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FULL BENCH—Appeals against decision of Commission—

2020 WAIRC 00927

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. CR 15 OF 2018 GIVEN ON 17 APRIL 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2020 WAIRC 00927
CORAM	:	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
HEARD	:	TUESDAY, 8 SEPTEMBER 2020
DELIVERED	:	FRIDAY, 20 NOVEMBER 2020
FILE NO.	:	FBA 5 OF 2020
BETWEEN	:	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION WESTERN AUSTRALIA Appellant AND STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED) Respondent

ON APPEAL FROM:		
Jurisdiction	:	**The Western Australian Industrial Relations Commission**
Coram	:	**Commissioner D J Matthews**
Citation	:	**2020 WAIRC 00300; 2020 WAIRC 301**
File No	:	**CR 15 of 2018**

Catchwords	:	Industrial law (WA) - Appeal against decision of Commission - Whether leave to appeal a finding should be granted in the public interest - Application to dismiss proceedings at first instance - Principles applied - Whether reasons for decision adequate - Principles applied - Whether Commission obliged to notify party of matters to be taken into account - Reinstatement - Fitness for work - Trust and confidence - Principles applied
Legislation	:	*Industrial Relations Act 1979* (WA) ss 26(3), 27(1)
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	Mr J Carroll of counsel
Respondent	:	Ms R Cosentino of counsel

Case(s) referred to in reasons:

Adam v East Metropolitan Health Service (2019) 99 WAIG 556

Australian Federal Police v Kalimuthu [2015] WASC 376

Australian Liquor, Hospitality and Miscellaneous Workers Union v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

Australian Rail, Tram and Bus Industry Union v Public Transport Authority of Western Australia [2017] WASCA 86; (2017) 97 WAIG 431

BHP Billiton Iron Ore Ltd v The Transport Workers Union of Australia, Union of Workers, Western Australian Branch [2006] WAIRC 03908; (2006) 86 WAIG 642

Bucu v Midland Brick Co Pty Ltd (2002) 82 WAIG 743

Chief Executive Officer, Department for Child Protection and Family Support v IGR [2019] WASCA 20; (2019) 54 WAR 222

Colson v Barwon Health [2013] FWC 8734

Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union (2004) 143 IR 354

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

Marshall v Lockyer [2006] WASCA 58

Mt Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273

Nguyen Le v Vietnamese Country Community Ethnic School South Australian Chapter [2014] FWCFB 7198

Perth, Fremantle and Suburban Bread Carters' Industrial Union of Workers v Coastal District Master Bakers' Industrial Union of Employers (1903) 2 WAAR 71

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

Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union [2017] WAIRC 00452; (2017) 97 WAIG 1329

Rainbow Coast Neighbourhood Centre Inc v Kylie Wood [2011] WAIRC 00821; (2011) 91 WAIG 1831

Ruane v Woodside Offshore Petroleum Pty Ltd (1991) 71 WAIG 913

Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (2007) 69 NSWLR 198

Scaffidi v Chief Executive Officer, Department of Local Government and Communities [2017] WASCA 222; (2017) 52 WAR 368

State School Teachers Union v Director-General Department of Education (2018) 98 WAIG 1157

State School Teachers Union v Director-General Department of Education (2019) 99 WAIG 336

The Australian Rail, Tram and Bus Industry Union of Employees v Public Transport Authority of Western Australia [2017] WAIRC 00830; (2017) 97 WAIG 1689

Warren v Coombs [1970] HCA 9; (1979) 142 CLR 531.

X v The Commonwealth (1999) 200 CLR 177

Reasons for Decision

SCOTT CC:

Introduction

1 I have had the benefit of reading the reasons for decision of the Senior Commissioner. I agree with those reasons and the conclusion that the appeal ought to be dismissed. However, there are two matters I wish to comment on.

Adequacy of the reasons

2 As the Senior Commissioner notes, the reasons at first instance are brief. The reasons do not set out the sorts of recitation of evidence and analysis both of facts and the law that are regularly included in such reasons. The question is, though, whether the requirements of the law regarding adequacy of reasons have been met.

3 In considering whether they are adequate it is necessary that the Full Bench is able to discern why the learned Commissioner concluded as he did. It is also desirable that the reasons explain why the losing party's case failed. In this case, the Senior Commissioner has been able to discern why the learned Commissioner formed his various conclusions by going back to the evidence and arguments before the Commissioner rather than from explanation or analysis behind those conclusions contained in the reasons.

4 One example is where the learned Commissioner dealt with the issue of Mr Kilner's purported lack of trust making reinstatement impracticable. At [23], the Commissioner referred to the respondent relying:

> "…upon some documents the applicant's member produced and some communications from the applicant's member to parliamentarians and office holders within the Department of Education."

5 At [24], the learned Commissioner stated "I have read those documents closely". There was no identification of what the documents were or what Mr Kilner said in them.

6 In [27], the reasons for decision say that the concerns expressed by Mr Kilner in the documents and communications "were all expressed to relevant people". The people to whom they were expressed were not identified. There is no explanation as to why they were "relevant" people.

7 At [29], the learned Commissioner said "the tone of the documents and communications is, in my view, fine". It appears from the next brief sentence that the reason that the tone was fine was because there was "no abuse or offensive language". However, there was no identification or analysis of what was said, whether it was reasonable, or the tone and why it was fine.

8 A further example is the lack of analysis of Professor Janca's evidence other than that the Commissioner found that it was cogent and credible.

9 It was upon the identification and analysis undertaken by the Senior Commissioner in his reasons, that it may be concluded, based on the material before the Commission at first instance, that the conclusions drawn by the Commissioner at first instance were open, and that in light of the analysis done by the Senior Commissioner, that those reasons were adequate.

10 Therefore, while, as a matter of law, the reasons may be sufficient, they would be enhanced for the purposes of a better understanding of them if they provided more detailed explanations and analysis rather than brief or imprecise references and conclusions.

Trust and confidence

11 It was quite clear from the history of Mr Kilner's correspondence with his employer and others that he was someone who expressed his concerns and complaints, and his desire for improvement. His correspondence with the Director General could be viewed as challenging the competency and good faith of the Director General, the Department, various sections within it and individual principals, deputy principals and district directors over particular, identified issues. Whilst expressing his dissatisfaction, concerns and grievances, Mr Kilner's correspondence with the Director General was expressed in a manner that was not disrespectful or discourteous. She responded with courtesy and thanked him for drawing those things to her attention, and she pointed out areas of change that were being effected. The Director General's letters were expressed in typical public sector language and tone. There is nothing to suggest that Mr Kilner's correspondence was viewed by her as evidencing a breakdown in trust and confidence. It is true that throughout an extensive period, he was disgruntled, could be described as agitating and being an activist, and in some cases was over-exuberant. However, there appeared to be no malice in his communications albeit that by the time he was communicating with the Director General, the Minister and others, he was deep in the throes of the dispute leading to this claim.

12 In his correspondence, Mr Kilner pointed to other cases where teachers employed by the Director General had been treated unfairly and in that sense his complaints had some validity. He also made complaints about the Department not accepting the umpire's decision. Whilst that was his view, it ignored the right of any litigant to avail themselves of an appeal within the "umpiring" process. However, that is not enough to demonstrate a breakdown in trust and confidence. An employee is entitled to raise complaints and grievances and to express their views, provided that they do so in a reasonable way, and without malice or mischief. Employees are not expected to be meek and compliant in all things.

13 Although there may have been an escalation in Mr Kilner's expressions of concerns, tone and the scope of the people to whom he complained, he did not express a breakdown of trust and confidence. It is one thing to have complaints and be disgruntled and another to express them in the sorts of allegations raised in *Vimpany*. I would dismiss this ground of appeal.

KENNER SC:

Background

14 The proceedings relating to the present appeal have some history. The appellant's former employee, Mr Kilner, was employed as a teacher at Busselton Senior High School (BSHS). He had been employed by the appellant since May 1982. In February 2018, his employment by the appellant as a Senior Teacher was terminated on the grounds of ill health. The respondent, on behalf of Mr Kilner, made an application under s 44 of the *Industrial Relations Act 1979* (WA) alleging that Mr Kilner's dismissal by the appellant was harsh, oppressive, and unfair. Given the circumstances of Mr Kilner's dismissal on ill health grounds, the respondent sought an order that Mr Kilner be reinstated or re-employed at a school other than BSHS.

15 The Commission found at first instance that the dismissal of Mr Kilner was unfair but declined to reinstate him or order he be re-employed. An order for the payment of compensation was made: ***State School Teachers Union v Director-General Department of Education*** (2018) 98 WAIG 1157; 1162. On appeal to the Full Bench, the Full Bench suspended the Commission's decision and remitted the matter back to the Commission for further hearing. The issue to be determined by the Commission on the remittal was Mr Kilner's current state of health, given the paucity of clear evidence on the issue in the proceedings at first instance: ***State School Teachers Union v Director-General Department of Education*** (2019) 99 WAIG 336. The matter to be considered by the Commission was "Mr Kilner's capacity to return to work, and the practicability of being reinstated or alternatively re-employed at a school other than BSHS": at [120].

16 On the remittal proceedings, the learned Commissioner concluded on the evidence, including medical evidence obtained by the respondent, that as at the time of the remittal, Mr Kilner was fit for work at a school other than BSHS. The Commission also dismissed an application brought by the appellant under s 27(1) of the Act, that the proceedings should be dismissed because the respondent failed to disclose a medical certificate, and a medical report in the respondent's then solicitor's possession, at the first instance hearing. The Commission discounted the amount to be paid to Mr Kilner for remuneration lost by 50 per cent, with 25 per cent being for Mr Kilner's failure to mitigate his loss and a further 25 per cent, in recognition of the respondent's failure to disclose the documents at the first hearing: ***State School Teachers Union v Director-General Department of Education*** [2020] WAIRC 00292; (2020) 100 WAIG 371. From this decision the present appeal is brought. Whilst there are 13 separate grounds of appeal, they can be grouped into three main issues, they being the dismissal of the s 27(1) application; the fitness for work reinstatement issue; and the lack of trust and confidence reinstatement issue. There are further matters raised by the grounds of appeal and they are that the learned Commissioner's reasons for decision at first instance were inadequate and second, two matters relating to the Commission's duty under s 26(3) of the Act.

Appeal principles

17 Given the decision at first instance was a discretionary one, the Full Bench can only intervene if satisfied that error is established in the sense discussed in ***House v R*** [1936] HCA 40; (1936) 55 CLR 499. The Full Bench may draw its own inferences from facts as found and is not limited to those drawn by the Commission at first instance: ***Warren v Coombs*** [1970] HCA 9; (1979) 142 CLR 531.

Public interest

18 An appeal does not lie to the Full Bench from a "finding", unless the Full Bench is satisfied that the matter is of such importance that in the public interest it should entertain the appeal: s 49(2a) Act. As was said by the Full Bench in ***Rainbow Coast Neighbourhood Centre Inc v Kylie Wood*** [2011] WAIRC 00821; (2011) 91 WAIG 1831 at [24]:

> Is the matter of such importance that in the public interest an appeal should lie?
>
> 24 The principles that apply when considering the importance of an appeal in the public interest was settled in ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (***1989) 69 WAIG 1873. In that matter the Full Bench unanimously held that the words 'public interest' are not to be narrowed to mean 'special or extraordinary circumstances'. An application may involve circumstances which are neither special nor extraordinary. It may involve circumstances which, because of their very generality, are of great importance in the public interest. Each matter will be a question of impression and judgment whether the appeal has the required degree of importance. Also important questions that may have effect in other industries, and substantial matters of law affecting jurisdiction, can give rise to matters of sufficient importance in the public interest to justify an appeal: ***Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch*** (2005) 86 WAIG 247 (Ritter AP) [13] – [14].

19 See too: ***The Australian Rail, Tram and Bus Industry Union of Employees v Public Transport Authority of Western Australia*** [2017] WAIRC 00830; (2017) 97 WAIG 1689 per Smith AP at [68].

20 The appellant contended that the matters relevant to the s 27(1) application are of such importance that an appeal should lie. In referring to the above ***PTA*** Full Bench decision, the appellant submitted that the public interest was served because the application at first instance related to the standards of conduct that should have to be met by parties to proceedings before the Commission. This includes the oversight of such standards; ensuring parties are not unfairly prejudiced by the conduct of an opposing party; that the procedures of the Commission are not brought into disrepute and that the obligation on the Commission to act according to equity and good conscience is sustained. It was further contended that the Commission's errors in relation to determining the s 27(1) application were "substantial and egregious". Finally, the submission was made that given the substantive proceedings were dealt with and determined with the s 27(1) application, no delay would be occasioned by entertaining an appeal from this interlocutory decision. The respondent opposed the grant of leave and contended that the matters raised in the grounds of appeal are not of sufficient moment. It was submitted that the matters do not involve issues of wider importance to other parties to proceedings before the Commission.

21 It is not without some hesitation that I consider that leave should be granted on this occasion. The matters the subject of these grounds of appeal do go to allegations of improper conduct of a registered organisation under the Act, both towards the appellant in these proceedings and more important, in relation to the respondent's obligations to the Commission. And the grounds of appeal raise matters about the proper test to apply in exercising the s 27(1) discretion.

Section s 27(1) application

22 This issue is dealt with in grounds 3, 4 and 5 of the grounds of appeal. These grounds of appeal are in these terms:

> 3. In dismissing the s 27 Application, the Commissioner erred in law by mistaking the facts in finding at [40] and [41] of the reasons for decision that Exhibit 4 only related to Mr Kilner's fitness to work at Busselton Senior High School **(BSHS),** and not any other school.
>
> (a) Exhibit 4 related to all schools, and not just BSHS, and
>
> (b) the mistake led the Commissioner to materially misunderstand the prejudice occasioned the Director General by the failure to disclose that document (see [58]).
>
> 4. The Commissioner erred in law by constructively failing to exercise his jurisdiction according to law when purporting to deal with the s 27 Application. In particular:
>
> (a) to deal with the s 27 Application according to law, it was necessary for the Commissioner to:
>
> (i) identify the matters which were relevant to the public interest (whether those matters weighed for or against dismissing the proceedings),
>
> (ii) make findings of fact in relation to each of those matters, and
>
> (iii) weigh and balance the matters relevant to the public interest in order to determine if further proceedings were necessary or desirable in the public interest, however
>
> (b) the Commissioner failed to undertake the above steps when purporting to deal with the s 27 Application.
>
> 5. In dealing with the s 27 Application, the Commissioner made an error of principle in implicitly finding that it was for the Director General to prove "who did what and when" ([64] and [65]) in circumstances where:
>
> (a) the conduct of the Union was objectively improper and the failure to disclose the medical evidence it held caused prejudice to the Director General and wasted time and resources of the Director General and the Commission,
>
> (b) the Union is bound by the acts of its officers and counsel, regardless of who engaged in such conduct or when they engaged in such conduct, and

(c) the question of "who did what and when", in relation to the matters raised in the s 27 Application, are matters wholly within the knowledge of the Union (and not the Director General).

23 To understand the basis for these grounds of appeal, some consideration of the factual background to these proceedings is necessary. As a preliminary to this, I should make some comment on the law, although it is well known. The power to dismiss or refrain from hearing a matter under s 27(1) was considered by me in the ***PTA*** Full Bench noted above, where I said at pars 137 - 138:

137 Section 27(1)(a) is a power to dismiss an application or refrain from further hearing an application. This power is broad in scope and should be exercised with caution. It is in the following terms:

27. Powers of Commission

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

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

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

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

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

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

And

…

138 In ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2013] WAIRC 00754; (2013) 93 WAIG 1431, in considering an application under s 27(1)(a)(ii) to dismiss a matter before the Commission in the public interest, I said at pars 22 and 23:

22 In another context, in *The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd* (2006) 86 WAIG 1268, I considered the meaning of the "public interest" for the purposes of s 36A(1) of the Act. In referring to s 27(1)(a)(ii) of the Act, empowering the Commission to dismiss or refrain from further hearing a matter, I referred to *QEC* and at par 35 I observed as follows:

35 Given the construction I have placed on s 36A(1) of the Act, it is for the PTA to demonstrate that it would not be in the public interest for the Proposed Award to the made. The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:

"The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise or jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1]* (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) Access to Justice, vol II, book 1 (1978) pp 5ff; Raz, The Authority of Law, (1979), at p 217)."

23 I adopt what I said in *Skilled Rail Services* for present purposes. The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 4.

24 Given that the s 27(1) power enables the Commission to terminate a proceeding otherwise validly commenced, and there is no other jurisdiction in which the respondent's claim on behalf of Mr Kilner could be pursued, the burden on the appellant to persuade the Commission to exercise its powers under s 27(1) was a weighty one. This is particularly so as in the proceedings then to date, Mr Kilner had been found to have been unfairly dismissed and had been awarded compensation for loss. Whilst the remedy had been suspended on the first appeal for reconsideration on the remittal, the finding of unfairness remained undisturbed. The grant of the s 27(1) application would have effectively left Mr Kilner without a remedy. An important consideration for the Commission at first instance in considering the appellant's s 27(1) application, was where the equity and good conscience lay under s 26(1)(a) of the Act. This involved the learned Commissioner's good conscience based on all the material before him: ***Perth, Fremantle and Suburban Bread Carters' Industrial Union of Workers v Coastal District Master Bakers' Industrial Union of Employers*** (1903) 2 WAAR 71: per Parker J.

25 Underlying the appellant's grounds of appeal and submissions on this issue was an assertion of improper conduct by the respondent in failing to alert the appellant and the Commission at the time of the first hearing leading to the Commission's first decision in August 2018, of a further medical certificate from Mr Kilner's general practitioner, Dr Buckeridge, dated 1 March 2018. It was said that this second medical certificate also related to Mr Kilner's fitness for work. This second medical certificate, a copy of which is at AB 331, formal parts omitted, said:

> This is to certify that Bill Kilner will be unable to attend work from 01/03/2018 to 01/07/2018 inclusive due to a medical condition.
>
> He is making progress in his psychological treatment plan and should be fit for work at another school once he has dealt with the charges brought against him and had time to process this.
>
> There should be no reason why Mr Kilner could not continue teaching at another school in term four.

26 It was submitted that had this medical certificate been disclosed by the respondent, it may have had a material impact on the issue of Mr Kilner's fitness for work at a school other than BSHS, and the conduct of the appellant's case.

27 Mr Kilner gave evidence in the first hearing that by January 2018, his health was improving, and he expected to return to work as a Senior Teacher in September 2018 or by Term 4 at the latest: AB 218 - 219. In his evidence, on the remittal proceedings, Mr Kilner said the reference he made at [78] of his original witness statement in the first hearing, was based on what his general practitioner, Dr Buckeridge, had told him. He also said the reference to "RTW" meant any school other than BSHS: AB 600.

28 The medical evidence, as background to the present issue, was canvassed in some detail in the first Full Bench decision at [21] - [47], [90] - [95] and [100] - [107]. The Full Bench also commented at [86] on the inadequacy of the parties' cases put in the first hearing, and that in some respects, the medical evidence before the Commission was "contradictory and incomplete". I note in particular that before the controversial 1 March 2018 medical certificate from Dr Buckeridge in the possession of the respondent, Dr Lai, the appellant's occupational physician, wrote to Dr Buckeridge on 6 December 2017, to seek his opinion as to Mr Kilner's return to work "in his substantive position at Busselton in the foreseeable future? i.e. within the next 1 to 2 years": AB 298. Dr Mowat, Mr Kilner's psychologist, received a similar request from Dr Lai: AB 299.

29 On 8 December 2017, Dr Mowat responded to Dr Lai. In his letter, Dr Mowat, as to Mr Kilner's prognosis, said "Based on my meetings with Bill, I do not think he is likely to regain medical capacity to return to Busselton Senior High School in the foreseeable future": AB 301. Dr Buckeridge, by a medical certificate dated 15 December 2017, certified Mr Kilner as medically unfit to attend work from 15 December 2017 to 1 July 2017 [sic] inclusive. Dr Buckeridge said "At this stage I do not know whether Bill is likely to regain work capacity. I will assess this midway through next year": AB 302. As Mr Kilner was still employed at this stage, this medical certificate was in the possession of the appellant. Therefore, the appellant must have been taken to have known this broad assessment by Dr Buckeridge of Mr Kilner's fitness for work and it was available to the appellant's counsel for the hearing in the first proceedings. As referred to by the first Full Bench at [93], Dr Lai then provided his medical report dated 20 December 2017 to the appellant, in which he referred to both Dr Mowat's and Dr Buckeridge's responses.

30 Besides the second Dr Buckeridge medical certificate, a medical report dated 29 June 2018 from Dr Ng to the respondent's then solicitors, was also provided to the appellant by way of informal discovery, before the remittal proceedings. The appellant accepts that this medical report at the time of the first hearing, and before its production by the respondent to the appellant, was privileged: AB 332. In this medical report, Dr Ng expresses the opinion that given the prior history at BSHS, Mr Kilner should not return to this school. However, importantly, Dr Ng expressed the opinion that Mr Kilner's psychiatric condition had improved and he could commence a graduated return to work programme at another school, with low levels of violence, aggression or intimidation of staff. Dr Ng opined that Mr Kilner's psychiatric condition was most likely to continue to improve: AB 344 - 345.

31 Thus, based on the second medical certificate of Dr Buckeridge, along with the then privileged medical report from Dr Ng, the prognosis for Mr Kilner's recovery and return to work at a school other than BSHS was more positive. The second medical certificate from Dr Buckeridge was more, and not less, optimistic, of a return to work by Mr Kilner to his Senior Teacher duties, but at a school other than BSHS. Whilst Dr Buckeridge made some general mention of the "charges" against Mr Kilner, the overall conclusion of Dr Buckeridge, whilst the medical certificate was briefly expressed, was Mr Kilner's fitness for work should be achieved by Term 4 of 2018, that being by about early October of that year.

32 On any view of the combined effect of Dr Buckeridge's second medical certificate and the June 2018 medical report of Dr Ng, as at the time of the first hearing before the learned Commissioner in July 2018, the prognosis for a return to work by Mr Kilner was more favourable than as set out in Dr Buckeridge's first medical certificate of 15 December 2017. Thus, it is against this factual background that the appellant's arguments in relation to prejudice and the dismissal of the s 27(1) application must be considered.

33 First, the appellant contended that the learned Commissioner erred in his assessment of the s 27(1) application because he mistook the scope of the second Dr Buckeridge medical certificate (exhibit 4) at [40] and [41] of his reasons. At [40] and [41] the learned Commissioner said:

> Without having to decide the issue, I think that if the documents had been discovered they may have led to a finding that the applicant's member could not be returned to work at Busselton Senior High School but could be returned to work at another school.
>
> I think the likely result would have been, going back and pretending that I had decided to return the applicant's member to work, I would have simply ordered his return to work at a school other than Busselton Senior High School. It was, after all, a remedy squarely sought by the memorandum of matters.

34 The appellant submitted that the learned Commissioner wrongly concluded that the second medical certificate related only to BSHS. It was submitted that this meant that the Commission did not consider the real prejudice to the appellant, based on the assumption (mistaken) that the second medical certificate did not pertain to other schools. Thus, according to the appellant, this deprived the appellant of the opportunity to argue that as at July 2018 (the date of the first hearing), Mr Kilner was not fit for a return to work. The disciplinary matter referred to by Dr Buckeridge in the second medical certificate was not resolved and was argued to be a further basis to resist reinstatement. The appellant submitted that had this material been in evidence at the time of the first proceedings, the Commission would not have reinstated Mr Kilner as it did.

35 Read with other parts of the learned Commissioner's reasons, taken in their context, in particular pars [34] to [39], I do not consider that the learned Commissioner made the factual error as asserted by the appellant. First, it is clear from [40] of his reasons, he referred to "documents" and not just to Dr Buckeridge's second medical certificate. This was in reference to both the second medical certificate and the medical report from Dr Ng referred to at [34] and [36]. Second, there is no reference to any timing at [40] of the reasons and it is clear from preceding paragraphs in the learned Commissioner's reasons at [36], [38] and [39], that whether Mr Kilner was fit for work at another school, and whether the Commission had jurisdiction or power to make an order under s 44 of the Act in the terms sought by the respondent, was a live issue. Consideration of an alternative school, and a return to work programme, was an issue considered by Dr Ng, in his medical report, referred to above.

36 Read as a part of the entire medical record for Mr Kilner as at July 2018 the appellant would have been on stronger ground to resist reinstatement (given it bore the onus of establishing this), from Dr Buckeridge's first medical certificate of December 2017, which was very broad in scope, which she did have in her possession, but did not raise or seek to have tendered into evidence at first instance.

37 Also, given that the views expressed by Dr Buckeridge in exhibit 4 were very brief, it would be difficult to reach any firm conclusions as to Mr Kilner's fitness for work without further evidence. This was the very issue identified by the first Full Bench in its decision and the reason for the remittal for reconsideration of remedy, with the benefit of up-to-date medical evidence, to deal with practicability of reinstatement in a fulsome manner. Even Professor Janca on the remittal, could not be specific about what Dr Buckeridge meant by his second medical certificate, other than Dr Buckeridge used "standard" language in it that Mr Kilner had a "medical condition". Professor Janca then said that it was important in his view, that Mr Kilner was making progress in his treatment, and that he would be fit to teach at another school: AB 662 - 663.

38 In relation to ground 4, it was contended that the learned Commissioner "constructively failed" to exercise his jurisdiction according to law in dealing with the s 27 application. I have set out the approach to be taken in examining a matter under s 27(1) as referred to in the ***PTA*** case.

39 In summary, the appellant contended that to determine the matter before him, it was necessary for the learned Commissioner to identify matters relevant to the public interest; make relevant factual findings in relation to these matters; and then weigh those matters in the balance to decide, as a matter of discretion, whether to dismiss the proceedings. In the present context, the appellant contended this should have at least involved the Commission considering several factors, including that of a right of a union to have a claim heard under the Act; the access of a relevant employee to relief if so entitled; a requirement on the Commission to act in accordance with equity, good conscience and the substantial merits of the case; that the proceedings before the Commission need to be conducted fairly and justly and the Commission to ensure that its proceedings are not subject to abuse.

40 Whilst accepting that the learned Commissioner acknowledged Mr Kilner's right to access relief if entitled, the appellant submitted that none of the other factors were considered as a part of assessing the public interest in determining the s 27(1) application. Further submissions were made by the appellant in relation to the "rules and procedures for litigation" and obligations on litigants in proceedings before the Commission, and that proceedings can be conducted "improperly" regardless of whether they are knowingly and intentionally so conducted, if a party conducts proceedings below an objective standard which would be reasonable to expect in proceedings before the Commission. In these respects, it was contended that at the

time of the first proceedings, Mr Kilner knew of the second medical certificate from Dr Buckeridge which referred to his unfitness for work at any school, at least until Term 4 2018. Further, that submissions were made on behalf of the respondent to the effect that Mr Kilner was not suffering a medical condition either when he was forced to retire or at the time of the hearing and submissions made as to the effect of Mr Kilner's evidence in chief as to why he did not want to return to BSHS. The contention was put that the matters referred to were only sought to be corrected in January 2020, which was not only after disclosing Dr Buckeridge's second medical certificate, but also after the first appeal to the Full Bench, where it was put to the Commission that the respondent did not recant from its position put in the initial proceedings.

41 The upshot of this was, according to the appellant's submissions, that Mr Kilner either knowingly participated in the misrepresentation of his position to the Commission or did not try to correct the record. The submission was made that Mr Kilner's conduct fell below an objectively reasonable standard of behaviour and he could not be regarded as innocent or blameless. It was submitted by the appellant that the responsible officer of the respondent, Ms Macliver, who was handling Mr Kilner's matters on behalf of the respondent, must have known of the existence of the second medical certificate, but did not try to disclose it. Thus, the respondent was knowingly involved in not disclosing what could be prejudicial to its case on behalf of Mr Kilner, or at least was negligent in not doing so.

42 The appellant contended that contrary to the observations of the learned Commissioner, the respondent was at fault and that fault prejudiced the appellant in the conduct of the proceedings at first instance. It was contended that the Commission's failure to adequately consider all these matters demonstrated that he constructively failed to exercise his jurisdiction under s 27(1) of the Act.

43 I am not persuaded that the learned Commissioner failed to exercise his jurisdiction under s 27(1) of the Act according to law. The power to dismiss or refrain from hearing a matter is a very broad power to be exercised with caution under s 26(1) of the Act. The learned Commissioner commenced his consideration of the s 27(1) application at [53] of his reasons. He identified the application as being one to dismiss the substantive proceedings under s 27(1) of the Act. Both the appellant and the respondent had filed detailed written submissions and materials on the s 27(1) application: AB 33 - 188 and 189 - 199. Both parties also made further oral submissions in connection with the application at the resumed hearing on 7 February 2020. The substance of the appellant's grounds of its s 27(1) application were summarised at AB 42 - 43. The essence of the appellant's position was set out at [54] - [57] of the learned Commissioner's reasons: AB 210.

44 Reference was made to the appellant's contention that she suffered an irredeemable prejudice by reason of the failure to disclose the second Dr Buckeridge medical certificate (and the Dr Ng medical report, albeit accepting at the time of the first hearing it was subject to legal professional privilege); that the respondent engaged in an abuse of the Commission's proceedings and wasted time and resources; and that the respondent did not come before the Commission with clean hands. These were the public interest issues to be decided as relied on by the appellant. The learned Commissioner referred to arguments by the appellant that the absence of Dr Buckeridge's second medical certificate (and also Dr Ng's medical report) not only led to prejudice to the appellant but also that the respondent should suffer a consequence for its conduct: see [55] and [57] reasons at first instance. Also, the learned Commissioner referred to the fact that the respondent had put a case that Mr Kilner did not suffer a medical condition at the time of the original hearing or at the time of his dismissal, and that the respondent was wrong to have put arguments to the contrary, and running a case different to the documents in its possession: at [55] and [56].

45 In assessing the s 27(1) application, the Commission had to consider the interests of the parties and those directly affected. The learned Commissioner considered the impact of failing to disclose the second Dr Buckeridge medical certificate and concluded it was "not much of an opportunity to lose": at [58]. This referred to the learned Commissioner's conclusions on the impact of the second Dr Buckeridge medical certificate considered at [34] - [41]. At [35] he referred to the appellant's contentions as to the alleged impact on the case of the respondent if this medical certificate had been available and made the argument of the respondent that Mr Kilner did not suffer a medical condition problematic, and would enable the appellant to put a case for impracticability of reinstatement. At [36] the learned Commissioner considered, correctly, that it was impossible to know (in retrospect) the impact of the possession by the respondent of the second Dr Buckeridge medical certificate or the Dr Ng medical report, but acknowledged reliance could have been placed on them, that Mr Kilner was not fit for work at BSHS, and whether the Commission could consider an order for a return to work at another school and whether, and if so, "whether he was fit to work at another school".

46 Given the burden on the appellant to make out its s 27(1) application, and to establish, and not just seek to infer, improper conduct on behalf of the respondent, it was wholly unsurprising of the learned Commissioner to say as he did at [59], that he found it "very difficult" to undertake the assessment of the respondent's conduct, based on what was before the Commission. This is particularly so, given the submissions of the appellant at first instance, that she sought to attribute no blame or accountability for failing to disclose the documents on either the respondent's then solicitors or counsel appearing. It was open for the appellant to call evidence from the respondent to make good her claims as to the respondent's conduct, but she did not avail herself of that opportunity. With respect, it is not to the point to contend that such persons are in the "respondent's camp". An officer of the respondent summonsed to give evidence in a matter before the Commission would have to tell the Commission what he or she knows about a relevant matter, under their oath or affirmation. As to the arguments by the appellant regarding what Mr Kilner may have known, by sitting through the proceedings at first instance, and the assertion he was complicit in failing to disclose the second medical certificate, this is with respect, a long bow to draw. There was no direct evidence about this matter and Mr Kilner was not called to give evidence about his knowledge in the remittal proceedings.

47 This no doubt led to the conclusion expressed by the learned Commissioner at [62] - [64] and [68], that it would be necessary for the appellant to demonstrate (and by inference establish), serious misconduct by the respondent to warrant the summary dismissal of the proceedings to the great prejudice of Mr Kilner. The learned Commissioner plainly weighed in the balance the competing contentions, albeit, in brief terms, and concluded that he should not exercise his power of dismissal of the application under s 27(1).

48 And while the appellant made submissions as to the conduct of parties and the "rules" and "procedures" for litigation, proceedings before the Commission are conducted under the Act, the *Industrial Relations Commission Regulations 2005* (WA) and relevant Practice Notes. Principally, the Commission's procedural powers are set out in s 27 of the Act. Discovery and production of documents are not available as a right in this jurisdiction. The Commission must be satisfied that an order for discovery, production and inspection, is just: ***Australian Liquor, Hospitality and Miscellaneous Workers Union v Burswood Resort (Management) Ltd*** (1995) 75 WAIG 1801 at 1805. If an order for discovery and production is made by the Commission, whether informally or on affidavit, as opposed to those civil jurisdictions where discovery is dealt with by Rules of Court, it is doubtful whether the obligation to discover is a continuing obligation, absent an order providing for it (see B. Cairns *Australian Civil Procedure* 10th Ed at par [10.260]).

49 I am not persuaded that the grounds of appeal in relation to the s 27(1) application have been made out.

Adequacy of reasons

50 Ground 1 challenged the adequacy of the learned Commissioner's reasons for decision. Although particular (a) was not pressed, ground 1 is:

> **Insufficiency of reasons**
>
> 1. The Commissioner made an error of law in failing to provide sufficient reasons for his decisions.
>
> **Particulars**
>
> (a) In dismissing the Director General's application made under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) **(s 27 Application),** the Commissioner failed to: (i) explain the law he applied when considering that application, or (ii) identify or explain the matters which he considered to be of relevance to the question of whether the proceedings should be dismissed as not being necessary or desirable in the public interest.
>
> (b) In finding that Mr Kilner was "fit for work" (at [15]), the Commissioner failed to explain the relevant law that he applied as it relates to determining whether a person is able to fulfil the inherent requirements of a position.
>
> (c) In finding that reinstatement or re-employment was practicable, the Commissioner failed to explain the findings of fact that he made as to what are Mr Kilner's beliefs, concerns, or views in relation to the Department of Education **(Department)** and its officers.
>
> (d) In finding that Mr Kilner's concerns set out in his emails to the Director General were not "unreasonably held" (at [26]), the Commissioner failed to set out: (i) the evidence which he relied upon for that finding, and (ii) the reasoning process which led him to that finding.

51 In a recent decision of the Court of Appeal in ***Chief Executive Officer, Department for Child Protection and Family Support v IGR*** [2019] WASCA 20; (2019) 54 WAR 222 Quinlan CJ, Murphy and Beech JJA summarised the legal principles as to the adequacy of a judge's reasons at [112]:

> **Adequacy of reasons for decision: legal principles**
>
> 112 Principles relevant o an evaluation of the adequacy of reasons include the following:
>
> (1) Reasons for decision need not be lengthy or elaborate.
>
> (2) Reasons should disclose the intellectual process that led to the decision in sufficient detail and with sufficient certainty to enable the litigant to know why they were unsuccessful and to enable an appeal court to determine whether the decision involved appellable error.
>
> (3) It is not necessary to refer to every submission advanced by a party. However, a tribunal or court must engage with the central element(s) of a losing party's case and explain why that case fails.
>
> (4) In determining the adequacy of the reasons, the reasons must be read as a whole, and, if necessary, considered in the context of the evidence. An appellate court may take into account what can legitimately be inferred from the reasons. Whether reasons are adequate will depend upon the circumstances of the case and the matters that arose for the judge's or tribunal's consideration.

52 (See too ***Mt Lawley Pty Ltd v Western Australian Planning Commission*** (2004) 29 WAR 273; ***Marshall v Lockyer*** [2006] WASCA 58; ***Scaffidi v Chief Executive Officer, Department of Local Government and Communities*** [2017] WASCA 222; (2017) 52 WAR 368 at 409 – 410; ***Bucu v Midland Brick Co Pty Ltd*** (2002) 82 WAIG 743; ***Ruane v Woodside Offshore Petroleum Pty Ltd*** (1991) 71 WAIG 913)

53 In ***Marshall,*** McClure JA referred to the obligation on a judge to give reasons and at [247] - [249] and said:

> **Adequacy of reasons**
>
> 247 The trial Judge was under a duty to give reasons. In determining the adequacy or sufficiency of the reasons, it is necessary to look at the reasons as a whole, and if necessary in the context of the evidence, to see if they give the sense of what was intended in a way that achieves the required function and purpose of reasons: ***Garrett v Nicholson*** (1999) 21 WAR 226 at 248 per Owen J. The function of reasons is to allow an appeal court to determine whether the decision was based on an appealable error and to provide procedural fairness to a litigant who is entitled to know why it is that he or she has been successful or unsuccessful. It is sufficient if the reasoning process which led to the result is disclosed with sufficient certainty to enable a litigant to know why it

is that the result ensued and to ensure that the statutory right of appeal has been secured: ***Garrett v Nicholson*** at 248.

248 However, reasons need not be lengthy and elaborate nor do they require reference to all of the evidence led in the proceedings or every submission advanced by the parties: ***Mount Lawley Pty Ltd v Western Australian Planning Commission*** (2004) 29 WAR 273 at [28]; ***Soulemezis v Dudley (Holdings) Pty Ltd*** (1987) 10 NSWLR 247.

249 Further, as the Full Court stated in ***Mount Lawley Pty Ltd v Western Australian Planning Commission*** at [29], inadequacy of reasons does not necessarily amount to an appealable error; an appeal court will only intervene when the inadequacy or insufficiency in the reasons are such as to give rise to a miscarriage of justice.

(Footnotes omitted)

54 With this ground of appeal, the appellant advanced several arguments. In summary as to particular (b) the submission was that whether a person can fulfill the inherent requirements of a position is a mixed question of fact and law. Thus, it was submitted that the Commission had to state what is meant by the inherent requirements of a position as a question of law, then apply the facts to that conclusion. The appellant contended that the learned Commissioner did not state as a conclusion of law what the inherent requirements of Mr Kilner's position were, especially in the present case, where the question of Mr Kilner's ability to teach at a school other than BSHS was a crucial matter to be determined. Absent a relevant finding, the learned Commissioner erred in law and given that the respondent was not provided with an opportunity to close its case, an inference is not open to the Full Bench that the Commission simply accepted the respondent's submissions on this point.

55 As to particular (c), in summary the appellant submitted that the learned Commissioner's reasons were inadequate to explain the views or concerns Mr Kilner expressed or held, especially where he relied upon his assessment of those views or concerns, in concluding that it would not be impractical for Mr Kilner to return to teach at a school other than BSHS. Thus, the appellant submitted that it is impossible to understand how the learned Commissioner concluded as he did and whether an error of fact or law has been made. This is especially so, given the importance of Mr Kilner's views or concerns to the question of the practicability of re-employment, as the submission went.

56 Finally, as to particular (d), the appellant contended that the Commission's finding that Mr Kilner's views and concerns were "not unreasonable" for him to hold, was a statement of bare conclusion with no reasoning as to how the Commission reached that view. No consideration was given to the evidence to sustain such a finding and absent reference to such evidence, or a reasoning process shown leading to the finding, the appellant maintained this to be an error of law.

57 Whilst especially in this jurisdiction conciseness of reasons for decision is a virtue, and brevity is not a ground on which to set aside a decision, the reasons of a Commissioner must enable an unsuccessful party to understand why they failed. Importantly also, the Full Bench on appeal must be able to discern from a Commissioner's reasons, the existence of appellable error. And as observed in ***Scaffidi*** at [202] by Buss P, Mitchell and Beech JJA, it is necessary for a Commissioner:

> …to engage with the central element(s) of a losing party's case and explain why that case fails. Considering that party's submissions is an aspect of what procedural fairness requires. Ordinarily, that involves something more than a statement that the case is rejected.

58 As to the inherent requirements of the position of a secondary school teacher, this is a question of fact. It is also a matter of common sense, given the pervasive role of schoolteachers in the community and our system of compulsory primary and secondary education. Most members of the community have been to school and to varying degrees, been exposed to the work of teachers in the classroom. I consider that the learned Commissioner was able to take some judicial notice of this as a matter of common knowledge in the community. Despite this however, there was ample evidence that the duties and responsibilities of a secondary school teacher was in evidence before the Commission. The respondent's solicitors, in their letter of request to their expert, Professor Janca, of 1 August 2019, included copies of materials in relation to the responsibilities of a schoolteacher.

59 It is to be noted that in his first report of 15 August 2019 (exhibit 18: AB 478) Professor Janca was provided with a copy of extracts of the *School Education Act 1999* (WA) and the Teachers (Public Sector Primary and Secondary Education) Award 1993, setting out the core responsibilities of a classroom teacher, which include supervision of students and to "maintain proper order and discipline" (s 64(1)(e)(e) Act) and "supervision of students" (cl 12(1)(b) Award). In the second paragraph of Professor Janca's report (AB 478) he refers to the documents provided in the respondent solicitor's letter of 1 August 2019, requesting the fitness for work assessment, which included the extracts of the SE Act and the Award as above.

60 It was in the knowledge of this material, that Professor Janca provided his opinion as to Mr Kilner's fitness for work to teach at a school other than BSHS. Professor Janca is well qualified in his field. A copy of his curriculum vitae was exhibit 16: AB 367 - 401. He is the Winthrop Professor of Psychiatry at the University of Western Australia and is a consultant psychiatrist at the Osborne Park Hospital in Perth. Professor Janca also engages in some medico-legal work for a private practice, involving Workers Compensation claims, fitness for work assessments and motor vehicle accidents etc. For these purposes, Professor Janca is an approved medical specialist.

61 As the learned Commissioner observed at [11] of his reasons, Professor Janca's evidence was the only expert evidence before the Commission, on Mr Kilner's fitness for work. The appellant led no evidence. The Commissioner referred to Professor Janca's evidence commencing at [9] of his reasons. Professor Janca acknowledged the above material was given to him in his instructions: AB 640 - 641. It was open to the learned Commissioner to conclude that Professor Janca had regard to this material in his assessment of Mr Kilner's fitness for work. Nothing in the appellant's cross-examination of Professor Janca suggested to the contrary and as I have said, the appellant led no evidence on the point.

62 The learned Commissioner considered Professor Janca's evidence at [9] - [11] and [14] of his reasons. I accept that the learned Commissioner's reasons were brief. I think with respect, it would have been preferable had he referred to Professor Janca's evidence in more detail. Notably however, Professor Janca's evidence was uncontroverted, it was from an acknowledged expert in the field, he thought Mr Kilner was fit for work, and no other evidence to the contrary was before the Commission. The Commission found that Professor Janca's evidence was "cogent and credible" and "was not undermined in any way by cross-examination or competing evidence". The learned Commissioner, at [10], said he had "no reason to not believe it and no reason to not accept it". He accurately stated at [9] of his reasons that Professor Janca's evidence was that Mr Kilner was fit for work at a school other than BSHS. The learned Commissioner concluded on that basis, correctly, at [11], that the only expert evidence before the Commission was that Mr Kilner was fit for work and the evidence was not impugned.

63 Based on the finding set out above, it was plainly open on the evidence to reach the conclusion, which was the only conclusion reasonably open, that Mr Kilner was fit to return to work as a teacher, at a school other than BSHS, and the learned Commissioner so found at [12] of his reasons. Then at [13] - [15] of his reasons, the learned Commissioner dealt with the central plank of the appellant's case, that Mr Kilner may suffer a relapse of a medical condition, as Mr Kilner could not be quarantined. This was a line of questioning put by the appellant to Professor Janca in his evidence: AB 646 - 647. And this was the subject of an exchange between the learned Commissioner and Professor Janca at AB 658. The Commission then, in the context of this line of argument put by the appellant, at [13] and [14] of his reasons, adverted to Professor Janca's evidence on the point and, that Mr Kilner's prior medical problems to an extent, were related to difficulties he experienced at BSHS. The learned Commissioner found this analysis by Professor Janca to be "compelling": at [14] of the reasons. He also acknowledged the evidence of Professor Janca that, even though his opinion was Mr Kilner was fit for work to teach, "stressors may impact upon the applicant's member at another school" at [14] of the reasons. This was an accurate summary of the evidence.

64 I am not persuaded this sub-ground is made out.

65 As to sub-grounds 1(c) and (d) these may be dealt with together. In summary, the appellant contended that the Commission failed to explain what were Mr Kilner's "beliefs, concerns and views" in relation to the Department of Education, and did not describe how Mr Kilner's views and concerns etc were not "unreasonably held". It was submitted by the appellant that given that these matters were relied upon by the Commission in concluding that re-employment of Mr Kilner was not impracticable, then the Commission needed to explain the basis for such findings. It was said that the learned Commissioner's reasons did not state what Mr Kilner's views or concerns were, and in failing to do so, it is impossible to understand from his reasons, his decision, thus constituting an error of fact or law. So too, in failing to explain how Mr Kilner's views were "not unreasonable" to hold, a similar error was committed.

66 At [22] of his reasons, the learned Commissioner states the issue raised by the appellant at first instance as being Mr Kilner's "deep-seated lack of trust for the Department, and that deep-seated lack of trust is such that it would be impracticable for Mr Kilner to be reinstated or re-employed". At [23] of his reasons the learned Commissioner referred to "some documents the applicant's member produced and some communications from the applicant's member to parliamentarians and office holders within the Department of Education".

67 The respondent in its submissions pointed out that exhibits 12 to 15, tendered by the appellant, were not the only documents before the Commission involving communications between Mr Kilner and others. Several other documents were tendered by the respondent at first instance, including exhibits 6 to 11, some of which involved communications to and from the then appellant, and others to a member of Parliament and to the ERG panel, raising issues about difficulties identified at BSHS. The respondent submitted these documents show that Mr Kilner has engaged in the communications with the appellant and others, without difficulty, that the appellant now complains about in exhibits 12 to 15. It was therefore submitted that given this prior and accepted pattern of communication between Mr Kilner and the then appellant, there was no basis to say that trust and confidence had been lost.

68 The respondent submitted that, given this material before the Commission, the learned Commissioner at [23] to [31] of his reasons considered the issues raised in them and concluded there was no basis to reach the view that re-employment was impracticable. The respondent further submitted that the Commission's consideration in this part of his reasons was clear and logical.

69 The documents referred to by both the appellant and the respondent, and which were tendered as exhibits 6 to 15, largely speak for themselves. They represent a course of conduct engaged in by Mr Kilner over many years, from 2011 to 2019. There are only some nine exhibits. Given the content of the documents is largely self-explanatory, it was open for the Commission to state that the matters raised in them did concern "real events and real concerns" and were directed to, and responded by, in several cases, the appellant herself. Whilst it would, again, have been preferable for the learned Commissioner to have set out in more detail in his reasons the content of these communications and documents, this is a case where the Commission's reasons can be read and their adequacy considered in the context of the evidence to which they refer: ***CEO v IGR*** at [112]. When read in this way, I consider that the Commission's reasons, with respect, were overly brief, they were adequate, given the specific matter he had to address.

70 Similarly, as to the statement of the learned Commissioner regarding the "reasonableness" of Mr Kilner's views, at [26], this needs to be read in the context of all the passages of his reasons at [23] to [31] and not taken in isolation. And they need to be read with the evidence, being the documents and communications themselves. As noted by the respondent, the correctness or otherwise of the issues raised by Mr Kilner in these various communications and documents, was not in issue and the learned Commissioner acknowledged this at [26]. For example, several of the documents and communications related to the ERG and its aftermath, a subject that Mr Kilner obviously felt strongly about, as recognised by the appellant herself in her replies to his correspondence. The learned Commissioner said that having considered the documents and the communications, in context, there was no basis to conclude that it would be impracticable for Mr Kilner to work at a school other than BSHS.

71 If I am wrong and it could be concluded that the Commission's reasons were inadequate, I am far from persuaded that it could also be concluded that a miscarriage of justice has occurred, having regard to the circumstances before the Commission. I am not persuaded that these sub grounds have been made out.

Section 26(3) point

72 This ground of appeal is:

> 2. The Commissioner erred in law by failing to notify the Director General of matters which were not raised before him on the hearing of the matter but for which he intended to take into account, and the Commissioner failed to provide the Director General with an opportunity to be heard in relation to such matters, and thereby contravened s 26(3) of the *Industrial Relations Act.*
>
> **Particulars**
>
> (a) In relation to the s 27 Application, the Commissioner failed to raise with the Director General that he considered that it was for the Director General to establish "who did what and when in such a way as to demonstrate a serious ethical failure on the part of the [Union] or its officers" (see [64]).
>
> (b) The Commissioner failed to raise with the Director General that it may be said that the concerns set out in Mr Kilner's emails to the Director General were not "unreasonably held" (at [26]).

73 Particular (b) was not pressed by the appellant. As to particular (a), it was submitted that the learned Commissioner at [64] of his reasons said it was for the appellant to demonstrate "who did what and when in such a way as to demonstrate some serious ethical failure on the part of the applicant or its officers". The appellant submitted this must mean the need for her, as a part of her s 27(1) application, to call evidence from union officers, Mr Kilner or the union's solicitors, as to its failure to reveal material documents in the initial proceedings. The submission was made that given these matters are wholly within the knowledge of the respondent and its officers, and they would not be in the appellant's "camp", it would not be reasonable to expect the appellant to do so. Given that the Commission did not raise this matter with the appellant, then this constituted a failure to comply with s 26(3) of the Act.

74 The issue raised by this ground of appeal is not one about s 26(3) of the Act. The observation was made by the learned Commissioner in his reasons at [64] that the appellant "has not really undertaken the task of demonstrating who did what and when in such a way as to demonstrate some serious ethical failure on the part of the applicant or its officers". This comment was plainly made in the context of the case put by the appellant at first instance, that the respondent, through its officers, misconducted itself by failing to disclose the second Dr Buckeridge medical certificate (and possibly also the Dr Ng report), which misconduct irretrievably prejudiced the appellant.

75 The appellant bore the onus of making out her s 27(1) application. In making the above comment, the learned Commissioner was doing no more than saying, especially as the appellant made no criticism of the respondent's solicitors or counsel, that the appellant had failed to make out its case and discharge the burden on it. The learned Commissioner was highlighting what he saw as a deficiency in the appellant's case on her s 27(1) application. Accordingly, the Commission did not consider any matter or information not raised before it on the hearing of the matter. Rather, it was the absence of evidence or information that the Commission considered relevant to the s 27(1) application, that the Commission was highlighting. This ground of appeal is not made out.

Reinstatement - fitness for work

76 This issue is raised in grounds 6 and 7 of the grounds of appeal in these terms:

> **Impracticability of reinstatement - Fitness to fulfil the inherent requirements of the Position**
>
> 6. In holding that Mr Kilner was "fit for work", the Commissioner applied the wrong test, and thereby made an error of law. In particular, where:
>
> (a) to be able to fulfil the inherent requirements of a position, the employee needs to be able to perform their duties safely (that is, without an unreasonable risk to themselves),
>
> (b) in determining whether the person can perform their duties safely, it is necessary to have regard to both to the degree of the risk, and the consequences of the risk being realised, and
>
> (c) despite the evidence before the Commission that Mr Kilner suffered risk of relapse if he returned to teach at another school, due to the risk of there being students who are "difficult to manage", the Commissioner failed to assess the degree of risk and the seriousness of the harm that may ensue if the risk was realised, the Commissioner failed to apply the correct test law.
>
> 7. In the alternative to ground 6, in holding that Mr Kilner was "fit for work", the Commissioner failed to take into account a material relevant consideration, namely, whether Mr Kilner was able to perform the inherent requirements of the position safely.

77 As made plain by s 23A(3) and (4) of the Act, the primary remedy on a finding that a dismissal is unfair, is reinstatement, unless the Commission concludes that reinstatement is "impracticable". For the purposes of the statutory remedy, this means that reinstatement or re-employment by an employer is "not reasonably feasible or reasonably capable of being accomplished on the facts and in the circumstances of the particular case": ***Australian Rail, Tram and Bus Industry Union v Public Transport Authority of Western Australia*** [2017] WASCA 86; (2017) 97 WAIG 431 per Buss and Murphy JJ at [30]. This involves a "bespoke" evaluation of the circumstances of possible reinstatement or re-employment of a former employee, in a common-sense fashion: ***PTAWA*** per Kenneth Martin J at [148] citing ***Nicholson v Heaven and Earth Gallery Pty Ltd*** (1994) 1 IRCR 199; (1994) 57 IR 50 and ***Perkins v Grace Worldwide (Aust) Pty Ltd*** (1997) 72 IR 186.

78 In the present matter, as noted in the first Full Bench decision at [116] - [119], in the case of a referral for hearing and determination under s 44(9) of the Act, the remedy to be granted by the Commission is conditioned by the memorandum of matters referred for hearing and determination and enables the Commission to resolve the particular dispute, which is not limited to the terms of s 23A of the Act: ***BHP Billiton Iron Ore Ltd v The Transport Workers Union of Australia, Union of Workers, Western Australian Branch*** [2006] WAIRC 03908; (2006) 86 WAIG 642; ***Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union*** [2017] WAIRC 00452; (2017) 97 WAIG 1329. The order made by the learned Commissioner that the appellant re-employ Mr Kilner at a school other than BSHS, was plainly an order within power as a matter contained in the s 44(9) referral and an order that resolved that part of the dispute referred for hearing and determination.

79 In assessing these grounds of appeal, I first consider an overview of the evidence before the Commission as to Mr Kilner's fitness for work. It is important to state at the outset, that given the order of the first Full Bench, the issue for the learned Commissioner to determine was Mr Kilner's fitness for work as at the time of the proceedings on the remittal, and not any prior time. Evidence came principally from Mr Kilner himself and Professor Janca.

80 Since the matter was before the Commission in the first instance hearing, Mr Kilner testified that in the intervening two years he worked with his doctor and psychologist and felt in much better health. Mr Kilner testified that in relation to his capacity to work, that he had been undertaking some volunteer work at the Busselton Shire in teaching difficult students and did not experience anxiety or panic attacks any longer. He considered himself able to contribute and to have capacity to go back to work on a 0.8 basis as a teacher. Mr Kilner said that he no longer has irrational thoughts or fears he had in 2017, from the student attacks etc that he experienced. Mr Kilner felt able to return to a school other than BSHS, where he spent 29 years and said he probably stayed too long at that school, as he became emotionally involved in the school environment. Mr Kilner said that he tried to make the school a better place, which led to his breakdown in 2017. He testified that he felt much more positive about working at other schools.

81 Mr Kilner was also taken to a part of his witness statement tendered in evidence in the first hearing where at [78] Mr Kilner said that he could return to work by September 2018 or in Term 4 2018. He said this came from his general practitioner, Dr Buckeridge. Dr Buckeridge advised him this was the period needed to get over what had been happening and, the reference to a return to work, was a reference to a return to work at other than BSHS. Mr Kilner also said that he had provided his curriculum vitae to other schools in the Bunbury area, however, he did not discover that he had been "red flagged" by the appellant, until sometime later. This "red flagging" meant that he was not to be re-employed in any government school. Mr Kilner also testified that if he did commence at another school "next week", and he encountered difficult students, he would be much better placed to deal with the issues because since 2017, he had built strength of character to deal with any trauma.

82 As I have mentioned above, Professor Janca was an expert witness called by the respondent in relation to Mr Kilner's fitness for work. At the request of the respondent's solicitors, Professor Janca prepared a medical report dated 15 August 2019 regarding Mr Kilner's fitness for work as a Senior Teacher at a school other than BSHS. A copy of the medical report was exhibit 18: AB 478 - 485. Professor Janca's report canvassed Mr Kilner's recent history of psychiatric problems since early 2017 and the difficulties experienced at BSHS. This included consideration of various medical reports prepared by Dr Lai, the appellant's occupational physician, Mr Kilner's treating general practitioner, Dr Buckeridge and his psychologist, Dr Mowat. And the medical report prepared by Dr Ng was also included. Professor Janca's medical report also canvassed Mr Kilner's past medical and psychiatric history and other matters. The "Mental State Examination" section of his report was based on Professor Janca's interview with Mr Kilner, and was the substance of the report dealing with Mr Kilner's fitness for work and answered the specific questions posed by the respondent's solicitor's letter of request.

83 In terms of past illness affecting his capacity to work as a Senior Teacher, Professor Janca concluded from the information provided by Mr Kilner and his prior medical information, that Mr Kilner had suffered an adjustment disorder with anxiety. As to whether at the time of the interview with Mr Kilner, Mr Kilner suffered any illness, Professor Janca said at AB 483:

> "At the time of my interview with Mr Kilner, he did not suffer from the above-mentioned or any other psychiatric condition. Over the past year his symptoms of anxiety significantly improved and currently have no impact on his overall functioning".

84 In answer to whether Mr Kilner's medical condition needed further investigation or treatment, Professor Janca said that it did not: AB 483. In answer to whether Mr Kilner has any incapacity to work as a Senior Teacher, Professor Janca said at AB 483:

> "Mr Kilner is currently not incapacitated either totally or partially for work as a Senior Teacher".

85 And Professor Janca said that Mr Kilner was able to work as a Senior Teacher, but, consistent with the opinion from Dr Ng, this should be at a school other than BSHS: AB 484. Finally, Professor Janca opined that Mr Kilner should return to work at an alternative school environment gradually, to enable him to adjust to a new school: AB 484.

86 Professor Janca prepared a supplementary medical report dated 21 November 2019 tendered as exhibit 20: AB 526 - 527. In it, Professor Janca expressed the view that based on his interview with Mr Kilner and the medical information provided to him, Mr Kilner "likely achieved fitness to work at an alternative school in mid-2018": AB 526. As a clarification of his answer to a question in his first medical report that Mr Kilner should undertake a graduated return to work, Professor Janca said that it was best for Mr Kilner to start work four hours per day, three days per week, and increase to a 0.8 FTE over four to six weeks. He said this was not for any medical reason, but "would facilitate Mr Kilner's adaption to a new school environment", given his prolonged absence from teaching and his preoccupation with his prior work problems and the ongoing legal process: AB 527.

87 In cross-examination, Professor Janca said that the recommendation for a return to work at a school other than BSHS, was because of the possibility of a relapse due to past experience and a potential for higher levels of aggression, violence or intimidation of staff. When put to him that managing intimidating or aggressive students may cause Mr Kilner to be re-traumatised at another school, Professor Janca said this would be "highly speculative" and, added that Mr Kilner's problems at BSHS were not just the management of difficult students, but also the lack of support from the school and school authorities: AB 647.

88 When a list of events prepared by Mr Kilner, that occurred between 2001 and 2017 (exhibit 12: AB 359 - 361) was raised with Professor Janca, he testified that he could not conclude this had any contribution to Mr Kilner's mental state because at the time of his interview with Mr Kilner, Professor Janca was not aware of this document. Whilst part of a history of prior issues, exhibit 12 was not a part of Professor Janca's mental state assessment: AB 649 - 650. Also when questioned about Standards and Integrity processes, Professor Janca expressed the view that Mr Kilner did not display signs of anxiety because of this and on the contrary, Mr Kilner displayed the predominant emotion of being pleased with the outcome of the Commission proceedings, where he succeeded: AB 653.

89 Professor Janca was also asked about the Standards and Integrity process and the reference to it in the second medical certificate from Dr Buckeridge, referred to earlier in these reasons. In response, Professor Janca said that he did not have the medical certificate before him at the time of his interview with Mr Kilner, but his assessment of his mental state examination and his conclusion that Mr Kilner did not have a mental disorder, was based on the "here and now": AB 654. When Professor Janca was asked by the learned Commissioner whether there could be any quarantining from any similar stressors or triggers to those Mr Kilner experienced at BSHS, he said there could be no guarantee of this: AB 658.

90 As to ground 6, the appellant contended that the learned Commissioner erred in law in applying the wrong test as to whether Mr Kilner met the inherent requirements of the position of a Senior Teacher. The submission was made that for the Commission to be satisfied that it was reasonably feasible for an order of re-employment to be made, in the present case, meant that a person must be able to fulfil the inherent requirements of a position, which includes the performance of work safely, without risk to themselves or to others. This latter submission referred to and relied upon a decision of the High Court in ***X v The Commonwealth*** (1999) 200 CLR 177. The appellant contended, in reliance on ***X,*** that for a person to perform work safely, an assessment needs to be made of risk involved and the consequences if the risk is realised.

91 ***X*** arose in the context of Commonwealth anti-discrimination legislation, and another case relied on by the appellant, ***Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union*** (2004) 143 IR 354, involved a different issue as to whether employees were "unsuitable" to be given preference in employment under a preference in employment order made by the Australian Industrial Relations Commission in the coal industry. Therefore, both cases may be said to be distinguishable. However, despite this, I think it is a matter of common sense, that in an unfair dismissal case where reinstatement or re-employment is sought, if a former employee has suffered a medical condition leading to termination of their employment, that the "reasonable feasibility or reasonable capability" of accomplishing reinstatement or re-employment should involve, as a part of the calculus, the need for the employee to meet the inherent requirements of a position, without an unreasonable risk of recurrence of illness or injury. Such an assessment must, however, it seems to me, be based on cogent evidence, and involve a real and not remote or fanciful level of risk, nor one based on mere conjecture.

92 The learned Commissioner referred to Professor Janca's expert evidence and report commencing at [9] of his reasons. He accepted Professor Janca's evidence as cogent and credible and accepted it as evidence that Mr Kilner was fit for work. This was plainly a finding open on the evidence as that was Professor Janca's opinion as a well-credentialled expert, and as expressed in both of his medical reports and in his oral testimony. Notably too, there was no evidence to the contrary. The learned Commissioner observed at [11] and [12], that Professor Janca's evidence was not impugned and supported a finding that Mr Kilner was fit for work to teach at a school other than BSHS.

93 In terms of the appellant's argument as to the inherent requirements of the position of a teacher, as I have mentioned at [45] above, Professor Janca was provided with a copy of extracts of materials setting out the core responsibilities of a classroom teacher, which he said he reviewed. It thus must be accepted that Professor Janca's opinion was given in full knowledge of these matters. In any event, as I have also mentioned, and which seemed accepted in the proceedings at first instance, such matters would be taken as a given, based on the commonly understood responsibilities of any schoolteacher.

94 The crux of the appellant's contentions in relation to this ground of appeal was directed at the prospect of a relapse of Mr Kilner's prior adjustment disorder and the learned Commissioner's failure to consider the risk of this, given Mr Kilner's prior history. I am not persuaded that the learned Commissioner failed to have regard to the matters he should have considered in assessing the practicability of the re-employment of Mr Kilner at a school other than BSHS. At [13] of his reasons he considered and rejected the appellant's arguments at first instance, that the possibility of Mr Kilner suffering a relapse of his prior medical condition because he could not be "quarantined" from stressors similar to those that led to his suffering the medical condition arising from his time as a teacher at BSHS, meant he could not return to work. The learned Commissioner was plainly alive to this issue, and he raised this matter with Professor Janca when the professor was giving his evidence. At AB 658 to 659, an exchange took place between the Commission and Professor Janca, where the learned Commissioner asked about the possibility of triggers such as stressors experienced by Mr Kilner from his experience at BSHS from past events, and there can be no guarantee against such, but they were higher at BSHS.

95 In further cross-examination, arising from these questions, Professor Janca testified that if at another school Mr Kilner experienced similar problems, including an unsupportive principal etc, then Professor Janca could not exclude the possibility that Mr Kilner may react in the same way. However, as with all such matters, Professor Janca's evidence at that point must be considered in the context of all his testimony. As I have mentioned, earlier in the cross-examination, at AB 647, when asked similar questions by the appellant's counsel, Professor Janca said, as to the possibility of any relapse at another school, if Mr Kilner had to handle aggressive and intimidating students, whether this may cause Mr Kilner to suffer a relapse, the professor described this as "highly speculative". He also noted that Mr Kilner's past problems were not just because of problematic students, but also the perceived lack of support and understanding from school authorities.

96 At [14] of his reasons, the learned Commissioner considered Professor Janca's evidence as to problems experienced by Mr Kilner and that they related, to a degree, to matters particular to BSHS and also noted his evidence that the same stressors may be evident at another school. Despite this, Professor Janca's evidence was that Mr Kilner was fit for work. At [15] the learned Commissioner referred to the appellant's case there may be the possibility of a relapse at another school and considered it speculative. On all the evidence, this conclusion was plainly open. The learned Commissioner then found on the evidence that Mr Kilner was fit for work and again, on all the evidence, such a conclusion was open and, indeed, was the only reasonable conclusion that could be reached. Also, based on Professor Janca's expert medical reports, Mr Kilner's mental state during the assessment supported the conclusion that Mr Kilner was fit for work; that the prior issues had been resolved and did not impact on his health; and that at the time of the remittal, Mr Kilner suffered no psychiatric condition.

97 As to the appellant's complaint in ground 7, put in the alternative to ground 6, that the learned Commissioner did not consider a relevant consideration, that being whether Mr Kilner fulfilled the inherent requirements of his teaching position safely, this must be rejected. Largely for the reasons set out above in dealing with ground 6, the expert opinion of Professor Janca was given in the context of the inherent requirements of a teaching position, which were made known to him. The learned Commissioner accepted Professor Janca's opinion and his evidence that Mr Kilner was fit to teach at another school and could do so safely, with the risk of a relapse being "highly speculative". The Commission's reasons at [9] to [15] discussed above, in their totality and in the context of all of the evidence, albeit expressed briefly, did consider and rejected the contention that Mr Kilner could not perform the inherent duties of a teacher safely. These conclusions were all open on the evidence and the findings the learned Commissioner made, should have been made.

98 These grounds of appeal are not made out.

Reinstatement - trust and confidence

99 This matter is the subject of grounds 8 to 13 of the appeal. These appeal grounds, some of which are expressed in the alternative, are:

8. In considering whether it was practicable for Mr Kilner to be reinstated or re-employed on the basis of a loss of trust and confidence, the Commissioner erred in law by constructively failing to exercise his jurisdiction. In particular:

    (a) to deal with the question of practicability as it related to the question of trust and confidence, it was necessary for the Commissioner to:

        (i) make findings of fact as to what are Mr Kilner's beliefs, concerns, and / or views in relation to the Department and its officers, as evidenced in Exhibits 12, 13, 14 and 15 and his evidence given under oath,

        (ii) make findings as to whether, and to what extent, such views, concerns and / or beliefs, established that Mr Kilner had lost trust or confidence in the Department and / or its officers, and

        (iii) consider and make findings as to whether any such loss of trust or confidence meant that the re-establishment of the employment relationship was not reasonably feasible.

    (b) the Commissioner failed to undertake the above steps when purporting to deal with the issue of practicability of reinstatement or re-employment from a trust and confidence perspective.

9. In considering whether it was practicable for Mr Kilner to be reinstated or re-employed on the basis of a loss of trust and confidence, the Commissioner erred in law by taking into account an irrelevant consideration, namely, whether the concerns held by Mr Kilner, as evidenced by the "documents and communications" were "not unreasonable" to hold (at [26]).

10. In the alternative to ground 9, the Commissioner erred in law in finding that Mr Kilner's concerns set out in his emails to the Director General were "not unreasonable" to hold because such finding was not open on the evidence. In particular:

    (a) Mr Kilner's views, concerns and / or beliefs set out in his emails included, but were not limited to:

        (i) that the Department's officers engaged in a "misogynistic abuse of power to subvert the truth and trample over people without real legal support" (Exhibit 14),

        (ii) that there are "'dark places' in Royal Street" (by which Mr Kilner meant head office of the Department) (Exhibit 14), and

        (iii) there is a cultural problem in the Department where the bureaucrats "run the show" (Exhibit 15),

    (b) the Commissioner rejected Mr Kilner's attempts to explain way what are the plain messages in these documents (see [30]), and

    (c) there was no evidence explaining the basis for holding of such views, let alone how such views could be "not unreasonable" to hold.

11. The Commissioner's finding that the tone of the communications to the Director General was "fine" (see [29]) is a manifestly unreasonable conclusion. In particular, by:

    (a) making bald and unsubstantiated allegations of a misogynistic abuse of power and that there are "dark places" in head office,

(b) making the implicit assertion that the Director General does not foster trust, and

(c) making the explicit assertions that the Director General is unable to control her staff, and therefore that her staff "run the show",

the tone of the comminutions was not of an "appropriate" tone when directed to the Director General herself, copying the Minister for Education and also an Independent Parliamentary Committee, such that no reasonable decision make could form such a conclusion.

12. The Commissioner's finding that the documents and communications do not sustain a finding that Mr Kilner has such a loss of trust and confidence in his employer as to make his return to work problematic is manifestly unreasonable such that no reasonable decision maker could form such a conclusion. In particular, where:

(a) Exhibits 12, 13, 14 and 15, demonstrate that Mr Kilner has lost trust and confidence in the Department generally, and lost trust and confidence in the ability of the Director General to manage her Department in an ethical and appropriate manner,

(b) Exhibit 12 demonstrates that Mr Kilner considers that the Department's issues exist at all levels of the Department, including within BSHS, and extending outside of BSHS to include the regional director (referred to as the "District Director"), the Standards and Integrity unit, and the Director General,

(c) Mr Kilner's evidence under oath included, but was not limited to, that:

(i) he considers that the Department has a cultural problem and needs to change,

(ii) he considers that the Department uses Standards and Integrity "as a stick to terrify" its employees,

(iii) he named three members of the "executive" or "leadership group" within the Department who he considered to be problematic "bureaucrats" in "Silver City",

(d) the Commissioner rejected Mr Kilner's attempts to explain away what are the plain messages in Exhibits 12, 13, 14 and 15 (see [30]), and

(e) there was no fact or matter relied upon by the Commissioner to undermine the full force and effect of Mr Kilner's views,

the only reasonable conclusion was that it was not reasonably feasible for the employment relationship to be re-established in light of Mr Kilner's lack of trust and confidence in the Director General, senior office holders with the Department, specified Directorates within the Department, and the culture of the Department as a whole.

13. In considering the question as to whether reinstatement was impracticable due to a loss of trust by Mr Kilner, the Commissioner erred in law by failing to consider a material considerations, namely, whether the oral evidence given by Mr Kilner in the proceedings established a lack of trust by Mr Kilner in the Department such that reinstatement or re-employment was impracticable. In particular, Mr Kilner's oral evidence included:

(a) he considers that the Standards and Integrity branch of the Department of Education is "used as stick to terrify you" (Transcript, 69.9),

(b) the bureaucrats he refers to in his emails were within the senior executive leadership, and included a Deputy Director General and the Executive Director of Workforce (Transcript, 70.9), and

(c) that he considers the Department continues to have a cultural problem (Transcript, 68.4).

100 I have already discussed the approach to the practicability of an order for reinstatement or re-employment at [77] above. The bespoke evaluation requires the Commission to consider the specific dismissal situation and to evaluate the underlying facts: ***PTAWA*** at [120] to [121] per Kenneth Martin J. This assessment must be undertaken in a common-sense fashion. In the decision under appeal to the Industrial Appeal Court in ***PTAWA***, the Full Bench considered the role of an alleged loss of trust and confidence in determining whether an order of reinstatement should be made: ***Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees*** [2016] WAIRC 00236; (2016) 96 WAIG 408 per Smith AP and Scott ASC with Beech CC in dissent.

101 In considering the broad matters of principle, endorsed by the Industrial Appeal Court on the appeal to it, Smith AP and Scott ASC observed at [104] and [105]:

104. The Full Bench in ***Nguyen*** at [24] also considered the observation of Gray J in ***Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd*** ([2000] FCA 627 [42]) that with the emergence of corporate employers, the importance of trust and confidence in the employment relationship has diminished. The Full bench in ***Nguyen*** at [25] adopted the remarks made by Gostencnik DP in ***Colson v Barwon Health*** ([2013] FWC 8734) about the point being made by Gray J. In ***Colson*** Gostencnik DP observed [21] – [22]:

> I do not take his Honour's comments to mean that trust and confidence as an element of the employment relationship is no longer important. It is merely recognition that in many cases it will be important to have regard to the totality of the employment, and that in the case of a corporate employer, the loss of trust and confidence in the employee will be by a manager or managers of the corporate employer. But as his Honour observed, in such cases the 'critical question must be what effect, if any, a loss of trust by the manager in an employee is likely to have on the operation of the workplace concerned' ([2000] FCA 627). It is important to understand that his Honour's observations were made in the context of an interlocutory application while His Honour was considering 'balance

of convenience' arguments against reinstatement on an interlocutory basis. His Honour's observation about the effect of the shift from a personal to a corporate employment relationship were made as an introduction to his conclusion that the respondent did not provide any evidence on the 'critical question' as identified. So much is clear from the following passage:

> … It might be more significant, for instance, to know the name of Mr Voss's immediate supervisor and to know the attitude of that person towards him. If the immediate supervisor had no trust in Mr Voss, it might also be relevant to know whether it would be possible to place Mr Voss in another part of the workplace, under another supervisor, who did have such trust. It would also be relevant to know what effect any lack of trust by any manager or supervisor in a particular employee might have on the conduct of operations in the workplace. There is no evidence as to any of these matters.
>
> [43] Resort to an assertion that trust and confidence in a particular person have been lost cannot be a magic formula for resisting the compulsory reinstatement in employment of the particular person ([2000] FCA 627).

In my view, His Honour is merely saying that it is not enough to simply assert that trust and confidence in an employee has been lost. Where this is relied upon then there must be evidence from the relevant managers holding that view and an assessment must be made as to the effect of the loss of trust and confidence on the operations of the workplace. In short, all of the circumstances must be taken into account. This seems evidence and is hardly controversial.

105. The Full Bench in ***Nguyen*** then distilled the following principles from the decided cases concerning the impact of trust and confidence on the question whether reinstatement is appropriate [27] – [28]:

- Whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate but while it will often be an important consideration it is not the sole criterion or even a necessary one in determining whether or not to order reinstatement (*Tenix Defence Pty Ltd v Galea* [2003] AIRC (11 March 2003) at [7] – [8]).
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts (*Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191).
- An allegation that there has been a loss of trust and confidence must be soundly and rationally based and it is important to carefully scrutinise a claim that reinstatement is inappropriate because of a loss of confidence in the employee. The onus of establishing a loss of trust and confidence rests on the party making the assertion (*Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191).
- The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing or misconduct, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably damaged or destroyed (*Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191).
- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee whom the employer believed to have been guilty of serious wrongdoing or misconduct are not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate (*Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191).

Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive. In making this assessment, it is appropriate to consider the rationality of any attitude taken by a party.

102 Evaluating trust and confidence can involve either or both the employer's trust and confidence in the prospective employee or vice versa. Regardless of which emphasis is considered, the focus should be on the circumstances of the workplace into which it is proposed to reinstate or to re-employ the former employee. This is simply part of assessing the underlying facts.

103 These grounds of appeal principally relate to several documents in evidence, they being exhibits 12, 13, 14 and 15 and Mr Kilner's oral evidence in relation to them. The first document is a "List of Events" that Mr Kilner maintained contributed to his psychiatric problems (see exhibit 12: AB 359-361). Mr Kilner referred to systematic bullying he had raised with the former Director-General of the Department of Education. The list, dated 10 April 2018, contains 23 items referring to various incidents that have occurred over the period from 2001 to March 2017, at BSHS and Mr Kilner's interactions with the Standards and Integrity Division and the District Directorate of the Department. In the main, the list of items makes various factual assertions and allegations arising from these incidents. These also include correspondence with members of Parliament and the then appellant, in relation to what Mr Kilner regarded as legitimate grievances. At the end of a several paragraphs in exhibit 12, Mr Kilner wrote "NO ACTION". In several others, he wrote "ACTION".

104 Mr Kilner was taken to several items in his cross-examination. He accepted that if he was re-employed at another school, he may need to contact the District Director to resolve issues, despite having made criticisms. Correspondence to the then appellant in relation to the culture of the Department and to the District Director, regarding the culture at BSHS, was referred to. When cross-examined in relation to the "NO ACTION" comments, Mr Kilner said that he did not mean this to be critical of the appellant, but to record the fact that matters had not changed: AB 620. However, as mentioned, the learned

Commissioner, in his reasons at [30], did not accept this, despite concluding overall that the documents and communications did not establish such a loss of trust and confidence to make a return to work a difficulty.

105 Exhibit 13 (AB 362) was an email from Mr Kilner to the appellant dated 4 April 2019. It referred to earlier correspondence of 31 January 2019, which congratulated the appellant on her then appointment as the Director-General of the Department. It referred to the prospect of a change of management style along with a new Minister. The email then referred to the Full Bench appeal and Mr Kilner's information that the Department may have been appealing the decision. Mr Kilner referred to "a waste of taxpayer funds" if such were to occur and he referred to other cases that have come before the Commission, involving teachers. A reference was made to an "adversarial culture exhibited by Human Resources". When he was cross-examined on this, Mr Kilner said that he was not intending to criticise the Department, but to point out there were funds being wasted on "some of these things": AB 623. In re-examination, Mr Kilner said that he had no day to day dealings with the Human Resources section of the Department as a teacher: AB 634.

106 Exhibit 14 (AB 363) was an email to the appellant from Mr Kilner dated 13 July 2019. It commenced by commending the appellant on her recent address given to the State Council of the respondent. Some comment was then made on Mr Kilner's proceedings in the Commission and that "bureaucrats (of the Department) will process my case through the WAIRC and the Department will receive more negative press". Mr Kilner also mentioned his daughter witnessing "rude officers" of the Department in court (seemingly in the first hearing) and a reference to his daughter, as a reason for her to leave the practice of the law, being "the misogynistic misuse of power to subvert the truth and trample over people without real legal support". Also, mention was made by Mr Kilner to him not arguing with this comment by his daughter and saying further, that he has been a "whistle-blower" who has witnessed and documented much of this behaviour displayed by the Department over the years. A further comment was made by Mr Kilner that he hoped that the appellant could use her "good moral compass" to "navigate the 'dark' places in Royal St" and he hoped that the appellant would use her ethical and accountable decision making to restore trust in the teaching profession. Mr Kilner further said there would be instant recognition of the appellant's actions, in circumstances "where currently there is no demonstration of empathy or care".

107 In his oral testimony, Mr Kilner was asked about the content of exhibit 14. In cross-examination, Mr Kilner said that he was not being critical of the appellant but that the "bureaucrats" in the Department do not create trust. Also, he referred to a meeting at the respondent where the Education Minister attended and was said to have referred to the need for the culture of the appellant to change: AB 626-627. Mr Kilner also said that recent changes introduced by the Minister and the appellant have "made a tremendous difference in the last year and a half, two years": AB 628. As to the comment about "misogynistic misuse of power", Mr Kilner testified this was something his daughter had said. Mr Kilner said that he did not adopt his daughter's description but added, he had witnessed some of this conduct: AB 630.

108 Mr Kilner was questioned about his reference to a "10 point plan" to deal with violence in schools which has now required the appellant to take responsibility and Mr Kilner acknowledged the Minister and the appellant as being responsible for these changes: AB 635 to 636.

109 The final specific document referred to by the appellant in these appeal grounds, was exhibit 15 (AB 365). This was an email dated 11 November 2019 to Minister Templeman about another case before the Commission involving a teacher. It referred to Mr Kilner's unfair dismissal case before the Commission and to school violence and an unsupportive workplace. Mr Kilner referred to the Minister for Education '"trying to address cultural problems in DET'" but it seems like a "Yes Minister" scenario where the bureaucrats run the show! DET seems hell bent on opposing judicial decisions and making a mockery of the Industrial Commission that is supposed to deliver justice to workers". Mr Kilner was also cross-examined on this email. He testified that although the Minister for Education was trying to make changes, there was a cultural problem in the Department because it was not following the "Code of Conduct": AB 632 - 633.

110 The learned Commissioner considered the documents in exhibits 12, 13, 14 and 15 at [23] to [31] of his reasons without, however, specifically identifying each. This was in the context of the appellant's argument that the return to work of Mr Kilner would be impracticable because of Mr Kilner's "deep-seated lack of trust", referred to at [22] of the reasons. The learned Commissioner said at [22] that having read the documents closely, "in number, context and content and tone they do not come anywhere near demonstrating what the respondent contends they demonstrate". The Commission then observed at [26] there were few documents and that "the context of the documents and the communications relate to concerns that whether ultimately found to be correct, were not unreasonable for the applicant's member to hold". The learned Commissioner also noted at [27] that the documents were addressed to the relevant people, were not made on social media or in newspapers or broadly distributed to "maximise pressure on the powers that be". Also, the learned Commissioner said at [28] that the content of the documents related to "real events and concerns in relation to those events". He also found at [29] that the tone of the documents was "fine" and there was no use of offensive or abusive language. As noted the learned Commissioner was somewhat critical of Mr Kilner's attempts to downplay the content of some documents and communications, but read as a reasonable person would read them, concluded at [30], that they did not "reveal such a loss of trust of the applicant's member in his employer as to make his return to work problematic".

111 As to ground 8, the appellant submitted that it was necessary for the Commission to undertake several steps as a part of fact finding and its consideration including making findings of fact as to what were Mr Kilner's beliefs and concerns in relation to these documents and his evidence; to what extent such views and concerns established any loss of trust or confidence; and whether any loss of trust or confidence sustained was such that the employment relationship could not be reasonably feasibly re-established. It was submitted that these steps were necessary for the Commission to make findings as to a lack of trust and confidence and failing to do so, amounted to a constructive failure to exercise jurisdiction.

112 The proper approach to whether there should be the reinstatement or re-employment of an unfairly dismissed employee has been referred to earlier in these reasons. This does not involve a formulaic approach to the assessment of the merit of restoring an employment relationship. This assessment is based on the specific facts, as to whether an employment relationship should be restored. The focus of the assessment should be on the restoration of an employment relationship in the particular

workplace concerned: ***Nguyen Le v Vietnamese Country Community Ethnic School South Australian Chapter*** [2014] FWCFB 7198; ***Colson v Barwon Health*** [2013] FWC 8734 as cited by the Full Bench in ***PTA*** at [104]. In the present context, this means primarily a classroom in a local school environment. Mr Kilner did express some strident views, directed to the culture of the Department; past problems at BSHS (and there were problems); interactions with the Standards and Integrity section and some District officers. The task for the Commission, was to assess the documents and communications referred to by the appellant, in the context of all the evidence. A judgment was required as to whether, given most documents and communications were historical, they meant an employment relationship could not reasonably feasibly be established for the future.

113 The learned Commissioner said that he had read the documents closely. He considered that the content of the documents related to specific events and sometimes, identified individuals. He was satisfied that the views and opinions expressed by Mr Kilner were not canvassed publicly or otherwise at large, such as to cause embarrassment or to undermine the appellant. The content of the documents spoke for themselves. It was unnecessary to repeat the matters raised as a matter of fact. The content of them was not controversial. There was no dispute by Mr Kilner he authored the communications, although he did attempt to qualify some of his responses, which as I have mentioned, the learned Commissioner did not accept.

114 I am not therefore persuaded that the Commission failed to constructively exercise its jurisdiction.

115 In relation to ground 9, the appellant submitted in summary, that the absence of trust and confidence may be between employer and employee and, also between employee and employer. Reference was made to a decision of Rothman J in ***Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney*** (2007) 69 NSWLR 198. The submission was made that as a matter of logic, whether a person's views were reasonable or rationally based, was irrelevant to whether there is a sufficient level of trust and confidence to re-establish an employment relationship. Thus, the submission was that if the learned Commissioner referred to the reasonableness of Mr Kilner's views, this was an error and involved an irrelevant consideration.

116 There is no doubt that a relevant lack of trust and confidence may be between either the employer in a prospective employee, and a prospective employee in the employer, or both. Whomever has a demonstrated lack of trust and confidence, whether it be the prospective employee or the employer, if sufficiently serious, and made out based on a credible foundation, that can undermine the relationship between the parties to a prospective re-established contract of employment. Based on the evidence, the bespoke evaluation by the Commission of a claim of losing trust and confidence by either party to a prospective employment relationship, involves an objective assessment by the Commission, having regard to s 26(1)(a) and (c) of the Act, and the formation of the requisite opinion, that reinstatement or re-employment is, or is not, reasonably feasible or reasonably capable of being accomplished.

117 I have set out at [101] above, extracts of the Full Bench majority decision in ***PTA*** at [104] and [105]. At [105], at the bottom of the par, the Full Bench said that in assessing whether a viable and productive employment relationship can be restored, it is relevant to consider the *rationality* of any attitude taken by a party. Furthermore, at [106], the majority said that in terms of the *attitude* that may be expressed by an applicant about an employer or other employees, or the employer about an applicant, an issue to consider is whether those attitudes as expressed "have a *reliable foundation* …". (My emphasis).

118 Accordingly, I consider that the reasonableness of the view held by an employee or an employer may be a relevant consideration in assessing whether such views are rational or reliable, as part of the Commission's overall assessment. This ground of appeal is not made out.

119 In the alternative to ground 9, as to ground 10, the appellant contended that if "reasonableness" was a relevant consideration in the Commission's assessment of Mr Kilner's views and opinions, there was no evidence before the Commission to support the conclusion that his views were "not unreasonable". Specific reference was made to exhibit 14 and the observation as to "misogynistic abuse of power…" to the "dark places in Royal Street" comment, also, in exhibits 14 and 15, the comment that "bureaucrats run the show". The submission was made that absent evidence, an error of law was committed.

120 As a starting point in considering this ground, as noted above, in relation to ground 8, the content of exhibits 12, 13, 14 and 15 largely speak for themselves. Despite the onus being on the appellant to establish that reinstatement or re-employment is impracticable, other than the cross-examination of Mr Kilner, no other evidence was led by the appellant to resist it. The question arising is whether based on the content of these documents themselves, in the context of all of the evidence, especially Mr Kilner's, whether the conclusion of the Commission that the concerns of Mr Kilner were not unreasonable to hold, was open.

121 This ground of appeal appears to focus the appellant's challenge on this issue to the two emails to the appellant in exhibits 14 and 15. As such, I generally confine consideration of the appellant's submissions to these two documents, although it appears from the learned Commissioner's reasons, that he considered the documents and communications more widely. I will, however, comment on several other of Mr Kilner's communications, as set out in the respondent's submissions.

122 As already noted, exhibit 14 was an email to the appellant of 13 July 2019 in which he commended the appellant for her address to the respondent in relation to ethical and accountable decision making and the creation of trust. As also noted above, Mr Kilner referred to his case before the Commission in the first hearing and the comments made by his daughter, reportedly referring to "misogyny" in the Department. Whilst such comments are technically hearsay, and as reported, were irrelevant to the proceedings before the Commission at first instance, it is apparent from the email that Mr Kilner did not adopt this statement as his own, but referred to it in the context of the ERG review of BSHS in May 2011. A copy of the report of the ERG was an annexure to Mr Kilner's witness statement in the first hearing: AB 221-228. And Mr Kilner gave evidence about it at AB 611-616. Comments were made in the ERG report as to staff relationships and a lack of recognition and a perception amongst staff members at BSHS, that their views were not valued or considered: AB 223. Also in the cross-examination of Mr Kilner, in an exchange between Mr Kilner and the learned Commissioner, Mr Kilner referred to his role as a "whistle-blower" and his observations about misogyny, where he said he had seen many examples of it at Busselton and that it was a problem at the Department: AB 630.

123 As to the assertion by Mr Kilner in exhibit 14 that negotiations in relation to his case had reached a stalemate and that "bureaucrats" would process his case through the Commission and that negative press would follow, this statement is largely innocuous. It reflected Mr Kilner's views that the proceedings were likely to be contested further (as they have been). And a copy of an article in the local newspaper in Busselton about Mr Kilner's unfair dismissal case, was also supportive of the view he expressed: AB 518 – 519.

124 As to the "dark places" in Royal Street comment, it is difficult to see how much meaning could be attached to such a broad statement. No reference is made to specific individuals or those that Mr Kilner may work with or have direct dealings with as a teacher, in a specific teaching workplace. The context appears to be Mr Kilner's hope for the appellant to restore what he described as building trust back into the teaching profession, and some systemic change in the Department's approach.

125 The reference to the cultural problem in the Department and "that the bureaucrats run the show" appeared in exhibit 15, the email to Minister Templeman. This email referred to another case involving a teacher, Mr Buttery. Again, the comment of Mr Kilner is non-specific, is generalised and referred to efforts by the Education Minister at reform. As with the "dark places" comment, it appears to carry little real meaning, other than to be encouraging of reform, but it being resisted.

126 While the appellant did not specifically single out other comments or expressions of view by Mr Kilner in this ground of appeal, as I have mentioned, the respondent in its written submissions did refer to several others in exhibits 13, 14 and 15. Before turning to them, the learned Commissioner dealt with the documents and communications globally at a higher level of abstraction. No specific comments or documents were singled out.

127 I do not propose to recite all the other statements and expressions of view made by Mr Kilner, as set out at [96] - [99] of the respondent's written submissions, additional to those separately considered above. I generally accept the respondent's characterisation of them as "banal" and reasonable, in the context in which the statements were made. Most, for example, those commenting on the Human Resources Department's pursuit of Mr Kilner's case on appeal, were simply statements of fact. They do not approach such a "deep-seated lack of trust for the Department" that re-employment of Mr Kilner by the appellant would not be reasonably feasible or reasonably capable of being accomplished.

128 Ground 11 complains that the learned Commissioner's conclusion that the "tone" of the documents and communications considered above, were "fine" was a manifestly unreasonable conclusion. The reference to this issue is at [29] of the reasons. Importantly, the learned Commissioner said in the same paragraph that "there is no abuse or offensive language". The first sentence of the Commission's reasons must be read in the context of the whole paragraph and not in isolation. The appellant submitted that the communications that the learned Commissioner relied upon for these purposes included the "misogynistic abuse of power to trample over people" and the "dark places in head office" reference (exhibit 14: AB 363); an implicit assertion by Mr Kilner that the appellant did not engender trust (said to arise from exhibit 14); and that the appellant's staff "run the show" (exhibit 15: AB 366).

129 It was submitted by the appellant that the effect of these communications challenged the competence and integrity of the appellant to undertake managing the Department, especially when Mr Kilner copied other persons into such correspondence, including the Minister for Education. This ground of appeal relies on substantially the same documents and communications as is the subject of the earlier grounds of appeal. The upshot of the submission being that the integrity of the appellant was questioned by Mr Kilner. As to the "misogynistic abuse of power" contention, as noted at [106] above in connection with ground 10, this statement was made not by Mr Kilner but by his daughter. The reference in exhibit 14 in the header to "What Does Trust Look Like" is plainly a reference to the subject of the appellant's speech to the Council of the respondent, which is referred to in the first paragraph of Mr Kilner's email. I think it is a fair observation, as the respondent contended in its written submissions, that the appellant has focused on those parts of exhibits 14 and 15 in this respect, without regard to the whole of the other communications and documents in evidence. It is the whole context of the documents and communications overall, that the learned Commissioner had regard to.

130 It is fair to say too, as I have already noted, that some comments made by Mr Kilner, were ill advised comments to make to the appellant in her capacity as the Director-General of the Department. However, I do not consider that taken in context, the documents or communications made by Mr Kilner were motivated by ill-intent. Several of them are complimentary of the appellant and attempts made to reform the work environment for teachers generally. I consider that many of the documents and communications, not just those referred to by the appellant in these grounds of appeal, reflect a genuinely held view by Mr Kilner of the need for a positive change and a commitment to BSHS, over many years, both as a person representing teachers in the workplace and as an advocate for broader reform and improvement. Mr Kilner had been thanked for raising issues in the past in connection with the ERG, with the then appellant in September 2012 doing so (see exhibit 9: AB 354 - 355). In response to further correspondence with the Director-General in January 2013, in reply, the then appellant commended Mr Kilner for his level of passion for BSHS: exhibit 11: AB 358.

131 I therefore consider that the learned Commissioner, taken in the context of an overall consideration of the various documents and correspondence, both by and from Mr Kilner and to him, it was open to reach the view that the tone of them was not inappropriate. There was no evidence of a response by the appellant to Mr Kilner's correspondence in exhibit 14 for example, where she could have objected to the manner of Mr Kilner's communications with her, even though Mr Kilner was not an employee of the appellant, as the proceedings were still before the Commission and not yet concluded. What was required by the Commission was a balanced assessment of all the material, not just some of it. Having reviewed all the material in evidence, I consider it was open for the learned Commissioner to conclude as he did, as to their general tone and character.

132 As to ground 12, again in reliance on exhibits 12, 13, 14 and 15, the appellant submitted that overall, the Commission's finding that the documents and communications did not support a conclusion of a loss of trust and confidence, was manifestly unreasonable. The appellant repeated its view as to the effect of the exhibits and referred to Mr Kilner's oral evidence in relation to them. It was submitted that the oral evidence given by Mr Kilner supports the view he does not have trust and confidence in the appellant and her capacity to manage the Department appropriately or ethically, to provide a safe work

environment for teachers or to manage taxpayer funds effectively. The submission was further made that Mr Kilner's views extend to all levels of the organisation including past principals of BSHS, district officers, previous Director-Generals and other divisions within the Department including Standards and Integrity, Human Resources, amongst a few more.

133 The net effect of this, according to the appellant, was that the only conclusion reasonably open from these expressions of views, was that the re-establishment of an employment relationship between Mr Kilner and the appellant would not be reasonably feasible.

134 As to this ground generally, the contentions advanced were somewhat of a culmination of the complaints raised in grounds 9, 10 and 11. Given the conclusions reached in relation to those grounds, I consider that it was not open for the Commission to conclude on the evidence, including exhibits 12, 13, 14 and 15, read as a whole, that a loss of trust asserted by the appellant was established. None of the material relied on by the appellant went to the establishment of a case of a loss of trust and confidence in the workplace of a school teacher in a classroom setting, or in the interaction with other teachers or principals, with whom Mr Kilner may have direct and regular involvement, in the future. The reference specifically to BSHS, and the comments made by Mr Kilner about the difficulty at that school, had to a considerable extent, a foundation, as revealed by the subsequent ERG report.

135 The matters raised and complained of by the appellant in relation to these documents and communications, stand in stark contrast to the facts before the Commission in the case before the Full Bench in ***PTA*** for example. There, as summarised by the Full Bench at [114] - [124], the former employee made and maintained throughout the proceedings at first instance and also on appeal, very serious allegations against co-workers that she would have to work directly with, including that they had conspired against her in relation to a particular workplace incident; that some had committed perjury when giving evidence before the Commission; and that credible doubts remained about the employee's reliability to recount and record events, as an important part of the job into which she was seeking to be reinstated. These workplace-specific matters were found by the Full Bench to be directly relevant to whether the employer legitimately maintained a loss of trust and confidence, to resist reinstatement.

136 To the contrary in this case, no such workplace-specific circumstances arise. Mr Kilner had in several respects, legitimate concerns as to the difficulties experienced at BSHS. These concerns were to an extent, borne out by the ERG report in evidence (see AB 221 - 228). Some of its findings and recommendations were consistent with the views expressed by Mr Kilner before and during the review (see exhibits 7, 8, 9, 10 and 11: AB 349 - 358). The fact that the Minister for Education and the appellant, then took initiatives to remedy some problems identified, is consistent with the legitimacy of several issues raised by Mr Kilner in his past correspondence. In some of this correspondence, he has acknowledged and supported these initiatives. In all the circumstances, it was open for the Commission to conclude that Mr Kilner was well-intended, to improve not just BSHS, but also the work environment for teachers generally.

137 Whilst the appellant referred to some of Mr Kilner's oral evidence at [131(e)] of her written submissions, this evidence was plainly supplementary to an explanation of his views, as expressed in exhibits 12, 13, 14 and 15, as these documents were introduced into evidence by the appellant at first instance, in her cross-examination of Mr Kilner. None of the views in that evidence, again in the context of the evidence before the Commission, including that complimentary of the efforts of the appellant at reform, in particular to address what were perceived to be the "cultural problems" within the Department, went to the specific environment of a teacher in a classroom and within a school. More particularly, Mr Kilner also confirmed that of those areas identified by the appellant in her grounds of appeal, those being Human Resources, Standards and Integrity and the senior management of the Department, none would have any direct contact or involvement with him as a teacher in a classroom regularly. The only exception seemed to be where Mr Kilner said, "if you have done something wrong" (in the case of Standards and Integrity) or in the conduct of an Expert Review Group (senior management): AB 633 - 635. Mr Kilner was also conciliatory and positive in relation to the "10-point plan" which in part at least, appears to have arisen from past difficulties at BSHS: AB 636.

138 By ground 13, the appellant complained that the learned Commissioner failed to have regard to Mr Kilner's oral evidence referred to above, in concluding that the appellant had not established a sufficient lack of trust and confidence by Mr Kilner in the appellant, to resist re-employment. The submission was made that in effect the Commission only relied on the documentary evidence as to these matters. It is apparent however, as noted above, that the basis for much of the cross-examination and re-examination of Mr Kilner on these issues, was the documents tendered in evidence as exhibits 12, 13, 14 and 15. It was the appellant who introduced them into evidence. The views expressed in relation to these matters are primarily to be obtained from the documents. The appellant's submissions in closing at first instance (AB 676 - 689), referred largely to these exhibits. It seems tolerably clear from a review of the appellant's closing submissions, that the primary focus of the appellant's case was the documents themselves, which, as I have noted, were largely self-explanatory. The appellant made three references to Mr Kilner's oral testimony, but seemingly only to emphasise what the appellant maintained the documents themselves said.

139 The learned Commissioner referred to Mr Kilner's testimony as to these documents and communications at [30] of his reasons. This paragraph is plainly to be read in the context of his prior comments at [23] - [29]. As noted above, the Commission did not accept Mr Kilner's attempts to explain away some of his comments made in exhibit 12, but was not, overall, persuaded by the appellant's case to resist re-employment. The learned Commissioner also referred to "other examples" but did not mention them specifically. It is clear however that regardless, the primary focus of the appellant's challenge was the content of the documents and communications in exhibits 12, 13, 14 and 15. The documents themselves were the best evidence of their content, not what Mr Kilner may have said about them, in some cases many years after the event.

140 It was thus hardly surprising, and it was appropriate, that the learned Commissioner placed his principal focus on the documents themselves, and not be distracted by what Mr Kilner may have said about them in retrospect.

141 I am not persuaded that any of these grounds of appeal are made out.

Notice of contention

142 A Notice of Contention was filed by the respondent. Several issues raised in some grounds and submissions made by the respondent on the Notice have been touched on above in dealing with the grounds of appeal.

143 The respondent submitted that further reasons support the Commission's decision to dismiss the s 27(1) application made by the appellant, set out in grounds 1(a) and (b) of its Notice. These grounds are:

> **Section 27(1)(a)(ii) application for dismissal of matter**
>
> 1. The Appellant's application for dismissal of the matter pursuant to section 27(1)(a)(ii) ought to have been dismissed because:
>
> a. In order to find that the further proceedings were not desirable in the public interest, the Appellant needed to persuade the Commission that:
>
> i. The Respondent's conduct in not disclosing Dr Buckeridge's Certificate dated 1 March 2018 ("the Certificate") prior to the hearing of 25 July 2018 was improper; or
>
> ii. The respondent's conduct in making closing submissions to the effect that Mr Kilner did not suffer from a medical condition and was fit for work at the date of dismissal was improper; or
>
> iii. The combination of (i) and (ii) was improper conduct; and
>
> iv. Because of that improper conduct, the public interest weighed against further proceedings.
>
> b. The non-disclosure of the Certificate was not improper conduct because:
>
> i. In the absence of specific orders by the Commission, there was no automatic right to discovery of documents, nor an obligation to give discovery of document, (sic) prior to the hearing;
>
> ii. There was no evidence before the Commission that the Appellant had made any request to the Respondent for discovery of medical records or medical certificates.
>
> iii. There was no evidence of any deliberate decision on the part on the Respondent to withhold the Certificate.

144 I have earlier in these reasons dealt with the general principles to apply concerning s 27(1) of the Act and those applicable to discovery, production and inspection in this jurisdiction. I accept that demonstrating serious misbehaviour or improper conduct by a party to proceedings may be a basis for the Commission to exercise its powers to dismiss a matter under s 27(1) of the Act. I accept too the respondent's submission that, as discussed by Alanson J in ***Australian Federal Police v Kalimuthu*** [2015] WASC 376 at [44], non-disclosure should be regarded as an irregularity, unless it is deliberate or fraudulent. Here, there was no evidence to establish that failing to disclose the second medical certificate of Dr Buckeridge was other than inadvertent conduct by the respondent.

145 There was no obligation to disclose the Dr Ng medical report, as it was subject to legal professional privilege. As the respondent noted in its submissions, until the last medical certificate from Dr Buckeridge, which issued after the notice of termination of employment had been given by the appellant to Mr Kilner, Mr Kilner had provided all his medical certificates to the appellant as his employer, as a part of his taking extended sick leave. I accept that it would be a reasonable assumption for the respondent to make, if it turned its mind to this issue, that Mr Kilner also did so on the last occasion of receiving a medical certificate from Dr Buckeridge. It was not established to the contrary.

146 The respondent accepted, properly in my view, that it ought to have disclosed the existence of Dr Buckeridge's second medical certificate to the appellant at the time of the first hearing. However, absent anything before the learned Commissioner to establish deliberate conduct by the respondent, which would be a serious matter, to dismiss the application in toto, when a finding of an unfair dismissal had been made and a compensation order had issued, would be a harsh and unjustified response. As to the appellant's submission there had been a finding of implicit misconduct by the Commission, in reducing the remuneration lost to be paid to Mr Kilner, I do not think that the matter can be put so highly. The learned Commissioner was not satisfied that the respondent's failure to disclose the second medical certificate of Dr Buckeridge was sufficiently serious to dismiss the proceedings. He was however, of the view that the respondent's failure, falling short of an abuse of process, should have consequences, hence the discount in his order for remuneration lost. It was a question of degree.

147 Also, having regard to the evidence before the Commission at first instance in the initial hearing, including the reports from Dr Lai, the first Dr Buckeridge medical certificate, and even having regard to the content of Dr Ng's medical report, had it been put before the Commission, the learned Commissioner was correct to observe that any lost opportunity to the appellant, taken in the context of all of the material, caused by the absence of the second medical certificate from Dr Buckeridge, was minimal.

148 As to grounds 1(c) and (d) of the Notice, these are as follows:

> c. The Respondent's submissions to the Commission to the effect that Mr Kilner was not suffering from a medical condition and was not unfit for work as at the date of his dismissal was not improper conduct because:
>
> i. Whether or not the Certificate was discovered, it was at best an opinion which was expressed in uncertain terms and without setting out the facts or assumptions on which it was based. Accordingly, the Respondent was not bound to limit its submissions by reference to what was contained in the Certificate.
>
> ii. The submissions were made in closing and after the close of the Appellant's case;

iii. The submissions were appropriately qualified in the course of closing submissions, as reflecting the evidence that was before the Appellant at the time of the dismissal.

d. The public interest weighed against the dismissal of the proceedings because:

i. In exercising its discretion under section 27(1)(a)(ii) the Commission was bound to consider the interests of Mr Kilner as a person immediately concerned in the industrial matter.

ii. Disclosure of the Certificate, and the absence of the submissions complained about, on their own or in combination, would not have altered the finding that the termination of Mr Kilner's employment was harsh, unjust or unreasonable;

iii. Mr Kilner had no other remedy for the harsh, unjust or unreasonable termination of his employment, other than a remedy determined by way of the proceedings;

iv. The Appellant was not prejudiced by the non-disclosure, or the making of submissions (in isolation or combination) in a manner that could not be remedied because it had the opportunity to present its case in relation to remedy at the remitted hearing.

(Footnotes omitted)

149 It was submitted by the respondent that in the circumstances, the submissions made on Mr Kilner's behalf at the first instance hearing that Mr Kilner was not suffering a medical condition and was not unfit for work, at the time of his dismissal, was not improper conduct. This was because, as I understood the submission, the second medical certificate was brief and uncertain; the issue was always Mr Kilner's fitness for work at a school other than BSHS; that the respondent's then submissions reflected the evidence before the appellant at the time of Mr Kilner's dismissal; and having regard to the medical evidence before the Commission, and the Dr Ng report (not in evidence but known to the respondent), the respondent's counsel's submissions to the Commission should be seen as an invitation to find Mr Kilner was fit, despite some evidence to the contrary. The respondent contended that the appellant, in the initial hearing, was alive to the contradictory nature of some of the evidence before the Commission and made submissions on the point: AB 83. It was contended that the Commission was not led into error by the course taken and the appellant, by the submissions just referred to, was aware of the issue too.

150 In terms of the position adopted before the first Full Bench, the respondent submitted that it was put before the Full Bench in the double negative, that the learned Commissioner had not found Mr Kilner was not suffering a medical condition. Further, that on this basis, the respondent maintained its position before the Full Bench that in the context of all the evidence, Mr Kilner was not unfit to work at a school other than BSHS. The result of this was said to be there was no impropriety in the above submission, and the second Dr Buckeridge certificate, even if it were in evidence, would not have precluded the maintenance of this position. In these circumstances, the respondent said it would be contrary to the interests of Mr Kilner for the s 27(1) application to have succeeded. And even having regard to the second medical certificate, when taken with all the other medical evidence, Mr Kilner had or would shortly have recovered from his medical condition and could work at another school. For the appellant, it was submitted that Mr Kilner was complicit in the non-disclosure and even if not, the submission was made that the wrongs of the agent should be brought to bear on the principal.

151 In dealing with this aspect of the Notice, I observe that the learned Commissioner reached no conclusion on whether there was an inconsistency between the submissions made by counsel for the respondent and the content of the second medical certificate, and also the Dr Ng report. This is dealt with at [65] - [67] of his reasons. At [66] the learned Commissioner said:

> There is also an issue about the making of certain submissions by the applicant's counsel where the applicant held two documents, the medical certificate referred to in the previous paragraph and the report of Dr Ng.

152 The learned Commissioner then said at [67]:

> I have no idea how, if it is the case that there is an inconsistency, how the inconsistent submissions came to be made. The respondent tells me she does not blame counsel. That is unhelpful to me in determining whether anyone was at fault and, if so, who and why.

153 A further complication is a lack of reference in the learned Commissioner's reasons, to the timing of any return to work. I have referred to this above at [35], in dealing with the grounds concerning the s 27(1) application. On the evidence before the Commission at first instance, even assuming the second medical certificate had been tendered, along with the Dr Ng report, it would have been open for the learned Commissioner to have concluded that Mr Kilner would soon be fit for work at a school other than BSHS. That was the substance of Dr Ng's report and the second medical certificate from Dr Buckeridge, albeit, in very brief terms, he said that Mr Kilner should be able to return to work by Term 4. The reference by Dr Buckeridge to the "charges" and "processing" of them was somewhat ambiguous and uncertain. I also note that Professor Janca commented, as mentioned at [37] above, that he was unclear as to the meaning of Dr Buckeridge's second medical certificate.

154 None of the medical evidence then before the Commission, or known to the respondent, suggested that Mr Kilner would never be fit for work at any school.

155 I do not consider, on these further bases, that the conduct of the respondent could be regarded as improper, so Mr Kilner should have been denied any remedy by granting the s 27(1) application. In the circumstances too, I am not persuaded that the appellant would have been prejudiced in the manner suggested, or that Mr Kilner was complicit in any impropriety.

156 Ground 2 of the Notice is:

Impracticability of Reinstatement: Mr Kilner's Fitness for Work

2. The Commission's conclusion that Mr Kilner was fit to work in a school other than Busselton Senior High School should be upheld because:

a. in relation to the relationship between medical incapacity and practicability of reinstatement, the pertinent enquiry was as to Mr Kilner's fitness to perform the inherent requirements of the relevant role prospectively from the date of the hearing.

b. The onus was on the Appellant to establish credible reasons why reinstatement of Mr Kilner was impracticable.

c. The Appellant did not adduce and did not rely upon any expert evidence expressing opinions different to those expressed by Professor Janca.

d. Professor Janca's opinion was given after he had examined Mr Kilner on 1 August 2019. He had regard to the medical report of Dr Lai, the report of Dr Ng, and the certificates of Dr Buckeridge and Dr Mowatt, (sic) Section 64(1) of the *School Education Act 1999* setting out teachers' functions and Part 3 of the *Teachers (Public Sector Primary and Secondary Education) Award 1993* which set out teachers' duties.

e. Professor Janca's opinion was:

i. Mr Kilner suffered from an illness in the past that would have impacted on his ability to work as a Senior Teacher. His illness appeared to be psychological and reactive in nature and met DSM-5 diagnostic criteria for an adjustment disorder with anxiety.

ii. At the time of his interview with Mr Kilner, Mr Kilner did not suffer from any psychiatric condition. Over the past year his symptoms of anxiety significantly improved and currently have no impact on his overall functioning.

iii. Mr Kilner's medical condition does not warrant further investigation or treatment.

iv. Mr Kilner is not currently incapacitated either totally or partially for work as a Senior Teacher. He is able to work as a Senior Teacher.

v. His impression was that Mr Kilner likely achieved fitness to work at an alternative school in mid-2018.

vi. While there is no guarantee that Mr Kilner would not suffer a relapse at a school other than Busselton Senior High School, the risk was low.

f. No specific facts were put to Prof Janca that established the risk of relapse at a school other than Busselton Senior High School was other than a low risk.

g. The Appellant adduced no evidence that Mr Kilner was unable prospectively to perform the inherent requirements of the role of Senior Teacher.

(Footnotes omitted)

157 These matters do not essentially raise new issues not already canvassed in the grounds of appeal and the above reasons. In any event, I accept that from the appellant's perspective, as at the time of the proceedings, Mr Kilner was not an employee and the appellant would therefore have not been able to insist upon him submitting to a medical examination. There was no necessity on the appellant to call her own expert evidence and it was open to her to rely upon the expert evidence adduced by the respondent. This would not have precluded however, Professor Janca's medical reports, along with the materials provided to him, being reviewed by an expert of the appellant's choosing, as to whether, on what was before Professor Janca, any difference of view may be open. It is not uncommon in legal proceedings for the views of an expert witness for one party, to be the subject of review and comment by an expert retained by another party. Absent this course taken by the appellant, the fact is the only expert evidence was that of Professor Janca. He unambiguously concluded that Mr Kilner was fit for work as at the time of the remittal. This must be taken to be a prospective assessment and it was in favour of the respondent's position.

158 As to ground 3 of the Notice, it provides:

Impracticability of Reinstatement- Trust and confidence

3. The Commission's conclusion that a return to work was not impracticable for trust and confidence reasons should be upheld because:

a. The evidence upon which the Appellant relied to establish Mr Kilner lacked trust and confidence in the Director General was:

i. Correspondence sent by Mr Kilner after his employment had ended and therefore not indicative of his relationship with the Director General as an employee;

ii. Concerned the litigation in which Mr Kilner was involved, and so was not a matter that could be taken into account in relation to trust and confidence.

b. The relevant enquiry was the effect of the loss of trust and confidence on the operation of the workplace. The Appellant led no evidence relevant to this issue.

c. The correspondence relied upon by the Appellant to establish a loss of trust and confidence by Mr Kilner was consistent with Mr Kilner's past conduct in advocating for improvement of conditions for teachers without any adverse consequences for the ongoing employment relationship.

d. The Appellant is a large civil service organisation which has the capacity to deal with and manage Mr Kilner's communications.

159 It was contended that the correspondence relied upon by the appellant to assert a lack of trust and confidence was dated after the termination of Mr Kilner's employment. Thus, it did not go to establishing his relationship with the appellant whilst Mr Kilner was an employee. Second, the respondent contended that the correspondence relied on resulted from these proceedings, both at first instance and in appeal, and could not be considered in establishing a lack of trust and confidence. Third, there was

no direct evidence about Mr Kilner's inability to work in the workplace of a teacher. Fourth, the correspondence relied on dealt with concerns Mr Kilner historically had about working conditions for teachers generally whilst he worked as a teacher, some of which were recognized by the then appellant. Finally, that the Department, being a very large organisation, can accommodate the views expressed by Mr Kilner in his communications.

160 To some extent again, as to this ground, there is an overlap in the respondent's contentions with its responses to the grounds of appeal, which have been considered above. I agree with the appellant's submissions in part, that she did not just rely on correspondence and communications which took place after the termination of Mr Kilner's employment in February 2018. Exhibit 12, Mr Kilner's "list of issues", whilst dated April 2018, related to matters well before his dismissal, in some cases, many years earlier.

161 As to the submission that some of the correspondence concerned Mr Kilner's proceedings before the Commission (see exhibits 13, 14 and 15) I accept that as a general proposition, any tension, discomfort or ill feeling arising between parties resulting from the fact of exercising a statutory workplace right, should not be considered in determining loss of trust and confidence: ***Nguyen.*** To the extent that exhibits 13 and 14 mention the Commission proceedings involving Mr Kilner, which generally adopt the theme of a waste of taxpayers' money and the Department's pursuit of appeals, these matters should not be considered in assessing whether trust and confidence has been lost. The fact is both parties can exercise legal rights, including rights to an appeal. An exception to not taking such matters into account, may include where one party or the other adopts an extreme response, disproportionate to the circumstances of the proceedings concerned.

162 Whilst the appellant referred to ***Adam v East Metropolitan Health Service*** (2019) 99 WAIG 556, it is not apparent from that decision that the conduct of the former employee concerned was only due to taking an unfair dismissal claim. The conduct of the applicant was extreme, accusing the employer of corruption, being untrustworthy, and engaging in "conspiracies and cover-ups": at [22]. And Emmanuel C found the applicant's letters and emails to his former employer to have a concerning tone which could be viewed as "aggressive, abusive and mocking": at [22]. If such statements did arise directly out of and only related to the institution of the proceedings, then I consider they would fall into the extreme and disproportionate category, referred to above. It would be appropriate for the Commission to have regard to them, in considering whether trust and confidence had been lost. The facts in ***Adam*** however, are a far cry from those in the present matter.

163 To the extent that this ground refers to the need to focus on the workplace and those persons and sections of the Department to whom Mr Kilner made reference in the organisation, having little interaction day to day with teachers, these issues have been dealt with in the grounds of appeal above. Additionally, I do not think the size of an organization alone, should be a disqualifying factor in reaching a view as to whether trust and confidence may be lost.

Conclusion

164 I would dismiss the appeal.

EMMANUEL C:

165 I have had the benefit of reading the draft reasons of the Senior Commissioner. I agree with those reasons and have nothing to add.

2020 WAIRC 00928

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION WESTERN AUSTRALIA
	APPELLANT
	-and-
	STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	RESPONDENT
CORAM	FULL BENCH
	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 20 NOVEMBER 2020
FILE NO/S	FBA 5 OF 2020
CITATION NO.	2020 WAIRC 00928

Result	Appeal dismissed
Appearances	
Appellant	Mr J Carroll of counsel
Respondent	Ms R Cosentino of counsel

Order

This appeal having come on for hearing before the Full Bench on 8 September 2020, and having heard Mr J Carroll of counsel on behalf of the appellant, and Ms R Cosentino 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 this appeal be and is hereby dismissed.

By the Full Bench

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

COMMISSION IN COURT SESSION—Unions—Application for Alteration of Rules—

2020 WAIRC 00940

APPLICATION PURSUANT TO S.62 - ALTERATION OF REGISTERED RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

COMMISSION IN COURT SESSION

CITATION	**:**	2020 WAIRC 00940
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
HEARD	**:**	THURSDAY, 3 DECEMBER 2020
DELIVERED	**:**	THURSDAY, 3 DECEMBER 2020
FILE NO.	**:**	FBM 1 OF 2020
BETWEEN	**:**	UNITED VOICE WA Applicant AND (NOT APPLICABLE) Respondent

CatchWords	**:**	Industrial law (WA) – Application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) – Alteration of Union rules – Alteration of name of industrial organisation of employees – Alteration of name of counterpart federal body – No objection to application – Application granted
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Alteration to rules authorised
Representation:		
Applicant	**:**	Mr J Raja on behalf of the applicant

Reasons for Decision

THE COMMISSION IN COURT SESSION:

1 United Voice WA (the organisation), an industrial organisation registered pursuant to the *Industrial Relations Act 1979* (WA) (the Act), seeks to alter its Rules to do two things. It seeks to alter its name to United Workers Union (WA) and to alter the name of its counterpart federal body, in Rule 29 – COUNTERPART FEDERAL BODY, from United Voice to United Workers Union. It does so because its counterpart federal body amalgamated with the National Union of Workers to become the United Workers Union ([2019] FWC 6756).

2 We have considered the evidence provided by Ms Carolyn Anne Smith, Secretary of United Voice WA. It records that the process undertaken by the organisation to make these alterations has been in accordance with the requirements of Rule 28 – ALTERATION OF RULES. This rule requires that:

> The Branch Council shall have power to alter these rules. Not less than 21 days written notice of any proposed alteration and reasons therefore shall be given to all members of the union and any member shall be entitled to object in writing to the Branch Council concerning the proposed alteration.
>
> In addition, any member shall be entitled to object to the proposed alteration by forwarding a written objection to the Registrar of the WA Industrial Relations Commission.

At the time of the giving of notice of proposed alterations and the reasons therefore, members shall be informed in writing of their rights to object thereto.

3 A notice was sent to all members on 3 June 2020. The notice informed members of the proposed alterations; the intention to apply to the Commission to make the alterations; that the members are entitled to object to the proposed alterations and that they may make any objection, in writing, to the organisation's Council or to the Registrar or both, within 21 days.

4 Ms Smith says that no objections were notified to the organisation.

5 A resolution was formally put to the Branch Council 'that the rules of United Voice WA be altered accordingly to give effect to the

- name change of the State branch from United Voice WA to United Workers Union (WA); and
- recognise the national name change from United Voice to United Workers Union'.

6 The Branch Council passed the motion on 14 July 2020, authorising the alterations (Affidavit of Carolyn Anne Smith – Appendix 4).

7 The Registrar published notice of the application to alter the Rules in the Western Australian Industrial Gazette of 28 October 2020 ((2020) 100 WAIG 1410). The notice set out that any person who wished to object to the application may do so in writing and it set out how such an objection may be made. No objections have been received by the Registrar.

8 The requirement in s 53(3) of the Act that the matter not be heard until after the expiration of 30 days from the date of publication of the notice has been met.

9 In all of these circumstances, the requirements of the Rules for the alteration of those rules and the requirements of the Act have been met. Therefore, the Commission in Court Session authorises the Registrar to make the alterations to the Rules in accordance with the terms of the application.

2020 WAIRC 00963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 3 DECEMBER 2020
FILE NO/S	FBM 1 OF 2020
CITATION NO.	2020 WAIRC 00963

Result	Alteration to the rules authorised
Appearances	
Applicant	Mr J Raja on behalf of the applicant

Order

Having heard from Mr J Raja on behalf of the applicant, the Commission in Court Session hereby authorises the Registrar, in accordance with s 62(2) of the *Industrial Relations Act 1979* (WA) to register the following alterations to the Rules of United Voice WA:

1. In Rule 1 – NAME, Rule 3 – ELIGIBILITY FOR MEMBERSHIP, sub-rule (6) and Rule 29 – COUNTERPART FEDERAL BODY, to alter the name 'United Voice WA' to 'United Workers Union (WA)'; and
2. In Rule 29 – COUNTERPART FEDERAL BODY, to alter the name 'United Voice' to 'United Workers Union'.

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

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2020 WAIRC 00901

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

RESPONDENT

CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 10 NOVEMBER 2020
FILE NO/S	APPL 46 OF 2020
CITATION NO.	2020 WAIRC 00901

Result	Order issued
Representation	
Applicant	Ms J Allen-Rana (as agent)
Respondent	Mr J Dekuyer (as agent)
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch	Ms P Lim (as agent)
Electrical Trades Union WA	Mr A Giddens (as agent)

Order

WHEREAS this is an application to vary the *Railway Employees' Award No. 18 of 1969*;

AND WHEREAS this application was filed by the Public Transport Authority of Western Australia;

AND WHEREAS this application named The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch as the respondent to this application;

AND WHEREAS the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Employees Union of Australia, Engineering and Electrical Division Western Australian Branch and The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Employees – Western Australian Branch are also parties to the Award;

AND WHEREAS on 2 October 2020 a Registry Services Officer 'contacted and spoke with the Electrical Trades Union WA (formerly known as Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Employees Union of Australia, Engineering and Electrical Division)' to confirm the correct email address for service of this application (info@etuwa.com.au);

AND WHEREAS on 2 October 2020 a Registry Services Officer 'contacted and spoke with The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch (formerly known as The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Employees - Western Australian Branch)' to confirm the correct email address for service of this application (amwuwa@amwu.asn.au and amwuwa@amwu.org.au);

AND WHEREAS on 2 October 2020 the Registry Services Officer served the notice of application by email to info@etuwa.com.au, amwuwa@amwu.asn.au and awuwa@amwu.org.au;

AND WHEREAS on 30 October 2020 this application was set down for hearing and I am satisfied that a notice of hearing was served on all parties in accordance with regulation 24 of the *Industrial Relations Commission Regulations 2005* (WA) by email (successful delivery receipts were received) and by post on 30 October 2020;

AND WHEREAS the respondent, The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch and the Electrical Trades Union WA informed the Commission that they did not intend to appear at the hearing;

AND WHEREAS the applicant requested this matter be dealt with on the papers, and the other parties did not object,

AND WHEREAS all parties consented to the minute of proposed order;

NOW THEREFORE the Commission, having heard from Ms J Allen-Rana as agent on behalf of the applicant, Mr J Dekuyer as agent on behalf of the respondent, Ms P Lim as agent on behalf of The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch and Mr A Giddens as agent on behalf of the Electrical Trades Union WA, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the *Railway Employees' Award No. 18 of 1969* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after 1 January 2021.

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

SCHEDULE

1. Clause 4.3 – Experience Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - EXPERIENCE ALLOWANCE

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - $ 6.90

After 24 months service with the employer - $ 14.40

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance: Delete paragraph (a) of subclause 4.4.1 of this clause and insert the following in lieu thereof:

(a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of $17.60 per week to such tradesperson/apprentice.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 – Leading Hands: Delete this clause and insert the following in lieu thereof:

4.5. - LEADING HANDS

Leading Hands shall be paid the following rate per week:

(a) Class 3

When in charge of not less than three and not more than ten others, paid $32.70 extra per week

(b) Class 2

When in charge of more than 10 but fewer than twenty others, paid $49.10 extra per week

(c) Class 1

When in charge of more than twenty others, paid $63.40 extra per week

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 4.6 – Electrical Licence Allowance: Delete this clause and insert the following in lieu thereof:

4.6. - ELECTRICAL LICENCE ALLOWANCE

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $23.20 per week.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.1 – On Call Allowances: Delete subclause 5.1.2 of this clause and insert the following in lieu thereof:

5.1.2 On Call Allowance

An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of $4.83 per hour.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

6. Clause 5.3 – Meal Breaks: Delete paragraph (a) of subclause 5.3.1 of this clause and insert the following in lieu thereof:

(a) An employee who having responded to a call is unable to return to the employee's home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of $11.45 as provided under this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

7. Clause 5.4 – Away from Home Allowances:

A. Delete subclause 5.4.2 of this clause and insert the following in lieu thereof:

5.4.2 Where sub clause 5.4.1. applies, the employee shall be paid an allowance of $52.60 per day except when the accommodation includes dining facilities and meals, in which case an allowance of $39.45 per day shall be paid.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

B. Delete subclause 5.4.5 of this clause and insert the following in lieu thereof:

5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of $13.85 per day.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

8. Clause 5.6 – Travelling Time – Traffic: Delete subclause 5.6.3 of this clause and insert the following in lieu thereof:

5.6.3 When the period of relief is for one week or less an allowance of $8.00 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

9. Clause 5.7 – Meal Allowance: Delete this clause and insert the following in lieu thereof:

5.7. - MEAL ALLOWANCE

5.7.1 Refreshment Allowance

An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of $5.75 where:

(a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and

(a) The employee is not entitled to a meal allowance as prescribed elsewhere in this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

5.7.2 Meal Allowance

Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid $11.45 in lieu where:

(a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or

(b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

9. Clause 5.8 – Shifts and/or Night Work Allowance – (Six – Day Shift Work): Delete subclause 5.8.1 of this clause and insert the following in lieu thereof:

5.8.1 The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.

(a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of $2.92 an hour on all time paid at the ordinary rate.

(b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of $3.36 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of $2.92 an hour for all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance an employee will be paid an allowance of $3.36 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee's continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of $3.47 per hour.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

(f) Provided that shift penalties do not apply to Saturday and Sunday hours, which are paid as follows: ordinary hours on Saturday are paid with a 50% loading in accordance with subclause 3.3.2(c), additional hours on Saturdays are paid at double time in accordance with subclause 3.3.2(b) and all time on Sunday is paid at double time in accordance with subclause 3.3.2(a).

NOTICES—Award/Agreement matters—

2020 WAIRC 00934

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A 1 OF 2020

APPLICATION FOR A NEW AWARD TITLED

"LOCAL GOVERNMENT OFFICERS' (WESTERN AUSTRALIA) AWARD 2021"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Administrative, Clerical And Services Union Of Employees* and *City Of Kalamunda And Others* under the *Industrial Relations Act 1979* for the registration of the above Award.

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

3. - AREA, SCOPE AND OPERATION OF THIS AWARD

3.1 This award shall apply throughout the State of Western Australia to all local government authorities and their agencies and their employees whether members of the Union/s or not.

3.2 This award shall not apply to employees employed by employers who are national system

employers, as defined by the *Fair work Act 2009*.

3.3 This award shall come into operation on a date to be specified by the Commission.

4. – DEFINITIONS

4.1 Airport Officer shall mean an Officer appointed by the employer whose duties include use of the Reporting Officers Handbook, the care of the employer's Airport facilities and who may also be responsible for the oversight of the use and conduct of the operation of such facilities and associated facilities and installations. Staff supervision may also be a requirement of the position.

4.2 Commission shall mean the Western Australian Industrial Relations Commission.

4.3 Community Services Officer (Welfare and ancillary services) shall mean a person engaged by a respondent whose role is to encourage, promote or conduct community pursuits and whose aim is the maintenance or improvement of general social and living standards with regard to family support, services, income, welfare, employment, education, health, housing, children, youth, aged and domiciliary services, or who is primarily concerned with the social and living standards in the community and shall include an Assistant Community Services Officer.

4.4 Community Services Officer (recreation) shall mean a person engaged by a respondent whose role is to initiate, coordinate, encourage, promote or conduct recreational activities within a community and shall include an assistant in relation to such functions and recreation centre and swimming pool staff. Provided that this definition does not include a person employed in a clerical capacity, for example Cashier/Receptionist in a Recreation/Aquatic Centre.

4.5 Community Services Officer (Arts, Theatre and Museum) shall mean a person engaged by a respondent whose role is to raise the community's awareness of existing programmes, exhibitions, events, groups and organisations relative to arts and to encourage a positive and continuing interest in the arts within a community.

An Officer may be a Theatre Manager who is responsible for the supervision of Theatre workers and coordination and promotion of activities of the Theatre or a Museum Supervisor who is responsible for the overall supervision, care and maintenance of an employer's Museum.

4.6 Law Enforcement Officer shall mean an employee employed to patrol within the geographical confines of a Local Authority for the purpose of watching, protecting or inspecting all property belonging to the Local Authority and/or to enforce one or more of the Authority's By-Laws or any Acts of Parliament which that Authority is empowered to enforce.

4.8 Officer or Employee shall mean a person appointed by a Local Authority to one of the classifications in this award, a person engaged by a Local Authority as a Trainee in accordance with Clause 16. – National Training Wage, and any other person appointed by a Local Authority to a non-elective office necessary to the proper carrying out of the power and duties imposed upon the Local Authority by the *Local Government Act 1995*, its successor and/or any other Act.

4.10 Supervisory Officer shall mean an Officer appointed to supervise and control a section (or sections) of the employer's outside work force and may be required to participate in the preparation of budgets and estimates.

4.11 Union(s) shall mean the Western Australian Municipal, Administrative, Clerical and Services Union of Employees and/or the Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees.

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

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

1 December 2020

2020 WAIRC 00935

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. A 2 OF 2020

APPLICATION FOR A NEW AWARD TITLED

"MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Administrative, Clerical And Services Union Of Employees* and *City Of Kalamunda And Others* under the *Industrial Relations Act 1979* for the registration of the above Award.

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

3. - AREA AND SCOPE

3.1 This award shall apply throughout the State of Western Australia to all local government authorities and their agencies and their employees whether members of the Union/s or not.

3.2 This award shall not apply to employees employed by employers who are national system employers, as defined by the *Fair work Act 2009.*

5. - DEFINITIONS

5.4 Employee means any person employed by a respondent in any of the classifications, callings or occupations specified by this award.

5.5 Employer means any respondent to this award.

5.6 Headquarters shall mean and include a permanent place wherein are stored or kept, plant equipment and materials or a place where vehicles are parked.

5.7 Horticulture tradesperson shall mean an employee who has successfully completed a recognised apprenticeship in the Gardening or Landscape Gardening or Turf Management or Nurseryperson branches of the Horticulture Trade, and who produces proof satisfactory to the employer of such qualification, or who has by other means achieved a standard of knowledge equivalent thereto and is appointed in writing as such by the employer.

5.8 Horticultural tradesperson/curator means an employee who is in charge or has care and control over a park, garden, botanical garden, tennis court ground, cricket ground, golf course or other sporting ground or any other ground or similar area, but who does not directly supervise other employees other than apprentices in training or to supervise employees as a leading hand and who does not perform the normal duties of a caretaker.

15. - CLASSIFICATION DEFINITIONS

15.1 Municipal employee - level 1

15.1.1 Qualifications, training and experience

(1) An employee at this level will need to undertake industry induction and training which may include information on the industry, organisations, conditions of employment, skill formation and career path opportunities, planning and layout of work, documentation procedures, occupational health and safety, equal opportunity and performance appraisal incorporating quality control and assurance.

(2) No previous work experience is required at this level.

(3) "A" Class Licence may be required.

15.1.2 Specialist knowledge of skills

(1) General

Indicative but not exclusive of the skills required of an employee at this level are:

(a) Use of a limited range of hand tools.

(b) Drive a light vehicle.

(2) Communication skills

Basic oral and written literacy and numeracy skills to enable liaison with immediate work group.

(3) Complexity/multi-skilling

Tasks are simple and non-complex.

15.1.3 Responsibility and accountability

Employees at this level:

(1) Work under direct supervision.

(2) Are responsible for the quality and completion of their own work subject to detailed direction.

(3) Are responsible for care of tools and equipment in their use.

15.1.4 Decision making and problem solving

(1) Judgement is limited as work is repetitive and generally coordinated by others.

(2) Work is clearly defined and of a routine and basic nature with established procedures, guidance and close supervision.

(3) Required to exercise basic judgement relating to own work and personal safety as required by relevant legislation and Council safety procedures.

15.2 Municipal employee - level 2

15.2.1 Qualifications, training and experience

An employee at this level will have satisfactorily completed the requirements of level 1 and will be undertaking structured and/or on-the-job training (including appropriate safety training) or possess appropriate and relevant equivalent experience in some or all of the following areas:

(1) Basic construction and/or maintenance, i.e., basic concreting and/or basic bitumen handling.

(2) Safe operation and user maintenance of minor plant.

(3) Safe operation and user maintenance of light vehicles.

(4) Selected hand tools.

(5) Parks maintenance.

(6) Basic stores work.

(7) Two-way radio operation.

(8) "A" Class licence may be required.

(9) Certificate of competency in minor plant operation may be required.

(10) Basic labouring skills.

15.2.2 Specialist knowledge of skills

(1) General

Indicative but not exclusive of the skills required of an employee at this level are:

(a) Plant operation skills:

(i) Use of a variety of selected hand tools and use of minor plant and equipment requiring basic operation rather than technical skills.

(ii) Operator's skills level low some experience preferred.

(iii) Single function equipment.

(iv) Operator machine maintenance low complexity.

(v) Minimal dimensional control on works required other than pre-set by plant.

Examples: Small/large rollers (sub-grade), ride-on mowers, chipper/mulcher, mowers, brush cutters, brick cutters, jack hammers, small concrete cutters.

(b) Drive vehicles requiring "A" class licence.

(c) General gardening including parks and grounds maintenance and minor repair to reticulation systems.

(d) Basic store work, including receiving, despatching, distributing, sorting, checking and packing.

(e) Basic inventory control of documenting and recording of goods, materials and components.

(f) Basic keyboard skills where required.

(g) Concrete and bitumen work.

(h) Sound knowledge of Council safety policy requirements as they relate to the job being undertaken.

(2) Communication

Basic oral and written literacy and numeracy skills to enable liaison with work groups and communication with members of the public.

(3) Complexity/multi-skilling

Tasks are of limited complexity.

15.2.3 Responsibility and accountability

(1) Works under routine (general) supervision either individually or in a team environment.

(2) Responsible for the quality and completion of their own work subject to routine direction.

(3) Responsible for materials, tools, equipment and minor plant in their use.

15.2.4 Decision making and problem solving

(1) Problems at this level may require limited personal judgement. Work procedures are already well established. The individual must apply existing known techniques to the work with decision making being within existing routines, procedures and practices.

(2) Required to make operational decisions relating to own safety and work as required by relevant legislation and Council safety procedures.

15.3 Municipal employee - level 3

15.3.1 Qualifications, training and experience

An employee at this level will have satisfactorily completed structured and/or on-the-job training (including appropriate safety training) or possess appropriate and relevant experience in some or all of the following areas:

(1) Intermediate construction and/or maintenance, i.e., intermediate concreting and/or bitumen, formwork and pipelaying.

(2) Safe operation and user maintenance of minor to medium mechanical plant.

(3) Safe operation and user maintenance of medium vehicles.

(4) Specialised hand tools and other equipment.

(5) Basic horticulture and/or nursery.

(6) Stores work and inventory control.

(7) Basic supervision.

(8) “A” and “B” class licence may be required.

(9) Plant certificate(s) may be required.

(10) May be required to hold appropriate Life Saving Certificate, including Resuscitation and First Aid.

(11) Appropriate SECWA safety accreditation may be required.

15.3.2 Specialist knowledge of skills

(1) General

Indicative but not exclusive of the skills required of an employee at this level are:

(a) Plant operation skills:

(i) Use of specialised hand tools and minor plant.

(ii) Operator skill low to medium experience required.

(iii) Single function equipment.

(iv) Operator machine maintenance and set up low to medium complexity.

(v) Basic dimensional control on works other than pre-set by plant.

Examples: Loader (yard) (borrow pit), chipper, roller (base course), cherrypicker (unconfined working space), tractors and mounted equipment.

(b) Drive vehicles up to two axles.

(c) Use of measuring instruments and tools.

(d) Basic horticultural and nursery skills, including gardening, tree pruning, grafting, propagating, potting, planting and other duties.

(e) Store work, including:

(i) Inventory and store control.

(ii) Licensed operation of appropriate materials, handling equipment.

(iii) Intermediate keyboard skills and computer operation.

(f) Prepare concrete, bitumen and pipe laying to line and grade from plans, drawings, and instructions, including form work, levelling, screed, render and finish.

(g) Basic supervisory skills.

(h) Sound knowledge of Council safety policy requirements as they relate to the job being undertaken.

(2) Communication

Oral and written literacy and numeracy skills to provide information and advice to other employees, higher level staff and members of the public.

(3) Complexity/multi-skilling

Able to perform a broader range of activities with variation restricted to the area of operation with a limited complexity subject to training and/or experience.

15.3.3 Responsibility and accountability

(1) Works under routine (general) supervision either individually or in a team environment on a range of projects.

(2) Responsible for the quality and completion of their own work subject to routine direction.

(3) Responsible for materials, tools, equipment, vehicles, and plant in their use.

(4) Responsible for quality control/assurance procedures, including to recognise quality deviation/faults.

(5) May be responsible for the supervision and limited guidance of a small work group.

15.3.4 Decision making and problem solving

(1) Problems at this level are generally of a routine nature, requiring experience and a degree of personal judgement based on previous experiences and set guidelines. Solutions are readily available with problems being of limited difficulty.

(2) Required to make technical and operational decisions relating to own safety and work, and safety of other employees and the public.

15.4 Municipal employee - level 4

15.4.1 Qualifications, training and experience

An employee at this level will have a satisfactorily completed structured and/or on-the-job training (including appropriate safety training) or possess appropriate and relevant equivalent experience and achieved a good working knowledge of the technical requirements of the job to be undertaken in some or all of the following areas:

(1) Advanced construction and/or maintenance, i.e., advanced concreting and/or bitumen finishing work, pipelaying, and material sampling, testing and compaction techniques.

(2) Safe operation and user maintenance of mechanical plant.

(3) Safe operation and user maintenance of heavy vehicles.

(4) Precision tools and instruments.

(5) Reticulation.

(6) Intermediate horticulture and nursery and may include assistance in turf preparation.

(7) Materials and equipment estimating.

(8) Progress towards Supervisory Certificate (level 1) and/or relevant experience.

(9) “A”, “B” or “C” class licence may be required.

(10) Plant certificate(s) may be required.

(11) Appropriate SECWA safety accreditation may be required.

(l2) Licence in explosives handling may be required.

15.4.2 Specialist knowledge of skills

(1) General

Indicative but not exclusive of the skills required of an employee at this level are:

(a) Plant operation skills:

(i) Operator skill level medium-high with significant experience.

(ii) Multi-function equipment.

(iii) Operator machine maintenance and set up medium to high complexity.

(iv) Dimensional control working to existing levels or moderate degree of accuracy to design levels.

Examples: Hiab, loader (box out), grader (box out) (maintenance), excavator (box out), street sweeper, gang mower (sports turf), cherrypicker (confined working space).

(b) Drive vehicles three axles or greater.

(c) Use and interpretation of precision measuring instruments and tools.

(d) Intermediate horticultural and nursery, including assistance in turf preparation and maintenance, tree pruning and landscaping.

(e) Plan reading, single dimensional.

(f) Advanced concrete work - major concrete works, reinforced structural from plans and drawings without pre-set levels.

(g) Developed supervisory skills.

(h) Basic understanding of quality control techniques.

(i) Installation, repair and maintenance of reticulation systems (including controllers) and modification and additions to existing systems including low voltage electrical work.

(j) Sound knowledge of Council safety policy requirements as they relate to the job being undertaken and the affect on the public.

(k) Handling and use of explosives.

(2) Communication

Oral and written literacy and numeracy skills to provide information and advice to other employees, higher level staff, clients, suppliers, and members of the public.

(3) Complexity/multi-skilling

Able to perform broader range of activities with variation restricted to the area of operation with a high level of complexity subject to training and/or experience.

15.4.3 Responsibility and accountability

(1) Works under limited supervision either individually or in a team environment and may be on a range of projects.

(2) Responsible for quality and standard of work performed, including work of other employees.

(3) Responsible for providing employees under their supervision with on-the-job training and guidance.

(4) Responsible for materials, tools, equipment, vehicles and plant in the employee's use and used by others under their supervision.

(5) Responsible for quality control/assurance procedures, including to recognise and correct quality deviations and/or faults.

(6) May be responsible for the supervision and limited guidance of a small work group.

15.4.4 Decision making and problem solving

(1) Problems at this level require employees to use some originality in approach with solutions usually attributable to application of previously encountered solutions or experience.

(2) Required to make technical and operational decisions relating to own work and safety and safety of the public.

(3) May be required to make technical and operational decisions relating to the work and safety of others.

15.5 Municipal employee - level 4A

15.5.1 Qualifications, training and experience

An employee at this level will have completed the requirements of a Trade Certificate level qualification or possess appropriate and relevant equivalent experience.

15.5.2 Specialist knowledge of skills

(1) General

An employee is required to exercise the skills and knowledge of the relevant trade or experience.

(2) Communication

Exercises good interpersonal and communication skills.

(3) Complexity/multi-skilling

Performs non-trade tasks within the employee's skill, competence and training.

15.5.3 Responsibility and accountability

(1) Performs work under the limited supervision either individually or in a team environment.

(2) Responsible for assuring the quality of their own work.

(3) Assists in the provision of on-the-job training to a limited degree.

(4) Understands and applies quality control techniques.

15.5.4 Decision making and problem solving

(1) Exercises discretion within the scope of this level.

(2) Performs work which while primarily involving the skills of the employee's trade or experience is incidental or peripheral to the primary task and facilitates the completion of the whole task. Such incidental or peripheral work would not require additional formal technical training.

15.6 Municipal employee - level 5

15.6.1 Qualifications, training and experience

An employee at this level will have completed the requirements of level 4 and will have satisfactorily completed structured training (including appropriate safety training) or level 4A and possess appropriate and relevant equivalent experience to one or more of the following levels:

(1) Safe operation and user maintenance of specialist plant and/or heavy vehicles.

(2) Advanced reticulation.

(3) Advanced or specialist horticulture and nursery, including turf preparation and management.

(4) Materials, equipment and cost estimating, and job cost recording.

(5) Completed Supervisory Certificate (level 1) and/or relevant equivalent experience.

(6) Experienced Trade Certificate or equivalent.

(7) "A", "B" or "C" class licence may be required with extensive experience.

(8) Plant certificate(s) may be required.

15.6.2 Specialist knowledge of skills

(1) General

Indicative but not exclusive of the skills required of an employee at this level are:

(a) Plant operation skills:

(i) Operator skill level medium-high with significant experience.

(ii) Multi-function equipment.

(iii) Operator machine maintenance and set up medium to high complexity.

(iv) Dimensional control of work requiring a high degree of accuracy with respect to design levels.

Examples: Excavator and grader (final trim).

(b) Advanced or specialist horticultural, turf and/or nursery skills.

(c) Technical skills in plan reading including horizontal and vertical dimensions.

(d) Sound supervisory, guidance and training skills.

(e) Understand and applies quality control techniques.

(f) Install, repair and maintain major reticulation systems, including electrical work. Pump and bore installation, repair and maintenance.

(g) Good working knowledge of Council organisation, operations and general procedures which impact upon their work.

(h) Sound knowledge of Council safety policy requirements as they relate to the job being performed and the affect on the public.

(2) Communication

(a) Developed oral and written literacy and numeracy skills to provide information and advice to other employees, higher level staff, clients, suppliers, and members of the public.

(b) May be required to prepare basic written correspondence and/or prepare standard format reports.

(3) Complexity/multi-skilling

(a) Broader range of activities with variation restricted to the area of operation with a high level of complexity subject to training and/or experience.

(b) Capable of undertaking a range of specific tasks of a complex nature.

15.6.3 Responsibility and accountability

(1) Works unsupervised and is subject to limited direction.

(2) Responsible for quality and standard of work performed, including work of other employees.

(3) Responsible for achieving and maintaining high technical quality without direction.

(4) Responsible for providing employees under their supervision with on-the-job training and guidance.

(5) Responsible for materials, tools, equipment, vehicles and plant in the employee's use and used by others under their supervision.

(6) Responsible for quality control/assurance procedures, including to recognise and correct quality deviations and/or faults.

(7) Responsible for productivity and efficiency of work groups supervised.

15.6.4 Decision making and problem solving

(1) Problems at this level are frequently of a complex or technical nature, with solutions not necessarily related to previous direct experience and therefore require some initiative and personal judgement. If required, guidance and assistance is usually available.

(2) May be required to make planning, technical and operational decisions relating to the work and safety of other employees and safety of the public.

15.7 Municipal employee - level 6

15.7.1 Qualifications, training and experience

Employees at this level will have satisfactorily completed the requirements of level 5 and have as a minimum, a trade certificate or equivalent or possess appropriate and relevant equivalent experience and will, in addition:

(1) Safe operation and user maintenance of a range of different vehicles and/or plant and has extensive experience in their operation at an advanced level.

(2) Advanced or specialist horticulture and nursery, including turf preparation and management with extensive experience in a wide range of areas.

(3) Materials, equipment and cost estimating. Job cost and budgetary control.

(4) Completed Supervisory Certificate (level 2) and has relevant experience.

(5) Have commenced and partially completed an appropriate post trade certificate.

(6) "A", "B" or "C" class licence may be required with extensive experience.

(7) Plant certificate(s) may be required.

15.7.2 Specialist knowledge of skills

(1) General

Indicative but not exclusive of the skills required of an employee at this level are:

(a) Operation of a range of vehicles and/or specialised plant requiring advanced skills and operation to rigid specifications.

(b) A wide range of advanced and/or specialist horticultural, turf and/or nursery skills.

(c) Advanced technical skills in materials performance and compaction and plan reading including horizontal and vertical dimensions and establishing sections for materials estimating.

(d) Sound supervisory, training and basic human resources management and employee relations skills.

(e) Detailed knowledge and understanding of quality control techniques and their application.

(f) Detailed knowledge of Council organisation, operation and general procedures.

(g) Sound knowledge of Council safety policy requirements as they relate to the job being performed and the affect on the public.

(2) Communication

(a) Developed oral and written literacy and numeracy skills to negotiate with other employees, higher level staff, clients, suppliers, and members of the public.

(b) May be required to prepare written correspondence and reports.

(3) Complexity/multi-skilling

(a) Broader range of activities with variation restricted to the area of operation with a high level of complexity subject to training and/or experience.

(b) Capable of undertaking a range of specific tasks of a complex nature.

15.7.3 Responsibility and accountability

(1) Works without direct supervision.

(2) Responsible for quality and standard of work performed, including productivity and safety.

(3) Responsible for providing employees under their supervision with on-the-job training and guidance.

(4) Responsible for ensuring personnel practices are applied.

(5) Responsible for materials, tools, equipment, vehicles and plant in the employee's use and used by others under their supervision.

(6) Responsible for quality control/assurance procedures, including to recognise and correct quality deviations and/or faults.

(7) Responsible for productivity and efficiency of work groups supervised.

(8) Responsible for negotiation with clients, suppliers and members of the public.

15.7.4 Decision making and problem solving

Problems at this level are frequently of a complex or technical nature with solutions not necessarily related to previous direct experience and therefore requiring initiative, personal judgement and discretion.

Exercise high precision trade skills using various materials and/or specialised techniques.

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

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

1 December 2020

INDUSTRIAL MAGISTRATE—Claims before—

2020 WAIRC 00967

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00967
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	FRIDAY, 16 OCTOBER 2020
DELIVERED	**:**	FRIDAY, 4 DECEMBER 2020
FILE NO.	**:**	M 29 OF 2020
BETWEEN	**:**	BRIAN ROBERT CLIFFORD-SMITH
		CLAIMANT
		AND
		KEEN BROS. (WA) PTY LTD
		RESPONDENT
FILE NO.	**:**	M 60 OF 2020
BETWEEN	**:**	STEPHEN MUTCH
		CLAIMANT
		AND
		KEENBROS WA PTY LTD
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Determination of preliminary issue – Whether the *Educational Services (Post-Secondary Education) Award 2010* (Cth) cover the claimants and the respondent and applies to the claimants' employment
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Industrial Relations Act 1979 (WA)
		Motor Vehicle Drivers Instructors Act 1963 (WA)
		National Education and Training Regulator Act 2011 (Cth)
		Vocational Education and Training Act 1996 (WA)
		Vocational Education and Training (General) Regulations 2009 (WA)
Instrument	**:**	*Educational Services (Post-Secondary Education) Award 2010* (Cth)
Case(s) referred to in reasons:	**:**	***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813
		Kucks v CSR Ltd (1996) 66 IR 182
		Amcor Ltd v CFMEU [2005] HCA 10
		Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd [2014] FCAFC 148

		TAL Life Ltd v Shuetrim [2016] NSWCA 68
		Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd [2016] FCCA 621
		Director of Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No7) [2013] FCCA 1097
		Logan and Otis Elevator Company, Moore J, 1997 IRCA 200 (20 June 1997)
		Ware v O'Donnell Griffin (Television Services) Pty Ltd [1971] AR (NSW) 18
		Fair Work Ombudsman v Da Adamo Nominees Pty Ltd No4 [2015] FCCA 1178
		Mildren and Anor v Gabbusch [2014] SAIRC 15
		Miller v Minister of Pensions [1947] 2 All ER 372
		Briginshaw v Briginshaw [1938] HCA 34
		Fedec v The Minister for Corrective Services [2017] WAIRC 00828
		Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd [2013] FCA 638
Result	**:**	Preliminary issue determined
Representation:		
Claimants	**:**	Self-represented
Respondent	**:**	Mr S. Kemp (of counsel) from Kemp & Associates

REASONS FOR DECISION

1 Keen Bros (WA) Pty Ltd (Keen) operates a business, which provides two services: (1) heavy vehicle driving training; and (2) practical driving assessments (PDA) on behalf of the Director-General of the Department of Transport (Department) for Heavy Rigid (HR), Heavy Combination (HC) and Multi Combination (MC) driving licences.

2 Mr Stephen Mutch (Mr Mutch) and Mr Brian Clifford-Smith (Mr Clifford-Smith) were employed by Keen as truck driving instructors and assessors conducting PDAs. Mr Mutch and Mr Clifford-Smith commenced an originating claim alleging Keen contravened the *Educational Services (Post-Secondary Education) Award 2010* (the Award) and the *Fair Work Act 2009* (Cth) (FWA).

3 In both cases, Keen's response is that the Award does not cover Mr Mutch and Mr Clifford-Smith and Keen, and the Award does not apply to their employment by Keen.

4 The Western Australian Industrial Magistrates Court (IMC) determined that there was an identified preliminary issue for resolution and, to that end, ordered that M 29 of 2020 and M 60 of 2020 be heard on the same occasion.

5 In each case, the questions to be determined are:

- Whether the Award covers Mr Clifford-Smith and Keen and applies to Mr Clifford-Smith's employment; and
- Whether the Award covers Mr Mutch and Keen and applies to Mr Mutch's employment.

(the Preliminary Issues)

6 In part, resolution of the Preliminary Issues requires construction of certain clauses of the Award.

7 Schedule I outlines the jurisdiction and practice and procedure relevant to the IMC.

8 Relevant to the matters identified under the heading, 'Jurisdiction' in Schedule I of this decision, I am satisfied that:

- Keen is a corporation to which paragraph 51(XX) of the Constitution applies and it is a '***national system employer***'; and
- Mr Mutch and Mr Clifford-Smith are individuals who were employed by Keen and are '***national system employees***'.

9 Schedule II outlines the principles relevant to construction of an industrial instrument. In summary, the interpretation of an award begins with consideration of the natural and ordinary meaning of the words used.[1] An award is to be interpreted in light of its industrial context and purpose, and must not be interpreted in a vacuum divorced from industrial realities.[2] An award must make sense according to the basic conventions of the English language.[3] Narrow and pedantic approaches to the interpretation of an award are misplaced.[4]

Issues For Determination

10 The following issues require determination:

(a) What '*post-secondary educational service*' industries are covered by the Award?

(b) In determining (a), what is meant by '*vocational education and training*'?

(c) Having determined what is meant by vocational education and training, what is meant by this training '*leading to qualifications recognised within the AQF*'?

(d) Is Keen in an industry included in cl 4.3 of the Award, specifically in cl 4.3(a) of the Award?

(e) Are Mr Mutch and Mr Clifford-Smith employed by Keen in the classifications listed in sch B, C or D of the Award, specifically teachers in sch C?

(f) Having regard to the functions and tasks undertaken by Mr Mutch and Mr Clifford-Smith as heavy vehicle driving instructors and PDA assessors, are they properly classified as '**teachers**' as that term is defined in cl 3.1 of the Award? Alternatively, is another classification appropriate?

Construction Of Cl 4 Of The Award - Coverage

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

12 Clause 4.1 of the Award provides that the Award '*covers employers throughout Australia in the post-secondary educational services industry and their employees*' employed in various classifications. The classification relied upon by Mr Clifford-Smith and Mr Mutch is Schedule C – Classifications – Teachers and Tutors/instructors.

13 The Award does not apply to:

- any secondary school;
- employers where the Higher Education Industry – Academic Staff – Award 2010 or the Higher Education Industry – General Staff – Award 2010 applies; or
- any employer whose principal function is the provision of labour market assistance programs.[5]

14 Clause 4.3 of the Award lists a number of industries which encompass post-secondary educational services and Mr Clifford-Smith and Mr Mutch rely upon '*(a) vocational education and training (VET) teaching leading to qualifications recognised within the AQF*' to support their contention that Keen is an industry employer in the '*post-secondary educational services*'.

15 '**[P]*ost-secondary educational services industry*** *means the provision of education and training to persons over the age of 16 years who have exited the school education system*'.[6]

16 '**[T]*eacher*** *means an employee engaged to teach students where a teaching qualification is mandatory or required by the employer, and where the work required involves teaching a course of study or units of work recognised within or pursuant to the … [AQF] or accredited by a relevant state or territory authority and which is neither the work of an academic teacher nor a tutor/instructor*'.[7]

17 '**[T]*utor/instructor*** *means an employee engaged in providing tutoring/instruction to students where the course is not accredited and where the employer may not require a teaching qualification and which is neither the work of an academic teacher nor a teacher*'.[8]

The Meaning Of *Vocational Education And Training* In Cl 4.3 Of The Award

18 '[V]*ocational education and training … teaching leading to qualifications recognised within the AQ*F' is not defined in the Award. Similarly, I note that other post-secondary educational services referred to in cl 4.3 of the Award are not defined, and the impression formed is that the various industry sectors are well known to those who are familiar with them because they either teach or learn in the industry. Perhaps it is a case of '*it is so obvious it goes without saying*', until it is not.

19 The breadth of possible industry sectors is clearly wide and varied. For example, '*community and adult education teaching not leading to qualifications recognised by the AQF*' (referred to in cl 4.3(f)) could, arguably, include pottery, woodwork or knitting classes either as a one off lesson or as a course.

20 The reference to '*vocational education and training*' must mean something in the context of the post-secondary educational services. The fact that the words appear in relation to '*leading to qualifications recognised by the AQF*' suggests that the context is a more formal one than that of '*community and adult education teaching not leading to qualifications recognised by the AQF*'.

21 The Australian Qualifications Framework (AQF) is the national policy for regulated qualification in Australian education and training.

22 I note the reliance by the parties on dictionary definitions in an attempt to persuade the IMC of the meaning of various words used in the Award. '*Dictionary definitions may assist in identifying the range of possible meanings a word may bear in various contexts, but will not assist in ascertaining the precise meaning the word* [or words] *bears in a particular context*'.[9]

23 Noting that the Award is an Australia wide industry award concerning formal and informal education services delivered to people over the age of 16 years outside of secondary and tertiary education, in my view, some guidance about the meaning of '*vocational education and training*' comes from the various Acts regulating vocational education and training in Australia.

24 In Western Australia, it is the *Vocational Education and Training Act 1996* (WA) (VET Act). Section 5(1) of the VET Act defines '***vocational education and training***' to mean '*education, instruction, training or experience that encompasses the development of skills, knowledge and attitudes in any vocation, or in any academic or practical discipline relevant to a particular occupation, business, employment or trade, but, subject to section 6, does not include education, instruction, training or experience provided by a school or a university*'.

25 Further, s 5(1) defines '***VET course***' to mean '*a course of study or training or both study and training in which vocational education and training is provided*' and '***approved VET course***' to mean that is:

- *accredited by the* [Training Accreditation Council] *under Part 7A; or*
- *accredited under a corresponding law; or*
- *prescribed by the regulations*.

26 In other jurisdictions, '*vocational education and training*' has a number of slightly different meanings.[10] However, there are common characteristics throughout the jurisdictions, namely it includes:

- skills or work or vocation based learning;
- in a wide range of occupational areas generally outside of secondary and tertiary academic institutions;
- with courses or units of competency referrable to the AQF; and
- where statements of attainment[11] demonstrate satisfactory completion.

27 I do not consider that it is possible to provide an all-encompassing definition of '*vocational education and training*' for the Award, but the purpose of canvassing the definitions across the jurisdictions is to attempt to distil indicia by which it is possible to determine whether employees and employers are involved in education and training that may come within the scope generally considered '*vocational education and training*'.

28 In Western Australia the provision of '*vocational education and training*' is carried out in colleges,[12] other vocational and education institutions (not colleges),[13] registered training providers,[14] and training contracts (apprenticeships and the like).[15] I note that other jurisdictions have similar arrangements with respect to the provision and regulation of '*vocational education and training*'.

29 Therefore, I would add to the indicia in [26], namely that the '*vocational education and training*' is undertaken by people or organisations that are subject to a regulatory regime or oversight body.

30 I also note the *Vocational Education and Training (General) Regulations 2009* (WA) (Regulations) provides three relevant definitions:

- reg 4(1) – '***listed*** *means listed on the national register*' [the national register maintained under s 216 of the *National Education and Training Regulator Act 2011* (Cth)].
- reg 4(2) – '***approved VET course***' prescribed for the purposes of s 5(1) of the VET Act means, relevantly, '*each listed unit of competency that forms part of a listed training package*'.
- reg 5(1) – outlines the '***corresponding law***' meaning the corresponding law in each jurisdiction in Australia.

Is Keen In An Industry Referred To In Cl 4.3 Of The Award?

Does Keen provide vocational education and training?

Evidence

Keen's Business

31 The uncontroverted evidence of Mr Paul Ernest Charles Keen (Mr Keen), director of Keen, is that Keen is registered under s 27 of the VET Act as a Registered Training Organisation (RTO)[16] and is approved to deliver training and assessment in a number of AQF units of competency.[17] Mr Keen lists the AQF units of competency, which include:

- Drive MC vehicle (TLIC4006);
- Drive HR vehicle (TLIC3004);
- Drive HC vehicle (TLIC3005);
- Drive Medium Rigid (MR) vehicle (deliver only) (TLIC3003); and
- Drive Medium Rigid (LR) vehicle (deliver only) (TLIC2002).

32 Further, according to Mr Keen, Keen was required to be a RTO to be an authorised provider to carry out PDA for the Department.[18]

33 Mr Keen says that Keen is not approved to deliver any qualifications recognised by the AQF.[19] Further, Keen does not deliver accredited courses and does not carry on any other business as a RTO.[20]

34 Mr Keen is the only person who is authorised to sign a Statement of Attainment for units of competency issued by Keen, which he says is an adjunct to its primary business of truck driving training and PDA for the Department.[21]

35 There are five classes of heavy vehicle driver's licence: MC, HR, HC, MR and LR.[22] Save for a MC driver's licence, a person seeking to obtain a heavy vehicle driver's licence need not complete any unit of competency or be supervised by a licenced driving instructor (the example used in the Court was a farmer teaching his child to drive a truck).[23]

36 Similarly, a learner heavy vehicle driver is not required to hold a learner's permit to commence truck driving training, but must be accompanied by a supervisor, who may be one of three people:

- '*a licenced driving instructor employed by an RTO … who holds the* [relevant] *class of licence … to the* [licence under] *supervision*';

- a licenced driving instructor not employed by a RTO who holds the relevant class of licence to the licence under supervision; or
- '*a person who is not a licenced driving instructor or employed by an RTO …* [who] *has held a Relevant Licence for at least 4 years*' (although this person cannot charge for supervision).[24]

37 Pursuant to the Department guidelines and the *Motor Vehicle Drivers Instructors Act 1963* (WA) (MVDI Act), if a person wants to derive some form of payment for driving instructing, they must be a licenced driving instructor. There are three options to becoming a licenced driving instructor, two of which involve recognition of prior learning:

1. assessment by the Department – this option involves no recognition of prior learning (such as a Certificate IV) and includes a written theory test and practical assessment by the Department;
2. recognition of prior learning – this option involves recognition of a Certificate IV in Transport and Logistics exempting the applicant from having to undertake the written theory test and practical assessment; and
3. recognition of prior learning – this option is an extension of option 2 applicable to recognising driving instructors from other States.[25]

38 The most significant difference between options 1 and 2 is that driving instructors initially assessed by the Department need to be reassessed every three years, whereas driving instructors with a Certificate IV are generally exempt from this process.

39 Just as there is more than one option to learning to drive a truck and to being licenced as a licenced driving instructor, there is more than one option to being assessed for a heavy vehicle driving licence:[26]

- HR and HC
  - The PDA can be undertaken by the Department or by a RTO. If the PDA is undertaken by the Department, a person can attend the Department and be assessed by one of the Department's employed assessors. In this case the person need not present a Statement of Attainment prior to the PDA being undertaken. The successful person is issued with the relevant heavy vehicle driver's licence.
  - If the PDA is undertaken by the RTO, the person must first obtain a Statement of Attainment in a relevant unit of competency (e.g. Drive HC vehicle (TLIC3005)), then the person undertakes the PDA assessed by an authorised provider (who must have completed three prescribed AQF units of assessment, but not necessarily hold a Certificate IV in Training and Assessment), who issues a Certificate of Competency to a successful person. The Certificate of Competency is presented to the Department who issues the relevant heavy vehicle driving licence.
- MR and LR
  - The PDA must be conducted by a driving assessor employed by the Department.
- MC
  - The PDA must be conducted by an authorised provider and not the Department. Similar to a PDA undertaken by a RTO for HR and HC licences, the person must first obtain a Statement of Attainment in a relevant unit of competency, then the person undertakes the PDA assessed by an authorised provider (who must have completed three prescribed AQF units of assessment, but not necessarily hold a Certificate IV in Training and Assessment), who issues a Certificate of Competency to a successful person. The Certificate of Competency is presented to the Department who issues the MC licence.

40 According to Mr Keen, Keen's 'predominant' business is to provide 'one on one' vehicle supervision to learner truck drivers so that they can obtain a heavy vehicle driver's licence issued by the Department. This involves the learner driving a Keen truck under supervision of one of the driving instructors, who observes the learner and provides oral feedback.[27]

41 The usual driving session is one hour, but can be up to three hours or be delivered in a block of sessions. The learner driver is called from a waiting room and unless the learner driver is taken to a particular area to commence driving, the learner driver will commence driving and continue driving for the session, with oral feedback delivered by the driving instructor. Save for the driving session interaction between the learner driver and the driving instructor, there is no interaction between the two outside of the driving session. Other administrative tasks are carried out by administrative staff.[28]

42 The units of competency delivered by Keen do not require any instruction beyond the usual supervision to prepare a learner driver to pass the PDA. Keen does not deliver planned classes or lessons and the amount of driving instruction given depends on the learner driver's prior experience or skill level. There is no minimum number of sessions that must be undertaken prior to carrying out the PDA.[29]

The Terms of the PDA Heavy Vehicles Agreement with the Department

43 Clause 3.1 of the External Provision of Practical Driver Assessments Heavy Vehicles between the Department and Keen (the PDA Agreement) provides, amongst other things, that Keen must conduct PDA in accordance with the Service Specifications in sch 2 to sch 5.

44 In consideration of conducting the PDA, Keen may charge certain fees.

45 As part of the PDA Agreement, Keen is required, amongst other things, to maintain registration as a training organisation with the Australian Skills Quality Authority (ASQA) or the Training Accreditation Council (TAC), and ensure certain approved nationally recognised training units or qualifications (located at www.training.gov.au) are on the scope of registration (applicable to the vehicles for which Keen is approved), namely: Drive HR; Drive HC; and Drive MC.

46 Schedule 2 of the PDA Agreement under 'Standards and Procedures' provides, in brief, that Keen is to verify an applicant '*has successfully completed the approved Unit of Competency Module relevant to the class of vehicle and retain the Statement of Attainment*'.

47 Thereafter, Keen is to assess an applicant against the HC or MC competency standard, relevant to the vehicle type set out on the Department's website to assess the ability of the applicant to demonstrate that they possess the ability to perform correct driving practices. The PDA Agreement provides the assessment criteria.

48 Upon completion of a PDA, Keen provides the applicant with a Certificate of Competency.

49 The service specifications in the PDA Agreement are prescriptive about how the PDA is to be conducted. Further, sch 3 to sch 5 set out the assessors' requirements for HR, HC and MC driving licences and, in summary, the assessor is required to have three AQF units of competency, an unrestricted licence in the relevant class of licence, and be approved by the Department.

Mal Davey

50 Keen adduced evidence from Mr Mal Davey (Mr Davey), Director of Commercial Management, Driver and Vehicle Services for the Department. Mr Davey manages the commercial relationship between the Department and PDA contracts.

51 Mr Davey's evidence is similar to Mr Keen in that he confirmed the Department requires:

(a) PDA for an MC '*licence to be conducted by one of its authorised providers*' (who is also a RTO);

(b) PDA for HR and HC licences can '*be conducted by one of its authorised providers*' or an assessor '*employed by the Department*'; and

(c) PDA for MR and LR licences to be conducted '*by a driving assessor employed by the Department*'.[30]

52 Therefore, exclusivity of conducting PDA by an authorised provider is in relation to MC licences only. All other heavy truck licence PDA can be conducted by an authorised assessor or a driving assessor employed by the Department.

53 Mr Davey's evidence is otherwise consistent with [39] above.

54 Other than for an MC licence, at its most basic, for any other heavy vehicle driver's licence a person can be supervised by a friend who holds the relevant licence for the requisite period of time and present for a PDA at the Department. If the person successfully completes the PDA, the Department will issue the relevant heavy vehicle driver's licence.[31]

Mr Clifford-Smith

55 Mr Clifford-Smith was employed by Keen from 24 July 2015 to 2 October 2019 as a full-time instructor and assessor working from Monday to Thursday and paid at the rate of $35 per hour.[32]

56 Mr Clifford-Smith is an authorised assessor for the Department.[33]

57 According to Mr Keen, Mr Clifford-Smith was engaged predominantly to provide supervision to learner driver's wanting to obtain a MR or LR driver's licence. This involved a four hour engagement, of which three hours was supervised driving by Mr Clifford-Smith and a one hour PDA conducted by an assessor employed by the Department. Mr Clifford-Smith had no engagement with the learner driver during the PDA conducted by the Department.[34]

58 Mr Clifford-Smith also supervised HR driving sessions from time to time and undertook assessments of learner drivers who had been supervised by other driving instructors employed by Keen.[35]

59 Save for noting the standard of performance of the learner driver during each session, Mr Clifford-Smith did not: [36]

- undertake any classroom instruction;
- present any course;
- undertake any preparation prior to the driving sessions; and
- have any ongoing liaison with any learner driver or carry out any administrative duties.

60 Mr Clifford-Smith says Keen offers nationally recognised vocational training courses in heavy vehicle operation as a RTO (under s 27(1) of the VET Act).

61 Mr Clifford-Smith says that he taught and assessed students enrolled in AQF recognised courses leading to LR, MR and HR licences.[37] Mr Clifford-Smith has a Certificate IV in Training and Assessment.[38]

62 Similar to the evidence given by Mr Keen, Mr Clifford-Smith says applicants received nationally recognised Statement of Attainment prior to '*facilitated access to the appropriate vehicle licence*'.[39]

63 Mr Clifford-Smith described before and after work duties, which involved checking vehicles, returning keys to the office, looking at the appointments for the following day and some minor administrative duties. In terms of his substantive duties, Mr Clifford-Smith says that this involved '*ascertaining candidates' credentials and prior learning, performing demonstration exercises, designing, implementing and monitoring student skill development and programs, providing learning and feedback as to skill acquisition levels, and recording learning outcomes*'.[40]

64 Mr Clifford-Smith provided examples of his training record forms.[41]

65 Mr Clifford-Smith says Keen employs '*appropriately qualified staff*' within Federal and State frameworks as provided in its Policy and Procedure Manual.[42]

66 Mr Clifford-Smith gave an example of a typical session with a learner truck driver, which included introducing himself to the person, verifying their driving experience and evaluating their level of expertise. He would then take the person to a truck and describe the process and follow Keen's procedures. The ultimate outcome was to ensure the person pass the PDA.

67 The person's performance was recorded on assessment sheets related to nationally recognised standards (I note that this is a form provided by the Department). Mr Clifford-Smith was occasionally asked to verify competencies for third party organisations (in a similar manner to Mr Mutch).

68 Mr Clifford-Smith said that a Statement of Attainment could be taken anywhere to do the PDA and some people did not end up doing the PDA. The person could also be assessed by the Department with or without a Statement of Attainment, or if they failed to achieve the Statement of Attainment.

69 Mr Clifford-Smith agreed Keen delivered units of competency, and did not issue qualifications. However, Keen provided Statements of Attainment.

70 Mr Clifford-Smith denied Keen wanted (in the alternative) equivalent experience to the Certificate IV qualification, referring to the Policy and Procedure Manual. Mr Clifford-Smith agreed people might complete any training in a short period of time.

Mr Mutch

71 Mr Mutch was employed by Keen from February 2008 to May 2019, initially as a heavy vehicle driving instructor and from 2016 as an assessor. He has a Certificate IV in Training and Assessing.

72 According to Mr Keen, Mr Mutch was engaged predominantly to provide supervision to learner driver's wanting to obtain an HR or HC driver's licence. Mr Mutch also undertook assessments of learner drivers who had been supervised by other driving instructors employed by Keen.[43]

73 Save for noting that the standard of performance of the learner driver during each session, Mr Mutch did not:[44]

- undertake any classroom instruction;
- present any course;
- undertake any preparation prior to the driving sessions; and
- have any ongoing liaison with any learner driver or carry out any administrative duties.

74 According to Mr Mutch, he taught and assessed students enrolled in AQF recognised courses, resulting in them being issued with a Statement of Attainment enabling the student to be assessed in order to obtain a qualification in a number of courses.[45]

75 Mr Mutch (and Mr Clifford-Smith) also conducted verification of competence and driver evaluation assessment as part of pre-employment requirements for third parties.[46] In simple terms, other organisations would engaged Keen to verify that heavy vehicle truck drivers were assessed as competent as part of the organisations pre-employment process.

76 Mr Mutch says that he '*covered all aspects of safe driving practices and operating a vehicle in accordance to the manufacturers specifications and in compliance Occupational Health and Safety … whilst teaching and conducting assessments…designed, implemented and delivered training dependent upon the individual's learning requirements*' including recording learning progress, providing verbal feedback and training outcomes '*taught and assessed complex procedures*'.[47]

77 Mr Mutch says Keen '*issued students with a resource guide that … demonstrated the level of instruction and knowledge required by a student … to obtain a Certificate of Attainment* [Mr Mutch agreed that he had erroneously referred to the Statement of Attainment as a 'Certificate'] *to progress to undertake a PDA*'.[48]

78 Further, Keen developed a Policy and Procedure Manual about its operations and training packages and informing students that its driving instructors possess the appropriate qualifications and that training and assessments are to national standards leading to AQF qualifications.[49]

79 Mr Mutch gave an example of a typical driving session, describing a session similar to that provided by Mr Clifford-Smith.

80 Mr Mutch agreed that the period of time to prepare a person for the PDA was variable and depended on the person, the type of licence and other such factors.

81 Mr Mutch said he monitored each lesson and the person's progress.

82 Mr Mutch disagreed that he only supervised a person's driving, although he agreed that some people presented having an ability to drive a truck (that is, they had previous driving experience). He agreed the minimum session was one hour, but said that for a HC and MC licence it was a minimum of two hours although this was, again, dependent on the person's existing level of skill. That is, a more competent student may progress more quickly.

83 Mr Mutch also agreed that a unit of competency is not a qualification and that most of the learning and assessment was undertaken in the truck cabin and that he was ensuring that the person was able to successfully complete the PDA.

General information from Keen's website

84 Mr Mutch and Mr Clifford-Smith both referred to general information from Keen's website.[50]

85 The general information provides that:

> *You will be taught all aspects of safe and legal driving techniques together with correct vehicle operations, whilst giving you the confidence and skill required to advance in your driving career.*
>
> …

> *KeenBros* [sic] *Truck Driving School is* ***Authorised Provider Number 500****, for the Department of Transport, allowing us to provide in-house training and assessing for* ***HR****,* ***HC****,* ***MC****, and training for* ***LR*** *and* ***MR****.*
>
> …
>
> *Units of Competency provided are: TLIC2002, TLIC3003, TLIC3004, TLIC3005, TLIC4006, TLIB0002 & TLIB2008*

Keen student resource guide

86 Mr Mutch said that Keen issued students with a resource guide for learning to drive HC vehicles, which demonstrated the level of instruction and knowledge required by a person to enable them to obtain a Statement of Attainment.[51]

87 The student resource guide provides for the RTO entry requirements and under the heading '*Staff to be involved*' states:

> *Assessor must have all relevant qualifications & Instructors the relevant license* [sic]

88 Thereafter, various qualifications are listed, as is the assessment process to be carried out by the instructor and assessor.

89 Notably, under the heading of '*Mapping of Assessment*', the training package code and title for the unit of competency for a HC vehicle is noted to be '*TLI10 Transport and Logistics Training Package*'.

Keen's policies and procedure manual

90 Mr Mutch and Mr Clifford-Smith referred to various sections in a Keen's Policies and Procedure Manual.[52] They both placed particular emphasis on Standard 7 entitled '*Competence of RTO staff*' and the purported (only) requirement by Keen's for training to be delivered by a person holding a Certificate IV in Training and Assessment from the Training and Assessment Training Package, and assessments being conducted by a person who has certain competencies as identified.

91 The particular references made by Mr Mutch and Mr Clifford-Smith, as it relates to RTO staff, is selective in its emphasis where Standard 7 also sets out alternative staff competency requirements not requiring a Certificate IV in Training and Assessment, consistent with the Department's requirements for authorised assessors and driving instructors.[53]

92 The Policies and Procedures Manual at Standard 2 entitled '*Compliance with Commonwealth, state/territory legislation and regulatory requirements*' provides that Keen '*complies with relevant Commonwealth and State/Territory legislation*' as it relates to, amongst other things, VET (presumably meaning vocational education and training). Further, that Keen's policies and procedures will meet Commonwealth and State/Territory requirements including the client being '*provided with information about current legislation and regulatory requirements that significantly affect their participation in VET*' (again, presumably meaning vocational education and training).

93 In Standard 5 of the Policies and Procedure Manual, Keen '*recognises the AQF qualification and statement of attainment issued by other* [RTOs]'.

94 In Standard 7, referred to above, Keen outlines the requirements for assessments carried out by Keen's authorised assessors and the requirements for training delivered by a person. As previously stated, consistent with the Department's requirements for authorised assessors and driving instructors.

95 In Standard 8 of the Policies and Procedure Manual, Keen will ensure that assessments will '[l]*ead to the issuing of a statement of attainment or qualification under the AQF when a person is assessed as competent against nationally endorsed unit(s) of competency in the application Training Package*'.

96 In Standard 10 of the Policies and Procedure Manual, Keen will '*issue AQF qualifications and statements of attainment that are within its scope of registration*' and '*identify the units of competency from Training Packages or competencies or modules from accredited courses*'.

Findings of fact

97 In my view, Mr Mutch and Mr Clifford-Smith over-stated the complexities of their employment duties and the need for Certificate IV qualifications to carry out their dual role as authorised assessors to conduct PDA for the Department and as driving instructors. Again, in my view, they did so to bolster their job description and to shoehorn their employment duties into certain classifications under the Award. As will be discussed, this was unnecessary and casts some doubt on the authenticity of aspects of their evidence.

98 For example, Mr Mutch's and Mr Clifford-Smith's evidence is that they '*designed, implemented and delivered training dependent upon the individual's learning requirements* [including recording learning progress, providing verbal feedback and training outcomes] … *taught and assessed complex procedures*'.

99 Mr Keen's and Mr Davey's evidence was credible and truthful. It was apparent that Mr Keen adopted a different approach to the heavy vehicle driver training to that of Mr Mutch and Mr Clifford-Smith. In many respects, I found his evidence about the features of the training more authentic, although, for reasons that will shortly become apparent, this does not have a material effect on the outcome.

100 When regard is had to the surrounding documents and to Mr Mutch's and Mr Clifford-Smith's oral evidence concerning a typical driving session and Mr Keen's evidence, it was apparent, and I find on the balance of probabilities, that:

- the heavy vehicle driver training delivered by Keen was prescribed by the Department or the AQF and certainly not designed by either Mr Mutch or Mr Clifford-Smith;
- to the extent that Mr Mutch and Mr Clifford-Smith recorded learning progress and provided training outcomes this was in an unsophisticated manner, which included such comments as '*Not a good start to-day* [sic]. *Not listening. Pulled out on traffic @ Kelvin Rd after I told him not to*'[54] being no more than a running dialogue of a session;

- the typical driving session was very much dictated by the past experience of the learner driver, which did not require an in depth analysis of learner driver's ability. In my view, this would have been readily apparent after asking a few short questions and a casual observation of the first driving session;
- the driving sessions were generally one hour time slots and the goal in most, if not all, cases was to facilitate the learner driver to attain the necessary skills and knowledge to pass a driving test to obtain a heavy vehicle driving licence;
- this required Mr Mutch and Mr Clifford-Smith to follow a series of steps designed with an end goal of attaining a heavy vehicle driving licence;
- the Department and Keen did not require Mr Mutch or Mr Clifford-Smith to have a Certificate IV in Training and Assessment to undertake their duties as driving instructors or their duties as authorised assessors for PDA. However, the fact that Mr Mutch and Mr Clifford-Smith did have a Certificate IV in Training and Assessing was no doubt a good selling point for Keen and it meant that they did not have to comply with other Department requirements; and
- the PDA was prescribed by the Department and Mr Mutch and Mr Clifford-Smith were obliged to follow the Department's guidelines in carrying out their functions as authorised assessors. They exercised no autonomy in that regard.

101 However, the following is also relevant and I find on the balance of probabilities that:

- Keen was a RTO registered under the VET Act;
- Keen was registered to deliver training in units of competency recognised by the AQF in learning to drive a heavy vehicle of a particular class or classes;
- if a person passed the particular unit of competency, Keen provided a Statement of Attainment that is recognised in Australia as part of a national framework of vocational education and training;
- while not able to issue any qualifications under the AQF, Keen delivered training in units of competency that potentially lead to such qualifications being attained by a person (if they wished to do so); and
- as part of its service delivery in conducting PDA and truck driver training, Keen was required to adhere to certain statutory and regulatory requirements under Commonwealth and State and Territory legislation as it related to, amongst other things, vocational education and training.

102 In respect of Keen's business, I accept two things:

(1) Keen's principle business was to facilitate learner truck drivers to get a heavy vehicle driving licence and, in doing so, it did not devise a course or series of lessons, but followed a script set out by the Department and the AQF (in terms of the unit of competencies); and

(2) the Department required Keen to be a RTO so as to conduct PDA and, in doing so, it was required to comply with a series of steps including the provision of a Statement of Attainment, which could be converted to a heavy vehicle driver's licence.

103 I also accept that, other than for a MC driver's licence, all other heavy vehicle driver's licences can be obtained without formal training or instruction and by the PDA being conducted by the Department without a Statement of Attainment.

Determination

104 Be that as it may, and as unsophisticated as the training appears to have been, I also find on the balance of probabilities that Keen was engaged in '*vocational education and training*':

- where it provided skills based learning;
- enabling people to potentially be employed as a heavy vehicle truck driver outside of secondary and tertiary academic institutions;
- which was based on units of competency referrable to the AQF;
- where a Statement of Attainment provided by Keen demonstrated satisfactory completion of a unit of competency and that Statement of Attainment could be converted to certain AQF recognised qualifications upon completion of a training course, albeit not one conducted by Keen; and
- which was recognised and regulated by the VET Act and in the context of nationally recognised training.

105 Further, I also find that, notwithstanding Keen could not issue qualifications recognised by the AQF or conduct accredited courses, it did deliver training in units of competency recognised by the AQF and these units of competency could form part of qualifications recognised by the AQF.

106 That is, merely because a person did not obtain qualifications from Keen, did not prohibit them from adding to any Statement of Attainment provided by Keen and in time obtaining AQF qualifications. In that sense, any Statement of Attainment provided by Keen was potentially one step in a series of steps to qualification in some other area.

107I find Keen provides '*vocational education and training*' in respect of heavy vehicle truck driver training.

Does The Vocational Education And Training Provided By Keen Lead To Qualifications Recognised Within The AQF?

108 There is no ambiguity or technical meaning to be applied to the meaning of '*leading to qualifications recognised within the AQF*'. The clear intention of these words in the context of the cl 4.3 of the Award recognises a range of learning options. Were this not the case, then delivering units of competency and providing Statement of Attainment for the units of competency would have no value.

109 That is, what would be the point of delivering training for single units of competency if they could not be converted to a qualification if a person so desired at some point?

110 Further, while the heavy vehicle truck driver training provided by Keen, of itself, does not provide a qualification recognised within the AQF, the units of competency delivered by Keen enable a person to obtain qualifications recognised within the AQF if the person goes on to undertake further units of competency.

111 In that sense, the vocational education and training by Keen leads to qualifications recognised within the AQF, in that it is a step in a series of steps to qualification.

112 I do not accept the narrow construction advanced by it to the effect that Keen does provide a final or complete qualification, therefore the units of competency delivered by Keen do not lead to qualifications recognised by the AQF.

113 In my view, that is not what is intended with respect to '*vocational education and training*', particularly when regard is had to units of competency capable of being completed in a staged manner.

Determination

114 Therefore, I find on the balance of probabilities that Keen is an employer within the '*post-secondary educational services industry*' where it provides '*vocational education and training teaching leading to qualifications recognised within the AQF*' by providing heavy vehicle driver training. It is not to the point that Keen does so primarily to enable someone to obtain a heavy vehicle driver's licence.

Were Mr Mutch And Mr Clifford-Smith Employed By Keen As Teachers Or Tutor/Instructors?

115 Clause 4.1 of the Award provides that the Award covers employers '*in the post-secondary educational services industry and their employees … employed in the classifications listed in'* sch B, sch C and sch D.

116 Mr Mutch and Mr Clifford-Smith contend that they were employed by Keen as 'teachers' in Schedule C – Classifications – Teachers and Tutor/instructors of the Award.

117 The following principles, drawn from decided cases, are relevant to determining the appropriate classification of Mr Mutch's and Mr Clifford-Smith's position:

- '*Where the particular issue is whether an employee is engaged in a particular classification or class of work, then the Court takes a practical approach and will consider the aspect of the employee's employment which is the principal or major or substantial aspect*'.[55]
- Determining the major or substantial aspect of an employee's employment is '*not merely a matter of quantifying the time spent on the various elements of work performed…;the quality of the different types of work done is also a relevant consideration*'.[56]
- The focus is upon the identification of the skills and duties required of an employee who is called upon to perform the function that is required to be performed by the employer. The individual performance of a particular employee (e.g. quality and quantity of work, capacity for more complex work et cetera) is less relevant than the skills and duties necessary to perform the function required to be performed by the employer.[57]

118 Mr Mutch's and Mr Clifford-Smith's evidence has been discussed above and findings made with respect to their roles and duties.

119 It is necessary to focus on the skills, duties and tasks required of a heavy vehicle driving instructor and authorised assessor in the context of the meaning of '**teacher**' and '**tutor/instructor**' in the Award.

120 While it was not quantified during the hearing, my overall impression, and I find, was that heavy vehicle truck driver training occupied substantially more work time than PDA. That is, depending on the learner driver's experience actual time in the cabin of a truck occupied more time than the PDA (which appeared to be approximately an hour).

121 Save for some limited administrative office duties, Mr Mutch's and Mr Clifford-Smith's work was predominantly providing supervision and instruction to the learner driver in the cabin of the truck with some ancillary instruction given outside the cabin. A learner driver with limited prior heavy vehicle driving experience would require more instruction than someone who had previous heavy vehicle driving experience. I do not accept that either claimant devised any course or training package. Their role was very much scripted by the Department and the AQF.

122 Having regard to the Department's requirements for heavy vehicle driving instruction, the *Motor Vehicle Drivers Instructors Act 1963* (WA) (MVDI Act) and the evidence about what Keen required to enable employees to provide heavy vehicle driving instruction, I am not satisfied that Mr Mutch and Mr Clifford-Smith are properly classified as teachers in sch C of the Award.

123 The fact that Mr Mutch and Mr Clifford-Smith have a Certificate IV is not determinative.

124 The definition of '**teacher**' in the Award has two parts, the first of which applies where a teaching qualification is mandatory or required by the employer.

125 A teaching qualification, such as a Certificate IV, is not mandatory to undertake heavy vehicle driving instructing for the purposes of providing a Statement of Attainment for a unit of competency recognised within the AQF. The Department and Keen both recognised prior relevant driving experience and assessment in the particular class of vehicle as an alternative to a Certificate IV (prior learning).

126 Further, Keen did not require a Certificate IV for an employee to undertake heavy vehicle driving instructing. Keen's Policy and Procedure Manual in Standard 7 provided for equivalent competencies to a Certificate IV, consistent with the Department's requirements and Mr Keen's evidence. There was also no requirement for Keen to employee instructors and assessors with a Certificate IV to meet its obligations under the PDA Agreement both in relation to heavy vehicle instructing and conducting PDA assessments (noting PDA assessments do not form part of the heavy vehicle driving instruction).

127 In addition, there was no evidence before the IMC that the units of competency delivered by Keen were required to be taught by an employee with a teaching qualification.

128 Therefore, I find that Mr Mutch and Mr Clifford-Smith have not proven on the balance of probabilities that they were employed by Keen in the classification of teachers under sch C of the Award.

129 I note that Mr Mutch and Mr Clifford-Smith preferably characterised the classification of their employment as teachers under sch C of the Award, however, they also made reference to tutors/instructors under the same classification. Therefore, I have also considered whether they were employed as tutors/instructors under sch C of the Award having regard to the definition of tutors/instructors in cl 3.1 of the Award.

Determination

130 I find that Mr Mutch and Mr Clifford-Smith were employed by Keen in the classification of tutors/instructors under sch C of the Award for the following reasons:

- heavy vehicle driving instruction, including the units of competency associated with the relevant heavy vehicle licence, was not an accredited course. Nothing in the evidence demonstrated that the heavy vehicle driving instruction or the units of competency were '*accredited by an authority exercising statutory powers of accreditation*';[58]
- Keen did not require its employees to have a teaching qualification;
- the work carried out by Mr Mutch and Mr Clifford-Smith was not work of an academic teacher or a teacher; and
- while the words '*students'* and '*tutoring/instruction'* are not defined in the Award, having regard to the actual tasks and functions carried out by Mr Mutch and Mr Clifford-Smith and the approach adopted in constructing the Award terms, it is clear they did not benignly sit in a truck cabin. That is, their role was not limited to mere supervision of a learner driver, which is inconsistent with delivering units of competency in any event. I accept that Mr Mutch and Mr Clifford-Smith were required to provide more instruction and knowledge than that expressed by Mr Keen, albeit not to the level suggested by them. Meaning the amount of instruction may have been little or much more depending on the prior truck driving experience of the learner driver, but that does not necessarily undermine the overall character of what Mr Mutch and Mr Clifford-Smith were required to do. Furthermore, the word '*student*' has numerous meanings, from someone who is engaging in formal academic study to someone who is engaging in learning for pleasure. A pedantic approach to the meaning of '*student*' under the Award is inconsistent with the breath of post-secondary educational service industries intended to be covered, and which are covered, by the Award.

Outcome

131 Therefore, I am satisfied on the balance of probabilities that:

- The Award covered Keen as an employer in the post-secondary educational services industry;
- The Award covered Mr Mutch and Mr Clifford-Smith where they were employed by Keen in the classification of tutors/instructors in sch C of the Award; and
- As a consequence, the Award applies to Mr Mutch and Keen and to Mr Clifford-Smith and Keen.

D SCADDAN

INDUSTRIAL MAGISTRATE

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

[2] ***City of Wanneroo*** 438, 440.

[3] ***City of Wanneroo*** 440.

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

[5] Clause 4.2 of the Award.

[6] Clause 3.1 of the Award.

[7] Clause 3.1 of the Award.

[8] Clause 3.1 of the Award.

[9] ***TAL Life Ltd v Shuetrim*** [2016] NSWCA 68 [80].

[10] A table of definitions of '*vocational education and training*' is contained in Schedule III.

[11] '***VET statement of attainment***, *in relation to units of competency or modules of a VET course, means a statement given to a person confirming that the person has satisfied the requirements of units of competency or modules specified in the statement*' – see s 3 of the *National Education and Training Regulator Act 2011* (Cth).

[12] Section 35 of the VET Act.

[13] Section 57 of the VET Act.

[14] Part 7A of the VET Act.

[15] Part 7 of the VET Act.

[16] Exhibit 4 (in both claims) – Witness Statement of Paul Ernest Charles Keen dated 11 September 2020 [4], [5] and PK2. Keen is registered pursuant to the VET Act.

[17] Exhibit 4 [5], PK2.

[18] Exhibit 4 [5], [24], PK1 at clause 7.3(a).

[19] Exhibit 4 [6], PK2 page 5 of 8.

[20] Exhibit 4 [24].

[21] Exhibit 4 [7], [25].

[22] Exhibit 4 [8].

[23] Exhibit 4 [9].

[24] Exhibit 4 [10].

[25] Exhibit 4 [11] - [13] and PK3. It is further noted that applicants for a driving instructors licence must also hold a current WA driver's licence for a minimum of three years in the class instruction is to be given, be of good character, be a fit and proper person and be over 21 years of age.

[26] Exhibit 4 [15] - [18].

[27] Exhibit 4 [19].

[28] Exhibit 4 [20] - [23].

[29] Exhibit 4 [26], [27].

[30] Exhibit 3 – Witness statement of Mal Davey dated 15 September 2020 [5].

[31] Exhibit 3 [11].

[32] Exhibit 1 – Witness statement of Brian Clifford-Smith dated 16 August 2020 [51], [56].

[33] Exhibit 1 [63].

[34] Exhibit 4 [29].

[35] Exhibit 4 [30]. [31].

[36] Exhibit 4 [32], [33], PK4.

[37] Exhibit 1 [41].

[38] Exhibit 1 – Annexure C.

[39] Exhibit 1 [43].

[40] Exhibit 1 [47].

[41] Exhibit 1 [48].

[42] Exhibit 2 – Keen Policy and Procedure Manual.

[43] Exhibit 4 [35], [36].

[44] Exhibit 4 [37], [38], PK5.

[45] Exhibit 1 [7]

[46] Exhibit 1 [8], Annexure E (VOC Assessment sheet).

[47] Exhibit 1 [9] - [11], Annexure F (Department information on assessment for HC).

[48] Exhibit 1 [12].

[49] Exhibit 1 [13]; Exhibit 2 Annexure J.

[50] Exhibit 2 Annexure B (M 60 of 2020).

[51] Exhibit 2 Annexure G.

[52] Exhibit 2 Annexure J.

[53] Exhibit 2 Annexure J at pages 11 and 12.

[54] Exhibit 4 PK5 .

[55] ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCCA 621, [27]; ***Director of Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No7)*** [2013] FCCA 1097; ***Logan and Otis Elevator Company*** 1997 IRCA 200 (20 June 1997) (Moore J).

[56] ***Ware v O'Donnell Griffin (Television Services) Pty Ltd*** [1971] AR (NSW) 18.

[57] ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCCA 621, [32]; ***Fair Work Ombudsman v Da Adamo Nominees Pty Ltd No4*** [2015] FCCA 1178, [256]

[58] Meaning of '**accredited**' in cl 3.1 of the Award.

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

Jurisdiction

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

[2] The IMC being a court constituted by an industrial magistrate, is '***an eligible State or Territory court***': FWA s 12 (see definitions of '***eligible State or Territory court***' and '***magistrates court***'); *Industrial Relations Act 1979* (WA) 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 the terms of a modern award where the modern award *applies* to give an entitlement to a person and to impose an obligation upon a respondent employer: FWA s 46(2). The modern award *applies* if it *covers* the employee or the employee organisation and the employer, the modern award is in operation and no other provision of the FWA provides that the modern award does not apply: FWA s 47(1) (when read with s 48 of the FWA).

[5] An obligation upon an '***employer***' covered by a modern award is an obligation upon a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA s 42, s 48, s 14, s 12. An entitlement of an employee covered by a modern award is an entitlement of an '***employee***' who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed by a national system employer*': FWA s 42, s 48, s 13.

Contravention

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

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

- Contravening a term of a modern award: FWA s 539, s 45.
- Contravening a NES.

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

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

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

[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 and Anor 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].*

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

Schedule II – Relevant Principles Of Construction

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

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

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

c. '*The objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context. The apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances*';

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

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

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

The following is also relevant:

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

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

Schedule III – Table Definitions – Vocational Education And Training

State	Legislation	Definition
ACT	*Training and Tertiary Education Act 2003*	The education and training and qualifications and statements of attainment under the vocational education and training provisions of the AQF.
NSW	*Vocational Education and Training (Commonwealth Powers) Act 2010*	No separate definition.
NT	*Training and Skills Development Act 2016*	No separate definition.
Qld	*Further Education and Training Act 2014*	No separate definition.
SA	*Training and Skills Development Act 2008*	Education and training for work in relation to which qualifications and statements of attainment are issued under the vocational education and training provisions of the AQF.
Tas	*Training and Workforce Development Act 2013*	Vocational education and training, and attainment of associated qualifications or statements of attainment, under level 1, 2, 3, 4, 5 and 6 of the AQF.
Vic	*Education and Training Reform Act 2006*	The education and training and qualifications and statements of attainment under the vocational education and training provisions under the AQF. That part of education and training which is directed towards the development of skills and knowledge in relation to work when it is provided by an adult education institution or a community based organisation which is not a TAFE institute, a commercial provider or industry provider.

2020 WAIRC 00933

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00933
CORAM	**:**	INDUSTRIAL MAGISTRATE J. HAWKINS
HEARD	**:**	WEDNESDAY, 21 OCTOBER 2020
DELIVERED	**:**	FRIDAY, 27 NOVEMBER 2020
FILE NO.	**:**	M 43 OF 2020
BETWEEN	**:**	MARIO ALVAREZ PTY LTD
		CLAIMANT
		AND
		FAIR WORK OMBUDSMAN
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Review of the Compliance Notice pursuant to s 717 of the *Fair Work Act* (Cth) – Alleged contravention of cl 17.4 of the *Joinery and Building Trades Award 2010* (Cth) by failure to pay redundancy pay – Whether employees full time employment is terminated or changed to casual employment – Downgrading of employees position – Abandonment of employment
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Acts Interpretation Act 1901 (Cth)
		Industrial Relations Act 1979 (WA)
Instrument	**:**	*Joinery and Building Trades Award 2010* (Cth)
Case(s) referred		
to in reasons:	**:**	***Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman*** (2016)
		Hana Express Group Ltd v Fair Work Ombudsman (2020) 350 FLR 359
		Miller v Minister of Pensions [1947] 2 All ER 372
		Workpac Pty Ltd v Rossato [2020] FCAFC 84
		Berkley Challenge Pty Ltd v United Voice [2020] FCAFC 113
		Buckman v Barnawatha Abattoirs Pty Ltd [1994] 140 IR 376
		Harrison v FLSmidth Pty Ltd [2018] FWC 6695
		Khayan v Navitas English Pty Ltd (2017) 273 IR 44
		Amcor Limited v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241
		Deeney v Patrick Projects Pty Ltd (2019) FWC 1772
		Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623
Result	**:**	Application to cancel Compliance Notice dismissed. Compliance Notice varied and confirmed.
Representation:		
Claimant	**:**	Mr M. Alvarez (director) on behalf of the claimant
Respondent	**:**	Mr A. Willinge (of counsel) as instructed by Australian Government Solicitors

REASONS FOR DECISION

Introduction

1 Mario Alvarez Pty Ltd (the Claimant) sought a review of a Compliance Notice issued pursuant to s 717(1)(a) of the *Fair Work Act 2009* (Cth) (FW Act). The Compliance Notice had been given to the Claimant pursuant to s 716 of the FW Act by Ms Louise Claire Casey (Ms Casey), a Fair Work Inspector, employed by the Fair Work Ombudsman (the Respondent). The Compliance Notice alleged a contravention by the Claimant. A copy of Compliance Notice is attached to these reasons in Schedule 1.

2 The Compliance Notice related to an employee of Claimant, Mr Colin Wright (Mr Wright). Sadly, Mr Wright passed away on 26 August 2020. There is no dispute that Mr Wright was employed by the Claimant. The Compliance Notice stated that the Claimant did not pay Mr Wright redundancy pay under the *Joinery and Building Trades Award 2010* (Cth) (the Award) when his full-time employment was terminated by the Claimant.

3 The Claimant seeks a cancellation of the Compliance Notice. The Claimant does not dispute that it did not pay Mr Wright any redundancy pay but says it did not have to do so.

4 The Respondent however says the Compliance Notice should be varied and confirmed. The variation that the Respondent seeks is because the Compliance Notice referred to Mr Wright being owed six weeks' redundancy pay instead of seven weeks.

5 There is no dispute that Mr Wright was employed as a full-time stonemason and was paid pursuant to the Award. In particular, there is no dispute that the Award applies despite s 121(a) of the FW Act. The application of s 121 of the FW Act was not raised by the parties. In any event, cl 17.4(a) of the Award states as follows:

> *Clause 17.4 applies to an employee of a small business employer except for an employee who is excluded from redundancy pay under the NES by sections 121(1)(a), 123(1), 123(4)(a) or 123(4)(d) of the* [FW] *Act.*

6 There is no dispute that Mr Wright had been continuously employed for a period of between three to four years. Section 121(1)(a) of the FW Act excludes redundancy pay for employees whose '*period of continuous service … is less than 12 months*'. Further, Mr Wright did not fall within any of the other exclusions referred to in s 123(1)(a), s 123(4)(a) and s 123(4)(d) of the FW Act because:

a) Mr Wright was not employed for a specified period, task or season (s 123(1)(a) of the FW Act);

b) Mr Wright was not employed as an apprentice (s 123(4)(a) of the FW Act); and

c) Nor was there any evidence Mr Wright was '*an employee prescribed by the regulations as an employee to whom*' subdivision 11A of the FW Act applied.

7 There is also no dispute that in 2019 the Claimant's director, Mr Mario Alvarez (Mr Alvarez), raised concerns with Mr Wright and another employee, Mr Robert Rowan (Mr Rowan), about the decline in the Claimant's business. On or about 5 December 2019, the Claimant wrote to Mr Wright by letter which stated as follows:

> *Dear Colin*
>
> ***Termination of Full-time Employment***
>
> *As per my previous verbal communication, we are sorry to notify you that your employment with Andes Stone Works in the capacity of the Full-time Stone Mason position will terminate at 1pm on December 20th, 2019. Your final payment including accrued annual leave will be paid during the following week.*
>
> *As discussed, we are able to offer you employment on a casual basis up until Andes Stone Works is no longer operating.*
>
> *Should you have any queries, please don't hesitate to contact me. We'd like to thank you for the contribution you've made during your time at Andes Stone Works.*
>
> *Kindly sign below to indicate receipt of this notice.*
>
> *Sincerely,*
>
> *Mario Alvarez*
>
> *Owner*

8 Following receipt of this correspondence, Mr Wright requested that the Claimant provide him with two separate letters to encompass what had been written to him on 5 December 2019. Those letters were provided to Mr Wright by the Claimant on or about 10 December 2019. The first of those letters still dated 5 December 2019 stated:

> *Dear Colin*
>
> ***Termination of Full-time Employment***
>
> *As per my previous verbal communication, we are sorry to notify you that your employment with Andes Stone Works in the capacity of Full-time Stone Mason position will terminate at 1pm on December 20th, 2019. Your final payment including accrued annual leave will be paid during the following week.*
>
> *Should you have any queries, please don't hesitate to contact me. We'd like to thank you for the contribution you've made during your time at Andes Stone Works.*
>
> *Kindly sign below to indicate receipt of this notice.*
>
> *Sincerely,*
>
> *Mario Alvarez*
>
> *Owner*

9 The second of those letters also dated 5 December 2019 provided to Mr Wright on or about 10 December 2019 read as follows:

> *Dear Colin*
>
> ***Offer of Casual Employment***
>
> *As discussed, we are able to offer you employment on a casual basis up until Andes Stone Works is no longer operating.*
>
> *Kindly sign below to indicate receipt of this offer.*
>
> *Sincerely,*
>
> *Mario Alvarez*
>
> *Owner*

10 The reason for these two letters being provided was for the purposes of Mr Wright accessing Centrelink benefits. Further, there is no dispute that Mr Wright's last day of attending employment was 16 December 2019. On 18 December 2019, Mr Wright's wife and daughter contacted the Claimant to advise that Mr Wright was very sick and would not be returning to work.

11 At [6] of the Originating Claim (the Claim) the Claimant says it did not commit any contravention of the Award because:

a. properly characterised, the Amended Documents [the two further letters dated 5 December 2019 provided by the Claimant to Mr Wright] *constituted a change of Mr Wright's employment conditions agreed by him in a manner similar to that contemplated in clause 12.7(e) of the Award; and*

b. given that Mr Wright had not been terminated and remained in employment of the Claimant, no redundancy pay was payable.

12 Effectively, the Claimant says that Mr Wright's employment was not terminated as he either was offered casual employment with the Claimant or accepted casual employment with the Claimant.

13 Further, although not particularised, the Claimant may also be seeking to suggest that Mr Wright abandoned his employment and as a result was not entitled to redundancy pay.

14 The Respondent, however, says that the Compliance Notice should be confirmed. It also says that there was a mistake in the Compliance Notice which is non-contentious. The Respondent says the Compliance Notice should be varied as Mr Wright's length of service was between three to four years. Accordingly, the Respondent says, pursuant to cl 17.4(d) of the Award, the correct period of redundancy pay was seven weeks, not six weeks, as expressed in the Compliance Notice.

Burden Of Proof And Jurisdiction

15 The jurisdiction of Western Australian Industrial Magistrate Court to review a Compliance Notice is set out in Schedule 2 of these reasons. The Claimant wants the Compliance Notice cancelled. As such, it is required to prove that this should occur on the balance of probabilities.[1]

16 The standard is well accepted and means '*more probable than not*'.[2]

17 In respect to the Respondent's application to vary the Compliance Notice, the Respondent bears the burden of proof on the balance of probabilities.

18 When I say I am 'satisfied' in these reasons, I mean I am satisfied upon the balance of probabilities.

Evidence

Ms Casey

19 Ms Casey's evidence is set out in her witness statement.[3] At the hearing she was made available for cross-examination but was not subject to any cross-examination by the Claimant. Ms Casey's evidence was simply to outline the steps she had undertaken and the documents she had received prior to issuing the Compliance Notice. Her evidence referred to a letter from the Claimant's solicitor dated 15 January 2020. That letter indicated that the intention and effect of the letters dated 5 December 2019 written to Mr Wright was to change his employment status from a full-time permanent employee to that of a casual employee and that the change in status of Mr Wright's employment conditions was by mutual consent. As a result, the Claimant's solicitors denied that the Claimant had terminated Mr Wright's employment. I note however that there was no written evidence to establish that Mr Wright consented to the change in his employment conditions.

20 At [12] of Ms Casey's witness statement, she sets out the reasonable belief as to why a contravention of cl 17.4 and cl 26.4 of the Award had occurred. Specifically it was that:

a. The Award [applied] *to the Claimant.*

b. The Claimant employed Mr Wright on or around 16 February 2016 or 6 June 2016 to 20 December 2019.

c. Mr Wright ceased to be employed by the Claimant by termination at the Claimant's initiative because the Claimant no longer required the job done by Mr Wright to be done by anyone.

d. Mr Wright [was] *entitled to redundancy payments in accordance with clauses 17.4 and 26.4 of the Award.*

e. The Claimant contravened clauses 17.4 and 26.4 of the Award in relation to Mr Wright by failing to pay him the applicable redundancy payment, based on his length of service at the end of his employment.

21 Ms Casey formed the view that '*Mr Wright ceased to be employed by the Claimant by termination at the Claimant's initiative*'.

22 In [13] of Ms Casey's witness statement she indicated that '*the Claimant ended Mr Wright's full time employment*' and that the reason for the '*termination was that* [the] *business was slow and there was not enough work. Therefore,* [she] *considered that the entitlement to redundancy applied*'. Her statement indicates that simply because '*the Claimant offered Mr Wright a casual employment contract did not detract from the termination of* [his] *full time employment conditions*'.

23 Attached to her witness statement is a copy of her 'Decision Record' of 4 February 2020. In that 'Decision Record' it refers to information received from Mr Alvarez in which he maintained that he had not told '*people the business was closing as he wasn't sure what was going to happen*' and whether he would keep the business '*trading for 3 months, six months, he didn't know*'. Ms Casey's record indicates that Mr Alvarez suggested that business was slow and '*that's why he said the full time employment was ending and* [that] *he would keep people on as* [a] *casual*'.

24 As far as Mr Alvarez was concerned, Mr Wright's employment had not ended, and he had not been '*sacked*'. Mr Wright still had a job but there were simply insufficient hours to keep Mr Wright employed on a full-time basis.

25 Ms Casey was not subject to any cross-examination and as a result I can accept her evidence in full and find it reliable.

Mr Rowan

26 The Claimant relied upon the evidence of Mr Rowan, a foreman with the Claimant, which was in the form of a witness statement and his oral evidence at hearing. His evidence was to the effect that he and Mr Wright had had ongoing discussions with Mr Alvarez, that the Claimant's business was not doing well and that they should start to look for alternative work. His evidence was that as the end of financial year in 2019 came closer Mr Alvarez advised him and Mr Wright that he was expecting to have work after the financial year and that he '*was thinking to keep the business running up to Christmas*'. His evidence was that Mr Alvarez asked if Mr Rowan and Mr Wright wanted to stay until that time and that he and Mr Wright agreed to stay. He explained however Mr Alvarez approached both he and Mr Wright in December 2019 to inform them that if they wanted to continue with the Claimant for a few more months, work was coming up. In particular, Mr Rowan's evidence was that:

> *Mario told us if we agreed to work as casual employment as the work booked was not sufficient to keep us on fulltime basis.*

27 He explained both he and Mr Wright received the letters of 5 December 2019 from Mr Alvarez. Mr Rowan explained that he agreed to the offer of casual employment. However, his evidence at trial was that both he and Mr Wright were aware of what was going on and that is why he and Mr Wright signed the letters from the Claimant. He did confirm that when Mr Wright initially received the letter of 5 December 2019, Mr Wright had indicated that he had spoken with his wife and would not sign the letter. Mr Wright wanted Mr Alvarez to re-write the letter in two separate letters requesting '*a letter stating "termination of Employment" … with the purpose of sending it to centre-link*' to start claiming unemployment benefits and the second letter being the offer of permanent casual employment.

28 In his witness statement Mr Rowan stated that '*the second letter* [which I presume to be the letter of 5 December 2019] *was an offer of permanent casual position which Colin agreed and signed, therefore Colin signed both letters*'. In cross-examination Mr Rowan was asked whether by that comment he was stating that Mr Wright agreed because he signed the letter. In answer Mr Rowan said:

> *No really agreed, you know, you have to understand this, we - there's three of us that work together, so it's a small business. We have a letter, we also have … we talk a lot … we had a lot of verbal agreement …* [s]*o we already knew what was going on in regards to going from sort of fulltime employment to casual employment.*
>
> …
>
> [S]*o when we knew what was going on that's why we signed the letter.*

29 Mr Rowan agreed that Mr Wright's last day coming to work was 16 December 2019 and was aware that Mr Wright had been diagnosed with a terminal illness. Mr Rowan accepted that the question of whether Mr Wright's employment was terminated was a legal question.

30 Mr Rowan was a reliable witness. However, his evidence in respect to the issue of whether Mr Wright accepted the offer of casual employment was very general and lacked particularity.

31 Mr Rowan did not refer to any particular statement or discussion between himself and Mr Wright concerning Mr Wright accepting the offer of casual employment. At best he suggested that all three men, Mr Alvarez, himself and Mr Wright, discussed the situation in respect to the Claimant's business.

32 Given the general nature of Mr Rowan's evidence it was insufficient to satisfy me that an inference could be drawn that by signing the letters of 5 December 2019 Mr Wright was accepting the Claimant's proposal of casual employment.

33 Given the general nature of Mr Rowan's evidence where it conflicts with the evidence of Ms Casey's, I find it unreliable and give it no weight.

Issues For Determination

34 Did cl 12.7(e) of the Award permit Mr Wright's employment to be changed from full-time to casual employment?

35 Was Mr Wright's employment terminated?

36 Did Mr Wright abandon his employment?

Determination

Did cl 12.7(e) of the Award permit Mr Wright's employment to be changed from full-time to casual?

37 Paragraph 6(a) of the Claim suggests that any possible change in Mr Wright's employment from full-time to casual employment was permitted by cl 12.7(e) of the Award. That clause provides:

> *Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.*

38 Simply put, this clause permits a casual employee being able to elect to become a full-time or part-time employee. It makes no mention of a full-time employee changing to a casual employee.

39 This issue was not pressed by the Claimant. In any event when read in context, this clause has no application to the facts of this case.

40 Simply put, this clause permits a casual employee being able to elect to become a full-time or part-time employee. It makes no mention of a full-time employee changing to a casual employee.

Was Mr Wright's employment terminated?

41 The primary position of the Claimant is that Mr Wright's employment was not terminated but that he remained employed as a casual employee.

42 To determine this issue requires an examination of the two letters of 5 December 2019 and any other relevant evidence.

43 One of the letters was headed, '*Termination of Full-time Employment*'. It states that Mr Wright's employment '*in the capacity of the Full-time Stone Mason position will terminate at 1pm on December 20th, 2019*'. It referred to final payments and accrued leave.

44 The letter is unambiguous and makes clear that Mr Wright's employment as a full-time stonemason was being terminated.

45 There is no dispute that the Claimant offered Mr Wright a casual employment. But it was only an offer. Although the letter asked Mr Wright to sign the letter to confirm receipt, it did not state directly that by signing, Mr Wright accepted the offer.

46 Additionally, the Claimant's proposal of casual employment lacked particularity as to the conditions of the offer. It was therefore incapable of acceptance.

47 In any event, it cannot be inferred that by his conduct Mr Wright accepted the proposal of casual employment by the Claimant. Mr Wright dated the acknowledgement of receipt of the letters of 5 December 2019 on Friday, 13 December 2019. Mr Wright did not return to work after Monday, 16 December 2019 and his family advised the Claimant on 18 December 2019 that he was too sick to return to work. I give no weight to Mr Rowan's evidence as to whether Mr Wright accepted the Claimant's offer of casual employment for the reasons previously expressed.

48 However, even if Mr Wright can be said to have accepted the proposal of casual employment it does not preclude a finding that Mr Wright's full-time employment was terminated. Such change would have been fundamental and has been considered to be significant.[4]

49 As a full-time employee, Mr Wright's employment was a guaranteed 38 hours per week plus annual leave and other entitlements. As a casual, Mr Wright had no guarantee of work and the potential of no work. As a casual employee Mr Wright would have therefore had fewer entitlements such as annual leave, paid personal/carer's leave and redundancy pay (see s 86 and s 96 of the FW Act).

50 If the Claimant's position is correct, it would result in an absurd situation where the Claimant could change Mr Wright's employment from full-time to casual. The Claimant could then employ Mr Wright for a short period, even a day, and end his employment, resulting in the loss of redundancy pay; being clearly an unfair result.[5]

51 It has been accepted that where there is profound downgrading of an employee's position this constitutes a termination of employment.[6] Further, in ***Harrison v FLSmidth Pty Ltd***[7] it was found that an employee can be dismissed (at the initiative of the employer) where there is a significant reduction in pay and duties, even if they remain employed.

52 Accordingly, even if I had been satisfied that Mr Wright accepted the proposal of casual employment, this would have been a profound downgrading of his position and would have constituted a termination of employment in any event.

53 A further issue that requires determination in respect to the issue of 'termination' is whether such termination was '*at the employer's initiative because the employer no longer requires the job done by the employee or to be done by anyone'*.

54 Clause 17.4(c) of the Award states as follows:

> *Subject to paragraphs (f) and (g), an employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:*
>
> *(i) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or*
>
> *(ii) because of the insolvency or bankruptcy of the employer.* (emphasis added)

55 I am satisfied that Mr Wright's employment was terminated at the initiative of the Claimant and was the principle contributing factor which resulted in Mr Wright's termination of employment.[8] The letters of 5 December 2019 from the Claimant to Mr Wright:

a) were on the Claimant's letterhead;

b) were addressed to Mr Wright;

c) were entitled '*Termination of Full-time Employment*';

d) used the words '*We are sorry to notify you that your employment with Andes Stone Works in the capacity of the Full-time Stone Mason position will terminate at 1pm on December 20th, 2019*'.

e) refers to a final payment;

f) gives thanks to Mr Wright for his contribution;

g) asks Mr Wright to acknowledge receipt of the letter by signing; and

h) makes no mention that Mr Wright was agreeing to the proposal or had, in fact, suggested it.

56 I am also satisfied that the Claimant no longer required the job of stonemason to be done by Mr Wright or anyone. In ***Amcor Limited v Construction, Forestry, Mining and Energy Union***[9] the High Court considered whether employees of the employer were entitled to redundancy payments following a merger. Despite the merger, all employees kept their job and entitlements. At [44] the High Court made clear that the relevant enquiry:

> *[W]ether employment in a particular kind of work then being undertaken was to come to an end. If that employment was to come to an end, it was necessary to consider why that was to happen. Was it because the employer no longer wanted the job, then being done by the employee, done by anyone? Or was it 'due to the ordinary and customary turnover of labour' …*
>
> [T]*he emphasis was upon a 'job' becoming redundant rather than a worker becoming redundant.*

57 Although not factually exactly the same, the decision of ***Deeney v Patrick Projects Pty Ltd***[10] is relevant. In that case a number of employees were made redundant and claimed they had been unfairly dismissed. It was found:

> *I am satisfied that the* [employers] *no longer required the applicants' jobs to be performed by anyone because of the changes in the operational requirements of the* [employers' business] *… The fact that casual opportunities still remained does not detract from the need to reduce the full time permanent workforce.*

58 Further, Mr Alvarez, in his discussions with Ms Casey on 31 January 2020, said he was not sure how long the business would keep trading but that the business was slow and there was not enough work and that is why Mr Wright's employment was ending. Likewise, Mr Rowan's evidence was that Mr Alvarez told Mr Rowan and Mr Wright that the Claimant's business was not doing well and that the work booked was not sufficient to keep him and Mr Wright employed full-time. Further, there was no evidence that anyone else was being employed to undertake Mr Wright's job. Nor is there any evidence that this usually happened in the Claimant's business or was due to the normal turnover of labour. The evidence establishes that the job came to an end as there was not enough work. As stated ***in Berkley Challenge Pty Ltd v United Voice***:[11]

> *Terminations arising from adverse economic circumstances … are not 'ordinary and customary turnover of labour'.*

59 For the reasons previously expressed at [41] to [58], I therefore find that:

a) Mr Wright's full-time employment was terminated on 20 December 2019;

b) That the termination of Mr Wright's full-time employment was at the initiative of the Claimant because the Claimant no longer required the job performed by Mr Wright to be done by anyone and this was not due to the Claimant's ordinary and customary turnover of labour.

Did Mr Wright abandon his employment?

60 A further possible issue that needs to be determined is whether Mr Wright abandoned his employment. An abandonment of employment is akin to a contractual 'repudiation'. It is well established that to determine whether a repudiation occurs has to be determined objectively by '*the conduct of the relevant party' that such conduct 'conveys to a reasonable person … repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it*'.[12]

61 Mr Wright had been employed between three to four years. On the Claimant's own evidence it establishes that Mr Wright attended work on 16 December 2020. Further, the letter from the Claimant to Mr Wright said that his full-time employment was terminating on 1.00 pm on 20 December 2019. In addition, there is clear evidence that Mr Wright's family advised the Claimant on 18 December 2019 of Mr Wright's ill health and that he would not be returning to work. On the basis of this evidence, when viewed objectively, it is insufficient to convey that Mr Wright disavowed his employment contract with the Claimant.

Variation Of Compliance Notice

62 The Respondent seeks a variation of the Compliance Notice. Mr Wright was employed from February or June 2016 until 20 December 2019. He was therefore employed between three and four years. Pursuant to cl 17.4(d) of the Award the correct number of weeks for three to four years of employment is seven weeks redundancy pay.

63 Ms Casey's evidence at [14] of her witness statement explains the error she made in the calculation of the redundancy pay. This issue does not take the Claimant by surprise and the Claimant's solicitors were aware of this issue.[13]

64 This change is simply being sought to match the entitlement referred to in the Award. As a result, I consider I am able to vary the Compliance Notice pursuant to s 717(3) of the FW Act.

Orders

65 Accordingly, based on the findings above, I am satisfied that the Claimant has not proven that it has not committed a contravention by not paying Mr Wright redundancy pay in accordance with cl 17.4 of the Award.

66 It is therefore ordered as follows:

(1) The application by the Claimant to cancel the Compliance Notice is dismissed.

(2) Pursuant to s 717(3) of the FW Act the Compliance Notice issued on 12 February 2020 is varied by substituting the words '7 weeks' wages' for '6 weeks' wages' where those words appear in the table at [6] of the Compliance Notice.

(3) The varied Compliance Notice is otherwise confirmed.

J HAWKINS

INDUSTRIAL MAGISTRATE

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[1] See ***Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman*** (2016) 304 FLR 264 [28] - [29], [32] - [35]; ***Hana Express Group Ltd v Fair Work Ombudsman*** (2020) 350 FLR 359 [49], [54].

[2] See ***Miller v Minister of Pensions*** [1947] 2 All ER 372.

[3] Exhibit 2.

[4] See ***Workpac Pty Ltd v Rossato*** [2020] FCAFC 84 [27] - [30], [31], [35] - [36], [57], [65] - [68] (Broomberg J); [14] - [322], [412], [475], [477], [478] - [479] (White J).

[5] See ***Berkley Challenge Pty Ltd v United Voice*** [2020] FCAFC 113 [172]

[6] See ***Buckman v Barnawatha Abattoirs Pty Ltd*** [1994] 140 IR 376 (Smith J)

[7] ***Harrison v FLSmidth Pty Ltd*** [2018] FWC 6695 [33], [36] - [38].

[8] See ***Khayan v Navitas English Pty Ltd*** (2017) 273 IR 44 [75].

[9] ***Amcor Limited v Construction, Forestry, Mining and Energy Union*** (2005) 222 CLR 241 [43] - [44], [54].

[10] ***Deeney v Patrick Projects Pty Ltd*** (2019) FWC 1772 [78].

[11] ***Berkley Challenge Pty Ltd v United Voice*** [2020] FCAFC 113 [237].

[12] See ***Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*** (1989) 166 CLR 623.

[13] See pages 25 and 35 of the witness statement of Ms Casey.

Schedule 1 – Compliance Notice

FWO GOLD COAST
PO BOX 1945 SURFERS PARADISE QLD 4217

COMPLIANCE NOTICE
(issued under section 716(2) of the *Fair Work Act 2009* (Cth))

Date of Issue: 12 February 2020

Name of Employer:	MARIO ALVAREZ PTY LTD Trading as Andes Stone Works
ABN/ACN (if applicable):	81 125 839 358 / ACN 125 839 358
Employer Contact/ Director (if applicable):	MARIO ALVAREZ

I **LOUISE CASEY**, being a duly appointed Fair Work Inspector, reasonably believe that Mario Alvarez Pty Ltd trading as Andes Stone Works (**Employer**) has contravened a term of the Joinery and Building Trades Award 2010 [MA000029] (**Award**), as described below. This Compliance Notice requires you to take steps to remedy the contraventions described below.

Rights and obligations under this Compliance Notice

1. Failure to comply with this Compliance Notice may contravene section 716(5) of the *Fair Work Act 2009* (Cth) (**FW Act**) and render you liable for a civil penalty (unless you have a reasonable excuse).
2. You may be liable to a civil remedy if you give false or misleading information or produce false or misleading documents. It is also a serious offence under the *Criminal Code* (Cth).
3. If you do not comply with this Compliance Notice, the Fair Work Ombudsman may, without further notice, commence legal action against you and/or individuals involved in your failure to comply with this Compliance Notice to recover any outstanding monies which this Compliance Notice requires you to pay and to seek civil penalties.
4. Complying with the Compliance Notice is not an admission that you contravened, or have been found to have contravened, the Award or the FW Act.
5. You may apply to the Federal Court, Federal Circuit Court or eligible State or Territory Court for a review of this Compliance Notice on either or both of the following grounds:
   (a) you did not commit the contraventions set out in this Compliance Notice;
   (b) this Compliance Notice does not comply with sections 716(2) or 716(3) of the FW Act.

Details of the contravention(s)

6. The Employer, on between 21 December 2019 and 28 December 2019 (**Period**), contravened the clause of the Award set out in the table below.

No	*Clause*	*Details of contravention(s)*
(a)	17.4 and 26.4	**Redundancy pay for employee of small business employer contravention** Failing to pay Colin Wright Redundancy pay of 6 weeks' wages at his base rate of pay for his ordinary hours of work no later than 7 days after the date on which the employee's Full Time employment terminated. (**Entitlement**).

Required action under this Compliance Notice

7. In accordance with section 716(2) of the FW Act, I require you by Friday 13 March 2020 to:

Step 1 – calculate and rectify underpayments

(a) In respect of the contravention referred to in row (a) of the table above:

(i) in respect of Colin Wright's employment:

1. calculate the amount the Employer should have paid to Colin Wright during the Period in respect of the Entitlement;

2. make a payment to Colin Wright of the amount referred to in (1) immediately above; and

3. make a record of the information and amount referred to in (1) and the amount of the payment referred to in (2) immediately above (**Underpayment Rectification Information**).

Step 2 – Superannuation

(b) calculate additional superannuation contributions required (if any) by clause 27 of the Award in respect of the amount required to be paid Mr Wright of the Employer as a result of Step 1.

(c) in relation to Colin Wright who is owed such additional superannuation contributions, pay such additional superannuation contributions to Colin Wright's chosen Superannuation Fund.

Reasonable evidence of steps taken to comply with this Compliance Notice

8. In accordance with section 716(2) of the FW Act, I require you to produce the following reasonable evidence of your compliance with the actions specified in paragraph 7 above:

(a) a schedule that sets out:

(i) in relation to Mr Wright and in respect of the contravention that concerns Colin Wright, the Underpayment Rectification Information;

(ii) in relation to Mr Wright, the additional superannuation contributions calculated for Mr Wright and paid to his Superannuation Fund in accordance with Step 2; and

(b) proof that full payment has been made to Mr Wright identified in Step 1 of the payments required to be made by Step 1 and Step 2, such as a bank transfer showing the transfer of funds to Mr Wright and his Superannuation Fund, or a copy of Mr Wright's payroll records showing the payments.

9. The evidence referred to above must be provided to the Fair Work Ombudsman by 20 March 2020 by email to louise.casey@fwo.gov.au or by post to The Fair Work Ombudsman, Attn: Louise Casey, PO Box 1945 Surfers Paradise QLD 4217.

10. You may be liable to a civil penalty or other civil remedy under the FW Act if you give false or misleading information or produce false or misleading documents in response to this Compliance Notice. You may also be liable for a criminal offence under the *Criminal Code* (Cth) if you do so.

Louise Casey

Fair Work Inspector
Fair Work Ombudsman

Schedule 2 – Jurisdiction of Western Australian Industrial Magistrates Court (IMC) to review a Compliance Notice

[1] Section 717(1) of the FW Act states:

> ***717 Review of compliance notices***
>
> *(1) A person who has been given a notice under section 716 may apply to the Federal Court, the Federal Circuit Court or an eligible State or Territory Court for a review of the notice on either or both of the following grounds:*
>
> *(a) the person has not committed a contravention set out in the notice;*
>
> *(b) the notice does not comply with subsection 716(2) or (3).* (emphasis added)

[2] Section 2C of the *Acts Interpretation Act 1901* (Cth) provides that reference to a 'person' includes '*corporate as well as an individual*'.

[3] The IMC, being a court constituted by an industrial magistrate, is '***an eligible State or Territory Court***': FW Act, s 12 (see definition of '***eligible State or Territory court***' and '***magistrate court***'): and also *Industrial Relations Act 1979* (WA) s 81 and s 81B.

[4] Accordingly, it is open to the IMC to review a Compliance Notice given to a person by a Fair Work Inspector on the grounds that the person has not committed a contravention set out in the Notice.

[5] The extent of a court's power to review has been the subject of detailed analysis – ***Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman*** (2016) 304 FLR 264.

[6] Section 717 of the FW Act does not state what rules of evidence and procedure applies in a review of a Compliance Notice.

[7] Section 551 of the FW Act requires the strict rules of evidence and procedure for civil matters to be applied when hearing proceedings relating to a contravention of a civil remedy provision.

[8] Albeit, that s 717 is not defined under the FW Act as a civil remedy provision (see s 539 of the FW Act), the review requires a determination of whether the Claimant contravened the Award. A contravention of an Award (s 45) is a civil remedy provision (s 539 of the FW Act). Accordingly, I am satisfied s 551 of the FW Act applies to this application under s 717 of the FW Act.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2020 WAIRC 00811

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ALLAN HOLLINGTON

APPLICANT

-v-

ALTRAD SERVICES PTY LTD (FORMERLY CAPE AUSTRALIA ONSHORE PTY LTD)

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER

DATE TUESDAY, 22 SEPTEMBER 2020

FILE NO. B 95 OF 2020

CITATION NO. 2020 WAIRC 00811

Result Direction issued

Representation

Applicant Mr S Kemp of counsel

Respondent Mr J Lord

Directions

HAVING heard Mr S Kemp of counsel on behalf of the applicant and Mr J Lord on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

(1) THAT each party shall give informal discovery by serving its list of documents by 13 October 2020.

(2) THAT inspection of documents shall be completed by 20 October 2020.

(3) THAT the applicant and respondent file an agreed statement of facts (if any) no later than 3 days prior to the date of hearing.

(4) THAT the matter be listed for hearing for one day.

(5) THAT the parties have liberty to apply on short notice.

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

2020 WAIRC 00910

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ALLAN HOLLINGTON

APPLICANT

-v-

ALTRAD SERVICES PTY LTD (FORMERLY CAPE AUSTRALIA ONSHORE PTY LTD)

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER

DATE FRIDAY, 13 NOVEMBER 2020

FILE NO/S B 95 OF 2020

CITATION NO. 2020 WAIRC 00910

Result Discontinued by leave

Representation

Applicant Mr S Kemp of counsel

Respondent Mr J Lord

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 and is hereby discontinued by leave.

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

2019 WAIRC 00833

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR LESLIE GEORGE MAGYAR
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 25 NOVEMBER 2019
FILE NO/S	U 124 OF 2018
CITATION NO.	2019 WAIRC 00833

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms R Hartley (of counsel)

Order

HAVING heard from the applicant in person and Ms R Hartley, of counsel, for the respondent on Monday, 25 November 2019;

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

THAT the respondent provide informal discovery to the applicant by close of business, Monday, 9 December 2019.

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

2020 WAIRC 00972

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00972
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	TUESDAY, 21 JULY 2020, WEDNESDAY, 22 JULY 2020, MONDAY, 21 SEPTEMBER 2020 AND BY WRITTEN SUBMISSIONS MONDAY, 19 OCTOBER 2020, FRIDAY, 30 OCTOBER 2020
DELIVERED	**:**	TUESDAY, 8 DECEMBER 2020
FILE NO.	**:**	U 124 OF 2018
BETWEEN	**:**	MR LESLIE GEORGE MAGYAR
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
		Respondent

CatchWords	:	Industrial Law (WA) - Unfair dismissal claim - Applicant dismissed due to negligence in failing to ensure student enrolled and in failing to deliver instruction to student – Application dismissed
Legislation	:	
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr N Marsh, of counsel
Respondent	:	Ms R Hartley, of counsel

Reasons for Decision

1 The applicant was employed as a teacher by the respondent from 2001 until 3 September 2017, when he was dismissed for being negligent in the performance of his functions. The respondent found the applicant had been negligent in failing to ensure that a student in his class was enrolled in a course and in failing to deliver instruction to the student in that course.

2 The applicant, immediately prior to his dismissal, worked as a computing teacher at Kent Street Senior High School.

3 Some students at Kent Street Senior High School progress toward achievement of vocational certificates. These certificates are within the purview of registered training organisations which are quite separate to the school. The courses are taught at the school but the qualification is granted by this separate entity.

4 The Certificate II in Information Technology is one such course. Students may nominate that they wish to achieve such a qualification and they will be placed in classes where the course will be delivered at the school by employees of the respondent.

5 A student must of course be 'enrolled' in the course with the registered training organisation to achieve the certificate.

6 In 2017, Kent Street Senior High School had a student who had nominated that he wished to complete the Certificate II in Information Technology. The student had been allocated to a class taught by the applicant for instruction in the course.

7 The school year started on 1 February 2017.

8 As at 14 June 2017 the student in question had not been enrolled with the registered training organisation nor had the applicant commenced giving the student any instruction in the course.

9 The applicant accepted that he did not ensure that the student was enrolled as at 14 June 2017 (ts 121) and accepted that he had delivered no instruction to the student in the course as at that date (ts 120).

10 There is really no sensible argument that can be put up against a charge that the applicant was negligent.

11 The applicant knew that the student had nominated that he wanted to progress toward achievement of the Certificate II in Information Technology and had been placed in his class for instruction in it.

12 The applicant knew that to achieve the qualification the student had to be enrolled in the course with the registered training organisation.

13 A teacher who fails to ensure that a student in his class has been enrolled in a course in these circumstances is negligent. The failure to ensure the student was enrolled occurred against a background where the applicant was aware the student was, in his words, "dragging his feet" (ts 105 and 106) in relation to enrolment. It was not as if it was fair or reasonable for the applicant to assume the student had enrolled himself. Enrolment was fundamental to achievement of the qualification and the applicant had not ensured it had occurred. That was negligent.

14 Further, a teacher who does not deliver instruction to a student in his class is negligent. A teacher is employed to teach. To not do so is negligent.

15 By way of explanation, the applicant said he did not teach the course to the student in question, and, rather, allowed him to do private study:

> Because I had a – a – a student that just was not – to me appeared to be not wanting to do the work for that subject. So I thought at the time the best course of action is do private study, don't play computer games, don't disturb anyone else, just do your English and maths work (ts 120).

16 As for when, if ever, he was going to teach the student, he said:

> … I knew that it's a – really a one-year course and we still had a year and a half to go. So we could catch up in – later in the year (ts 120).

17 The explanation is a bad one. The folly of it became clear when it emerged that the student in question was not capable of completing the course in a year, or a year and a half, with regular instruction, as the applicant had imagined. In March 2018, the applicant "started to realise" that the student was "not like my other students" and that, in fact, "he was my weakest student". (ts 96).

18 In fact, the student ended up struggling with completion of the course and needed intensive assistance to get over the line (ts 194).

19 This points up the calamity in the applicant's negligence. His failure to teach the student in the first half of 2017 meant that the student's true abilities were not known to him at that time.

20 Enrolment in the course, and the instruction in the course that would have, and should have, followed enrolment, would have allowed the applicant to assess the student's skills, and tailor his teaching to ensure the student was given every chance of achieving his goal.

21 The applicant was negligent and the consequences of his negligence became clear for all to see.

22 By way of defence, if one can call it that, the applicant took a scattergun to a range of issues, some directly related to the student in question, some much broader.

23 The applicant said that at least part of the period when the student was not enrolled, and should have been, was not his fault, or could not have been avoided by him, because the school changed the registered training organisation which ran the Certificate II Information Technology course.

24 It is true the school changed the registered training organisation around mid-March 2017, seven weeks after the commencement of the school year. An enrolment of a student before this time, with the old registered training organisation, would not have been effective and a student would have to be enrolled with the new registered training organisation after mid-March 2017.

25 This does not, however, excuse a failure to make sure the student in question was enrolled as at mid-June 2017, especially when the applicant was aware that this particular student being enrolled was an issue (ts 106). It certainly would not excuse not teaching the child.

26 The applicant also complained that the regime of teaching for the student in question, designed by others, was not appropriate. The student was supposed to be taught the course, in part at least, in the "homeroom" period, that is the period of 20 minutes between the school day commencing and the first instructional period of the day.

27 Apparently such a system is not at all unheard of at Kent Street Senior High School.

28 I think what the applicant says is that because of this system he could not effectively teach the student in question in the course in which he should have been enrolled in or, alternatively, that because of the system he was unable to discover the student's true abilities and thus was unable to determine that he needed more intensive instruction.

29 The alleged deficiencies in the system cannot now assist the applicant to excuse a failure to enrol the student as at 14 June 2017 and to teach him from 1 February 2017 to 14 June 2017. It is irrelevant to the matter of enrolment. In relation to teaching, if this is the regime, you do what you can within it.

30 It is not acceptable to simply not teach.

31 The applicant says that not allowing students to do private study in his class was "unworkable and totally unjustified". The applicant raises this because the finding against the applicant was, in part, that he had allowed the student in question to do "private study" in circumstances where he had been "previously instructed not to allow students to use class time for private study". (See Exhibit 4, respondent's list of exhibits, letter dated 23 May 2018.) The applicant points to the fact that other teachers were allowed to simply supervise students in their classes while they did "private study".

32 There is a need to put the "previous instruction" referred to in the letter of 23 May 2018 in its proper and full context.

33 The instruction is found in a letter from the school's principal, Katherine Ward, to the applicant dated 25 November 2016 which said, in part:

> You are not to give [students] permission to do private study in your designated class time.

34 Reading the entire letter, the instruction was part of the principal addressing apparent problems with the applicant not sufficiently engaging with students in the classroom to make sure they completed their courses.

35 Pages 1 and 2 of the letter go into great detail about the apparent problems and how they are said to have arisen.

36 At page 3, the following appears, with my emphasis added:

> AITSL Standard 7.1 – Meet professional ethics and responsibilities
>
> In short, the responsibility to engage the students in the teaching and learning process sits with you as the classroom teacher.
>
> - Teach them and encourage them to achieve.
> - **You are not to give them permission to do private [study] in your designated class time.**
> - Should a student fail to work, you are obliged under our 'no surprises' policy to inform the parents/carers and to seek their support in encouraging their child to achieve.
> - Finally, you are to adhere to your code of conduct and therefore must not engage in behaviour that may bring your own reputation or that of the Department and the Public Sector into disrepute. This means that you are to stop telling students, parents/carers and colleagues that it is the fault of administration that this course is not more hands on. To reiterate, you must provide evidence of curriculum to justify the purchase of additional resources.

37 Put in its proper context the relevance of the passage in the letter, and its invocation as a particular against the applicant, are easily understood.

38 In relation to the student in question, the instruction was not "unworkable and totally unjustified". It was an instruction designed to make sure students, such as the student in question, were taught by the applicant what they should be taught to progress toward achievement of a nominated goal.

39 The applicant made a total red herring of the issue by pointing to other teachers being authorised to allow students, including the student in question, to do private study when under their supervision.

40 There was no evidence that those other teachers had ever used "private study" as a way of abrogating their responsibility to deliver a course to a student as the principal evidently thought the applicant had.

41 Another assertion was the applicant had been treated unfairly because the principal of the school was biased against him. The applicant says that because of a difficult and confrontational past between him and the principal he was targeted and reports were made to head office about his conduct that would not have been made if that history had not existed.

42 I have no difficulty at all in accepting that there was a history of confrontation between the applicant and the principal. The principal stopping the applicant from being able to spend money on a school credit card was an example of a flashpoint in that history of conflict.

43 However, bias would only be relevant if it could demonstrate some real significance in relation to the finding of negligence against the applicant. The principal was not a decision maker and an appearance of bias would not be enough. There would have to be some act, proven on the part of the principal, that made a material difference to the finding against the applicant that he was negligent.

44 This might be something like setting an arbitrary and unilateral standard for the applicant and then asserting negligence for a failure to meet it, or pretending that something the applicant did, or did not do, was negligence when, in fact, other teachers did it, or did not do it, with impugnity.

45 The applicant, I think, says something like this occurred in relation to the instruction in the letter of 25 November 2016.

46 That instruction has however been put in its proper context above and it is not, to my mind, evidence of any arbitrary treatment of the applicant.

47 There is no evidence of the principal treating the applicant differently in an unfair way. There was no evidence at all that the principal had set the applicant up to fail by imposing an unfair requirement upon him or had treated him differently to others in an unfair way.

48 Ultimately, there was neglect on the part of the applicant in relation to the enrolment of a student and the teaching of a student. There is nothing arbitrary or unilateral about the requirements to do these things. They are not even set by the principal. They are fundamental requirements of being a teacher.

49 Finally, there was a general assertion that what happened to the applicant, both in terms of findings against him and penalty, was unfair because the applicant was being left to "carry the can" when others had a role in the failure to enrol and teach the student in question.

50 I have no hesitation at all in finding that the student in question was failed not only by the applicant but also by others.

51 The applicant had a history that had led the principal to write to the applicant in the terms she did on 25 November 2016. Yet in June 2017, and only by accident really, it was found that the applicant was doing effectively the same thing as that about which the principal had been concerned in November 2016. These were also concerns about which the Head of Learning in the relevant area had been aware, he having been present at the meeting that was referred to in the 25 November 2016 letter.

52 It was plainly not good enough for those further up the tree to allow the applicant to have a student in his class who, by June 2017, had not been enrolled in, and was receiving no instruction in, a course he had nominated and for which he had been timetabled.

53 None of this, in my view, diminishes the seriousness of the negligence of the applicant, especially given his experience and history. A failure to teach is just not good enough.

54 But those higher up the tree should really be examining whether they did enough to ensure the situation did not arise, given what they believed had happened in 2016.

55 The principal said that she was required to have "no level of oversight to ensure a teacher was doing their job appropriately". She went on to explain what she meant by this in that she had:

> … 63 teachers teaching in 63 different rooms at any one time. It would be almost impossible for me to check that effective teaching is happening in every single classroom and that those sorts of things like adhering to process is happening in every single classroom. It's why we have the Teacher Registration Board. It's why people need to actually treat their role as a professional and undertake their professional duties. (ts 149).

56 With the gloss the principal placed upon her first statement by the second, the first might be accepted, but the applicant was not just another teacher. He was a teacher in whom the principal had identified a weakness. She should have done something to ensure that deficiency was being addressed and that no student was being affected by it not being addressed.

57 The applicant's Head of Learning, said:

> I had no reason to believe that if the student was timetabled in SIS against that certificate, against that teacher, that that teacher wouldn't be working with that student on a daily basis, the student's appearing in their class five times a week, I had no reason to think that that teacher wouldn't be doing the job that I'm expecting them to do. (ts 188).

58 He also should have known better than to make such an assumption in relation to the applicant given what had happened in 2016.

59 However, whatever relevance such failures have, it will not be, and cannot be, to make the decision made in relation to the applicant unfair. His negligence is too great for that. It goes to the heart of being a teacher. That is, to be sufficiently interested in your students that they are enrolled in and being taught in a course they are coming to school to do.

60 In relation to the wrongdoing, it may have been enough to warrant dismissal on its own and without more. I say this because it seems to me, as I have said, that the negligence goes to the very heart of what this teacher was being paid taxpayer money to do.

61 A teacher should know whether a student is properly enrolled in a course when the teacher is delivering that course under an arrangement with a registered training organisation. A teacher should also give instruction to the student in that course.

62 It is not appropriate to say that so long as the student causes no trouble, or does other work, this is good enough. It is not. While Year 11 and 12 students are progressing toward adulthood and should be given some latitude and responsibility, it goes too far to allow them to decide what to do in the way the applicant allowed.

63 It is also not good enough to come up with explanations to the effect, "it is an easy course and can be completed in a short period of time". The folly of this approach was shown up by this case. The applicant's assessment of the student was quite wrong. It was not an easy course for him at all and he was almost left with too little time to complete it. Ultimately he was placed in a special support class to do so.

64 So, as I say, this matter could have without more warranted dismissal.

65 In this case, however, there were four findings of misconduct on the applicant's record as follows:

- In February 2015, he committed a breach of discipline and was reprimanded and fined.
- In June 2015, he committed a breach of discipline and was reprimanded and fi ned.
- In May 2016, he committed a breach of discipline and was reprimanded and fined.
- In October 2016, he was found to have committed an act of misconduct and reprimanded.

66 Any question that the penalty was unfair is completely resolved by reference to these matters.

67 As I say, dismissal for this breach alone may have been warranted. I could not possibly find the applicant's employer, who is in charge of the delivery of education within the public system at massive taxpayers' expense was wrong, or unfair, in dismissing the applicant for this matter, given his past record.

68 The application is dismissed.

2020 WAIRC 00971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR LESLIE GEORGE MAGYAR
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 8 DECEMBER 2020
FILE NO/S	U 124 OF 2018
CITATION NO.	2020 WAIRC 00971

Result	Application dismissed
Representation	
Applicant	Mr N Marsh, of counsel
Respondent	Ms R Hartley, of counsel

Order

HAVING heard from Mr N Marsh, of counsel, for the applicant and Ms R Hartley, of counsel, for the respondent on Tuesday, 21 July 2020, Wednesday, 22 July 2020 and Monday, 21 September 2020 and by subsequent written submissions filed on Monday, 19 October 2020 by the respondent and Friday, 30 October 2020 by the applicant;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* order that the application be, and is hereby, dismissed.

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

2020 WAIRC 00938

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00938
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	WEDNESDAY, 2 DECEMBER 2020
FILE NO.	**:**	U 67 OF 2020
BETWEEN	**:**	RODNEY CHARLES NATION
		Applicant
		AND
		ALBANY COMMUNITY RADIO INC.
		Respondent

CatchWords	**:**	Unfair dismissal - Jurisdiction - National system employer - Trading corporation - Trading activities - Whether trading activities substantial - Not for profit
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Associations Incorporation Act 1987 (WA)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr R C Nation
Respondent	**:**	Mr C Cooper (of counsel)

Cases referred to in reasons:

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

Bankstown Handicapped Children's Centre Association Inc and Another v Hillman and Others [2010] FCAFC 11, (2010) 182 FCR 483

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

Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers) (1987) 67 WAIG 325

United Firefighters Union of Australia v Country Fire Authority [2015] FCAFC 1; (2015) 228 FLR 497

Reasons for Decision

1 Mr Rodney Charles Nation claims that his employer, Albany Community Radio Inc, unfairly dismissed him when it purported to make his position redundant.

2 Albany Community Radio Inc deny that Mr Nation was unfairly dismissed and contend that the job was no longer required and it had been decided the job Mr Nation was engaged to do would no longer be done by anyone.

3 In addition, Albany Community Radio Inc maintains that it is a national system employer for the purposes of the *Fair Work Act 2009* (Cth) (**FW Act**) and therefore the Western Australian Industrial Relations Commission (**Commission**) lacks jurisdiction to hear and determine Mr Nation's claim. As this matter has been raised, it is necessary for the Commission to determine the issue of jurisdiction prior to enquiring into and dealing with the substance of Mr Nation's claim.

Questions to Be Decided

4 The issue I must decide is whether, on an overall assessment, Albany Community Radio Inc is a corporation, and its operations and activities have the character of trading. If I conclude that it is a trading corporation the Commission lacks jurisdiction to hear and determine the claim.

Background and Evidence

5 The Commission wrote to the parties proposing to hear the matter of the objection to the jurisdiction of the Commission on the papers unless one party objected. Neither party objected and the parties were invited to make submissions and file material relevant to the issues.

6 Albany Community Radio Inc submitted a signed witness statement of the Chairperson and attached an extract of the ASIC Association Summary, an extract of the Australian Charities and Not-for-profits Commission record, a copy of the Rules of Association for Albany Community Radio Inc dated December 2013, and a profit and loss statement for the period of 1 July 2019 to 30 June 2020. The witness statement described the operations and activities of the organisation and noted the nature of the arrangements for the raising of revenue to support its activities.

7 Mr Nation submitted an email in response contending that the respondent was a state system employer as he had understood that he had not been employed by a national system employer and that other employees had made applications concerning the Albany Community Radio Inc that had been heard by the Commission. Mr Nation did not contest the contents of the Albany Community Radio Inc Chairperson's witness statement concerning the operations and activities of the organisation and the arrangements for raising revenue to support its activities.

8 In response to the Commission's invitation to provide further details concerning his knowledge of any other applications concerning Albany Community Radio Inc which were relevant to the issue of jurisdiction, Mr Nation provided the name of the employees and the application references for three matters involving two former employees.

9 Subsequently, Albany Community Radio Inc advised by email that they had not previously been involved in any proceedings before the Commission.

10 On 23 November 2020, Mr Nation in response to the submissions made by Albany Community Radio Inc, reiterated by email the application numbers and employee names of the three matters he believes 'were undertaken through the Fair Work Commission / WAIRC'.

11 The application references cited are not applications to this Commission. The application references use the reference system adopted by the Fair Work Commission (**FWC**) which differs from that of the Commission. A search of the decisions database of the FWC and the Commission did not identify a decision being issued in any of the matters cited. Therefore, I conclude that neither the FWC nor the Commission have previously considered and determined the issue of whether the Albany Community Radio Inc is a national system employer or a state system employer.

Principles

12 Section 14(1)(a) of the FW Act defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines constitutional corporations as corporations which are trading, or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or employer including the FW Act. If an employer is a trading corporation it is a national system employer, then this Commission does not have jurisdiction to consider, hear or determine an unfair dismissal application.

13 In accordance with the Western Australian Industrial Appeal Court's decision in ***Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)*** (1987) 67 WAIG 325, the Commission is unable to proceed unless satisfied that the Commission has the necessary jurisdiction to do so.

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

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

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

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

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

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

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

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

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

15 The decision of the Court in ***Lawrence*** has been cited with approval in superior appellate court decisions (see for example ***United Firefighters Union of Australia v Country Fire Authority*** [2015] FCAFC 1; (2015) 228 FLR 497 and in ***Bankstown Handicapped Children's Centre Association Inc and Another v Hillman and Others*** [2010] FCAFC 11, (2010) 182 FCR 483) ***(Bankstown).***

16 In ***Bankstown*** in recognising that the activities of the Association in that case were directed at the public good the Full Court of the Federal Court nevertheless concluded the operations and activities were trading activities and had a commercial character. The Federal Court noted the description of the relationship between the parties in the relevant contract and its overall activities [54].

Is Albany Community Radio Inc a Corporation?

17 I find that Albany Community Radio Inc is an incorporated body and upon its registration as an incorporated Association under the *Association Incorporation Act 1987* (WA) on 16 February 2005, it became a body corporate in accordance with that Act.

Is Albany Community Radio Inc a <u>Trading</u> Corporation?

18 The second question to be determined is whether the overall activities of the Albany Community Radio Inc have the character of trading activities.

19 The 'Rules of Association' set out the principal objects of Albany Community Radio Inc are to operate, maintain and conduct the business of operating an FM radio broadcasting, transmitting and receiving station at a designated site to be known as 'Albany Community Radio', provide for equitable and community access to the broadcasting station, cultivate an awareness and appreciation of all types of Australian music with particular emphasis on encouraging local performers and provide a forum for debating topical and community issues. As in ***Bankstown***, the purpose of the organisation, however, is not necessarily determinative and an assessment of its activities and whether these have the character of trading is required.

20 To support its activities Albany Community Radio Inc receives revenue through different sources:

a. Income from subleasing antennae of a Transmitter mast at Mount Clarence, Western Australia to several entities (transmitter income). The Transmitter mast is leased by Albany Community Radio Inc from the Department of Lands and Heritage.

b. Various sponsors make payments to Albany Community Radio Inc in exchange for advertising 'spots' during on-air radio broadcast (sponsor income).

c Membership is open to all interested persons and organisations and a fee is levied (membership income).

d. Donations may also be received (donations).

e. The Australian Taxation Office made a payment of $10,000 in April 2020 as part of the stimulus package to support businesses during the COVID-19 crisis (stimulus income).

f. In 2017 a grant of $20,000 for the payment of bookkeeper wages and IT equipment was received from the Community Broadcasting Association of Australia (grant income).

21 The Albany Community Radio Inc expends funds on staffing, licences, accommodation, communications, insurance and banking, subscriptions and travel.

22 In accordance with the principles in ***Lawrence*** it is necessary to establish whether the trading activities are sufficient to justify its categorisation as a 'trading corporation' and it is a question of fact and degree.

23 In 2019-2020 the revenue raised by Albany Community Radio Inc was $131,890.92 from the following sources:

a. $74,274.04 from transmitter income representing 56% of total revenue.

b. $45,373.79 from sponsor income representing 34% of total revenue.

c. $10,000.00 from stimulus income representing 8% of total revenue.

d. $2,243.09 from membership fees, donations and miscellaneous income representing 2% of total revenue.

24 I consider that the subleasing and sponsorship activities have the character of trading activities. These activities involve contracting with various organisations predominantly businesses for payment in exchange for provision of a service. That is, they have the character of commercial trade in services or elements of exchange: Re ***Ku-ring-gai Co-operative Building Society (No 12) Ltd*** (1978) 36 FLR 134 (139, 159 - 160) cited in ***Lawrence.***

25 The two trading activities are the overwhelming sources of revenue and when combined represent 90% of the total revenue. In ***Bankstown*** [52] the Full Court observed that 'there is no bright line that determines what proportion of trading activities is substantial'. The purpose of the Albany Community Radio station may not be commercial in nature, however, clearly the trading activities engaged in to support the operations of the organisation are not insubstantial, not trivial, insignificant, marginal, minor nor incidental.

Conclusion

26 For these reasons I conclude that Albany Community Radio Inc is a trading corporation. This finding reflects an overall assessment of the nature of the operations and activities on the material provided to me.

27 In concluding that Albany Community Radio Inc is a trading corporation I must conclude that this Commission lacks the necessary jurisdiction to hear and determine this matter and dismiss the application.

2020 WAIRC 00939

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RODNEY CHARLES NATION
	APPLICANT
	-v-
	ALBANY COMMUNITY RADIO INC.
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 2 DECEMBER 2020
FILE NO/S	U 67 OF 2020
CITATION NO.	2020 WAIRC 00939

Result	Application dismissed
Representation	
Applicant	Mr R C Nation
Respondent	Mr C Cooper

Order

HAVING HEARD from Mr R C Nation on his own behalf and Mr C Cooper on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

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

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

2020 WAIRC 00931

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00931
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	TUESDAY, 6 OCTOBER 2020
DELIVERED	**:**	WEDNESDAY, 25 NOVEMBER 2020
FILE NO.	**:**	U 103 OF 2020
BETWEEN	**:**	SIMON COATES Applicant AND ROTTNEST ISLAND AUTHORITY Respondent

CatchWords	**:**	Unfair dismissal - Jurisdiction of Public Service Appeal Board - Construction of s 78 and s 79 of the *Public Sector Management Act 1994* (WA) - Principles of statutory interpretation
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Public Sector Management Act 1994* (WA) *Rottnest Island Authority Act 1987* (WA)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr I Sampson
Respondent	**:**	Mr J Carroll
Solicitors:		
Applicant	**:**	Roundhouse Legal
Respondent	**:**	State Solicitor's Office

Cases referred to in reasons:

Anthony Hordern and Sons Ltd and Others v Amalgamated Clothing and Allied Trades Union of Australia [1932] HCA 9; (1932) 47 CLR 1

Bellamy v Chairman Public Service Board (1986) 66 WAIG 1579

Byrne v Australian Airlines Ltd *[*1995] HCA 24; (1995) 185 CLR 410

Director General Department of Justice v Civil Service Association of Western Australia Incorporated [2005] WASCA 244; (2005) 86 WAIG 231

Gramotnev v Queensland University of Technology [2015] QCA 127; (2015) 251 IR 448

Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [2012] WASCA 50; (2012) 287 ALR 315

Soliman v University of Technology, Sydney (No 2) [2009] FCAFC 173; (2009) 191 IR 277

The Civil Service Association of Western Australia Incorporated v Director-General, Department for Child Protection [2010] WAIRC 00206; (2010) 90 WAIG 214

Reasons for Decision

1 This is an application by Mr Simon Coates (**applicant**) pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (**IR Act**). The applicant alleges that he was unfairly terminated from his employment with the Rottnest Island Authority (**respondent**) on 21 July 2020. The respondent denies that the applicant was unfairly terminated.

2 The respondent argues that the Western Australian Industrial Relations Commission (**Commission**) does not have the power to deal with this application and that this issue must be decided before the Commission may proceed to conciliate or to hear and determine the matter.

Questions to Decide

3 The first issue to decide is whether the Commission as presently constituted has the jurisdiction to enquire into and deal with the applicant's claim made pursuant to s 29(1)(b)(i) of the IR Act.

4 The second issue to decide is whether the terms of the applicant's appointment and the dispute resolution procedure of the relevant industrial agreement provides the Commission as constituted with jurisdiction to hear and determine his application.

Applicant's Submissions

5 The applicant says the Commission has jurisdiction because the correct construction of s 80I(1)(d) of the IR Act is to be read to preclude a government officer from appealing a decision to dismiss a government officer. The applicant says s 80I(1)(d) of the IR Act expressly excludes the Public Service Appeal Board (**Board**) from hearing an appeal concerning a 'dismissal' of a government officer.

6 It follows, the applicant says, that he is a public service officer which is a subgroup of a government officer, and consequently he is precluded from appealing the decision to dismiss pursuant to s 80I(1)(d) of the IR Act. Therefore, he may make an application under s 29(1)(b)(i) of the IR Act and engage the general unfair dismissal jurisdiction of the Commission.

7 In addition, the applicant argues that his contract of employment specifies that the Public Sector CSA Agreement 2019 **(CSA Agreement 2019)** provides the capacity for the applicant to make application to the Commission where a dispute remains unresolved. The applicant contends that the CSA Agreement 2019 expressly provides a referral mechanism to this Commission.

Respondent's Submissions

8 The respondent asserts that the applicant is a public service officer appointed under s 64(1)(a) of the *Public Sector Management Act 1994* (WA) (**PSM Act**).

9 The respondent argues that the Board, which is established under Division 2 of Part IIA of the IR Act, has exclusive jurisdiction to deal with the matter the subject of this application. The respondent maintains that the Commission's ability to hear and determine this matter pursuant to s 29(1)(b)(i) of the IR Act is ousted by the exclusive jurisdiction of the Board as set out under s 80I of the IR Act and as established in ***Bellamy v Chairman Public Service Board*** (1986) 66 WAIG 1579.

10 The respondent argues that the applicant's claims should be dealt with by the Board under s 80I(1)(d) of the IR Act which reads as follows:

> an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed

Jurisdiction of the Commission – Principles

11 Section 80C(1) of the IR Act contains a definition of a 'government officer' as follows:

> …
>
> ***government officer*** means —
>
> (a) every public service officer; and
>
> (aa) each member of the Governor's Establishment within the meaning of the Governor's Establishment Act 1992; and

(ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the Parliamentary and Electorate Staff (Employment) Act 1992; and

(b) every other person employed on the salaried staff of a public authority; and

(c) any person not referred to in paragraph (a) or (b) who would have been a government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984,

…

12 The PSM Act at s 79(3) provides for an employing authority who considers an employee's performance to be substandard to terminate that employee:

(3) Subject to subsections (4), (5) and (6), an employing authority may, in respect of one of its employees whose performance is in the opinion of the employing authority substandard for the purposes of this section —

(a) withhold for such period as the employing authority thinks fit an increment of remuneration otherwise payable to that employee; or

(b) reduce the level of classification of that employee; or

(c) terminate the employment in the Public Sector of that employee.

13 Section 78(1) of the PSM Act provides that where a government officer is aggrieved by a decision made to terminate them under s 79(3)(c) of the PSM Act the government officer may appeal against that decision or finding to the Commission as constituted by the Board:

(1) Subject to subsection (3) and to section 52, an employee or former employee who —

(a) is, or was, a Government officer within the meaning of section 80C of the Industrial Relations Act 1979; and

(b) is aggrieved by —

(i) a decision made in respect of the Government officer under section 79(3)(b) or (c) or (4); or

(ii) a finding made in respect of the Government officer in the exercise of a power under section 87(3)(a)(ii); or

(iii) a decision made under section 82 to suspend the Government officer on partial pay or without pay; or

(iv) a decision to take disciplinary action made in respect of the Government officer under section 82A(3)(b), 88(b) or 92(1),

may appeal against that decision or finding to the Industrial Commission constituted by a Public Service Appeal Board appointed under Division 2 of Part IIA of the *Industrial Relations Act 1979*, and that Public Service Appeal Board has jurisdiction to hear and determine that appeal under and subject to that Division.

14 The Board is appointed under Division 2 of Part IIA of the IR Act, and that Board has jurisdiction to hear and determine that appeal under and subject to that Division.

15 Section 80I of the IR Act sets out the jurisdiction of the Board.

(1) Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —

(a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;

(b) an appeal by a government officer under the *Public Sector Management Act 1994* section 78 against a decision or finding referred to in subsection (1)(b) of that section;

(c) an appeal by a government officer under the *Health Services Act 2016* section 172 against a decision or finding referred to in subsection (1)(b) of that section;

(d) an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed,

and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).

[(2) deleted]

(3) A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in the *Public Sector Management Act 1994* section 94 or 95A.

16 Section 80I(b) of the IR Act provides that a government officer may appeal to the Board a decision to dismiss made pursuant to s 78(1)(b) of the PSM Act. That is a decision to dismiss made under s 79(3)(c) of the PSM Act which concerns an employee's performance if the employing authority is of the opinion employee's performance is substandard.

17 Section 80I(1)(d) of the IR Act provides that the Board has jurisdiction to hear and determine an appeal that a government officer be dismissed. This is a decision other than one made under s 78(1)(b) of the PSM Act. This provision provides an ability for a government officer to appeal a decision to dismiss for reasons other than those set out in s 78(1) of the PSM Act.

18 The dismissal of an employee is within paragraph (c) of the definition of an 'industrial matter' in s 7 of the IR Act and s 23(1) of the IR Act provides as follows:

> Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter.

19 The jurisdiction of the Commission to enquire into and deal with any industrial matter is conditioned by the opening words 'Subject to this Act' and s 80E(1) of the IR Act provides as follows:

> Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

20 The reference to an Arbitrator is a reference to a Public Service Arbitrator. Therefore, a Public Service Arbitrator has the exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer.

21 The Western Australian Industrial Appeal Court considered the effect of the words 'exclusive jurisdiction' in ***Director General Department of Justice v Civil Service Association of Western Australia Incorporated*** [2005] WASCA 244; (2005) 86 WAIG 231. Justices Wheeler and Le Miere held [27]:

> It seems likely, having regard to the considerations mentioned, that the expression "exclusive jurisdiction" in s 80E(1) was intended to do no more than exclude the general jurisdiction of the Commission, pursuant to s 23, to inquire into and deal with industrial matters generally.

22 In ***Bellamy v Chairman Public Service Board*** the full bench of this Commission established that the general powers under the IR Act for the Commission to deal with an application by a government officer alleging unfair termination lodged under s 29(1)(b)(i) of the IR Act cannot be used when specific powers exist under s 80I of the IR Act for the Board to deal with an application of this nature because, adopting the authority of ***Anthony Hordern and Sons Ltd and Others v Amalgamated Clothing and Allied Trades Union of Australia*** [1932] HCA 9; (1932) 47 CLR 1, the special provisions are intended to exhaustively deal with government officers and prevail over the general powers.

23 In ***The Civil Service Association of Western Australia Incorporated v Director-General, Department for Child Protection*** [2010] WAIRC 00206; (2010) 90 WAIG 214, the full bench affirmed that the Board ousts the jurisdiction of the Public Service Arbitrator on account of the statutory interpretation principle of *generalia specialibus non derogant.* That is where there is a conflict between general and specific legislative provisions, the specific provisions prevail.

Jurisdiction of the Commission - Application

24 It was not in dispute that the applicant is an employee as defined in s 3 of the PSM Act. That is, the applicant is a public service officer and a government officer.

25 The applicant submitted that the Rottnest Island Authority is not a trading enterprise and not a government department. I find that the Rottnest Island Authority is established by the *Rottnest Island Authority Act 1987* (WA) and s 26(1) provides that staff of the Rottnest Island Authority are to be appointed under the PSM Act:

> There shall be appointed, under and subject to Part 3 of the *Public Sector Management Act* 1994, such other officers as may be necessary to enable the Authority to perform its functions.

It was not in dispute that the applicant was appointed under and subject to the PSM Act.

26 The applicant's construction of s 80I(1)(d) of the IR Act expressly excludes a government officer from appealing a decision to dismiss is not correct.

27 If the applicant was dismissed because the respondent was of the opinion that his performance was substandard, the applicant is able to appeal his employer's decision made under s 79(3)(c) of the PSM Act, to the Board pursuant to s 78(1)(b) of the PSM Act and under s 80I(1)(b) of the IR Act. If the decision to dismiss was made on a basis other than substandard performance the applicant may appeal the decision to the Board under s 80I(1)(d) of the IR Act, which provides a government officer the ability to appeal a decision to terminate on the basis other than on substandard performance. Section 80I(1)(d) of the IR Act does not negate the entitlement of a government officer to appeal a decision pursuant to s 78(1) of the PSM Act; rather it broadens the scope to enable a government officer to appeal a decision to dismiss based on circumstances other than those set out in s 78(1) of the PSM Act.

28 Similar to the circumstances in both ***Bellamy v Chairman Public Service Board*** and ***The Civil Service Association of Western Australia Incorporated v Director-General, Department for Child Protection*** the principle of *generalia specialibus non derogant* results in the general jurisdiction of the Commission being ousted and by the jurisdiction of the Board.

29 Therefore, the Commission as presently constituted does not have the jurisdiction to enquire into and deal with the applicant's claim.

Contract of Employment and the Public Sector Agreement

30 A second limb of the applicant's contentions are that a terms of the applicant's employment contract incorporated the terms of the Public Service and Government Officers CSA General Agreement 2017 (**CSA Agreement 2017**) and/or the CSA Agreement 2019. Both Agreements provide for unresolved disputes to be referred to the Commission.

31 The applicant submits that he has followed the dispute resolution procedure set out in the CSA Agreement 2019. This procedure provides that unresolved disputes may be referred to the Commission. The dispute has not been resolved and he now purports to refer the dispute to the Commission pursuant to s 29(1)(b)(i) of the IR Act.

Principles

32 The terms of an industrial agreement are not automatically imported into a contract of employment: ***Soliman v University of Technology, Sydney (No 2)*** [2009] FCAFC 173; (2009) 191 IR 277. In ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410, the High Court noted that parties may expressly agree that an industrial agreement forms part of the contract. Language such as 'governed by' and 'subject to' an agreement have been interpreted as merely providing information and do not indicate an intention to incorporate the agreement into the contract: ***Soliman v University of Technology, Sydney (No 2)*** and ***Gramotnev v Queensland University of Technology*** [2015] QCA 127; (2015) 251 IR 448.

33 Industrial Agreements are decisions of the Commission which when taken in conjunction with the IR Act have the force of law. However, an agreement registered pursuant to s 41 of the IR Act cannot confer jurisdiction on the Commission if the jurisdiction is ousted by other specific provisions of the legislation. Parties cannot, by consent, confer a jurisdiction on the court which it does not possess, see ***Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*** [2012] WASCA 50; (2012) 287 ALR 315 [74].

34 The only basis jurisdiction can be found is if upon a proper construction of the IR Act and the PSM Act the general jurisdiction of the Commission applies.

Application

35 The applicant's contract of employment at the time of his termination states that:

> The terms and conditions of your appointment are as provided in the PSMA and regulations made under that Act, including the disciplinary provisions, the *Public Service and Government Officers CSA General Agreement 2017* (PSOGCSAGA) and any supporting departmental specific industrial agreement.

36 The CSA Agreement 2017 was replaced by the CSA Agreement 2019. Both instruments contain dispute resolution procedures that provide for parties to refer unresolved disputes to the Commission. The applicant contends that the dispute resolution provisions that enable a 'party' to refer a matter to the Commission were not limited to the parties to the Agreement itself and included and extended to an individual employee who was in dispute with an employer party. I have not concluded a decision on this issue as it is not necessary to do so given my reasons set out above.

37 There would need to be a finding that the terms of the CSA Agreement 2019 are incorporated into the contract of employment for the applicant to succeed. I have not concluded a decision on this issue as it is not necessary to do so given my reasons set out above.

38 The applicant's employment is regulated by the PSM Act and IR Act. These laws provide that government officers may appeal a decision to terminate their employment to the Commission as constituted by the Board. The dispute resolution procedure contained in neither the CSA Agreement 2017 nor the CSA Agreement 2019 can confer jurisdiction on the Commission as presently constituted where, as set out above, the jurisdiction is ousted.

Conclusion

39 As I have found that the Commission as constituted cannot deal with this application for the reasons set out above, if the applicant wishes to continue to contest his termination he must lodge an appeal to the Board.

40 In the circumstances I will make an order dismissing the application.

2020 WAIRC 00932

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMON COATES
	APPLICANT
	-v-
	ROTTNEST ISLAND AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 25 NOVEMBER 2020
FILE NO/S	U 103 OF 2020
CITATION NO.	2020 WAIRC 00932

Result	Application dismissed
Representation	
Applicant	Mr I Sampson (of counsel)
Respondent	Mr J Carroll (of counsel)

Order

HAVING HEARD Mr I Sampson (of counsel) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

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

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

CONFERENCES—Matters arising out of—

2020 WAIRC 00903

DISPUTE RE LEAVE SWAP APPROVAL PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 11 NOVEMBER 2020
FILE NO/S	C 5 OF 2020
CITATION NO.	2020 WAIRC 00903

Result	Order issued
Representation	
Applicant	Ms H Harper
Respondent	Mr D Anderson of counsel

Order

HAVING heard Ms H Harper on behalf of the applicant and Mr D Anderson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2020 WAIRC 00839

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 14 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD
	APPELLANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	MURPHY J
DATE	WEDNESDAY, 7 OCTOBER 2020
FILE NO/S	IAC 5 OF 2020
CITATION NO.	2020 WAIRC 00839

Result	Programming Orders Issued

Order

1. The appellant in IAC 5/2020 to file one electronic copy of submissions and provide three physical copies of submissions and a list of legal authorities and serve a copy on the respondents by 4 pm on 3 November 2020.
2. The respondents in IAC 5/2020 to file one electronic copy of submissions and provide three physical copies of submissions and a list of legal authorities and serve a copy on the appellants by 4 pm on 1 December 2020.
3. The appellant in IAC 5/2020 is to file one electronic copy of the appeal book and provide three physical copies of the appeal book and serve a copy on the respondents by 4 pm on 23 December 2020.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2020 WAIRC 00923

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY RAYMOND MORAN
	APPLICANT
	-v-
	WORKSAFE WA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 18 NOVEMBER 2020
FILE NO.	OSHT 7 OF 2020
CITATION NO.	2020 WAIRC 00923

Result	Direction issued
Representation	
Applicant	Ms V Kafentzis (of counsel)
Respondent	Ms T Hollaway (of counsel)

Direction

WHEREAS the Tribunal issued a Direction on 8 September 2020 and following an objection lodged by the respondent;

AND HAVING heard from Ms V Kafentzis (of counsel) on behalf of the applicant and Ms T Hollaway (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT all matters requiring to be served on either party or the Tribunal may be served by email on each parties' nominated email address and proof of service is by the email sent notification;
2. THAT the respondent will provide to the applicant by 23 November 2020:
   - 2.1. copies of all documents from 1 January 2005 until 22 October 2020, held in the databases set out in 2.1(a), (b) and (c) herein, in connection with Geoffrey Moran, Marlin Contracting and/or Marlin Roofing:
     - a) WISE – WorkSafe Information System Environment;
     - b) CALS – Complaint and Licensing System; and
     - c) Objective – Electronic Documents records management system;
   - 2.2. an index of the documents that the respondent asserts are subject to legal professional privilege; and
   - 2.3. a copy (subject to valid objections) of the documents (following the applicant providing, by 16 November 2020, a list of the documents that were not disclosed on 22 September 2020) which were not disclosed on 22 September 2020 and which are not the subject of legal professional privilege.
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as evidence in chief;
4. THAT the applicant file and serve upon the respondent any witness statements upon which he intends to rely by no later than 18 January 2021;
5. THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely by no later than 1 February 2021;
6. THAT the parties provide any rebuttal statements by 14 February 2021;

7. THAT the applicant file and serve upon the respondent an outline of submissions by no later than 21 February 2021;
8. THAT the respondent file and serve upon the applicant an outline of submissions by no later than 3 March 2021;
9. THAT the parties shall give notice to each other of any witnesses required to attend the hearing for cross-examination at least 3 days prior to the hearing;
10. THAT the matter be listed for hearing for up to 3 days duration after conferral with the parties regarding appropriate length of hearing on dates to be fixed; and
11. THAT the parties have liberty to apply on short notice.

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

2020 WAIRC 00924

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANNE LORNA BEST

APPLICANT

-v-

THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT
DATE THURSDAY, 19 NOVEMBER 2020
FILE NO/S PRES 5 OF 2020
CITATION NO. 2020 WAIRC 00924

Result Direction issued

Direction

WHEREAS this is an application pursuant to s 66 of the of the *Industrial Relations Act 1979* (WA); and

WHEREAS the Chief Commissioner is of the opinion that proposed directions should issue; and

WHEREAS the parties' consent to the proposed directions.

NOW THEREFORE, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the directions hearing listed for Thursday, 19 November 2020 at 10:30 am be vacated;
2. THAT the substantive claim be set down for hearing for 1 day, in December 2020; and
3. THAT the respondent file a response by 3 December 2020.

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

2020 WAIRC 00983

APPEAL AGAINST THE DECISION TO TAKE IMPROVEMENT ACTION ON 21 JULY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ALESSANDRA GRANITTO

APPELLANT

-v-

THE DEPARTMENT OF EDUCATION WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE FRIDAY, 11 DECEMBER 2020
FILE NO. PSAB 23 OF 2020
CITATION NO. 2020 WAIRC 00983

Result	Directions issued
Representation	
Appellant	Ms J Dilena (of counsel)
Respondent	Mr D Anderson (of counsel)

Direction

HAVING heard from Ms J Dilena of counsel on behalf of the appellant and Mr D Anderson of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 15 December 2020;
2. THAT the appellant file a written outline of submissions by 29 December 2020.
3. THAT the respondent file a written outline of submissions by 12 January 2021.
4. THAT discovery be informal.
5. THAT this matter be listed for a half-day hearing.

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

2020 WAIRC 00982

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 SEPTEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICHOLAS CHURCHILL
	APPELLANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 11 DECEMBER 2020
FILE NO.	PSAB 28 OF 2020
CITATION NO.	2020 WAIRC 00982

Result	Directions issued
Representation	
Appellant	Ms J Wragg (of counsel)
Respondent	Mr T Pontre (of counsel)

Direction

HAVING heard from Ms J Wragg of counsel on behalf of the appellant and Mr T Pontre of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT discovery by both parties be informal and be provided by 15 January 2021;
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by 5 February 2021;
3. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 12 February 2021;
4. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 12 March 2021;
5. THAT the appellant has leave to file any outline of evidence of any witness to be called in response to the respondent's filed outlines of evidence by 19 March 2021;
6. THAT the respondent has leave to file any outline of evidence of any witness to be called in response to the appellant's responsive outlines of evidence by 26 March 2021;
7. THAT the appellant file a written outline of his submissions by 9 April 2021;
8. THAT the respondent file a written outline of its submissions by 23 April 2021;

9. THAT the matter be listed for a 4-day hearing not before 23 April 2021; and
10. THAT the parties have liberty to apply at short notice.

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

2020 WAIRC 00969

DISPUTE RE TRANSFER OF EMPLOYEE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 7 DECEMBER 2020
FILE NO.	PSAC 27 OF 2020
CITATION NO.	2020 WAIRC 00969

Result	Recommendation made
Representation	
Applicant	Ms D Larson (of counsel)
Respondent	Mr D Barratt (as agent)

Recommendation

WHEREAS this application was filed on 26 November 2020, pursuant to section 44 *Industrial Relations Act 1979*, by the applicant seeking the Western Australian Industrial Relations Commission's assistance on issues relating to the applicant's member's employment;

AND HAVING heard from Ms D Larson, of counsel, for the applicant and Mr D Barratt, as agent, for the respondent during conference on Monday, 7 December 2020;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* recommend –

> That the applicant's member, Mr Hector O'Loughlin, be returned forthwith to gainful employment with the respondent in a temporary role for a period of three months or until issues relating to his return to his substantive position are resolved, whichever is the shorter.

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

2020 WAIRC 00981

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATASHA STEPHENSON
	APPLICANT
	-v-
	M.J EDWARDS T/AS M.J EDWARDS & J.PENDARVIS
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 10 DECEMBER 2020
FILE NO.	U 27 OF 2020
CITATION NO.	2020 WAIRC 00981

Result	Direction issued
Applicant	Ms E Creek (of counsel)
Respondent	Mr M Edwards

Direction

WHEREAS on 7 December 2020, the respondent applied for the hearing scheduled for 10 December 2020 to be adjourned. The applicant opposed the adjournment and noted the respondent had failed to comply with a Direction issued on 26 August 2020, to file and serve an outline of submissions by 18 November 2020. The respondent submitted that he intends to file and serve an outline of submissions by 14 December 2020.

HAVING heard from Ms E Creek (of counsel) on behalf of the applicant and Mr M Edwards on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the respondent file and serve an outline of submissions by close of business on Monday, 14 December 2020; and
2. THAT the hearing is listed for one day on Thursday, 17 December 2020.

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

2020 WAIRC 00921

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JODIE PALMER
	APPLICANT
	-v-
	PARKINSON'S WESTERN AUSTRALIA INC.
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 18 NOVEMBER 2020
FILE NO.	U 87 OF 2020
CITATION NO.	2020 WAIRC 00921

Result	Direction issued
Representation	
Applicant	Mr C Palmer (as agent)
Respondent	Mr P Goddard (of counsel)

Direction

HAVING heard from Mr C Palmer (as agent) on behalf of the applicant and Mr P Goddard (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

1. THAT the applicant file and serve an outline of witness evidence upon which she intends to rely with respect to the issue of the application being out of time by 42 days prior to the hearing;
2. THAT the respondent file and serve an outline of witness evidence upon which it intends to rely with respect to the issue of the application being out of time by 28 days prior to the hearing;
3. THAT the applicant file and serve an outline of submissions 14 days prior to the hearing;
4. THAT the respondent file and serve an outline of submissions 7 days prior to the hearing;
5. THAT the hearing will be listed for 1 day on a date to be fixed; and
6. THAT the parties have liberty to apply on short notice.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Kalamunda Salaried Agreement 2019 AG 20/2020	11/24/2020	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	City of Kalamunda	Commissioner T B Walkington	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2020 WAIRC 00977

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 FEBRUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00977
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MR GREG LEE - BOARD MEMBER MR PETER HESLEWOOD - BOARD MEMBER
HEARD	**:**	THURSDAY, 5 NOVEMBER 2020, THURSDAY, 26 NOVEMBER 2020
DELIVERED	**:**	THURSDAY, 10 DECEMBER 2020
FILE NO.	**:**	PSAB 3 OF 2020
BETWEEN	**:**	CAROL ELENA HUTCHINSON Appellant AND WA COUNTRY HEALTH SERVICE Respondent

CatchWords	**:**	Public Service Appeal Board – Jurisdiction – Whether appellant was dismissed – End of a fixed term contract - Contract ended due to effluxion of time
Legislation	**:**	*Industrial Relations Act 1979* (WA): s 27(1)(n) & s 80I(1)(d)
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	In person
Respondent	**:**	Ms R Sinton & Ms S Waterton (as agents)

Cases referred to in reasons:

Gallotti v Argyle Diamond Mines Pty Ltd [2003] WASCA 166; (2003) 83 WAIG 3053

Gallotti v Argyle Diamond Mines Pty Ltd t/a Argyle Diamonds [2002] WAIRC 06828, (2002) 82 WAIG 3011

Khayam v Navitas English Pty Ltd t/a Navitas English [2017] FWCFB 5162

Kylie Oliver v Malcolm Goff, Managing Director, Challenger TAFE [2006] WAIRC 05224

Metropolitan (Perth) Passenger Transport Trust v Gersdorf (1981) 61 WAIG 611

Nicholas v Department of Education and Training [2008] WAIRC 01645; (2009) 89 WAIG 817

Pacheco-Hernandez v Duty Free Stores Gold Coast Pty Ltd (No. 2) [2019] FCCA 1295

Townes-Vigh v North Metropolitan Health Service [2020] WAIRC 00188

Reasons for Decision

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

2 Ms Hutchinson was a Patient Assisted Travel Scheme (**PATS**) Regional Officer. She is appealing what she says is a decision by the WA Country Health Service (**Health Service**) to dismiss her on 13 January 2020. Ms Hutchinson says that she was dismissed in retaliation for making a complaint against her supervisor. Ms Hutchinson's appeal is 50 days out of time. She asks the Board to extend the time for her to bring her appeal.

3 The Health Service says it did not dismiss Ms Hutchinson and, even if it did, the Board should not extend the time for Ms Hutchinson to bring her appeal.

4 Before the Board can hear Ms Hutchinson's substantive appeal, it must deal with the preliminary issues of whether Ms Hutchinson was dismissed, and if she was, whether the Board should extend the time for Ms Hutchinson to bring her appeal.

What must the Board decide?

5 First, the Board must decide whether Ms Hutchinson was dismissed. That involves considering whether Ms Hutchinson was sent away or removed from employment, or whether her employment simply ended by the effluxion of time.

6 If the Board decides that Ms Hutchinson was dismissed, then the Board must decide whether to extend the time for Ms Hutchinson to bring her appeal.

Legislation and legal principles

Dismissal

7 Ms Hutchinson has brought her appeal under s 80I(1)(d) of the *Industrial Relations Act 1979* (WA) (**IR Act**). It states:

> **80I. Board's jurisdiction**
>
> (1) Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> …
>
> (d) an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).

8 It is clear from the authorities that a dismissal involves being sent away or removed from office, employment or position: ***Metropolitan (Perth) Passenger Transport Trust v Gersdorf*** (1981) 61 WAIG 611; ***Gallotti v Argyle Diamond Mines Pty Ltd t/a Argyle Diamonds*** [2002] WAIRC 06828, (2002) 82 WAIG 3011 at [55] – [62].

9 The Board is bound by ***Gallotti v Argyle Diamond Mines Pty Ltd*** [2003] WASCA 166; (2003) 83 WAIG 3053 (**Gallotti (IAC)**) and EM Heenan J's reasoning at [5]: 'There is ample authority for the proposition that the cessation of the relationship of employer and employee by the effluxion of an agreed term of employment is not a "dismissal"' and at [7]: 'There will not be a dismissal where the term of a contract of employment expires'.

10 To succeed, Ms Hutchinson must prove that her employment ended because of some action on the part of the Health Service that amounted to sending Ms Hutchinson away or removing her from her employment, and not simply because the term of her contract expired.

Extension of time to appeal

11 If the Board finds that Ms Hutchinson was dismissed, then the Board would need to decide whether under s 27(1)(n) of the IR Act it should extend the time for Ms Hutchinson to appeal to 24 March 2020.

12 For the reasons set out below, the Board finds that Ms Hutchinson was not dismissed. Accordingly the Board does not need to consider whether to extend the time for Ms Hutchinson to appeal.

Was Ms Hutchinson dismissed?

13 The facts set out from [14] to [23] are not in dispute.

14 Ms Hutchinson was employed on a fixed term contract from 5 August 2019 to 5 February 2020. It states: 'In signing this agreement you acknowledge that you have been contracted to this position for the above period only. Upon expiration of this fixed term contract there is no obligation on either party to enter into any further employment arrangement.'

15 Ms Hutchinson was supervised by Ms Renee Whyatt. Ms Whyatt reported to Mr Rory Stemp.

16 In late October 2019 Ms Hutchinson raised concerns about Ms Whyatt with Mr Stemp. Mr Stemp organised for the three of them to meet on 4 November 2019. At that meeting, Ms Hutchinson discussed her concerns about Ms Whyatt. Mr Stemp considered those concerns to be an 'interpersonal issue'. Ms Whyatt apologised to Ms Hutchinson for Ms Hutchinson's perception of what had happened. They agreed Ms Hutchinson needed more training and development, for what Ms Whyatt viewed as errors and Ms Hutchinson viewed as inadequate training provided by Ms Whyatt. Mr Stemp and Ms Whyatt organised for Ms Hutchinson's desk to be moved closer to Ms Whyatt for training purposes.

17 On 10 January 2020 Ms Hutchinson met with Ms Whyatt and Ms Stacey Murray, a human resources consultant. At that meeting, Ms Whyatt told Ms Hutchinson that Ms Hutchinson would not be given a further contract of employment. Ms Hutchinson replied with words to the effect that she understood there was no guarantee that the Health Service would extend her contract. They discussed that Ms Hutchinson's last day of work would be 5 February 2020 and that she should use up her flexitime on that day.

18 Several days later, on 13 January 2020, Ms Whyatt emailed Ms Hutchinson a document called a T1 Termination Form (**T1 Form**). It sets out the employee's details, address and why employment has come to an end. Under a heading 'reason for termination', the T1 Form states 'dismissed'. As soon as Ms Hutchinson saw the T1 Form on 14 January 2020, she requested a meeting with Ms Whyatt. Ms Whyatt scheduled a meeting for around 3pm that day with Ms Hutchinson and Ms Murray.

19 Ms Hutchinson did not want to wait until 3pm for the meeting, so she went to speak to Mr Stemp about why she had received a form that said she had been dismissed. Mr Stemp told Ms Hutchinson words to the effect that 'it should have said "end of contract"'. Ms Hutchinson did not consider that this explained why Ms Whyatt would have selected 'dismissed' under the heading 'reason for termination'.

20 Ms Hutchinson said:

> So I didn't feel that I was getting anywhere with Mr Stemp because of the previous time that he had not responded to my complaint. He had dismissed that pretty much, ah, as being a inter - interrelationship issue. So I didn't feel that he was, um, going to take this seriously either. So I then decided to go into the human resources office and speak - and asked if I could have a meeting with [Ms Murray].

21 So Ms Hutchinson went to Ms Murray's office and raised the issue with her. She complained that Ms Whyatt had been bullying her and had now written "dismissed" on the T1 Form. Ms Murray indicated she was not sure why Ms Whyatt had written 'dismissed' on a T1 Form and that she would follow the matter up.

22 Ms Murray gave Ms Hutchinson a grievance lodgement form and Ms Hutchinson lodged a formal grievance about Ms Whyatt the same day.

23 Ms Hutchinson's last day of employment was 5 February 2020. Ms Hutchinson sent a number of emails complaining that she had been dismissed. She complained to the Public Sector Commissioner about Mr Stemp's management of her grievance against Ms Whyatt, and told the Health Service that she wished to lodge a breach of standards claim and an unfair dismissal claim. On 24 March 2020 Ms Murray telephoned Ms Hutchinson. Ms Murray explained to Ms Hutchinson that the T1 Form had been completed in error.

Ms Hutchinson's case

24 The Board considers that Ms Hutchinson was a reliable witness. Her evidence was forthright, clear and consistent. Ms Hutchinson had good recall about the events in question. Her testimony was not disturbed in cross-examination in relation to anything material. To the extent that Ms Hutchinson's relevant evidence conflicts with that of the Health Service's witnesses, the Board prefers Ms Hutchinson's evidence, other than as set out in these reasons.

25 Ms Hutchinson gave evidence that she considers she was dismissed because she complained about Ms Whyatt. Ms Hutchinson explained that Ms Whyatt 'had been speaking to [her] very disrespectfully and very harshly and [she] was feeling very intimidated.' Ms Hutchinson found Ms Whyatt unapproachable and considered that Ms Whyatt had not properly trained her.

26 When Ms Hutchinson explained her concerns to Ms Whyatt and Mr Stemp at their meeting on 4 November 2019, Mr Stemp's response was 'this is an interpersonal issue'. Ms Hutchinson did not agree with that. Ms Whyatt apologised to Ms Hutchinson and raised a number of errors that she said Ms Hutchinson had made. Ms Hutchinson explained her view that the errors were caused by a lack of training.

27 Ms Hutchinson's evidence is that after that meeting, the bullying began:

> **Ms Hutchinson:** She was treating me with contempt and I was being forced to follow strict rules where no one else was being made to follow those same rules. If I - I was very rarely ever late but one day I was late, just to give you an example, one day I was late three minutes and she tore into me. She was rude and nasty to me and complained that I had - was three minutes late and I explained, you know, that I'm rarely ever late and that the other women are late and I've - you know, constant, consistently late every, you know 10, 15 minutes sometimes and she never says anything to them, um, but her attitude to me was quite, um demoralising and she would do it in front of the other women as well and she continued this kind of treatment of me over the next three to three and a half months. She continued that kind of contempt, everything that I said she would be extremely dismissive. She would be nasty in her responses to me when I would ask questions. Not every single time but there was certainly a - a huge element of that, um, she even had another lady in the office who was, ah, I believe trying to help her own interests in getting on the right side of Renee because originally she had been suffering at the hands of Renee and she had found, um, that Renee was now, um, favouring her so she was adding to that relationship by finding fault with things that I was doing in the office in front of all the other women trying to find fault with everything I did in the office and Renee was backing her up and they were basically, I think, bullying me together. And so that continued for the three and a half months, I was suffering from, um, from the stress of it, of feeling - and I was being consistently being bullied by the two of them where they were trying to make me wrong in - in every way that they possibly could.

28 Ms Hutchinson gave evidence that there were two things that the Health Service did to send her away from her employment: first, Ms Whyatt told Ms Hutchinson that her contract would not be renewed on about 11 November 2020, which she said was days after Ms Hutchinson made a complaint about Ms Whyatt on 30 or 31 October 2019, and second, Ms Whyatt subsequently chose to put 'dismissed' on a T1 Form, when there were options other than 'dismissed' available for Ms Whyatt to select.

29 Ms Hutchinson agreed that her contract was for a fixed term and that the Health Service was under no obligation to enter into a further fixed term contract. Ms Hutchinson said she believed that the Health Service had an 'operational requirement still to employ someone and they even employed someone instead of me and the retaliation that I received straight after I had made a complaint, along with the dismissed on the form, it proved to me that her intent was actually to dismiss me.'

30 Ms Hutchinson gave evidence that the Health Service's goal was to dismiss her, but that it waited until her contract expired 'to make sure that legally they were still keeping within legal grounds to terminate me'. In cross-examination the Health Service put to Ms Hutchinson that on 22 January 2020 Ms Hutchinson was aware that she had not been dismissed, and that her contract ceased with the effluxion of time. Ms Hutchinson said that 'it ceased with the effluxion of time but it doesn't mean that I wasn't bullied and that she in her heart was intent, - was her intent to dismiss me which was shown by the form that she submitted'.

31 Finally, Ms Hutchinson said that during her phone call with Ms Murray on 24 March 2020, Ms Murray 'introduced the concept that Ms Whyatt made an administrative error.' Ms Hutchinson's evidence is that she responded to Ms Murray by saying 'Well no, she didn't. And nobody's ever mentioned to me that it was an administrative error. This is the first I've heard of it.'

Mrs Hartnup

32 Mrs Hartnup is Ms Hutchinson's sister. She gave evidence as well. The effect of her evidence was that Ms Hutchinson contacted Mrs Hartnup very regularly while Ms Hutchinson was employed by the Health Service and complained about the way she was treated by Ms Whyatt.

Ms Hutchinson's submissions

33 Ms Hutchinson submits that she was removed from her employment in retaliation for having made a formal complaint about Ms Whyatt. Ms Hutchinson says Ms Whyatt and Mr Stemp 'colluded to remove' her by replacing Ms Hutchinson with another employee on a short term contract.

34 Ms Hutchinson submits that had she not been dismissed, she would have been offered an extension to her fixed term contract. This is because she was hired first and therefore was 'first in line.' In essence, Ms Hutchinson argues that but for her complaint against Ms Whyatt, Ms Hutchinson would have been offered further employment.

35 Ms Hutchinson argues that she was bullied by Ms Whyatt because after making the complaint Ms Hutchinson experienced depression, ill-health, lack of confidence, stuttering and anxiety. She says this is a 'breach of duty of care' and contravenes the *Occupational Safety and Health Act 1984* (WA) and the IR Act.

36 Ms Hutchinson says Ms Whyatt's intention to dismiss Ms Hutchinson is clear because Ms Whyatt entered 'dismissed' as the reason for termination on the T1 Form. Doing so was not an error because Ms Whyatt 'had sufficient experience terminating three other staff members and one was also "end of short term contract", so regardless of their reasons for termination, she knew she had choices, such as "end of casual contract", and "permanent move outside WA Health" as kinder and more appropriate options…Ms Whyatt had access to Human Resources staff at all times, and certainly had the opportunity to seek administrative advice in this instance'.

37 Ms Hutchinson argues that the Health Service breached her contract by not providing her with the full six months of employment because she started working around a week later than the start date of her written contract.

Health Service's case

38 Ms Whyatt, Ms Murray and Mr Stemp gave evidence for the Health Service.

39 At the time when Ms Hutchinson was employed by the Health Service, Ms Whyatt was acting in the role of Senior Project Officer. She was Ms Hutchinson's supervisor.

40 Ms Murray is a Human Resources Consultant for the Health Service in the South West.

41 Mr Stemp is a Principal Contract Manager (Clinical Contracts) for the Health Service in the South West.

Mr Stemp

42 At times during cross-examination Mr Stemp was uncooperative and evasive. He had to be asked several times by the Board to answer Ms Hutchinson's questions. At times Mr Stemp's recollection of events was poor, usually when it seemed to the Board that a better recollection may not have reflected well on him. Mr Stemp indicated that his recollection was poor at least seven times. At times Mr Stemp would not make a concession that obviously needed to be made. For example, it was apparent from the nature of the issues, which included Ms Whyatt's manner in dealing with Ms Hutchinson, inadequate training, contradictory directions, not providing details of 'errors' and not allowing Ms Hutchinson to contact patients/specialists for information, that Ms Hutchinson's concerns were not limited to interpersonal issues. Those concerns were recorded by Mr Stemp in an email. When Ms Hutchinson put to Mr Stemp that the issues she raised about Ms Whyatt were not only interpersonal issues, he would not answer her question directly:

> **Ms Hutchinson:** So in that, ah, summary you've said that you've considered it to be an interpersonal issue even though I cited or you cited here at least four or five different issues that were not related to interpersonal, that there were issues relating to the time - amount of time taken in training, lack of training, contradictory directions, not providing details of errors and not allowing me to contact specialists and patients which was undermining my work. So would you consider those interpersonal issues?
>
> **Mr Stemp:** They were the issues that you raised.
>
> **Ms Hutchinson:** Yes. Would you consider those interpersonal issues?
>
> **Mr Stemp:** They were the issues you raised.
>
> **Ms Hutchinson:** Would you - - -
>
> **Emmanuel C:** Well, I think that Ms Hutchinson- - -
>
> **Ms Hutchinson:** The question - - -
>
> **Emmanuel C:** - - - is saying that's how you characterised what you say she raised - - -?
>
> **Mr Stemp:** Well, what I just - but these - they - they were the issues she raised, yeah.
>
> **Emmanuel C:** That's not in dispute. I think - - -?
>
> **Mr Stemp:** No.
>
> **Emmanuel C:** - - - the point she's making is they're not interpersonal issues, are they? She's putting that to you so that you can respond?
>
> **Mr Stemp:** Ah, no. I - I - I understand that but, um - - -
>
> **Ms Hutchinson:** The question, Mr Stemp, is are they interpersonal issues or are they issues other than interpersonal?
>
> **Mr Stemp:** They are issues, ah, so Renee noted that Celestine had missed some training and development, that's not an interpersonal issue. Ah, discussion of proposed changes to work location, that's not an interpersonal issue. Ah, requested Celestine - requested details of specific errors; these will be provided by Renee, that's not an interpersonal issue.

43 Mr Stemp gave evidence that Ms Hutchinson came to see him on 14 January 2020 because she was concerned that the T1 Form said she was being dismissed, 'which was not true'. Mr Stemp said he told Ms Hutchinson that 'it should have been "end of contract" or something similar.' At that time, Mr Stemp thought the T1 Form had to be completed for all employees leaving the organisation 'so that they could, ah, finalise return of equipment, um, whatever, ah, outstanding, ah, superannuation or, ah, leave, ah, ah, requirements might be so - an - an administrative tool for - to finalising the, ah, ah, the employment status.'

44 Mr Stemp described what he said to Ms Hutchinson when he met with her on 14 January 2020:

> **Ms Waterton:** Okay. After you'd spoken with the appellant can you just please talk me through what subsequently took place regarding this issue and I'll just - if I could please admit - - -
>
> **Emmanuel C:** Well, has Mr Stemp given evidence yet about what he discussed with - as I understood it, you've given evidence about what Ms Hutchinson's concern was - - -?
>
> **Mr Stemp**: Yeah.
>
> **Emmanuel C:** but what, if anything, did you say to her?
>
> **Mr Stemp:** Did I say? Ah, well, I told her that it wasn't true that she was being dismissed and that I would, ah, get Ms Whyatt to, ah, change - and I think I said something along the lines of her contract not being extended, um, which was - if I can perhaps take a liberty just to talk through things at this point because it does get a bit messy, um, so the T1 as it turns out and I wasn't aware at the time, ah, is not for use with the expiration of fixed term contracts so there are - there are dropdown boxes in it, there are no options that allow for that, um, I asked Ms Whyatt to, ah, put, ah, "End of contract," or "Not being renewed," but there's no free text to allow for that, there are no dropdown options, um, so we subsequently discussed putting, ah, ah, "Leaving to another department - leaving WA Health permanently."
>
> **Ms Waterton:** You discussed that?
>
> **Mr Stemp:** Ah, I did with Ms Hutchinson, ah, at a subsequent meeting.
>
> **Ms Waterton:** Thank you?
>
> **Mr Stemp:** Um - sorry, and, ah, then that led us down the path of having to say which other non-government or which other non-WA Health department that was so that was obviously not going to work either, ah, so I had taken over managing the T1 at that point, um, and we - well, I in the end decided that we should put, ah, ah, "Casual contract not being renewed," which was the best fit.
>
> **Ms Waterton:** Did the appellant appear satisfied with that once you sort of moved through that process, did she seem satisfied and understood that it was an administrative issue at the time?
>
> **Mr Stemp:** I think at one point she contacted me and I think that's - this is about the point where we actually resolved it or as best as we have, ah, and - and asked for a copy of the T1 and for some other paperwork, ah, I said in an email, I believe, at that point, that it was an administrative, ah, internal document and that we couldn't provide a copy of the other documents that she had requested which its name eludes me, um, but, ah, there was an acknowledgement that that was the situation.

45 The Board asked Mr Stemp whether he ever explained to Ms Hutchinson that the use of the word 'dismissed' on the dropdown box on the T1 Form was a mistake. At first Mr Stemp said he 'most definitely did' but then he said he 'would've said "an error or mistake." A mistake I'd – yeah. I'd have probably said mistake… or "incorrect".'

46 Mr Stemp denied that 'bullying allegations or similar – things of a similar nature' factored into his decision not to offer a further contract to Ms Hutchinson. He gave evidence that Ms Hutchinson's contract was not renewed because there was no longer a backlog of work from when PATS moved in-house and the service did not need as many staff going forward. Further, a system had been set up to offer existing permanent staff with fixed-term opportunities within PATS as those opportunities arose. This system was 'to get a - a body of people within, ah, the organisation who had experience of PATS, ah, and could be used for leave relief or to bring in if somebody left at short term so that was part of the, ah, employment and strategy effectively.'

47 Mr Stemp gave evidence that he did not have the delegated authority to dismiss an employee. Authority to dismiss an employee lies with the Chief Executive of the Health Service.

Ms Whyatt

48 Ms Whyatt was generally unforthcoming and at times evasive when giving evidence. Her evidence was disturbed in relation to several matters, including whether she was aware that Ms Hutchinson took stress leave. Ms Whyatt's recollection of some events was poor and she indicated that she could not remember several times. Ms Whyatt's evidence conflicts with that of Ms Murray in relation to whether Ms Murray asked Ms Whyatt why she selected 'dismissed' when filling in the T1 Form. Accordingly, the Board has concerns about the reliability of Ms Whyatt's evidence. However, Ms Whyatt's evidence about the reason why she filled in the T1 Form and selected the 'dismissed' option was clear, consistent and undisturbed in cross-examination. That part of Ms Whyatt's evidence rang true to the Board and the Board accepts it.

49 Broadly, Ms Whyatt denied bullying Ms Hutchinson, meeting with Ms Hutchinson on 11 November 2020 or telling Ms Hutchinson in November that she would not be offered another contract.

50 Ms Whyatt's evidence was that she thought she had to fill out the T1 Form for Ms Hutchinson to make sure Ms Hutchinson received any leave entitlements owing to her and for IT to close off computer access.

51 Ms Whyatt said that she filled out most of the form including a section that asks for a reason for termination. Ms Whyatt said:

> There's a section where it is a reason for termination, which is a dropdown box option. There's no option to free text in there, so I picked the option of dismissed because I felt at the time that it was the closest option. The other options that I considered was the cessation of casual contract but Ms Hutchinson was not on a casual contract. And the other option was the - I don't know the exact words but it was permanent move out of WA Health but when you selected that one you

> then had another more options appeared to fill in where the person was moving and to the best of my knowledge Ms Hutchinson wasn't going to another job, so I picked the dismissed.

52 Ms Whyatt again confirmed this where she explained that she ruled out other options because Ms Hutchinson was not on a casual contract and she was not moving to another job outside WA Health. Ms Whyatt said that Ms Hutchinson was not dismissed, rather 'the fixed term contract ran out'.

53 Ms Whyatt said:

> Ms Hutchinson was never dismissed, that was never my intent of the - of the form. The fixed term contract ran out. I was just trying to complete a T1 form and my intention of completing the T1 form was not to use the word dismissed, um, it was to make sure that Ms Hutchinson received the pay and any entitlements owing to her. Um, to be honest I - I didn't really think too much about the word dismissed. The point of the form was to close off the IT access and to ensure that Ms Hutchinson received all the entitlements in her last pay because in my mind Ms Hutchinson was never dismissed, it was the end of a fixed term contract with an end date.

54 Ms Whyatt gave evidence that this was the first time she had completed a T1 Form for a fixed term employee.

55 Ms Whyatt's evidence is that Mr Stemp asked her why she had selected 'dismissed' on the T1 Form. Ms Whyatt denied that Ms Murray asked her about that.

Ms Murray

56 Ms Murray's evidence was also less than forthcoming. She insisted that Ms Hutchinson's formal grievance only related to matters already raised and resolved in late October 2019, even though it is clear from the grievance document dated 14 January 2020 that is not correct. The grievance document refers to a range of matters that had arisen since October 2019, and includes statements such as:

> *Over the past four months,* [Ms Whyatt] has treated me with contempt, and I have found it very stressful to work with her due to her dominating and disrespectful way of talking to me. She has consistently discriminated against me… Since *[the meeting on 4 November 2019*], despite her apology, *her contempt for me has continued* – making my working environment very unhappy and stressful and has caused regular bouts of illness in response to the stress I have been under. *She has continued to treat me* discriminately (sic) from how she treats the other women in the office. (emphasis added)

57 Even when the grievance document was put to Ms Murray, she would not concede that Ms Hutchinson's grievance related to circumstances after late October 2019.

58 Relevantly, Ms Murray gave evidence that at the meeting on 10 January 2020 Ms Whyatt told Ms Hutchinson that her fixed term contract was not going to be extended and they discussed the options available to Ms Hutchinson to use the rest of her flexitime. Ms Murray said Ms Hutchinson commented that she was aware that her final day of work was 5 February 2020 and that Ms Hutchinson had no expectation that she would be offered a further contract. An email sent by Ms Murray to Ms Hutchinson and Ms Whyatt on 10 January 2020 after their meeting that day confirming what was discussed was tendered.

59 Ms Murray gave evidence that on 14 January 2020 Ms Hutchinson came to her office to discuss the T1 Form. Ms Hutchinson told her that she had spoken to Mr Stemp about it and was dissatisfied with his response. Ms Hutchinson also requested the forms to make a formal grievance about Ms Whyatt. Ms Murray says she told Ms Hutchinson that she would look into why Ms Whyatt had filled in the T1 Form the way she had.

60 Ms Murray's evidence is that a T1 Form is not needed when a fixed term contract expires. Ms Murray says she asked Ms Whyatt why she used the form and filled it in the way she did. Ms Whyatt explained to Ms Murray that she thought the T1 Form was necessary to ensure Ms Hutchinson received her entitlements. When asked by the Board if Ms Murray had asked Ms Whyatt why she had filled out the T1 Form in the way she did, Ms Murray said:

> Um, yes. Um, I had asked her what, um, what she had populated on the form. Um, she said that she had selected the term dismissed because there was no free text, um, ability, she wasn't able to type anything in there and she found that confusing. Um, she said that any other option in there wasn't, um - it was neither appropriate, um, some of the options were retirement, um, transfer within WACHS. Um, and if you were to select those options it compelled you to then populate where that person was - was moving to or, um, things of that nature, so that was the only option that was allowed to be - that would allow her to populate it without any further information.

61 Ms Murray said in cross-examination that Mr Stemp's email to Ms Whyatt said that a different option should have been selected, so 'that in and of itself, um, would explain that what was contained on that form was an error. It was not correct. It was an error.' Mr Stemp's email to Ms Whyatt states: '[Ms Hutchinson] just spoke to me. The issue is that the T1 (section D) says that she is being "dismissed", which is not the case. The form needs to say that the contract is not being extended. Please make change and send back to her. Then no need for meeting.'

62 Ms Murray gave evidence about her phone call with Ms Hutchinson on 24 March 2020. She said she explained to Ms Hutchinson that the T1 Form 'had been completed in error and that, um, that had prompted, um, both Mr Stemp and Ms Whyatt to be, ah, provided with the information on the correct use of the termination form.'

Health Service's submissions

63 The Health Service says Ms Hutchinson was not dismissed. Rather, she was employed on a fixed term contract from 5 August 2019 to 5 February 2020. When the term of her contract ended, her employment ended. The Health Service argues that the language of the written contract does not give rise to an expectation of ongoing employment beyond the end date of the fixed term of employment. Further, when Ms Hutchinson met with Ms Whyatt for her performance development meeting in December 2019, Ms Whyatt told Ms Hutchinson that she was unable to say whether a further contract would be offered but that that would be discussed at a meeting in January. That meeting took place on 10 January 2020. During the meeting Ms Whyatt told Ms Hutchinson that no further contract of employment would be offered. Indeed, the Health Service says Ms Hutchinson acknowledged at that time that she was 'aware that "it was not a given that contracts *would* be renewed and

accepted this".'(original emphasis) Failing to offer a further contract does not amount to a dismissal: ***Kylie Oliver v Malcolm Goff, Managing Director, Challenger TAFE*** [2006] WAIRC 05224.

64 In relation to the T1 Form, the effect of the Health Service's argument is that Ms Whyatt made a mistake. A T1 Form should not be used when a fixed term contract comes to an end. Ms Whyatt did not know that as she had only filled out a T1 Form on one other occasion, when a permanent employee resigned. Ms Whyatt filled out the T1 Form in this case because she understood it was necessary in order for outstanding leave entitlements to be paid out. The Health Service says there is no 'fixed term contract' option on the T1 Form, (presumably because the form is not intended for use for fixed term employees), so Ms Whyatt selected 'dismissed'.

65 The Health Service says the T1 Form did not 'constitute an act of removing or sending away from employment prior to the cessation of the Appellant's contract, but rather the confirmation of the cessation of the Appellant's contract on the 5 February 2020, as had been discussed and acknowledged by the Appellant in a meeting on 10 January 2020'.

66 Finally, the Health Service says that although at the meeting on 31 October 2019 Ms Hutchinson raised issues about Ms Whyatt's communication and interpersonal skills, Ms Hutchinson did not lodge a formal complaint against Ms Whyatt before 14 January 2020.

67 The Health Service says that the facts of this matter are similar to those in ***Townes-Vigh v North Metropolitan Health Service*** [2020] WAIRC 00188. In that matter, Ms Townes-Vigh, who had been employed on a series of fixed term contracts, argued that she was unfairly dismissed because her employer did not offer her a further fixed term contract or a substantive position. The Health Service points to [37] of ***Townes-Vigh v North Metropolitan Health Service***, where the Board in that matter considered the following factors:

1. all of Ms Townes-Vigh's contracts clearly stated they were for a fixed term;
2. the parties had agreed that upon expiration of Ms Townes-Vigh's final fixed term contract, there would be no obligation on either party to enter into any further employment arrangement;
3. no one had promised Ms Townes-Vigh a permanent appointment; and
4. there was no evidence the employer had said or done anything to reasonably lead Ms Townes-Vigh to have an expectation of ongoing employment.

The Health Service also points to [38] and [40] of ***Townes-Vigh v North Metropolitan Health Service***, and says that a decision not to offer a subsequent fixed term contract does not constitute a dismissal. A contract coming to an end with the effluxion of time cannot be characterised as a dismissal.

Consideration

68 To invoke the Board's jurisdiction, Ms Hutchinson must prove that she was dismissed.

69 On the evidence before the Board, the Board cannot find that Ms Hutchinson was sent away or removed from her employment. It is clear that Ms Hutchinson was employed on a fixed term contract. The parties agreed in writing that employment would be from 5 August 2019 to 5 February 2020. That contract was later varied, but only in relation to the number of hours Ms Hutchinson would work. The contract is concise, just a page and a half. It expressly provides in at least six places that the employment contract is for a fixed term. It includes the following acknowledgment: 'In signing this agreement you acknowledge that you have been contracted to this position for the above period only. Upon expiration of this fixed term contract there is no obligation on either party to enter into further employment arrangements.' The box beside 'I accept this fixed term of employment' is ticked. Ms Hutchinson signed the contract.

70 The Board has no difficulty finding that the parties agreed to fixed term employment. The Health Service was not obliged to, and did not, offer Ms Hutchinson a further contract of employment at the end of the fixed term. Accordingly, the employment relationship ended with the effluxion of the agreed term of employment: ***Gallotti*** **(IAC)**.

71 In her oral closing submissions, Ms Hutchinson referred to ***Pacheco-Hernandez v Duty Free Stores Gold Coast Pty Ltd (No. 2)*** [2019] FCCA 1295 (**Pacheco-Hernandez**) and ***Khayam v Navitas English Pty Ltd t/a Navitas English*** [2017] FWCFB 5162 (**Navitas**) in support of her argument.

72 Although Ms Hutchinson acknowledged that ***Pacheco-Hernandez*** arises under a different legislative framework, she argued that it is sufficiently similar to her circumstances for the Board to consider it. Ms Hutchinson argues that in accordance with the findings in ***Pacheco-Hernandez***, the Health Service failed to prove that one of the substantive and operative factors for removing Ms Hutchinson from her position was not because she made complaints about Ms Whyatt. Ms Hutchinson says her employment was terminated when in fact her employer had the operational requirement and budget to extend her role, but instead the Health Service gave Ms Hutchinson's role to someone else. Ms Hutchinson argues that her performance and her conduct were not issues and it would have been logical to extend her contract given she was already trained for the role.

73 Ms Hutchinson points to the reasoning in ***Navitas*** to support a contention that her fixed term contract was not a contract for a specified time.

74 The difficulty for Ms Hutchinson is that the particular reasoning in those cases does not assist her, because the reasoning arises in a different legislative context. In ***Pacheco-Hernandez***, the legislative regime provided for a reverse onus of proof. The employer in that case needed to prove that the reason it dismissed the employee was for a reason other than because the employee exercised a workplace right to make complaints about her employment. Here the onus of proof is not reversed. It is for Ms Hutchinson to prove that she was dismissed, not for the Health Service to prove it did not renew her contract for a reason other than because she complained about Ms Whyatt. In relation to the reasoning in ***Navitas*** that Ms Hutchinson relies on, it does not assist Ms Hutchinson's case that in this matter either party could terminate the employment contract before the end of the fixed term.

75 The Board accepts that Ms Hutchinson had concerns about Ms Whyatt's behaviour, that she felt bullied by Ms Whyatt and that she tried to raise those concerns with Mr Stemp. It is clear Ms Hutchinson was disappointed that Mr Stemp did not escalate the matter.

76 In the Board's view, even if Ms Whyatt told Ms Hutchinson on around 11 November 2020 that Ms Hutchinson's contract would not be renewed, it does not follow that Ms Hutchinson was dismissed.

77 It is not in dispute that Ms Whyatt indicated to Ms Hutchinson at her performance development meeting in December 2019 that she could not confirm whether Ms Hutchinson would be offered a further contract. Indeed the performance management document, which Ms Hutchinson signed, states:

> Manager Comment: Unable to confirm at this stage if fixed term contract will be renewed after end of current contract. Current Fixed term contract end date is 5 February 2020. Meeting to be arranged in January 2020 to advise.'

78 Further, Ms Murray, Ms Whyatt and Ms Hutchinson gave evidence that when Ms Hutchinson was informed on 10 January 2020 that her employment would end as agreed on 5 February 2020, Ms Hutchinson said words to the effect that she expected as much.

79 Ms Hutchinson wrote in her grievance document dated 14 January 2020:

> On Friday, 10th January, I was told in a meeting with [Ms Whyatt] and the HR Officer, that my contract would not be renewed – which I accepted gracefully, as it was not a given that contracts would be renewed, and although I suspected that this was partially due to her set against me, I accepted the decision without any issue at all. However, this morning she sent me a T1 form to complete to put my termination into effect, when I saw that in the "reason for termination" she had entered the word "dismissed". I was NOT dismissed! I have done nothing wrong, and nothing to warrant this treatment. Her attitude towards me is adversarial and provocative, and entering the word "dismissed" into the termination box is another attempt at provoking me. [Ms Whyatt]'s Manager, Rory Stemp, has confirmed that it should be "Contract Ended".

80 Clearly Ms Hutchinson understood that her employment would come to an end on 5 February 2020. It was seeing that Ms Whyatt had selected the word 'dismissed' on the T1 Form that led to Ms Hutchinson deciding that she had been dismissed.

81 None of Mr Stemp's emails to Ms Hutchinson about the T1 Form say that Ms Whyatt selecting 'dismissed' was a mistake or otherwise an administrative error. We accept that nobody from the Health Service properly explained to Ms Hutchinson that the use of 'dismissed' on the T1 Form was simply a mistake for many weeks, at least until Ms Murray spoke to Ms Hutchinson on 24 March 2020. In our view, the lack of clear and frank communication by the Health Service about that matter led to Ms Hutchinson fixating on the idea that she had been dismissed. That is regrettable and increased the prospect of this dispute coming before the Board.

82 However, the Board does not accept that Ms Whyatt dismissed Ms Hutchinson in retaliation for Ms Hutchinson complaining about her, or for any other reason. There is nothing before the Board to suggest that Ms Whyatt had the power to dismiss any employee from employment. It is clear that power can only be exercised by the Chief Executive. Further, the Board is not persuaded that Ms Whyatt selecting 'dismissed' when filling in the T1 Form was anything other than an administrative error on her part. In any event, Ms Whyatt selecting 'dismissed' on the T1 Form did not (and could not) effect a dismissal. Indeed it had no bearing at all on the status of Ms Hutchinson's employment relationship with the Health Service.

83 Finally, that Ms Hutchinson started work one week after the start date set out in her written contract of employment does not mean she was dismissed.

84 The Board finds that Ms Hutchinson's employment ended with the passing of time, in accordance with what the parties agreed. Ms Hutchinson was not removed or sent away from her employment. She stopped working for the Health Service when her fixed term contract ended. Ms Hutchinson was not dismissed and therefore the Board lacks jurisdiction to hear and determine her appeal.

Conclusion

85 The Board must dismiss this appeal for want of jurisdiction.

2020 WAIRC 00978

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 FEBRUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROL ELENA HUTCHINSON
	APPELLANT
	-v-
	WA COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR GREG LEE - BOARD MEMBER
	MR PETER HESLEWOOD - BOARD MEMBER
DATE	THURSDAY, 10 DECEMBER 2020
FILE NO	PSAB 3 OF 2020
CITATION NO.	2020 WAIRC 00978

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Ms R Sinton & Ms S Waterton (as agents)

Order

HAVING heard from the appellant in person and Ms R Sinton and Ms S Waterton 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 –

THAT this appeal be, and by this order is, dismissed.

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

NOTICES—Union Matters—

2020 WAIRC 00973

NOTICE

APPL No. 60 of 2020

NOTICE is given of an application by the Registrar of the Western Australian Industrial Relations Commission to the Commission in Court Session of the Western Australian Industrial Relations Commission to cancel the registration of *Seamen's Union of Australia, West Australia Branch* (APPL 60/2020) on the grounds the organisation is defunct.

The matter is listed for hearing before the Commission in Court Session at **10.30AM** on **Monday, 18 January 2021** at Level 18, 111 St Georges Terrace, Perth.

Any person who desires to object to the application may do so by appearing at the hearing before the Commission in Court Session at the above listed date and time.

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

8 December 2020

2020 WAIRC 00974

NOTICE

APPL No. 61 of 2020

NOTICE is given of an application by the Registrar of the Western Australian Industrial Relations Commission to the Commission in Court Session of the Western Australian Industrial Relations Commission to cancel the registration of *The Printing and Allied Trades Employers' Association of Western Australia (Union of Employers)* (APPL 61/2020) on the grounds the organisation is defunct.

The matter is listed for hearing before the Commission in Court Session at **10.45AM** on **Monday, 18 January 2021** at Level 18, 111 St Georges Terrace, Perth.

Any person who desires to object to the application may do so by appearing at the hearing before the Commission in Court Session at the above listed date and time.

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

8 December 2020

2020 WAIRC 00975

NOTICE

APPL No. 62 of 2020

NOTICE is given of an application by the Registrar of the Western Australian Industrial Relations Commission to the Commission in Court Session of the Western Australian Industrial Relations Commission to cancel the registration of *The Western Australian Branch of the Commonwealth Steamship Owners' Association, Industrial Union of Employers (Fremantle)* (APPL 62/2020) on the grounds the organisation is defunct.

The matter is listed for hearing before the Commission in Court Session at **11.00AM** on **Monday, 18 January 2021** at Level 18, 111 St Georges Terrace, Perth.

Any person who desires to object to the application may do so by appearing at the hearing before the Commission in Court Session at the above listed date and time.

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

8 December 2020