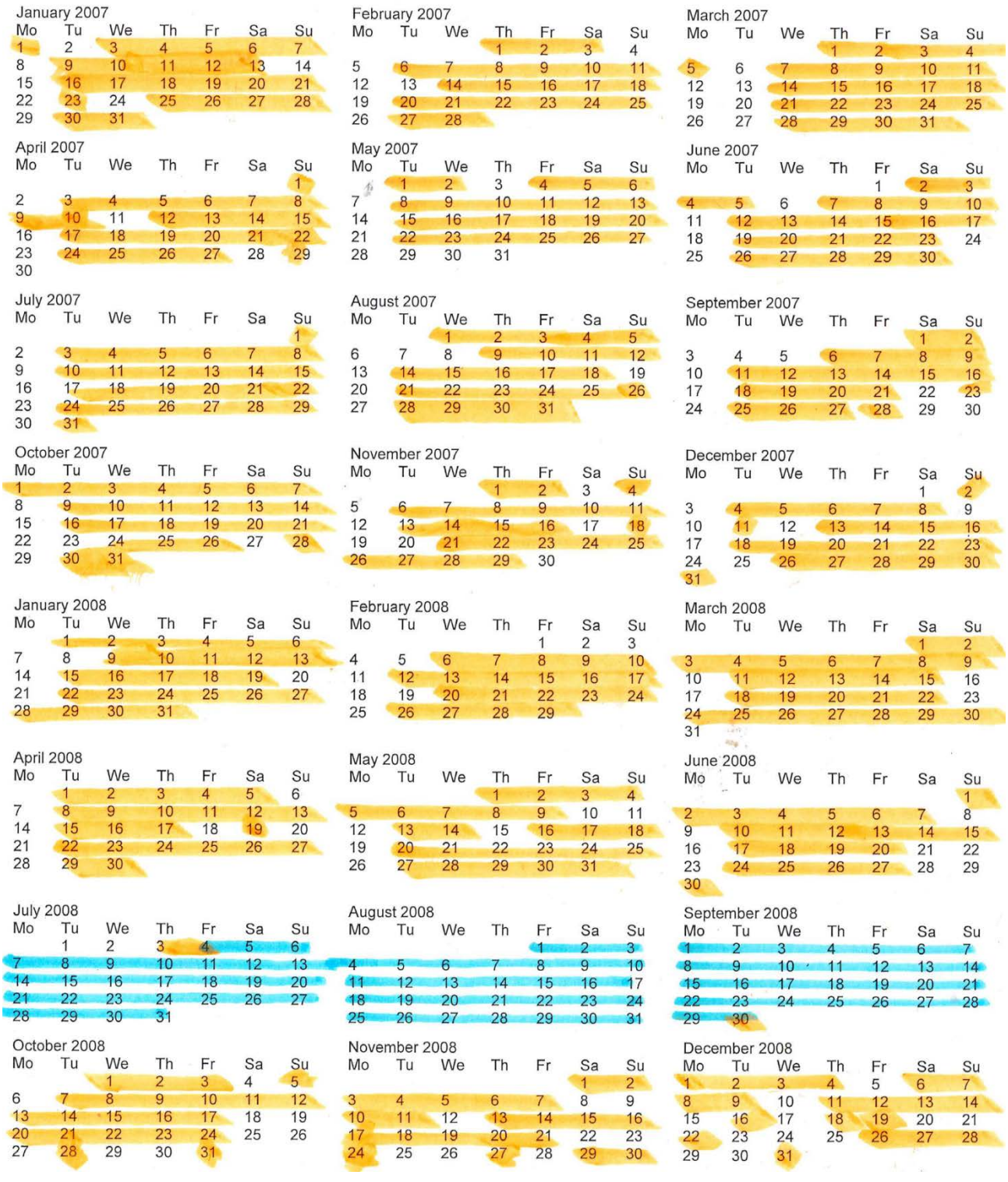
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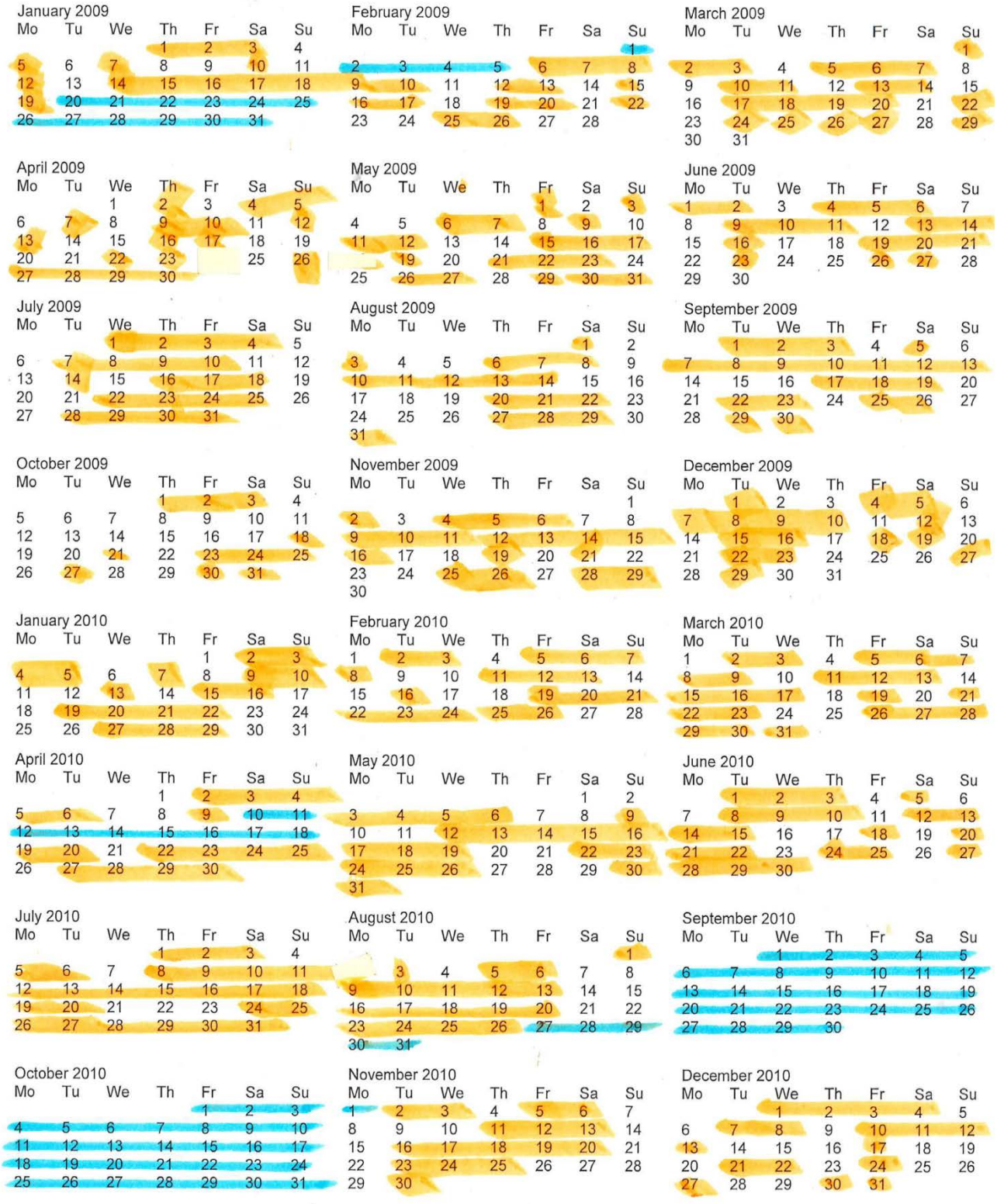
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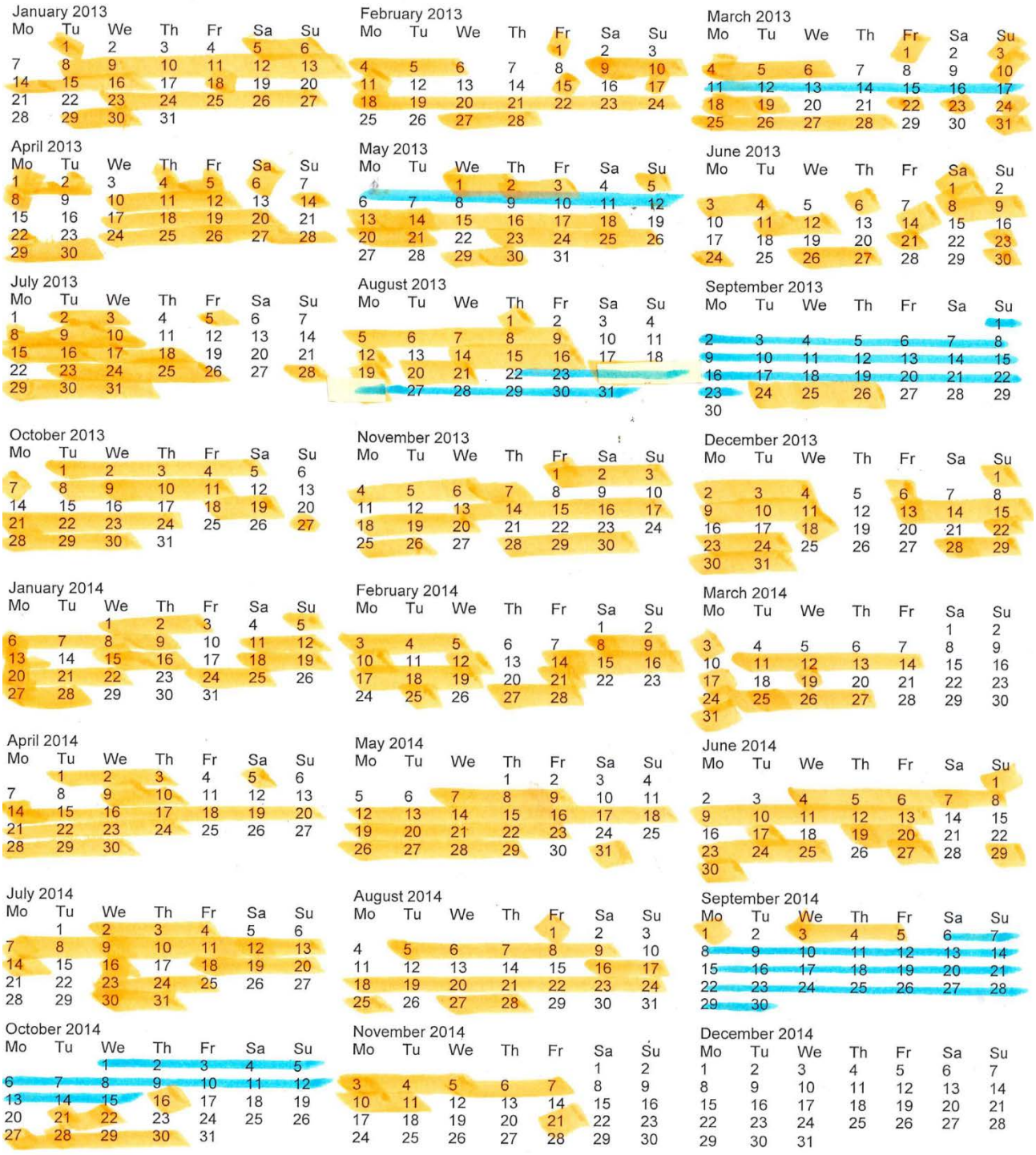
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UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2020 WAIRC 00277

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00277
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	THURSDAY, 10 OCTOBER 2019
DELIVERED	**:**	FRIDAY, 15 MAY 2020
FILE NO.	**:**	B 114 OF 2019
BETWEEN	**:**	NIGEL JOHN BARR
		Applicant
		AND
		THE SLATTER GROUP WA PTY LTD
		Respondent

CatchWords	**:**	Benefit Under a Contract - Prescribed Amount - Interpretation of Legislation and Regulations
Legislation	**:**	*Industrial Relations Act 1979* (WA)
		Industrial Relations (General) Regulations 1997 (WA)
Result	**:**	Commission has jurisdiction to hear the substantive claim
Representation:		
Counsel:		
Applicant	**:**	Mr C Fordham (of counsel)
Respondent	**:**	Ms C Tsang (of counsel)
Solicitors:		
Applicant	**:**	Slater & Gordon Lawyers
Respondent	**:**	Lavan Legal

Case(s) referred to in reasons:

Bhalsod v Perrie [2016] WASC 412

Brayson Motors Pty Ltd (In Liq) v Federal Commissioner of Taxation [1985] HCA 20; (1985) 156 CLR 651

***Bull v The Attorney General* (NSW)** [1913] HCA 60; (1913) 17 CLR 370

Leahne Rowley v BHP Billiton Iron Ore [2013] WAIRC 00581; (2013) 94 WAIG 539

Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 84 WAIG 2152

Stewart Michael Shields v WMC Resources Ltd [2004] WAIRC 10787; (2004) 84 WAIG 3378

Webster v McIntosh (1980) 32 ALR 603

William Hayward v Griffin Coal Mining Company Pty Ltd [2004] WAIRC 11512; (2004) 84 WAIG 1412

Reasons for Decision

1 Mr Nigel John Barr claims that he has been denied a benefit for payments of a bonus calculated with reference to the profit generated by individual projects under a contract of employment with The Slatter Group WA Pty Ltd (**Slatter Group**). Mr Barr calculates the total value of the bonus payments to be $592,251.60. Mr Barr contends that he has received only $15,000 of this amount. Mr Barr accepted the contract of employment in October 2013 and commenced employment on 4 November 2013 (**2013 Contract**).

2 Mr Barr's 2013 contract was terminated by agreement with the Slatter Group on 10 October 2017. Mr Barr and his employer agreed on a contract of employment with different terms which the applicant signed on 11 October 2017 (**2017 Contract**). This second contract did not include a term for a bonus payment.

3 On 6 February 2019, Mr Barr was notified by the Slatter Group that his employment was terminated as a result of redundancy. The Slatter Group declined Mr Barr's request for payment of the bonus payments he submits are due under the 2013 Contract. On 5 August 2019, Mr Barr applied to the Western Australian Industrial Relations Commission (**Commission)** pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (**IR Act**) seeking payment of the bonuses.

4 The Slatter Group objected to the Commission hearing and determining this matter on the basis that Mr Barr's salary exceeded the prescribed amount. The Slatter Group submitted that the relevant salary rate for the purposes of this matter is the salary paid at the time of Mr Barr's dismissal in February 2019 which was $165,000. The Slatter Group refer to reg 5(2) of the *Industrial Relations (General) Regulations 1997* (WA) (**Regulations**) which sets out the method for calculating an employee's

salary for the purposes of s 29AA(5) of the IR Act. The Slatter Group also argue that the 2017 Contract extinguished the term concerning the payment of bonuses in the 2013 Contract.

5 Mr Barr contends that the benefit he claims he is entitled to is provided in an earlier contract of employment. Mr Barr submits that it is the salary rate in the contract of employment which contains the benefit he claims, the 2013 Contract, that is the relevant salary rate. As this salary rate is under the prescribed amount, Mr Barr argues the Commission is able to hear and determine his claim. Mr Barr submits that the terms of the 2013 Contract were not extinguished by the 2017 Contract.

The Question to be Determined

6 The question I must answer is whether it is the salary rate in the first contract, the 2013 contract, or the salary rate at the time of Mr Barr's dismissal from employment as the salary rate that ought to be applied for the purposes of determining whether the salary received by Mr Barr exceeds the 'prescribed amount' as set out in s 29AA of the IR Act.

What are the Principles that Apply?

7 The jurisdiction to enquire into and deal with an industrial matter is conferred by s 23(1) of the IR Act to hear and determine a claim. Section 29(1)(b)(ii) of the IR Act provides standing to an employee to bring a claim: ***Matthews v Cool or Cosy Pty Ltd*** [2004] WASCA 114; (2004) 84 WAIG 2152.

8 Acting under the power conferred by s 23(1) and s 29(1)(b)(ii) of the IR Act, the Commission may hear and determine an industrial matter referred by an employee that is a claim of a benefit the employee claims to be entitled under his or her contract of employment.

9 Section 23(1) of the IR Act cannot be read in isolation, or only together with s 29(1)(b)(ii). Both of these provisions must be read with the restrictions set out in s 29AA(4) and s 29AA(5) of the IR Act. This approach applies the principle that the IR Act is to be read as a whole. Section 29AA(4) and s 29AA(5) of the IR Act are very specific provisions that operate to prohibit the Commission from determining a claim where the contract of employment of the employee who seeks to refer the claim pursuant to s 29(1)(b)(ii) of the IR Act provides for a salary that exceeds the prescribed amount.

10 The limitation provided for in s 29AA(4) and s 29AA(5) of the IR Act prevails to read down the general jurisdiction to enquire into and deal with an industrial matter conferred in s 23(1) of the IR Act when the matter referred is a claim that an employee has not been allowed a benefit to which he or she is entitled to under the contract of employment.

11 Section 29AA(4) and s 29AA(5) of the IR Act clearly provides a limitation on claims referred pursuant to s 29(1)(b)(ii) of the IR Act that can be determined by the Commission:

> (4) The Commission must not determine a claim that an employee has not been allowed by his or her employer a benefit to which the employee is entitled under a contract of employment if —
>
> (a) an industrial instrument does not apply to the employment of the employee; and
>
> (b) the employee's contract of employment provides for a salary exceeding the prescribed amount.
>
> (5) In this section —
>
> ***industrial instrument*** means —
>
> (a) an award; or
>
> (b) an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section; or
>
> (c) an industrial agreement; or
>
> (d) an employer-employee agreement;
>
> ***prescribed amount*** means —
>
> (a) $90 000 per annum; or
>
> (b) the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section.

12 The relevant regulation which provides for the 'prescribed amount' is found at reg 5 of the Regulations:

> **5. Prescribed amount — section 29AA**
>
> (1) For the purposes of paragraph (b) of the definition of "prescribed amount" in section 29AA(5) of the Act the specified salary is $90 000, or that amount as affected by indexation in accordance with regulation 6.
>
> (2) For the purposes of paragraph (b) of the definition of "prescribed amount" in section 29AA(5) of the Act, the salary provided for in an employee's contract of employment is to be worked out as follows —
>
> (a) for an employee who was continuously employed by an employer and was not on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the greater of —
>
> (i) the salary that the employee actually received in that period; and
>
> (ii) the salary that the employee was entitled to receive in that period;

(b) for an employee who was continuously employed by an employer and was on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the total of —

(i) the actual salary received by the employee for the days during that period that the employee was not on leave without full pay; and

(ii) for the days that the employee was on leave without full pay an amount worked out using the formula —

$$\frac{\text{remuneration mentioned in subparagraph (i)} \times \text{days on leave without full pay}}{\text{days not on leave without full pay;}}$$

or

(c) for an employee who was continuously employed by an employer for a period less than 12 months immediately before the dismissal or claim — the amount worked out using the formula —

$$\frac{\text{remuneration received} \times 365}{\text{days employed.}}$$

13 In the interpretation of any statute or subsidiary legislation, regard is to be had to the ordinary and natural meaning of the words used within the relevant statute, in the context of the statute read as a whole. The Supreme Court of Western Australia summarised the principles of statutory interpretation in ***Bhalsod v Perrie*** [2016] WASC 412 [19]:

> The applicable principles of statutory construction include the following. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The context and purpose of a provision are important to its proper construction because the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The legal meaning of the relevant provision is to be decided by reference to the language of the instrument viewed as a whole. The purpose of the statute resides in its text and structure. The purpose of legislation must be derived from what the legislation says, and not from some a priori assumption about its purpose or any assumption about the desired or desirable reach or operation of the relevant provisions.

14 Where a legislative scheme is remedial or beneficial the presumption is towards the greater benefit to the individual and construed to give 'the fullest relief which the fair meaning of the language will allow': ***Bull v The Attorney General* (NSW)** [1913] HCA 60; (1913) 17 CLR 370, 384 (Isaccs J).

15 Delegated legislation, such as regulations, ought not be considered for the purposes of interpreting their principle legislation: ***Webster v McIntosh*** (1980) 32 ALR 603, 606. However, where the delegated legislation is an essential part of the legislative scheme then regulations may be considered to understand the scheme as established by the High Court of Australia in ***Brayson Motors Pty Ltd (In Liq) v Federal Commissioner of Taxation*** [1985] HCA 20; (1985) 156 CLR 651. Any conflict arising must be resolved in favour of the legislative provision.

Consideration

16 Mr Barr submits that the contract of employment that referred to s 29AA(4)(b) of the IR Act must be the same contract of employment that is referred to in s 29(1)(b)(ii) of the IR Act because those two subsections were clearly drafted to operate together. In s 29(1)(b)(ii) of the IR Act the terms 'employee', 'employer', 'contract of employment' are talking about the same employee, the same employer and the same contract of employment as that in s 29AA(4)(b) of the IR Act. In this matter the relevant contract is clearly the 2013 Contract which provides for a salary of $150,000.

17 The Slatter Group submits that the regulations provide that the rate of salary is what Mr Barr received in the 12 months prior to his dismissal. Mr Barr was effectively dismissed in February 2019 when his position was made redundant. The Slatter Group submits that reg 5 of the Regulations refers to the salary the employee received or was entitled to receive during the 12 months immediately before his dismissal. The Slatter Group submit that Mr Barr's salary at the time of his dismissal exceeds the prescribed amount.

18 The Slatter Group submit the decision of ***Stewart Michael Shields v WMC Resources Ltd*** [2004] WAIRC 10787; (2004) 84 WAIG 3378 (***Shields***) is instructive in this matter in that the Commission found that for the purposes of determining whether an employee's salary exceeded the prescribed amount, the salary the employee received or was entitled to receive in the last 12 months of their employment should be applied. In ***Shields*** the issue to be decided was set out as 'whether or not Mr Shields' contract of employment provides for a salary exceeding the prescribed amount' [13] and how the prescribed amount is to be calculated [15]. In this matter the respondent contended that the prescribed amount is to be calculated by reference to reg 5(2) of the Regulations. The Commission rejected this contention and found that reg 5(2) of the Regulations goes to the calculation of the salary provided for in the employee's contract of employment and not to the calculation of prescribed amount (which is to be found in reg 5(1) of the Regulations). Mr Shields' claim was that he was unfairly dismissed. In ***Shields*** the Commissioner, having found that reg 5 of the Regulations did not apply to the circumstances of the matter before him, found that at the material time the applicant's salary was that which was 'laid down' or 'specified' in the applicant's contract of employment. ***Shields*** did not consider the question of different contracts and which salary under the different contracts is to be referenced for the purposes of s 29AA(4)(b) of the IR Act.

19 The Slatter Group also refer to the decision of Kenner C in ***William Hayward v Griffin Coal Mining Company Pty Ltd*** [2004] WAIRC 11512; (2004) 84 WAIG 1412 (***Hayward***). In that case the issue to be determined was whether the applicant's contract of employment, at the material time, provided for a salary exceeding the prescribed amount [2]. Mr Hayward brought a claim for unfair dismissal. At [26] the Commission sets out that the ordinary and natural meaning of s 29AA(3) of the IR Act appears to concern itself with the two issues. The first issue is what salary does an applicant's contract of employment 'provide for'. Secondly, having determined this issue, the next question is whether the salary exceeds the 'prescribed amount'. Further the Commission finds that reg 5(2) of the Regulations provides a method to calculate the 'salary provided for in an employee's contract of employment' which is that referred to in s 29AA(3)(b) of the IR Act and concerns unfair dismissal. The Slatter Group contend that this case is authority for the interpretation to be applied in the matter now before the Commission because the same wording of s 29AA(3)(b) of the IR Act is found in s 29AA(4)(b) of the IR Act which concerns claims for benefits under a contract of employment.

20 ***Hayward*** concerned a claim for unfair dismissal and the Commission found that the material time was that of the date of the employee's dismissal and the terms of the employment contract at that time. I do not agree with the Slatter Group's contentions that this decision is authority and that it is only the salary at the time of an employee's dismissal that is relevant for the purposes of a claim for a benefit under a contract of employment. In ***Hayward*** the relevant salary that was provided under the contract of employment that was the subject of the claims for the unfair dismissal claim and a benefit under the contract of employment. In the matter now before the Commission the benefit claim is under the 2013 Contract

21 Following the reasoning in ***Hayward***, the application of reg 5(2) of the Regulations cannot be the 'period of 12 months immediately before the dismissal' because there was no dismissal during the operation of the 2013 Contract which came to an end by mutual agreement. Regulation 5 provides the method of working out the salary of an employee 'the period of 12 months immediately before the dismissal or claim'. I read the 'claim' as referring to the claim that an employee has not been allowed by his employer a benefit to which the employee is entitled under a contract of employment referred to in s 29AA(4)(b) of the IR Act. That is, in this matter, the claim for a benefit under the 2013 Contract and it is the salary rate provided for in this contract which is relevant.

22 In further support of their contentions the Slatter Group point to ***Leahne Rowley v BHP Billiton Iron Ore*** [2013] WAIRC 00581; (2013) 94 WAIG 539 (***Rowley***), in particular [8] 'The question to be answered at this stage of the proceedings is *whether, at the time of termination of her employment and the commencement of this claim,* Ms Rowley's "salary", for the purposes of ss 29AA(4) and (5) exceeded the statutory cap'. ***Rowley*** concerned the meaning of the term 'salary' and the inclusion of the value of other benefits paid to an employee in the calculation of an employee's salary. Ms Rowley had one contract of employment and her claim concerned this contract of employment at the time of her dismissal. ***Rowley*** is not concerned with the application of s 29AA of the IR Act to circumstances similar to that of Mr Barr's claim.

23 I read s 29AA(4)(b) of the IR Act to mean it is the employee's salary under the contract under which the benefit is claimed that is relevant. The starting point must be the statute and not the regulation. That is, if reg 5 of the Regulations is applied in the manner in which the Slatter Group contend, it would be inconsistent with the plain meaning of the language of the statute. The statute must prevail.

24 In this case then, the salary rate is that provided for or received under the 2013 Contract and is under the prescribed amount set at the time of the termination of that contract or at the time the claim was made.

25 The Slatter Group further submit that the 2017 Contract replaced the 2013 Contract and extinguished any entitlements or benefits under the earlier contract. This is not a matter relevant to determining the issue whether the claim is barred as a result of s 29AA(4)(b) of the IR Act. This is a contention that the benefit claimed by Mr Barr is one that he is not entitled to.

Conclusion

26 On the basis of the reasons set out herein, Mr Barr's salary was less than the prescribed amount and the Commission has jurisdiction to hear the substantive claim. A declaration will be made to this effect.

2020 WAIRC 00278

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NIGEL JOHN BARR
	APPLICANT
	-v-
	THE SLATTER GROUP WA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 15 MAY 2020
FILE NO.	B 114 OF 2019
CITATION NO.	2020 WAIRC 00278

Result	Commission found to have jurisdiction
Representation	
Applicant	Mr C Fordham (of counsel)
Respondent	Ms C Tsang (of counsel)

Declaration & Order

HAVING HEARD from Mr C Fordham (of counsel) on behalf of the applicant and Ms C Tsang (of counsel) on behalf of the respondent;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979 (*WA), hereby:

1) DECLARES that the Commission has jurisdiction to hear the substantive claim; and

2) ORDERS that Mr Nigel John Barr's claim be listed for conciliation or hearing.

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

2020 WAIRC 00218

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00218
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 16 APRIL 2020
DELIVERED	**:**	FRIDAY, 17 APRIL 2020
FILE NO.	**:**	U 145 OF 2019
BETWEEN	**:**	SARAH COLOMB Applicant AND DEPARTMENT OF EDUCATION WESTERN AUSTRALIA Respondent

CatchWords	**:**	Industrial Law (WA) - Unfair dismissal application - Summons to produce documents objected to - Documents subject to legal professional privilege - Order for production of some documents that are not subject to legal professional privilege made
Legislation	**:**	*Industrial Relations Act 1979* s 33(2)
Result	**:**	Order issued
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr J Carroll (of counsel) and with him Ms S Bhar
Summons Recipient		
Applicant	**:**	Mr W Spyker (of counsel)

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

1 The respondent seeks by way of summons, a summons directed to Spyker Legal Pty Ltd, four sets of documents:

(1) any agreement for Spyker Legal Pty Ltd (Spyker Legal) to provide services to Ms Sarah Colomb in relation to her workers' compensation claim made against the Department of Education in 2019 (Claim);

(2) any correspondence from Slater & Gordon to Ms Colomb or Spyker Legal relating to fees owed by Ms Colomb to Slater & Gordon in return to the Claim, and in what circumstances any such fees would fall due;

(3) what occurred during the conciliation conference held on Spyker file note from conciliation conference that led to settlement of the Claim on 19 August 2019, and

(4) any advice given by Spyker Legal, or any of its employees, to Ms Colomb in relation to any offer made by the Department of Education to settle the Claim, including any advice as to the reasonableness of any such offer and any advice as to whether Ms Colomb would owe Spyker Legal fees for its services if the offer was rejected.

2 The respondent filed the summons after a preliminary hearing on the question of whether the Western Australian Industrial Relations Commission has jurisdiction to hear and determine Ms Colomb's unfair dismissal claim held on 16 January 2020. The preliminary hearing was held because it was clear on the papers that Ms Colomb had resigned her employment as part of the settlement of a workers' compensation claim.

3 Ms Colomb claimed she had been 'constructively dismissed'.

4 The hearing did not resolve the matter of whether Ms Colomb had been 'dismissed' as that term is used in the Industrial Relations Act 1979.

5 Spyker Legal Pty Ltd resists production of the documents on the basis that each and all are the subject of legal professional privilege. That privilege is, of course, in favour of Ms Colomb and Ms Colomb makes it clear that she wishes the privilege maintained.

6 The recipient of the summons thus acts, with respect, entirely responsibly and competently in resisting production on the basis it does.

7 The respondent argues that Ms Colomb, in the furtherance of her case, has deployed each of the documents sought and, accordingly, should be taken to have waived legal professional privilege.

8 Ms Colomb says she was constructively dismissed because of certain circumstances relating to a conciliation conference before WorkCover WA on 19 August 2019 at which, as part of the compromise of her workers' compensation claim, she agreed to resign her employment with the respondent.

9 The respondent seeks the documents outlined because she says they will show that the circumstances were not as Ms Colomb alleges. The respondent says that Ms Colomb has made a case that asks that I accept certain assertions and that those assertions may be undone by production of the documents. The respondent says it would be unfair to allow Ms Colomb to assert privilege over the documents where that is the case.

10 In relation to (1) and (2) Ms Colomb says that she has possession of the relevant documents and will discover them to the respondent. The summons directed to Spyker Legal Pty Ltd accordingly falls away.

11 In relation to (3), I find that what happened at the conciliation conference before WorkCover WA may be relevant to determination of this matter. Insofar as what happened was recorded by Ms Colomb's legal representatives, those documents are relevant and amenable to production under the summons. However, I do not consider that any note from the conference that is subject to legal professional privilege should be provided. For reasons which will follow, I find that legal professional privilege has not been relevantly waived in this case.

12 In relation to the documents at (4), the respondent seeks documents that clearly would be privileged and again, for reasons which will follow, I do not consider that legal professional privilege has been waived and so there will be no order in relation to these documents.

13 Ms Colomb's state of mind at the conference is relevant to her unfair dismissal claim as she says that her actions at the conference were unfairly induced by the respondent and that she did not freely bring her employment to an end.

14 In a case where someone's state of mind is relevant, it may be that the assertion of a certain state of mind directly or impliedly puts in issue a privileged communication. If someone says they relevantly believed "A" based on legal advice they received, it follows that that person has opened themselves up to a powerful argument that they may not resist production of the advice on the basis that it is privileged.

15 The respondent says that the fact that Ms Colomb had legal representation at the conference is relevant to her assertions going to the issue of constructive dismissal insofar as the fact she received legal advice must be seen as touching upon her state of mind.

16 However, in relation to this 'fact' Ms Colomb gave evidence on 16 January 2020 to effect that while she had a lawyer at the conference, she was not provided by him with "advice per se" about whether or not "to accept the offer put by the Department" (ts 36, hearing 16 January 2020).

17 It is by that evidence that the respondent says Ms Colomb tries to advance a case that is inconsistent with maintenance of legal professional privilege. The respondent says that it would be unfair to allow that assertion to be maintained without her being able to examine documents over which privilege is claimed which will, or may, reveal that Ms Colomb was in fact given legal advice.

18 While one can easily appreciate that there is force in the respondent's submission, on balance I do not consider that the factual background here is one where Ms Colomb impliedly waived privilege over whatever advice she was given. I do not consider that there is inconsistency between her case and the assertion of privilege and I do not consider it would be unfair to the respondent to meet Ms Colomb's case without the documents at (4) being produced.

19 Saying that one has not received "advice per se" cannot amount to waiver of privilege in relation to something, either expressly or impliedly.

20 In any event, and far more powerfully in my view, Ms Colomb's state of mind, as that state of mind was affected by advice or a lack of advice from her lawyers, is not that which is relevant here. In my view, while it is relevant that Ms Colomb had access to competent counsel, what that person did or did not tell her is not particularly relevant.

21 In my opinion, what is relevant, where constructive dismissal is alleged, is Ms Colomb's state of mind insofar as that state of mind was created or influenced by the respondent, not her state of mind insofar as it was created or influenced by her own advisers.

22 Ultimate findings in relation to whether Ms Colomb was constructively dismissed may have regard to the fact she had competent counsel available to her, but Ms Colomb says nothing relevant to determination of the matter by saying she did not get "advice per se" from her lawyer. She has therefore not, either expressly or impliedly, furthered her case by reliance upon something to which privilege attaches.

23 For the sake of clarity, I note that this is the case even if Ms Colomb seriously seeks to argue that she received no advice at all from Mr Spyker and all the respondent seeks to show is that she did, in fact, receive advice.

24 What is important is whether anything Ms Colomb has said is inconsistent with a claim of privilege. That is, looking at Ms Colomb's case, whether it would be unfair for what Ms Colomb has said to stand, or to be relied upon further by her, without the respondent having an opportunity of inspecting related privileged documents.

25 In my view, in a situation where Ms Colomb clearly had competent representation, the question of whether she got any, or any good, advice is not material to the matter of whether her resignation was a constructive dismissal. Accordingly, it cannot be said it would be unfair to the respondent for Ms Colomb to further her claim of constructive dismissal without us knowing more about the exchanges between her and her representative.

26 Ms Colomb admits that she had legal representation. That will be relevant. To my mind what her agents did or did not do is not material.

27 There will be an order that the recipient of the of the summons provide documents in item (3) that are not subject to legal professional privilege.

2020 WAIRC 00214

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SARAH COLOMB
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 16 APRIL 2020
FILE NO/S	U 145 OF 2019
CITATION NO.	2020 WAIRC 00214

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr J Carroll (of counsel) and with him Ms S Bhar
Summons Recipient Applicant	Mr W Spyker (of counsel)

Order

HAVING heard from the applicant in person, Mr J Carroll, of counsel, for the respondent and Mr W Spyker, of counsel, for the summons recipient applicant on Thursday, 16 April 2020;

WHEREAS there was a preliminary hearing in this matter on Thursday, 16 January 2020;

AND WHEREAS subsequently the respondent issued a summons directed to 'Spyker Legal Pty Ltd (ACN 618 245 186)' on 7 February 2020 seeking the production of various documents described therein;

AND WHEREAS the recipient of the summons, by Form 1A filed 20 February 2020, objected to provision of the documents;

AND WHEREAS there was a hearing on the objection on 16 April 2020;

AND WHEREAS the Commission gave reasons for decision orally at the conclusion of the hearing and which reasons will be published as soon as is practicable;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* order that:

> Spyker Legal Pty Ltd produce to the Registry of the Western Australian Industrial Relations Commission notes taken by anyone acting for Sarah Colomb at the conciliation conference in the WorkCover WA Workers' Compensation

Conciliation Service on 19 August 2019, where those notes are of events at which those representing the Director General, Department of Education were also present.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

CONFERENCES—Matters referred—

2020 WAIRC 00216

DISPUTE RE FIXED TERM CONTRACTS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00216
CORAM	**:**	PUBLIC SERVICE ARBITRATOR SENIOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 3 FEBRUARY 2020 WRITTEN CLOSING SUBMISSIONS 8 & 18 FEBRUARY 2020
DELIVERED	**:**	FRIDAY, 17 APRIL 2020
FILE NO.	**:**	PSACR 19 OF 2019
BETWEEN	**:**	CIVIL SERVICE ASSOCIATION (INC.) Applicant AND DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION Respondent

Catchwords	**:**	Public Service Commissioner's Instruction 23 – Conversion of fixed term contract and casual employees in WA public sector to permanent status – Employee employed on series of fixed term contracts over several years – Principles of interpretation applied – Employee did not meet requirements to be eligible for conversion to permanency – Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* ss 44(9), 80C(1)(a); *Public Sector Management Act 1994* ss 22A(7), 64(1)(b); *Interpretation Act 1984* (WA)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr M Amati
Respondent	**:**	Mr J Carroll of counsel
Solicitors:		
Applicant	**:**	
Respondent	**:**	State Solicitor's Office of Western Australia

Case(s) referred to in reasons:

Civil Service Association Inc v Department of Water and Environmental Regulation [2019] WAIRC 00794; 100 WAIG 138

Patman v Fletchers' Fotographics Pty Ltd (1984) 6 IR 471

Case(s) also cited:

Amcor Limited v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241

Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union [2018] FCAFC 223; (2018) 363 ALR 343

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813

Director General, Department of Education v SSTU (2019) 99 WAIG 1609

Norwest Beef Industries Limited and Anor v AMIEUW (WA Branch) (1985) 12 IR 314

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 347 ALR 405; 91 ALJR 936

Tulloh v CEO, Department of Corrective Services [2020] WASCA 10

Reasons for Decision

1 The present matter is referred for determination under s 44(9) of the *Industrial Relations Act 1979* (WA). The background to the application is set out in my earlier reasons for decision of 7 November 2019 in relation to an application for interim orders made by the applicant on behalf of its member, Mr Byrnes: *Civil Service Association Inc v Department of Water and Environmental Regulation* [2019] WAIRC 00794; 100 WAIG 138. The dispute referred for determination is set out in the schedule to the s 44(9) memorandum which is in the following terms:

> 1. The parties are in dispute in relation to the conversion to permanency of the applicant's member Mr Byrnes, who was employed by the respondent as a Manager, Process Industries Regulatory Services. The applicant refers to and relies upon cl 2 of the Commissioner's Instruction No. 23, which sets out criteria for the conversion of fixed term contracts and casual employees engaged in the public sector, to permanency.
>
> 2. Mr Byrnes was engaged by the respondent on a series of fixed term contracts since in or about August 2015, it is alleged. On 10 June 2019, the respondent informed the applicant by letter, that the respondent did not consider Mr Byrnes was eligible for conversion to permanency. Subsequent discussions between the parties were not successful in resolving the dispute.
>
> 3. The applicant maintains that Mr Byrnes is eligible to be converted to permanent, on-going employment on the basis that the criteria in cl 2.1 of the CI are met. These criteria are that:
>
> (a) the reason for engagement on a fixed term contract is not a circumstance mentioned in the relevant industrial instruments; and
>
> (b) the employee has completed two or more years of continuous service in the same or similar role; and
>
> (c) the employee is not subject to formal disciplinary or substandard performance action at the time of assessment.
>
> 4. Specifically, the issue is whether, in accordance with cl 2.1(a) of the CI, Mr Byrnes' "reason for engagement on a fixed term contract" is, or is not, due to "a circumstance mentioned in the relevant industrial instruments". The respondent maintains that Mr Byrnes was engaged on a fixed term contract from October 2018 to cover a period of leave whilst the substantive occupant of the position was in another position, in an acting capacity. This is disputed by the applicant.
>
> 5. The applicant seeks an order that Mr Byrnes be eligible for conversion to permanency and that he be made a permanent employee under CI 23.
>
> 6. The respondent's position is that cl 2.1(a) of the CI is not met and it objects to and opposes the applicant's claim.

2 The matter in dispute largely turns upon the proper interpretation of CI 23, which sets out a procedure for the conversion of fixed term contract and casual employees engaged in the public sector in this State, to permanency. Specifically, as reflected in the referral set out above, the principal issue in this case is whether Mr Byrnes satisfies the criterion in cl 2.1(a) of the CI.

The facts

3 The essential facts in this matter are not really in dispute and they are as follows. Mr Byrnes has Bachelor of Science and Master of Business Administration degrees. He has held a number of positions prior to his employment by the respondent in 2015. These included with the Department of Environmental Protection from 1997 for several years before working in the private sector from 2011. Mr Byrnes commenced his employment with the respondent in August 2015 on a fixed term contract as a Principal Strategy and Reform Officer. Copies of Mr Byrnes' various fixed term contracts were contained in a bundle of documents tendered by the parties as exhibit A1. The 18 contracts identified by Mr Byrnes were generally for periods of about one year and some were for a few months only. The contracts involved Mr Byrnes mainly working in the position of Manager Licensing (Process Industries) from November 2016 through to October 2019.

4 A summary of Mr Byrnes' employment history under these various fixed term contracts was helpfully set out in an aide memoire to the respondent's written submissions. This document refers to the dates of the various fixed term contracts; their length; the title of the position occupied by Mr Byrnes and what the respondent contended was the reason for the appointment under the contract. This document also is cross-referenced to the relevant fixed term contract documents contained in exhibit A1. In relation to some of these positions, Mr Byrnes testified that he took part in an expression of interest type of process, which he said involved some degree of merit selection. As to how the contract renewal process took place, Mr Byrnes testified that in most cases, the fixed term contract just "rolled over". The exception to this was the few where the appointment was based on an expression of interest and he was required to apply for the particular position.

5 Mr Byrnes further testified that he has had no adverse performance assessments and this was not in dispute. He also maintained that from his history of appointments in the same or similar positions, he has had at least two years' continuous service in a similar role for the respondent.

6 There was some contention about the basis of Mr Byrnes' appointment to some of the fixed term contract positions, as to whether this was to provide one-off periods of relief or for some other reason, contemplated in the relevant industrial agreements. I will consider this issue in more detail later in these reasons. This issue relates to the contract between July and December 2018, where the substantive occupant of the position, Mr Bailes, was appointed to an acting higher position of Senior Manager - Industry Regulation (Process Industries). In essence Mr Byrnes, in the fixed term contract position concerned, reported to Mr Bailes. Mr Bailes had in turn been appointed to his acting position, because its substantive occupant, Mr Schuller, was appointed to a higher position of Acting Director Regulatory Services (Environment). It was common ground that Mr Bailes resigned from his employment with the respondent in late 2018. Thus, in effect, over these

periods, both Mr Bailes and Mr Schuller were "acting up" in higher positions, leading to Mr Byrnes filling Mr Bailes' substantive position over this time period. Mr Byrnes in his evidence said he was aware of this.

7 In relation to the few positions that Mr Byrnes occupied resulting from an expression of interest process, he said that the process was internal. Both Mr Schuller and Mr Bailes assessed Mr Byrnes' suitability for the positions. No interview was conducted and no selection criteria or any assessment report was prepared. This was largely confirmed on the evidence of Mr Schuller, who was called on behalf of the respondent.

8 After Mr Bailes left the respondent's employment, Mr Byrnes had two further fixed term contracts, in January and April 2019 respectively. Evidence was given by the respondent's Manager People Services, Mr Murphy. He testified that both short-term contracts were offered to Mr Byrnes to enable the CI 23 conversion review process, which had started in late 2018, to see its course. This was also set out in the bundle of documents at pp 121 and 127, in the respondent's "Human Resources Request Form". It was also common ground that Mr Byrnes applied for substantive appointment to management positions at the respondent in early 2019, but he was assessed by the respondent as not being suitable for the roles.

Relevant provisions of CI 23

9 CI 23 has as its stated intent to "provide a framework for the conversion and permanent appointment of *current* fixed term contract and casual employees, subject to applicable criteria being met" (my emphasis). By its scope and application, it "is limited to persons employed at the time of the commencement of this Instruction". The CI commenced on 10 August 2018. For present purposes, clauses 1.1, 1.2, 2, 3.1 and 4.2 are particularly relevant. Given the discussion to follow, it is convenient to set those provisions out now. Clause 1 deals with a review of the status of fixed term contract employees and cls 1.1, 1.2 and 1.3 are in the following terms:

> 1.1 Employing authorities shall conduct a review of current fixed term contract employee arrangements to:
>
> (a) identify the reason for the engagement of each fixed term contract employee; and
>
> (b) determine whether a fixed term contract employee has met the criteria in clause 2 and if so, shall offer to convert or appoint the fixed term employee to permanency in accordance with clause 4.
>
> 1.2 The employing authority shall commence the review as soon as possible after the commencement of this Instruction, taking into consideration the requirements at 1.3.
>
> 1.3 The employing authority shall provide the names, business email addresses and work locations of fixed term contract employees who will be subject to the processes in this Instruction to the relevant union/s no less than 30 working days prior to the commencement of the review, or as otherwise agreed to by the employing authority and the relevant union.

10 Additionally, cl 2 deals with criteria for converting or appointing a fixed term contract employee to a permanent role. The most contentious part for present purposes is cl 2.1(a). Clause 2.1 is as follows:

> 2.1 The criteria for conversion or appointment to permanency of a fixed term contract employee are as follows:
>
> (a) the reason for engagement on a fixed term contract is not a circumstance mentioned in the relevant industrial instruments; and
>
> (b) the employee has completed two or more years of continuous service in the same or similar role; and
>
> (c) the employee is not subject to formal disciplinary or substandard performance action at the time of assessment.

11 A proper assessment of merit is dealt with in cl 3.1 of the CI and it states:

> 3.1 Where all the provisions in clause 2 are met, and the employing authority forms the opinion that the employee has not been subject to a proper assessment of merit for their role, a proper assessment of merit shall be undertaken in accordance with clause 10.

12 Finally, cl 4 of CI 23 concerns the outcome of a review for fixed term contract employees and cl 4.2 relevantly provides:

> 4.2 Subject to clauses 11 and 12 of this Instruction, and if all of the criteria in clause 2.1 and the requirements in clauses 3 and 5 are met, then:
>
> (a) where the employee is to remain in their current role, the employing authority shall offer to convert or appoint the employee to permanent, at the employee's substantive level of classification; or
>
> (b) where the current role is not required on an ongoing basis, but a similar role will be, the employing authority shall offer to appoint or employ the employee permanently to that role at the employee's substantive level of classification.

Interpretation of CI 23

13 CI 23 is not an industrial instrument such as an award or an industrial agreement. It is an administrative instrument made under s 22A of the *Public Sector Management Act 1994* (WA), although it is not considered to be subsidiary legislation for the purposes of the *Interpretation Act 1984* (WA). Despite this however, I agree with the written submissions of the respondent that it is appropriate to interpret CI 23 in accordance with the usual cannons of statutory interpretation, making due allowance for the fact that it may not have been drafted with the skill, attention and felicity of expression of parliamentary counsel.

14 This being so, the starting point in the interpretation of CI 23 must be the text. In this respect, in Pearce D, *Statutory Interpretation in Australia* (8th Ed), 2019, the learned author, when dealing with the contemporary approach to statutory interpretation observes at par 2.1:

2.1 In a statement that has come to be quoted as the present basis for interpreting legislation, the plurality (Kiefel CJ, Nettle and Gordon JJ) in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405; 91 ALJR 936 at [14] said:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

The courts recognise that the application of this approach will in most cases lead a court to having to make what is commonly referred to as a 'constructional choice'. The following observations of Gageler J in *SZTAL* at [37]-[39] are important to the making of this choice:

> …The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'.
>
> The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.
>
> Integral to making such a choice is discernment of statutory purpose ....

This chapter is concerned with how the courts arrived at this approach to statutory interpretation and the application of the approach in practice. As was noted in *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223; (2018) 363 ALR 343 at [79] 'the task of statutory construction can be assisted by a wide range of more specific principles of statutory construction, many of which have been developed by the courts, while others are now expressed in legislation'. The court observed that:

> Some caution is required in selecting and applying the non-statutory or common law principles. They are not inflexible rules and their application in particular circumstances can be nuanced. Moreover, there can be tension between some of the principles. They are not masters, but should be viewed as servants and tools of analysis in the task of statutory construction.

The various Australian legislatures have also intervened in the process for making the constructional choice that a court must determine. This intervention is discussed after the common law approaches are outlined.

15 Consistent with longstanding authority too, the terms of CI 23 are to be construed as a whole.

16 As set out above, the stated purpose of CI 23 is to provide a framework for conversion for certain categories of public sector employees to permanent employment status. CI 23 had a commencement date of 10 August 2018 and by its scope and application, it is limited to persons employed at the time of its commencement. It thus was not intended to apply to future employees.

17 By cl 1.1, in its introductory part, employing authorities “shall conduct *a* review of *current* fixed term arrangements”. The first step is for an employer to identify the reason for an employee’s engagement on a fixed term contract. As to cl 1.1(b), the reference to meeting the criteria in cl 2 is not unqualified. In my view, and consistent with the need to read CI 23 as a whole, the satisfaction of the criteria in cl 2 is not absolute. Whilst cl 1.1(b) refers to the employer “shall offer to convert or appoint the fixed term contract employee to permanency”, the subclause goes on to say, “in accordance with clause 4”.

18 Thus, in my opinion, the terms of cls 2, 3, 4, 5, 11 and 12 operate together as part of the scheme intended by CI 23. It is not enough for conversion or appointment to permanency of a fixed term contract employee to occur, for only the criteria in cl 2.1 to be met. In the case of the proposed conversion or appointment of a fixed term contract employee to permanent appointment, the following requirements, where relevant, must be met:

(a) the employee must be in employment on a fixed term contract at the time of the commencement of CI 23 i.e. as at 10 August 2018;

(b) the employee’s reason for engagement must not be for a reason set out in an applicable industrial instrument;

(c) the employee must have completed at least two years’ “continuous service” (as defined in the CI 23 Definitions clause);

(d) the employee must not be subject to any formal disciplinary action or substandard performance action at the time of the assessment;

(e) in the case of an employee who has not had a proper assessment of merit one is to be undertaken under cl 10;

(f) relevant advertising and recruitment obligations must be satisfied;

(g) funding for a permanent appointment must be confirmed as required by cl 12; and

(h) if a suitable permanent registrable or registered employee under the Public Sector Management (Redeployment and Redundancy) Regulations 2014 is able to undertake a role, then no offer of conversion to permanency can be made.

19 I therefore do not accept the applicant's submissions to the effect that the criteria for conversion of a fixed term contract employee is limited to only those matters referred to in cl 2.1. To adopt this narrow approach is, with respect, to fail to read and interpret CI 23 as a whole which, in my view, is required.

20 The next issue to consider as to the approach to the interpretation of CI 23, is the point in time at which the terms of cl 2.1(a) is to be considered. The answer to this question is to be obtained from the language used in relevant provisions of CI 23, having regard to and in the context of its stated intention. The first matter to observe is that the reference in the "Scope and Application" provision of CI 23 refers to it being "limited" to those employees who are employed in a relevant manner at the time CI 23 commenced. This is a clear indication that the framework and mechanisms set out in CI 23 were not intended to have ongoing effect, and to apply to all fixed term and casual employees, irrespective of when their employment commenced with the employer.

21 By cl 1.1, the introductory words of this clause refer to the review of the status of fixed term contract employees, the language used by the draftsperson of cl 1.1 is that an employer "shall conduct *a* review …". There is nothing in the language of cl 1.1 to suggest that the obligation on an employer is to engage in a series of reviews, on an ongoing basis. On the contrary, the language that follows cl 1.1 indicates a contrary intention. This is in accordance with the broad interpretative principle that CI 23, as with a statute or regulation, should be read and interpreted from the beginning to its end: *Patman v Fletchers' Fotographics Pty Ltd* (1984) 6 IR 471 at 474 - 475 per Priestly JA. The use of the word "current" in cl 1.1 also suggests a temporal connection, in that the review is not to be based on past or future full-time fixed term contract employee arrangements.

22 Following this approach, after cl 1.1, in cl 1.2 it is said that the employer "shall commence *the* review as soon as possible after the commencement of this Instruction …". By cl 1.3, also set out above, it is provided that the employer is to provide certain information to relevant unions "no less than 30 days prior to the commencement of *the review* …". Similarly, in cls 1.4, 1.5 and 4.1, reference is also variously made to "*the review*", in terms of the processes to apply and the outcome. I note also that a similar scheme operates in the case of casual employees, commencing at cl 6 of CI 23.

23 Accordingly, having regard to these provisions of CI 23, I consider that the respondent's submission, that a review of a fixed term contract employee in accordance with its terms, was intended to be a one-off process and not some form of continuous or periodical assessment, to be the correct approach.

24 A further and related question, that arises in the present case, is the relevant contract or contracts of a fixed term contract employee that are to be the subject of assessment and review by the employer. This also involves a matter of construction of provisions of CI 23. This was a matter in dispute between the parties. In my view, for the following reasons, there is a temporal connection between the currency of a fixed term contract employee's contract and the commencement of the review process. This involves no inconsistency with the terms of cl 2.1(b), which deals with the requirement for a fixed term contract employee to have had at least two years' continuous service, as that term is defined, as I will now endeavour to explain.

25 The temporal connection between the relevant contracts to be considered and the timing of the review, is supported by the language used in the relevant provisions of the CI. As noted by the respondent in its written submissions, in my view correctly, the language of cl 1.1 speaks of "current" fixed term contract arrangements and not prior fixed term contract arrangements. The ordinary meaning of the word "current" is "belonging to the current time; …at the present time" (Concise Oxford Dictionary). Furthermore, in cl 1.1(a) as part of the review, the employer is required to "identify *the reason*" for each employee's engagement on a fixed term contract. The language of this provision, with the use of the word "the" reason, in conjunction with the use of "current" in the preamble in cl 1.1, strongly suggests that it is the fixed term contract in effect at the time of the employer's review, that is to be taken into account by the employer, to ascertain whether the requirements of the CI are met. Even if, as postulated by the respondent, the relevant fixed term contract for present purposes was that to which Mr Brynes was a party at the time of the commencement of CI 23, for the reasons that I set out below, this would make no difference to the outcome of the present matter.

26 As mentioned above, this approach to construction of CI 23 involves no inconsistency or absurdity when read with cl 2.1(b), which was the import of the applicant's submissions on this issue. The applicant submitted that this approach would involve an absurd construction because if a hypothetical employee had been employed on a series of fixed term contracts for say 10 years, the last for 15 months, the person would be ousted from the conversion process. I do not consider this to be the case.

27 The number of contracts and the period over which they have been in effect is a separate issue to the issue of the reason for the engagement of a fixed term contract employee and whether the reason is for a circumstance mentioned in an industrial instrument, as at the material time of the review and assessment. The former matters are relevant to the satisfaction of criterion cl 2.1(b). This deals only with "continuous service" as defined in the CI. It does not concern itself with the reason for the engagements under fixed term contracts in the past, as long as the employee has been employed continuously for at least two years in the same or similar job. Nor does it require the performance of the same or similar role under a single fixed term contract for two or more years, which also seemed to be the import of the applicant's submissions. As the definition makes clear, the focus is on "service (employment)" and not fixed term contracts per se. Clause 2.1(b) is an independent criterion to cl 2.1(a). This means, on the hypothetical example cited by the applicant in its written submissions, if the hypothetical employee performed the same or similar job for at least two or more years of the period cited, this criterion would be met. In my view in this case, there can be no doubt that Mr Byrnes satisfies cl 2.1(b) of the CI.

28 Finally, in relation to the issue of interpretation of CI 23, it is important to note that it does not prohibit fixed term contracts of employment. It is recognised that fixed term contract employment may be appropriate, as long as it is for a purpose permitted by the relevant industrial instrument. In this case, it was not in dispute that this meant cl 15.2 of the Public Service and Government Officers General Agreement 2014 and cl 16.5 of the Public Service and Government Officers General Agreement 2017. Accordingly, in my view, it would be, as contended by the respondent, contrary to the scheme of operation of CI 23 and the terms of the relevant industrial instruments, and their intended primacy, for an employee to be able to rely on prior fixed

term contracts, as opposed to a current fixed term contract, to support a claim for conversion to permanency, in circumstances where the current fixed term contract is for a purpose mentioned in the relevant industrial instrument but the prior fixed term contracts were not for such purposes. Moreover, such an approach would be at odds with the express obligation on an employer under cl 1.1 of CI 23 to conduct a review of current and not past fixed term arrangements.

Consideration

29 As I have indicated above, I have no doubt Mr Byrnes had, on the evidence and the material contained in exhibit A1, been continuously employed for two or more years in the same or similar role for the respondent, in satisfaction of cl 2.1(b) of CI 23. The issue is whether, having regard to the proper construction of relevant provisions of CI 23, Mr Byrnes satisfied the requirements of cl 2.1(a) of CI 23. For the following reasons, I do not think that he did.

30 A circumstance mentioned in the 2014 and 2017 Agreements, in effect at the material time of Mr Byrnes' employment, was for employment on a fixed term contract to cover one-off periods of relief. Other circumstances included work on a project with a finite life, seasonal work, where an employee has specific skills not readily available, and any other situation agreed by the parties. There are additional circumstances set out in cl's 16.2, 16.3 and 16.8 of the 2017 Agreement, that I will come to later in these reasons.

31 In this case, the relevant fixed term contract in force at the time CI 23 came into effect, was for the position of Manager Licensing - Process Industries, with a term of appointment from 1 July to 31 December 2018. A copy of this fixed term contract was at pp 115 - 116 of exhibit A1. The fixed term contract was dated 29 May 2018 and while the copy in exhibit A1 was not signed by Mr Byrnes, there was no dispute that this was the position occupied by him at this time. As I have already mentioned, and it was not in dispute, this fixed term contract came about because the substantive occupant of the position, Mr Bailes, was acting in a higher role. On the first page of the contract, in the area dealing with the details of the employment, is marked the words "Reason for contract - covering one-off period of relief". Mr Byrnes' evidence was, as I have already observed, that he was aware Mr Bailes was the substantive occupant of the job and that he (Mr Bailes) was acting in a higher position. As also noted earlier in these reasons, this was the subject of evidence from Mr Schuller who confirmed the nature of Mr Byrnes' appointment at the time and that Mr Bailes was occupying a higher position with the respondent. Exhibit R9, a spreadsheet setting out the various positions occupied by Messrs Schuller, Bailes and Byrnes, illustrated the number and type of appointments of these three employees at the time. This showed Mr Byrnes' acting/contract positions at the same times Messrs Schuller and Bailes were also in their respective acting positions.

32 It is clear from the evidence taken as a whole, that in relation to Mr Byrnes' fixed term contract from July to December 2018, that in that time both Mr Schuller and Mr Bailes, as the substantive holders of their respective positions, were entitled to return to them. None of these positions were vacant.

33 As at the time of the offer and acceptance of the July to December 2018 fixed term contract, Mr Byrnes was appointed to his position to cover the position for Mr Bailes, who was in turn acting in a higher position. On any view, this was a "one-off period of relief" as stated in the fixed term contract itself and was a circumstance specified in cl 15.2 of the 2017 Agreement. Whilst the applicant made much of the fact that Mr Bailes resigned from his position with the respondent in late 2018, in my opinion this cannot alter the conclusion that the "reason" for the engagement of Mr Byrnes on the fixed term contract in July 2018 was for one-off relief, as was referred to in the 2017 Agreement at that time.

34 In relation to Mr Byrnes' final two short fixed term contracts for the periods 1 January to 31 March 2019 and 1 April to 30 June 2019, both of these contracts were for the purpose of enabling the respondent's then fixed term contract review process, which commenced in late 2018, to proceed to completion. This was the uncontested evidence of Mr Murphy and was consistent with the chain of correspondence at the time, as set out in exhibit R7. To extend a fixed term contract for the reason of ensuring employees may continue to participate in an employer's fixed term contract review process under CI 23 is not only consistent with the spirit of CI 23 and equity and good conscience, but is also plainly a circumstance mentioned in a relevant industrial agreement for the purposes of cl 2.1(a) of CI 23. In particular, as mentioned earlier, I refer to cl's 16.2, 16.3 and 16.8 of the 2017 Agreement and note that cl 16.3 specifically refers to a renewal of an existing fixed term contract in relation to a review for a possible conversion under processes referred to in cl 16.8, which ultimately became CI 23. This was a circumstance specifically contemplated by the 2017 Agreement and was specified in the various human resources documents in evidence at exhibit A1.

Conclusions

35 In the circumstances of this case, irrespective of which fixed term contract Mr Byrnes was a party to, either as at the commencement of CI 23 or in early 2019 when the respondent commenced its review of fixed term contract arrangements, I am not persuaded that Mr Byrnes met the requirements of cl 2.1 of CI 23 for him to be eligible for conversion to permanency. Accordingly, I do not need to finally determine the respondent's alternative contention that even if Mr Byrnes had met the cl 2.1 requirements, he would not have satisfied the cl 3 requirement for a "proper assessment of merit" in accordance with cl 10 of CI 23. However, in light of the evidence led in these proceedings on this issue, I have considerable doubt as to whether these requirements could have been satisfied, especially where Mr Byrnes had applied for and had not been assessed as suitable by the respondent for two management positions, one of which he occupied on a fixed term contract basis from 2016 to 2019.

36 For the foregoing reasons, the application must be dismissed.

2020 WAIRC 00217

DISPUTE RE FIXED TERM CONTRACTS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION (INC.)
	APPLICANT
	-v-
	DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 17 APRIL 2020
FILE NO	PSACR 19 OF 2019
CITATION NO.	2020 WAIRC 00217

Result	Application dismissed
Representation	
Applicant	Mr M Amati
Respondent	Mr J Carroll of Counsel

Order

HAVING heard Mr M Amati on behalf of the applicant and Mr J Carroll of counsel on behalf of the respondent the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2020 WAIRC 00267

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WARREN MEDCRAFT
	APPLICANT
	-v-
	METLABS AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 8 MAY 2020
FILE NO/S	B 94 OF 2018
CITATION NO.	2020 WAIRC 00267

Result	Orders issued
Representation (by correspondence)	
Applicant	Mr G McCorry (as agent)
Respondent	Ms R Harding (of counsel)

Order

HAVING heard from Mr G McCorry, as agent, for the applicant and Ms R Harding, of counsel, for the respondent by correspondence between Monday, 20 April 2020 and Wednesday, 6 May 2020 inclusive;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* and by consent, make the following orders:

1. THAT by close of business, Monday, 15 June 2020, the applicant file any witness statements and materials that he intends to rely upon;
2. THAT by close of business, Monday, 6 July 2020, the respondent file any witness statements and materials that it intends to rely upon;
3. THAT by close of business, Monday, 20 July 2020, the parties file any Statement of Agreed Facts that has been agreed between them (if any);
4. THAT, five weeks before the hearing date, the applicant file:
   (a) an outline of submissions;
   (b) a list of authorities;
   (c) a list of documents on which the applicant intends to rely.
5. THAT, three weeks before the hearing date, the respondent file:
   (a) an outline of submissions;
   (b) a list of authorities;
   (c) a list of documents on which the respondent intends to rely.
6. THAT, a party must, on request, provide a copy of any document referred to in that party's list of documents, to the other party;
7. THAT, at least one week before the hearing date, each party is to give notice of its intention to cross examine any witnesses;
8. THAT save as otherwise determined by the Commission, the witness statements filed by the parties stand as the evidence in chief of each witness;
9. THAT the matter be listed for hearing on a date to be set by the Commission; and
10. THAT the parties have liberty to apply.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2020 WAIRC 00227

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LESLIE ENRIQUEZ
	APPLICANT
	-v-
	THE TRUSTEE FOR GIAMONDIFAMILY TRUST
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 29 APRIL 2020
FILE NO.	B 170 OF 2019
CITATION NO.	2020 WAIRC 00227

Result	Direction issued
Representation	
Applicant	In person
Respondent	Mr Mark Cox (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Mr M Cox (of counsel) and with him Ms L Wright (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 applicant file and serve any outlines of evidence of witnesses and documentary evidence he intends to rely on at hearing by 13 May 2020;

2. THAT the respondent file and serve any outlines of evidence of witnesses and documentary evidence it intends to rely on at hearing by 3 June 2020;
3. THAT the applicant file and serve any outlines of evidence of witnesses and documentary evidence in response to the respondent's witnesses and documentary evidence he intends to rely on at hearing by 17 June 2020;
4. THAT the parties file and serve any objections to the witness statements or evidence filed in the matter by 1 July 2020;
5. THAT four weeks before the date on which the matter is listed for hearing the applicant file an outline of submissions and list of authorities on which he intends to rely;
6. THAT two weeks before the date on which the matter is listed for hearing the respondent file an outline of submissions and list of authorities on which it intends to rely;
7. THAT the matter be listed for hearing on a date to be set after 8 July 2020, and
8. THAT the parties have liberty to apply at short notice.

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

2020 WAIRC 00229

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LESLIE ENRIQUEZ
	APPLICANT
	-v-
	THE TRUSTEE FOR GIAMONDIFAMILY TRUST
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 30 APRIL 2020
FILE NO.	B 170 OF 2019
CITATION NO.	2020 WAIRC 00229

Result	Direction issued
Representation	
Applicant	In person
Respondent	Mr Mark Cox (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Mr M Cox (of counsel) and with him Ms L Wright (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 applicant file and serve any outlines of evidence of witnesses and documentary evidence he intends to rely on at hearing by 13 May 2020;
2. THAT the respondent file and serve any outlines of evidence of witnesses and documentary evidence it intends to rely on at hearing by 3 June 2020;
3. THAT the applicant file and serve any outlines of evidence of witnesses and documentary evidence in response to the respondent's witnesses and documentary evidence he intends to rely on at hearing by 17 June 2020;
4. THAT the parties file and serve any objections to the witness statements or evidence filed in the matter by 1 July 2020;
5. THAT four weeks before the date on which the matter is listed for hearing the applicant file an outline of submissions and list of authorities on which he intends to rely;
6. THAT two weeks before the date on which the matter is listed for hearing the respondent file an outline of submissions and list of authorities on which it intends to rely;
7. THAT the matter be listed for hearing on a date to be set after 8 August 2020, and
8. THAT the parties have liberty to apply at short notice.

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

2020 WAIRC 00219

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ACCESS GROUP AUSTRALIA
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 17 APRIL 2020
FILE NO/S	OSHT 3 OF 2020
CITATION NO.	2020 WAIRC 00219

Result	Name of applicant amended
Representation	
Applicant	Mr Craig Chadwick
Respondent	Ms Chynne Stamp (of counsel)

Order

HAVING heard from Mr C Chadwick on behalf of the applicant and Ms C Stamp (of counsel) on behalf of the respondent, The Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* and the *Industrial Relations Act 1979*, hereby orders –

THAT the name of the applicant be amended by the deletion of the name 'Access Group Australia' and the insertion in lieu thereof the name 'Craig Chadwick'.

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

2020 WAIRC 00220

REVIEW OF DECISION - S.61A - OSH ACT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	CRAIG CHADWICK
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	MONDAY, 20 APRIL 2020
FILE NO.	OSHT 3 OF 2020
CITATION NO.	2020 WAIRC 00220

Result	Direction issued
Representation	
Applicant	Mr Craig Chadwick
Respondent	Ms Chynne Stamp (of counsel)

Direction

HAVING heard from the applicant in person and Ms C Stamp (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT all matters requiring to be served on either party or the Tribunal to be served by email on each parties' nominated email address and proof of service is by the email sent notification;

2. THAT each party may request that the other party produce documents or material by email served on the other party no later than 30 April 2020;
3. THAT each party to provide documents and materials requested by the other party by 14 May 2020;
4. THAT the applicant file and serve upon the respondent his outlines of any evidence including his own witness evidence and any other witnesses, and documents on which he intends to rely by 4 June 2020;
5. THAT the respondent file and serve upon the applicant its outline of evidence including any witness evidence and documents on which it intends to rely by 25 June 2020;
6. THAT the applicant file and serve upon the respondent a written outline of submissions and any list of authorities upon which he intends to rely no later than 14 days before the date listed for hearing;
7. THAT the respondent file and serve upon the applicant a written outline of submissions and any list of authorities upon which it intends to rely no later than seven days before the hearing;
8. THAT the matter be listed for a one-day hearing on a date to be fixed, and
9. THAT the parties have liberty to apply at short notice.

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

2020 WAIRC 00221

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 FEBRUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROL ELENA HUTCHINSON
	APELLANT
	-v-
	DEPARTMENT OF HEALTH, WA COUNTRY HEALTH SERVICE, SOUTH WEST REGION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR G LEE - BOARD MEMBER
	MR P HESLEWOOD - BOARD MEMBER
DATE	TUESDAY, 21 APRIL 2020
FILE NO.	PSAB 3 OF 2020
CITATION NO.	2020 WAIRC 00221

Result	Direction issued
Representation (on the papers)	
Appellant	On her own behalf
Respondent	Ms R Sinton (as agent)

Direction

HAVING heard from the appellant on her own behalf and Ms R Sinton (as agent) on behalf of the respondent about programming this matter in relation to the preliminary matters of whether the appellant was dismissed and whether the Board should extend the time limit for the appellant to make her appeal, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 12 May 2020.
2. THAT the appellant file her outlines of evidence and documents, other than the agreed documents, on which she intends to rely by 2 June 2020.
3. THAT the respondent file its outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 23 June 2020.
4. THAT the appellant file written submissions by 14 July 2020.
5. THAT the respondent file written submissions by 28 July 2020.
6. THAT discovery be informal.
7. THAT the parties have liberty to apply.

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

2020 WAIRC 00254

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 18 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TREVOR WALLEY
	APPELLANT
	-v-
	DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIONS
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MR J LAMB - BOARD MEMBER
	MS H REDMOND - BOARD MEMBER
DATE	WEDNESDAY, 6 MAY 2020
FILE NO	PSAB 4 OF 2020
CITATION NO.	2020 WAIRC 00254

Result	Orders issued
Representation	
Appellant	In person
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from the appellant in person and Mr J Carroll, of counsel, for the respondent, on Wednesday, 6 May 2020, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that:

1. The respondent file written submissions in relation to the appeal being filed out of time by close of business Wednesday, 20 May 2020;
2. The appellant file submissions in response to the respondent's submissions described in order 1 above by close of business Wednesday, 10 June 2020;
3. The respondent file any submissions in reply by close of business, Wednesday, 17 June 2020; and
4. The parties have liberty to apply.

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

2020 WAIRC 00224

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 19 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROSSANA POLESTICO
	APPELLANT
	-v-
	HEALTH SUPPORT SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR G BROWN - BOARD MEMBER
	MS J LOVE - BOARD MEMBER
DATE	TUESDAY, 28 APRIL 2020
FILE NO.	PSAB 5 OF 2020
CITATION NO.	2020 WAIRC 00224

Result	Direction issued
Representation	
Appellant	Mr P Mullally (as agent)
Respondent	Ms N Ireland (as agent)

Direction

HAVING heard from Mr P Mullally (as agent) on behalf of the appellant and Ms N Ireland (as agent) on behalf of the respondent about programming this matter in relation to the preliminary matters of whether the appellant was dismissed and whether the Board should extend the time limit for the appellant to make her appeal, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 12 May 2020.
2. THAT the appellant file her outlines of evidence and documents, other than the agreed documents, on which she intends to rely by 26 May 2020.
3. THAT the respondent file its outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 10 June 2020.
4. THAT the appellant file written submissions by 24 June 2020.
5. THAT the respondent file written submissions by 8 July 2020.
6. THAT discovery be informal.
7. THAT the parties have liberty to apply.

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

2020 WAIRC 00270

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 5 MARCH 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMUEL JAMES EDWARDS
	APPELLANT
	-v-
	DEPARTMENT OF HEALTH - SOUTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL - CHAIR
	MS L BROWN - BOARD MEMBER
	MR R SINTON - BOARD MEMBER
DATE	TUESDAY, 12 MAY 2020
FILE NO.	PSAB 6 OF 2020
CITATION NO.	2020 WAIRC 00270

Result	Direction issued
Representation	
Appellant	In person (by video)
Respondent	Mr M Aulfrey (by telephone)

Direction

HAVING heard from the appellant on his own behalf and Mr M Aulfrey (as agent) on behalf of the respondent about programming this matter, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the appellant file an amended notice of appeal by 2 June 2020;
2. THAT the respondent file an amended response by 23 June 2020.

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

2020 WAIRC 00249

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY JENNIFER MEUNIER
	APPLICANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 5 MAY 2020
FILE NO.	U 24 OF 2020
CITATION NO.	2020 WAIRC 00249

Result	Direction issued
Representation (on the papers)	
Applicant	On her own behalf
Respondent	Ms J Vincent (of counsel)

Direction

Having heard from the applicant on her own behalf and from Ms J Vincent (of counsel) on behalf of the respondent about programming the jurisdictional question of whether the Commission in its general jurisdiction can hear and determine this application, and where the parties agree that the applicant is a public service officer, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the respondent file written submissions by 15 May 2020; and
2. THAT the applicant file written submissions by 1 June 2020.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2020 WAIRC 00231

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBRA ABBOTT
	APPLICANT
	-v-
	MIDWAY COMMUNITY CARE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 30 APRIL 2020
FILE NO.	U 26 OF 2020
CITATION NO.	2020 WAIRC 00231

Result	Direction issued
Representation (on the papers)	
Applicant	Ms D Abbott (on her own behalf)
Respondent	Ms L Langridge (of counsel)

Direction

HAVING heard from the applicant on her own behalf and Ms L Langridge (of counsel) on behalf of the respondent about programming the matter of whether the Commission has jurisdiction to hear application U 26/2020, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the respondent file witness statements and documents on which it intends to rely by 15 May 2020.
2. THAT the applicant file witness statements and documents on which she intends to rely by 5 June 2020.
3. THAT the respondent file written submissions by 19 June 2020.

4. THAT the applicant file written submissions by 3 July 2020.
5. THAT discovery be informal.
6. THAT the matter be listed for a one-day hearing.
7. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2020 WAIRC 00215

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THIERRY LIEBGOTT
	APPLICANT
	-v-
	NORTH METROPOLITAN TAFE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 17 APRIL 2020
FILE NO/S	U 39 OF 2020
CITATION NO.	2020 WAIRC 00215

Result	Orders issued
Representation (by correspondence)	
Applicant	Mr S Kemp (of counsel)
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Mr S Kemp, of counsel, for the applicant and Mr J Carroll, of counsel, for the respondent by correspondence on Thursday, 9 April 2020 and Wednesday, 15 April 2020;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* and by consent make the following orders:

(1) Within seven days of the date of this order, the Respondent is to produce for the Applicant a copy of each of the documents listed in the Respondent's List of Discoverable Documents which was filed on 15 April 2020; and

(2) The Applicant has liberty to apply for further and better discovery and production of documents.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Parliamentary Employees General Agreement 2019 PSAAG 3/2020	05/07/2020	The Civil Service Association of Western Australia (Inc)	Speaker of the Legislative Assembly of Western Australia, President of the Legislative Assembly of Western Australia, Media, Entertainment and Arts Alliance of Western Australia (Union of Employees),	Commissioner T Emmanuel	Agreement registered