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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2020 WAIRC 00421

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HANSSEN PTY LTD
	APPELLANT
	-and-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 21 JULY 2020
FILE NO/S	FBA 6 OF 2020
CITATION NO.	2020 WAIRC 00421

Result	Order issued
Appearances	
Appellant	Mr M Hemery of counsel
Respondent	Mr D McDonnell of counsel

Order

Having heard Mr M Hemery of counsel on behalf of the appellant, and Mr D McDonnell of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

> THAT Annexure HABP-2 to the affidavit of Hector Palomar dated 23 April 2019 received in the Registry on 20 July 2020 be and is hereby substituted for Annexure HABP-2 to the affidavit of Hector Palomar dated 23 April 2019 contained in the appeal books filed in the herein appeal on 8 July 2020.

By the Full Bench

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00855

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HANSSEN PTY LTD
	APPELLANT
	-and-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 15 OCTOBER 2020
FILE NO/S	FBA 6 OF 2020
CITATION NO.	2020 WAIRC 00855

Result	Appeal discontinued
Appearances	
Appellant	Mr M Hemery of counsel
Respondent	Mr D McDonnell of counsel

Order

Whereas the appellant sought and was granted leave to discontinue the appeal, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby discontinued.

By the Full Bench

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

FULL BENCH—Appeals against decision of Industrial Magistrate—

2020 WAIRC 00809

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 201/2020 GIVEN ON 8 JULY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00809
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS COMMISSIONER T B WALKINGTON
HEARD BY	**:**	WRITTEN SUBMISSIONS
DELIVERED	**:**	TUESDAY, 22 SEPTEMBER 2020
FILE NO.	**:**	FBA 8 OF 2020
BETWEEN	**:**	LAUNDRY HOLDINGS PTY LTD Appellant AND NATHAN THOMAS Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**INDUSTRIAL MAGISTRATES COURT**
Coram	**:**	**INDUSTRIAL MAGISTRATE M FLYNN**
File No	**:**	**M 201/2019**

CatchWords	:	Industrial law (WA) – Appeal against decision of the Industrial Magistrate – Jurisdiction of Full Bench to deal with entitlements under the *Fair Work Act 2009* (Cth) – Commission not an eligible State or Territory court to exercise jurisdiction under FW Act – Extension of time to respond to jurisdictional issue – Appeal dismissed
Legislation	:	*Fair Work Act 2009* *Industrial Relations Act 1979*, s 84
Result	:	Appeal dismissed
Representation:		
Appellant	:	Mr C Silke
Respondent	:	Mr N Thomas on his own behalf

Case(s) referred to in reasons:

Ghimere v Karriview Management Pty Ltd (No 2.) [2019] FCA 1627

Adrian Manescu v Baker Hughes Australia Pty Limited [2020] WAIRC 00683

Rogers v J-Corp Pty Ltd [2015] WAIRC 00862; (2015) 95 WAIG 1513

Reasons for Decision

SCOTT CC:

Introduction

1 This is an appeal to the Full Bench of the Western Australian Industrial Relations Commission said to be made pursuant to s 84 of the *Industrial Relations Act 1979*, against the decision of the Industrial Magistrate's Court in matter M 201 of 2019, issued on 8 July 2020.

Background

2 The appeal was filed on 29 July 2020, along with an application for an extension of time in which to file the appeal book. The reason given by Mr Clifford Silke, representing the appellant, for the application to extend time was that the appellant is self-represented and its director, who has carriage of the matters, is not available until mid-October 2020 because he is sailing in the Kimberleys. He is only contactable and able to provide instructions intermittently. For those reasons, an extension of time until 28 October 2020 was sought to file the appeal book.

3 It is clear from the Reasons for decision of the Industrial Magistrate's Court that the matter before the industrial magistrate was a claim relating to entitlements said to arise under the *Fair Work Act 2009* (Cth) (FW Act) and an award made under that Act, the *Hospitality Industry General Award 2010*.

4 By letter dated 14 August 2020, at the direction of the Full Bench, the Associate wrote to Mr Silke, saying that:

> The Full Bench notes that the matter before the Industrial Magistrates Court related to entitlements said to arise under the Fair Work Act 2009 (Cth) (FW Act) and an award made under that act. You are referred to s 562, 563(f) and 565 of the FW Act and the definition of 'eligible State or Territory court' in s 12 of the Act, which set out the appropriate avenue for an appeal against a decision of the Industrial Magistrates Court in those circumstances. You are referred to the decisions of the Full Bench in *Rogers v J-Corp* [2015] WAIRC 00862; (2015) WAIG 1513 and *Manescu v Baker Hughes* [2020] WAIRC 00683. I attach copies of the sections of the FW Act and those decisions for your information.
>
> The Full Bench has directed that:
>
> 1. the appellant is to file written submissions about whether the Full Bench has jurisdiction to hear this appeal by 4:30 PM on Friday, 28 August 2020; and
> 2. the respondent is to file written submissions in reply by 4:30 PM on Friday, 4 September 2020.

5 On 24 August 2020, Mr Silke telephoned the Associate and said that he would respond by email the next day. On 25 August 2020, the Associate received an email from Mr Silke in which he noted his previous request for an extension of time in which to file the appeal book, and asked for an extension of time to reply to the issue of jurisdiction as he was '[n]ot in a position to consider the facts carefully with limited access to expert opinion'.

6 The respondent, Mr Nathan Thomas, was invited to respond to the issue of the application for an extension of time in which to respond to the issue of jurisdiction. By email dated 31 August 2020, Mr Thomas objected to the extension being granted to the appellant. He noted that Mr Silke's solicitors had been in contact with him many times during the entirety of the matter before the Industrial Magistrate's Court. Mr Thomas said that the matter related to entitlements under the FW Act and the National Employment Standards. He said that it was his understanding that an appeal against the decision of an eligible State or Territory court in regard to the FW Act lies to the Federal Court. He asked that the appeal be dismissed.

7 By letter dated 4 September 2020, the Associate again wrote to Mr Silke at the direction of the Full Bench. The Associate noted the request for the extension of time in which to respond to the letter of 14 August 2020 and that the Full Bench had taken account of the respondent's objection. The letter went on to note:

> The Full Bench has considered all of the circumstances and is concerned by the delay created by the extension proposed by the appellant of 28 October 2020.
>
> The Full Bench has directed me to inform you that an extension has been granted, however the extension is for a further 14 days. You will be required to respond to the issue raised in my letter of 14 August 2020 by no later than 4:00 PM on Friday 18 September 2020.

Should you fail to respond by that time, the Full Bench will proceed to consider whether the appeal is within jurisdiction based on the material it currently has before it.

8 This email was sent to the same email address as the previous correspondence directed to Mr Silke and was sent on Friday, 4 September 2020. In effect, the time for the appellant to respond had been extended from 28 August to 18 September 2020, a period of 21 days.

9 By 4 pm on Friday, 18 September 2020, there had been no response received from the appellant.

Consideration and conclusion

10 In accordance with the notice given to the appellant, the Full Bench now proceeds to consider whether the appeal is within jurisdiction based on the material it currently has before it. That material is that this is an appeal against the decision of the Industrial Magistrate. The matter before the Magistrate arose under the FW Act and the *Hospitality Industry (General) Award 2010*.

11 I note the decisions of the Full Bench in *Rogers v J-Corp Pty Ltd* [2015] WAIRC 00862; (2015) 95 WAIG 1513; Colvin J in *Ghimere v Karriview Management Pty Ltd (No 2.)* [2019] FCA at 1627 at [19]; and the Full Bench in *Adrian Manescu v Baker Hughes Australia Pty Limited* [2020] WAIRC 00683. These decisions make clear that the appropriate jurisdiction for an appeal against a decision of the Industrial Magistrate's Court in dealing with a matter under the FW Act, 'lies to the Federal Court from an eligible State or Territory court exercising jurisdiction under this Act' (s 565(1) of the FW Act). In those circumstances, there is no jurisdiction in the Full Bench to deal with the matter.

12 Further, I am of the view that had the appellant wished to make a submission, he has been provided with a reasonable opportunity to do so. His unavailability in the particular circumstances is, in my view, not sufficient to warrant the matter being delayed further and it is not in the public interest for the matter to remain on foot. In all the circumstances, an order should issue dismissing the appeal.

MATTHEWS C:

13 I agree with the Reasons for decision of Chief Commissioner Scott and have nothing to add.

WALKINGTON C:

14 I also agree and have nothing to add.

2020 WAIRC 00810

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAUNDRY HOLDINGS PTY LTD
	APPELLANT
	-and-
	NATHAN THOMAS
	RESPONDENT
CORAM	FULL BENCH
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER D J MATTHEWS
	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 22 SEPTEMBER 2020
FILE NO/S	FBA 8 OF 2020
CITATION NO.	2020 WAIRC 00810

Result	Appeal dismissed
Appearances	
Appellant	Mr C Silke on behalf of the appellant
Respondent	Mr N Thomas on his own behalf

Order

Having heard from Mr C Silke on behalf of the appellant and Mr N Thomas on his own behalf, by written submissions, and reasons for decision having issued on Tuesday, 22 September 2020, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT this appeal be and is hereby dismissed.

By the Full Bench

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

COMMISSION IN COURT SESSION—Matters dealt with—

2020 WAIRC 00816

COVID-19 GENERAL ORDER PURSUANT TO SECTION 50 OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 24 SEPTEMBER 2020
FILE NO/S	APPL 16B OF 2020
CITATION NO.	2020 WAIRC 00816

Result Application dismissed

Representation

- Dr T Dymond on behalf of UnionsWA
- Mr P Moss, and with him Ms K Eatwell and Ms A Cabassi on behalf of the Chamber of Commerce and Industry of Western Australia Limited
- Mr B Entrekin, and with him Ms N Chisholm on behalf of the Hon. Minister for Industrial Relations

Order

On 14 April 2020, the Western Australian Industrial Relations Commission issued a General Order under s 50 *Industrial Relations Act 1979* (WA) amidst the COVID-19 pandemic that allows state system employees to take unpaid pandemic leave, annual leave on half pay and annual leave in advance (2020 WAIRC 00205).

On 21 July 2020, UnionsWA sought to have the General Order varied to allow for the pandemic leave to be paid.

On 22 September 2020, UnionsWA sought leave to withdraw the application.

NOW THEREFORE, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders THAT:

The application be and is hereby dismissed.

(Sgd.) P E SCOTT,
Chief Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

2020 WAIRC 00800

APPLICATION FOR COVID-19 GENERAL ORDER THAT AIMS TO PROVIDE FURTHER FLEXIBILITY TO MANAGE PRIVATE SECTOR EMPLOYMENT ARRANGEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA LIMITED
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 15 SEPTEMBER 2020
FILE NO/S	APPL 19 OF 2020
CITATION NO.	2020 WAIRC 00800

Result	General Order varied
Representation	

- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited
- Mr B Entrekin, and with him Ms M Hughie-Williams on behalf of the Hon. Minister for Industrial Relations
- Dr T Dymond on behalf of UnionsWA

Order

On 15 May 2020, the Commission in Court Session issued a General Order in this matter (2020 WAIRC 00279); and

On 30 June 2020, the Commission reviewed the General Order; and

On 1 July 2020. The Commission in Court Session issued an Order in this matter (2020 WAIRC 00384) that the General Order be further reviewed on 15 September 2020; and

On 15 September 2020, the Commission reviewed the operation of the General Order of its own motion and sought responses from the Chamber of Commerce and Industry of Western Australia Limited, the Hon. Minister for Industrial Relations and UnionsWA; and

Those parties reported that the General Order is operating as intended, and that the operation of the General Order ought to be extended until 28 March 2021 so that the General Order is consistent with the operation of the Federal JobKeeper scheme.

NOW THEREFORE, the Commission in Court Session, pursuant to the powers conferred on it by s 50 of the *Industrial Relations Act 1979* (WA) hereby orders THAT:

The General Order of the Commission dated 15 May 2020 (2020 WAIRC 00279) be varied in the following manner:

1. In clause 1. – Application:
   a) subclause (2) delete '28 September 2020' and insert '28 March 2021' in lieu thereof; and
   b) subclause (3) delete 'no later than 30 June 2020' and insert 'mid March 2021 but no later that 7 days after any changes are made to the Federal JobKeeper scheme' in lieu thereof.
2. In clause 8. – Rules Relating to JobKeeper Enabling Directions subclause (10) delete '28 September 2020' and insert '28 March 2021' in lieu thereof.

(Sgd.) P E SCOTT,
Chief Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2020 WAIRC 00745

DEPARTMENT OF COMMUNITIES (CSA FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS AND PARENT HELPERS) AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	P 19 OF 2019
CITATION NO.	2020 WAIRC 00745

Result	Order issued
Representation	
Applicant	Mr M Giles, and with him Mr M Finnegan
Respondent	Ms R Smith, and with her Dr N Woolf

Order

HAVING heard Mr M Giles and with him Mr M Finnegan on behalf of Civil Service Association of Western Australia (Inc), and Ms R Smith and with her Dr N Woolf on behalf of the Department of Communities, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Department of Communities (CSA Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990* be varied in accordance with the following Schedule and that such variations shall have effect on and from Wednesday, 26 August 2020.

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

SCHEDULE

1. Clause 14 – SALARY PACKAGING ARRANGEMENT

Delete subclause (6) and insert the following in lieu thereof:

(6) Compulsory Employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory Employer contributions made to superannuation schemes established under the *State Superannuation Act 2000* (WA) are calculated on the gross (pre packaged) salary amount regardless of whether an Employee participates in a salary packaging arrangement with their Employer.

2. Clause 19 – PUBLIC HOLIDAYS

Delete paragraph (a) of subclause (1) and insert the following in lieu thereof:

(a) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

2020 WAIRC 00747

EDUCATION DEPARTMENT MINISTERIAL OFFICERS SALARIES ALLOWANCES AND CONDITIONS AWARD 1983 NO 5 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	P 21 OF 2019
CITATION NO.	2020 WAIRC 00747

Result	Order issued
Representation	
Applicant	Mr M Giles, and with him Mr M Finnegan
Respondent	Ms R Smith, and with her Dr N Woolf

Order

HAVING heard Mr M Giles and with him Mr M Finnegan on behalf of Civil Service Association of Western Australia (Inc), and Ms R Smith and with her Dr N Woolf on behalf of the Department of Education, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No. 5 of 1983* be varied in accordance with the following Schedule and that such variations shall have effect on and from Wednesday, 26 August 2020.

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

SCHEDULE

1. Clause 17 – PUBLIC HOLIDAYS

Delete paragraph (a) of subclause (1) and insert the following in lieu thereof:

(a) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

2. Clause 52 – SALARY PACKAGING ARRANGEMENT

Delete subclause (6) and insert the following in lieu thereof:

(6) Compulsory Employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory Employer contributions made to superannuation schemes established under the *State Superannuation Act 2000* (WA) are calculated on the gross (pre packaged) salary amount regardless of whether an Employee participates in a salary packaging arrangement with their Employer.

2020 WAIRC 00746

ELECTORATE OFFICERS AWARD 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	DEPARTMENT OF THE LEGISLATIVE ASSEMBLY (WA), DEPARTMENT OF THE LEGISLATIVE COUNCIL (WA)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	P 20 OF 2019
CITATION NO.	2020 WAIRC 00746

Result	Order issued
Representation	
Applicant	Mr M Giles, and with him Mr M Finnegan
Respondent	Ms R Smith, and with her Dr N Woolf

Order

HAVING heard Mr M Giles and with him Mr M Finnegan on behalf of Civil Service Association of Western Australia (Inc), and Ms R Smith and with her Dr N Woolf on behalf of the Department of the Legislative Assembly (WA) and the Department of the Legislative Council (WA), the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Electorate Officers Award (1986)* be varied in accordance with the following Schedule and that such variations shall have effect on and from Wednesday, 26 August 2020.

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

SCHEDULE

Clause 15 – PUBLIC HOLIDAYS

Delete paragraph (a) of subclause (1) and insert the following in lieu thereof:

(a) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, provided that the employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

2020 WAIRC 00743

GOVERNMENT OFFICERS (INSURANCE COMMISSION OF WESTERN AUSTRALIA) AWARD, 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	INSURANCE COMMISSION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	P 17 OF 2019
CITATION NO.	2020 WAIRC 00743

Result	Order issued
Representation	
Applicant	Mr M Giles, and with him Mr M Finnegan
Respondent	Ms R Smith, and with her Dr N Woolf

Order

HAVING heard Mr M Giles and with him Mr M Finnegan on behalf of Civil Service Association of Western Australia (Inc), and Ms R Smith and with her Dr N Woolf on behalf of the Insurance Commission of Western Australia, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Government Officers (Insurance Commission of Western Australia) Award 1987* be varied in accordance with the following Schedule and that such variations shall have effect on and from Wednesday, 26 August 2020.

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

SCHEDULE

Clause 17 – PUBLIC HOLIDAYS

Delete subclause (a) and insert the following in lieu thereof:

(a) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

2020 WAIRC 00751

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	ARGRICULTURAL PRODUCE COMMISSION, ANIMAL RESOURCES AUTHORITY, ARCHITECTS BOARD OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	P 25 OF 2019
CITATION NO.	2020 WAIRC 00751

Result	Order issued
Representation	
Applicant	Mr M Giles, and with him Mr M Finnegan
Respondent	Ms R Smith, and with her Dr N Woolf

Order

HAVING heard Mr M Giles and with him Mr M Finnegan on behalf of Civil Service Association of Western Australia (Inc), and Ms R Smith and with her Dr N Woolf on behalf of the Agricultural Produce Commission, Animal Resources Authority and Architects Board of Western Australia, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Government Officers Salaries, Allowances and Conditions Award 1989* be varied in accordance with the following Schedule and that such variations shall have effect on and from Wednesday, 26 August 2020.

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

SCHEDULE

Clause 24 – PUBLIC HOLIDAYS

Delete subclause (1) and insert the following in lieu thereof:

(1) The following days shall be allowed as holidays with pay:

New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

2020 WAIRC 00749

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	P 23 OF 2019
CITATION NO.	2020 WAIRC 00749

Result	Order issued
Representation	
Applicant	Mr M Giles, and with him Mr M Finnegan
Respondent	Ms R Smith, and with her Dr N Woolf

Order

HAVING heard Mr M Giles and with him Mr M Finnegan on behalf of Civil Service Association of Western Australia (Inc), and Ms R Smith and with her Dr N Woolf on behalf of the Department of Communities, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Government Officers (Social Trainers) Award 1988* be varied in accordance with the following Schedule and that such variations shall have effect on and from Wednesday, 26 August 2020.

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

SCHEDULE

Clause 23 – PUBLIC HOLIDAYS

Delete paragraph (a) of subclause (1) and insert the following in lieu thereof:

(a) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

2020 WAIRC 00748

JUVENILE CUSTODIAL OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	P 22 OF 2019
CITATION NO.	2020 WAIRC 00748

Result	Order issued
Representation	
Applicant	Mr M Giles, and with him Mr M Finnegan
Respondent	Ms R Smith, and with her Dr N Woolf

Order

HAVING heard Mr M Giles and with him Mr M Finnegan on behalf of Civil Service Association of Western Australia (Inc), and Ms R Smith and with her Dr N Woolf on behalf of the Department of Justice, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Juvenile Custodial Officers' Award* be varied in accordance with the following Schedule and that such variations shall have effect on and from Wednesday, 26 August 2020.

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

SCHEDULE

1. Clause 5.12 – SALARY PACKAGING ARRANGEMENT

Delete subclause 5.12.6 and insert the following in lieu thereof:

5.12.6 Compulsory employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory employer contributions made to superannuation schemes established under the *State Superannuation Act 2000* (WA) are calculated on the gross (pre packaged) salary amount regardless of whether an employee participates in a salary packaging arrangement with their employer.

2. Clause 6.5 – PUBLIC HOLIDAYS:

Delete paragraph (1) of subclause 6.5.1 and insert the following in lieu thereof:

(1) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

2020 WAIRC 00744

PUBLIC SERVICE ALLOWANCES (FISHERIES AND WILDLIFE OFFICERS) AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	THE DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIONS, DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL DEVELOPMENT, THE DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	P 18 OF 2019
CITATION NO.	2020 WAIRC 00744

Result	Order issued
Representation	
Applicant	Mr M Giles, and with him Mr M Finnegan
Respondent	Ms R Smith, and with her Dr N Woolf

Order

HAVING heard Mr M Giles and with him Mr M Finnegan on behalf of Civil Service Association of Western Australia (Inc), and Ms R Smith and with her Dr N Woolf on behalf of the Department of Biodiversity, Conservation and Attractions, Department of Primary Industries and Regional Development and the Department of Water and Environmental Regulation, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Public Service Allowances (Fisheries and Wildlife Officers) Award 1990* be varied in accordance with the following Schedule and that such variations shall have effect on and from Wednesday, 26 August 2020.

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

SCHEDULE

1. Clause 8 – PUBLIC HOLIDAYS

Delete subclause (1) and insert the following in lieu thereof:

(1) The following days shall be allowed as holidays with pay: New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

2. Clause 13 – SALARY PACKAGING

Delete subclause (6) and insert the following in lieu thereof:

(6) Compulsory Employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory employer contributions made to superannuation schemes established under the *State Superannuation Act 2000* (WA) are calculated on the gross (pre packaged) salary amount regardless of whether an officer participates in a salary packaging arrangement with their employer.

2020 WAIRC 00750

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	CHEMISTRY CENTRE (WA), COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE, COMMISSIONER FOR EQUAL OPPORTUNITY (EQUAL OPPORTUNITY COMMISSION)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 AUGUST 2020
FILE NO/S	P 24 OF 2019
CITATION NO.	2020 WAIRC 00750

Result	Order issued
Representation	
Applicant	Mr M Giles, and with him Mr M Finnegan
Respondent	Ms R Smith, and with her Dr N Woolf

Order

HAVING heard Mr M Giles and with him Mr M Finnegan on behalf of Civil Service Association of Western Australia (Inc), and Ms R Smith and with her Dr N Woolf on behalf of Chemistry Centre (WA), Commissioner for Children and Young People, Commissioner for Equal Opportunity (Equal Opportunity Commission), the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Public Service Award 1992* be varied in accordance with the following Schedule and that such variations shall have effect on and from Wednesday, 26 August 2020.

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

SCHEDULE

1. Clause 15 – SALARY PACKAGING ARRANGEMENT

Delete subclause (6) and insert the following in lieu thereof:

(6) Compulsory Employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory employer contributions made to superannuation schemes established under the *State Superannuation Act 2000* (WA) are calculated on the gross (pre packaged) salary amount regardless of whether an officer participates in a salary packaging arrangement with their employer.

2. Clause 24 – PUBLIC HOLIDAYS

Delete paragraph (a) of subclause (1) and insert the following in lieu thereof:

(a) New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2020 WAIRC 00812

INTERPRETATION OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPLICANT

-v-

MINISTER OF CORRECTIVE SERVICES

RESPONDENT

CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 22 SEPTEMBER 2020
FILE NO/S	APPL 42 OF 2020
CITATION NO.	2020 WAIRC 00812

Result	Discontinued by leave
Representation	
Applicant	Mr G Upham
Respondent	Mr A Clark

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be discontinued by leave.

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

INDUSTRIAL MAGISTRATE—Claims before—

2020 WAIRC 00804

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00804
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 26 AUGUST 2020
DELIVERED	**:**	THURSDAY, 17 SEPTEMBER 2020
FILE NO.	**:**	M 23 OF 2020
BETWEEN	**:**	DUC HIEN IN

CLAIMANT

AND

OAKSIDE GROUP PTY LTD ATF OAK FAMILY TRUST

RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Small claim under the *Fair Work Act 2009* (Cth) – Failing to pay an amount in full – Failing to pay untaken paid annual leave upon cessation of employment – Contravention of a civil remedy provision – Withholding of entitlements – Jurisdiction of Industrial Magistrates Court to make orders sought pursuant to a contract of employment
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Corporation Act 2001 (Cth)
		Fair Work Regulations 2009 (Cth)
		Taxation Administration Act 1953 (Cth)
		Industrial Relations Act 1979 (WA)
Case(s) referred		
to in reasons:	**:**	***Sharrock v Downer EDI Mining Pty Ltd*** [2018] WAIRC 00377
		Ghimire v Karriview Management Pty Ltd (No 2) [2019] FCA 1627
		WorkPac Pty Ltd v Rossato [2020] FCAFC 84
		McShane v Image Bollards Pty Ltd [2011] FMCA 215
		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 proven in part
Representation:		
Claimant	**:**	Self-represented
Respondent	**:**	Ms Y. Diao on behalf of the Respondent (as a director)

REASONS FOR DECISION

1 The Claimant, Mr Duc Hien In, was employed as a permanent part-time manager of the North Perth Post Office by the Respondent, Oakside Group Pty Ltd as trustee for the Oak Family Trust, from 27 March 2019 to 29 October 2019 (the Claim Period).

2 The Claimant alleges the Respondent contravened s 323 and s 90(2) of the *Fair Work Act 2009* (Cth) (FWA) in failing to pay him:

(1) ordinary wages in full for work performed from 21 October 2019 to 29 October 2019; and

(2) untaken paid annual leave for the Claim Period following the termination of his employment.

3 The Claimant elected the small claims procedure under s 548 of the FWA.

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

Background

5 The Respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operates a Post Office in North Perth (the Post Office). The Respondent is a '***constitutional corporation***' within the meaning of that term in s 12 of the FWA and is a '***national system employer***' within the meaning of that term in s 14(1)(a) of the FWA. The Claimant is an individual who was employed by the Respondent and is a '***national system employee***' within the meaning of that term in s 13 of the FWA.

6 The Claimant was originally contracted to undertake work for the Respondent at the Post Office and commenced permanent part-time employment with the Respondent on 27 March 2019 pursuant to a contract of employment dated 27 March 2019 (the Agreement).[1] The Claimant's employment ceased on 29 October 2019, although the reasons for the cessation are disputed by the parties.

7 Relevant to the Claimant's claim, the Agreement contained the following terms:

- he was paid at the rate of $29 per hour base rate '*plus super plus holiday entitlement*' and he was to be paid weekly in the first month and then fortnightly payments '*in regular*'; and
- he was guaranteed a minimum of '*20 hours per week*' employment.

8 The Claimant worked the following hours and says that he was not paid wages for the work undertaken:[2]

- four hours per day from 21 October 2019 to 25 October 2019 inclusive – 20 hours;
- three and a half hours on 26 October 2019; and
- four hours per day on 28 October 2019 and 29 October 2019 – 8 hours.

9 The Claimant claims 31.5 hours of unpaid wages he alleges were not paid in full and 47.69 hours of untaken paid annual leave he alleges were not paid upon the cessation of his employment.

10 The Respondent did not provide a final pay slip upon the Claimant's termination of employment. The Respondent did not provide any pay slips during the course of the Claimant's employment but relied upon handwritten records in a time and wages book as payslips.[3]

11 Ms Ying Diao (Ms Diao), director of the Respondent and licensee of the Post Office, agreed the Respondent did not pay the Claimant for the hours worked between 21 October 2019 and 29 October 2019, but says the Respondent was entitled to withhold payment for the time worked because the Claimant suddenly left his employment without notice.

12 Ms Diao also agreed that the Claimant did not take annual leave during the Claim Period and says the Respondent was not required to pay any untaken paid annual leave because the Claimant had been overpaid during his employment, both during the Claim Period and when he was a contractor.

13 I note the Claimant and the Respondent made various allegations against the other. For my part, these allegations had little or no relevance to the claim or to the claimed entitlements under the FWA. I put these allegations to one side.

14 The most significant factual issue in dispute is the circumstances surrounding the cessation of the Claimant's employment on 29 October 2019.

15 I also note the Claimant's claim makes no reference to his employment being covered by an industrial agreement, such as a modern award or an enterprise agreement. Similarly, the Respondent did not seek to rely upon any industrial agreement in answer to the Claimant's claim beyond Ms Diao mentioning in her evidence that the Claimant was paid above award wages.

16 Accordingly, I have limited my consideration and determination of the Claimant's claim to any entitlement under the FWA having regard to only the Agreement, which gives rise to an issue relating to the jurisdiction of the IMC to make the orders sought by the Claimant.

The Requirement To Provide Certain Employment Records

17 At the outset, I note the Respondent did not maintain or provide any employment records[4] relevant to the Claimant's employment, save the Respondent completed a time and wages book. I also note that no pay slips were provided to the Claimant as required by s 536(1) of the FWA.

18 Further, the Respondent did not have any process of reconciling accrued or taken annual leave and did not make or keep any record relevant to annual leave.[5]

19 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*'.[6] A civil remedy provision includes s 44(1) of the FWA, which involves a contravention of a National Employment Standards (NES).[7]

20 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.[8]

21 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.[9]

22 The Claimant said that he was never provided with pay slips or details of his accrued annual leave during the Claim Period.

23 Ms Diao said the Respondent maintained a handwritten time and wages book signed by Claimant, which Ms Diao says constituted the Respondent's payslips.[10] Beyond that, the Respondent did not keep and maintain the requisite statutory employment records.

24 The Respondent's time and wages book is not a payslip provided to the Claimant and does not substitute for a payslip provided to the Claimant. Therefore, in my view, the Respondent has not discharged its burden in establishing a reasonable excuse for its non-compliance with keeping and maintaining certain employment records, including payslips.

Was The Respondent Entitled To Withhold Wages For The Claim Period?

25 The Agreement is silent about the parties' obligation with respect to termination of employment.

26 The NES applies the minimum standards applicable to the employment of employees which cannot be displaced, and under the NES, the employer is to give to an employee notice of termination: s 61 and s 117 of the FWA.

27 '*A modern award or enterprise agreement may include terms specifying the period of notice*' (if any) an employee is to give to an employer: s 118 of the FWA.

28 Therefore, in the absence of any employment instrument requiring the Claimant to provide notice of termination of employment, the circumstances surrounding the Claimant leaving his employment are irrelevant to the Claimant's claim. That is, the outcome in the Claimant's claim for the payment of wages owed for work undertaken does not depend upon whether he voluntarily left his employment or whether he was 'dismissed' by Ms Diao.

29 Even if I accept Ms Diao's evidence that the Claimant suddenly left his employment on 29 October 2019 and he did not come back (that is, the Claimant left without notice), the Respondent was not entitled to withhold the Claimant's wages for the period worked from 21 October 2019 to 29 October 2019.

30 There are limited circumstances enabling an employer to withhold wages for work performed by the employee for the employer. These limited circumstances ordinarily require written agreement between the employer and the employee or are expressly provided for in an industrial agreement or another written law. None of these limited circumstances apply in the Respondent's case.

31 Further, the Respondent does not dispute that the Claimant worked the times he says that he worked from 21 October 2019 to 29 October 2019.

32 However, an issue arises with respect to the IMC's jurisdiction and power to make orders under the small claims procedure of the FWA where the Claimant seeks to enforce a contractual term without reference to an obligation to pay an amount under the FWA or an industrial instrument.

33 The Claimant relies upon s 323 of the FWA to establish that the failure by the Respondent to pay his wages in full under the Agreement is a failure to pay an amount required to be paid under the FWA.

34 I refer to the IMC decision in ***Sharrock v Downer EDI Mining Pty Ltd*** [2018] WAIRC 00377 which considered the meaning of '*to pay an amount*' and '*pay an amount under this Act*' in s 548(1A) relative to s 545(3) of the FWA (at [33] to [49]) and the jurisdiction of the IMC to make orders arising from a breach of a contractual entitlement.

35 The conclusion in ***Sharrock***, at [59], is that the '*IMC may have jurisdiction to hear a claim* [and make orders] *for breach of contractual entitlement in the small claim procedure*' under the FWA, but this would depend on the nature of the claim.

36 The Claimant's claim for unpaid wages relates solely to the Respondent's failure to comply with a term of the Agreement. Absent the Agreement, there is no other industrial instrument or provision under the FWA upon which the Claimant can rely to establish a legal obligation to pay an amount the Respondent was required to pay.

37 While s 323 of the FWA creates an obligation to pay amounts in full for the performance of work, it says nothing of what this amount is referrable to and does not create an amount for which there is a legal obligation to pay.

38 The IMC is not empowered under s 545(3) or s 548(1A) of the FWA to make an order for compensation and the nature of the order sought by the Claimant arises because there has been a breach of the Agreement by the Respondent in failing to pay wages. This breach is not referrable to any amount required to be paid by the Respondent under the FWA or an industrial agreement.

39 While I am satisfied the Respondent erroneously withheld the payment of the Claimant's wages for work performed between 21 October 2019 and 29 October 2019, I am not satisfied the payment of an amount for unpaid wages under a contract of employment is an amount the Respondent was required to pay under the FWA (rather the Respondent had, and arguably still has, an obligation to pay the amount under the Agreement).

40 Therefore, the IMC does not have jurisdiction to make an order under s 545(3)(a) of the FWA in respect of the Claimant's claim for unpaid wages under the Agreement.

41 I note this decision does not lock out the Claimant from making a claim for denial of a contractual benefit or breach of a common law contract in other forums.

Was The Respondent Entitled To Withhold Untaken Paid Annual Leave For The Claim Period?

42 The Claimant says he never took annual leave during the Claim Period, which was not disputed by the Respondent.

43 The Respondent did not keep or maintain any records of the Claimant's accrued annual leave.

44 The issue identified with respect to the IMC's power to make orders under s 545(3) of the FWA does not arise in respect of the Claimant's claim for untaken paid annual leave. The NES contained in the FWA applies '*to the employment of employees* … [and] *cannot be displaced*': s 61(1) of the FWA.

45 The NES relevant to annual leave is contained in pt 2 - 2, div 6 of the FWA. Section 87(1) of the FWA provides that '[f]*or each year of service … an employee is entitled to 4 weeks of paid annual leave*'.

46 Section 90(2) of the FWA provides that if an '*employee has a period of untaken paid annual leave*' at the cessation of employment, '*the employer must pay* [to] *the employee* [that] *amount that would have been payable … had the employee taken* [the] *period of leave*'.

47 Nothing in pt 2 - 2, div 6 of the FWA provides for the withholding of untaken paid annual leave owed at the cessation of employment.

48 Similar to that stated with respect to the withholding of wages, in the absence of any employment instrument or other written law enabling the Respondent to withhold annual leave payments, the circumstances surrounding the Claimant leaving his employment are irrelevant to the Claimant's claim. Again, the outcome in the Claimant's claim for the payment of untaken paid annual leave does not depend upon whether he voluntarily left his employment or whether he was 'dismissed' by Ms Diao.

49 Even if I accept Ms Diao's evidence that the Respondent paid the Claimant additional monies over the course of his work at the Post Office, as a contractor and as an employee, there is no employment record of what monies were paid and for what purpose.

50 The time and wages book relied upon by the Respondent claims the Claimant was 'overpaid' on pages where the Claimant was referred to as a 'contractor'. Beyond that there is no way the Respondent's assertion of an 'overpayment' can be verified by the time and wages book.

51 In any event, the Respondent's reference to the Claimant being 'overpaid' and, therefore, there was some oblique basis upon which the Respondent could claim the alleged 'overpayment' as a set off of any amount owed for untaken paid annual leave is flawed.

52 In ***WorkPac Pty Ltd v Rossato*** [2020] FCAFC 84 (***Rossato***), his Honour White J at [818] to [864] reviewed the law as in related to claims for set off and at [865] summarised the applicable principles into four propositions:

> *(a)* … *application of the parties* [employment] *contract* … [if the parties] *agree that a sum of money is paid and received for a specific purpose which is over and above or extraneous to an award entitlement, the* [employment] *contract precludes the employer from later seeking to rely on the payment as satisfying an award obligation which is outside the agreed purpose of the payment* … [A]*n employer cannot later reallocate an amount agreed to be paid to an employee in respect of* [one purpose] … *(for example, ordinary hours of work) to meet a claim in respect of* [another purpose] … *(for example, overtime pay)* … *If* [the purpose of the payment] *arises out of the same purpose as the award obligation, it can be set off;*

(b) … application of the common law principles … [w]*hen there are outstanding award or enterprise agreement entitlements, a payment designated by the employer as being for a purpose other than satisfaction of the award entitlement cannot be regarded as having satisfied the award or enterprise agreement';*

(c) close regard must be had to the character of the payment on which the employer relies for the claimed set off and the purpose … for which it was made; and

(d) the purpose for which a payment was made will be a question of fact in each case. It may be express or … implied from the parties' agreement or from the employer's conduct. (original emphasis)

53 On the Respondent's evidence the purpose for which the untaken paid annual leave amount was withheld was to set off alleged overpayments made to the Claimant while he was a contractor and as an employee. Leaving aside the fact that those alleged overpayments cannot be properly quantified or verified, some of the alleged overpayments were apparently made to the Claimant for doing work after 5.00 pm or when he was not even employed by the Respondent.

54 Simply put, the character of the alleged overpayments was completely different to that of untaken paid annual leave. There is no close correlation between the two payments to enable a claim for set off, even if one could be calculated in this case.

55 During the Claim Period, the Claimant claims 47.69 hours of annual leave and at the end of his employment he was entitled to be paid an amount the equivalent to that payable if he had taken the period of leave. As stated, the Respondent did not keep any employment records concerning the accrual or taking of annual leave and provided no reasonable excuse for failing to do so. Accordingly, I accept the Claimant's computation of accrued annual leave hours owing.[11]

Outcome

56 Section 545(3) of the FWA enables an eligible State court (of which 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'.

57 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.

58 I note further that the Claimant elected the small claim procedure. Thus, the amount referred to in s 548(1)(a) and s 548(1A)(a) of the FWA refers to '*an amount that 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 I am satisfied that the Claimant has proven to the requisite standard the following:

- the Respondent failed to pay the Claimant's untaken paid annual leave accrued between 27 March 2019 and 29 October 2019 upon the cessation of the Claimant's employment, and I am satisfied the amount owed remains outstanding;
- the Claimant is entitled to 47.69 hours in untaken paid annual leave and the Respondent is required to pay to the Claimant the amount of $1,383.01 pursuant to s 90(2) of the FWA; and
- in failing to pay the Claimant's untaken paid annual leave upon the cessation of employment, the Respondent has contravened s 44(1) of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 1.

60 For the reasons already given, I am not satisfied that the Claimant's claim as it relates to unpaid wages under the Agreement is an amount the Respondent is required to pay under the FWA (nor is it a '*safety net contractual entitlement*' relating to any of the subject matters described in s 61(2) of the FWA). Accordingly, the Claimant's claim as it relates to unpaid wages under the Agreement is dismissed.

Result

61 I make the following order:

- pursuant to s 545(3) of the FWA and subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), the Respondent is to pay to the Claimant the amount of $1,383.01 within 30 days of the date of this order.

D. SCADDAN
INDUSTRIAL MAGISTRATE

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[1] Exhibit 1 – Attachment entitled 'Agreement'.

[2] Exhibit 1 – Attachment of hours worked and Claimant's evidence.

[3] Exhibit 4 – Time and wages book.

[4] Including pay slips in accordance with reg 3.33 of the *Fair Work Regulations 2009* (Cth).

[5] Contrary to reg 3.36 of the *Fair Work Regulations 2009* (Cth).

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

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

[8] ***Ghimire*** [14].

[9] ***Ghimire*** [16].

[10] Exhibit 4.

[11] Exhibit 1.

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 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, 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 a term of the NES and failing to pay in full an amount owed under the FWA: FWA s 44(1), s 323 respectively.

[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, s 47. A NES 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, s 47.

Small Claims Procedure

[6] The FWA provides that in 'small claims proceedings, the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities': FWA s 548(3). In ***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 [7], Judge Lucev explained this provision as follows:

> *Although the Court is not bound by the rules of evidence, and may act informally, and without regard to legal forms and technicalities in small claim proceedings in the Fair Work Division, this does not relieve an application from the necessity to prove their claim. The Court can only act on evidence having a rational probative force.*

Contravention

[7] 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).

[8] The civil penalty provisions identified in s 539 of the FWA includes:

- The Core provisions (including s 44(1)) set out in pt 2 - 1 of the FWA: FWA s 61(2) 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.

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

- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA s 545(3).

[10] 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

[11] 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.*

[12] 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 00836

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00836
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 2 SEPTEMBER 2020
DELIVERED	**:**	THURSDAY, 1 OCTOBER 2020
FILE NO.	**:**	M 24 OF 2020
BETWEEN	**:**	GIUSEPPE RIOLO

CLAIMANT

AND

KISS KISS FOOD SUPPLIES PTY LTD

RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Small Claim under the *Fair Work Act 2009* (Cth) – Failing to pay ordinary wages – Failing to pay untaken paid annual leave upon termination of employment – Contravention of National Employment Standards – Contravention of a modern award – Withholding entitlements
Legislation	**:**	*Fair Work Act 2009* (Cth) *Corporation Act 2001* (Cth) *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) *Taxation Administration Act 1953* (Cth) *Industrial Relations Act 1979* (WA)
Instruments	**:**	*Food, Beverage and Tobacco Manufacturing Award 2010* (Cth)
Case(s) referred to in reasons:	**:**	***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 ***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 proven
Representation:		
Claimant	**:**	Self-represented
Respondent	**:**	Ms M. Sultana on behalf of the Respondent (as a director)

REASONS FOR DECISION

1 It is unfortunate that employers do not obtain appropriate advice before acting against an employee. All too often the employer becomes entrenched in the indignity of the situation which unnecessarily clouds and infects their decisions. Had the employer obtained appropriate advice they may have saved themselves and others the time, expense and angst associated with litigation.

2 This claim is a good example of an employer who was, and still is, unable to get past allegations its director made against an employee. Leaving aside the truth of the allegations, the director's conduct on behalf of the employer opens up for scrutiny possible perversions, the irony of which is lost.

Admission Of Part Of The Claimant's Claim

3 During the course of the hearing, Ms Manuela Sultana (Ms Sultana), director of Kiss Kiss Food Supplies Pty Ltd, the Respondent, admitted the Respondent owed Mr Giuseppe Riolo, the Claimant, untaken paid annual leave. This admission was properly made, as there was never any basis for the Respondent failing to pay, or withholding, untaken paid annual leave upon the termination of the Claimant's employment.

4 The issue in dispute was the number of hours of accrued annual leave owing. However, to his credit the Claimant admitted he estimated the number of hours of accrued annual leave (112 hours)[1] and he was prepared to accept the Respondent's calculation of annual leave hours (84.13 hours).[2]

5 The National Employment Standards (NES) relevant to annual leave is contained in pt 2 - 2, div 6 of the *Fair Work Act 2009* (Cth) (FWA). Section 90(2) of the FWA provides that if an '*employee has a period of untaken paid annual leave*' at the cessation of employment, '*the employer must pay* [to] *the employee* [that] *amount that would have been payable … had the employee taken* [the] *period of leave*'.

6 Nothing in pt 2 - 2, div 6 of the FWA provides for the withholding of untaken paid annual leave owed at the cessation of employment.

7 In the absence of any employment instrument or other written law enabling the Respondent to withhold annual leave payments, the circumstances surrounding the Claimant leaving his employment are irrelevant to the Claimant's claim. The outcome in the Claimant's claim for the payment of untaken paid annual leave does not depend upon whether he voluntarily left his employment or whether he was summarily dismissed for misconduct.

8 Accordingly, in relation to the Claimant's claim as it relates to annual leave, I find that the Respondent contravened s 90(2) of the FWA by failing to pay the Claimant upon the termination of his employment an amount that would have been payable to him had he taken paid annual leave. I find that the number of hours of accrued annual leave at the time of the termination of the Claimant's employment was 84.13 hours.

The Remainder Of The Claimant's Claim

9 The remaining aspect of the Claimant's claim relates to the Respondent's failure to pay him wages for work undertaken.

10 These reasons deal with this remaining aspect of the Claimant's claim.

11 The Claimant was employed by the Respondent as a full-time pastry chef from 25 February 2019 to 15 October 2019. He was employed pursuant to a contract of employment signed and dated 25 February 2019 (Contract of Employment), which expressly provided that the terms and conditions of the Claimant's employment was set out in the *Food, Beverage and Tobacco Manufacturing Award 2010* (Cth) (the Award), unless the Contract of Employment contained more generous provisions.[3]

12 The Claimant alleges the Respondent contravened the Award and the FWA in failing to pay him ordinary wages from 1 October 2019 to 4 October 2019, 7 October 2019 to 11 October 2019 and on 15 October 2019.[4]

13 The Claimant elected the small claims procedure under s 548 of the FWA.

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

15 The Respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operates a food supply and preparation business. The Respondent is a '***constitutional corporation***' within the meaning of that term in s 12 of the FWA and is a '***national system employer***' within the meaning of that term in s 14(1)(a) of the FWA. The Claimant is an individual who was employed by the Respondent and is a '***national system employee***' within the meaning of that term in s 13 of the FWA.

16 I am satisfied the Award applied to the Claimant's employment having regard to the '*Job Purpose*' and '*Key Responsibilities*' referred to in the Contract of Employment and the definition of '***food, beverage and tobacco manufacturing***' in cl 3 of the Award and Award coverage referred to in cl 4 of the Award.[5] Further, the exclusions in cl 4 of the Award do not apply to the Claimant's employment.

17 Relevant to the Claimant's claim, the Contract of Employment contained the following terms:

- cl 5.1 – the employee is '*paid* ***monthly*** *at a rate of $20.22 per hour*' (original emphasis);
- cl 5.3 – the employee is '*paid … on the 15th day of the month*';
- cl 8.1 – consistent with the FWA, the employer can terminate the employee's employment upon giving the requisite notice in writing;
- cl 8.3 – the employee can terminate his employment consistent with the table in cl 8.1 (mirroring the employer's obligation);
- cl 10.2 – if the employee damages or breaks any property '*this must be repaired/replaced by the employee and costs incurred … will be deducted from the* [employee's] *pay at the* [employer's] *discretion*';
- cl 10.3 – if the employee produces '*second quality products that cannot be*' sold and do not meet certain standards, the employee is to '*pay for the cost of goods suffered as a loss*' with the costs to '*be deducted from the employees pay at the* [employer's] *discretion*';
- cl 11.1 – the terms and conditions in the Contract of Employment '*constitute all of the terms and conditions of* [the employee's] *employment and replace any prior understanding or agreement between* [the employee] *and the employer*'; and
- cl 11.2 – '[t]*he terms and conditions … may only be varied by a written agreement signed by both* [the employee] *and the employer*'.

18 The parties agreed the Claimant worked on the dates stated in his claim, save that there is a factual dispute concerning 30 minutes of work on 15 October 2019.

19 The Claimant claims 72.5 hours of unpaid wages for work performed for the Respondent.[6] The Respondent says the Claimant worked 72 hours, where for 30 minutes on 15 October 2019 the Claimant was in a meeting with Ms Sultana.

20 On 15 October 2019, the Claimant was summarily dismissed for serious misconduct. The circumstances surrounding the alleged serious misconduct are irrelevant where the Claimant admitted he was summarily dismissed for serious misconduct, and the IMC is not tasked with determining the merits of his dismissal.

21 On 18 November 2019, one month after his summary dismissal, the Claimant was provided with a letter signed by Ms Sultana giving written reasons for his dismissal.[7]

22 The Respondent withheld the whole of the Claimant's wages for his time worked because:

(a) the Claimant offered, and Ms Sultana agreed, for the whole of his wages to be withheld and, as a result, Ms Sultana would not 'pursue' a complaint to the police about the Claimant stealing the Respondent's property; and

(b) in the alternative, cl 18.1(d) of the Award enabled the Respondent to deduct one week's wages in lieu of the Claimant's failure to provide notice.

23 The Respondent did not provide a final pay slip upon the Claimant's termination of employment.

Was The Respondent Entitled To Withhold The Claimant's Wages?

24 Clause 8.3 of the Contract of Employment provides that if the Claimant wants to terminate his employment, he is to provide the Respondent with notice of termination in accordance with the table in cl 8.1. Relevantly, the Claimant would need to give one week's notice.

25 The Contract of Employment makes limited reference to the Respondent being authorised to make deductions from the Claimant's wages and, according to cl 2.1 of the Contract of Employment, the terms and conditions referred to in the Contract of Employment may only be varied by a written agreement signed by both the Claimant and the Respondent.

26 No varied written agreement signed by both the Claimant and the Respondent was referred to by either party or said by either party to exist.

27 Clause 10.2 and cl 10.3 of the Contract of Employment provide for deductions for damage or breakage or substandard quality. The Respondent made no reference to the Claimant's wages being withheld for any of these reasons.

28 Clause 5.3 of the Contract of Employment provides that the Claimant '*will be paid monthly … on the 15th of the month*'.[8] However, cl 28.3 of the Award provides that on termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee on the next working day.

29 It is common ground that the Claimant's unpaid wages were not paid on 15 November 2019 (being the 15th of the next month) or on the day of termination or forwarded to the Claimant on the next working day.[9] The amount remains outstanding.

Could the Respondent withhold the Claimant's wages under cl 18.1(d) of the Award?

30 Clause 18.1(d) of the Award, relied upon by the Respondent (in the alternative) provides:

> *If an employee who is at least 18 years old does not give the period of notice required under paragraph (b), then the employer may deduct from wages due to the employee under this award an amount that is no more than one week's wages for the employee.*

31 As identified, if the Claimant terminated his employment, he was required to provide one week's notice and the Respondent could have deducted one week's wages (such deduction being a discretion), if he did not do so.

32 The Claimant says he resigned from his employment on 9 October 2019 and gave two weeks' written notice to the Ms Gabriella Sgroi (Ms Sgroi), the Respondent's Production Manager and Ms Sultana's daughter.[10]

33 Both Ms Sgroi and Ms Sultana completely disavow the Claimant gave notice of termination of his employment, although Ms Sgroi says the Claimant informed her, he had a job offer from Crown and indicated a start date of 21 October 2019.

34 For the purposes of the Respondent's reliance on cl 18.1(d) of the Award, if I accept Ms Sgroi and Ms Sultana's evidence that the Claimant had not given written notice of termination, at the time of the Claimant's summary dismissal on 15 October 2019, the Claimant was not leaving the Respondent's employment and had merely evinced an intention to work at Crown in the future.

35 Thereafter, consistent with the Claimant continuing to attend work, the Respondent summarily terminated the Claimant's employment on 15 October 2019. In this circumstance, there was no basis for the Respondent to have recourse to cl 18.1(d) of the Award.

36 Further, the contents of the letter from Ms Sultana to the Claimant dated 18 November 2019 makes no reference to deducting the Claimant's wages under cl 18.1(d) of the Award.

37 Therefore, having regard to the Respondent's evidence, the Respondent was not entitled to withhold the Claimant's wages under cl 18.1(d) of the Award where:

- Ms Sgroi and Ms Sultana deny ever receiving notice of termination of employment from the Claimant;
- at its highest, Ms Sgroi said the Claimant told her that he had been offered a job at Crown and he could start on 21 October 2019, but she did not treat this as a resignation and left it to be discussed the following day;
- nothing further was said until the Claimant's employment was terminated on 15 October 2019; and
- in the meantime, the Claimant continued to attend work in the usual course.

38 Ultimately, it was the Respondent who terminated the Claimant's employment and cl 18.1(d) of the Award had no part to play. Notably, if the Claimant's evidence was accepted, the result is the same.

39 Therefore, the Respondent was not entitled to deduct one week's wages pursuant to cl 18.1(d) of the Award.

Could the Respondent withhold the Claimant's wages as part of some other agreement?

40 The Claimant denied any agreement with Ms Sultana for the Respondent to withhold his wages in return for her not pursuing any further complaint with the Western Australia Police (WA Police).

41 Again, for the purposes of the Respondent's reliance on an oral agreement with the Claimant to withhold wages, if I accept Ms Sultana's evidence that:

- on 18 November 2019, she spoke with the Claimant on the telephone, who 'offered' to forego his wages in return for her not pursuing a complaint with the WA Police that he stole the Respondent's property;
- she agreed to this offer and withheld the wages;
- the letter from her to the Claimant dated 18 November 2019 reflects the content of the conversation between her and the Claimant; and
- there was no signed written agreement of the oral agreement between the Claimant and the Respondent,

a number of issues arise.

42 The letter terminating the Claimant's employment was written one month after the Claimant's termination for serious misconduct and is dated three days after the Claimant anticipated being paid in accordance with cl 5.3 of the Contract of Employment.

43 The Respondent has never disputed the Claimant worked on the days he claims he was not paid for.

44 Arising from this, the contents of the letter raised no issue with the Claimant attending work on the days he said he did or that he failed to perform functions of his employment while attending work. Therefore, it is apparent, consistent with the Claimant's evidence, the Claimant performed work for the Respondent giving rise to a requirement for the Respondent to pay the Claimant's wages, in accordance with cl 5.3 of the Contract of Employment and cl 28.1(b) of the Award.

45 To the extent the Respondent could vary the terms and conditions of the Contract of Employment, it could only do so in accordance with cl 11.2 of the Contract of Employment. That is, in writing signed by the Claimant and the Respondent.

46 Therefore, leaving aside the moral turpitude of an employer agreeing to forgo a police complaint in exchange for wages (and later saying that a police investigation would be pursued if the employee continued a court claim),[11] even if I accept Ms Sultana's evidence of an oral agreement with the Claimant, the terms of the oral agreement sought to vary cl 5 of the Contract of Employment, and any such variation could only be in writing signed by both parties. No such written variation exists.

47 Further, the letter dated 18 November 2019 purports to terminate the Claimant for stealing and makes no mention of the Claimant damaging or breaking property, or producing unsaleable second quality products, or not meeting quality assurance standards or the costs associated with this, if any costs were incurred.[12]

48 Accordingly, there were no grounds for the Respondent to make any deductions from the Claimant's wages under cl 10.2 or cl 10.3 of the Contract of Employment.

49 Section 324(1) of the FWA provides that '[a]*n employer may deduct an amount from an amount payable to an employee*', but only in respect of the reasons given in s 324(1)(a) to s 324(1)(d) of the FWA, and none of these reasons apply in the Claimant's case.

50 Therefore, in the circumstances having regard to the Respondent's evidence, the Respondent was not entitled to withhold the Claimant's wages in accordance with an alleged oral agreement between the Claimant and Ms Sultana where:

- the oral agreement purported to vary a term of the Contract of Employment for the payment of monthly wages;
- the oral agreement was not reduced to writing and signed by the Claimant and the Respondent;
- the Contract of Employment expressly required variation of its terms only by written agreement signed by the Claimant and the Respondent;
- no grounds exist to invoke cl 10.2 or cl 10.3 of the Contract of Employment; and
- section 324(1) of the FWA does not apply to the Claimant and the Respondent.

51 Therefore, in the circumstances, the Respondent was not entitled to withhold the Claimant's wages for the period claimed pursuant to an alleged oral agreement (even if I were to accept such an agreement, in fact, existed).

52 The remaining disputed factual issue is whether the Respondent is required to pay the equivalent of 72 or 72.5 hours for the period worked. I find the Respondent is required to pay 72.5 hours for the following reasons:

- according to Ms Sultana, the final 30 minutes of the Claimant's attendance at work on 15 October 2019 involved him being at a meeting leading to his dismissal;
- on Ms Sultana's evidence, the Claimant was required to attend a meeting at the employer's direction;
- the Claimant's attendance at the meeting demonstrates the Claimant's compliance with the employer's direction; and
- therefore, the Claimant continued to perform work in accordance with the employer's direction.

Outcome

53 Section 545(3) of the FWA enables an eligible State court (of which 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'.

54 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.

55 I note further that the Claimant elected the small claim procedure. Thus, the amount referred to in s 548(1)(a) and s 548(1A)(a) of the FWA refers to '*an amount that 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.

56 I am satisfied the Claimant has proven to the requisite standard the following:

- the Respondent failed to pay the Claimant for work undertaken from 1 October 2019 to 4 October 2019, 7 October 2019 to 11 October 2019 and on 15 October 2019, and I am satisfied the amount owed remains outstanding;
- the Claimant worked 72.5 hours during this same period and the Respondent was required to pay to the Claimant the amount of $1,509.45 on termination of his employment in accordance with cl 28.3 of the Award;[13]
- in failing to pay the Claimant in relation to the performance of work, the Respondent has contravened s 45 of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 2;
- the Respondent failed to pay the Claimant's untaken paid annual leave accrued between 25 February 2019 and 15 October 2019 upon the cessation of the Claimant's employment, and I am satisfied the amount owed remains outstanding;
- the Claimant accrued 84.13 hours in untaken paid annual leave and the Respondent is required to pay to the Claimant the amount of $1,753.39 pursuant to s 90(2) of the FWA and $306.84 in leave loading pursuant to cl 34.5(a) of the Award;[14]
- in failing to pay the Claimant untaken paid annual leave upon the termination of employment, the Respondent has contravened s 44(1) of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 1; and
- in failing to pay the Claimant leave loading, the Respondent has contravened s 45 of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 2.

57 I also make the following final observation. It is of concern that Ms Sultana stated that if the Claimant continued his claim she will '*reopen the Police investigation with new evidence coming from the meeting with the Industrial Magistrates Court*'.[15]

58 The reference to '*Industrial Magistrates Court*' is in fact a reference to a pre-trial conference before the Registrar conducted in April 2020. Anything said by a party for the purpose of attempting to settle a case at a pre-trial conference is said without prejudice to any evidence adduced or may adduce.[16] The clear intention of pre-trial conferences is to enable parties to have frank discussions with a view to resolving claims. This clear intention would be undermined if parties were later prejudiced by their frank discussions.

59 Further to that, it is a dangerous course for an employer to attempt to dissuade a current or former employee from pursuing their legitimate legal interests by suggesting a detriment if they do.

Result

60 I make the following order:

- Pursuant to s 545(3) of the FWA and subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), the Respondent is to pay to the Claimant the amount of $3,569.68 within 30 days of the date of this order.

D. SCADDAN
INDUSTRIAL MAGISTRATE

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[1] Originating Claim and the Claimant's oral evidence.

[2] Exhibit 2 – Witness Statement of Manuela Sultana dated 17 August 2020 at Annexure 15.

[3] Exhibit 1 – Witness Statement of Giuseppe Riolo dated 4 August 2020 at Attachment 1.

[4] Exhibit 1 – Attachment 4 (time sheet).

[5] Section 47(1) of the FWA.

[6] Exhibit 1 – Attachment 4.

[7] Exhibit 2 – Annexure 7.

[8] Consistent with this, the Claimant was last paid on 15 October 2019 for work undertaken from 1 to 30 September 2019 as shown in Exhibit 1, Attachment 3.

[9] See Exhibit 1, Attachment 3 for the last payslip provided to the Claimant for the work undertaken from 1 to 30 September 2019.

[10] Exhibit 1 – Attachment 2.

[11] Exhibit 2 – Annexure 11.

[12] I note s 325 of the FWA and observe that this section may have applied to cl 10.2 and cl 10.3 of the Contract of Employment.

[13] See s 46(1) of the FWA.

[14] See s 46(1) of the FWA.

[15] Exhibit 2 – Annexure 11.

[16] Regulation 23(2) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA).

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 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, 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 a term of the NES and failing to pay in full an amount owed under the FWA: FWA s 44(1), s 323 respectively.

[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, s 47. A NES 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, s 47.

Small Claims Procedure

[6] The FWA provides that in 'small claims proceedings, the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities': FWA s 548(3). In ***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 [7], Judge Lucev explained this provision as follows:

> *Although the Court is not bound by the rules of evidence, and may act informally, and without regard to legal forms and technicalities in small claims proceedings in the Fair Work Division, this does not relieve an applicant from the necessity to prove their claim. The Court can only act on evidence having a rational probative force.*

Contravention

[7] 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 (emphasis added): FWA, s 545(3)(a).

[8] The civil penalty provisions identified in s 539 of the FWA includes:

- The Core provisions (including s 44(1) and s 45) set out in pt 2 - 1 of the FWA: FWA s 61(2), s 539.

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

- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA s 545(3).

[10] 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

[11] 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.*

[12] 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 00835

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00835
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 27 AUGUST 2020
DELIVERED	**:**	THURSDAY, 1 OCTOBER 2020
FILE NO.	**:**	M 127 OF 2019
BETWEEN	**:**	RICHARD FRANK MOORE

CLAIMANT

AND

ROYALSTAR PTY LTD T/A TORRE ELECTRICS (ABN:24009451763)

RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Requirement to pay an amount in lieu of notice of termination under *Fair Work Act 2009* (Cth) – Whether the claimant's employment was terminated by the employer – Whether the claimant resigned – Requirement to pay an amount in full under the *Minimum Conditions of Employment Act 1993* (WA) – Whether the claimant was an 'employee' of the respondent or an 'independent contractor'
Legislation	**:**	*Fair Work Act 2009* (Cth) *Minimum Conditions of Employment Act 1993* (WA) *Corporations Act 2001* (Cth) *Industrial Relations Act 1979* (WA) *Long Service Leave Act 1958* (WA) *Magistrates Court (Civil Proceedings) Act 2004* (WA)
Case(s) referred to in reasons:	**:**	***Botica v Top Cut Holdings Pty Ltd*** [2020] WAIRC 00061 ***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 ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 ***ACE Insurance Ltd v Trifunovski*** (2011) 200 FCR 532 ***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 ***Mildren v Gabbusch*** [2014] SAIRC 15 ***Sammut v AVM Holdings Pty Ltd [No 2]*** [2012] WASC 27 ***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 R. Torre on behalf of the Respondent (as a director)

REASONS FOR DECISION

1 The Claimant, Mr Richard Frank Moore, was employed as a full-time general manager of Torre Electrics by the Respondent, Royalstar Pty Ltd t/as Torre Electrics, from 2 July 1990 to 21 December 2018.

2 The Claimant alleges the Respondent failed to pay him:

a. an amount of $8,233.77 being the equivalent of five weeks in lieu of notice and associated superannuation in contravention of s 117 of the *Fair Work Act 2009* (Cth) (FWA); and

b. wages of $630 for work undertaken as a casual employee from January 2019 to May 2019 in contravention of the *Minimum Conditions of Employment Act 1993* (WA) (MCE).

3 The Claimant elected the small claims procedure under s 548 of the FWA.

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

Background

5 The Respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operated an electrical contracting business, Torre Electrics. The Respondent is a '***constitutional corporation***' within the meaning of that term in s 12 of the FWA and is a '***national system employer***' within the meaning of that term in s 14(1)(a) of the FWA. The Claimant is an individual who was employed by the Respondent and is a '***national system employee***' within the meaning of that term in s 13 of the FWA.

6 The Claimant is an electrician by trade.

7 The Respondent intended to cease operating Torre Electrics sometime in early 2019. The Claimant was attending to the sale of the Respondent's assets relating to Torre Electrics and arranging for trading activities to either close or be handed over to another electrical contractor. It appears one of the last items to be finalised to dissolve the business was the expiration of a commercial lease on 1 March 2019 for a building occupied by the Respondent.

8 The Claimant's final day of work with the Respondent was 21 December 2018, although he carried out nine jobs associated with electrical warranty work on behalf of the Respondent from January 2019 to May 2019 (the Warranty Work).

9 Upon the cessation of the Claimant's employment on 21 December 2018, he was paid $51,879.48 (gross) in entitlements, including ordinary wages, untaken paid annual leave, accrued long service leave and associated superannuation.

10 The Claimant's claim and the dispute between the parties involves two principal issues:

A. Whether the Claimant resigned from, or the Respondent terminated, the Claimant's employment on 21 December 2018?

B. Whether the Claimant was a casual employee of, or an independent contractor to, the Respondent for the Warranty Work undertaken from January 2019 to May 2019?

11 The Claimant says the Respondent terminated his employment and he was not provided with the requisite statutory notice period prior to his termination or payment in lieu of notice upon his termination. The Respondent says the Claimant resigned from his employment and he was paid all of his entitlements.

12 The Claimant further says that pursuant to an oral agreement with Mr Ross Torre (Mr Torre), director of the Respondent, he was employed as a casual employee of the Respondent to undertake the Warranty Work at a rate of $70 per job and he did nine jobs for which he is owed $630.

13 The Respondent does not dispute the rate stated by the Claimant or that the Claimant did the work or that the Claimant is owed $630 for undertaking the work. The Respondent's dispute is that the Claimant was not employed as a casual employee, but was an independent contractor, and when the Claimant presents a proper invoice for payment, he will be paid.

Was The Claimant's Employment Terminated Or Did He Resign?

14 The critical time period relevant to the parties' factual dispute about the cessation of the Claimant's employment is from 19 December 2018 to 21 December 2018.

15 The chronology is as follows:

- On 12 June 2017, the Claimant made enquiries with Mr Torre about the 'paying out' of accrued leave entitlements.[1] Nothing came of this enquiry.
- On 14 December 2018, Mr Torre requested the Claimant to give two employees one week's notice of termination with their end date being 21 December 2018.
- On 19 December 2018, Mr Torre requested a meeting with the Claimant and the two men met at a café at about 2.00 pm. A range of topics were discussed, including:
  - the financial state of Torre Electrics;
  - issues regarding closing the business;
  - the Claimant's entitlements and how they were to be paid; and
  - the Claimant undertaking the Warranty Work in the future.
- On 21 December 2018 at 5.44 am, the Claimant sent an email to Mr Torre stating:[2]

  Further to our discussion on Wednesday afternoon about you requesting to pay my entitlements out fortnightly.

  I have had discussions with my accountant and Lyne and find that it is best to have my entitlements paid out in full as a lump sum, not just for me but also best for you, as you would have to pay superannuation contributions on that format which may have an effect on your future cash flow.

  As you stated there is no work going forward as of Friday 21/12/2018, so have thought that Friday could be my last day of employment, can you please clarify my employment situation going forward.
- On 21 December 2018, the Claimant's employment ceased.
- On 21 December 2018, the Respondent authorised the transfer of $38,991.48 to the Claimant in accordance with a final payslip.[3]
- On 31 December 2018, the Claimant sent an email to 'Sandra', one of the Respondent's employees. The relevant content of the email states:[4]

  (*2*) *I have also noticed that I have not been paid my 5 week's pay in lieu of notice that was not given*.

- On 3 January 2019, 'Sandra' sent an email to the Claimant in response to the Claimant's email dated 31 December 2018. The relevant content of the email states:[5]

  The 5 weeks pay in lieu of notice, I was advised by Ross that he had spoken to you and Stacey and had told you the last day of work was going to be the 21/12, if you have any discrepancy regarding this best you speak to Ross direct to clarify it.

- On 6 January 2019, the Claimant sent an email to 'Sandra' in response to her email dated 3 January 2019. The relevant content of the email states:[6]

  As for the notice given, below (marked with the brackets) is an extract of an email from me to Ross on Friday, 21 December, 2018 5:44 AM, which Ross forwarded to you, which confirms no notice was given for termination of employment.

  [The contents of the email dated 21 December 2018 was inserted into the email]

  Next thing I know, was when you informed me on Friday 21/12/2018 that you had organised my payout and issued a pay slip. Employment finished. Hence 5 weeks pay in lieu of notice is owed as no notice was given.

Discussions on 19 December 2018

16 According to the Claimant, Mr Torre wanted to pay the Claimant's entitlement by instalments, which he could not accept without discussing the proposal with his wife. He and Mr Torre also discussed the other employees' termination and Mr Torre referred to there being no work going forward. The Claimant said they discussed the Claimant doing maintenance work for 'Schneider' and he and Mr Torre agreed he would be a causal employee ('*if and when Torre Electrics was scaled fully back of employee's*' [sic]) and paid a set rate of $70 per job.

17 The Claimant agreed he understood there was some future work to be undertaken for 'Schneider' and finishing off existing work and '*bits and pieces*' to wind down the business. The Claimant also understood that the business had to be out of the leased premises before the lease ended. The Claimant agreed there had been discussions about closing the business, but he was not aware of a definite date. The Claimant denied there was a conversation about him finishing up and wanting to do things amicably. He agreed that Mr Torre did not want to undertake the Warranty Work but did so to help out the Claimant.

18 According to Mr Torre, the meeting on 19 December 2018 was to discuss the final issues regarding the closure of the business and the Claimant said he wanted to think about a proposal to pay his entitlements in instalments, which was the Respondent's preference. Mr Torre also said that the second part of the conversation was to do with ceasing employment and how the Claimant's employment was to end. Mr Torre said the Claimant asked about future work where the Respondent had a small amount of warranty work for one client. They agreed the Claimant would charge $70 per job, but Mr Torre said the work was to be undertaken on a sub-contractor basis where the Claimant had an Australian Business Number (ABN). The work was completed and months later he received an email from the Claimant wanting payment, but the Claimant never produced an invoice for payment.

Events on 21 December 2018

19 According to the Claimant, Mr Torre arrived at the office between 11.00 am and 12.00 pm and started to answer his questions in the email the Claimant had sent earlier in the morning, '*telling* [the Claimant] *that today … 21st December 2018 was* [the Claimant's] *last day*' of work and that he was to finish with the two other employees.[7] The Claimant said he did not return to work after 21 December 2018.

20 In respect of the contents of the email dated 21 December 2018, the Claimant said that he wanted to know his status going forward, as he did not know the situation and he was not sure what was going on. He did not believe that he was anticipating that 21 December 2018 was his last day of employment.

21 Mr Torre received the Claimant's email dated 21 December 2018 in which the Claimant said he wanted his entitlements in a lump sum and, in his view, saying *today was Claimant's last day*. Mr Torre said he agreed to everything the Claimant wanted and he was happy for the Claimant to leave on 21 December 2018 if the Claimant wanted to go. Mr Torre denied putting the *acid test* on the Claimant to leave, although he acknowledged that one day the Claimant's employment would end with the closing of the business.

Resolving the evidence

22 It is clear that the Claimant and Mr Torre had different recollections or perceptions of events surrounding the cessation of the Claimant's employment. I am not able to resolve the differences by rejecting their evidence as incredible or necessarily untruthful where in many respects their evidence is consistent with each other.

23 However, there are a number of difficulties with respect to the content of the Claimant's email dated 21 December 2018 when compared to the content of the conversation between the Claimant and Mr Torre on 19 December 2018:

- notwithstanding discussions on 19 December 2018 included the specific termination of other employees, even on the Claimant's evidence, at its highest, there was a general discussion about the Claimant's employment ceasing in the future consistent with the closing of the business;
- however, the Claimant professed to be unaware of when the business would close, although he acknowledged that there was some work to be finished off and *bits and pieces* to complete to wind down the business and there was no definitive date for closure;
- further, nothing in the Claimant's evidence arising from the conversation on 19 December 2018 indicated that the Claimant: was asked to nominate a date to end his employment; or informed of when in fact the business was

closing upon which it was implied his employment would cease from that date, notwithstanding Mr Torre had said there was no work from 21 December 2018;

- the real gravamen of the Claimant's concern arising from discussions on 19 December 2018 was the payment of outstanding entitlements and he wanted some time to think about the Respondent's proposal to pay the entitlements by instalments, noting that this issue was also raised some 18 months earlier;
- between the end of the meeting on 19 December 2018 until the Claimant sent the email on 21 December 2018, nothing changed. That is, the Respondent did not press a response to the proposal about paying entitlements put forward by Mr Torre, nor did the Respondent press any other issue discussed at the meeting;
- it was the Claimant's email dated 21 December 2018 that bought things to a head. In that email the Claimant said he wanted his entitlements in a lump sum (rather than by instalments) that he '*thought that Friday could be my last day of employment*'; and
- after receiving this email, according to the Claimant, Mr Torre said 21 December 2018 was his last day and the Claimant was given a final pay slip and paid his entitlements.

24 The Claimant's explanation that he was not anticipating his employment ending on 21 December 2018 is inconsistent with the contents of his email where he nominates an end date of 21 December 2018. I do not accept that this email was merely a query about an unknown future work situation.

25 While the Claimant did query his future employment situation, this also needs to be seen in the context of the Claimant's other query on 19 December 2018 regarding carrying out the Warranty Work (the circumstances of which are disputed).

26 Section 117 of the FWA refers to the giving of notice of termination of an employee's employment and generally applies where an employer is the moving party and ends the employee's employment.

27 In the Claimant's case, where the Claimant bears the onus of proving his claim and the facts giving rise to his claim, I am unable to discount that, consistent with Mr Torre's evidence, following the general discussions on 19 December 2018, which included the Claimant's employment ending at some point coinciding with the eventual closing of the business, Mr Torre agreed to the Claimant's suggested last day of employment being 21 December 2018.

28 Nothing in the evidence suggests the Respondent or Mr Torre proposed or suggested this day as the end of the Claimant's employment and, in fact, the first time this date was raised was when it was proposed by the Claimant in his email dated 21 December 2018.

29 To the extent 21 December 2018 was a relevant date, it was relevant because two other employees had received notices of termination to cease employment on that date and because at the meeting on 19 December 2018, Mr Torre had said there was '*no work* [for the business] *going forward*'.

30 However, the Claimant agreed there was still some work to do in relation to closing the business and the actual date or timing of the closure was not known albeit that it was likely to be around the same time as the cessation of a commercial lease for the Respondent's office.

31 I am satisfied that, on the evidence, it is equally open to conclude an alternative rational explanation exists; that being, Mr Torre acquiesced to the Claimant's proposal to finish on 21 December 2018 and paid out his entitlements as requested.

32 While I am satisfied of an alternative explanation on the evidence, I am not satisfied the Claimant has proven to the requisite standard the Respondent terminated his employment.

33 Therefore, if I am not satisfied the Respondent terminated the Claimant's employment, I am not satisfied an obligation under s 117(1) of the FWA applies to the Claimant's employment.

Was The Claimant A Casual Employee Or An Independent Contractor?

34 The discussions between the Claimant and Mr Torre on 19 December 2018 are also relevant to the issue of whether the work undertaken by the Claimant between January 2019 and May 2019 was as a casual employee of the Respondent or an independent contractor to the Respondent.

35 The nature of these discussions was, in my view, very general and the agreed facts concerning this work include:

- the Claimant wanted to do the Warranty Work for the Respondent in 2019 and offered to do discrete jobs at $70 per job;
- the Warranty Work involved replacing faulty equipment under warranty associated with a minor contract remaining with the Respondent's business;
- the Respondent was reluctant to have the Claimant carry out this work, but said the work could be done by the Claimant as a subcontractor and the Claimant was to supply an ABN;
- the Claimant disputed the work could be done on a subcontracting basis because it would not comply with certain regulatory requirements for electrical work;
- the Claimant undertook nine jobs between January 2019 and May 2019 and 'invoiced' the Respondent for $630; and
- the Respondent declined to pay the amount 'invoiced' until the Claimant provided a tax invoice with an ABN.

36 On 20 May 2019, the Claimant sent an email to 'Sandra' and Mr Torre requesting payment of $630 for work performed.[8] I note the attachments does no more than list item numbers with an amount of $70 next to each item number.

37 Between 22 May 2019 and 27 May 2019, there was a series of emails between the Claimant and Mr Torre disputing how the Claimant would invoice the Respondent for the Warranty Work and reference to the conversation on 19 December 2018 about the Claimant's status as a casual employee or subcontractor.[9] Suffice to say the Claimant and Mr Torre had a different view on how the work was to be paid and the Claimant's status.

38 This issue was not resolved at the time the work was done.

39 The Claimant refers to the MCE as the basis for his claim for wages as a casual employee.

40 Therefore, *if* the MCE has any application to the claim, the Claimant must first prove to the requisite standard that he is an '***employee***' as defined in s 3 of the MCE, noting the Respondent denies the Claimant was an employee at the time the Warranty Work was undertaken.

41 '[E]***mployee***' in s 3 of the MCE means '*a person who is an employee within meaning of*' the *Industrial Relations Act 1979* (WA) (IR Act).

42 Section 7 of the IR Act defines '***employee***' to, relevantly, mean '*(a) any person employed by an employer to do work for hire or reward including an apprentice; or (b) any person whose usual status is that of an employee*'.

43 In ***Botica v Top Cut Holdings Pty Ltd*** [2020] WAIRC 00061 (***Top Cut***), Industrial Magistrate Flynn (as he was then) comprehensively reviewed the meaning of '***employee***' as it related to the FWA, but also as it related to s 4(1)(a) and s 4(1)(b) of the *Long Service Leave Act 1958* (WA) (LSL Act).

44 The relevant definition of '***employee***' in s 3 of the MCE (by virtue of s 7 of the IR Act) is the same as that in s 4(1)(a) and s 4(1)(b) of the LSL Act.

45 As Industrial Magistrate Flynn noted in ***Top Cut***, at [55], the meaning of '***employee***' in s 4(1)(a) and s 4(1)(b) of the LSL Act has been construed by appellate authority in Western Australia consistent with the meaning of '***employee***' in the FWA adopted by authorities in other jurisdictions.

46 In summary, the totality of the relationship between the parties must be examined to determine whether the person who is engaged is an employee or an independent contractor.[10] The principles applied in respect of the meaning of '***employee***' in s 4(1)(a) and s 4(1)(b) of the LSL Act are also applicable to the meaning of '***employee***' in s 3 of the MCE.

47 I adopt Industrial Magistrate Flynn's summary and adaptation, at [38] in ***Top Cut***, identifying a number of potentially significant and relevant factors in assessing the totality of the relationship between a person who engages another to do work and the person who is engaged to do the work.[11] I also note the different methodologies referred to at [39] in ***Top Cut***.

48 Similar to that in ***Top Cut***, there are factors suggesting an 'employee/employer' relationship between the Claimant and the Respondent and factors suggesting the Claimant was 'independently contracted' to the Respondent to carry out the Warranty Work.

49 The factors suggesting an 'employee/employer' relationship include:

- the Claimant attended the Respondent's office for each job to complete the necessary computer or paperwork;
- the Respondent nominated the Warranty Work to be undertaken, if and when it was required to be done; and
- on the Claimant's evidence, he was required to operate under the Respondent's electrical licence and electrical contractor's licence to complete the Warranty Work.

50 The factors suggesting an 'independent contractor' relationship include:

- the Warranty Work involved discrete and limited tasks where the Respondent had otherwise divested its electrical business to another organisation. In that sense, there was limited representation of the Respondent by the Claimant;
- the Claimant presented the Respondent with an 'invoice' at the completion of nine jobs rather than was paid for work undertaken on each occasion;
- the work was invoiced at a job rate of $70 per job and not an hourly rate;
- the Warranty Work was infrequent with nine jobs completed over some five months;
- there was no suggestion that the Claimant was directed to do the work or supervised in carrying out the work. The Claimant was free to determine the manner in which he completed the Warranty Work; and
- the Respondent otherwise had no control, nor did it assume control, over the Claimant's time. The Respondent did not have the Claimant's exclusive services and it appears the Claimant did not, and was not required to, regularly attend the workplace. The Claimant was free to look for other work.

51 Whether the Claimant used the Respondent's tools or wore the Respondent's uniforms (if there was any) is unknown, although having regard to other circumstances, I do not consider this determinative of the Claimant's status as an employee or as an independent contractor.

52 Further, the parties placed significant emphasis on whether the Claimant could complete the Warranty Work without the Respondent's electrical licence and electrical contracting licence. The Claimant was adamant that he could not, and this was indicative of him being an employee, whereas the Respondent said the Claimant could complete the work using the Respondent's licences, and this is no different to the position adopted by other subcontractors.

53 While I have noted this factor as an indicator of the Claimant's 'employee/employer' relationship, again, this is not determinative where I also cannot disregard the Respondent's engagement of other subcontractors using its electrical licence and electrical contracting licence (and I am not required to resolve the legitimacy in doing so).

54 Finally, the Claimant's ABN was cancelled on 23 May 2019.[12] The existence of the ABN during the Warrant Work merely demonstrates the Claimant *could have* issued a tax invoice for the Warranty Work, not necessarily that he was operating a business. However, in part, it supports Mr Torre's evidence of the Respondent's preference for the work to be contracted to the Claimant.

55 When assessing the totality of the relationship between the Claimant and the Respondent, the Claimant's ability or inability to carry out the Warranty Work using the Respondent's electrical licence and electrical contracting licence and the nomination of the Warranty Work by the Respondent is less significant than the combined effect of the Warranty Work being infrequent, discrete and involving limited tasks charged on a per job basis where the Respondent otherwise had no, or did not assume, control over the Claimant's exclusive services.

56 Therefore, I conclude the Claimant supplied his services to the Respondent on an ad hoc basis on a per job rate of $70 per job to do the Warranty Work, rather than serving the Respondent in whatever remained of its business.

57 I am not satisfied the Claimant was an '***employee***' of the Respondent for the purposes of the MCE.

Outcome

Claimant's claim for payment in lieu of notice of termination

58 Section 545(3) of the FWA enables an eligible State court (of which 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'.

59 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.

60 I note further that the Claimant elected the small claims procedure. Thus, the amount referred to in s 548(1)(a) and s 548(1A)(a) of the FWA refers to '*an amount that 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.

61 Having regard to the findings made I am not satisfied the Claimant has proven to the requisite standard the Respondent was required to pay an amount in lieu of notice of termination under s 117(2) of the FWA.

The Claimant's claim for payment of the Warranty Work

62 The Claimant did not identify what provision of the MCE he relied upon for the purposes of his claim for the payment of $630 for the Warranty Work, nor did he identify the enforcement provisions relevant to the IMC.

63 The IMC has limited jurisdiction under the MCE and IR Act: s 7 of the MCE and s 81A of the IR Act. The IMC has no jurisdiction to consider a broader common law contractual claim or a claim for denial of contractual benefits.

64 If I assume the Claimant relies on s 17C(1) of the MCE to seek payment in full and he seeks to enforce the payment of the amount of $630 pursuant to s 7(c) of the MCE, when read with s 83 of the IR Act, the IMC can only order payment where a contravention or failure is proved under s 83(4) of the IR Act: s 83A(1) of the IR Act.

65 This is predicated on the Claimant being an employee of the Respondent (bearing in mind the condition being implied into a contract of employment).

66 Having regard to the findings made, I am not satisfied the Claimant has proven to the requisite standard he was an employee of the Respondent and thus no condition for payment in full can be implied into any contract of employment for the purposes of the MCE. Therefore, there is no basis for the IMC to make an order for payment under s 83A of the IR Act.

Result

67 The Claimant's claim is dismissed.

D. SCADDAN
INDUSTRIAL MAGISTRATE

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[1] Exhibit 1 - witness statement of the Claimant dated 26 April 2020 [4] and the email chain dated 12 June 2017 at RM-2.

[2] Exhibit 1 [5] and email dated 21 December 2018 at RM-3.

[3] Exhibit 1 at RM-21.

[4] Exhibit 1 [7] and email dated 31 December 2018 at RM-4.

[5] Exhibit 1 - email dated 3 January 2019 at RM-5.

[6] Exhibit 1 - email dated 6 January 2019 at RM-4.

[7] Exhibit 1 [6].

[8] Exhibit 1 - RM-8.

[9] Exhibit 1 - RM-9, RM-10, RM-11, RM-12, RM-13.

[10] ***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; ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16, 28 - 29; ***ACE Insurance Ltd v Trifunovski*** [2011] FCA 1204; (2011) 200 FCR 532 [29].

[11] *In **Abdalla v Viewdaze Pty Ltd** (2003) 53 ATR 30, the Full Bench of the Western Australian Industrial Relations Commission identified a number of factors of potential significance when assessing the totality of the relationship between a Business and a Worker. I have adapted the list and added to it from other cases. The list is not exhaustive. Features of a relationship in a particular case which do not appear below may be relevant.*

a. Does a Worker perform work for anyone other than a Business (or have a genuine and practical entitlement to do so)? Does the Worker operate from premises other than that of a Business? Does a Worker advertise his or her services to the world at large? The right of a Business to the exclusive services of a Worker is characteristic of an employment relationship. On the other hand, if a Worker also works for others (or has the genuine and practical entitlement to do so) then this suggests an independent contract.

b. Does a Worker have the right to delegate or subcontract work? Does a Worker have an obligation to regularly attend the workplace? If a Worker is entitled to delegate work to others (without reference to a Business) then this is an indicator that a Worker is an independent contractor. An employment contract is personal in nature; it is a contract for the supply of the services of the worker personally.

c. To what extent do the arrangements for remuneration and leave of a Worker resemble an employment relationship?[11] Employees tend to be paid a periodic wage or salary and the rate is often set in advance by the Employer. Employees tend to be afforded paid leave for holidays and when unable to work because of illness. Independent contractors tend to be paid by reference to completion of tasks and there may be genuine negotiations about remuneration. Independent contractors tend not to be paid when on holidays or when unable to work because of illness. Employers tend to meet certain expenses associated with each employee including insurance and the cost of a uniform. Independent contractors often pay these expenses themselves. Compared to independent contractors, employers are rarely entitled to make deductions from payments to Workers on account of poor work performance.

d. Does a Business present a Worker to the world at large as an emanation of the business?[11] Typically, this will arise because a Worker is required to wear the uniform of the Business. Alternatively, if a Worker generates personal goodwill with customers of the Business and is able to leverage this goodwill into an asset that is saleable, a Worker may be an independent contractor.

e. Does a Worker have a special skill that is typically required by a Business for a discrete task or for a discrete time period? Such persons tend to be engaged as independent contractors rather than as employees.

f. Does a Worker spend a significant portion of his or her remuneration on business expenses, suggesting an independent contractor?

g. Does a Business have the right to suspend or dismiss a Worker in a manner consistent with typical dealings between an employer and an employee, suggesting an employment relationship?

[12] Exhibit 5.

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The *Fair Work Act 2009* (Cth) and *The Industrial Relations Act 1979* (WA)

Jurisdiction under the *Fair Work Act 2009* (Cth)

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

[2] The IMC, being a court constituted by an industrial magistrate, is an '***eligible State or Territory court***': FWA s 12 (see definitions of '***eligible State or Territory court***' and '***magistrates court***'); IR Act s 81, 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 a term of the NES: 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, s 47. A NES 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, s 47.

Small Claims Procedure

[6] The FWA provides that in 'small claims proceedings, the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities': FWA s 548(3). In ***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 [7], Judge Lucev explained this provision as follows:

> *Although the Court is not bound by the rules of evidence, and may act informally, and without regard to legal forms and technicalities in small claims proceedings in the Fair Work Division, this does not relieve an applicant from the necessity to prove their claim. The Court can only act on evidence having a rational probative force.*

Contravention

[7] 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).

[8] The civil penalty provisions identified in s 539 of the FWA includes:

- The Core provisions (including s 44(1)) set out in pt 2 - 1 of the FWA: FWA s 61(2), s 539.

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

- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA s 545(3).

[10] 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.

Jurisdiction under *Industrial Relations Act 1979* (WA)

[11] Section 83 and s 83A of the IR Act confer jurisdiction on the IMC to make orders for the enforcement of a provision of an industrial agreement where a person has contravened or failed to comply with the agreement. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order necessary for the purpose of preventing any further contravention. The IMC must order the payment of any unpaid entitlements due under an industrial agreement.

[12] The powers, practice and procedure of the IMC are the same as a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA). The onus of proving a claim is on the claimant and standard of proof required to discharge the onus is proof 'on the balance of probabilities'. The IMC is not bound by the rules of evidence and may inform itself on any matter and in any manner it sees fit. In ***Sammut v AVM Holdings Pty Ltd [No 2]*** [2012] WASC 27 [40] - [47], Commissioner Sleight examined a similarly worded provision regulating cases in the State Administrative Tribunal of Western Australia, noting:

> [T]*he rules of evidence are* [not] *to be ignored… After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth…*
>
> *The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.*

Burden and standard of proof

[13] In an application under the FWA and under the IR Act, 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.*

[14] 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].

RECEIVED APPLICATION—Matters pertaining to

2020 WAIRC 00834

RECEIVED APPLICATION - DENIED CONTRACTUAL BENEFITS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMY HAPGOOD
	APPLICANT
	-v-
	RE-BOOT FITNESS
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 1 OCTOBER 2020
FILE NO/S	REGC 57 OF 2020
CITATION NO.	2020 WAIRC 00834

Result Application dismissed

Order

On 25 August 2020, an application was received for filing by the Commission's Registry and the $50 filing fee was paid.

On 27 August 2020, during a conversation with a Registry Services Officer, the applicant expressed an interest in applying to have the filing fee waived due to financial hardship. The applicant was also provided with general information about the jurisdiction of the Commission and was advised of areas of the application which may require amending, prior to the application being formally filed.

On 31 August 2020, a copy of an Application for Waiver of Fee and the associated instructions was sent to the applicant's email address by a Registry Services Officer.

On 8 September 2020, a follow-up email was sent by a Registry Services Officer requesting that the applicant advise of her intentions to the application.

On 16 September 2020, the application was referred to Chief Commissioner Scott for instruction as no further correspondence had been received from the applicant by the Registry.

On 18 September 2020, at the direction of Chief Commissioner Scott, a letter was sent to the applicant asking her to advise of her intentions regarding the application by no later than Friday, 25 September 2020 and that if no response was received, the application would be dismissed.

On 19 September 2020, a response was received from the applicant in which she stated that while she did wish to pursue the application, she was not able to make the necessary amendments at that time.

On 22 September 2020, a further letter was sent to the applicant confirming that in the absence of advice from her, the application still had not been formally registered, providing her with information about the matters she needed to amend and requesting that she confirm her intentions regarding the application by no later than Friday, 25 September 2020, or it will be dismissed.

As of 29 September 2020, no further correspondence has been received from the applicant.

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

THAT the application be and is hereby dismissed.

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

CONFERENCES—Matters referred—

2020 WAIRC 00681

COMMISSION'S OWN MOTION PURSUANT TO S. 44(7)(B)
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 6 AUGUST 2020
FILE NO/S	CR 13 OF 2020
CITATION NO.	2020 WAIRC 00681

Result	Order issued
Representation	
Ms M Shanhun	Ms S Maddern (of counsel)
Ms K Payne	Mr P Brunner (of counsel)
Minister for Industrial Relations	Mr J Carroll (of counsel)

Order

WHEREAS on 28 July 2020 the Minister for Industrial Relations wrote to the Registrar and requested leave to intervene and be heard on behalf of the State about the validity of the COVID-19 JobKeeper General Order;

AND WHEREAS the Minister for Industrial Relations says he is a person who has a statutory right to be heard in relation to the making of any General Order, and was heard in relation to the making of the COVID-19 JobKeeper General Order;

AND WHEREAS there is no objection to the Minister for Industrial Relations being granted leave to intervene and be heard on behalf of the State about the validity of the COVID-19 JobKeeper General Order;

AND WHEREAS the Commission in Court Session is satisfied that the State has an interest in these proceedings because the validity of the COVID-19 JobKeeper General Order is contested;

NOW THEREFORE the Commission in Court Session, pursuant to s 30(1) of the *Industrial Relations Act 1979* (WA), orders –

THAT the Minister for Industrial Relations be granted leave to intervene in application CR 13 of 2020, to be heard about the validity of the COVID-19 JobKeeper General Order.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

2020 WAIRC 00795

COMMISSION'S OWN MOTION PURSUANT TO S. 44(7)(B)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 11 SEPTEMBER 2020
FILE NO/S	CR 13 OF 2020
CITATION NO.	2020 WAIRC 00795

Result	Application discontinued
Representation	
Ms M Shanhun	Mr J Richards (of counsel)
Ms K Payne	Mr P Brunner (of counsel)

Order

WHEREAS on 10 September 2020 Mr J Richards (of counsel) wrote to the Commission in Court Session on behalf of Ms Shanhun and informed it that Ms Shanhun seeks that application CR 13 of 2020 be discontinued;

AND WHEREAS that same day Mr P Brunner (of counsel) wrote to the Commission in Court Session and confirmed that Ms Payne consents to the Commission issuing an order dismissing application CR 13 of 2020;

NOW THEREFORE the Commission in Court Session, pursuant to the powers conferred under s 27(1)(a) of the *Industrial Relations Act 1979* (WA), orders –

THAT application CR 13 of 2020 be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

2020 WAIRC 00817

DISPUTE RE FIXED TERM CONTRACTS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 25 SEPTEMBER 2020
FILE NO/S	PSACR 2 OF 2020
CITATION NO.	2020 WAIRC 00817

Result	Application dismissed
Representation (by correspondence)	
Applicant	Mr J Nicholas (of counsel)
Respondent	Ms J Vincent (of counsel)

Order

Having heard from the parties via correspondence on Thursday, 24 September 2020 now therefore I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* and by consent, hereby order:

(1) THAT leave to discontinue the application is granted; and

(2) THAT the application be, and is hereby, dismissed.

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

CORRECTIONS—

2020 WAIRC 00790

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONALD ANDREW PARNELL
	APPLICANT
	-v-
	THE ROMAN CATHOLIC ARCHBISHOP OF PERTH
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	(CORRIGENDUM MONDAY, 7 SEPTEMBER 2020)
FILE NO/S	U 132 OF 2019
CITATION NO.	2020 WAIRC 00790

CORRIGENDUM

1. In [82], line 5 [2020] WAIRC 00420 of the reasons for decision dated 21 July 2020, delete ‘par 81’ and insert ‘par 78’ in lieu thereof.

2. In [85], line 8 [2020] WAIRC 00420 of the reasons for decision dated 21 July 2020, delete ‘par 85 ’ and insert ‘par 82’ in lieu thereof.

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

Dated: 7 September 2020

PROCEDURAL DIRECTIONS AND ORDERS—

2020 WAIRC 00852

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN DOYLE
	APPLICANT
	-v-
	ROMAN CATHOLIC BISHOP OF BUNBURY
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 14 OCTOBER 2020
FILE NO.	B 167 OF 2019
CITATION NO.	2020 WAIRC 00852

Result	Direction issued
Representation	
Applicant	Mr A Doyle
Respondent	Mr I Curlewis (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Mr I Curlewis (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 witness statements upon which the applicant intends to rely by 15 December 2020;
2. THAT the respondent file and serve witness statements upon which it intends to rely by 14 February 2021;
3. THAT the parties provide a list of documents upon which they respectively will rely by 14 February 2021;
4. THAT the matter otherwise be adjourned to a date to be fixed, and;
5. THAT parties have liberty to apply on short notice.

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

2020 WAIRC 00851

REVIEW OF DECISION - S.61A - OSH ACT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	NORTH METROPOLITAN HEALTH SERVICE
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 14 OCTOBER 2020
FILE NO/S	OSHT 5 OF 2020, OSHT 6 OF 2020
CITATION NO.	2020 WAIRC 00851

Result	Order issued
Representation	
Applicant	Mr T Bishop (of counsel)
Respondent	Mr J Lloyd (of counsel)

Order

HAVING heard from Mr T Bishop (of counsel) on behalf of the applicant and Mr J Lloyd (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA), hereby orders:

Improvement Notice 90013201

1. The Tribunal hereby affirms the WorkSafe WA Commissioner's decision to affirm Improvement Notice 90013201, with modifications, made on 13 May 2020, with the following further modifications:
   - Improvement Notice 90013201 dated 15 May 2020 and the WorkSafe WA Commissioner's letter dated 13 May 2020 be substituted with Amended Improvement Notice 90013201 which is attached to this Order and marked "Annexure A"; and
   - the Amended Improvement Notice 90013201 do stand as Improvement Notice 90013201;
   - the Applicant shall cause Improvement Notice 90013201 to be displayed in accordance with s 48(3) of the *Occupational Safety and Health Act 1984* (WA);
   - any requirement to display any other document be dispensed with.

Improvement Notice 90013285

2. The Tribunal hereby affirms the WorkSafe WA Commissioner's decision to affirm Improvement Notice 90013285, with modifications, made on 13 May 2020, with the following further modifications:
   - Improvement Notice 90013285 dated 15 May 2020 and the WorkSafe WA Commissioner's letter dated 13 May 2020 be substituted with Amended Improvement Notice 90013285 which is attached to this Order and marked "Annexure B"; and

- the Amended Improvement Notice 90013285 do stand and Improvement Notice 90013285;
- the Applicant shall cause Improvement Notice 90013285 to be displayed in accordance with s 48(3) of the *Occupational Safety and Health Act 1984* (WA);
- any requirement to display other document is dispensed with.

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

2020 WAIRC 00840

REVIEW OF NOTICE - S.51A - OSH ACT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	SHIRE OF CAPEL
	APPLICANT
	-v-
	WORKSAFE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 7 OCTOBER 2020
FILE NO/S	OSHT 9 OF 2020
CITATION NO.	2020 WAIRC 00840

Result	Order issued
Representation	
Applicant	Ms R Airey (of counsel)
Respondent	Mr J Lloyd (of counsel)

Order

HAVING heard from Ms R Airey (of counsel) on behalf of the applicant and Mr J Lloyd (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA), hereby orders:

Improvement Notice 49200012

1. The Tribunal hereby revokes the WorkSafe WA Commissioner's decision, made on 25 June 2020, to affirm Improvement Notice 49200012 with modifications, and the notice is hereby cancelled.

Improvement Notice 49200013

2. The Tribunal hereby affirms the WorkSafe WA Commissioner's decision, made on 25 June 2020, to affirm Improvement Notice 49200013 with modifications, with the following further modification:
   - The date for compliance with Improvement Notice 49200013 is extended to 7 November 2020.

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

2020 WAIRC 00853

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNE LORNA BEST
	APPLICANT
	-v-
	AUSTRALIAN NURSES FEDERATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 15 OCTOBER 2020
FILE NO/S	PRES 5 OF 2020
CITATION NO.	2020 WAIRC 00853

Result	Respondent's name changed
Appearances	
Applicant	Ms A Best (in person)
Respondent	Mr M Olson (secretary) and with him Ms K Colette (industrial officer)

Order

This matter having come on for a directions hearing before me on Tuesday, 13 October 2020, and having heard Ms A Best on her own behalf, and Mr Olson and with him Ms K Colette for the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the respondent's name "Australian Nurses Federation" be deleted and amended to "The Australian Nursing Federation, Industrial Union of Workers Perth".

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

2020 WAIRC 00838

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 4 MAY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTINE GAYE WHITE
	APPELLANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MR D HILL - BOARD MEMBER
	MR M AULFREY - BOARD MEMBER
DATE	FRIDAY, 2 OCTOBER 2020
FILE NO	PSAB 12 OF 2020
CITATION NO.	2020 WAIRC 00838

Result	Orders issued

Order

WHEREAS the Public Service Appeal Board issued directions on 24 July 2020 (100 WAIG 1260) directing that the parties file documents with the Registry of the Western Australian Industrial Relations Commission;

AND WHEREAS a request for mediation under the *Employment Dispute Resolution Act 2008* in relation to this appeal was filed 29 September 2020;

AND WHEREAS the parties have consented to engage in mediation and a mediation has been listed for 15 October 2020;

AND HAVING received a request from appellant via email dated 29 September 2020 that the Public Service Appeal Board suspend the operation of the directions yet to be complied with;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby orders that –

Directions 4 and 5 of the directions issued 24 July 2020 (100 WAIG 1260) are suspended from operation until further direction from the Public Service Appeal Board.

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

2020 WAIRC 00814

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANNIE DERKACS

APPLICANT

-v-

TETYANA PODKAS TRADING AS PHOENIX PODIATRY

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE WEDNESDAY, 23 SEPTEMBER 2020
FILE NO. U 152 OF 2018
CITATION NO. 2020 WAIRC 00814

Result Direction issued

Representation

Applicant Ms A Derkacs

Respondent Ms T Podkas

Direction

HAVING heard from the applicant on her own behalf and Ms T Podkas 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 closing submissions by close of business on Tuesday, 6 October 2020;

2. THAT the respondent file and serve closing submissions by close of business on Tuesday 20 October 2020;

3. THAT the applicant file and serve a response to the respondent's closing submissions by close of business on Tuesday, 3 November 2020; and

3. THAT parties have liberty to apply for oral submissions.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shire of Victoria Plains (External Employees) Union Industrial Agreement 2020 AG 16/2020	09/23/2020	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Victoria Plains	Commissioner T B Walkington	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2020 WAIRC 00807

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 7 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES EDWARD PICKS

APPELLANT

-v-

WA COUNTRY HEALTH SERVICE BOARD

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MR M GOLESWORTHY - BOARD MEMBER
DATE THURSDAY, 17 SEPTEMBER 2020
FILE NO PSAB 23 OF 2019
CITATION NO. 2020 WAIRC 00807

Result	Order issued
Representation	
Appellant	Mr C Studsor (as agent)
Respondent	Ms S Waterton & Ms R Sinton (as agents)

Order

HAVING heard from Mr C Studsor as agent on behalf of the appellant and Ms S Waterton and Ms R Sinton as agents on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT the name of the respondent be amended to WA Country Health Service.

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

2020 WAIRC 00806

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 7 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00806
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MR D HILL - BOARD MEMBER MR M GOLESWORTHY - BOARD MEMBER
HEARD	**:**	TUESDAY, 18 AUGUST 2020, WEDNESDAY, 19 AUGUST 2020
DELIVERED	**:**	THURSDAY, 17 SEPTEMBER 2020
FILE NO.	**:**	PSAB 23 OF 2019
BETWEEN	**:**	EDWARD PICKS Appellant AND WA COUNTRY HEALTH SERVICE Respondent

CatchWords	**:**	PSAB – Appeal against decision to dismiss under s 150(3) of the *Health Services Act 2016* (WA) – Dismissal was harsh, unfair and disproportionate – Decision to dismiss adjusted and replaced with a warning and improvement action in the form of training and development
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 26(1), s 80I(d) & s 80L *Health Services Act 2016* (WA) s 6, s 145, s 150(3) & s 151
Result	**:**	Appeal upheld
Representation:		
Appellant	**:**	Mr C Studsor (as agent)
Respondent	**:**	Ms S Waterton & Ms R Sinton (as agents)

Cases referred to in reasons:

B. Rose v Telstra Corporation Limited (Unreported, AIRC, Print Q9292)

Bercove v Hermes (No. 3) (1983) 74 FLR 315

Browne v Dunn (1893) 6 R 67

Cooper v Australian Taxation Office [2015] FWCFB 868

Gaudet v Commissioner Ian Johnson Department of Corrective Services [2013] WAIRC 00032

Orr v The University of Tasmania (1957) 100 CLR 526

Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch [2016] WAIRC 00236; (2016) 96 WAIG 408

Raxworthy v The Authority for Intellectually Handicapped Persons (1989) 69 WAIG 2266

Reasons for Decision

1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).

2 Mr Picks was employed by the WA Country Health Service (**Health Service**) at Bunbury Hospital from 2005. He was first employed as a Patient Care Assistant on a casual basis, then as Patrol Officer on a fixed term basis. Mr Picks was a permanent full time Security Officer from 1 January 2009.

3 In July 2019, Mr Picks was convicted of assault occasioning bodily harm in relation to an incident between Mr Picks and a member of his extended family (**Conviction**). Mr Picks did not notify the Health Service about the criminal charge or Conviction.

4 On 6 September 2019, the Regional Director of the Health Service wrote to Mr Picks and informed him that:

> It has come to my attention you have recently been charged and convicted of a serious offence.
>
> In accordance with Section 150(3) of the *Health Services Act 2016* (**the Act**), if an employee is convicted or found guilty of a serious offence the employing authority may take disciplinary action or improvement action, or both disciplinary action and improvement action, as deemed appropriate.

5 On 19 September 2019, the Chief Executive of the Health Service wrote to Mr Picks and informed him that the Health Service proposed to take disciplinary action by way of dismissal in accordance with sections 6 and 150(3) of the *Health Services Act 2016* (WA) (**HS Act**).

6 One day later, the Operations Manager at Bunbury Hospital wrote to Mr Picks and proposed to impose a final warning and training and development as a result of Mr Picks failing to report the charge and Conviction.

7 Then in early November 2019, the Chief Executive informed Mr Picks by letter that the proposed disciplinary action of dismissal remained appropriate and was effective that day. Mr Picks was paid five weeks' salary in lieu of notice.

8 Mr Picks appeals the decision made by the Chief Executive to dismiss him. He says that the Chief Executive did not adequately consider his excellent work history, the isolated nature of the offence and all the circumstances of the incident. Mr Picks asks that he be reinstated with no loss.

9 The Health Service says that because of the nature of Mr Picks' conduct, and because the position Mr Picks held required him to provide security for patients, visitors and other WACHS staff, the decision to dismiss Mr Picks was appropriate and in accordance with the HS Act and established case law principles. It asks the Board to dismiss Mr Picks' appeal.

What must the Board decide?

10 The parties agree that assault occasioning bodily harm is a serious offence under the HS Act and that under s 145 of the HS Act an employee must report in writing a charge and a conviction of a serious offence within seven days. Mr Picks did not notify the Health Service after he was charged with and convicted of assault occasioning bodily harm.

11 It is not in dispute that the Chief Executive had authority to, and did, dismiss Mr Picks.

12 The appeal before the Board is a hearing de novo: ***Raxworthy v The Authority for Intellectually Handicapped Persons*** (1989) 69 WAIG 2266. The question for the Board is whether the Health Service's decision to dismiss Mr Picks should be adjusted in the circumstances of this matter.

Legislation

13 Sections 145, 150(3) and 151 of the HS Act are relevant to this matter. They provide:

> **145. Duty of staff member to report certain criminal conduct and misconduct findings**
>
> (1) A staff member who is charged with having committed, or is convicted or found guilty of, a serious offence must, within 7 days of the charge being laid or the conviction, report that fact in writing to the staff member's responsible authority.
>
> (2) A staff member who has a misconduct finding made against them under the Health Practitioner Regulation National Law (Western Australia) must, within 7 days of receiving notice of the finding —
>
> (a) report that fact to the staff member's responsible authority; and
>
> (b) provide the person to whom the report is made with a copy of the finding.
>
> (3) In subsection (2) —
>
> misconduct finding includes a finding of unsatisfactory professional performance, unprofessional conduct or professional misconduct.
>
> **150. Disciplinary or improvement action where registration suspended or conditional or in case of serious offence**
>
> …
>
> (3) Despite the Sentencing Act 1995 section 11, if an employee is convicted or found guilty of a serious offence the employing authority may take such disciplinary action or improvement action, or both disciplinary action and improvement action, as the employing authority considers appropriate (having regard to section 151) with respect to the employee.
>
> …

151. Protection of patients to be paramount consideration

The protection of a health service provider's patients must be the paramount consideration in relation to determining whether to take disciplinary action against an employee under section 150.

14 Mr Picks appeals the Health Service's decision to dismiss him and asks the Board to exercise its jurisdiction under s 80I(1)(d) of the *Industrial Relations Act 1979* (WA) (**IR Act**) by adjusting that decision.

Should the decision to dismiss stand or should it be adjusted?

15 It is clear from the framework of the HS Act that dismissal was not the only option open to the Health Service. Rather, in exercising his discretion under s 150(3) of the HS Act, the Chief Executive could have decided to take no action or some other form of disciplinary or improvement action.

16 In determining this matter, the Board will need to decide whether the matters Mr Picks relies upon sufficiently outweigh the gravity of having been convicted of a serious offence, such that dismissal is not justified.

Mr Picks' evidence

17 Mr Picks gave evidence on his own behalf. He also called his father-in-law, Mr Peter Michael, and his former colleague, Mr Martin Fisher, as witnesses.

18 Mr Michael is an Aboriginal Elder who is regarded as a mentor within the South West of Western Australia. He is closely involved with a number of Indigenous organisations. Mr Michael is also recognised under his Indigenous culture as the grandfather of the man Mr Picks assaulted.

Mr Picks' and Mr Michael's evidence

19 Mr Picks and Mr Michael gave evidence that Mr Picks' marriage to his Indigenous wife some 28 years ago caused a rift between them and two members of his wife's extended family. They both described long-running and complex cultural tensions. Mr Michael said Mr Picks otherwise gets along very well with his many Indigenous relatives and is held in high regard in the community.

20 Mr Picks and Mr Michael also gave evidence that Mr Picks' wife is in very ill-health and struggling with complications including those caused by three kidney transplants. Shortly before the incident that led to the Conviction, Mrs Picks' third kidney transplant was failing. Mr Picks said the five years leading up to the incident had been particularly challenging in relation to his wife's health. As well as working full-time for the Health Service, Mr Picks worked for a private security firm and was also responsible for his wife's care. Mrs Picks needed dialysis three times per week and constantly had medical appointments in Bunbury and Perth. Mr Picks would drive her to most of those appointments. Medical records were tendered in support of Mrs Picks' ill health and medical appointments.

21 Mr Picks described being verbally abused by the two members of his extended family several weeks before the assault. On the night of the incident, Mr Picks was at a pub with his wife and daughter celebrating his daughter's pregnancy. Mr Picks was attempting to make peace with one of the members of his extended family member involved in the feud when that man suddenly hit him. Mr Picks reacted instinctively to the provocation and punched the man.

22 That incident resulted in Mr Picks being charged with assault occasioning bodily harm. Mr Picks cooperated with police at all times. Notwithstanding the provocation, Mr Picks pleaded guilty because he wanted to put the matter to rest, avoid protracting or exacerbating the family feud and avoid further stress to his very ill wife and himself.

23 In his evidence Mr Picks expressed much remorse about his actions. He gave evidence that the feud, tied into his worry at the time about his wife's ill health, became too much. Mr Picks said his reaction at the time of the incident was unacceptable and out of character. He is very embarrassed by his actions and knows he should have walked away.

24 Mr Picks and Mr Michael gave evidence that the family feud has been de-escalated as a result of Mr Michael's intervention as an Elder. The effect of Mr Picks' evidence was that the relevant relationships are now civil. The effect of Mr Michael's evidence was that the tensions were resolved. Mr Michael said he highly doubted there would be issues in future.

25 In summary, Mr Picks' evidence is that the incident was a one-off that took place in extenuating circumstances and in a very different environment to the workplace. He has always acknowledged that his actions were wrong and has expressed remorse for them. The triggers that led to the incident are not present in Mr Picks' workplace and the main driver, being the family feud, has now been resolved with Elder assistance.

26 Mr Picks gave evidence that he loved his job and was distraught to lose it. He had been unaware that he had an obligation to report the criminal charge and Conviction, and he did not have an induction when he started work with the Health Service.

27 Despite the Board reminding the parties about the rule in ***Browne v Dunn*** (1893) 6 R 67 the Health Service did not put to Mr Picks in cross-examination that his continued employment in a patient-facing role would compromise patient care.

28 The Board asked Mr Picks about whether he would work safely with patients, staff and visitors in future. He said:

> I'm my harshest critic, in - in work I always try to be professional. I try to put the patients first. There is - there is, ah, situations that you can arise on and use tools to get you out of matters from aggressive people. And - and like I said, 13 years of being there we've dealt with dementia patients, we've dealt with people on drugs, we've dealt with psychosis. And for me not to act in those 13 years with these people it just seemed a bit harsh to me the outcome of what Mr Moffett was saying…

> I would keep up the same standards going back to work. I had never let my standards down before this incident and I would not let my standards down when I'm at work, I'm very professional. I - I do my utmost. If I don't know something I don't go gung-ho at it, I'll always ask questions with the appropriate people. Um, so I can't see - I would not change that point of view of my work ethic, you know, that's always been me at my workplace, you know, that - that I'm upfront, I'm a very direct person, an upfront person. And, um, yeah, so that's where I - yeah, I just wouldn't let my standards down again. Yes, I regret what happened outside of work, I really do, if I could take it back I would, you know. But that's a cliché, you know. But - but I love my work, I'm good at my work, I enjoy my work, I enjoy the people that you get to meet at the hospital. Yes, they might be trying sometimes but you see them after they've been medicated up at the, ah - up at the wards they're a whole different person, they're actually apologising to you for their behaviour. So it's that gratitude that you - you just can't - it's - sometimes it's real heart-warming that you see this person that's come in, who's angry at you, angry and bursting but you know there's circumstances behind that. So the aggression side of - of that is never been at work for me, it's just the satisfaction. Yes, you get your nasty pasties that they're not going to change for anyone but you get a lot of good cases where medication, a couple of weeks up at the wards they're a whole different person, so it's gratitude just that someone to say thank you to you. You know, you - you don't get a lot of thanks in a job but when a patient says "Thank you, I'm - I'm very sorry for my behaviour", you know. So there's always light there for me and as - and - and everyone needs that human contact and I treat them like I don't judge them while I'm at work, you know. While I'm at work what it is what it is, they come in for a reason. Everyone's got a back story for it. So to me I wouldn't change myself because that's who I am, I do love my work, I do love working with these people and, yeah. And like I said, I'm good at it. And I've been at a big loss since I've been out of work from it. So, um, yeah, my guarantee is, yeah, I'll just keep on moving forward and that's all I can do.

29 Mr Picks said that he had expected the issues would be resolved with the Health Service imposing a final warning and improvement action, based on the letter he received from Mr Matters. He was shocked to then receive the letter from the Chief Executive proposing that Mr Picks be dismissed. Mr Picks said 'I just had pure panic in me.'

30 The effect of Mr Picks' evidence is that his relationship with his colleagues, his manager Mr Matters and the Health Service has not broken down. Mr Picks has always gotten along very well with his colleagues, including Mr Matters. Mr Picks said the staff at the Bunbury campus 'have been fantastic'. Mr Picks' evidence is that he does not present a risk to patients. He always follows clinical direction and knows to remove himself if necessary. Further, if Mr Picks were to find himself in a situation at work where he is confronted by an aggressive person with whom he has a pre-existing relationship, he would let his work partner take the lead. Mr Picks gave evidence that he has worked for over 13 years with challenging, high risk patients in volatile environments without receiving any complaints.

31 Around 20 positive written references were tendered by Mr Picks. At least 10 were from senior clinicians employed by the Health Service who used to work with Mr Picks. It is fair to characterise them as glowing. For example:

> This is a letter of reference and support for Mr Ted Picks, whom I believe was recently charged with assault. To say this was initially met with disbelief and shock is an understatement, for reasons I will attempt to objectively and succinctly describe.
>
> In my former professional role of SRN3 Psychiatric Liaison/Triage Clinician at Bunbury Regional Hospital, I had many occasions to both observe and work alongside Mr Picks, over four years between 2005-2009. Given my primary role was assessment and management of often severely disturbed and volatile individuals, Mr Picks [sic] calm, non-judgemental and reassuring personality style was frequently pivotal in diffusing distressing and potentially aggressive incidents. Of particular note here, is that his approach to patient management or "tools of his trade" never included aggression, either direct or implied. This is rare amongst security staff. His ability to develop a rapport and assist in promoting compliance with both medical and psychiatric interventions was extremely helpful to both staff and patients. Medical and Nursing staff were always pleased to know "big Ted" was working their shift.
>
> When this assault charge comes into discussion with my professional peers, we question what kind of severe threat to himself or those near him would cause him to react this way. We are all thoroughly certain it must have been defensive rather than assaultive. Another issue here is the possibility Mr Picks has been discriminated against because he is obviously a robust man of considerable strength. If Mr Picks loses his employment at the hospital, that loss will be shared by both patients and staff.
>
> [Former SRN3 Psychiatric Liaison – Bunbury Regional Hospital]
>
> ---
>
> Ted has shown himself time and again to be ideally suited to this work. Whenever the topic of the difficult and stressful ED work environment comes up, Ted's name is discussed. His imposing physical presence goes a long way towards defusing potential physical altercations, and despite the incredibly demanding stresses of the work, I have never seen him lose his temper. He is invariably calm, professional and respectful towards even the most difficult of our clients and his help has been key in many difficult situations.
>
> I have no hesitation in recommending Ted for any type of security work. I have worked in the ED setting for over 20 years and he is the best security guard I have ever worked with.
>
> [Emergency Medicine Specialist Physician, Bunbury and Busselton Hospital Emergency Departments]
>
> ---
>
> Ted has always been highly valuable in diffusing aggressive situations, and calming the disturbed with his professional, rational, and thoughtful approach. He has a wide experience of life and people and he is able to quickly establish rapport and engage clientele, as well as make rapid and accurate assessments of potentially volatile situations. Ted deals with such situations quickly and effectively, with the minimum of fuss.

Ted is greatly loved and admired by the Emergency Department Staff, and is a famous and well-regarded presence. He has fantastic communication skills and which are often underestimated; for example in the 14 years I have known him I have seen him resort to physical methods on only a couple of occasions. He is always willing to help out, and often has valuable suggestions on how to manage difficult situations. I trust him totally; Ted is honest and forthright and reliable; a team-player, willing to help out provide solutions, credible to the healthcare personnel, and respected by all.

[Staff Specialist, Emergency Department Bunbury Hospital]

Edward has always capably performed a range of security and public liaison duties, working closely with colleagues, hospital staff, patients and members of the public. This included supporting staff and other people, and dealing with situations in the emergency department, hospital wards, mental health units, and public areas of the hospital. At times Edward has provided one-to-one support and supervision of patients.

Edward has strong skills in being able to 'read a situation' and respond appropriately. He engages people verbally as a priority, to understand and diffuse tense situations to achieve the best outcome for people and the hospital. Where necessary, Edward acted quickly and decisively to resolve issues that had the potential for violence or when it was displayed by agitated people.

Edward has always taken a proactive approach to maintaining the safety of people. And he regularly put forward suggestions and proposals to improve work procedures. He was extremely thorough in completing daily/safety reports, and also communicated effectively over the radio, phone and email. Edward conducted work site patrols, identified workplace hazards and was positive in embracing change.

Edward completed day and night shifts, working together with other security colleagues as part of a team. You could always reply [sic] on Edward's ability to achieve the best result in any given situation.

[A/Manager Administration and Support – Bunbury Hospital]

I understand that Ted Picks is attending court for an assault charge. When speaking to Ted it was clear he was distressed about the charge and remorseful of the incident that had occurred. To become physical and have this reaction is totally out of character for Ted.

I am confident in saying that Ted is a very well respected and competent security guard at our hospital. He has deescalated situations many times. He treats everybody with dignity and works well within our team. Ted is always respectful to all patients and staff. Many times Ted has diverted patient aggression with his verbal skills and this has kept the staff in a safe working environment. I personally will continue to trust Ted despite this charge.

[Shift co-ordinator/Registered Nurse, Bunbury Hospital Emergency Department]

I have worked closely with Ted in a number of very stressful and potentially dangerous situations regarding emergency department security scenarios and feel that I can confidently and categorically state that Mr. Picks has always demonstrated a consistently confident, professionally assertive, "kind but firm" role in security in our hospital. I've seen him maintain [a] calm, professional, courteous, demeanor, excellent verbal and non-verbal communication, and has become someone that I know that our staff can rely on in any situation.

I have never seen him flustered by verbally/physically assaultive patients, and know that when he is on shift, that patients and staff will be treated with respect and kindness, and that we can all go home safe and sound.

I couldn't recommend someone more highly than Mr. Picks, and am more than happy to be contacted for verbal clarification of this reference.

I would happily work with Mr. Picks any time, and would consider any organization better off with him on service.

[Consultant Emergency Physician and A/HOD of Bunbury Emergency Department]

32 Finally, Mr Picks gave evidence that he is the sole income earner supporting a family of five, including his wife, who remains unwell, and their foster children. Mr Picks also financially supports his adult daughter.

Mr Fisher's evidence

33 Mr Fisher gave evidence for Mr Picks. Mr Fisher has worked as a Clinical Nurse Specialist/Psychiatric Liaison Nurse for the Health Service in its various iterations for 20 years. Fifteen years ago Mr Fisher and a colleague established the Psychiatric Liaison Team, which is primarily based in the Emergency Department and also offers a Mental Health Service to the Bunbury campus. Mr Fisher has known Mr Picks for over 14 years and worked closely with him during that time.

34 Mr Fisher gave evidence about the way Mr Picks performs his key duties, in particular when accompanying medical staff as they transfer potentially violent, volatile and vulnerable patients from one part of the campus to another. Mr Fisher's evidence is that Mr Picks interacts well with patients, deescalating situations, following 'well-authorised process' and behaving appropriately. Mr Fisher said Mr Picks is well known in the Indigenous community, uses common sense and de-escalation skills, has considerable life skills, uses humour where appropriate and doesn't overstep boundaries. Mr Fisher said he was unaware, and he would know given the small size of the team, of any instance when Mr Picks has not followed clinical direction.

35 In relation to whether Mr Picks would pose a potential safety risk to patients or the public, Mr Fisher said:

> [M]y experience of working with Mr Picks over 14 years I've never seen him become angry or actually threaten a patient or do anything which in any way was dangerous or - or at risk. Often we would have situations which were very uncomfortable and difficult to deal with and you would have - there's a process in ED where you actually have a - a debrief and it's a chance to actually express yourself and how difficult those situations were because sometimes patients can be very, very threatening, can be verbally antagonistic as well which can be very difficult to deal with but in all the time I've worked with Mr Picks I always found he was able to - certainly contained himself and never lost his temper or over used force with patients.

Mr Picks' submissions

36 Mr Picks' central submission is that his dismissal was harsh because it was disproportionate to the misconduct in question, having regard to the circumstances of the offence.

37 He argues that the Health Service has not adequately considered all the circumstances as required by ***Gaudet v Commissioner Ian Johnson Department of Corrective Services*** [2013] WAIRC 00032. In particular:

a. Mr Picks was physically provoked as part of a longstanding, escalating family feud;

b. he was experiencing considerable stress related to his wife's recent deterioration in health due to a failing third kidney transplant;

c. Mr Picks pleaded guilty to the charge to resolve the matter and avoid worsening the family feud;

d. the family feud has been de-escalated following intervention by Elders;

e. Mr Picks acknowledges the seriousness of the matter and his responsibility for the offence. He is remorseful and disappointed in his actions;

f. the incident took place in an uncontrolled environment which is unlike his work environment; and

g. Mr Picks had an unblemished work history with the Health Service since 2005. He was highly regarded by clinical staff for his ability to manage and de-escalate potentially violent situations.

38 Mr Picks disputes the Health Service's argument that as a result of s 151 of the HS Act he is unsuitable to work in patient facing roles. There is no evidence of Mr Picks ever becoming violent or aggressive at work. On the contrary, the evidence shows that Mr Picks is respected by his colleagues for his calm demeanour and ability to de-escalate volatile situations.

39 Further, Mr Picks maintains the necessary trust and confidence still exists between him and his former employer. Mr Picks argues that when all the circumstances are weighed and considered alongside his work history and the controls in the workplace, it is apparent that dismissal is a disproportionate outcome in this case. Mr Picks argued that the Board should adjust the Health Service's decision such that some other outcome is imposed, for example a reprimand.

40 Mr Picks says in all the circumstances the Board should adjust the Health Service's decision to dismiss him, such that his employment is reinstated with no loss.

The Health Service's evidence

41 The Health Service called Mr Shane Bolton and Mr Jeffrey Moffet to give evidence.

Mr Bolton's evidence

42 Mr Bolton has held a number of roles with the Health Service since 2013. Relevantly he was Mr Picks' manager from April 2016 to October 2018 when Mr Bolton was the Coordinator of Resources and Planning.

43 Mr Bolton gave evidence about the key responsibilities and inherent requirements of a Security Officer working for the Health Service:

> Security officers are required to interact with the consumer in a number of different ways. They're required to monitor site security by CCTV and work in the operations room to do that. They're required to patrol the grounds, they're required to patrol internally to demonstrate a security presence. They have physical security responsibilities, locking up, unlocking and the like. They have responsibilities to respond to emergencies, non-clinical emergencies, largely violence and aggression emergencies and that includes the restraint of certain people and other non-clinical emergencies such as fire and smoke, potential bomb threats. They have responsibilities there as a responding team member. They have guarding responsibilities for high risk patients. They have responsibilities to report incidents, various types. They have responsibilities to interface with the police on a number of different matters and they have responsibilities to document their security activity throughout the day.

44 When asked to provide an outline of Mr Picks' work experience and personal attributes, Mr Bolton said 'My understanding of Mr Picks' work experience is that he's been a security officer for at least a decade. That's my understanding. That's his work history.' Mr Bolton said Mr Picks took his role professionally.

45 Mr Bolton gave evidence about the non-clinical positions available in the Health Service's South West region that do not require a particular qualification. He said 'The handyman's position does not require a qualification.' When pressed further, Mr Bolton said 'The supplies clerk is – is a non-qualified position but all other positions within the facilities management team require a trade qualification.' Mr Bolton gave evidence that 'they all have some sort of element of patient facing, you know, they're – they're not patient facing like a nurse but a facilities management will be at the bed head of a patient. A supplies clerk will be at the cupboard restocking the consumables that are used in the room so there is none to my knowledge that are not directly patient facing.'

46 It is apparent from Mr Bolton's testimony that he was asked to consider whether there were any suitable alternative vacant positions for Mr Picks. Mr Bolton's evidence is that at the relevant time the only available position Mr Picks could have done was 'one vacant handyman's position'. From Mr Bolton's understanding of the Commissioner's Instruction No. 23 (**CI23**), he thought that the casual employee working in the handyman's position 'had to be considered' for the position. In cross-examination Mr Bolton said that the casual employee was in the process of being assessed under CI23, (presumably for conversion to permanency), but that assessment was not yet complete.

47 Mr Bolton did not give evidence about why he or anyone else within the Health Service considered that Mr Picks could not work in a patient facing role.

48 In cross-examination Mr Bolton said there was no 'effort to find out exactly like the resume or anything from [Mr Picks] to understand exactly what skillsets he may have had that [Mr Bolton wasn't] aware of.'. In re-examination Mr Bolton said his knowledge of Mr Picks' skillset came from his understanding that 'Mr Picks had been a security officer for the good part of 10 years not a tradesman.'

Mr Moffet's evidence

49 Mr Moffet is the Health Service's Chief Executive. He is responsible for a broad range of matters including the dismissal of employees.

50 Mr Moffet gave evidence about how he made the decision to dismiss Mr Picks. Mr Moffet said he received a briefing note that brought the Conviction to his attention. That briefing note did not contain any analysis or a recommendation.

51 Mr Moffet's evidence is that he considered the briefing note, discussed the matter with his team and a day or two later he proposed that Mr Picks could no longer remain in the Security Officer role. Mr Moffet said 'I could not see that that was a viable option whatsoever. Um, and, ah, ultimately, I guess, considering whether he could be found alternative employment, or in the alternative, if that was not possible, proposing termination. That was – that was really, ah, my thinking, um, I guess, my decision process.'

52 When asked if there were any other factors he considered in reaching the decision, Mr Moffet said:

> Well, ah, I guess there were steps. Um, the first - the first point for me was to, um, ask for consideration around alternate employment options. Um, and I - you talk - I talked with the IR team around that and - and they went back through their, um, processes to engage, um, with his manager, I - ah, I think, at that time. I had also specifically contacted the Regional Director and, um - Ms Kerry Winsor, ah, and asked her to - to consider that issue. Ah, ultimately, um, once they had, I guess, made their own, sort of, assessment and determination around what positions were available, um, suitability and skills in terms of alternate employment, ah, the advice back to me was there were, um, no realistic options. Um, at that point, there was a proposal or a decision taken to propose termination to Mr Picks himself.

53 Mr Moffet said that in discussion with his IR team, he considered Mr Picks' response to the proposal to dismiss and had a discussion with his Regional Director before making the final decision to dismiss Mr Picks. Mr Moffet described the matters Mr Picks raised, being his personal circumstances, employment record and the circumstances surrounding the Conviction. Mr Moffet gave evidence that 'the first consideration is, ultimately, for patient safety, protection of – of – of the public and patient safety.' Mr Moffet gave evidence about the emergency department and mental health areas being high risk environments because they are volatile and subject to a lot of provocation, as well as heightened emotions from patients and visitors. Mr Moffet said 'ultimately, um, a person with a recent conviction for assault occasioning bodily harm really was not an appropriate person to be placed in that setting. Um, and we could not guarantee, um, or have confidence, ah, that patient safety, ah, would occur, and protection of patients, um, as – was, I guess, reasonably afforded. It was too – too high a risk, in our judgment.'

Mr Moffet gave evidence about his concern that it would be an unacceptable risk to have Mr Picks working as a Security Officer and that he was confident a robust search for alternative roles was done:

> **MOFFET, MR:** I mean, for me, the tests, ah, are really about, ah, whether, in the future, if there was an, ah - an incident involving Mr Picks, um, that, ah, compromised the safety of a patient, staff member, ah, or a visitor, um, would - would that be a - a decision that, ah, I guess, a reasonable mind would think was okay. And ultimately, whilst an employee that might have a conviction of this type may be able to operate in other roles, and I think that's entirely acceptable, I - I don't think it's acceptable, and I didn't think it was acceptable at the time, to operate in a security role. I just don't think the risk could be managed in that manner. And I - I had no way of assuring myself about whether this was, um, a one-off in terms of, um, I guess, that type of conduct.
>
> **EMMANUEL C:** Was there something before you to suggest that it was more than one incident?
>
> **MOFFET, MR:** No, there was - there was nothing before me. Ah, but there was also, um, no evidence presented, um, ah, around, um - and when I wrote to Mr Picks, ah, obviously, he has opportunity to provide as much information as he would. And there were - beyond, I guess, a statement, which, understandably, um, one would - would make, that it was a one-off, I mean, I had to reach judgment about whether that was, um, sufficient to, um, I guess - to - to assure me that patient safety would be - would be guaranteed.
>
> **EMMANUEL C:** Is there anything else you want to say about why your evidence is that you considered at the time - and perhaps you still consider - that you couldn't have confidence that patient safety would be assured in his presence? And that you also said that it was too high a risk. Can you tell us anything else about why you say that?
>
> **MOFFET, MR:** Um, yeah, so - I mean, generically, if we are considering people to operate in security roles where - where, you know, a great deal of judgment and interpersonal skills, de-escalation, conflict management skills are required, um, we would never employ someone into that sort of a role with a recent conviction, ah, of assault occasioning bodily harm. It's - that's - that just would not make sense for us. It wouldn't pass the test. And I suspect it wouldn't in -

> in - in most sectors. So I guess - I mean, ultimately, that's the consideration for us, is - is, um, whether, ah, a conviction of that nature is - is consistent with the responsibilities of the role. Ah, and that's why I was at pains. I mean, I - I spoke twice to the Regional Director to see whether alternate employment options were available, because I accept that, um, you can have a conviction of that nature and be in a - a much lower risk role, or a non-patient-facing role. Um, and, ah, as I said, I - I had two discussions with the Regional Director in relation to that, and asked them to consider those issues. So, ah, you know, I - I was very mindful, um, that he was a sole income earner, ah, and - and had circumstances, um, in his family, um, that were difficult for him. Ah, we certainly would - I - I would have preferred that he was found alternate employment, but the reality is, um, roles have to be suitable and available, and he has to have the skills to match. And I - I was assured, um, at that time, um, that that - that was the case. They went through a robust test. And I have every confidence in, um, Mr Bolton and Ms Winsor that they are - they are really solid managers with a lot of integrity and a lot of commitment to their workforce.
>
> **EMMANUEL C:** A robust test in the carrying out of that search for alternative options, you mean?
>
> **MOFFET, MR:** Yes. Yep.
>
> **EMMANUEL C:** Okay?
>
> **MOFFET, MR:** I did, for example, um, ask them to consider, ah, alternate locations. I mean, Bunbury's large and, um, obviously has a number of jobs, but also alternate locations in - in or around the Southwest. So I know - I know that they searched further afield. Um, and at the same time, our - our IR team, um, made the same inquiry.

Health Service's submissions

54 The Health Service argues Mr Picks has not established that his dismissal was harsh in the circumstances.

55 Security Officers are responsible for providing patient, staff and visitor safety. That means there is a clear nexus between Mr Picks' conduct on the night of the incident and the inherent requirements of his role. The Health Service says it cannot be reassured that Mr Picks would not engage in aggressive behaviour again if provoked, nor that the family feud would not escalate in future. The Health Service says the character references tendered by Mr Picks are of limited value because some of the referees would not have been aware of the Conviction. Further, given Mr Picks has lost his security licence, it is 'disingenuous of him to purport that he is a fit and proper person to provide security services for patients, visitors and staff at public healthcare facilities.'

56 The Health Service says Mr Picks cannot do any patient facing role, although it does not explain in any detail why that is the case. When pressed, the Health Service said that given the nature of Mr Picks' conviction, there would be a risk in Mr Picks doing any patient facing role.

57 The Health Service argues the only role it could have placed Mr Picks in was the handyman role but the Health Service could not displace an employee deemed permanent under CI23 for an employee convicted of a serious offence.

58 For those reasons, taking into account that patient care is the paramount consideration in accordance with s 151 of the HS Act, the Health Service says dismissal remains the appropriate outcome. The Board should not adjust the Health Service's decision.

Consideration

59 The Board accepts Mr Picks' submission that 'all the circumstances of the offending and of the employment… need to be weighed in the balance' when deciding whether the decision to dismiss should be adjusted.

60 In short, the Board considers a real injustice has been done to Mr Picks. The decision to dismiss was a disproportionate response and that decision should be adjusted. We reach that conclusion for the following reasons.

61 All of the witnesses in this matter were reliable. Mr Picks' testimony was particularly forthcoming and credible.

62 We accept that Mr Picks' Conviction arose in unique circumstances. It was the culmination of provocation in the context of long-running, complex, cultural family tension and the stress of his wife's recent, problematic kidney transplant. It goes without saying that assault occasioning bodily harm is a serious matter. However the Board is satisfied that Mr Picks' continued employment does not pose an unacceptable risk to the Health Service.

63 The Board accepts Mr Michael's and Mr Picks' evidence that the family feud has been de-escalated as a result of Elder intervention. Further, the Board finds that in the unlikely event that Mr Picks were to be provoked at work by a person with whom Mr Picks had family or cultural tensions, Mr Picks would either remove himself from that situation or otherwise respond appropriately.

64 The Board is mindful of our obligation under s 153 of the HS Act to have regard to s 151 of the HS Act.

65 The Board accepts Mr Fisher's evidence about Mr Picks' ability to remain calm while working with violent, volatile and challenging people and situations. It is apparent, and the Board finds, that Mr Picks performed his role as Security Officer well for over 13 years. Mr Picks' employment record was unblemished. The Board considers that the evidence demonstrates that Mr Picks is able to perform the inherent requirements of the Security Officer role. Mr Picks is skilled at responding to violent, aggressive and volatile behaviours and emergencies. In the circumstances Mr Picks does not represent a threat to, or otherwise compromise patient, staff or visitor safety. On the evidence before us in this matter, we find that Mr Picks' ongoing employment is more likely to enhance patient care than compromise it.

66 The Board makes the findings at [65] without relying on Mr Picks' references. Clearly the references tendered by Mr Picks do not amount to sworn evidence. However the Board is not bound by the rules of evidence: s 80L and s 26(1) of the IR Act. In the circumstances of this matter, it would be difficult to find that the Health Service is prejudiced by the references being taken into account. The references were filed and served nearly four months before the hearing. Many of the references were from the Health Service's own senior employees. Indeed, many were written on the Health Service's letterhead. The Board

considers, and the Health Service concedes, the Health Service could have made enquiries of those employees. The Health Service did not.

67 Further, the Health Service does not seek to challenge the truthfulness of the references. Rather the Health Service said that it could not be known whether the referees knew about the Conviction and how it may have affected their view of Mr Picks. As was pointed out to the Health Service, it is apparent from the references that some of the referees were aware of the Conviction.

68 In our view, to the extent that the references are from Mr Picks' former colleagues and relate to his work performance and patient safety, they are relevant to the issue of whether Mr Picks' employment would compromise the protection of patients. We consider that it would be open to us and in accordance with s 26(1)(b) of the IR Act to place some weight on the references. However, as we say at [66], we make our finding that Mr Picks remains suitable to perform the Security Officer role without relying on the references.

69 Mr Moffet and the Health Service referred to 'discussions with the team' but there was no evidence or even submissions about what those discussions entailed. Relevantly, the only evidence before the Board is that the decision-maker considered it would not be possible for Mr Picks to work as a Security Officer or in any patient facing role because the risk was too great.

70 We note two matters in passing. First, the Chief Executive was unlikely to have been assisted by the briefing note, given it lacked the fundamental material one could reasonably expect would be included. At a minimum, the briefing note should have included analysis and a recommendation or recommendations for Mr Moffet to consider.

71 Second, the letter dismissing Mr Picks from his employment was decidedly lacking. In our view, an employee is entitled to be told the reasons why his employer has decided he should be dismissed. If, in response to a proposal to dismiss, an employee has put forward matters to be considered before the final decision is made, and those matters make no difference to the proposed decision, the employer should explain why that is so. It is unfortunate that in its letter to Mr Picks dated 7 November 2019, the Health Service did not explain the reasons why it considered dismissal to be appropriate, nor why the matters Mr Picks put forward made no difference to the outcome.

72 The circumstances in this matter are very different to those in the cases relied on by the Health Service. Mr Picks' actions cannot be reasonably compared to a senior government lawyer who ran an escort agency and engaged in tax fraud: ***Bercove v Hermes (No. 3)*** (1983) 74 FLR 315, a professor who had a sexual relationship with his student: ***Orr v The University of Tasmania*** (1957) 100 CLR 526, nor a public servant who committed two counts of indecency against a child: ***Cooper v Australian Taxation Office*** [2015] FWCFB 868.

73 The Health Service relies on ***B. Rose v Telstra Corporation Limited*** (Unreported, AIRC, Print Q9292) and submits that the Conviction:

a. viewed objectively is likely to cause serious damage to the relationship between Mr Picks and the Health Service;

b. damages the Health Service's interests; and

c. is incompatible with Mr Picks' duty as an employee.

74 The Board does not accept those submissions. Viewed objectively, the Conviction was not likely to cause such serious damage to the employment relationship so as to warrant dismissal in the circumstances of this matter. Further, no evidence of damage to the Health Service's interests was led. The evidence does not support a finding that the Conviction is incompatible with Mr Picks' duty as an employee, such that the Health Service can no longer hold out Mr Picks as a suitable person to work as a Security Officer. Here there is not evidence that such a view could be said to be genuine, credible or rationally based. Applying the reasoning of the Full Bench in ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** [2016] WAIRC 00236; (2016) 96 WAIG 408 at [106], the Board is satisfied that the employment relationship can and should be restored.

75 The Board considers that the Health Service has applied simplistic reasoning to a complex issue. The circumstances of the Conviction do not lead to the conclusion that Mr Picks cannot work as a Security Officer or in any other patient facing role.

76 In our view, the Health Service's approach would have been understandable if Mr Picks had assaulted a vulnerable person or someone in his care. While serious and clearly regrettable, the circumstances of the Conviction were not that. When viewed in context, and taking into account Mr Picks' exemplary employment record and demonstrated approach in diffusing violent situations at work, the fact of the Conviction does not lead to the conclusion that Mr Picks cannot work as a Security Officer or in any other patient facing role.

77 That Mr Picks has lost his security licence does not lead us to conclude he cannot work as a Security Officer or in any other patient facing role. We do not accept the Health Service's submission that 'it would be disingenuous for [Mr Picks] to purport that he is a fit and proper person to provide security services for patients, visitors and staff at public healthcare facilities.' The Board understands that the circumstances of the Conviction were not considered when Mr Picks' security licence was revoked. Rather, a conviction of that type automatically results in the revocation of the relevant security licence. Further, the Health Service does not require its Security Officers to hold a security licence.

78 Even if the Board had concluded that Mr Picks could no longer work as a Security Officer, we would have had serious concerns about the Health Service's search for an alternative role. In our view, such as it was, the 'search' can hardly be described as 'robust'. First, it was not reasonable to conclude that Mr Picks could not do any patient facing role. Second, in order to properly consider Mr Picks for a role other than the one he had done for over a decade, at a minimum the Health Service needed to ask Mr Picks about his skills and qualifications. It did not.

79 It was wholly inadequate to conduct a search for an alternative role without engaging with Mr Picks at all. That Mr Bolton knew of Mr Picks' skills in the context of his work as a Security Officer does not mean that Mr Bolton knew what else Mr Picks may have been able to do. Further, contrary to the Health Service's submission set out at [57], the evidence did not support a finding that a casual employee had been deemed permanent under CI23. Mr Bolton's evidence was that a casual employee was in the process of being assessed under CI23. Those circumstances do not preclude the Health Service from considering Mr Picks for that role.

80 The Board considers that Mr Picks has been treated harshly and unfairly indeed. We find that the decision to dismiss was harsh, unfair and disproportionate.

How should the decision be adjusted?

81 We consider that the matters set out at [37] sufficiently outweigh the gravity of the Conviction. Taking into account all of the circumstances of the matter, Mr Picks should not lose his job.

82 The decision to dismiss should be adjusted such that it is replaced with a decision to impose a warning and improvement action in the form of training. Mr Picks should be reinstated without loss and with continuity of employment benefits. His service should be deemed continuous for all relevant purposes.

83 In making our decision about how the Health Service's decision to dismiss should be adjusted, we have taken into account that Mr Picks failed to report the criminal charge and Conviction.

84 We will order accordingly.

2020 WAIRC 00808

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 7 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD PICKS
	APPELLANT
	-v-
	WA COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR D HILL - BOARD MEMBER
	MR M GOLESWORTHY - BOARD MEMBER
DATE	THURSDAY, 17 SEPTEMBER 2020
FILE NO	PSAB 23 OF 2019
CITATION NO.	2020 WAIRC 00808

Result	Appeal upheld
Representation	
Appellant	Mr C Studsor (as agent)
Respondent	Ms S Waterton & Ms R Sinton (as agents)

Order

HAVING heard from Mr C Studsor as agent on behalf of the appellant and Ms S Waterton and Ms R Sinton as agents on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT appeal PSAB 23 of 2019 is upheld;
2. THAT the decision by the respondent to dismiss the appellant is adjusted by being quashed and replaced with a reprimand and training and development;
3. THAT the appellant is reinstated without loss of pay or entitlements within 14 days of the date of this order; and
4. THAT the appellant's service is deemed continuous for all relevant purposes.

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

2020 WAIRC 00815

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 1 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PONNURAJAH (PON) RATNASINGHAM
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MR G LEE - BOARD MEMBER
	MS M BASTIAN - BOARD MEMBER
DATE	WEDNESDAY, 23 SEPTEMBER 2020
FILE NO	PSAB 22 OF 2019
CITATION NO.	2020 WAIRC 00815

Result	Appeal dismissed
Representation	
Appellant	Mr M Amati (as agent)
Respondent	Ms J Vincent (of counsel) and with her Mr T Ledger (of counsel)

Order

HAVING heard from Mr M Amati, as agent, for the appellant and Ms J Vincent, of counsel, and with her Mr T Ledger, of counsel, for the respondent on Tuesday, 22 September 2020;

WHEREAS the appellant's representative emailed the Associate of the Public Service Appeal Board at 8:35 am on Wednesday, 23 September 2020 stating that he had been instructed by the appellant to seek leave to discontinue the appeal;

AND WHEREAS the respondent's representative informed the Associate of the Public Service Appeal Board, during a telephone conversation commencing at 9:28 am on Wednesday, 23 September 2020, that the respondent consented to the appellant having leave to discontinue the appeal;

AND WHEREAS the Public Service Appeal Board unanimously granted the leave sought;

AND WHEREAS for the avoidance of any doubt the Public Service Appeal Board considers it appropriate to formally dismiss the appeal;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

(1) THAT leave to discontinue the appeal be granted; and

(2) THAT the appeal be, and is hereby, dismissed.

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

NOTICES—Union Matters—

2020 WAIRC 00854

NOTICE

FBM 1 of 2020

NOTICE is given of application FBM 1 of 2020 by United Voice WA to the Commission in Court Session of the Western Australian Industrial Relations Commission (WAIRC) for an alteration to the Title, Rule 1 – Name, Rule 3 – Eligibility for Membership and Rule 29 – Counterpart Federal Body of its registered rules.

The proposed alterations are detailed below. Proposed alterations are shown as strikethrough for deletions and underlining for additions.

Title

~~United Voice WA~~ United Workers Union (WA) Rules

Rule 1 - Name

The name of the union is ~~United Voice WA~~ United Workers Union (WA).

Rule 3 – Eligibility for Membership

(6) Together with such other persons whether employed in the foregoing industries or not as have been appointed officers of ~~United Voice WA~~ United Workers Union (WA) as at the date of registration of this union.

Rule 29 – Counterpart Federal Body

Each office within the union may, from such time as the Branch Executive or Branch Council may determine, be held by the person who, in accordance with the rules of ~~United Voice~~ United Workers Union, in respect of ~~United Voice WA~~ United Workers Union (WA), holds the corresponding office in that body.

A copy of the Rules of the organisation and the proposed rule alterations may be inspected in the Registry on Level 17, 111 St George's Terrace, Perth, WA.

Any person who objects to the application and who, having given notice of that objection within the time and in the manner prescribed, satisfies the Commission in Court Session that the person has a sufficient interest in the matter, may appear and be heard in objection to the application.

Pursuant to regulation 69(5) of the *Industrial Relations Commission Regulations 2005* (WA) a notice of an objection in the approved form (Form 1A – Multipurpose Form) must be filed within 21 days of this notice. A Form 1A – Multipurpose Form is available on the WAIRC website at www.wairc.wa.gov.au under Applications & Forms.

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

VOCATIONAL EDUCATION AND TRAINING ACT 1996—Appeals dealt with—

2020 WAIRC 00841

APPEAL INSTITUTED UNDER S 60F OR S 60G OF THE VOCATIONAL EDUCATION AND TRAINING ACT 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TMSW PTY LTD
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 9 OCTOBER 2020
FILE NO/S	APA 2 OF 2020
CITATION NO.	2020 WAIRC 00841

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS application APA 2 of 2020 was filed on 24 June 2020;

AND WHEREAS on 29 July 2020 a conference was held in this application;

AND WHEREAS the applicant's representative agreed to update the Commission by 7 August 2020 about whether the applicant intended to continue with this application, but did not update the Commission;

AND WHEREAS the applicant's representative was again asked on 11 August 2020 to update the Commission about whether the applicant intended to continue with this application, but did not update the Commission;

AND WHEREAS my Associate left a voice message for the applicant on 24 August 2020 asking the applicant's representative again for an update about this application, but received no response;

AND WHEREAS on 8 September 2020 my Associate emailed the applicant's representative and informed her that if she did not update the Commission about whether the applicant intended to continue with this application, a show cause hearing would be listed;

AND WHEREAS the applicant's representative did not update the Commission and on 15 September 2020 a show cause hearing was listed. My Associate emailed and posted notices of hearing to the applicant's representative that day, and in her covering email, my Associate informed the applicant's representative that if the applicant did not attend the show cause hearing and did not show cause why this application should not be dismissed, then this application would be dismissed;

AND WHEREAS the applicant has not contacted the Commission since 30 July 2020;

AND WHEREAS a show cause hearing was held on 8 October 2020 and there was no appearance by the applicant;

AND WHEREAS I am satisfied that a notice of hearing was served on the applicant in accordance with regulation 24 of the *Industrial Relations Commission Regulations 2005* (WA) by email (a successful delivery receipt was received) and by post on 15 September 2020;

AND WHEREAS the applicant has had ample opportunity to prosecute APA 2 of 2020 but has not, has not given any reason for the failure to do so, and has not given an explanation for the delay or made any submissions about hardship;

AND WHEREAS in the circumstances, I consider that this application should be dismissed for want of prosecution;

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

THAT application APA 2 of 2020 be, and by this order is, dismissed.

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