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FULL BENCH—Appeals against decision of Commission—

2013 WAIRC 00133

APPEAL AGAINST A DECISION OF THE COMMISSION GIVEN ON 27 JULY 2012 IN MATTER NO. B 43 OF 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2013 WAIRC 00133
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 22 JANUARY 2013
DELIVERED	**:**	FRIDAY, 8 MARCH 2013
FILE NO.	**:**	FBA 5 OF 2012
BETWEEN	**:**	MR KULWANT SINGH Appellant AND DHALIWALZ PTY LTD Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S M Mayman**
Citation	**:**	**[2012] WAIRC 00710; (2012) 92 WAIG 1609**
File No	**:**	**B 43 of 2012**

CatchWords	**:**	Industrial Law (WA) - appeal against decision of the Commission - duty to explain court procedures to self-represented litigants - scope of duty considered - Commissioner failed to perform duty to assist - Commissioner erred in receiving documentary evidence - rule in *Browne v Dunn* not applied - claims of denied contractual benefits - terms of the contract of employment considered - even if hearing fairly conducted no entitlement to the benefits claimed could succeed - appeal dismissed

Legislation	:	*Industrial Relations Act 1979* (WA) s 27, s 29(1), s 29(1)(b), s 29(1)(b)(ii), s 49, s 49(3)
		Fair Work Act 2009 (Cth) s 14, s 26(1), s 26(2)(b)(ii), s 26(2)(c)
		Minimum Conditions of Employment Act 1993 (WA) s 5, s 23
		Magistrates Court Act 2004 (WA) s 30
Result	:	Appeal dismissed
Representation:		
Appellant	:	In person
Respondent	:	Mr M N Zia and Mr S Singh

Case(s) referred to in reasons:

Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation (1983) 44 ALR 607

Browne v Dunn (1893) 6 R 97

Reid v Kerr [1974] 9 SASR 367

Stead v State Government Insurance Commission (1986) 161 CLR 141

Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82

In Marriage of F [2001] FamCA 348; (2001) 161 FLR 189

Michael v State of Western Australia [2007] WASCA 100

Tomasevic v Travaglini [2007] VSC 337

Case(s) also cited:

Nil

Reasons for Decision

SMITH AP AND BEECH CC:

The appeal and the order appealed against

1 This is an appeal instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the Act). The appeal is against an order made by the Commission on 27 July 2012 dismissing the appellant's application for orders requiring payment by the respondent for alleged outstanding contractual benefits. The application at first instance was made pursuant to s 29(1)(b)(ii) which provides for an industrial matter to be referred to the Commission by an employee claiming 'that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment'.

2 After hearing the matter, the Commission published an order dismissing the application and reasons for decision on 27 July 2012. The appellant filed his notice of appeal on 17 September 2012. Due to the unavailability of the parties, the appeal was not heard by the Full Bench until 22 January 2013. The appeal was lodged out of time as s 49(3) of the Act requires that an appeal against a decision of the Commission is to be instituted within 21 days of the date of the decision. The appeal was 31 days out of time.

3 We are of the opinion that leave should be granted to extend time to institute the appeal on grounds that the grounds of appeal raise the manner in which documentary evidence was received into evidence in the hearing of the application at first instance and whether the hearing was conducted in a manner that was fair to the parties.

The factual background

4 The appellant was employed for a short period by the respondent from 26 November 2011 until 23 December 2011. It was common ground that he was employed to work as a chef and that he would be paid $1,500 gross per week. The parties were in dispute as to whether he was employed as an executive consultant chef and the duties that he was to perform. However, the dispute about those issues was not material to the appellant's claim that he had not been allowed benefits under his contract of employment, or to the issues raised in this appeal.

5 The appellant's case was that after he commenced work he was required to work long hours. This led to him giving notice. The appellant's claims were as follows:

(a) Payment for 85 hours and 15 minutes in overtime. He calculated the amount he alleged was owing using an hourly rate of $39.47. The appellant also claimed penalties for working on Saturdays and Sundays. The total amount he claimed for overtime and penalties was $5,375.

(b) Payment of $357.75 in travelling allowance. He contended that this amount became due and owing when he was required to travel between Perth and Mandurah on three occasions to pick up goods. On the first occasion he collected meat and groceries. On the second occasion he collected a replacement Roband oven and on the third occasion he collected a stick-blender and groceries. He calculated the travelling allowance amount at 75 cents for each kilometre travelled.

(c) Three weeks pro-rata annual leave being an amount of $355.25.

6 The respondent disputed each of the appellant's claims.

The evidence

7 The evidence of the appellant in chief was as follows:

(a) He advertised on 'Gumtree' that he was looking for work. Mr Salwant Singh (who it appears from the way the defence was conducted is the owner of the respondent) met with the appellant at McDonald's Restaurant in East Victoria Park and told him that he was starting a new restaurant and he urgently needed someone to work as a chef, as his chef had suddenly disappeared.

(b) He was engaged by Mr Salwant Singh as an executive consultant chef and it was agreed that he would be paid a weekly salary of $1,500. His job was to plan the menus, create recipes, train kitchen staff, prepare food, ensure hygiene and cleanliness and to assist in establishing a business and operation model for future restaurants.

(c) Soon after he started working he realised all that was required was a cook, as his executive functions were not utilised very much other than preparing a menu. He did, however, conduct some staff training. He worked long hours over the short period he was employed and he kept a record on his phone of the hours that he worked. He claims 85 hours and 15 minutes in overtime. When asked by the Commissioner how he calculated the amount he claimed as overtime, he said his hourly rate of pay was based on 38 hours, which was $39.47 a week. He also said that he was claiming penalties for the period of time that he worked on Saturdays and Sundays.

(d) The Commissioner also asked what were the other parts of his claim for contractual entitlements. In response, the appellant said that on 13 December 2011, he was requested by the respondent (it is assumed that was Mr Salwant Singh) to pick up meat and groceries from Perth. When he did so he drove 152 kilometres. On 14 December 2011, he picked up a replacement oven because the one in the restaurant was not working properly and in doing so he drove 158 kilometres. On 15 December 2011, he travelled 167 kilometres when he picked up a commercial blender and groceries. For these journeys he claimed 75 cents a kilometre which he said was an 'award rate'.

8 The appellant was cross-examined by Mr Muhammad Naseem Zia, who was the company manager of the respondent. In cross-examination the appellant was asked whether there was an agreement to pay him (the appellant) for any expenses incurred in picking up equipment and groceries and the appellant said, 'No'. The appellant then said that he was just following instructions and he was asking for payment because he incurred expenses in carrying out these duties. The only other issues raised with the appellant in cross-examination were whether the kitchen staff were qualified and about the training they received.

9 After the very short examination in chief and cross-examination of the appellant was concluded, he stood down from the witness box and Mr Zia gave evidence.

10 When Mr Zia gave his evidence in chief he said that the appellant was not a contracted employee of the company because after the appellant commenced work they were in negotiation over the terms of the contract. He then said that the respondent disputed the hours worked by the appellant. In particular, he said, 'We have his timesheets that - we have kept his record of his work. According to these - this record, we have already paid him more than he deserved.': ***Singh v Dhaliwalz Pty Ltd t/a Punjabi Virsa***, B 43 of 2012, hearing ts 7. When Mr Zia gave this evidence the Commissioner asked the appellant whether he had seen the timesheets to which the appellant replied, 'No, I haven't.': hearing ts 7. The evidence of Mr Zia then continued. Mr Zia then went on to express an opinion that it was misleading and false for the appellant to claim payment for additional hours as they were only operating a dinner service from 5.00pm until 10.00pm. He conceded that some preparatory work was required each day, probably from 3.30pm or 4.00pm, to be worked by the appellant, but said that was part of the appellant's job and all included in the set pay of $1,500 a week. Without the respondent seeking to tender them, the Commissioner simply accepted the bundle of timesheets into evidence and marked them as exhibit R1.

11 Mr Zia then gave evidence that the appellant was employed as a cook and not as an executive consultant chef and produced a bundle of pay sheets which described the appellant as a cook. Again, but this time without asking the appellant whether he had previously seen the pay sheets, the Commission accepted the pay sheets into evidence and marked them as exhibit R2 with the title 'Bundle of pay sheets defining Mr Singh as a cook'.

12 Mr Zia was then cross-examined by the appellant. It was put to Mr Zia by the appellant that a verbal contract of employment was formed when he (the appellant) met with Mr Salwant Singh at McDonald's and that most of the terms of the contract were finalised at that meeting. Mr Zia said that he was not present at that meeting and pointed out there was no written contract which set out the number of hours that the appellant was to work. The appellant then put to Mr Zia a copy of a draft letter of appointment which was drafted by him (the appellant). The appellant asked to submit the document into evidence and the Commission accepted it and marked it as exhibit A1 and the exhibit was titled 'Letter of Appointment'.

13 The appellant then made what appeared to be a submission from the bar table that he had sent the respondent a letter of demand. Although it was not in response to a question, Mr Zia stated that they had a copy of the document and the appellant asked if that document could be submitted and it was accepted into evidence as exhibit A2 and the exhibit was titled 'Letter of Demand'.

14 After the letter of demand was tendered into evidence, the Commissioner asked the appellant a number of questions about his claims in the letter of demand although Mr Zia was still in the witness box under cross-examination. Whilst being questioned, the appellant tendered two more documents. The first was a document titled 'Working hours at Punjabi Virsa'. The document was accepted into evidence as exhibit A3. It is a typed document which sets out the hours on each day the appellant said he worked giving starting and finishing times and any breaks. The second document was a summary of the appellant's calculations of overtime and penalty rates which are said to be owed. The document was titled 'Wage claims against Punjabi Virsa Restaurant' and contains calculations of the hours worked. It was accepted into evidence as exhibit A4. It also contains calculations of overtime at time and a half, double time and a claim for additional penalties of 25% for working on Saturdays and 50% for working on Sundays.

15 After those documents were tendered, the cross-examination of Mr Zia resumed. Questions were then asked about the letter of demand and circumstances of how the employment relationship came to an end.

16 Mr Salwant Singh then gave evidence in chief. Mr Salwant Singh spoke about looking for a chef as he was starting his first and very new business. When he spoke to the appellant at McDonald's he was told by the appellant that he was a qualified chef with 45 years' experience in Singaporean and Malaysian food. Mr Salwant Singh also said that the appellant told him that he would take $1,500 a week and do everything from morning to evening including six lunches and six dinners each week. Mr Salwant Singh said that they did not end up doing lunches, but from the very first day the appellant commenced work he (Mr Salwant Singh) was not happy with the standard of the appellant's work.

17 The appellant cross-examined Mr Salwant Singh and sought to adduce evidence about his own qualifications and resume. During the cross-examination the appellant handed up a bundle of references which were accepted into evidence as exhibit A5. Mr Salwant Singh, however, gave no evidence about those documents. The entire cross-examination of Mr Salwant Singh was concentrated on questions about qualifications of other persons employed in the kitchen and the equipment that was available to be used. Importantly, there were no questions to Mr Salwant Singh about the terms and conditions of the appellant's employment.

18 At the conclusion of the evidence given by Mr Salwant Singh, both parties made very brief submissions.

The findings and conclusions of the Commission

19 After briefly recounting the evidence given by the witnesses, the Commissioner made no reference to the evidence given by the appellant about the records he kept of the hours of work, other than to say that the appellant had indicted he was owed 85 hours and 15 minutes in overtime at $39.47 (the hourly rate): [12] (AB 10). She then found that it was useful to examine the number of hours worked by the appellant as set out in the timesheets tendered as exhibit R1 which commenced from 26 November 2011 until 20 December 2011. She referred to the evidence given by Mr Zia that in total between those dates the appellant had worked 124 hours and that the maximum hours worked in any one day were eight. The Commissioner then made the following findings in her reasons, which we will repeat in full. They were as follows:

> 20 I have had the benefit of listening to each witness in these proceedings. I find the evidence of Mr Muhamed [sic] and Mr Sulwant [sic] Singh to be open and honestly given. It is always open to the Commission in the circumstances to believe part of what a witness has said and to reject another part of that evidence. Support for that proposition is found in the Industrial Appeals Court decision *Cousins v YMCA of Perth* [2001] WASCA 374; (2001) 82 WAIG 5 [43]. With respect to the number of hours worked during the applicant's employment I have considered exhibit R1 and the evidence given by the applicant and I prefer the evidence presented by the respondent in exhibit R1. The Commission rejects the evidence of Mr Kulwant Singh with respect to the number of hours worked. At no stage during the proceedings did the applicant raise the issue of accrued annual leave either in written evidence or in oral submissions.
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> 21 The onus is on the applicant to prove that his claims, in this case additional hours were worked during his period of employment and that they are benefits to which he was entitled under his contract of employment. Furthermore, it is for the Commission to determine the terms of the contract and to ascertain whether the claim constitutes a benefit denied under such a contract, having regard to the obligations of the Commission to act according to equity, good conscience and the substantial merits of the case as per *Belo Fisheries v Froggett* (1983) 63 WAIG 2394 and *Hot Copper Australia Ltd v Saab* (2001) WAIRC 03827; (2001) 81 WAIG 2701 - 2707.
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> 22 It is my view that the applicant has not made out his claim that he has been denied payment due under his contract of employment specifically for the additional hours worked. Furthermore, the Commission would go so far as to suggest that the applicant has not made out of [sic] claim that he has worked such additional hours.
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> 23 It is the view of the Commission, the applicant conceding, that there was no contractual obligation to pay for the three days of travel undertaken on 13, 14 and 15 of December 2011 to collect goods. In cross-examination the applicant conceded that he had offered to do it without payment on the part of the respondent.
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> 24 The third aspect of the claim relates to accrued annual leave, a matter that the Commission has yet to receive any submissions. Accordingly, it is the Commission's view that the applicant has not made out his claim that he has been denied payment due under his contract of employment for accrued annual leave.
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> 25 The Commission finds there was an employee/employer relationship with the respondent. The Commission finds there is no entitlement for accrued annual leave, additional hours claimed or travel undertaken on 13, 14 and 15 December 2011.
>
> 26 For the reasons expressed above the Commission dismisses the applicant's claim for accrued annual leave, additional hours and travel undertaken on 13, 14 and 15 December 2011. An order will now issue dismissing the application.

Grounds of appeal

20 The appellant's grounds of appeal set out not only what the appellant says were errors made by the Commissioner at first instance, but also contain his submissions. These are as follows:

> 1. In Para 14 of the Reasons for Decision the Commissioner states that in relation to the claim for travel expenses for errands done by Mr. Kulwant Singh for the respondent, the former had 'conceded there had been no commitment on the part of the respondent to pay for such travel as he had offered to pick up the equipment'. This is not true. This was not voluntary work but job done in response to instructions given by an employer to his employee. As an employer, it is highly inconsiderate for to expect an employee to carry out errands involving travel of over 100 km each time without offering any compensation for travel costs. It would also have been improper for an

employee, when asked to perform an errand, to bargain for compensation before undertaking the tasks. Applicant never expected that he was required to perform extra duties at his own expense for free.

2. In Para 16, referring to time-sheets tendered by Respondent as exhibit Rl, Commissioner Mayman observes 'while the exhibit did not cover the entire employment period of the applicant it was certainly useful to examine the number of hours worked by the applicant'. When the time-sheets were tendered by Respondent the Commissioner asked Applicant if he had seen these before and was answered in the negative. It is market practice for time-sheets to be filled in and signed by employees and witnessed by the employer or supervisor at the workplace. In this case, the time-sheets were filled in by the employer himself without the knowledge of Applicant. Furthermore, it is not market practice to have time-sheets for executive employees, only hourly-rated junior staff, so that wages can be fairly worked out at the end of the wage period. Applicant was employed as an Executive Consultant Chef at a gross weekly package of $1500/-. This was admitted in evidence (para 8 of Reasons for Decision). During the entire period of employment Respondent never brought up the matter of recording working hours and never required Applicant to record or submit time-sheets. He also never indicated that he was recording Applicant's times of arrival and departure from the workplace. It is submitted that the time-sheets tendered by Respondent were compiled after Applicant left the employment expressly to counter the overtime hours claim. After Commissioner Mayman asked Applicant if he had seen these time-sheets before, and his answer that he had not, they should not have been admitted in evidence. Not only were they admitted in evidence but were accepted as the preferred evidence as against Applicant's record of working hours that was submitted in support of the overtime claim. The decision to dismiss the claim seems in large part to be based on this fragile evidence.

3. In Para 25 the Commissioner finds there was an employer-employee relationship with the respondent. There was also no dispute as to the period of employment, i.e. from 26/11/2012 [sic] to 23/12/2012 [sic]. Surely, to go on to say that there was no entitlement to pro-rated annual leave would be a contradiction. Respondent never disputed this entitlement during the proceedings and Commissioner Mayman herself did not bring up the subject although it was listed as one of the denied entitlements in the original claim by Applicant. To dismiss this claim on the grounds that no submissions were made is denying justice to the applicant. Applicant and Respondent are both not legally-trained people and it was the responsibility of the Commissioner to guide the proceedings to ensure all points are adequately covered. Commissioner Mayman failed to conduct the proceedings in a fair and impartial manner, leaving applicant with the impression that he has not only been denied his contractual entitlements but also been denied justice.

Did the Commissioner err in dismissing the application?

21 The question posed in this heading is important. Firstly, it is apparent that when one crucial part of the evidence given in this matter is considered, it is patently clear that no error can be demonstrated in the finding made by the Commissioner that the appellant had no entitlement to payment for additional hours, accrued annual leave or travel. It was common ground that it was agreed by the appellant and Mr Salwant Singh on behalf of the respondent that he would be paid $1,500 a week. This was the only material term agreed by the parties. Thus, the appellant's claims for overtime and travel could not succeed as there was no agreement to pay overtime or payment for kilometres travelled. The agreement was simply that the appellant would work as a chef each week for the agreed amount. There was no agreement that particular hours were to be worked, or that penalties or overtime would be paid. It was an all-up payment for each week's work as a chef, irrespective of the number of hours that had to be worked or the duties performed. Secondly, when the question in the heading is put in this way, without considering the Commissioner's reasons for decision, regard can be had to the most important issue that should have been addressed by the Commissioner in her reasons. That issue is and was, what were the terms of the contract? This issue was not properly addressed by the Commissioner. She failed to find what were the terms of the contract of employment and whether the appellant had been denied any benefit accrued to him in accordance with the terms of the contract.

22 Nor was there any agreement to pay for untaken accrued annual leave. Where the provisions of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) apply, a right to pro-rata annual leave is implied into each contract of employment, pursuant to s 5 and s 23 of the MCE Act. However, the respondent is a national system employer within the meaning of s 14 of the *Fair Work Act 2009* (Cth). Where a person is employed by a national system employer, no right to pro-rata annual leave can be implied into the appellant's contract of employment. By operation of s 26(1), s 26(2)(b)(ii) and s 26(2)(c) of the *Fair Work Act*, an entitlement to pro-rata annual leave under the MCE Act does not apply to the conditions of employment of a person employed by a national system employer. Thus, in this matter, in the absence of any agreement to make payment for accrued pro-rata annual leave, the appellant's claim for payment for pro-rata annual leave could not have succeeded. In particular, there was no evidence it was a term of the appellant's contract of employment that he was to be paid for pro-rata annual leave.

Did the Commissioner err in her reasons for decision?

23 The decision appealed against is not the reasons for decision, but the order to dismiss the application. Whilst we are of the opinion that when regard is had to the evidence given by the parties, the order to dismiss was the only order that was open on the evidence; it is apparent that the Commissioner erred in her reasons for making the order. In addition, when the transcript of the hearing at first instance is reviewed, it is clear that the hearing was not conducted in a way that was fair to the parties. However, this could not have changed the outcome of the application.

(a) Ground 1 – the claim for travelling allowance

24 We are not persuaded that the Commissioner erred in finding the appellant had no contractual entitlement to travelling allowance. The appellant conceded when giving evidence at the hearing at first instance that there was no agreement that he would be paid travelling allowance to collect goods from Perth. He resorted to 'award rates' as a yardstick. But 'award rates'

were not a term of his contract. The Commissioner, in our opinion, properly relied upon this concession in making her finding that this claim had no merit. For this reason, ground 1 of the appeal fails.

(b) Ground 2 - the timesheets tendered by the respondent as exhibit R1

25 Although any record of the hours worked by the appellant should have not been material as uncontradicted evidence of the parties could be relied upon to find an all-up rate of pay, it is apparent the contents of the timesheets formed the central evidential premise relied upon by the Commissioner in making her decision to dismiss the appellant's claim for overtime. Thus, the procedure adopted by the Commissioner in accepting these documents into evidence requires examination.

26 In ground 2 of the grounds of appeal, the appellant points out that when the timesheets were produced by Mr Zia, the appellant informed the Commissioner that he had not seen them.

27 The timesheets were tendered into evidence during the examination in chief of Mr Zia and after the appellant had given his evidence. Whilst the timesheets were tendered into evidence without objection by the appellant and the contents were not challenged by him in cross-examination of Mr Zia or Mr Salwant Singh, the tender of these documents was, in our opinion, unfair to the appellant. When the Commissioner asked the appellant whether he had seen the timesheets and he said, 'No', the Commissioner had a duty to assist the appellant as a self-represented litigant by advising him that he could, if he wished, object to the tender of the documents into evidence, or if the documents were to be accepted he could return to the witness box and give evidence about his knowledge of the matters stated in the timesheets. She did neither of these things.

28 As Bell J in ***Tomasevic v Travaglini*** [2007] VSC 337 recently observed, it is the function of a judicial decision-maker to find facts on the basis of the evidence and in doing so is to ensure trial fairness and to elicit relevant evidence [127] - [128]. At [139] - [141] he explained:

> 139 Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR [International Covenant on Civil and Political Rights]. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.
>
> 140 Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.
>
> 141 The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

29 These principles are also applicable to matters heard in this Commission.

30 In light of the statement from the appellant that he had not seen the timesheets, the Commissioner should have asked Mr Zia who prepared the timesheets and how the entries in the timesheets were made. It was necessary for these questions to be asked to test whether the information contained in the timesheets could be relied upon as an accurate record of hours worked by the appellant. Without such an inquiry, and in light of the appellant's evidence that he kept his own record of the hours he worked, it was not open for the Commissioner to have relied upon the timesheets as evidence of the actual hours worked by the appellant. In any event, if questions were asked about who was the author of the entries in the timesheets and how were they prepared, it would have emerged that a third party kept records of times worked by the appellant and Mr Zia made the entries in the timesheets: appeal ts 10.

31 If a party has not been given a proper opportunity to deal with evidence that is given without warning by the opposing party, the situation can in some matters be remedied by the recall of the first party: ***Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation*** (1983) 44 ALR 607 (630). When the timesheets were accepted into evidence, if the contents were to be regarded by either party as directly relevant to the matters in issue, the appellant should have been afforded an opportunity of being recalled to the witness box to give evidence about his knowledge of the fact of the existence of the timesheets and whether the record of hours in those timesheets was accurate. The failure to afford the appellant such an opportunity was a breach by the Commissioner of the rules of procedural fairness and entitled the appellant to call in aid the rule in ***Browne v Dunn*** (1894) 6 R 67. The observance of the rule in ***Browne v Dunn*** is a rule that is fundamental to the proper conduct of a hearing of any application made under s 29(1) of the Act.

32 In ***Allied Pastoral Holdings Pty Ltd*** Hunt J said about the rule in ***Browne v Dunn*** (623):

> It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67.

33 This rule of practice, as Wells J in ***Reid v Kerr*** [1974] 9 SASR 367 said, is derived from (373 - 374):

> [T]wo basic precepts designed to ensure a fair trial according to law. The first is one of common justice: no witness should be attacked – and it is of prime importance that no party and no witness should think that it has happened – behind his back; he should have a fair opportunity of meeting whatever challenge is offered to his evidence and the substance of any testimony that is to be adduced to contradict it. The second precept is based on the practical needs of a trial under the adversary system: a judge (or jury) is entitled to have presented to him (or them) issues of fact that are well and truly joined on the evidence; there is nothing more frustrating to a tribunal of fact than to be presented with two important bodies of evidence which are inherently opposed in substance but which, because *Browne v. Dunn* ((1894) 6 R 67 (HL)) has not been observed, have not been brought into direct opposition, and serenely pass one another by like two trains in the night.

34 It is notable that when the *Magistrates Court Act 2004* (WA) was enacted, the rule in ***Browne v Dunn*** was expressly incorporated into procedures prescribed for Magistrates Courts. Section 30 of the *Magistrates Court Act* provides:

> In a case where a party is self-represented, the Court must inform the party of —
>
> (a) the need, when cross-examining a witness called by another party, to ask the witness about any evidence of which the witness or the other party has not previously had notice that the self-represented party —
>
> (i) intends to adduce; and
>
> (ii) intends to allege will contradict the witness's evidence;
>
> and
>
> (b) the consequences of not doing so.

35 The reason why this provision was enacted is that in recent times there has been a decline of professional representation in civil matters in Magistrates Courts. This provision was enacted to reflect the common law obligation on courts and tribunals to explain court procedures to self-represented parties: *Civil Procedure WA Magistrates Court, Legislative Developments*, Bulletin No 14, May 2004. Magistrates who preside over Magistrates Courts are, unlike members of the Commission, strictly bound to apply the rules of evidence. Thus one might say that the Commission is not obliged to apply the rule in ***Browne v Dunn***. Yet, in hearings where evidence is given and tested by cross-examination, the application of the rule becomes fundamental to a fair hearing.

36 Although pursuant to s 27 of the Act, the Commission is not bound by the rules of evidence and is able to inform itself as it thinks fit, that does not mean that the rules of evidence can or should be ignored. In *Justice in Tribunals* (3rd ed, 2010) the learned author J R S Forbes said [12.44]:

> The more important rules of evidence are designed to achieve justice and a tribunal may be persuaded, as a matter of discretion, that it is fair is to follow them. If they are not used to *exclude* evidence they may help in assessing its *weight* (*Kirkpatrick v Commonwealth* (1985) 9 FCR 36; 62 ALR 533). Consider, for example, the caution with which the courts treat eye-witness identifications (*Craig v R* (1933) 49 CLR 429 at 446; *R v Turnbull* [1977] 1 QB 224). In *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* ((1933) 50 CLR 228, 256 Evatt J observed:
>
> > Some stress has been laid by the present respondents upon the provision that the tribunal is not … 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the [other].

37 Forbes then went on to consider some practical considerations of a statutory command to liberate a tribunal from strictly applying the rules of evidence. He observed [12.45], [12.47] - [12.49]:

> [12.45] While it is clear that tribunals may act on hearsay (*T A Miller Ltd v Minister of Housing and Local Government* [1968] 1 WLR 992), it may be prudent to give it little or no weight if it is not sourced, or if no supporting evidence is adduced (*Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33). Some other pertinent questions are: How many 'tellers' has it passed through before reaching the tribunal? How likely is it that the original story was distorted? Was it reasonably possible to produce the same evidence in some better form (*Re Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1 at 5)?
>
> [12.47] There are other rules of evidence that a tribunal may choose to follow. As a matter of fairness it might decline to receive 'similar fact' evidence (See paragraph [12.60], below) if lapse of time, lack of resources or other circumstances are likely to make an effective response impossible (This is a reason for treating such evidence carefully, apart from its prejudicial tendencies: *Berger v Raymond Sun Ltd* [1984] 1 WLR 625).
>
> [12.48] The rule in *Jones v Dunkel* ((1959) 101 CLR 298; *Minister for Immigration and Multicultural Affairs v Capitly* (1999) 55 ALD 365) is a common sense rule of practice that a tribunal is entitled to apply (*Stasos v Tax Agents' Board of NSW* (1990) 90 ATC 4950; *Re Rodgers and Secretary, Department of Social Security* (1991) 24 ALD 693; *Edelsten v Minister for State for Health* (1998) 53 ALD 342; *Hewett v Medical Board (WA)* [2004] WASCA 170; *Rivera v Health Care* [2006] NSWCA 216; *Council of the NSW Bar Association v Power* [2008] NSWCA 135; *Bowen-James v Walton* (unreported, NSWCA, 5 August 1991); *New South Wales Bar Association v Meakes* [2006] NSWCA 340). According to *Jones v Dunkel* it may be inferred that a failure to call a significant witness, by a party well placed to call him, indicates that the missing evidence would not have assisted that party.
>
> [12.49] According to the rule in *Browne v Dunn* ((1893) 6 R 97 [sic]; *Allied Pastoral Holdings v Commissioner of Taxation* [1983] 1 NSWLR 1), a party who intends to ask a court to reject a witness's evidence should normally

> challenge that evidence in cross-examination and give the witness an opportunity to respond. This rule has been treated as a matter of natural justice in tribunals where oral evidence is received and cross-examination allowed (*Hoskins v Repatriation Commission* (1991) 32 FCR 443 at 446).

38 Where hearings of contested claims proceed in the Commission by the giving of witness evidence and cross-examination, the rule in ***Browne v Dunn*** should be explained to self-represented parties prior to the commencement of a hearing. It appears that did not occur. When the hearing transcript in this matter is read, it is apparent, as Wells J said, the body of evidence given by the appellant and the respondent passed each other without being tested 'like two trains in the night'. In light of the fact the appellant had not previously seen the timesheets and without the reliability of the contents of timesheets being tested, the timesheets should not have been relied upon by the Commissioner.

(c) Ground 3 - the appellant's claim for pro-rata annual leave

39 In ground 3 of the grounds of appeal, the appellant complains that the Commissioner did not ensure that all claims were covered and in failing to do so he had been denied justice. Whilst the complaint is correct, the fact is that the evidence did not provide any evidentiary support for the appellant's claim that he was entitled to under his contract of employment payment for pro-rata annual leave. Consequently, even if the appellant had been afforded an opportunity of giving evidence and making a submission about this claim, this claim could not have succeeded. However, that does not mean the complaint the appellant makes is not legitimate.

Further matters

40 Although the following matters were not raised by the appellant, they relate to the fundamental issue of the Commissioner not having conducted the hearing fairly. At a point in the appellant's evidence, the Commissioner said 'All right. You can stand down now' and asked Mr Zia whether he wanted to give evidence: hearing ts 7. In doing so, she did not give the appellant the opportunity, by way of re-examination, to explain or comment upon any of the answers he had given when being cross-examined. She did not confirm that he had concluded his evidence. She did not confirm that he had no other evidence to produce and that his case was therefore closed. The appellant does not complain that these omissions have disadvantaged him. However, that does not remove the obligation that was on the Commissioner to follow a procedure that ensured he was not disadvantaged.

41 At hearing ts 18-19, the appellant referred to his bundle of references and asked: 'Will they be of any use if I submit them?' The Commissioner's response was 'Well, I'm not going to tell you that. That would be most inappropriate, wouldn't it?' This was unhelpful to the appellant. We do not understand why it would be inappropriate for the Commissioner to explain to the appellant issues going to relevance and weight to be given to documents if they are tendered. This was a hearing in which there were unrepresented parties and it was appropriate that the Commissioner respond to such a question in a way that the appellant could make an informed decision whether or not he wished to tender his references.

42 When the Commissioner reserved her decision at the conclusion of the hearing, she said:

> I just want to let the parties know that this is a judicial decision, it's not an arbitral decision, which means, to prove the case, the applicant - it's a lot harder to prove a judicial decision than an arbitral decision.

43 We have great difficulty understanding this statement. It would have been a correct statement if the Commissioner had observed that she was exercising a judicial function, and not an arbitral function. It would be correct because when the Commission is enforcing entitlements due under a contract of employment, it is exercising a judicial function. However, the words 'it's a lot harder to prove a judicial decision than an arbitral decision' are a nonsense: an applicant is required to prove his claim on the balance of probabilities whether the jurisdiction being exercised by the Commission is judicial or arbitral.

44 More concerningly, if the Commissioner was intending to alert the appellant to the requirement on him to prove his case, in order to show fairness to him it was necessary that this be done at the commencement of the appellant's case, and not at the conclusion of the hearing when he had already presented his evidence.

Should the appeal be dismissed?

45 It has long been established that every person who brings an action before a court or tribunal is entitled to a fair hearing. Usually, when a miscarriage of justice on grounds of a breach of procedural fairness has occurred, an appeal will be successful and a new hearing will be ordered. This will not occur if a new hearing would be futile: ***Stead v State Government Insurance Commission*** (1986) 161 CLR 141, 145 (Mason, Wilson, Brennan, Deane and Dawson JJ). Thus, if compliance with the requirements of procedural fairness 'could have made no difference' to the result, relief will be withheld: ***Re Refugee Review Tribunal; Ex parte Aala*** [2000] HCA 57; (2000) 204 CLR 82, applying ***Stead*** [4] (Gleeson CJ), [104] and [110] (McHugh J), [131] (Kirby J) and [211] (Callinan J).

46 Although the hearing of the appellant's claims for contractual benefits was conducted in a manner that was unfair to the appellant, the demonstrated errors did not deny the appellant the possibility of a successful outcome. Even if the timesheets produced by Mr Zia were not accepted into evidence and the appellant's evidence about the hours he worked was accepted and even if the appellant was afforded an opportunity to make a submission or give evidence about his claim for pro-rata annual leave, in the face of uncontradicted evidence given by the appellant and Mr Salwant Singh about the agreed terms of the contract of employment, all the claims made by the appellant would necessarily fail.

47 We are of the opinion that leave should be granted to the appellant to appeal out of time as the Commissioner erred in her reasons for decision and in the manner she conducted the hearing of the application for denied contractual benefits. Although we are of the opinion that grounds 2 and 3 of the grounds of appeal have been made out, as the appellant is unable to show that he has benefits under his contract of employment that have been denied, we are of the view that the appeal should be dismissed.

HARRISON C:

48 I have had the benefit of reading the reasons for decision of her Honour, the Acting President and Beech CC. I agree with those reasons and have nothing to add.

2013 WAIRC 00134

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR KULWANT SINGH
	APPELLANT
	-and-
	DHALIWALZ PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 8 MARCH 2013
FILE NO.	FBA 5 OF 2012
CITATION NO.	2013 WAIRC 00134

Result	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr M N Zia and Mr S Singh

Order

This appeal having come on for hearing before the Full Bench on 22 January 2013, and having heard the appellant in person, and Mr M N Zia and Mr S Singh on behalf of the respondent, and reasons for decision having been delivered on 8 March 2013, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

2013 WAIRC 00123

APPLICATION PURSUANT TO S.62 - ALTERATION OF REGISTERED RULE 1 - NAME AND RULE 2 - CONSTITUTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2013 WAIRC 00123
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 14 JANUARY 2013, THURSDAY, 28 FEBRUARY 2013
DELIVERED	**:**	TUESDAY, 5 MARCH 2013
FILE NO.	**:**	FBM 7 OF 2012
BETWEEN	**:**	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	:	Industrial Law (WA) - application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise registration of alterations to registered rules - name of organisation - qualification of persons for membership - statutory criteria satisfied - application granted
Legislation	:	*Industrial Relations Act 1979* (WA) s 55, s 55(2), s 55(3), s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 55(5), s 56(1), s 59(1), s 62(2)
Result	:	Application granted
Representation:		
Applicant	:	Ms N Ireland and Mr L McLaughlan

Reasons for Decision

THE FULL BENCH:

Introduction

1 This application by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch (the applicant) was filed on 14 September 2012. The applicant, as a registered organisation, seeks the authorisation of the Full Bench, pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act), for the Registrar to alter the rules of the applicant as follows:

(a) To change the name of the organisation to the Electrical Trades Union WA; and

(b) To alter the qualifications of persons for membership in r 2 by changing the reference to 'tradesman' to 'tradesperson'.

2 As the proposed alterations seek to alter the name of the organisation and alter the qualification of persons for membership, the alterations sought cannot be registered by the Registrar unless the registration is authorised by the Full Bench.

3 This matter was first listed for hearing before the Full Bench on 14 January 2013. Immediately following the hearing, members of the Full Bench were informed that notice of the application and the rules of the applicant that relate to the qualification of persons for membership had not been published by the Registrar in the Western Australian Industrial Gazette as required by s 55(2) of the Act. Arrangements were then made on behalf of the Registrar to publish the required notice. The notice was published in the Western Australian Industrial Gazette on 23 January 2013: (2013) 93 WAIG 64 and as required by s 55(3) of the Act, the matter was relisted for hearing before the Full Bench on 28 February 2013.

4 After hearing Mr McLaughlan, the secretary of the applicant, on 28 February 2013, the Full Bench was satisfied the requirements in the Act that regulate alteration of rules of an organisation had been met. It then made the following order:

> The Registrar is hereby authorised to register the alterations to the rules of the applicant as published in the Western Australian Industrial Gazette on 23 January 2013 ((2013) 93 WAIG 64).

5 These reasons set out the reasons why the Full Bench formed the view that the proposal to register the alterations to the rules of the applicant to change its name and eligibility rule should be authorised by the Full Bench.

Reasons for the alterations to the rules

6 The applicant seeks to alter r 1 – Name and r 2 – Constitution. The reason why the name of the organisation is sought to be changed is set out in a notice sent to all members of the applicant in the 'CEPU Newsletter Western Australia' published in August 2012. In an attachment to a letter published in the newsletter from Mr McLaughlan, he said:

> The name should be changed to reflect the name that people recognise the Union as. Also, a shorter name will provide greater recognition and branding opportunities. It is recognized nationally and provides harmonization and consistency across the country.

7 Annexed to the letter was a table of proposed changes to the rules. In the table it was stated that the reason why the change of the word 'tradesman' to 'tradesperson' was sought was to change the wording in the eligibility rule so that it is gender neutral.

The applicant's rules about alterations

8 Pursuant to s 62(2) of the Act, the requirements of s 55(4) of the Act must be satisfied before the Full Bench can approve a rule alteration application to change the name of an organisation or to alter its rules of eligibility. Section 55(4) of the Act provides that the Full Bench shall refuse an application by an organisation under s 55 unless it is satisfied that:

(a) the application has been authorised in accordance with the rules of the organisation; and

(b) reasonable steps have been taken to adequately inform the members —

(i) of the intention of the organisation to apply for registration; and

(ii) of the proposed rules of the organisation; and

(iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,

and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection; and

(c) in relation to the members of the organisation —

(i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or

(ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;

and

(d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and

(e) rules of the organisation relating to elections for office —

(i) provide that the election shall be by secret ballot; and

(ii) conform with the requirements of section 56(1),

and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

9 The first matter the Full Bench must consider is that s 55(4) of the Act requires it to refuse a rule alteration application unless it has been authorised by the organisation in accordance with its rules.

10 The steps to be followed to alter the rules of the applicant are set out in r 19 of the rules of the applicant. Rule 19 provides as follows:

19.1 No amendment, addition to, variation, repeal or substitution of these rules shall be made unless endorsed by an Annual General Meeting or a Special General Meeting as provided for in Rule 7.

19.2 The Executive Committee or the State Council shall give seven (7) days notice specifying the time, place and objects of such meeting as referred to in 19.1 by conspicuously publishing a copy of a notice hereof in the major daily newspaper circulating in Western Australia and by posting a copy of the notice in a conspicuous place outside the Union office, also by notification to Job Representatives.

19.3 Notwithstanding anything hereinbefore contained no alteration to these Rules shall be made unless twenty one (21) days notice of the proposed alteration and the reasons therefore is given to members. The said notice and reasons shall be in writing and either distributed to all members of the Union or published conspicuously in the major daily newspaper circulating in Western Australia.

19.4 The notice referred to in 19.3 shall inform members that they or any of them may object to the making of the application for alteration or to the proposed alteration by forwarding written objection to the Registrar of the Western Australian Industrial Relations Commission to reach the Registrar no later than twenty one (21) days after the date of distribution or publication of the notice.

11 Pursuant to this rule, a special general meeting is empowered to endorse the alterations to the rules of the applicant. However, prior to a special general meeting being held seven days' notice of a special general meeting must be given by the executive committee or the state council. Also, prior to the special general meeting, 21 days' notice of the proposed alterations and the reasons for the alterations must be given to the members.

12 The facts supporting the applicant's submission that it complied with the rules of the applicant and the statutory requirements of the Act are set out in a statutory declaration made by Mr McLaughlan on 13 September 2012. Mr McLaughlan's statutory declaration evidences the following matters:

(a) The proposed changes to the rules of the applicant were tabled at a state council meeting on 1 August 2012. State council endorsed the rule changes and a motion was passed that a special general meeting be called for 5 September 2012 so that a ballot could be held on the changes.

(b) A notice to members of the special general meeting, an explanation of the proposed changes and information on where further details could be obtained was put into the applicant's newsletter which was posted to members on 13 August 2012.

(c) On 24 August 2012, a notice was placed on the door of the union office notifying the details of the special general meeting.

(d) An advertisement of a special general meeting to be held to consider proposed rule changes of the organisation was published in The West Australian newspaper on Friday, 24 August 2012.

(e) The special general meeting was held on 5 September 2012 at the union office in Balcatta.

(f) Thirty members of the union attended the meeting.

(g) The members voted in favour of the proposed changes.

13 The minutes of the special general meeting held on 5 September 2012 record that Mr McLaughlan outlined the process that the applicant had gone through in order to propose the alterations to the rules. Mr McLaughlan outlined the reasons for the proposed changes. He recommended that the rule changes be accepted by the meeting and outlined the process of applying to the Commission in order to change the rules. He also recommended that the application be made by the applicant to alter the rules as soon as possible. A motion was carried that the secretary's report be accepted and the recommendations endorsed.

14 It is our opinion that the special general meeting had been convened in compliance with r 19, r 7 and r 8 of the rules of the applicant:

(a) Pursuant to r 7.2, the secretary of the union is empowered to convene a special general meeting when requested by the state council or the executive committee to do so. In compliance with this rule, the request was made at a meeting of state council on 1 August 2012.

(b) Rule 7.3 requires the executive committee or state council to give seven days' notice specifying the time, place and objects of a special general meeting by publishing a copy of a notice in the major daily newspaper circulating in Western Australia, posting a copy of the notice in a conspicuous place outside the union office and by notification to job representatives. This provision in r 7.3 is identical to r 19.2 of the rules of the applicant. The statutory declaration of Mr McLaughlan provides documentary evidence that as required by r 7.3 and r 19.2, a notice was published in a major daily newspaper and on the door of the union office. On 14 January 2013, Ms Ireland provided to members of the Full Bench a copy of a letter dated 24 August 2012 containing notice that Mr McLaughlan sent to all job representatives. The notice set out the time, place and purpose of the special general meeting held on 5 September 2012.

(c) As required by r 19.3, notice of the special general meeting was also given to each of the members. We are also satisfied that the notice of the meeting and the reasons for making the alterations to the rules was given more than 21 days prior to the special general meeting being convened.

(d) Pursuant to r 8.1, a quorum of a special general meeting is 25 members. The minutes of the special general meeting record that 30 members of the applicant attended.

15 Having regard to all of this evidence, the Full Bench is satisfied that the application to alter the rules of the applicant had been authorised in accordance with its rules as required by s 55(4)(a) of the Act.

16 We are also satisfied that the members of the applicant had been provided with a reasonable opportunity to make an objection to the alterations and we note that no member of the applicant has objected to the making of the application or to the proposed alterations. For these reasons, we are satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act had been complied with. We are also satisfied that the requirements of s 55(5) of the Act do not arise as the proposed rule changes do not change or seek to alter in any way the eligibility of persons eligible to be members to include persons who are eligible to be enrolled in another organisation.

17 Section 55(4)(e) and s 56(1) of the Act relate to procedural rules for election for office, including secret ballots. The applicant's rules currently provide for the procedures required by these provisions of the Act and the alterations sought in this matter do not deal with the matters specified in those provisions of the Act. Consequently, no issue arises in this application in relation to the requirements of s 55(4)(e) and s 56(1) of the Act.

18 Pursuant to s 59(1) of the Act, the Full Bench is prohibited from authorising the registration of an organisation under a name identical with that by which any other organisation has been registered or which by reason of its semblance to the name of another organisation or body or for any other reason is, in the opinion of the Full Bench, likely to deceive or mislead any person. When regard is had to the record of the names of the organisations that are registered under the Act, we are satisfied that there is no other organisation that has a name that is identical or similar to the name of the proposed name of the applicant.

2013 WAIRC 00111

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	THURSDAY, 28 FEBRUARY 2013
FILE NO/S	FBM 7 OF 2012
CITATION NO.	2013 WAIRC 00111

Result	Order issued
Appearances	
Applicant	Ms N Ireland and Mr L McLaughlan

Order

This matter having come on for hearing before the Full Bench on Thursday, 28 February 2013, and having heard Ms N Ireland and Mr L McLaughlan on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The Registrar is hereby authorised to register the alterations to the rules of the applicant as published in the Western Australian Industrial Gazette on 23 January 2013 ((2013) 93 WAIG 64).

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Unions—Application for registration—

2013 WAIRC 00138

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PRINCIPALS' FEDERATION OF WESTERN AUSTRALIA
	APPLICANT
	-and-
	(THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	CECIL O'NEILL
	EDMUND FREDRICK BLACK
	JENNIFER BROZ
	KAYE ROSALIND HOSKING
	LESLIE BRUCE BANYARD
	TREVOR STEPHEN VAUGHAN
	OBJECTORS
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 11 MARCH 2013
FILE NO.	FBM 8 OF 2011
CITATION NO.	2013 WAIRC 00138

Result	Order issued

Order

The Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders, by consent, that —

1. The applicant file and serve an application under reg 20 of the *Industrial Relations Commission Regulations 2005* by close of business on 13 March 2013 (the application).
2. The applicant file and serve written submissions in relation to the application on or before 18 March 2013.
3. The objectors file and serve written submissions in relation to the application on or before 28 March 2013.
4. The application be set down for hearing on a date no earlier than 15 April 2013.
5. The parties have liberty to apply.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2013 WAIRC 00107

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ANTHONY HEWITT
	APPLICANT
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	MONDAY, 25 FEBRUARY 2013
FILE NO/S	PRES 1 OF 2013
CITATION NO.	2013 WAIRC 00107

Result	Order issued
Appearances	
Applicant	In person
Respondent	Mr M Finnegan

Order

This matter having come on for a directions hearing before me on 22 February 2013, and having heard the applicant in person, and Mr M Finnegan on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. The applicant file and serve a statement of particulars within 14 days of 22 February 2013, setting out:
   (a) the rule or rules of the respondent he says have not been observed; and
   (b) the facts upon which he relies to establish a finding of non-observance of a rule or rules of the respondent.
2. The respondent file and serve any further and better notice of answer and counter-proposal within seven (7) days of receipt of the applicant's statement of particulars.
3. The matter be listed for a further directions hearing at 111 St Georges Terrace, Perth in Court 1 (Level 18) on Friday, 15 March 2013 at 10:30 am.

(Sgd.) J H SMITH,
[L.S.] Acting President.

2013 WAIRC 00126

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER ANTHONY HEWITT
	APPLICANT
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 7 MARCH 2013
FILE NO.	PRES 1 OF 2013
CITATION NO.	2013 WAIRC 00126

Result	Application discontinued
Appearances	
Applicant	In person
Respondent	Mr M Finnegan

Order

WHEREAS this is an application pursuant to s 66 of the *Industrial Relations Act 1979* filed on 8 February 2013*;*

AND WHEREAS on 11 February 2013, the matter was listed for a directions hearing on 22 February 2013;

AND WHEREAS on 19 February 2013, the respondent filed a notice of answer and counter-proposal;

AND WHEREAS on 22 February 2013, the matter came on for a directions hearing before the President and the applicant appeared in person and Mr M Finnegan appeared on behalf of the respondent;

AND WHEREAS on 25 February 2013, a directions order was issued and the matter was listed for a further directions hearing on 15 March 2013;

AND WHEREAS on 5 March 2013, the applicant filed a Notice of withdrawal or discontinuance and a Statutory declaration of service in respect of the application;

AND WHEREAS on 6 March 2013, the respondent informed the Commission that it consents to the application being discontinued;

NOW THEREFORE, the President, pursuant to the powers conferred on her under the *Industrial Relations Act 1979*, hereby orders that —

1. The further directions hearing listed for 15 March 2013 be vacated; and
2. The application be and is hereby discontinued by leave.

(Sgd.) J H SMITH,
[L.S.] Acting President.

INDUSTRIAL MAGISTRATE—Claims before—

2013 WAIRC 00052

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2013 WAIRC 00052
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 19 DECEMBER 2012
DELIVERED	**:**	WEDNESDAY, 19 DECEMBER 2012
FILE NO.	**:**	CP 10 OF 2012, CP 11 OF 2012, CP 12 OF 2012, CP 13 OF 2012, CP 14 OF 2012, CP 15 OF 2012, CP 16 OF 2012, CP 17 OF 2012, CP 18 OF 2012, CP 19 OF 2012, CP 20 OF 2012, CP 21 OF 2012, CP 22 OF 2012, CP 23 OF 2012, CP 24 OF 2012, CP 25 OF 2012
BETWEEN	**:**	DEPARTMENT OF COMMERCE
		PROSECUTOR
		AND
		KENTUCKY FRIED CHICKEN PTY LTD ACN 000 587 780
		ACCUSED

Sentencing Remarks

Legislation	**:**	*Children and Community Services Act 2004*
		Sentencing Act 1995
Result	**:**	Conviction entered and global penalty imposed.
Prosecutor	**:**	Mr J Lee (of Counsel)
Accused	**:**	Mr T McDonald (of Counsel)

Sentencing Remarks

(These sentencing remarks were delivered extemporaneously on 19 December 2012 and have been edited from the transcript)

1 The Accused has pleaded guilty to and has been convicted of sixteen offences. In each instance section 190(1) of the *Children and Community Services Act 2004* (the Act) has been breached.

2 Section 190 of the Act provides that:

"A person must not employ a child under 15 years in a business, trade or occupation carried on for profit."

3 However, there are exceptions to that prohibition. The exceptions are found in section 191 of the Act which provides inter alia that:

> *"Children under the age of 15 years can work between the hours of 6 am and 10 pm with the written permission of a parent."*

4 In these matters it is alleged that children either worked without written parental permission, or worked beyond 10:00pm. In some instances it is alleged that both occurred.

5 The *Children and Community Services Act 2004* is an Act which in part, is aimed at protecting children from exploitation in their employment. The exploitation of children in their employment can arise in various circumstances. Further, the Act promotes the wellbeing of children.

6 Often children are desirous of working and will work for extended periods, thereby neglecting their social and educational needs. Often children may be encouraged to work by their well-meaning parents. Nevertheless, the effects of a child working may negatively impact upon the child. That is sometimes unrecognised.

7 In some instances, employers will use children as a cheap source of labour in achieving their ends. I say at this point that I do not consider that the Accused has in this instance done that.

8 The Act is welfare legislation, which strives to protect young people who are unable to protect themselves. It aims at ensuring that children maintain a balance between their work and other activities which they need to experience as children. It follows that any breach of the legislation must be viewed with the objectives of the Act in mind.

9 Each offence carries a penalty of $24,000. However, section 40(5) of the *Sentencing Act 1995* has application with respect to corporations. The maximum penalty for a corporation is therefore $120,000. The Accused in this matter is a corporation and is subject to a $120,000 fine for each of the breaches.

10 Section 6 of the *Sentencing Act 1995* sets out the principles of sentencing. It provides that the sentence imposed must be commensurate with the seriousness of the offence. The seriousness of the offence must be determined by taking into account the following factors:

1. the statutory penalty;
2. the circumstances of the commission of the offence, including the vulnerability of any victim;
3. any aggravating factors; and
4. any mitigating factors.

11 Aggravating factors are those which increase the culpability of an Accused. Mitigating factors are those which decrease the culpability of the accused or which would otherwise decrease the extent of any penalty that might be imposed.

12 The Accused in this matter trades as KFC. It operates four outlets in Western Australia at Karratha, Forrestfield, Ellenbrook and Rockingham. It has many more stores in the Eastern States. Its Western Australian operations are a minor part of its overall operations. Most KFC outlets in Western Australia are operated by franchisees.

13 The offences in these matters have in the main occurred at the Accused's Ellenbrook and Forrestfield stores. There was also one incident at its Rockingham store. The Karratha store was not involved in any of the offending behaviour.

14 It is alleged that between 4 November 2011 and 26 May 2012 the Accused employed sixteen children aged under 15 years otherwise than in conformity with the Act. I acknowledge that most of the children involved were nearing their 15th birthday. The sixteen children involved completed a total of 153 shifts after 10:00pm. On forty four separate occasions a child finished work after midnight. On one occasion a child finished work at 1:17am. In twenty one instances the child concerned worked late preceding a school day.

15 The offending took place over a 7 month period at three separate locations. In offending the Accused breached its own policy in relation to the employment of children. The offending was clearly serious. It was systemic in nature because it seems that the Accused allowed the offending to be repeated.

16 An aggravating factor in these matters is that the Accused had rostered some children to work beyond 10:00pm. In most instances, the children worked well beyond 10:00pm. There is a concern arising from the fact that the Accused enabled that to occur in the knowledge that it contravened the law and its own policies. The offending did not arise by inadvertence.

17 The Accused well knew what the law was. Indeed its own policies reaffirmed the requirement for compliance. Unfortunately the individual store managers concerned simply failed to comply with those requirements. It seems that the Accused did not have operative functions in place to prevent that occurring. That is an aggravating factor, in my view.

18 In mitigation, I accept that in the commission of these offences the Accused was not motivated by financial gain. The offences have resulted from inefficiency in management by individual managers. However there was a failure by the Accused to overview its managers' conduct at each particular store. That has now been put right. I take that into account as a mitigating factor. I also take into account that the Accused has no relevant record. That is of particular significance as is the fact that the Accused has pleaded guilty at its very first opportunity.

19 The Accused is clearly remorseful. It's gone into this matter in a very detailed way. It has presented to this court a large amount of materials outlining what it has already done and what it proposes to ensure that the offending does not reoccur.

20 I accept that the Accused has cooperated with prosecuting authorities. I accept what I have been told by Counsel for the Accused concerning the Accused cooperation. Indeed that is consistent with what is said in an affidavit lodged, which was sworn by the Accused's Human Resources Development Manager. The contents of the affidavit are unchallenged. I accept that the Accused, upon being notified of the offending caused its officers to come to Perth to discuss the issues with the

prosecuting authority. It did all that it could to resolve the matters as quickly as possible. The Accused must be given credit for that. As indicated it has now put in place measures to prevent the reoccurrence of the breaches. That reflects the way in which it views seriously its own its conduct and demonstrates its remorse in this matter.

21 The materials provided in the affidavit before me indicate that the Accused is a good corporate citizen. It has invested a large amount of money in the wellbeing of children. I need not detail those matters that are within the affidavit save to say that it is clearly evident that the Accused exercises good corporate responsibility with respect to its affairs relating to children.

22 The mitigating factors to which I have referred are substantial and inevitably impact in a significant way the ultimate disposition.

23 Section 54 of the *Sentencing Act 1995* enables this court to impose a global penalty where two or more offences are founded on the same facts or form, or are part of a series of offences of the same or similar kind. I propose to impose a single fine for all the offences. In doing so, I recognise that there are some material differences in seriousness between various counts.

24 I accept that the counts in relation to the children F, L and R, are at the bottom end of the scale of seriousness.

25 The most serious of the matters before me are those that relate to the children C, W, P, Fr and B-H. Those offences are to be regarded as being at the higher end of offending in respect of this group of offences, but are at mid-range of seriousness in relation to offending as a whole. There are some other offences which fall somewhere between the two putting them at the low to mid-range of offending.

26 In imposing the appropriate singular penalty, I take into account the need for a strong deterrent penalty. In matters such as this it is the general deterrent aspect of the penalty that attracts the greatest significance. It is important that not only the Accused but others get the message, that the welfare of young children is paramount. Children under the age of 15 should not work late. It is really quite a simple proposition. Working late will inevitably impinge upon a child's ability to perform at school and in other ways. Working late produces a myriad of undesirable outcomes. I need not mention them all. They will be obvious. The fact that a child or children, by working late, does not suffer any physical harm is of little significance. It will be other factors pertaining to the child's psychological and social circumstances that are important. Having said that I note that in most instances the children involved in these matters were approaching 15 years. Unlike some other similar matters dealt with by this Court the affected children were not of a particularly tender age.

27 Any fine imposed must, as I have said, be commensurate with the seriousness of the offending, taking into account the mitigating factors to which I have referred. The imposition of a single fine of $30,000 will, in my view, be reflective of the Accused's conduct which is commensurate with the seriousness of its offending, yet taking into account mitigating factors.

28 That penalty is consistent with other penalties imposed by this Court involving similar offending behaviour. That penalty is of significance. It is not a small penalty but is unlikely to crush the Accused. It reflects the seriousness of the Accused's conduct. It constitutes not only a personal deterrent penalty but, more importantly, acts a general deterrent penalty which will send a message to others that they cannot employ children at a late hour.

29 A global penalty of $30,000 is imposed.

G. CICCHINI
INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2013 WAIRC 00096

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00096
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 3 JULY 2012, TUESDAY, 27 NOVEMBER 2012, FRIDAY, 10 AUGUST 2012
DELIVERED	**:**	FRIDAY, 22 FEBRUARY 2013
FILE NO.	**:**	U 118 OF 2012, B 118 OF 2012
BETWEEN	**:**	DAVID ERNEST ELEY
		Applicant
		AND
		POTATO MARKETING CORPORATION OF WESTERN AUSTRALIA
		Respondent

Catchwords	:	Industrial law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal - Alleged denied contractual benefits - Jurisdiction considered - Whether respondent trading or financial corporation - Principles applied - Whether contractual relationship had been entered into - Unfair dismissal application dismissed; contractual benefits application to be listed for further hearing.
Legislation	:	Constitution (Cth) s 51(xx); Fair Work Act 2009 (Cth) ss 14, 26; Industrial Relations Act 1979 ss 29(1)(b), 29AA; Marketing of Potatoes Act 1946
Result	:	Declaration and order issued
Representation:		
Applicant	:	In person
Respondent	:	Mr D Howlett of counsel

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No.2) (2008) 89 WAIG 243

Stylianou v Country Realty Pty Ltd (2010) 91 WAIG 2029

Triantopoulos v Shell Company of Australia Ltd (2010) 91 WAIG 57

Higgins v Gateway Printing (2010) 90 WAIG 529

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

Reasons for Decision

1 Mr Eley was briefly appointed as the Chief Executive Officer of the Potato Marketing Corporation of Western Australia on 7 May 2012. His appointment was terminated on 14 May 2012. He now brings these proceedings alleging that the Corporation dismissed him unfairly. Additionally, Mr Eley seeks contractual benefits by way of salary for three years in the sum of $457,011 and a further $61,000 by way of a motor vehicle allowance for the same period.

2 A preliminary question has arisen in relation to both applications, that being whether the Corporation is a trading corporation for the purposes of s 51(xx) of the Constitution (Cth) and thereby is a national system employer for the purposes of s 14 of the Fair Work Act 2009 (Cth). If so, then by s 26 of the FW Act, Mr Eley's unfair dismissal application must be dismissed. In the case of his contractual benefits claim, there is a further argument put by the Corporation that Mr Eley's employment was not subject to an industrial instrument, for the purposes of s 29AA of the Industrial Relations Act 1979 (WA) and his salary exceeded the prescribed amount, precluding him from bringing a contractual benefits claim in this jurisdiction.

3 By the agreement of the parties, the Commission will deal with the jurisdictional issues first.

The Corporation

4 The Corporation is established under the Marketing of Potatoes Act 1946. The long title to the legislation refers to it as "[a]n Act to make provision for the marketing, sale and disposal of ware potatoes and to control their production; to require the registration of growers, and the licensing of areas of land used for the production, of potatoes; …" Under ss 9 and 10 of the MP Act, the Corporation is a body corporate and is not to be regarded as an agent or servant of the Crown. The functions of the Corporation are set out in s 17A of the MP Act which is in the following terms:

> ***17A. Functions***
>
> The functions of the Corporation are to —
>
> (a) regulate the production of ware potatoes so as to ensure the supply of the quantities, kinds and qualities preferred by consumers in the State; and
>
> (b) take delivery of, and otherwise deal with, potatoes in accordance with this Act and market potatoes in the State and elsewhere; and
>
> (c) register persons who are to be authorised to carry on business as a commercial producer of potatoes, and license the areas of land to be used in any such business; and
>
> (d) encourage and promote the use of potatoes and provide for the monitoring and, if thought fit, regulation of the production of potatoes for propagation or for any other prescribed kind of use; and
>
> (e) foster methods of production and adopt methods of marketing that will enable potatoes grown in the State to compete in price and quality against potatoes from alternative sources of supply; and
>
> (f) promote, encourage, fund and arrange for the conduct of research into matters relating to the production and marketing of potatoes, and undertake market development; and
>
> (g) seek and apply knowledge of new and improved techniques and materials that will assist it to perform its functions.

5 Furthermore, the Corporation has, for the purposes of carrying out its functions, a range of powers set out in s 19 of the MP Act. This includes, in s 19(1)(f), the power to "receive, handle, wash, brush, package, grade, treat, process, store, *purchase or sell potatoes, or contract or arrange for any such matter*" (emphasis added). The Corporation may also enter into partnerships

or arrangements for sharing of expenditure, profits and losses and may form or establish or take part in any corporation or joint venture.

6 Under s 22 of the MP Act, a person may not sell or deliver potatoes in this State other than to the Corporation or one of its authorised agents. It is an offence to not do so. Under Part IV of the MP Act, the Corporation's role in relation to marketing of potatoes in the State is set out. Additionally the Corporation has a regulatory function, in relation to the grant of permits to buy and sell potatoes and the licencing of growers and areas over which potatoes may be grown in the State.

7 The activities of the Corporation are set out in two affidavits of Ms Chalmers, a member of the Board of the Corporation, and Mr Cusack, the Corporation's Chief Operating Officer. Mr Cusack's affidavit was filed and served on Mr Eley at the request of the Commission. This was to address issues concerning the day to day operations of the Corporation. Mr Eley did not request the opportunity to cross-examine Mr Cusack. The evidence as a whole was not in contest. The issue is the characterisation of the Corporation's activities.

8 Ms Chalmers said that the Corporation has not, since at least 2005, received any financial support from the State or Commonwealth governments. She said that most of the Corporation's income is generated by trading activities through the sale of ware potatoes. Ms Chalmers said that presently, the agents appointed by the Corporation to receive, pack and grade potatoes as wholesale merchants, have also been appointed to distribute potatoes to retailers. Ms Chalmers referred to the written agency agreements between the Corporation and the merchants. These contain the commercial terms of the relationship between them.

9 According to Ms Chalmers, the Corporation's trading activity involves it making payments to the growers of potatoes in return for them growing and supplying potatoes to the merchants who then sell them into the market. Annexed to Ms Chalmers' first affidavit were copies of the Corporation's Annual Reports for the years ended 30 June 2006 and 30 June 2011 respectively. In relation to the latter, Ms Chalmers noted that the "sales" revenue to the Corporation for the year ended 30 June 2011 was $35,301,574 and the "cost of sales" expenses for the same period, were $33,577,551.

10 The day to day activities of the Corporation, and the process by which it acquires and disposes of potatoes, was set out in some detail by Mr Cusack. Mr Cusack described the activities of the Corporation and its fundamental role as ensuring a sufficient supply of potatoes to satisfy demand within the State and to market them within the State and elsewhere. The Corporation uses a network of licenced growers and merchants to achieve these objectives. Mr Cusack described the customers for potatoes as "end-point" customers, including large retailers such as Woolworths or Coles, potato wholesalers or companies that engage in potato processing. In this State there are presently some 60 growers and four main merchants who act as both packing/grading agents and distributors for potato product. Mr Cusack described both growers and merchants as independent commercial enterprises.

11 The Corporation's process for receiving and dealing with potatoes was outlined by Mr Cusack as follows. A grower licenced by the Corporation delivers harvested potatoes to merchants. Having done so, the grower provides two copies of Advice to the merchant, merchant then provides the Corporation with a Potato Consignment Advice. The appointed merchant, as an agent for the Corporation, then grades the potatoes depending upon their particular class. Once this is done, the merchant then submits to the Corporation a "Packout Result". This document identifies the merchant, the grower, the relevant Consignment Advice, and the tonnages, grades and price per tonne for the potatoes. From the Packout Results, the Corporation generates an invoice to the merchant.

12 The amount to be paid by the merchant for potatoes, takes into account a number of factors based upon current supply and market price data. Mr Cusack said that the Corporation tries to set prices which maximise their value to the Corporation, but which also allow the merchants to sell into the market at a competitive price. Mr Cusack further testified that the prices are regularly reviewed and are responsive to prevailing market conditions.

13 Once the invoice has been issued to the merchant by the Corporation, the merchant pays the relevant amount to the Corporation in accordance with the agreed payment terms, regardless of whether their merchant has in turn on-sold the potatoes to customers in the marketplace. Mr Cusack described the payment from merchants to the Corporation, as effectively "the price that the merchants pay to the Respondent to be given the right to sell the potatoes to customers."

14 In terms of the relationship between the Corporation and its merchants, Mr Cusack said that from time to time merchants will request the Corporation to discount a particular batch of potatoes, having regard to factors such as an oversupply at any time in the market. The Corporation sometimes agrees to such a discount or a lesser amount, depending upon its assessment of the commercial value of the potato batch concerned and other relevant market factors. If no agreement is reached between the Corporation and the merchant on the amount, then the merchants have the option of delivering the consignment of potatoes to the Corporation's "Board Store". Potatoes in the Board Store can then be offered to another merchant, failing which, they are sold direct to the market. According to Mr Cusack, in the year ending June 2012, total revenue from Board Store sales direct to customers was $51,071.09.

15 The Corporation is not involved in any way, in the sale process between the merchant and customers of the merchants.

16 The proceeds from the payments by the merchants to the Corporation are then distributed to the growers according to the particular "pool" that the growers are in. There are four payments made by the Corporation within each pool. The purpose of this system is to ensure that grower incomes are spread within each pool and in proportion to each grower's contribution to the pool. The amounts the growers receive are determined according to a detailed financial formula, based upon tonnage, grades and varieties delivered by the particular grower.

17 The costs of the Corporation in undertaking its activities are obtained by deducting a proportion of the funds paid into each pool. Such costs cover salaries and wages for staff, and general operating costs of the Corporation. Also, two per cent of the dollar value of each pool is deducted and paid into a Grower Reserve Fund. This Fund is used for the purposes of supplementing the price paid to growers during winter months, and also to undertake market research and development.

18 A copy of the Corporation's Annual Report for the year ended 30 June 2012 was annexed to an affidavit filed by Mr Eley. This records that for the 2012 financial year, total revenue from "sales" was $32,889,782. This compared to $35,301,574 for the 2011 financial year. Other revenue for 2012 included interest revenue of $99,029, and "other revenue" of $168,756. This latter revenue comprised store rentals, laboratory analysis and other items. The total income for 2012 was $33,157,567. On the expense side, for 2012 the "cost of sales" was $30,711,152. Other expenses include those directly related to the running of the Corporation.

19 It is clear that from the evidence of Ms Chalmers and Mr Cusack, that the "sales" revenue represents the payments made by the merchants to the Corporation for the right to sell potatoes into the retail market. Correspondingly, the "cost of sales" represents the payments made by the Corporation to the growers in accordance with the system outlined above. The only monies retained by the Corporation, save for the contributions into the Fund, are those to cover its operating expenses. The Corporation does not make a profit, and it endeavours to return all available funds to the growers.

20 According to Mr Eley, when he applied for the position of Chief Executive Officer, there was no reference to federal industrial instruments or federal industrial legislation in the materials that he was given as a part of the recruitment process. Mr Eley pointed to his job description, which refers to the relevant industrial instrument as being the Government Officers' Salaries, Allowances and Conditions Award 1989, an award of this Commission. Mr Eley also made reference to the relevant part of the 2012 Annual Report, which deals with key legislation impacting on the Corporation's activities. Mr Eley said that no reference is made in this material to the FW Act, and the only reference is to the Act, the Industrial Relations Reform Act 1993 (WA) and the Minimum Conditions of Employment Act 1993 (WA).

Legal principles

21 Whether a corporation is a trading or financial corporation is a matter of fact and degree. In terms of the relevant indicia as determined in particular by decisions of the High Court, I need do no more than refer to the observations of Steytler P in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No.2)* (2008) 89 WAIG 243. At par 68 Steytler P summarised the relevant principles as follows:

> 68 The more relevant (for present purposes) principles that might be drawn from these and other cases are as follows:
>
> (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], [101]; ***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].

22 Furthermore, as was said by Le Miere J (dissenting) in *Aboriginal Legal Service*, in relation to the meaning of "trade" and "trading" at pars 95-101:

> 95 'Trade' and 'trading' are ordinary words that must take their meaning from their context. The first meaning of 'trade' in the fourth edition of the Macquarie Dictionary is 'the buying and selling, or exchanging, of commodities, either by wholesale or by retail, within a country or between countries'. In ***Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*** (1978) 36 FLR 134--- (***Re Ku-ring-gai***) Bowen CJ said that the terms 'trade' and 'commerce' in the phrase 'in trade or commerce' in s 47 of the *Trade Practices Act 1974* (Cth) are ordinary terms which describe 'all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements' (139). Bowen CJ said that the word 'trade' is used with its accepted English

meaning: 'traffic by way of sale or exchange or commercial dealing'. His Honour went on to say that the word covers intangibles such as banking transactions as well as the movement of goods and persons. Deane J said of the terms 'trade' and 'commerce':

> The terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phases of the development of trade, commerce and commercial communication, the terms are clearly of the widest import … They are not restricted to dealings or communications which can properly be described as being at arms length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making (167).

96 In ***Bank of New South Wales v The Commonwealth*** (1948) 76 CLR 1, 381 Dixon J said that in s 92 of the Constitution the meaning of 'trade' is much wider than the buying and selling of goods and its history emphasises rather use, regularity and course of conduct than concern with commodities.

97 In ***Adamson*** Barwick CJ said: Trade for constitutional purposes cannot be confined to dealing in goods or commodities. Its full parameters may be difficult of definition. But the commercial nature of an activity is an element in deciding whether the action is in trade or trading (209).

98 Most people who trade intend or wish to make a profit. But it is not essential to the carrying on of trade that the corporation should make a profit, nor is it necessary that the corporation should desire or wish to make a profit. In ***Adamson*** Mason J said: I do not limit the concept of trading to buying and selling at a profit; it extends to business activities carried on with a view to earning revenue (235).

99 References to trading activities connoting activities of a commercial nature are to be found in a number of authorities including ***Re Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 19 - 20 and ***E v Australian Red Cross Society*** (1991) 27 FCR 310, 343.

100 The Macquarie Dictionary definitions of 'commerce' include 'trade, business'. The Macquarie dictionary definitions of 'commercial' include 'capable of returning a profit'. To the extent that 'commerce' is a synonym for 'trade', the word does not help to determine the meaning of trade. To the extent that the words 'commerce' or 'commercial' connote profit-making they do not provide a guide to the relevant meaning of trade because trade may be carried on even though there is no intention to make a profit.

101 In ***Re Ku-ring-gai*** Bowen CJ said: The commercial character of trade was mentioned more recently by Lord Reid in ***Ransom v Higgs***. His Lordship there said:

> 'As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services.' Moreover the word covers intangibles, such as banking transactions, as well as the movement of goods and persons, for historically its use has been founded upon the elements of use, regularity and course of conduct (139). (footnotes omitted)

23 I apply these principles for the purposes of determining this matter.

Contentions of the parties

24 Mr Eley contended that the Corporation's primary role is that of a regulator and compulsory acquirer of ware potatoes in the State. He drew attention to s 22 of the MP Act, to the effect that it is the law of the State that a person cannot sell or deliver ware potatoes to anyone other than the Corporation or an agent authorised to act on its behalf. Mr Eley contended that there is no trading relationship between growers and the Corporation, as the Corporation receives potatoes from growers acting under compulsion, with it being an offence for a grower to supply anyone other than the Corporation.

25 Similarly, Mr Eley contended that the relationship between the Corporation and its merchants is not trading either. This is because the merchants must deal with the Corporation and pay to the Corporation the effective proceeds of the sale of ware potatoes by them. In terms of the notion of "trading", Mr Eley contended that the Corporation does not engage in any buying or selling or exchanging of goods or services. This is because there is a legal compulsion for growers to deliver ware potatoes to the Corporation and it is an offence to not do so.

26 Mr Eley further contended that following the "compulsory acquisition" of potatoes, the Corporation pays the growers a rate for their supply, which the Corporation solely determines is appropriate. There is no negotiation with the growers as to rates for potatoes. In terms of the Annual Reports, Mr Eley contended that it is clear from them that around 99 per cent of the revenue of the Corporation is derived from this compulsory acquisition of and dealing with potatoes, with less than one per cent of the Corporation's income derived from other activities. Accordingly, Mr Eley contended that the Corporation is not a trading corporation for the purposes of s 51(xx) of the Constitution (Cth).

27 In the alternative, if the Commission determines that the Corporation is a trading corporation, Mr Eley submitted that there is insufficient evidence before the Commission to determine his salary for the purposes of the prescribed amount under s 29AA(5) of the Act. Mr Eley contended that this is a matter upon which the Commission will need to receive further evidence and submissions in order that a finding may be made.

28 On the other hand, in applying *Aboriginal Legal Service*, the Corporation contended that it is a trading corporation. It submitted that under the terms of the MP Act, the Corporation has the statutory power to trade. Its activities, as set out in the evidence, are funded entirely from its trading activities with growers and merchants. The Corporation does not receive any State or Commonwealth funding. The overwhelming proportion of the revenue of the Corporation is derived from trading activities. This is in the form of receiving payments from merchants in return for their participation in the process of selling ware potatoes into the market, making payments to the growers of potatoes and the process of supplying potatoes to merchants for sale into the market and from other activities.

29 The other activities referred to by the Corporation include the owning of real property; obtaining income in the form of rent from property; the buying and selling of plant and equipment; the entering into of various commercial contracts; and interest revenue from investments.

30 Assuming the Commission makes a finding that the Corporation is a trading corporation, then the further submission was made by the Corporation that by reason of the operation of the federal legislation, the GOSAC Award became a "notional agreement preserving State awards" and subsequently, and "award-based transitional instrument" under the FW Act. Furthermore, as a modern award made under the FW Act does not apply to a "high income employee", during Mr Eley's period of employment an industrial instrument did not, and could not, apply to his employment. Given the salary set out in Mr Eley's particulars of claim in his notice of application, it is a salary in excess of the relevant prescribed amount.

Consideration

31 The fact that the Corporation is a statutory corporation established under an Act of the Parliament does not preclude its characterisation as a trading corporation. For the following reasons, in my view, the Corporation is a trading corporation for the purposes of s 51(xx) of the Constitution (Cth).

32 The Corporation engages in substantial trading activities, indeed the vast majority of its revenue is derived from such trading activities. Those activities can be broadly characterised as the receipt, dealing with and sale of ware potatoes in the State. In my view they can be characterised as the "buying and selling" of and "exchange" of potatoes on a large scale. Whilst it is true that growers must provide potatoes grown by them to the Corporation, those potatoes supplied by growers are then dealt with by the Corporation in terms which are, in my view, plainly trading. An important consideration in this regard, is the relationship between the Corporation and its merchants. On the evidence, and in accordance with Part IX of the Marketing of Potatoes Regulations 1987, the merchants are agents of the Corporation. On the evidence also, and from the plain terms of the MP Act, the agents, as grading and packing and distribution merchants, are performing activities that the Corporation could otherwise perform itself if it had the necessary resources.

33 The fact that the Corporation is empowered to, and chooses to conduct its business regarding the wholesale disposal of ware potatoes through agents, does not detract from the essential character of the activity of the Corporation as being that of trading. From the terms of the Regulations, and applying general principles of agency, the activities and conduct of merchants, as agents for the Corporation, are to be regarded as conduct of the Corporation itself: see e.g. reg 69 Regulations. The trading activity is not only characterised by the sale of ware potatoes by the distributor merchants, but also through the purchase by them from the Corporation of the right to on-sell ware potatoes into the market for a profit. The evidence as to the pricing structures that the Corporation uses is clearly intended to enable merchants to operate as independent businesses in their own right, in accordance with their relationship with the Corporation, to enable a profit margin to be achieved by the merchants through their distribution sales.

34 The fact that the revenue derived by the Corporation from the merchants, is in turn then distributed back to the growers in accordance with the pool system, does not detract from the essential nature of the trading activities undertaken by the Corporation, in relation to the distribution and sale of ware potatoes. Furthermore, the Corporation plainly operates in a businesslike manner, and operates sophisticated systems of pricing and management of potato supply, through the quite complex pool arrangements which are in evidence.

35 In my view, the fact that the growers receive a set price for potatoes produced by them does not detract from the trading activities undertaken by the Corporation on their behalf.

36 The overall activities of the Corporation, with revenues of some $33m in 2012 derived from the buying or selling, or exchanging, of commodities (ware potatoes) by wholesale or retail in the State, can only reasonably be characterised as trading activity. The fact that the Corporation is essentially a not for profit organisation, and redistributes surpluses back to growers, is not of itself decisive against the proposition that the Corporation is a trading corporation.

37 Further supporting the businesslike and commercial character of the activities of the Corporation is the negotiations between the Corporation and the merchants, as referred to in the evidence of Ms Chalmers.

38 Whilst the Corporation also has a significant regulatory role in terms of the grant of permits and licences etc, again, that does not mean that the Corporation cannot be a trading corporation. It seems to me, on the basis of all of the evidence and materials before the Commission, that the Corporation engages in trading activities for the purposes of achieving its regulatory functions in s 17A of the MP Act. The fact that it does so, and has this overall regulatory responsibility, which may be considered to be one in the public interest, does not mean that the Corporation cannot be characterised as a trading corporation: *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 per Barwick CJ at 543.

39 Accordingly, by reason of s 26 of the FW Act, the Corporation being a trading corporation, the Commission has no jurisdiction to hear and determine Mr Eley's unfair dismissal claim.

40 In terms of Mr Eley's contractual benefits claim, the fact that the Corporation is a constitutional corporation does not preclude a contractual benefits claim being brought in this jurisdiction: *Stylianou v Country Realty Pty Ltd* (2010) 91 WAIG 2029; *Triantopoulos v Shell Company of Australia Ltd* (2010) 91 WAIG 57; *Higgins v Gateway Printing* (2010) 90 WAIG 529.

41 However the Corporation contends that given the combined effect of the former Workplace Relations Act 1996 (Cth) and the FW Act, and their respective transitional provisions, the GOSAC Award ultimately became an award-based transitional instrument under the federal legislation. Award-based transitional instruments ceased to have effect on the making of a relevant modern award under the FW Act.

42 The Corporation, as a trading corporation, cannot be covered by or subject to the terms of an award or industrial agreement of this Commission. It may be subject to a modern award under the FW Act. However, that is not material to the present issue. This is because by s 29AA(5) of the Act, "industrial instrument" means an award, an order, an industrial agreement or an employer-employee agreement made by the Commission under the Act. Given my conclusion that the Corporation is a trading corporation, and is thereby a national system employer for the purposes of the FW Act, then at the material time, Mr Eley's employment was not subject to an industrial instrument of this Commission under the Act.

43 Thus, it falls to be determined whether at the material time, Mr Eley's contract of employment provided for a salary exceeding the prescribed amount, which for the purposes of s 29AA(5)(b) was $134,100 as at 30 June 2012. Mr Eley asserts in his particulars of claim that he was employed by the Corporation as the Chief Executive Officer at a gross salary (including any salary package benefit value) of $152,337 per annum. No further particulars are provided in Mr Eley's claim as to the composition of this remuneration.

44 Furthermore, by its notice of answer and counter-proposal, the Corporation contends that whilst Mr Eley purported to act as the Chief Executive Officer of the respondent between 7 and 11 May 2012, as at 14 May 2012, on Mr Eley's summary dismissal, the terms of his contract with the Corporation were still in dispute. The Corporation contends that Mr Eley's appointment as Chief Executive Officer was conditional upon the approval of the Minister under s 18(4) of the MP Act, which approval was never given. The Corporation therefore denies there was any contractual relationship entered into between it and Mr Eley, capable of enforcement under s 29(1)(b)(ii) of the Act.

45 There is no evidence before the Commission as to these matters. To enable to the issue of whether there was an enforceable contract of employment in place between the Corporation and Mr Eley, and if so, Mr Eley's relevant salary for the purposes of s 29AA(5)(b) of the Act to be determined, the Commission will re-list Mr Eley's contractual benefits claim for further hearing and determination.

2013 WAIRC 00109

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID ERNEST ELEY
	APPLICANT
	-v-
	POTATO MARKETING CORPORATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 25 FEBRUARY 2013
FILE NO/S	U 118 OF 2012
CITATION NO.	2013 WAIRC 00109

Result	Application dismissed. Order issued
Representation	
Applicant	In person
Respondent	Mr D Howlett of counsel

Declaration and Order

HAVING HEARD Mr D Eley on his own behalf and Mr D Howlett of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

(1) DECLARES that the respondent is a constitutional corporation as defined in s 12 of the Fair Work Act 2009 (Cth).

(2) ORDERS that the application be and is hereby dismissed for want of jurisdiction.

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

2013 WAIRC 00098

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MANDI EZARD
	APPLICANT
	-v-
	MR ALLON KLEIN STEPHEN BROWNE LAWYERS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 22 FEBRUARY 2013
FILE NO/S	U 242 OF 2012
CITATION NO.	2013 WAIRC 00098

Result	Application discontinued
Representation	
Applicant	Ms M Ezard
Respondent	Mr S Browne (of counsel)

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979;*

AND WHEREAS on 29 January 2013 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference an agreement was reached between the parties;

AND WHEREAS on 15 February 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2013 WAIRC 00124

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MERYL GAY
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE (SIC) IN THE METROPOLITAN HEALTH SERVICES BOARD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 6 MARCH 2013
FILE NO/S	B 130 OF 2011
CITATION NO.	2013 WAIRC 00124

Result	Discontinued
Representation	
Applicant	Mr M Clancy (as agent)
Respondent	Mr M Golesworthy

Order

WHEREAS this is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and

WHEREAS on 13 October 2011 the Commission convened a scheduling conference; and

WHEREAS at the conclusion of that conference the parties were given time for further discussions; and

WHEREAS the Commission contacted the applicant's representative on numerous occasions about the status of the matter; and

WHEREAS on 11 September 2012 the Commission convened a further conference to deal with an interlocutory application; and

WHEREAS at the conclusion of that conference the parties were given further time to reach a settlement; and

WHEREAS the applicant's representative provided correspondence to the Commission on a regular basis about the progress of discussions; and

WHEREAS on 14 February 2013 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 19 February 2013 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2013 WAIRC 00135

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUNTHER GROBLER
	APPLICANT
	-v-
	O'DONNELL GRIFFIN PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 7 MARCH 2013
FILE NO/S	B 267 OF 2012
CITATION NO.	2013 WAIRC 00135

Result	Application discontinued
Representation	
Applicant	Ms R Cosentino (of counsel)
Respondent	Ms A Tait

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979;*

AND WHEREAS on 25 February 2013 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference an agreement was reached between the parties;

AND WHEREAS on 6 March 2013 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under *the Industrial Relations Act 1979;* hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2013 WAIRC 00110

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00110
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	FRIDAY, 19 OCTOBER 2012, FRIDAY 25 JANUARY 2013
DELIVERED	**:**	THURSDAY, 28 FEBRUARY 2013
FILE NO.	**:**	U 114 OF 2012
BETWEEN	**:**	LORRAINE MALONE
		Applicant
		AND
		LEEMAN AND GREEN HEAD COMMUNITY RESOURCE CENTRE INC.
		Respondent

Catchwords	**:**	Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether Commission has jurisdiction - Trading activities of respondent considered - Commission not satisfied respondent is a trading corporation - Declaration made
Legislation	**:**	*Industrial Relations Act 1979* s 29(1)(b)(i)
		Fair Work Act 2009 s 12, s 13, s 14(1)(a) and s 26
		Associations Incorporation Act 1987
		Australian Constitution s 51(xx) and s 109
Result	**:**	Declaration made
Representation:		
Applicant	**:**	Mr J Richardson (as agent)
Respondent	**:**	Mr K Trainer (as agent)

Case(s) referred to in reasons:

Shire of Ravensthorpe v John Patrick Galea (2009) 89 WAIG 2283

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

Reasons for Decision

1 On 22 May 2012 Lorraine Malone (the applicant) lodged an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) against Leeman and Green Head Community Resource Centre Inc (the respondent) claiming that she was unfairly dismissed by the respondent on 18 May 2012.

2 The respondent claims the Commission cannot deal with this application as it is a trading corporation and therefore subject to the *Fair Work Act 2009* (the FW Act).

Is the respondent a trading corporation?

Respondent's activities

3 The respondent receives grants from the Department of Regional Development and Lands (the Department) to conduct activities to meet specific outcomes. The Department requires community resource centres (CRC) to deliver outcomes using a business like model and the Department has a financial assistance agreement with each management committee. The respondent is incorporated under the *Associations Incorporation Act 1987* and has a committee of management which is responsible for its operation.

4 Ms Deborah Rice is the Department's Director of Community Development. Ms Rice outlined five areas that CRCs are expected to focus on:

(1) Building the capacity of the community.

CRCs are expected to provide training and activities to address the specific needs of the community.

(2) Delivering services and information on behalf of government and other agencies relevant to community needs.

CRCs act in partnership with the WA Government to provide mental health information, information from the Western Australian Council of Social Service Inc and the Cancer Council. This and other information is provided free to community members. Some information and assistance is provided on a cost recovery basis for example Centrelink and Medicare.

(3) Developing partnerships and negotiating business opportunities for the benefit of the community.

CRCs can undertake activities to generate income including undertaking activities on behalf of Centrelink, bank agencies and post offices. Secretarial services can also be provided.

(4) Increasing the profile of the CRC and the Network.

This covers promotional activities, signage and putting advertisements in local newspapers.

(5) Developing and maintaining high standards of management and governance.

CRCs report to the Department and are provided funding in order to do so and every six months feedback is given to CRCs about its business plan. The Department ensures that CRCs lodge Business Activity Statements and make Superannuation payments. Audited accounts are to be provided annually and funding is provided for this activity.

5 CRCs are generally run by a management committee. Any profit or income generated from a CRC's activities is returned to the CRC to deliver other services for the community's benefit.

6 Ms Gaynor Lindsay is the respondent's current coordinator and she has held this position since June 2012. Prior to this she was the respondent's chairperson and a committee member. Ms Lindsay works 30 hours per week for the respondent. Ms Shannon Boyle is employed by the respondent as a trainee receptionist/assistant coordinator and works 30 hours per week. Another employee works 20 hours per fortnight.

7 Ms Lindsay relies on the respondent's financial statement for the year ending 30 June 2012 (see Exhibit R1). This statement confirms that the respondent's income for this period was as follows:

LEEMAN AND GREENHEAD COMMUNITY RESOURCE GROUP ABN 98 118 468 235

Detailed Profit and Loss Statement

For the year ended 30 June 2012

	2012	2011
	$	$
Income		
Advertising – SIN	9,347	11,192
Computer Hire Fees	59	66
Desktop Publishing/Secretarial	819	126
Internet/E-mail Fees	553	1,217
Facsimile Fees	26	153
Salary Grant – Co-ordinator	40,000	40,000
Grant – Various Grants	50,500	55,891
Grant – Attorney Generals Department		2,000
Donations	178	4,992
Photolab	240	496
Recycling Income	171	
Laminating Fees	31	45
Membership Fees	677	275
Miscellaneous Income	1,558	8,745
Photocopying	167	326
Sales – Retail	750	358
Printing/Scanning	874	951
Interest received	103	
Freight Income	14	
Trash and Treasure	4,494	1,553
Rent – Office Space	2,310	3,037
Sales - SIN	3,616	3,505
Operational Income		3,778
Telephone Books	105	166
Centrelink	4,036	
Medicare (HIC)	350	
Telstra Payphones	1,374	1,933
Xmas Party Income	2,813	
Total income	125,168	140,808

(Extract from Exhibit R1)

8 The respondent initially relied on a document containing income and expenditure for the activities the respondent maintained are trading activities (see Exhibit R1(A)). At a further hearing a revised document, completed by Ms Ann Sigley, was relied upon by the respondent with respect to income and expenses related to these activities. This document is as follows:

TABLE OF TRADING ACTIVITIES

ITEM	INCOME	EXPENSES	PROFIT/LOSS
1. SECRETARIAL SERVICES			
FAXING	$ 26.38	$ 13.13	$ 13.25
LAMINATING	$ 35.17	$ 48.71	$ 13.54
PHOTOCOPYING	$ 167.12	$ 31.57	$ 135.55
PRINTING	$ 854.88	$ 221.81	$ 633.07
SCANNING	$ 8.18	$ 3.49	$ 4.69
SECRETARIAL WORK	$ 819.37	$ 69.00	$ 750.37
PHONEBOOK	$ 105.44	$ 67.41	$ 38.03
INTERNET/EMAILS	$ 612.11	$ 34.77	$ 577.34
TOTAL	**$ 2,628.65**	**$ 489.89**	**$ 2,138.76**

EXPLANATION OF CHANGES COMPARED TO PREVIOUS TABLE

1. Expenses were originally shown as $3329.43. They now appear as $455.12.

The new Auditor for the respondent has done an overhaul of the accounts and has worked out the expenses which is explained below.

For example: Faxing is charged @$2.00 per page and 50c each page thereafter. So therefore we have 10 x 1st pages = $20.00 then 18 other pages = $9.00 this is a total of $29.00 inc GST. We used 28 sheets of paper @ 1c per page = 28c. 10 phone calls @60c = $6.00 time to do the faxing is $7.60. So total expenses is $13.88 - 52c GST = $13.31 ex GST

ITEM	INCOME	EXPENSES	PROFIT/LOSS
2. ROOM HIRE			
SKILL HIRE MISSION AUSTRALIA CRS AUSTRALIA SALVATION ARMY JUSTICE SYSTEM		$2.20 per hour for power x 46.5 hours of room hire	
TOTAL	**$ 2,793.16**	**$ 102.30**	**$ 2,690.86**

ITEM	INCOME	EXPENSES	PROFIT/LOSS
3. OTHER INCOMES COMMISSION	$ 1,456.90	$543.06 Goods purchased	
	$ 1,456.90	**$ 543.06**	**$ 913.84**

ITEM	INCOME	EXPENSES	PROFIT/LOSS
4. SNAG ISLAND NEWS			
SALES	$ 3,615.61	$ 5,850.00 Paper	
		Time Printing	
ADVERTISING	$ 9,310.60	$ 8,840.00 Wages	
GRANT	$ 4,500.00	$ 795.60 Super	
TOTAL	**$ 17,426.21**	**$ 15,485.60**	**$ 1,940.61**

ITEM	INCOME	EXPENSES	PROFIT/LOSS
5. TRASH TO TREASURE			
SALES	$ 4,494.50	$ 764.88 power/rates	
		Water	

TOTAL	**$ 4,494.50**	**$ 764.88**	**$ 3,729.62**
ITEM	INCOME	EXPENSES	PROFIT/LOSS
6. PHONE BOX CLEARING	$ 1,374.88	4.5 hours time taken	
		$ 103.50	
	$ 1,374.88	**$ 103.50**	**$ 1,271.38**
ITEM	INCOME	EXPENSES	PROFIT/LOSS
7. CENTRELINK	$ 4,036.34		
MEDICARE	$ 350.00	Power	
		$ 171.60	
	$ 4,386.34	**$ 171.60**	**$ 4,214.74**
ITEM	INCOME	EXPENSES	PROFIT/LOSS
8. EQUIPMENT HIRE	$ 535.36		
	$ 535.36		**$ 535.36**
ITEM	INCOME	EXPENSES	PROFIT/LOSS
9. MEMBERSHIPS		time/print	
		postage	
	$ 677.33	$ 103.50	
	$ 677.33	**$ 103.50**	**$ 573.83**
ITEM	INCOME	EXPENSES	PROFIT/LOSS
10. PRINTER/TONERS/STATIONERY			
INTERNAL USE		$ 9,668.74	
	$ -	**$ 9,668.74**	**-$ 9,668.74**
TOTAL	$ 35,860.35	$ 27,433.07	$ 8,427.28

(Exhibit R9)

9 Ms Boyle and Ms Sigley explained the income and expenditure for each activity as follows:

1. Secretarial Services

   Faxing, laminating, photocopying, printing and scanning are charged per page. Secretarial work was charged at $60 per hour. A phonebook published by the respondent was compiled by employees and volunteers. Customers are charged for the time spent using the internet using computers purchased through a grant and these computers use the respondent's server and Wi-Fi system.

2. Room Hire

   This was income received for hiring out a room owned by the respondent.

3. Other Income Commissions

   This income was generated by selling items such as USBs, paper and from commission on the sale of art work. Only stock costs were factored into expenses for this item.

4. Local Newspaper

   This is published and sold fortnightly and includes paid advertisements. $200 per issue was paid to an editor who is assisted by the respondent's employees plus volunteers. The paper is distributed by volunteers and the respondent's employees.

5. Trash to Treasure

   This income is from selling second hand goods and volunteers conduct this activity as a community service. Expenses include electricity, rates and water for using a separate building where this activity takes place. This building is owned by the respondent.

6. Phone Box Clearing

   The respondent receives a commission from Telstra on the money cleared from the local telephone box. Expenses relate to the time taken by an employee to clear the phone box.

7. Centrelink / Medicare

   The respondent receives income from Centrelink to assist community members to complete Centrelink documentation and to provide a space for people to lodge documentation. Centrelink has a dedicated fax and telephone for community members to use.

The respondent receives income for providing the Medicare telephone service for community members and for sending mail to Medicare on behalf of community members.

8. Equipment Hire

The respondent has a public address system, purchased through a grant, and a bouncy castle purchased by the respondent which is hired out to community members. Insurance costs for these items are paid by the respondent.

9. Memberships

Community members are encouraged to become members of the respondent. Services are offered to members at discounted rates including free internet access. Expenses cover the time taken to send out membership forms and printing and postage costs.

10. Printers/Toner/Stationery

The cost of printers, toners and stationery for the respondent's internal use equates to $9,668.74.

Submissions

Respondent

10 The respondent is incorporated under the *Associations Incorporation Act 1987*. This act does not prohibit it from trading and making a profit is also not an essential characteristic of trading. The respondent submits that it trades with community members as confirmed by its table of trading activities and its grant funding from the Department is trading income as the funds are provided by the Department to deliver these trading activities to the community. As grant funding of $90,500 plus $35,860 in income from trading activities is a substantial amount of the respondent's total income the respondent is therefore a trading corporation.

Applicant

11 The respondent is designated as a not-for-profit organisation under the *Associations Incorporation Act 1987* and therefore does not meet the test of being a trading corporation. The applicant submits that as the respondent's employees are paid from grants from the Department this does not constitute trading (see ***R v The Judges of the Federal Court of Australia; ex parte Western Australian National Football League (Inc)*** (1979) 143 CLR 190).

Findings and conclusions

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 a constitutional corporation as a corporation to which s 51(xx) of the Australian Constitution applies. Section 51(xx) of the Australian Constitution provides that corporations amongst others 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 Act. If the respondent is a trading corporation, by virtue of ss 12, 13 and 14 of the FW Act, the jurisdiction of the Commission to deal with the applicant's claim is excluded by s 26 of the FW Act and s 109 of the Australian Constitution.

13 In the financial year ending 30 June 2012 the respondent claims it received income of $125,168. This does not appear to be correct. Income included in the respondent's Profit and Loss Statement is not in accord with some of the income Ms Sigley relies on in her table of trading activities. Ms Sigley's table includes income from advertising, internet use, sending emails, laminating fees, sales and rent which is different from the income from these activities contained in the Profit and Loss Statement. Furthermore, grant funding of $90,500 from the Department to employ staff and to assist in conducting the respondent's activities plus income of $35,860.35 which the respondent maintains it received in the financial year ending 30 June 2012 from trading activities adds up to $126,360.35 which is more than the total income included in the respondent's Profit and Loss Statement. Furthermore, the respondent's Profit and Loss Statement includes income from a Christmas party, donations and miscellaneous income which must be added to $126,360.35. The respondent's total income for the financial year ending 30 June 2012 is therefore unclear even though the respondent had the opportunity at two hearings to provide accurate figures about its income and expenditure.

14 I find that the respondent is an incorporated body as it is registered under the *Associations Incorporation Act 1987*. I also find that the respondent is not a financial corporation as there was no evidence that the respondent engaged in any financial activities.

15 Notwithstanding the lack of clarity about the respondent's total income during the relevant period it is necessary to review the character of the activities carried out by the respondent which it claims were trading activities within the context of the respondent's purpose and whether the respondent engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation (see ***Shire of Ravensthorpe v John Patrick Galea*** (2009) 89 WAIG 2283).

16 I find that the respondent's main role, character and purpose is to provide services to local residents for the benefit of the local community and the activities the respondent undertakes are in the main focussed on providing services to assist residents, using grant funding provided by the Department. I have based this conclusion on the respondent's charter which is to provide training and activities to address community needs, it is required to deliver services and information on behalf of government and other agencies for the community's benefit and it develops partnerships and negotiates business opportunities for community members. The respondent is also expected to promote the CRC and report its activities to the Department in a business-like manner. Any profit from an activity or income received is to be used for the community's benefit.

Analysis of the activities the respondent claims are trading activities

1. Secretarial Services

I find that these services were provided for the benefit of community members and that these activities were not conducted in a business-like manner or on a commercial basis. Whilst the respondent adopted a formula to calculate expenses for this activity these costs appear to be notional and do not factor in the true cost of conducting this activity when materials, wages and operating costs are taken into account.

2. Room Hire

17 I find that this activity lacks a commercial character. I find that this activity is provided by the respondent for the community's benefit and there was no evidence that room hire charges were set at commercial rates. Furthermore, no wages were factored in as an expense for this activity.

3. Other Income / Commissions

18 I find that the income from this activity, which was generated from sales and commissions, lacks a commercial or trading character. No expenses were factored into conducting this activity apart from the cost of stock. I also find that this activity is peripheral and incidental to the respondent's main activities.

5. Trash to Treasure

19 I find that this activity was provided for the benefit of the local community. As volunteers conducted this activity and as minimal expenses were incurred to conduct this activity I find that it was not conducted on a commercial or trading basis.

6. Phone Box Clearing

20 I find that this activity was undertaken for the community's benefit and was conducted in accordance with the respondent's obligations to the Department to be an agent for services which would otherwise be denied to the community.

7. Centrelink / Medicare

21 I find that these government services were provided for the benefit of the local community on behalf of Centrelink and Medicare under the respondent's obligations to the Department. Furthermore, minimal expenses were factored in to conducting this activity.

8. Equipment Hire

22 I find that this activity was conducted for the benefit of community members. There was no evidence that this activity was conducted in a business-like manner, nor were expenses, wages or depreciation factored into this activity. I also find that this activity was peripheral to the respondent's main functions.

9. Memberships

23 I find that this activity was a service and benefit offered to community members and lacks any commercial or trading character.

10. Printers/Toner/Stationery

24 This was an expense included by the respondent but it is unclear how this relates to the conduct of what the respondent claims are trading activities.

25 I find that the production of the local newspaper constitutes a trading activity. This activity generated a small profit from sales and a person was employed by the respondent to edit the newspaper. In my view this gives this activity a commercial character. However, I find that $4,500 out of the $17,426.21 in total income claimed for this activity cannot be included as income for this activity. I understand this amount was a grant paid to the respondent in return for possible services to be provided in using the local newspaper. This amount was therefore not paid in return for specific and quantified services being delivered. Furthermore, this amount does not appear as income in the respondent's financial accounts for the year ending 30 June 2012. I find that the income from this activity is therefore $12,926.21 ($17,426.21 - $4,500) which constitutes 10.33% of the respondent's claimed total income of $125,168. I find that this income, from one trading activity, is not a significant amount when considering the respondent's total income. Furthermore, this percentage may be less given uncertainty about the respondent's total income for the relevant period.

26 I reject the respondent's claim that grant funding is income from trading. This income was not used in the main to conduct trading activities given my findings above and in any event the main purpose of this grant funding is to facilitate the respondent conducting activities for the benefit of community members and not for the respondent to operate as a commercial or trading enterprise.

27 Having considered the nature and character of all of the activities conducted by the respondent and when taking into account the respondent's role and purpose being to provide services to the local community and having regard to only one activity being a trading activity generating 10% of the respondent's income, I find that the respondent was not a trading corporation during the relevant period for the purposes of this application.

28 For the reasons set out above I will declare that the respondent is not a trading corporation and the substantive matter will be listed for hearing on a date to be fixed.

2013 WAIRC 00122

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORRAINE MALONE
	APPLICANT
	-v-
	LEEMAN AND GREEN HEAD COMMUNITY RESOURCE CENTRE INC.
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 5 MARCH 2013
FILE NO.	U 114 OF 2012
CITATION NO.	2013 WAIRC 00122

Result	Declaration made
Representation	
Applicant	Mr J Richardson (as agent)
Respondent	Mr K Trainer (as agent)

Declaration

HAVING HEARD Mr J Richardson as agent on behalf of the applicant and Mr K Trainer as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby declares:

THAT the respondent is not a trading corporation.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2013 WAIRC 00086

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANA ROSE MCGINN
	APPLICANT
	-v-
	GOVERNING COUNCIL OF CENTRAL INSTITUTE OF TECHNOLOGY
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 18 FEBRUARY 2013
FILE NO/S	U 181 OF 2012
CITATION NO.	2013 WAIRC 00086

Result	Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on the 7th day of December 2012 the Commission set the matter down for hearing on the 23rd, 24th and 25th days of January 2013; and

WHEREAS on the 22nd day of January 2013 the applicant requested, in writing, that the hearing be vacated and the Commission vacated the hearing dates; and

WHEREAS on the 4th day of February 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2013 WAIRC 00112

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00112
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	BY WRITTEN SUBMISSIONS
DELIVERED	**:**	FRIDAY, 1 MARCH 2013
FILE NO.	**:**	U 5 OF 2013
BETWEEN	**:**	ARNOLD MUTATE
		Applicant
		AND
		VERONICA HENSHALL
		MANAGER HUMAN RESOURCES
		RIO TINTO IRON ORE
		Respondent

CatchWords	**:**	Industrial law - Claim of harsh, oppressive and unfair dismissal – Incorrect naming of former employer – Former employer a trading corporation - Whether Commission has jurisdiction - Principles applied - Claim not within Commission's jurisdiction
Legislation	**:**	Industrial Relations Act, 1979 (WA) ss 23(1), 29(1)(b)(i)
		Fair Work Act, 2009 (Cth) ss 14, 26, 27
		Australian Constitution ss 51(xx)
Result	**:**	*Application dismissed for want of jurisdiction*
Representation:		
Applicant	**:**	In person, by written submission
Respondent	**:**	Mr P. Swingler, by written submission

Case(s) referred to in reasons:

Krysti Guest v Kimberley Land Council [2009] WAIRC 00668;(2009) 89 WAIG 2063

Endeavour Coal Pty Limited v Construction, Forestry, Mining and Energy Union [2007] FCAFC 177, (2007) 173 IR 276

Tristar Steering and Suspension Ltd v IRC of NSW [2007] FCAFC 50, (2007) 161 IR 469

Reasons for Decision

1 On 7 January 2013 Mr Mutate, the applicant in this matter, filed a notice of application in the Commission claiming that he had been unfairly dismissed. He named as the respondent to the application "Veronica Henshall, Manager Human Resources Rio Tinto Iron Ore". He served the application, and a notice of answer was filed on the 16 January 2013 from Pilbara Iron Company (Services) Pty Ltd trading as Rio Tinto Iron Ore. The answer stated that it had been the employer of Mr Mutate and that it was a national system employer for the purposes of the *Fair Work Act 2009* (Commonwealth). The answer stated also that, therefore, the jurisdiction of the Commission to deal with the application is excluded by ss 26 and 27 of the *Fair Work Act* and s 109 of the Australian Constitution, and it requested that the application be dismissed for want of jurisdiction.

2 Mr Mutate disputed the notice of answer and stated that:

> "My claim is against Rio Tinto because they purported to unlawfully terminate my contract but as it now turns out they were not my employers and not a party to my contract of employment.
>
> The supporting documentation and evidence … makes no reference to "Pilbara Iron Company Pty Ltd" up as until the respondent has quoted it as "correct identity of employer." "Rio Tinto Iron Ore" represented by Victoria Henshall purported to terminate my contract and I have accordingly duly addressed the correct party for this purpose."

3 It is necessary for the Commission to decide whether it has the jurisdiction to enquire into and deal with Mr Mutate's claim. Both Mr Mutate and Pilbara Iron Company (Services) Pty Ltd agreed to the Commission determining the issue of jurisdiction on the papers.

Mr Mutate's Submission

4 In his submission of 1 February 2013, Mr Mutate had made the point that it was Rio Tinto Iron Ore, represented by Veronica Henshall, which has purported to terminate his contract. He states:

> "I believe that Rio Tinto has wrongfully terminated my contract as they are not my employer and a party to my contract of employment and neither were they acting as an agent for my employer and did not have authority to terminate my employment with Pilbara Iron Company Pty Ltd".

5 In his subsequent submission dated 13 February 2013, Mr Mutate attaches the letter terminating his employment and states that it shows that it is his employment with Rio Tinto which has been terminated. The letter makes no mention of Pilbara Iron Company (Services) Pty Ltd issuing the termination. He submits that he has lodged this claim against Rio Tinto in its capacity of having terminated his contract of employment and this has reasonably led him to believe that Rio Tinto was therefore his employer. He submits that he "was bound by terms and conditions of Rio Tinto" and that "Pilbara Iron Pty Ltd" is a wholly owned subsidiary of Rio Tinto and therefore Rio Tinto has overriding control, which again is why he has made his claim against Rio Tinto.

The Submission of Pilbara Iron Company (Services) Pty Ltd

6 The submission is that Mr Mutate was employed by Pilbara Iron Company (Services) Pty Ltd and a copy of the written contract of employment dated 19 April 2011, and a copy of Mr Mutate's payment summary, were provided to the Commission. The submission is that Pilbara Iron Company (Services) Pty Ltd is a one-hundred per cent owned Rio Tinto Limited entity and is a member of the Rio Tinto group of companies. It has been appointed by various Rio Tinto Iron Ore companies to provide various services to them including, relevantly, payroll, with the objective of maximising synergies and minimising operating costs between the various operations of the Rio Tinto Iron Ore group of companies.

7 In its submission, Mr Mutate's apparent confusion in relation to the identity of his employer was not reasonable, taking into account the contents of the contract of employment and the payment summary. In the respondent's submission, a reasonable person in Mr Mutate's position would have come to the conclusion their employer was Pilbara Iron Company (Services) Pty Ltd.

Consideration

8 Mr Mutate has claimed in this Commission that he has been unfairly dismissed. An employee can only be dismissed by their employer even if, as Mr Mutate seems to be suggesting, the employer did so at the direction of someone who was not his employer. Mr Mutate has been dismissed by his former employer.

9 Further, his claim that his dismissal was unfair can only be made against his former employer.

10 Accordingly, the first issue is to identify who was Mr Mutate's former employer?

11 The Commission has before it a copy of the letter of offer of employment to Mr Mutate dated 19 April 2011 and which was signed by him on page 8 on the 30 April 2011. The first page of the letter is Rio Tinto letterhead and it states at the bottom of the page, in smaller type, the name "Rio Tinto Limited". The letter is signed by Brendan Townsend, Manager Management, Accounting and Reporting. The letter offers Mr Mutate the position of full time employment in the role of operations analyst, based in Perth in the Management Accounting Team of Rio Tinto Iron Ore. Relevantly, it states:

> "Your contract of employment is with "Pilbara Iron Company Services Pty Ltd".

12 Commencing on page 2 is a schedule of remuneration, benefits and employment conditions. This page also names that company as Mr Mutate's former employer.

13 The PAYG payment summary, or group certificate, shows the payer's name as Pilbara Iron Company Services Pty Ltd.

14 There is nothing before me from Mr Mutate which could lead to a conclusion that his former employer was the person he named as the respondent in his notice of application.

15 On the information before me, I find that Mr Mutate's former employer was Pilbara Iron Company Services Pty Ltd.

16 In fact, Mr Mutate seems to acknowledge this himself when he states in his submission of 1 February 2013:

> "I believe that Rio Tinto has wrongfully terminated my contract as they are not my employer and a party to my contract of employment and neither were they acting as an agent for my employer and did not have authority to terminate my employment with Pilbara Iron Company Pty Ltd".

17 This statement appears to me to recognise that the person identified by Mr Mutate as the respondent to this claim of unfair dismissal was not in fact his employer, but that his employer was Pilbara Iron Company Services Pty Ltd.

18 There is no reason to question the submission that Pilbara Iron Company Services Pty Ltd is a one-hundred per cent owned Rio Tinto Limited entity which has been appointed to handle employment or payroll matters, and that the person who signed the letter terminating Mr Mutate's employment had the authority to do so. After all, the form and manner in which Mr Mutate's employment was terminated exactly corresponds to the form and manner in which Mr Mutate had been employed in the first place: Rio Tinto letterhead was used on 19 April 2011 when he was offered employment, and it was used on 7 November 2012 to dismiss him from employment.

19 It follows that Mr Mutate has not correctly named his former employer in this application and it cannot possibly succeed in that form. It falls at the first hurdle.

20 The incorrect naming of a respondent can be cured by an application to amend the name. However, in this case, it would be of no use for Mr Mutate to apply to change the name of the respondent to Pilbara Iron Company Services Pty Ltd. This is because that body is a company which is, on the undisputed information before the Commission, a trading corporation as that is described in s 51(xx) of the Australian Constitution. The significance of this is that it is therefore a national system employer as defined in s 14 of the *Fair Work Act 2009* (which is an Act of the Commonwealth Parliament) and, under s 26 and s 27 of that Commonwealth Act, the jurisdiction that this WA Industrial Relations Commission has under the *Industrial Relations Act, 1979* (which is an Act of the WA Parliament) to deal with claims of unfair dismissal where the employer is a national system employer is overridden by that Commonwealth Act (see generally the explanations in the decisions in *Krysti Guest v Kimberley Land Council* [2009] WAIRC 00668;(2009) 89 WAIG 2063 at [52] – [69], *Endeavour Coal Pty Limited v Construction, Forestry, Mining and Energy Union* [2007] FCAFC 177, (2007) 173 IR 276; *Tristar Steering and Suspension Ltd v IRC of NSW* [2007] FCAFC 50, (2007) 161 IR 469. As stated in the recent decision of *Jillaine Jones v Eco Abrolhos*

Accommodation Pty Ltd [2012] WAIRC 01087;(2012) 92 WAIG 2051, although those decisions all relate to the former *Workplace Relations Act, 1996* I consider their reasoning is applicable to the corresponding effect of the *Fair Work Act 2009*).

21 For the above reasons, I find that the Commission does not have the jurisdiction to deal with Mr Mutate's claim of unfair dismissal and accordingly an order will now issue that the application be dismissed for want of jurisdiction.

2013 WAIRC 00113

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ARNOLD MUTATE
	APPLICANT
	-v-
	VERONICA HENSHALL
	MANAGER HUMAN RESOURCES
	RIO TINTO IRON ORE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 18 MARCH 2013
FILE NO/S	U 5 OF 2013
CITATION NO.	2013 WAIRC 00113

Result	Application dismissed for want of jurisdiction

Order

HAVING heard Mr A Mutate (by written submissions) and Mr P Swingler for the respondent (by written submissions),

AND HAVING given reasons for decision, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order:

THAT this application be dismissed for want of jurisdiction.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2013 WAIRC 00101

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER RYAN
	APPLICANT
	-v-
	HARCOURTS BUSSELTON
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 25 FEBRUARY 2013
FILE NO/S	U 7 OF 2013
CITATION NO.	2013 WAIRC 00101

Result	Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979* filed on the 13th day of February 2013; and

WHEREAS on the 21st and the 29th days of January 2013 the Commission wrote to the applicant directing her attention to the requirement to pay a filing fee; and

WHEREAS by the 4th day of February 2013 the applicant had not paid the filing fee; and

WHEREAS on the 18th day of February 2013 the Commission convened a hearing for mention to show cause why the application should not be dismissed; and

WHEREAS the applicant did not appear at the hearing convened on the 18th day of February 2013;

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

THAT this application be, and is hereby dismissed.

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

2013 WAIRC 00103

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MATTHEW JAMES SMITH

APPLICANT

-v-

GOLDY MOTORS PTY LTD

RESPONDENT

CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 25 FEBRUARY 2013
FILE NO/S	U 164 OF 2012
CITATION NO.	2013 WAIRC 00103

Result	Application dismissed
Representation	
Applicant	Mr M Smith on his own behalf
Respondent	Mr G McCorry as agent

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on the 22nd day of November 2012 the Commission convened a hearing to deal with jurisdiction; and

WHEREAS the hearing was adjourned at the applicant's request; and

WHEREAS on the 19th day of February 2013 the applicant requested, in writing, that the application be dismissed;

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

THAT this application be, and is hereby dismissed.

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

2012 WAIRC 00249

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MS MARGARET SUSAN WEBB

APPLICANT

-v-

DIRECTOR-GENERAL
DEPARTMENT OF EDUCATION

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 24 APRIL 2012
FILE NO/S	U 72 OF 2010
CITATION NO.	2012 WAIRC 00249

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr M Danger of counsel

Order

WHEREAS the application is listed for hearing in Derby from 30 April to 3 May 2012 inclusive;

AND WHEREAS on 24 April 2012 the applicant made an application to adjourn the hearing of the matter on various grounds as set out in the application primarily that the applicant is no longer represented by the State School Teachers' Union of Western Australia, she wishes to obtain alternative legal representation and cannot do so the time available before the hearing of the matter;

AND WHEREAS the solicitors for the respondent have informed the Commission that the respondent does not oppose the applicant's application to adjourn the proceedings;

AND WHEREAS the Commission, having considered the grounds in support of the application is of the view that an adjournment should be granted and the hearing dates be vacated;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

(1) THAT the hearing listed in Derby from 30 April to 3 May 2012 be and is hereby adjourned.

(2) THAT the application be re-listed in Derby on dates to be fixed by the Commission.

(3) THAT summonses to witness filed by the respondent on 28 March and 4 April 2012 be and are hereby discharged.

(4) THAT the parties have liberty to apply on short notice.

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

2012 WAIRC 00348

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00348
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 9 SEPTEMBER 2010, WEDNESDAY, 16 NOVEMBER 2011, WEDNESDAY, 6 JUNE 2012
DELIVERED	**:**	MONDAY, 11 JUNE 2012
FILE NO.	**:**	U 72 OF 2010
BETWEEN	**:**	MS MARGARET SUSAN WEBB
		Applicant
		AND
		DIRECTOR-GENERAL
		DEPARTMENT OF EDUCATION
		Respondent

Catchwords	**:**	Adjournment application – Relevant principles applied – Commission not satisfied discretion should be exercised
Legislation	**:**	Industrial Relations Act 1979 (WA) s 27(1)(f)
Result	**:**	Adjournment refused
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr M Danger of counsel

Case(s) referred to in reasons:

Myers v Myers [1969] WAR 19;

Culverhouse v John Septimus Roe Anglican Community School (1995) 75 WAIG 1960;

Sali v SPC Ltd (1993) 116 ALR 625.

Case(s) also cited:

Reasons for Decision

1 These proceedings have a long history. The claim by Ms Webb that she was unfairly dismissed as a teacher at the Derby District High School on 27 April 2010 was commenced on 30 April 2010. The allegations giving rise to the dismissal of Ms Webb date back as far as 2007. Following two prior adjournments of the hearing by consent, the proceedings have been listed for hearing in Derby on 2-5 and 16-19 July 2012. At the outset of the matter Ms Webb was represented by a firm of solicitors up until September 2011. From 31 October 2011 Ms Webb was represented by the State School Teachers' Union of Western Australia. Previous attempts at a resolution of the claim by Ms Webb have not been successful.

2 Ms Webb now seeks an adjournment of the proceedings listed in July. She says that the adjournment application is made because the Union is no longer representing her as confirmed in advice to my Chambers on 23 April 2012. Ms Webb says that the Union no longer represents her following further offers of settlement by the Department of Education which she has declined to accept. Ms Webb says that given she is now unrepresented she will not be able to adequately represent herself in the proceedings.

3 The adjournment application is opposed by the Department. Counsel submitted that the matter has been extensively delayed, which delays have been caused by Ms Webb and not anything done by the Department.

4 As noted above, the history of the matter is extensive. The first conciliation conference under s 32 of the Act took place on 9 September 2010. From late 2010 to about February 2011, my Chambers were informed by Ms Webb's then solicitors that the parties were negotiating to settle. From early 2011 until about August 2011, the solicitors then on the record for Ms Webb were largely non-responsive to requests for advice as to the status of the matter. Finally, by letter of 27 September 2011 received in my Chambers, the solicitors for Ms Webb advised that they no longer acted for her in the proceedings. Thereafter on 31 October 2011, the Union advised my Chambers by letter that it represented Ms Webb. A second conciliation conference was held on 16 November 2011 following which, directions were made by the Commission for the provision of further and better particulars and discovery.

5 On 17 November 2011 the matter was listed for hearing in Perth on 5-8 March 2012. On 15 February 2012, at the request of the Union, and with the consent of the Department, the proceedings were adjourned for a period of at least six weeks to enable difficulties with obtaining and inspecting documents to be resolved. On 6 March 2012 the matter was relisted for hearing in Derby from 30 April – 3 May 2012 inclusive. Following this, by letter of 23 April 2012, the Union notified my Chambers that it no longer acted for Ms Webb.

6 Following on 24 April 2012, at the written request of Ms Webb, not opposed by the Department, the Commission agreed to further adjourn the hearing listed in Derby. It is to be noted that the further adjournment of the hearing was accompanied by a request that the matter be relisted in about August 2012. This is of course, always subject to the final decision of the Commission, taking into account matters such as the availability of the parties, witnesses and in the case of country listings, the relevant courthouse.

7 Subsequently, on 18 May 2012 the matter was relisted for hearing in Derby on 2-5 and 16-19 July 2012. This is some four months after the adjournment of the initial hearing in Perth in March this year. Following the listing of the matter in Derby in July, by request dated 20 May 2012, Ms Webb further requested the proceedings be adjourned. Ms Webb now requests that the matter not be heard until at least October 2012, as she needs to arrange for further legal representation.

8 Ms Webb informed the Commission during the adjournment proceedings, that at the time the union ceased to act for her she had refused a substantial offer to settle her claim. Ms Webb informed the Commission that she declined to settle because she wants to have her day in court and clear her name.

Consideration

9 Whether or not to grant an adjournment, involves a consideration of all of the circumstances of a case, and is a discretionary decision. There is a need to weigh up the relative prejudice to the parties as to whether an adjournment application should be granted: *Myers v Myers* [1969] WAR 19. It is well settled that in claims such as these, where a party alleges they have been unfairly dismissed and seek reinstatement, the proceedings must be dealt with expeditiously: *Culverhouse v John Septimus Roe Anglican Community School* (1995) 75 WAIG 1960. Furthermore, in balancing the factors to take into account, the Commission must consider the public interest and the efficient use of public resources: *Sali v SPC Ltd* (1993) 116 ALR 625.

10 It is obvious that these proceedings, from my brief narration above, have not been pursued expeditiously by Ms Webb. Whilst the delays in part during 2011 may be attributed to the solicitors formerly acting for Ms Webb, that represents only a portion of the time which has taken thus far in dealing with this matter. Whilst it is Ms Webb's prerogative to decline to accept offers of settlement of her claim, the circumstances which she now finds herself in, can only be largely attributed to her own doing. Certainly the Department has done nothing to frustrate or impede the progress of the matter. On the contrary, it appears to have been cooperative with Ms Webb's former solicitors and the Union, in responding to various requests and preparing the matter to be heard. It is to be noted that this case involves allegations of inappropriate conduct by Ms Webb against students and staff at Derby Senior High School. Many witnesses are proposed to be called, including children. Those individuals, along with those involved from the Department, have had these proceedings hanging over them now for the best part of two years. Ms Webb has been granted two adjournments which means those involved, in particular children witnesses have had to

prepare themselves on two occasions to give evidence. Also, as time passes memories fade and the due administration of justice can be compromised. Furthermore, the request by Ms Webb that the matter be listed for hearing again towards the end of this year, may fall during the time at which students undertake school examinations placing additional stresses and burdens upon them.

11 The duty of the Commission is to have regard to the interests of all concerned in the proceedings, and not just the circumstances of Ms Webb. Ms Webb has been afforded every reasonable opportunity to prepare her case for hearing and has had solicitors and the Union acting on her behalf. It is inconceivable that the case for Ms Webb was not largely prepared for hearing, given that the Union ceased to act for her only a week or so prior to the most recent dates listed for hearing in Derby. Indeed, Ms Webb, during the adjournment proceedings, conceded as much.

12 In my view, having weighed up all of the considerations, and having proper account for the interests of the Department and its witnesses, and the difficulties in obtaining available dates to hear the matter in the Derby Courthouse and thus the efficient use of public resources, it would be contrary to the interests of justice to adjourn the proceedings yet again for a third time. In the proceedings presently listed in Derby in July, Ms Webb will have ample opportunity to put her case and "clear her name" as she asserted during the adjournment proceedings.

13 Accordingly, the application to further adjourn the hearing is refused.

2012 WAIRC 00408

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS MARGARET SUSAN WEBB
	APPLICANT
	-v-
	DIRECTOR-GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 28 JUNE 2012
FILE NO/S	U 72 OF 2010
CITATION NO.	2012 WAIRC 00408

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr M Danger of counsel

Order

WHEREAS the substantive claim in this matter involves an allegation by Ms Webb that she was harshly, oppressively and unfairly dismissed by the Department on or about 27 April 2010;

AND WHEREAS the application is listed for hearing in Derby on 2-5 and 16-19 July 2012;

AND WHEREAS the Department has made an application under Reg 44 of the Industrial Relations Commission Regulations 2005 for the evidence of Mr C Skamp to be taken by way of video link. The grounds on which the application is made include that Mr Skamp was an investigator who interviewed Ms Webb and other witnesses. A transcript of those interviews was prepared. Mr Skamp is to be called to give evidence to establish that the transcript proposed to be tendered in the proceedings is of the interviews he conducted with Ms Webb and other witnesses. Mr Skamp now resides in the Perth and works for the WA Police. Mr Skamp has work commitments which would make travelling to Derby to give evidence difficult and his evidence is likely to be relatively short. Ms Webb opposes the application;

AND WHEREAS the Commission has considered the grounds in support of the application and in particular the terms of Reg 44(5) of the Regulations and will grant the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT the evidence of Mr C Skamp to be given in the hearing of the matter in Derby be by way of video link from Perth.

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

2012 WAIRC 00432

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS MARGARET SUSAN WEBB
	APPLICANT
	-v-
	DIRECTOR-GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 12 JULY 2012
FILE NO/S	U 72 OF 2010
CITATION NO.	2012 WAIRC 00432

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr M Danger of counsel

Order

WHEREAS the substantive claim in this matter involves an allegation by Ms Webb that she was harshly, oppressively and unfairly dismissed by the Department on or about 27 April 2010;

AND WHEREAS the application has been part heard and is listed for further hearing in Derby on 16-19 July 2012;

AND WHEREAS the Department has made an application under Reg 44 of the Industrial Relations Commission Regulations 2005 for the evidence of Ms C Apanah to be taken by way of video link. The grounds on which the application is made include that Ms Apanah was interviewed by investigators in relation to the charges against the applicant. Ms Apanah now resides in Tasmania and works for the Department of Education in Tasmania. Ms Apanah has teaching commitments which would make travelling to Derby to give evidence difficult;

AND WHEREAS the Commission has considered the grounds in support of the application and in particular the terms of Reg 44(5) of the Regulations and will grant the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT the evidence of Ms C Apanah to be given in the hearing of the matter in Derby be by way of video link from Tasmania.

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

2012 WAIRC 00751

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS MARGARET SUSAN WEBB
	APPLICANT
	-v-
	DIRECTOR-GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 13 AUGUST 2012
FILE NO/S	U 72 OF 2010
CITATION NO.	2012 WAIRC 00751

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr M Danger of counsel

Order

WHEREAS the substantive claim in this matter involves an allegation by Ms Webb that she was harshly, oppressively and unfairly dismissed by the Department on or about 27 April 2010;

AND WHEREAS the application has been part heard in Derby and is listed for further hearing in Perth on 15 August 2012;

AND WHEREAS the Department has made an application under Reg 44 of the Industrial Relations Commissions 2005 for the evidence of Mr P Bridge to be taken by way of video link. The grounds on which the application is made are that Ms Webb is appearing from Derby by video link and for Mr Bridge to travel from Derby to Perth will involve excessive costs and travel time;

AND WHEREAS the Commission has considered the grounds in support of the application and in particular the terms of Reg 44(5) of the Regulations and will grant the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT the evidence of Mr P Bridge to be given in the hearing of the matter in Perth be by way of video link from Derby.

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

2011 WAIRC 01040

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS MARGARET SUSAN WEBB
	APPLICANT
	-v-
	DIRECTOR-GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 16 NOVEMBER 2011
FILE NO.	U 72 OF 2010
CITATION NO.	2011 WAIRC 01040

Result	Direction issued
Representation	
Applicant	Mr M Amati as agent
Respondent	Mr M Danger of counsel

Direction

Having heard Mr M Amati as agent on behalf of the applicant and Mr M Danger of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby directs –

(1) THAT the applicant file and serve amended particulars of claim on the respondent by 4.00pm 18 November 2011.

(2) THAT the respondent shall give an informal discovery by serving its lists of documents by 14 December 2011.

(3) THAT inspection of documents shall be completed by 28 December 2011.

(4) THAT the application be listed for hearing for four days in late February or early March 2012.

(5) THAT the parties have liberty to apply on short notice.

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

2012 WAIRC 01035

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 01035
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 9 SEPTEMBER 2010, WEDNESDAY, 16 NOVEMBER 2011, WEDNESDAY, 6 JUNE 2012, MONDAY, 11 JUNE 2012, MONDAY, 2 JULY 2012, TUESDAY, 3 JULY 2012, WEDNESDAY, 4 JULY 2012, THURSDAY, 5 JULY 2012, MONDAY, 16 JULY 2012, TUESDAY, 17 JULY 2012, WEDNESDAY, 15 AUGUST 2012
DELIVERED	**:**	WEDNESDAY, 21 NOVEMBER 2012
FILE NO.	**:**	U 72 OF 2010
BETWEEN	**:**	MS MARGARET SUSAN WEBB Applicant AND DIRECTOR-GENERAL DEPARTMENT OF EDUCATION Respondent

Catchwords	**:**	Industrial law (WA) - Alleged harsh, oppressive or unfair dismissal - Allegations of poor conduct and behaviour - Prior inconsistent statements - Issues of procedural fairness - Principles applied - Application dismissed.
Legislation	**:**	Industrial Relations Act 1979 s 26(1)(a) and (c)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr M Danger of counsel
Solicitors:		
Applicant	**:**	
Respondent	**:**	State Solicitors Office

Case(s) referred to in reasons:

Geoffrey Johnstone v Ron Mance Acting Director General Department of Education (2002) 83 WAIG 1553

Reasons for Decision

1 The applicant Ms Webb was employed as a teacher at Derby District High School, which is located in Derby in the Kimberley region of the State. Ms Webb has been a teacher since about 1980. Between August and November 2007 Ms Webb was informed by the Department of Education that a number of disciplinary investigations were to be undertaken against her under the Public Sector Management Act 1994. Those investigations related to some 16 alleged breaches of discipline. The disciplinary incidents occurred on various dates during the course of 2007. The allegations, in the main, related to the use of inappropriate language to or in the presence of students; inappropriate use of force against students; a failure to report a student disclosure; and an attempt to interfere with a disciplinary investigation being conducted by the Department. As a result of the investigations, Ms Webb was charged with ten breaches of discipline.

2 By letters of 19 March and 1 April 2010, Ms Webb was informed by the Director General of the Department, Ms O'Neill, that most of the disciplinary charges were made out. By letter of 24 April 2010, the Department informed Ms Webb that her employment was terminated. The investigation and enquiry process under the PSM Act was very lengthy and took from late 2007, through to and including 2009.

3 As a consequence of notices given to Ms Webb under s 240 of the School Education Act 1999, Ms Webb was suspended from the school on 6 November 2007 and suspended without pay on 22 February 2008. Ms Webb has not been back to the school since.

4 By these proceedings, Ms Webb now challenges her dismissal by the respondent and seeks reinstatement.

Relevant principles

5 The relevant principles in relation to proceedings of this kind are well settled. An application by a teacher challenging their dismissal under the PSM Act enables the Commission to hear the matter de novo, depending on the circumstances of the case: *Geoffrey Johnstone v Ron Mance Acting Director General Department of Education* (2002) 83 WAIG 1553. The onus is on Ms Webb to establish her claim.

The charges laid and the outcome

6 As noted above, the allegations against Ms Webb, and the findings as a result of various investigations and disciplinary enquiries, are set out in letters to Ms Webb of 19 March and 1 April 2010. Given the nature of the allegations and the substantial body of evidence led in these proceedings, it is useful at this juncture, to set out the charges and findings in full as contained in the Department's letter of 19 March 2010. Formal parts omitted, it provides as follows:

1. On Friday 15 June 1007 at Derby District High School you behaved in an inappropriate manner towards a member of staff, namely Catherine Martin.

By way of further clarification it is claimed that you stated to another staff member that you "would run Cath out of town. I will get my elders on to her to get her out" or similar.

2. At about 11.40am on Friday 29 June 2007 at Derby District High School near the cooking room you behaved in an inappropriate manner towards a number of students, namely Kyle Angwin, Byron Moore and Clinton Waldron.

By way of further clarification it is claimed that the group of students attended at the cooking room requesting that they store some sausages in a refrigerator and you yelled at them "P.Off… get away from me."

3. At about 11.40am on Friday 29 June 2007 at Derby District High School near the cooking room you used inappropriate force against a student namely Clinton Waldron which was not authorised justified or excused by law.

By way of further clarification it is claimed that you ejected Clinton Waldron from the cooking room by grasping him by the collar and pushing him out of the room.

4. On an unspecified date in September 2007 you attempted to persuade three child witnesses to change their evidence provided to the Department of Education and Training in a current disciplinary process.

By way of further clarification, it is claimed that you caused a document to be produced, which you then presented to three child witnesses, namely Aaryn Harrison, Clinton Waldron and Kyle Angwin and requested that they sign it. The document stated that their evidence previously given in writing to the Department on 29 June 2007 was false, and that they now wished to retract this evidence, thus exonerating you from any wrong-doing. The evidence given by the three children on 29 June 2007 resulted in a disciplinary process being initiated by the Department which you were notified of in writing on the 27 August 2007.

5. At about 8.02am on 5 November 2007 at Derby District High School, 10 Anderson Street, Derby, you used inappropriate language towards a fellow member of staff in the presence of students.

By way of further clarification, it is claimed that you approached a female member of staff, namely Natasha Cockram, and confronted her in relation to a local complaint matter, involving Ms Webb and Ms Cockram, currently being dealt with by the Principal. You addressed Ms Cockram in a common area in school grounds, in the presence of a number of students close by who were making their way to class. You used words similar to "You little liar, I asked year 10 students, you made it up". You were advised that there were students nearby, and were requested to desist, but continued and stated: "You're a lying little shit" and "Don't tell me to shut up you little bitch". You made all of these comments in a loud manner so all persons in the vicinity could clearly hear them.

6. On an unknown date, during the middle of May 2007, you received information from a student and failed to report it to the Principal, in direct breach of the Department of Education and Training "Child Protection Policy".

By way of further clarification, it is claimed that you received a disclosure from a female student, namely "L", [words omitted], and failed to notify the Principal of the details of the disclosure.

7. On an unknown date, during term one 2007, at Derby District High School you used inappropriate physical action towards a student which was not authorised, justified or excused by law.

By way of further clarification, it is claimed that at about 11.00 am, on either a Wednesday or a Friday, during a S.O.S.E. lesson, you used inappropriate physical action towards Kyle Jordan Angwin, a Year 10 male student. It is claimed that you grabbed a baseball hat from Kyle's head and used the hat to hit him once to the side of the head. You then walked away with the hat.

8. On an unknown date, during term one 2007, at Derby District High School, you used inappropriate physical action towards a student, which was not authorised, justified or excused by law.

By way of further clarification, it is claimed that at an unspecified time on either a Wednesday or a Friday, during a S.O.S.E. lesson in the computer room you used inappropriate physical action towards Aaryn Harrison (Aaryn), a Year 10 male student. It is claimed that during the class, Aaryn was misbehaving and you approached him. As you got close, Aaryn slid from his chair and attempted to hide under the table. You used your foot to stamp on Aaryn's legs which were protruding out from under the desk.

9. On an unknown date, during term one 2007, at Derby District High School, you used inappropriate physical action towards a student, which was not authorised, justified or excused by law.

By way of further clarification, it is claimed that at an unspecified time on either a Wednesday or a Friday, during a S.O.S.E. lesson in the computer room you used inappropriate physical action towards Harley Kennedy, a Year 10 male student. It is claimed that you walked up to Harley (who was sitting at his desk) and you used both of your hands to grab

his hair and pull him from his seat towards you so that his chest was on the desk. You then released your grip and Harley sat back down.

10 On Thursday, 23 August 2007, at Derby District High School, you used inappropriate language towards students.

By way of further clarification, it is claimed that you opened the door of the cooking room and shouted at two male students who were loitering around the cooking room door and tapping on the window. You shouted words similar to "fuck off" towards the two students (possibly Glen Dann and Ishmael Barunga).

(Charge 6 anonomized by the Commission)

7 Five of the eight charges upheld, charges 1, 4, 5, 6, and 9, recommended that Ms Webb's employment be terminated. Charges 3, 7 and 10 led to recommendations that the Department reprimand Ms Webb.

8 At the outset of these proceedings, given the length of time over which the various Investigations and Inquiries had taken place, and some delays in the commencement of these proceedings by reason of adjournments sought by Ms Webb, the Commission sought clarification from counsel for the Department, as to how the various charges found to be proven, were to be relied upon for the purposes of these proceedings. Counsel indicated that charges 2, 7, 8 and 9 were abandoned. Charges 1, 4, 5 and 6 were relied upon by the Department to support its decision to dismiss Ms Webb. Charges 3 and 10 were relied upon by the Department to oppose reinstatement, in the event that the Commission found Ms Webb's dismissal to have been harsh, oppressive or unfair.

9 For the purposes of dealing with the allegations found proven, I will deal only with those on which reliance was based to terminate Ms Webb's employment. In the event that any of Ms Webb's challenges to those findings are made out, it will then be necessary to consider those charges referred to by the respondent as going to the issue of reinstatement.

Charge 6 – May 2007 fail to report disclosure by a student

10 This was the most serious allegation against Ms Webb. It was contended by the Department that in about mid May 2007, a student, L, then 14 years of age, disclosed to Ms Webb that she had suffered a serious reportable incident in Derby. The allegation was that Ms Webb had failed to report this disclosure to the School Principal, Mr Henderson, at the first opportunity, in accordance with the Department's Child Protection Policy. As a consequence, and as would be obvious, the Department contended this had significant detrimental effect on the student, then a child, and her family. It is convenient to set out the relevant terms of the Policy, which are cls 4.1 and 4.2 as follows:

4.1 GENERAL

All staff are responsible for acquiring the appropriate knowledge and understandings about child protection and respond appropriately to concerns of child maltreatment.

All public schools take reasonable actions to establish and maintain safe learning environments for all children. Such actions may involve assistance from district staff or other departments or non-government agencies.

…

To reduce the risk of suicidal and self harming children, decisive action must be taken by district or school staff regarding any concerns they have about a child and as early as possible.

…

4.2 REPORTING CHILD MALTREATMENT

Everyone working in a school needs to be able to recognise the risk factors and indicators of child maltreatment (refer to Appendix 1) to identify children who may be at risk and communicate these to the principal, either verbally or in writing. The principal must report the concerns as appropriate to the Department for Community Development (DCD) or the Western Australian Police Service (police).

If the concern relates to the conduct of a person other than a Department employee, the principal must report the concern to DCD. In addition if the concern relates to possible criminal conduct, the matter must be reported to the police.

…

Student disclosures must be responded to appropriately by staff and the child supported. If a disclosure from a student is ignored or dismissed the student continues to be placed at risk.

Written records of all concerns of maltreatment and disclosures that form the basis of a maltreatment report must be securely stored by the principal. This information must be provided to DCD and the police upon request (refer to Appendix 7).

The role of school staff is not investigative in matters of child maltreatment. Staff must report concerns to the principal who will action them appropriately. Staff may seek advice from professional colleagues including student services to clarify concerns and determine ongoing support for a child. Such consultation must be documented.

In order to avoid interfering with any investigative process initiated by DCD or the police, the principal (DD) must seek advice from DCD or the police as is appropriate prior to informing the parent / carer of a concern of maltreatment.

…

11 There was much evidence about this charge. Ms Webb testified that on 14 July 2007, during the school holidays, L and two friends, S and B, went to her house late one night. At the time Ms Webb had her son at home for the school holidays. They were watching a DVD. Ms Webb testified that she heard a knock on her door and when she answered it, she saw the girls. Ms Webb said the girls appeared to have been drinking and were intoxicated. Ms Webb said at first she told the girls to go away. However, they then proceeded to tell her that L had suffered a serious reportable incident about one week prior. On hearing this, Ms Webb said that she told them that she would immediately take L back to her mother. However, L did not want this as she feared the consequences. Ms Webb maintained that she told the girls that given what she had been informed, she would have to disclose this to the Principal at the School as soon as school returned after the holidays. Ms Webb also testified that she was aware that the Principal, Mr Henderson, was away on holiday at this time.

12 On returning to school at the beginning of term three, Ms Webb said that she spoke to Mr Henderson either on the first or second day of term and told him what had been disclosed to her. She said that she told Mr Henderson "quickly" prior to the beginning of a staff meeting. Ms Webb said that she also told a Deputy Principal "Jenny" and "Richo". Ms Webb testified that when she told Mr Henderson of the disclosure, he just looked at her in a surprised way and didn't say anything. In cross-examination, whilst Ms Webb initially said that she told Mr Henderson in the staff meeting, she later said that it occurred just prior to the staff meeting. Ms Webb also said that the disclosure took place in the library.

13 When it was put to her in cross-examination that her evidence about telling Mr Henderson of the disclosure was inconsistent with her statement to the Investigators, when she told them that she could not really remember where and when the report of the disclosure to Mr Henderson took place, she said she was overwhelmed with the number of charges she was then responding to. When she was informed by L of the serious reportable incident, Ms Webb said that she was asked by L not to tell anyone about it and made to promise that this would be the case. At the time the disclosure was made to her, Ms Webb testified that she made no attempt to telephone the Principal or a Deputy Principal, to inform them.

14 Furthermore, Ms Webb was not able to explain how it was that other school staff, such as the Principal Mr Henderson and a teacher Ms Hughes, were aware of the incident in late June if the disclosure took place at her home on the night of 14 July. When this question was put to her, Ms Webb described this as a "miracle".

15 Despite indications that she may not do so, evidence about the incident was given by L. It was obviously traumatic for her to relive the circumstances of the event some five years earlier. L said she went to see Ms Webb at her house. She thought this was in July some time, after the Derby races and in between the Boab Festival. She had her friends S and B with her at the time. L testified that she was not drunk but was affected by other substances at the time. L said to Ms Webb that something bad had happened to her while her friend S had been away at another school during the term. L said she did not want to tell S what happened over the phone and only told her when she came back to Derby in the July holidays.

16 Understandably, L testified that the incident and events surrounding it were a part of her life that she had tried to block out. She said that the serious reportable incident occurred sometime earlier, either just prior to or after Easter 2007. L did say that she probably told her friend B before telling S, and this was probably in about May or June. The first person she told was her partner. When it was raised with her in cross-examination, L was unable to say why she told the Investigators in November 2007, that the first adult who approached her about the incident was Ms Webb at school, about a week or two after the incident. She also told the Investigators that she told her friend B one or two days after the incident and S a few days after that.

17 L told the Investigators that she thought that one or other of S or B had told Ms Webb about it, which led to Ms Webb asking her about the incident at school. L also confirmed that as far as she was aware, Ms Webb "stuck to her word", and did not tell anybody about her disclosure. However, when it was put to her in cross-examination, she also was not able to explain how another teacher, Ms Hughes, knew of the incident in late June 2007.

18 S was L's best friend and is related to Ms Webb. She said that she only became aware of the serious reportable incident when she returned from school in the holidays at the end of the second term. S testified that L wanted to see Ms Webb so they went to see her at her house in July at around the time of the Derby Races. S seemed to think that L may have told her other good friend, B, about the incident at school during the first term. I pause to observe that this is consistent with what L told the Investigators. S did also say that on the night that the girls visited Ms Webb at her home in July, she was "pretty out of it". As with L, S could not explain, when it was put to her in cross-examination, how other teachers at the school knew of the incident in late June.

19 Evidence was also given by L's mother and grandmother. Her grandmother, J, was at the time, the school nurse at Derby District High School. She testified that in late June 2007, she received a telephone call from her daughter, E, L's mother, to go to their house. E and L were there and they informed her of the serious reportable incident and L also told her that she had disclosed it to Ms Webb earlier at school. The conversation with her daughter and granddaughter took place just before she went on long service leave on 9 July, which immediately preceded her retirement in early November 2007. A copy of the school newsletter, tendered as exhibit R4, bears this out. J also gave evidence in her capacity as a nurse, about the effect of delay in reporting, as she has been trained on the impact. She testified that there can be major legal and health consequences and a loss of forensic evidence. In her view, the failure to report the disclosure in a timely way had an enormous impact on L and has contributed to her poor self-esteem.

20 L's mother, E, also gave evidence. She was understandably, at times, very emotional. E testified that she received a telephone call from a friend, Eva, about ten weeks after the incident, to the effect that if she had problems with L of recent times, it was because she had suffered a serious incident. E was informed that Ms Webb was made aware of the incident. The contact from Eva to E would have been in about late June 2007. It was unclear on the evidence how Eva found out about the incident.

21 E said she immediately went to "Shum Gee and Jenny's" place, where she knew Ms Webb would be. E confronted Ms Webb and asked her why she did not tell her about the serious reportable incident. E testified that Ms Webb replied that L had asked her to promise not to tell anyone about the incident. According to E, Ms Webb informed her that the incident had occurred about ten weeks prior, and it was clear to E that Ms Webb had known about it for a long time. E said that she immediately

took Ms Webb down to the police station to report the incident. Ms Webb said she knew who did it and even drew a mud map as to where she thought it had occurred.

22 Some months later, after the Investigators had arrived at the school to investigate the allegations against Ms Webb, E said that Ms Webb came to her house. According to E's testimony, Ms Webb told her that L's friends, B and S, told her about the incident on the night that it happened. Also, Ms Webb told her that it was "illegal" for L to take part in an interview with the Investigators and she said that L should not attend. Ms Webb told E that she was also saying the same thing to all of the other parents of children who were to be interviewed.

23 E testified that if she had known of the incident at the time, then both herself and the teachers at the school would have understood why L was so hard to control and angry all the time and was getting into trouble.

24 The Principal of the school at the time, Mr Henderson, said that a staff member, Jenny Hughes, came to see him with a note which referred to Ms Webb having knowledge of a female student having suffered a serious reportable incident. The mother was concerned that Ms Webb and the school had not informed her of the allegation. The note from Ms Hughes was dated 27 June 2007. Given the seriousness of the event, Mr Henderson said he asked Ms Hughes to sign and date the note but a short time later, she retracted it. Ms Hughes said that she did so because fear of retribution by Ms Webb. However, she provided an unsigned copy of the note to Mr Henderson. When this was put to him, he could not recollect receiving an unsigned copy of the note at the time.

25 Mr Henderson confirmed that he was not away on holiday at the time Ms Webb suggested that he was. He had to undergo a minor surgical procedure, which took place during the school holiday period, but otherwise remained in Derby. In terms of Ms Webb's assertion that she reported the disclosure to him at the beginning of term three, Mr Henderson categorically denied this. He said at no time was there any advice to him from Ms Webb of L's disclosure to her. Moreover, Mr Henderson testified that in the first week of term three, Ms Webb was not at school as she was on leave. Ms Webb returned to school in the second week of term three, on 31 July. Mr Henderson said he had a meeting with her to discuss issues raised in the second term, in relation to her control of students and the need for a fresh start in the new term. In particular, Mr Henderson referred to his advice to Ms Webb, that students stop calling her "Auntie Margie" because this blurs the boundaries of the student teacher relationship.

26 Ms Hughes testified that J went to see her on 27 June to report the disclosure by L to herself and her mother. Ms Hughes said that she was also informed that Ms Webb had known about this for a long time and had not reported it. As the teacher responsible at the time for behaviour management, Ms Hughes said that she had been dealing with behavioural problems with L in the previous term and when she was informed of what had happened, she said that the "penny dropped". Ms Hughes said she immediately prepared a note of what she had been told by J which was dated 27 June 2007 and gave it to Mr Henderson. She did so because she understood that reporting obligations required teachers to report disclosures immediately. Ms Hughes confirmed that after a short time thinking about the matter, she withdrew the signed letter because of fear of retribution from Ms Webb, and replaced it with an unsigned copy.

27 Ms Hughes also testified that shortly after becoming aware of what happened she spoke with L to let her know that she was aware of the situation and that she had arranged counselling for the same day. In terms of the obligation to disclose, Ms Hughes referred to training for staff at the beginning of the teaching year 2007, at which Ms Webb was present, which emphasised the importance of the immediate reporting of disclosures because of possible adverse consequences for the students.

28 I have had the opportunity to observe closely the witnesses giving their evidence in relation to this matter over many days of hearings. Having done so, I do not accept Ms Webb's version of the events. Also, regrettably, I do not accept L and S's testimony as to the timing of the disclosure. L's testimony was completely at odds with the interviews she gave to the Investigators in November 2007 as to the incident, only some months after the event. I accept the obvious trauma that such an incident would cause to a young girl in L's situation. I also consider however, that her statements made to the Investigators at that time, to be a more reliable guide as to what occurred in 2007, than what has been said some five years later, in 2012.

29 A copy of the transcripts of the interviews conducted with the Investigator Mr Skamp, were tendered as exhibit R3 as business records of the Department. An affidavit was put on by the Department, verifying the accuracy of the transcripts as transcribed from the audio recordings. Also tendered, as part of the business records of the Department, were the Investigation and Inquiry Reports as exhibits R5 to R12. The Investigator and the Inquirer were acting as delegates of the Director General of the Department under the PSM Act.

30 To the extent that the evidence of L was inconsistent with the transcript of her interviews in November 2007, as a prior inconsistent statement, which was put to her in cross-examination, this entitles, but does not require the Commission to reject her testimony: see *Cross on Evidence* loose-leaf Ed par 17545. Whilst not bound by the rules of evidence, the Commission can have regard to the content of the interview statements, as business records of the Department, in these circumstances, not only for the purposes of discrediting the testimony of the witness but also, in the case of inconsistencies established in cross-examination, for the purposes of establishing the truth of their content. In each case it will be a question of the weight to be attached to the statements contained in the records.

31 Whilst L's best friend S was not interviewed by the Investigators, I consider her evidence to have been given sympathetically to and in support of Ms Webb. S was not an independent witness, being a relation of Ms Webb. Also, the fact that she said on the night that it was alleged that the girls made the disclosure to Ms Webb at her home on 14 July, that she was "out of it", further detracts from the credibility of her evidence. This is all the more so given the passage of some five years from the time of the alleged disclosure to Ms Webb at her home, to the time of these proceedings.

32 Furthermore, for reasons that I will come to in dealing with charge four, I have deep reservations as to whether any person associated with Ms Webb would be able to give evidence untainted by her influence over them, either tacit or explicit.

33 I also found Ms Webb's explanation of when she said she reported the disclosure to Mr Henderson, said to be in the beginning of term three, as wholly unconvincing. As counsel for the Department pointed out, Ms Webb's explanation in cross-examination as to how this report to Mr Henderson took place, kept changing. At first, Ms Webb said that she told Mr Henderson on the first or second day back in term three in a staff meeting. It then became just prior to the staff meeting outside the room. Later, the alleged report to Mr Henderson took place in the library. Additionally, when it was pointed out to Ms Webb that she was in fact on leave in the first week of term three, she said that the report must have occurred in the second week of term three instead.

34 In contrast to the shifting sands of Ms Webb's testimony, I found the testimony of witnesses called by the Department on this issue to be credible. First, I deal with the evidence of E. I found her testimony to be compelling. Obviously, even after several years, reliving the events of 2007 was very traumatic for her, as for her daughter. E became aware of the incident from her friend Eva, she thought in July 2007, but more probably it was late June. She went straight to Ms Webb and confronted her. Ms Webb told her that the incident had occurred some ten weeks prior. Ms Webb had promised to L not to tell anyone. Ms Webb and E went to the police station to make a report but L was not prepared to sign a formal complaint. E was clearly distressed at the knowledge that her daughter had been subject to such trauma, and Ms Webb had not reported her disclosure, despite the obligation to do so without delay.

35 At about the same time, L's grandmother, J, was informed of the incident. She immediately informed Ms Hughes. On the basis of Ms Hughes' testimony, and the note she prepared, this would have been on 27 June 2007. J described the impact of the delay in reporting such an incident in terms of the loss of forensic evidence, potential psychological damage due to a lack of prompt counselling and support, and the impact she observed, as a professional and as a grandparent, on L. Additionally, J confirmed L's original statement to the Investigators, when she testified that she was told by L that her disclosure to Ms Webb took place at the School, not long after the incident occurred.

36 Ms Hughes confirmed the report from J and her immediate contact with Mr Henderson. On Ms Hughes' testimony, being responsible for behaviour management issues, the impact on L of the delay in reporting the disclosure became obvious to her in retrospect. Ms Hughes also confirmed the refresher training that staff had received at the beginning of the 2007 school year, and the importance of disclosure.

37 Ms Webb's promise to L to not tell anyone of the serious reportable incident was borne out in the testimony of Mr Henderson. As noted, he was emphatic that there was no mention of it to him by Ms Webb at the beginning of term three, despite her assertions to the contrary, or at any other time. Mr Henderson only found out from Ms Hughes, when he was given the note on 27 June. The only meeting he had with Ms Webb was in the second week of term three, which was not to discuss L, but to discuss problems with Ms Webb's performance, in particular her over familiarity with students. There was clearly ample opportunity for Ms Webb to make a report to Mr Henderson of the disclosure, but none was made.

38 Overall, I found J, Ms Hughes and Mr Henderson credible witnesses. Additionally, their testimony was generally consistent with their interviews with the Investigators. I accept their evidence. However, even if, contrary to the Department's contentions, I was to accept Ms Webb's testimony and Ms Webb did report the disclosure to Mr Henderson some time in the second week of term three, as counsel for the Department rightly observed, this was many days after being told by L of the incident and contrary to the obligation on teachers, to report such a serious disclosure without delay.

39 The timing of the knowledge of E and J, Ms Hughes and Mr Henderson was also telling. None of Ms Webb, L or S, were able to explain how it could be, if Ms Webb had been told of the incident at her home on the night of 14 July as she claimed, and then first reported it to Mr Henderson in the second week of term three, that by the end of June, the others were already aware of the incident.

40 On balance, I am well satisfied that contrary to the obligations imposed on her by cl 4.2 of the Child Protection Policy, Ms Webb failed to report L's disclosure. This was based on a completely misguided notion of an attempt to be L's "friend", which put L, very sadly, at great risk of serious emotional and physical harm. Such a failure of duty was, of itself, in my opinion, sufficient to justify termination of employment.

Charge 1 – Behaved in inappropriate manner on 15 June 2007 towards Catherine Martin

41 By this charge, it was asserted by the Department that in mid June 2007, Ms Webb spoke to a fellow teacher Ms Natasha Cockram about another teacher, Ms Catherine Martin. Ms Martin has since married and her surname is now Apanah. For convenience, however, and consistent with the documents in evidence, I will refer to her by her former surname. It was alleged that in this conversation, which took place outside Ms Cockram's classroom, Ms Webb informed Ms Cockram, who Ms Webb knew to be a friend of Ms Martin, words to the effect that she would "run Cath out of town. I will get my elders on to her to get her out". The Department also contended that Ms Webb did this because Ms Martin was the source of a number of complaints to the Department about Ms Webb's conduct and behaviour in the school. In so acting, the Department contended that Ms Webb was attempting to intimidate Ms Martin into ceasing this activity. She used Ms Martin's friend, Ms Cockram, for this purpose, rather than confront Ms Martin directly.

42 Ms Webb testified that the reason that she spoke to Ms Cockram, along with another teacher Mr Haines, was to "sort out" why Ms Martin was, as she put it, "stalking" her and writing letters of report about her throughout the year. Ms Webb said that she asked Ms Cockram to assist her to find out what Ms Martin's difficulties with Ms Webb were. On the day in question, when Ms Webb asked Ms Cockram to speak with her outside of her classroom, Ms Webb said she did not say she would run Ms Martin out of town. Rather, she referred to the fact that elders in the town keep an eye on government organisations and get rid of those who aren't doing the right thing. Ms Webb testified that her elders are not from Derby as she comes from Fitzroy Crossing.

43 Furthermore, in cross-examination, Ms Webb said that Ms Martin did not understand her as she had no "cultural awareness" training. She said that Ms Martin misconstrued her behaviour with students. She spoke with Ms Cockram to try and get some results, as she knew Ms Cockram had a better rapport with Ms Martin than she did. Ms Webb did accept, however, that she

was not only annoyed, but became angry and upset by Ms Martin's complaints about her in the workplace, as she considered that Ms Martin was trying to "set her up".

44 Ms Cockram's version of the events regarding this incident was quite different. She testified that not long after she started teaching at Derby District High School as a new teacher, Ms Webb seemed to want to get to know her and other younger new teachers. According to Ms Cockram, Ms Webb said she wanted to work with them rather than with teachers such as Ms Martin and Ms Hughes, who Ms Webb regarded as "know it alls" who thought that they ran the school.

45 Ms Cockram testified that on Friday 15 June 2007 she was in her class teaching. Ms Webb came to the door and asked her to step outside the classroom. When she did so, Ms Webb came up close to her in her "personal space". Ms Webb asked Ms Cockram if she had been talking about Ms Webb. Ms Cockram replied that she had not. Ms Webb went on to say that she was not happy with Cath Martin, she was "going to run her out of town … [she did] not want her in the school … I've got my family here – we can run her out of town." Ms Cockram described the manner in which this was said as with intensity and Ms Webb, as she was saying this, slapped the back of one hand into the palm of her other hand. Ms Cockram testified that she felt quite intimidated by this behaviour as Ms Webb appeared to be quite aggressive.

46 As they were just outside of the classroom at this time, Ms Cockram said she was concerned that her students could see what was occurring through the classroom windows and was concerned about what the students may have thought about this incident.

47 As she considered Ms Webb's approach and comments to her as being serious and not in any way in jest, Ms Cockram passed on what was said to her to Ms Martin. According to Ms Cockram, Ms Martin was both annoyed and surprised. Ms Cockram said she was aware that Ms Webb and Ms Martin had had some "run-ins" in the past. After telling her about the incident, Ms Martin asked Ms Cockram if she would put the conversation she had with Ms Webb in writing. Ms Cockram testified that she was initially reluctant to do so, because of her fear of retribution from Ms Webb. However she decided to do so and the handwritten note she prepared was tendered as exhibit R18. Ms Cockram's evidence was that she prepared this note at the end of the school day on 15 June after the incident.

48 When in cross-examination, Ms Webb put to Ms Cockram that Ms Webb's elders do not come from Derby as she is from Fitzroy. Ms Cockram was emphatic in her response that Ms Webb said these things to her on the day. Allied to this, Ms Cockram said that as a result of cultural awareness training she had received in Broome, she was aware that aboriginal family members can be transient and may move from town to town to attend, for example, funerals etc.

49 Ms Martin testified that Ms Cockram came to see her as she was preparing to go to a school sport class. They went to Ms Martin's room where Ms Cockram relayed the conversation she had with Ms Webb. Ms Martin said that she was shocked by what she was told and would not expect this from a colleague. This caused her considerable anxiety and stress and she felt directly threatened. Ms Martin said she was aware that it may have been because of a series of incidents previously, when Ms Martin had reported various matters involving Ms Webb to the Principal. As a result of these events, and the threat made to her by Ms Webb, Ms Martin said that she avoided Ms Webb and undertook some counselling.

50 I found Ms Cockram to be an impressive witness. Her evidence was forthright. I accept her testimony. Ms Cockram's testimony was supported by a contemporaneous note which she made shortly after the incident, in her own hand. The note relevantly reads:

> Margie pulled me out of class to speak to me. Was questioning me about students etc. Then mentioned teacher's names that she doesn't get along with. Margie then mentioned her dislike for Cath and said exactly "I will run Cath out of town, I will get my elders on to her to get her out".
>
> I feel uncomfortable if Margie found out about this as she intimidates me.

51 I am satisfied from Ms Cockram's testimony, that Ms Webb did use the words alleged and did so in an intimidating manner towards Ms Cockram such that she came very close to her and gesticulated with her hands in an aggressive fashion. I also consider that Ms Webb had a motive to do so by "getting at" Ms Martin through Ms Cockram whom she knew to be a friend of Ms Martin. In my view, this was done for the purposes of intimidating Ms Martin and was consistent with Ms Webb's testimony that she was angry and annoyed with Ms Martin.

52 I also found Ms Martin to be a credible witness and I accept her evidence. I accept that whilst she may not have taken Ms Webb's statement literally, she was nonetheless threatened by it and it made her feel very uncomfortable around Ms Webb. I also accept the Department's submission that Ms Webb, by this conduct, was attempting to bully Ms Martin and she used Ms Cockram to deliver a message to her, in an endeavour to stop Ms Martin raising complaints as to Ms Webb's conduct and behaviour. Additionally, requesting Ms Cockram to leave her students whilst she was teaching her class, to discuss this matter, would have been clearly disruptive and distracting to both Ms Cockram and her students alike and inappropriate for that reason also.

53 I do not consider Ms Webb's contention in relation to "cultural awareness" as having any substance at all. Such contentions were peppered throughout Ms Webb's testimony and were thinly disguised allegations of racism. In my view, the complaints of the Department in relation to Ms Webb's conduct and behaviour had nothing at all to do with cultural awareness. They had everything to do with proper standards of professional conduct by teachers in the workplace, regardless of racial or ethnic background.

Charge 4 - In or about September 2007 attempt to persuade three child witnesses to change their evidence concerning a disciplinary investigation

54 By this allegation, it was asserted that Ms Webb interfered with the Investigation by the Department into the disciplinary allegations, by having three children retract their allegations of poor behaviour and conduct by Ms Webb. This was said to have been achieved by Ms Webb preparing a letter for the three students to sign, to the effect that a previous complaint letter of 29 June 2007, was false. The letter of 29 June is exhibit R1. It refers to the incident in the school cooking room on that day,

where the Department alleged that Ms Webb displayed inappropriate behaviour and used inappropriate force against a student Clinton Waldron. It was alleged that Ms Webb forced the student out of the cooking room by grasping his collar and pushing him backwards out of the door. Clinton Waldron and two other witnesses to the incident, students Kyle Angwyn and Aaryn Harrison, signed the letter.

55 The later and further letter, said to have been procured by Ms Webb, is undated and unsigned. It was exhibit R2. It had three spaces for the three students to sign. The letter says that the original complaint letter of 29 June 2007 was written on the suggestion of Ms Martin and made statements about Ms Webb's conduct and behaviour that were not true. The letter says that the boys were sorry for the accusations and that the original complaint letter should not have been written in the first place.

56 As to this issue, Ms Webb testified that it arose from an incident on 29 June when the school was hosting a visit from the Minister for Education and the Director General of the Department. Ms Webb was cooking lunch with students in her cooking class, for the visitors. It was common ground that Ms Webb was very busy and under considerable pressure on this day. Ms Martin was also involved in supervising a visiting group from another school, and was preparing a barbeque for them. An incident, the subject of charges two and three occurred. Ms Webb alleges Ms Martin coerced the three boys involved to write the letter of complaint. Ms Webb said that Ms Martin took the three students to the school computer room where she assisted them in the preparation of the letter. The letter was then given to the Principal Mr Henderson.

57 Some time later in term three, Ms Webb raised the issue of the 29 June complaint letter in her class. She testified that some students were complaining that teachers had put them on behaviour management programs. In the course of this issue being discussed, Ms Webb told the students that she had also received a complaint letter (exhibit R1), which had been given to the Principal, and she was horrified by it. By writing the letter, the three boys concerned who signed it, had taken her job away from her. In her evidence, Ms Webb testified that in saying this to the class, she did not try to influence the students in any way and did not tell them to write another letter or to change the original complaint letter in any way.

58 Ms Webb testified that she wanted to explain to the boys concerned the ramifications of the letter. She told the class that they "need to go home and discuss with [their] parents what to do. It's a very serious situation and the only way that it can be fixed is if [they] document the truth of how the first letter was actually written". In her interview with the Investigators on 5 December 2007 Ms Webb said at p 39:

> I said well you boys you just telling me that you've that I've lost my job. If any child in any school writes something like that about a teacher then there jobs gone. I said you boys have just taken my job from me. I said thank you very much after 29 years I said don't tell me about these things boys you better go home to your parents, talk about it and bring me back your thoughts in writing because that's the only way that you are going to save me now. And Kyle and Clinton said Oh were sick of signing letters, were not signing letters to no-one and I said I don't blame you Bubs. You don't have to sign letters and Aaron said you know Miss Webb I wrote that first letter. I said well why did you write it because you weren't even there. It was Kyle and Clinton he said because they're my mates and they were so upset and he said I'm going to write the second letter to tell the truth because you are a good teacher and we don't want you to loose your job. I said well baby I don't think one signature's gonna be enough but go talk to your mother and then bring me a letter. On the Monday the following week I was given a letter by Aaron and that's my response to that allegation and I'm sick of the lies and the by people like our Admin who are supposed to stand for justice and the truth the kids are the only ones telling the truth in all of this. [sic]

59 Ms Webb testified she does not recall what she told the Investigator.

60 In her next class with this group, Ms Webb testified that she was handed a letter by Trent Ozzies, signed by Aaryn Harrison, to the effect that the original complaint letter was untrue and was prepared under pressure from Ms Martin.

61 When cross-examined as to exhibit R2, that being the letter of retraction, Ms Webb said that Trent Ozzies was asked by Aaryn Harrison to help with typing the letter. Neither Aaryn Harrison nor Kyle Angwin gave evidence. Trent Ozzies did give evidence and it was to the effect that Aaryn Harrison approached him in a class and asked him to give him some help with a letter. Trent agreed. He and Aaryn Harrison went to the computer laboratory and Aaryn Harrison dictated to him the letter which Trent then typed up. Trent printed out one copy of the letter which only had Aaryn's name on it, which Aaryn signed (exhibit A2). Trent realised that he needed the signature of all three boys, so he printed three more copies of the letter with spaces for signatures for each of the boys.

62 Trent said he took one copy to Clinton Waldron. Clinton looked at the letter, but tore it up and threw it in the bin, according to Trent. Trent took another copy to Kyle Angwin who put it in his bag and took it home with him. Trent did not see this copy of the letter again. Trent testified that he had no knowledge of whether the letter was ever signed. According to Trent, Ms Webb had no involvement in the preparation of this letter of retraction.

63 In the absence of testimony from Kyle and Clinton, I am not able to conclusively determine their response to the production of the second letter, exhibit R2. However, on the strength of Trent Ozzies' evidence, it is open to infer and I do infer, that both Kyle and Clinton did not agree with the content of the letter of retraction because one of them threw it in the bin and the other did not sign it. More relevant, however, is the reason the letter came into existence. I accept Trent Ozzies' testimony that Ms Webb was not directly involved in the production of the retraction letter. However, the content of the transcript of the interview with the Investigator on 5 December 2007 is very revealing. Despite the fact that discussion about such matters by a teacher with students in a class is, of itself, highly inappropriate, given the position of authority Ms Webb had in the student-teacher relationship, the suggestion to "bring me a letter" and the reference to "bring me back your thoughts in writing because that's the only way you are going to save me now", was clear interference with the complaint process.

64 The message to students was abundantly clear in my view. Ms Webb was telling her students that she was about to lose her job as a teacher. The only way to save it was for the students to write a letter of exoneration. In my view this was a clear attempt to pervert the course of the Investigation process which was commenced as a result of the original complaint letter of 29 June 2007. In my view, this could be the only rational reason for Ms Webb raising this matter with the students in the class

on the day in question. Ms Webb was aware that some of the students were sympathetic to her situation and the suggestion to "bring in a letter" was a direct appeal to that sympathy.

65 Also, whilst it is not possible to finally determine the issue in the absence of evidence from the other students involved, I have considerable doubts that exhibits R1 and R2 were written by the same person, as alleged. The manner of composition, language used and structure of the letters is completely different.

Charge 5 – 5 November 2007 – use of inappropriate language to a fellow teacher in the presence of students

66 This allegation concerns an incident that occurred at the school early in the morning on 5 November 2007, at about 8am. It involved Ms Webb and another teacher, to whom I have referred above, Ms Cockram. A conversation took place between them in the presence of students. It was alleged that Ms Webb confronted Ms Cockram in relation to some matters being dealt with by the Principal Mr Henderson. Ms Webb was alleged to have called Ms Cockram a "liar", a "lying little shit". When told by Ms Cockram to shut up, Ms Webb is said to have responded in words to the effect "don't tell me to shut up you little bitch".

67 As noted earlier in these reasons, Ms Cockram was at the time, an inexperienced and young teacher at the school. On occasions, Ms Cockram was required to do relief teaching in Ms Webb's home economics class, as were others, because of a substantial number of absences by Ms Webb. Ms Webb testified that on one occasion, on 23 October 2007, after being absent on sick leave, she found her Home Economics Teacher's Aide, Ms Dwyer, in tears in the classroom. Ms Webb asked Ms Dwyer what was wrong. Ms Dwyer told her that Ms Cockram had reported to her that the students were saying that Ms Webb had told them the "cooking classes were failing because Ms Wendy Dwyer…was not preparing properly and that she was tardy and disorganised.": T26. Ms Webb testified she informed Ms Dwyer that this was not true and that the home economics lessons were successful. Ms Webb said she also told Ms Dwyer that she should not listen to gossip from other teachers.

68 Ms Webb lodged a number of complaints about this matter with Mr Henderson. Initially, Ms Webb asserted that the teacher concerned was Ms Martin. Ms Webb assumed this, because of the number of prior complaints Ms Martin had made to Mr Henderson about Ms Webb's conduct and behaviour. Subsequently, Ms Webb lodged a 'formal grievance' against Ms Cockram. It was alleged that Ms Cockram was unprofessional by raising what she had been told by her year 10 class with Ms Dwyer. Ms Webb requested a meeting with both Mr Henderson and Ms Cockram to resolve the issue. Ms Webb accused Ms Cockram of lying in order to avoid her own unprofessional behaviour. In the written complaint, Ms Webb made an allegation of racism by saying to Mr Henderson "is it only aboriginal teachers that are capable of unprofessional behaviour". Copies of the written complaints from Ms Webb to Mr Henderson are attached to exhibit A1.

69 Ms Webb became aware that it was in fact Ms Cockram who was the relief teacher in her home economics class on this occasion and not Ms Martin as a result of asking other staff who the relief teacher was on this particular day. Ms Webb said she decided to approach Ms Cockram to arrange a meeting. At about 7:40am on 5 November Ms Webb said she saw Ms Cockram walking on the path towards the manual arts room of the school, and moved across to cross paths with her. Ms Webb said she had the email from Mr Henderson in her hand at the time. Ms Webb said that she went up to Ms Cockram and said words to her to the following effect:

> Excuse me Ms Cockram can we please set up a meeting time with the principal over the Ms Dwyer incident because it was you who I need to see as Wendy had mentioned your name: T27

70 Ms Webb said that Ms Cockram then responded by shouting words to the following effect:

> Oh why don't you shut up.: T27

71 Ms Webb testified that she was shocked by the incident and had not been spoken to like this in 27 years of teaching.

72 Ms Webb denied she swore at Ms Cockram. She said it was Ms Cockram who was loud. Ms Webb testified that she responded by calling Ms Cockram a "chit" and a "bit". A '"chit" according to Ms Webb, is a "young precocious woman". A "bit" was said by Ms Webb to be an Aboriginal/English word for a "wannabe", a "young woman getting a bit above herself": T63. While Ms Webb said that she was not able to recall what she said to the Investigator on this issue, when it was put to Ms Webb that she told the Investigator that she used these words "chit" and "bit" deliberately, so that Ms Cockram may have thought she swore at her, Ms Webb denied this.

73 In terms of Ms Cockram's experience, Ms Webb also made the point of saying that Ms Cockram was only "two or three years out" and that Ms Webb was a senior and experienced teacher and that "there is a pecking order": T62. This theme, of describing other teachers with whom Ms Webb had encounters with as being "junior" or "two to three years out", was repeated on a number of occasions throughout Ms Webb's testimony.

74 The evidence of Ms Cockram as to this incident could not be more of a contrast. She said that on or about the Friday prior to the confrontation with Ms Webb on Monday 5 November, she was on duty in the school grounds. She saw Ms Webb who yelled at her to "check your pigeon hole". Ms Cockram did so. In it she found a note from Ms Webb. The note accused Ms Cockram of slander. It related to the issue of Ms Dwyer, about which Ms Webb had complained to the Principal, but the note did not refer to it specifically. Formal parts omitted, the note from Ms Webb to Ms Cockram reads as follows:

> I am writing to you to inform you that I have lodged a formal grievance against you for unprofessional behaviour through the spreading of gossip and misinformation designed to malign and undermine my name and teaching relationship with my teacher assistant.
>
> Natasha who the hell do you think you are going about the school forum gossiping about me and my teaching situation.
>
> You don't even know what teaching is about yet so I would like you mind your own business and keep out of mine.

> Schools don't need people who are adders spreading poison through the school with this sort of childish and unprofessional behaviour.
>
> I thought you were a great person and teacher but your nothing but a petty little gossip and not a very nice person at all.
>
> In future I will take much stronger action than this and formally charge you with slander and defamation if I catch you being so unprofessional again.

75 A copy of the note was tendered as exhibit R19.

76 Ms Cockram said that she was shocked and shaken when she saw the note. She testified that she felt intimidated by it. There was no invitation in the note to a meeting with Ms Webb and the Principal to discuss Ms Webb's grievance.

77 The following Monday morning Ms Cockram arrived at school. She testified that she did not want to see Ms Webb and she tried to avoid her. To do so, she waited for the siren to go before leaving her office, thereby minimising the possibility of running into Ms Webb. Ms Cockram's office was close to Ms Webb's home economics classroom. A "mud map" of the layout of this area, including the home economics classroom, Ms Cockram's office and a corridor/walkway adjacent, was prepared for the Investigator and a copy was tendered as exhibit R20.

78 As Ms Cockram was not teaching in period one, after waiting for the siren to sound, she left her office to go to the administration office to see if she had any relief teaching for the day. According to Ms Cockram, she saw Ms Webb with her students walking down the corridor. As soon as Ms Webb saw Ms Cockram, Ms Webb started to shout at her and swear. Ms Cockram said she recalled Ms Webb calling her a "lying little shit", and a "little bitch". Ms Cockram said she told Ms Webb to stop. Ms Webb came closer to Ms Cockram and kept going. At this point, Ms Cockram did tell Ms Webb to "shut up". Ms Cockram testified that Ms Webb was aggressive and was pointing her finger at her and yelling. Ms Cockram said there was certainly no request from Ms Webb to meet with her and Mr Henderson to discuss Ms Webb's grievance.

79 Ms Cockram said she was shaken by this encounter. When counsel for the Department asked her reaction to this Ms Cockram said at T260:

> What - what was your reaction? If you could describe it in a bit more detail?---My heart was going a million miles an hour. I was a bit shaky, and I was angry, and I wanted to let rip back, but at the same time, you know, you're at school, you're surrounded by students. I was trying to get her to stop. She wouldn't stop, and then just - just - yeah, more than anything intimidated and a bit shaken up and just frustrated, the fact that there's, you know - older member of staff having a go at one of the younger members of staff just really inappropriately, I think, anyway.

80 When asked further by counsel for the Department about whether Ms Webb was swearing, Ms Cockram said at T260:

> Do you recall what she said?---First it was, "You lying little shit." I remember that, because I was, like, well, what have I - you know, what have I done here? I haven't made up anything. And then she had said some other stuff coming close to me. Exactly what, I can't remember. When she was up on the ramp looking down at me she, yeah, called me a little bitch, but all the other words in between - not exactly - not exactly sure. I just remember those because - I said, in a place of work with kids around you kind of - you kind of step back when you hear that directed at you.

81 After this confrontation, Ms Cockram said that she went back to her office and rang one of the Deputy Principals. She told him that she was going home as she was shaken up by the incident. When she got home, Ms Cockram wrote a note that day about the incident. The note records Ms Webb's use of swear words directed at Ms Cockram. A copy of this handwritten note was tendered as exhibit R21. The next day, on 6 November, Ms Cockram made another note of the incident, to the same effect, but in which as she put it, she tried to "write it out a bit more officially". This note was exhibit R22.

82 Whilst she was not interviewed as a part of the Investigation, another teacher, Ms Preedy, was present in the home economics room at the time of the incident. She provided a written statement to the Investigator. Ms Preedy was not called to give evidence, but a copy of her statement was tendered as a part of the business records of the Investigation process as exhibit R23. While it is a question of weight, Ms Preedy did note that she heard Ms Webb's voice and she sounded "loud and obviously angry". Ms Preedy did not hear the words used by Ms Webb or the other person's reply. To that extent, Ms Preedy's statement is consistent with the evidence of Ms Cockram, but I cannot place much weight on it for the reasons just stated.

83 Having already found Ms Cockram to be a credible witness, her account of this incident was compelling. The fact of the contemporaneous notes made by Ms Cockram at the time of the incident is also of considerable weight. Whilst Ms Cockram accepted that she should not have told Ms Webb to "shut up" in the presence of students, I am satisfied it was in response to the conduct and behaviour of Ms Webb.

84 I did not find Ms Webb's explanation of this incident at all convincing. It was clear from the evidence that prior to 5 November, Ms Webb was very upset with Ms Cockram. Whilst this may, in view of Ms Cockram's evidence as to her conversation with Ms Dwyer, have been the result of a misunderstanding, Ms Webb's complaint to Mr Henderson and the language used in it, and importantly, exhibit R19, the note left by Ms Webb in Ms Cockram's pigeon hole, showed hostility towards Ms Cockram. I have no doubt on the evidence, that on the morning of 5 November, when Ms Webb saw Ms Cockram, she decided to give her "a piece of her mind". I accept that Ms Webb was loud and aggressive, and used the language alleged towards Ms Cockram. The suggestion, on Ms Webb's testimony, that Ms Cockram reacted angrily to Ms Webb's alleged calm and measured request for a meeting, by telling Ms Webb loudly, to "shut up", does not make sense and is inherently incredible.

Blurring of the teacher-student boundaries

85 A consistent theme in the case for the Department was the assertion that Ms Webb blurred the boundaries of the teacher-student relationship. It was contended that the blurring of boundaries was demonstrated, for example, by students referring to Ms Webb as "Aunty Margie", the giving of food to the students, and allowing students to visit Ms Webb at her home. It was put by the Department that this compounded problems for Ms Webb in the behaviour management of her students. A large

and obvious consequence of this blurring of the boundaries, was the failure to report the serious disclosure incident involving L, because L asked Ms Webb not to report the disclosure and trusted that Ms Webb would not tell anyone.

86 Whilst I have no doubt that Ms Webb had the best of intentions towards her students, I accept the blurring of the boundaries was a real problem for her. In part, the Principal, Mr Henderson, was attempting to be responsive to this issue in his counselling of Ms Webb about keeping an appropriate separation from personal relationships of kinship and the professional teacher-student relationship. I accept also, however, on the evidence, the response of the school in terms of the behaviour management policy, was sometimes lacking. The evidence showed that the "red card" system did not always work as it should, and this no doubt made the difficulties Ms Webb was experiencing with some students, even more difficult. While such a failure of the system from time to time no doubt made the hard job of a teacher harder, it is of itself no justification for poor behaviour and conduct of a teacher. Teachers must lead by example, and model the standards of behaviour expected of them.

Procedural fairness

87 Ms Webb's particulars of claim as originally filed, raised various allegations that she had been denied procedural fairness. Ms Webb was represented by a firm of solicitors at the time. Later, Ms Webb was represented by the State School Teachers' Union, and in its amended particulars of claim, similar allegations were made. As at the hearing of the claim, Ms Webb was unrepresented. Accordingly, the Commission gave Ms Webb an opportunity to explain her contentions in this regard, when parts of the original and amended particulars of claim were pointed out to her.

88 Ms Webb said she thought the process of the Investigation was unfair because the Investigator, Mr Scamp, let children be interviewed, some without parents being present. She also said that as the Investigation went on, more charges were laid. Ms Webb said some allegations were not specific enough, for example referring to "unknown dates and unknown times".

89 Detective Sergeant Scamp was called to give evidence. He was the Investigator who conducted the investigations into the allegations against Ms Webb at the time. Mr Scamp is a Detective Sergeant in the Western Australian Police. He confirmed the transcripts of the interviews of witnesses, which run to some 742 pages, which were tendered as exhibit R3, were those of the interviews he conducted and they are accurate. Detective Sergeant Scamp testified that he interviewed Ms Webb on at least two occasions, and there was no complaint raised by Ms Webb as to the process of the interviews. This is confirmed in the transcripts where in both interviews, on 15 November and 5 December 2007, when expressly asked about it, Ms Webb made no complaint or expressed any concern about the process of the interviews. All the interviews with children were with the permission of their parents.

90 I have carefully read all of the relevant interview transcripts and the Investigation and Inquiry Reports. The total of these materials run to nearly 1,000 pages. In my view, the process adopted by the Department was thorough and fair. All material allegations were put to Ms Webb and she was given ample opportunity to answer them. The same applies to the Investigation and Inquiry Reports. The consideration of the evidence and materials was fair and balanced. Whilst they are not in any way binding on the Commission, as proceedings of this kind are in the nature of a hearing de novo, I consider that the conclusions contained in the Reports were reasonably open. All of the interview transcripts and Investigation and Inquiry Reports, and the documents referred to in them, were provided to Ms Webb. She was given an opportunity to comment on the Department's proposed courses of action arising from each of them. There is no basis to conclude that the outcome of the disciplinary process was tainted by procedural unfairness in any way: *Johnstone*.

Conclusion

91 For all of the foregoing reasons, I am not satisfied that Ms Webb had made out her case challenging the findings arising from the disciplinary charges laid against her. In view of my conclusions in this regard, there is no need to consider the other findings, recommending reprimands, as they were only relied upon by the Department to resist reinstatement.

92 On all of the evidence and the submissions before the Commission, I am not persuaded that the dismissal of Ms Webb was harsh, oppressive or unfair. Accordingly, the application is dismissed.

2012 WAIRC 01036

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS MARGARET SUSAN WEBB
	APPLICANT
	-v-
	DIRECTOR-GENERAL
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 21 NOVEMBER 2012
FILE NO/S	U 72 OF 2010
CITATION NO.	2012 WAIRC 01036

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr M Danger of counsel and Ms R Owen

Order

HAVING heard the applicant in person and Mr M Danger of counsel and Ms R Owen 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 dismissed.

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

2013 WAIRC 00097

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILIP WETTON
	APPLICANT
	-v-
	ORD RIVER SPORTS CLUB
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 22 FEBRUARY 2013
FILE NO/S	B 141 OF 2012
CITATION NO.	2013 WAIRC 00097

Result	Application discontinued
Representation	
Applicant	Mr P Wetton
Respondent	Mr G Arnold (as agent)

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979;*

AND WHEREAS on 11 September 2012 and 22 November 2012 conferences between the parties were convened;

AND WHEREAS at the conclusion of the conference held on 22 November 2012 no agreement was reached between the parties;

AND WHEREAS on 15 February 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Amanda Lee Port	The Kim Green Family Trust Trading As BCJ Plastic Products	U 257/2012	Commissioner J L Harrison	Consent order issued
Trevor Vernon Herron	The Owners of Zenith City Centro Strata Plan 55731	U 221/2012	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2013 WAIRC 00141

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WA COUNTRY HEALTH SERVICE
	APPLICANT
	-v-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 14 MARCH 2013
FILE NO/S	C 15 OF 2008
CITATION NO.	2013 WAIRC 00141

Result	Application closed
Representation	
Applicant	Mr C Gleeson
Respondent	Ms A Samson

Order

WHEREAS at a conference in this matter held on 6 June 2008 the parties reached an agreement for an interim payment of $2.40 per shift to all cleaners who are rostered as ward-based cleaners who could be called upon to make and carbolise a discharge bed;

AND WHEREAS the conference was adjourned to allow further discussions between the parties to continue;

AND WHEREAS at a reconvened conference held on 7 February 2013 the Commission was informed that the parties have reached agreement on a multi-skilled patient support services worker model which now has been fully implemented and agree that the interim payment agreed on 6 June 2008 is no longer necessary,

NOW THEREFORE I, having heard Mr C Gleeson for the applicant and Ms A Samson for the respondent, and by consent, pursuant to the powers in s 44(6)(bb)(i) of the *Industrial Relations Act, 1979*, hereby order:

1. THAT the agreement between the parties made on 6 June 2008 for an interim payment of $2.40 per shift to all cleaners who are rostered as ward-based cleaners who could be called upon to make and carbolise a discharge bed is cancelled from 7 March 2013.
2. THAT the application C 15 of 2008 is hereby closed.

(Sgd.) A R BEECH,

[L.S.] Chief Commissioner.

CONFERENCES—Matters referred—

2012 WAIRC 00158

DISPUTE REGARDING THE EMPLOYERS REDEPLOYMENT OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD; THE PEEL HEALTH SERVICES BOARD; THE WA COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 19 MARCH 2012
FILE NO.	CR 1 OF 2012
CITATION NO.	2012 WAIRC 00158

Result	Direction issued
Representation	
Applicant	Ms E Palmer
Respondent	Mr N Fergus

Direction

HAVING heard Ms E Palmer on behalf of the applicant and Mr N Fergus on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

(2) THAT the applicant file and serve upon the respondent any signed witness statements upon which it intends to rely no later than 21 March 2012.

(3) THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than 23 March 2012.

(4) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than two days prior to the date of hearing.

(5) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.

(6) THAT the parties have liberty to apply on short notice.

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

2012 WAIRC 00438

DISPUTE REGARDING THE EMPLOYERS REDEPLOYMENT OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00438
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 28 MARCH 2012, THURSDAY, 29 MARCH 2012, FRIDAY, 1 JUNE 2012
DELIVERED	**:**	TUESDAY, 17 JULY 2012
FILE NO.	**:**	CR 1 OF 2012
BETWEEN	**:**	UNITED VOICE WA Applicant AND THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD. Respondent

Catchwords	**:**	Industrial law (WA) – Positions abolished – Whether calculation of severance pay entitlement for existing employees is an industrial matter – Requires current employment relationship - Application of Western Australian Government/LHMU Redeployment, Retraining and Redundancy Certified Agreement 2004 – Imposes time limit on process through which suitable alternative employment may be identified – Declaration and order issued
Legislation	**:**	Industrial Relations Act 1979 s 29(1)(l); s 44(9); s 27(1)(l); s 26 s 27(1)(s)
Result	**:**	Order and Declaration issued
Representation:		
Applicant	**:**	Ms E Palmer
Respondent	**:**	Ms T Sweeney

Case(s) referred to in reasons:

Kounis Metal Industries Pty Limited v Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch (1993) 73 WAIG 14*;*

Coles Myer Ltd v Koppin and Ors (1993) 73 WAIG 1754

Quality Bakers Australia Limited v Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch & Other (2004) 84 WAIG 2579

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355

Case(s) also cited:

Reasons for Decision

1 The employees the subject of the present dispute, Ms Padberg, Ms Tisdale, Ms D'Rozario, Ms Stanciu and Ms Carroll, have been long-standing employees at the Sir Charles Gardiner Hospital. All of them are engaged in the position of Menu Assistants in the hospital's catering department. Some of them have had very many years of service. As a result of a decision taken by the hospital in June 2011, changes to the catering department have been implemented such that most of the Menu Assistant positions have been abolished. A new position of Food Services Supervisor has been created and aspects of the operations of the catering service have been re-structured.

2 Because of this, and as required by the applicable industrial instruments, the hospital and the employees, as represented by the Union, have been conferring about alternative employment options for the Menu Assistants. Of a total of some 10 positions, five employees have accepted other offers of employment. The five employees the subject of these proceedings, have not. As a consequence of an interim order of the Commission made on 6 January 2012, these employees have been maintained in their Menu Assistant positions, on a supernumerary basis.

3 In accordance with the process described by the Western Australian Government/LHMU Redeployment, Retraining and Redundancy Certified Agreement 2004 a determination has been made by the Public Sector Commissioner of Western Australia, that the alternative employment offered by the hospital to the employees in question is 'suitable alternative employment' for the purposes of the Agreement. The Union disputes this. The Union in these proceedings seeks:

(a) a declaration that the employment offered by the hospital is not suitable alternative employment for the purposes of the Agreement;

(b) an order that the five employees concerned be paid severance pay; and

(c) any other orders that the Commission considers appropriate.

4 The substantive applications have been largely heard by the Commission. These reasons for decision deal with two subsidiary issues that have arisen during the course of the substantive proceedings. The first relates to an application under s 29(1)(l) of the Act to amend the s 44(9) referral to raise an issue concerning the proper interpretation of clause 9 Agreement. The issue relates to the calculation of severance pay entitlements for Ms D'Rozario. Whilst Ms D'Rozario was one of the employees included in the s 44(9) referral as being in dispute with the Minister regarding her redundancy and redeployment, this has now been resolved by agreement between the parties. However, the question of the calculation of entitlements, specifically the manner in which shift allowances are to be calculated, remains controversial. It is common ground that Ms D'Rozario has resigned from her employment and has received payment of severance under the Agreement.

5 The Union submits that the issue now raised not only has application to Ms D'Rozario, but also to the proposed redeployment of Ms Carroll and Ms Tisdale. This is because both of these employees have also taken a period of long service leave and whether that period of leave should be taken into account in calculating shift allowance entitlements. In response to issues raised by the Commission as to whether there remain any live industrial matters, and in Ms D'Rozario's case, whether the issue raised was a matter of enforcement, the Union contended that the relevance of the issue to remaining employees subject of the s 44(9) referral under the Act, provided the Commission with jurisdiction.

6 For the Minister, it was submitted, in relying upon decisions of the Industrial Appeal Court in *Kounis Metal Industries Pty Limited v Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* (1993) 73 WAIG 14 and *Coles Myer Ltd v Koppin and Ors* (1993) 73 WAIG 1754, that as Ms D'Rozario was no longer an employee at Sir Charles Gairdner Hospital, and no claim was made for the employment relationship to be restored, there no longer existed any live industrial matter for the Commission to enquire into and deal with.

7 After a short adjournment the Commission informed the parties that the application to amend the referral would be granted in part, but be limited to consideration of the proper method of calculation of entitlements to income maintenance and severance (if any), for the existing employees the subject of the s 44(9) referral. These are my reasons for so concluding which I can shortly state.

8 It is clear that the Commission has power to amend any proceedings on such terms as it considers fit, under s 27(1)(l) of the Act. It is also trite that in proceedings such as these, the Commission does not have jurisdiction or power to enforce the terms of an award or industrial agreement. That does not preclude, however, the Commission from engaging in what has been described as "arbitral interpretation", involving the interpretation of an award or industrial agreement, for the purposes of enquiring into and dealing with the industrial matter before it.

9 The issues in dispute between the parties to the present proceedings relate to the redeployment of, now, four employees employed as Menu Assistants at Sir Charles Gairdner Hospital. Questions have arisen as to the suitability of alternative employment that has been offered by the Minister, for the purposes of cl 8 of the Agreement. The Commission has heard a significant amount of evidence, and taken submissions on these issues to date. Regardless of whether the primary relief claimed by the Union, that being a declaration that the offers of alternative employment made by the Minister to the affected employees is not suitable alternative employment for the purposes of the Agreement, or not as the case may be, will involve the issue raised by the Union.

10 That is, insofar as Ms Carroll and Ms Tisdale are concerned, as existing employees, whether the Union is ultimately successful on their behalf, the fact that they have taken a period of long service leave will be a relevant consideration for the Minister, in calculating either their income maintenance or their severance pay, whichever arises under the Agreement. That is still a live issue to be determined in these proceedings. Given the nature and history of the present dispute, it is in the interests of the parties concerned, having regard to s 26 of the Act, that all relevant issues in dispute be determined by the Commission, subject of course to those matters being within the Commission's jurisdiction and power.

11 Insofar as Ms D'Rozario is concerned, I am not satisfied that a determination of this issue in relation to her circumstances would be within jurisdiction and power. That is because she has now resigned from her employment and is no longer an employee. In my view, in relation to her particular circumstances, the Commission would have no jurisdiction or power to make any determination about her entitlements as there is no live industrial matter on foot. Firstly there is no claim that the former employment relationship between her and the Minister be restored. Secondly and in any event, what the Union effectively seeks in relation to Ms D'Rozario, amounts to an after the event declaration about an entitlement under the Agreement, which is ultimately an enforcement issue or alternatively, a matter of bare interpretation.

12 For the foregoing reasons, the Commission requested the Union to draft an appropriate short amendment to the referral, reflecting the restricted amendment granted.

13 The second issue to be dealt with concerns the circumstances applying to Ms Stanciu. As a result of earlier proceedings before the Commission in the substantive matter concluding on 29 March 2012, an issue arose as to Ms Stanciu's medical fitness to undertake the suitable alternative employment then offered to her by the Minister. Ms Stanciu had been offered the alternative position of a Menu Assistant in the C Block location of the Sir Charles Gairdner Hospital. For medical reasons, in relation to which Ms Stanciu obtained a medical report from her general practitioner Dr Di Camillo, it was concluded that Ms Stanciu was permanently unfit for such a position as it would aggravate her medical condition. Following the proceedings on 29 March 2012, Ms Stanciu's circumstances were referred to the Minister's medical advisor for assessment. As a result, Ms Stanciu was offered a further alternative position, which the employer considered to be further suitable alternative employment.

14 The employer's medical assessment found that Ms Stanciu was not medically fit to perform the original duties of the position initially offered to her as suitable alternative employment. This opinion was expressed on advice from Dr Lee, an occupational physician. This advice was dated 17 April 2012. Subsequently, on 20 April 2012, Ms Stanciu was offered the further alternative position noted above. The Minister contends this is suitable alternative employment under cl 8(1) of the Agreement. Through the Union, Ms Stanciu has disputed this and does not consider that this is suitable alternative employment, and opposes her transfer.

15 The Union now contends, that in accordance with cls 8(2)(b) and (10) of the Agreement, Ms Stanciu is entitled to leave the services of the employer and receive a severance payment. This is prior to any further consideration by the Public Sector Commissioner, as to whether, in its view, the further alternative position is suitable alternative employment for the purposes of the Agreement.

16 Given that the Minister contests the Union's view as to Ms Stanciu's present entitlement, the parties agree that this matter be determined as a discrete issue in the proceedings. If the Union's contention is upheld, then Ms Stanciu would be entitled to severance payments in accordance with the terms of the Agreement. If not, the determination of the Public Sector Commissioner will be received and considered. If the Public Sector Commissioner, in accordance with the terms of the Agreement, concludes that the further offer is suitable alternative employment for Ms Stanciu, the Union foreshadowed recalling Ms Stanciu to give further evidence on the resumption of the proceedings. Since these submissions were made, the Public Sector Commissioner has determined that the further offer to Ms Stanciu should be regarded as suitable alternative employment for the purposes of the Agreement.

17 To facilitate the determination of this issue at this stage, the Commission will divide the proceedings under s 27(1)(s) of the Act. This discrete issue will become application CRA 1 of 2012. The remainder of the issues for determination will be application CRB 1 of 2012.

Terms of Agreement

18 The relevant provisions of the Agreement for present purposes are as follows:

> **8. REDEPLOYMENT AND RETRAINING**
>
> Suitable Alternative Employment
>
> …
>
> (2) a) The suitability of alternative employment or training shall be determined by the Public Sector Management Division of the Department of Premier and Cabinet after consultation with the employer, employee and Union concerned in accordance with subclause (1) of this clause and having regard for the particular circumstances of each employee.
>
> Any dispute between the parties over whether a position falls within the definition of suitable alternative employment as prescribed by subclause (1) of this Clause, subject to subclause 8 (2) (c) may be -referred to the Commission by any party to the dispute.
>
> b) Where suitable alternative employment is unable to be identified for an employee, the employee may elect within three months from the date the position becomes redundant to transfer to a position outside that defined as suitable or leave the services of the employer.
>
> An employee who elects:
>
> i) to leave the service of an employer shall be paid the severance and other payments prescribed by Clause 10 - Selective Voluntary Severance or Early Retirement of this Agreement; or

ii) to transfer to a position under the terms of this clause shall be entitled to the provisions of Clause 9 - Income Maintenance of this agreement .

…

10. SELECTIVE VOLUNTARY SEVERANCE OR EARLY RETIREMENT

Selective voluntary severance or early retirement

(1) a) Each employee identified as being surplus to the employer's requirements and who:

i) is dismissed without notice on grounds related to redundancy of the kind described in Clause 8 (2) (c) ; or

ii) cannot be found suitable alternative employment and who elects to resign; shall be entitled to the benefits of this clause.

Contentions of parties

19 The Union submitted that on its proper construction, consistent with the ordinary and natural meaning of the language of the clause, there is no ambiguity. It was submitted that the purpose of the clause is to place a time limit on the period from which an employee's position is declared redundant, for a suitable alternative position to be identified. If within the three month time limit specified in the clause, a suitable alternative position has not been identified, then the employee should be entitled to the option of leaving the employer and taking a severance payment. The Union contended that the evident purpose from the terms of the clause is to not leave an employee "in limbo" where there may be endless offers of alternative employment, thereby denying an employee an opportunity to leave the employer and take the benefits under the Agreement.

20 In this case, it is common ground that Ms Stanciu's position was, as with the other Menu Assistant positions, declared redundant on 9 January 2012. Whilst an interim order was made by Mayman C on 5 January 2012, the effect of the interim order was not to stay the declaration of redundancy of the positions rather a stay on the redeployment of the employees was imposed. This meant, as noted above, that the affected employees were declared supernumerary, and given alternative meaningful work.

21 The Union also contended, that the fact of the suitability of the alternative employment presently being in dispute, and being the subject of proceedings before the Commission, should not deny Ms Stanciu the benefit of the operation of this clause. In the present circumstances, after her position was declared redundant on 9 January 2012, the Union, on behalf of Ms Stanciu, by letter of 23 March 2012 to the Minister, said that should the alternative employment initially offered to her not be suitable, then Ms Stanciu intended to elect to leave the services of the employer and take a severance payment. Given that it was found by 23 April 2012 that the alternative employment offered to Ms Stanciu was not suitable, then within the three month period specified in cl 8(2)(b)(i) of the Agreement, Ms Stanciu has made her election.

22 For the Minister, it was submitted that even though the first offer of alternative employment was held not to be suitable by reason of Ms Stanciu's medical fitness, that does not preclude the Minister from making further offers of alternative employment to her in an endeavour to find a position which is suitable. Furthermore, the current revised alternative employment offer, is but one of a range of positions that have been offered to Ms Stanciu and her colleagues previously, from July 2011. The contention of the Minister was that until the Commission determines whether the current offer of alternative employment is suitable, then Ms Stanciu should not be entitled to resign and receive a severance payment.

Consideration

23 In relation to the principles to apply in the interpretation of industrial instruments, in *Quality Bakers Australia Limited v Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch & Other* (2004) 84 WAIG 2579 I observed:

> "It is settled law in this jurisdiction, that awards should be interpreted consistent with relevant principles having application to the construction of any other written instrument: *Perth Electric Tramways Employees' Industrial Union of Workers v The Commissioner of Railways* (1927) 7 WAIG 155; *FMWU v Wormald International (Australia) Pty Ltd* (1990) 70 WAIG 1287. That is, the meaning of the relevant provision in the Award needs to be read in its ordinary and natural sense within the context of the Award as a whole: *Norwest Beef Industries Ltd v WA Branch, Australasian Meat Industry Employee's Union* (1984) 64 WAIG 2124. Additionally, given that many if not most awards are drafted by those not always skilled in the art of legal drafting, a generous approach to interpretation ought be adopted: *Hospital Salaried Officers Association v Minister for Health* (1981) 61 WAIG 616; *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* (1987) 67 WAIG 1097."

24 Additionally, the High Court has reaffirmed the purposive approach to interpretation in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355. Applying these principles, in my view, the construction of the Union is to be preferred. I have reached that view for the following reasons.

25 From the language used in cl 8(2)(b), the draftsperson has clearly intended to specify a time limit on the process through which suitable alternative employment may be identified for an employee whose position has been declared redundant. The evident purpose of the time limitation, in this case three months, is to ensure that the process does not continue in endless cycles of offer and rejection.

26 The terms of the Agreement contemplate that the parties turned their minds to what would be a reasonable period of time from the date of an employee's position being declared redundant, to pursue suitable alternatives. The clear intention of cl 8(2)(b), from its plain and ordinary meaning, is to enable an employee to make a decision about their future within the three month time limit, to either transfer to an external position or to leave the employer, where suitable alternate employment has not been identified within this period. In the latter case, the terms of cl 8(2)(b)(i) make it clear that upon exercising that election, as long as it is within the three month time limit, in this case from 9 January 2012, the employee is entitled to be paid the severance and other payments prescribed by cl 10 of the Agreement. The overall purpose of the subclause, having regard to

the terms of cls 7, 8, and 10 of the Agreement when read as a whole, is to provide a degree of certainty within which the redeployment, retraining and severance process will take place. Whilst the purpose of the framework is to place an emphasis on finding alternate employment for an employee, it is not intended that disputes about these matters continue endlessly, and thus leave employees uncertain about their future, which conceivably could be the case on the Minister's interpretation of the Agreement.

27 If the focus is only on the first part of cl 8(2)(b), that being the finding of suitable alternate employment, then it is not difficult to envisage many circumstances where the employee would be denied the benefit of the remainder of the subclause. This is so because time may pass well beyond the point at which the employee's position is declared redundant.

28 Accordingly, a declaration will be made that Ms Stanciu should be entitled, in accordance with cls 8(b)(ii) and 10 of the Agreement, to elect to leave the services of the employer, and be paid the severance and other payments as prescribed.

2012 WAIRC 00791

DISPUTE REGARDING THE EMPLOYERS REDEPLOYMENT OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD.
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 28 AUGUST 2012
FILE NO.	CR 1 OF 2012
CITATION NO.	2012 WAIRC 00791

Result	Order issued
Representation	
Applicant	Ms E Palmer
Respondent	Ms T Sweeney

Order

HAVING HEARD Ms E Palmer on behalf of the applicant and Ms T Sweeney on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby –

ORDERS that the herein application be divided into applications CRA 1 of 2012 and CRB 1 of 2012.

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

2012 WAIRC 00790

DISPUTE REGARDING THE EMPLOYERS REDEPLOYMENT OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD.
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 28 AUGUST 2012
FILE NO.	CRA 1 OF 2012
CITATION NO.	2012 WAIRC 00790

Result	Declaration issued
Representation	
Applicant	Ms E Palmer
Respondent	Ms T Sweeney

Declaration

HAVING HEARD Ms E Palmer on behalf of the applicant and Ms T Sweeney on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby –

(1) DECLARES that the position of Menu Assistant at Sir Charles Gairdner Hospital occupied by Ms N Stanciu ceased to exist and was therefore redundant on 9 January 2012.

(2) DECLARES that Ms N Stanciu should accordingly be entitled to leave the services of the employer and be paid the severance and other payments in accordance with the terms of cls 8(b)(ii) and 10 of the Western Australian Government/Australian Liquor, Hospitality and Miscellaneous Union Redeployment, Retraining and Redundancy Certified Agreement 2004.

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

2012 WAIRC 00816

DISPUTE REGARDING THE EMPLOYERS REDEPLOYMENT OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD.
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 7 SEPTEMBER 2012
FILE NO/S	CRB 1 OF 2012
CITATION NO.	2012 WAIRC 00816

Result	Order and directions issued
Representation	
Applicant	Ms C Collins of counsel
Respondent	Mr T Sweeney and with her Mr C Gleeson

Order and Direction

HAVING heard Ms C Collins of counsel on behalf of the applicant and Ms T Sweeney on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby–

(1) ORDERS that the memorandum of matters referred for hearing and determination pursuant to section 44(9) of the Act be amended in the terms of the following schedule.

(2) DIRECTS that the applicant shall file and serve upon the respondent written submissions regarding its application for leave to re-open to adduce further evidence and whether the calculation of severance pay pursuant to clauses 9(2)(b)(ii)(bb) and 10(2) of the RRR Agreement should exclude any period of long service leave by 14 September 2012.

(3) DIRECTS that the respondent shall file and serve upon the applicant written submissions in reply regarding the application for leave to re-open to adduce further evidence and whether the calculation of severance pay pursuant to clauses 9(2)(b)(ii)(bb) and 10(2) of the RRR Agreement should exclude any period of long service leave by 21 September 2012.

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

AMENDED SCHEDULE

1. The applicant and the respondent are in dispute in relation to the proposed redeployment of five employees employed as Menu Assistants at Sir Charles Gairdner Hospital. The employees are Ms J D'Rozario, Ms B Padberg, Ms A Carroll, Ms N Stanciu and Ms S Tisdale.

2. As a consequence of restructuring of its catering services at the hospital, the respondent has determined that the menu assistant positions are no longer required and the positions have been abolished. The affected employees have been offered alternative employment which the respondent submits is suitable alternative employment for the purposes of cl 8 of the Western Australian Government / Liquor Hospitality and Miscellaneous Union Redeployment, Retraining and Redundancy Certified Agreement 2004 ('the RRR Agreement').

3. This is disputed by the applicant. The suitability of the positions offered by the respondent was referred to the Public Sector Commission of Western Australia for a determination as to whether the alternatives offered were suitable alternative employment for the purposes of the Agreement.

4. As a result of compulsory conference proceedings under s 44 of the Act the Commission made an interim order on 6 January 2012. The effect of the interim order is that the respondent maintain the affected employees in a supernumerary capacity, in their current positions, in their current work areas and on their current rosters and that they not be redeployed pending the final determination of the issue of the suitability of alternative employment.

5. On 13 January 2012 the Public Sector Commission advised the respondent that with the exception of the offer to Ms J D'Rozario, the offers made to the affected employees was suitable alternative employment for the purposes of the Agreement.

6. The respondent further contends that on the basis that the affected employees have not been dismissed there is no obligation upon it to offer them severance pay.

7. The applicant disputes the assessment that the offers constitute suitable alternative employment and opposes the redeployment.

8. The applicant further contends that even if the offers constitute suitable alternative employment according to the definition contained in clause 8(1) of the Agreement, having regard to the particular circumstances of each employee and what is fair, reasonable and just, redeployment is not suitable and severance pay should be offered.

9. An additional dispute has arisen between the parties out of the above circumstances relevant to the employees Ms Carroll and Ms Tisdale.

10. Clause 9 of the RRR Agreement provides for the calculation of income maintenance should an employee be deployed to suitable alternative employment or of severance pay should an employee receive severance pay pursuant to clause 10(2) of the RRR Agreement.

11. The Applicant contends that the calculations of a "shift allowance which is paid on a regular basis" under clause 9(2)(b)(ii)(bb) should exclude any period of long service leave during which the shift allowance was not payable.

12. Accordingly, having regard to all of the circumstances, the applicant seeks:

    (a) A declaration that the offers of alternative employment made by the respondent to the affected employees is not "suitable alternative employment" for the purposes of cl 8 of the Agreement;

    (b) An order that the respondent offer severance pay;

    (c) An order that the calculation of the shift allowance provided for in clause 9(2)(b)(ii)(bb) should exclude any period of long service leave during which the shift allowance was not payable; and

    (d) Such other orders as the Commission considers appropriate.

2012 WAIRC 00864

DISPUTE REGARDING THE EMPLOYERS REDEPLOYMENT OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 00864
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 7 SEPTEMBER 2012; WRITTEN SUBMISSIONS 14 & 18 SEPTEMBER 2012
DELIVERED	**:**	TUESDAY, 25 SEPTEMBER 2012
FILE NO.	**:**	CRB 1 OF 2012
BETWEEN	**:**	UNITED VOICE WA
		Applicant
		AND
		THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD.
		Respondent

Catchwords	:	Industrial law (WA) - Application to re-open proceedings prior to delivery of decision - Principles applied - Application dismissed.
Result	:	Application for leave to re-open refused
Representation:		
Applicant	:	Ms C Collins of counsel
Respondent	:	Ms T Sweeney

Case(s) referred to in reasons:

Londish v Golf Pacific Pty Ltd (1993) 117 ALR 361

Osborne v Landpower Developments Pty Ltd [2003] WASCA 117

Smith v New South Wales Bar Assn (1992) 176 CLR 256

Watson v Metropolitan (Perth) Passenger Transport Trust [1965] WAR 88

Case(s) also cited:

ALHMWA v SCGH [1996] Print N7046 (6 December 1996)

Autodesk Inc v Dyason (No2) [1993] HCA 6

Guest v Kimberly Land Council (2009) 89 WAIG 971

Guest v Kimberley Land Council (2009) 89 WAIG 2262

Reasons for Decision

1 On 7 September 2012 the Commission made directions in these proceedings requiring the parties to file and serve written submissions in relation to the application by the Union for leave to re-open the proceedings to lead further evidence in the matter. This issue was originally raised by the Union in April 2012, but by reason of the necessity for the Commission to determine other issues in these proceedings, the Commission has not had an opportunity to deal with the matter before now. A further issue the subject of the directions, that being how any severance payments arising from this application should be calculated, has been resolved by agreement between the parties and no further consideration of that matter is necessary.

2 The application relates to evidence given in the proceedings on 29 March 2012 from the Minister through Ms Glatz, the Acting Manager of Patient Support Services at Sir Charles Gairdner Hospital. The evidence related to whether the Menu Assistants deal with complaints from patients in relation to the meal service, or whether those matters are dealt with by supervisors and managers. The issue was not raised in Ms Glatz's witness statement, which stood as her evidence in chief. It arose during the course of cross-examination, specifically in response to a question by the Commission. The thrust of Ms Glatz's testimony was that whilst the Menu Assistants were performing some work at a level higher than their formal job classification level, in relation to formal complaints and the like, those matters were generally dealt with by supervisors and managers and the Menu Assistants would deal with lower level issues. After Ms Glatz had completed her evidence, the Minister called two further witnesses and the parties made submissions.

3 Following the adjournment of the hearing, the Union's representative received instructions that the evidence of Ms Glatz in relation to the handling of complaints by supervisors and managers, and not Menu Assistants, was either misleading or incomplete. It was suggested that this evidence does not accurately reflect the role and responsibilities of supervisors, managers and Menu Assistants. It was on this basis that the Union promptly made an application to the Commission for leave to re-open the proceedings to lead further evidence on this question.

4 Specifically, the Union has foreshadowed that it will call evidence from Ms Luff, a former supervisor at Sir Charles Gairdner Hospital. Ms Luff has knowledge and experience in the role and responsibilities of supervisors, managers and Menu Assistants, in relation to these matters.

5 The Union submitted that in reliance upon *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88 per Wolff CJ, leave to reopen should be granted. In that case, Wolff CJ said:

> …there is a dearth of authority as to the circumstances in which the court should reopen the evidence after the trial has concluded. I consider that a court should be cautious in doing so and should admit fresh evidence of this nature only when it is material that the interests of justice require it, and the evidence if believed would most probably effect the result, and further, that the evidence could not by reasonable diligence have been discovered before.

6 The Union submitted that it was in the interests of justice that this further evidence be put before the Commission. It was submitted that the position of the affected employees will be prejudiced if it is unable to lead such evidence. The Union contended that the Commission should be fully informed about the facts of the case before making a determination, and it has a duty to inform itself accordingly. Furthermore, the Union submitted that it is in the interests of justice that the Commission be fully informed.

7 As to whether the evidence will affect the result, the Union said that the issue of "suitable alternative employment", to be determined in the proceedings, necessarily involves the duties and responsibilities of the Menu Assistants, and that is a question which goes to the heart of whether the offers presently made to the employees could be regarded as suitable alternative employment. In this respect, the Union contended that Ms Luff will be a credible and reliable witness who has

relevant experience and knowledge to explain the complaints management process and the relative roles of supervisors and managers prior to the restructuring of the catering department at the Sir Charles Gairdner Hospital.

8 The Union submitted that such evidence could not have been discovered by reasonable diligence prior to the hearing, as it is responsive to evidence led by the Minister. It was not evidence which could have been reasonably anticipated before the hearing and was not dealt with by Ms Glatz in her evidence in chief. Furthermore, the issue was not raised in the outline of submissions filed by the Minister rather it arose out of questions directed to Ms Glatz by the Commission.

9 As a result of this, the Union did not become aware of any discrepancies in relation to this issue until further instructions were given to it after the adjournment of the hearing. It was contended therefore that counsel for the Union could not have reasonably anticipated this issue prior to the hearing, and taken instructions on it.

10 The Minister opposes the Union's application for leave to reopen. It also referred to *Watson*. As to the interests of justice, the Minister submitted that the assertion of the Union that Ms Glatz's evidence was misleading is unfair and prejudicial. It contends that the question of the management of complaints was fully explored at the hearing both through the Union's and Minister's witnesses. Ultimately, it is a question of a conflict on the evidence which is a matter for the Commission to determine.

11 In relation to whether any such additional evidence will affect the result of the proceedings, the Minister contended that the duties and responsibilities of the Menu Assistants is only one issue to be determined. In relation to whether an of employment is suitable alternative employment for the purposes of the Agreement, a number of other factors also need to be taken into account. Furthermore, the determination of suitable alternative employment does not preclude the inclusion of positions which may involve a lower level of responsibility, skills and differing duties. In view of all of the evidence led in these proceedings, the Minister submitted that further evidence of one witness on this issue would be unlikely to affect the overall result.

12 As to the question of whether with reasonable diligence the matter could have been discovered before the hearing, the Minister contended that the Union, in its own submissions, raised the issue of supervision duties performed by Menu Assistants, including supervising, mentoring and training the Food Service Attendant Position. This was also the subject of evidence through a number of the Union's own witnesses, from the affected employees.

13 Therefore, the Minister contended that the overall question of supervision was one widely canvassed during the proceedings and is a matter which could have been anticipated by the Union prior to the hearing.

14 Finally, the Minister submitted that to grant the application would prejudice it. This submission was made on the basis that Ms Glatz was an honest witness who provided credible testimony, and the Commission could evaluate her evidence in light of the evidence of the employees who gave evidence as to the work that they performed. The question of a conflict on the evidence is a matter to be dealt with in submissions of the parties, and accordingly, be determined by the Commission in light of all of the material before it.

Consideration

15 Whether leave should be granted to re-open a case after a hearing has concluded is a discretionary decision. Leave may be granted in circumstances where evidence is discovered after the hearing that could materially affect the result of the proceedings. *Watson* has been extensively referred to. In *Londish v Golf Pacific Pty Ltd* (1993) 117 ALR 361 in the Full Court of the Federal Court, after considering *Watson* and a number of other authorities, a less stringent test was applied. The court in *Londish* noted that in *Watson*, the test imposed for leave to re-open a case before the delivery of a judgement, was the same as that applying after delivery of a judgement. In a situation where leave is sought to re-open before the delivery of a judgement, the court in *Londish* applied the test for leave to amend pleadings during a case, that being the attainment of justice. This necessarily also involves the consideration of any prejudice to the other party in the proceedings.

16 The Full Court in *Londish* referred to the decision of the High Court in *Smith v New South Wales Bar Assn* (1992) 176 CLR 256 at 266-267. In that case, Brennan, Dawson, Toohey and Gaudron JJ drew a distinction between different considerations applying depending upon whether an application is made to re-open when the hearing is complete, or where reasons for judgement have been delivered. In the former case, the court concluded that it was difficult to see why in that situation, embarrassment or prejudice to the other party should not be the primary consideration. The decision in *Smith* was also considered by McLure J in *Osborne v Landpower Developments Pty Ltd* [2003] WASCA 117. At pars 12-14 her Honour observed:

> There is some uncertainty as to the test to be applied to the exercise of the court's discretion to permit the re-opening of a matter before orders are made. The High Court in *Smith v New South Wales Bar Association* (1992) 176 CLR 256 said at 266–267:
>
> > If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to inquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending on whether the case is simply one in which the hearing is complete, or one in which reasons for judgment have been delivered. It is difficult to see why, in the former situation, the primary consideration should not be that of embarrassment or prejudice to the other side. In the latter situation the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to re-open should be exercised.
>
> The rules relating to fresh evidence on appeal are well known. The appellant would need to show that there was a real possibility that the further evidence would have produced a different result if it had been admitted and that the further evidence would not have been available at the original hearing by the exercise of reasonable diligence: *Australian Electrical Electronics Foundry & Engineering Union (WA Branch) v Hamersley Iron Pty Ltd* (1998) 19 WAR 145

160, 162 and 163. A similar test was applied in *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88 on an application to re-open before judgment.

It is to be expected that a less stringent test would apply when leave to re-open is sought before reasons are delivered and orders made because the policy in favour of finality does not have the same force. …Relevant factors in the exercise of the discretion include the materiality of the evidence and whether the interests of justice would be advanced by its admission: *Joyce v GIO (NSW)* reported in Ritchie's Supreme Court Procedure, New South Wales, vol 2 p 8551–8552 and cited with approval by the High Court in *Smith* (above) (at 267).

17 Having considered these matters and the less stringent test adopted by the Full Federal Court in *Londish*, and in *Smith* and *Osborne*, leave to re-open will be not be granted. I am not persuaded in this instance it would be in the interests of justice to grant leave. The evidence of Ms Glatz as to the supervision of Menu Assistants was not dealt with in her witness statement in evidence in chief but it did arise in cross-examination and specifically out of questions from the Commission. The issue was canvassed in the Union's outline of submissions filed prior to the hearing. It was referred to in the witness statements of the employees called to give evidence by the Union. It was also the subject of cross-examination and re-examination. The question overall of any on-the-job supervision was quite well ventilated in the proceedings. It was a live issue. I see no reason why Ms Luff could not have been called to give evidence at the outset. Any conflict on the evidence as to this issue will need to be resolved by the Commission in the usual way.

18 There may also be material prejudice to the Minister in granting leave. If a party wishes to assert that a witness who has given evidence is to be doubted or cannot be relied upon, it can make submissions on that issue. To grant leave based on the application by the Union, may give rise to an apprehension of an implicit prejudgement as to the veracity of Ms Glatz's testimony. In my view that would be unfair. All of the evidence is in. The parties have been given a full opportunity to address the evidence in their closing submissions.

19 Further, the nature of the duties and responsibilities of Menu Assistants is not the only issue to be considered as to whether the offers made by the Minister are suitable alternative employment. Whilst it is a factor of some significance, there are other factors under the Agreement the Commission is required to have regard to.

20 Accordingly, the application for leave to re-open to receive the further evidence from Ms Luff is refused.

21 As foreshadowed at the directions hearing on 7 September, in the event the application by the Union to adduce further evidence was refused, the Commission would reserve its decision on the main issue in dispute, which I now do.

2012 WAIRC 00865

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD.
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 25 SEPTEMBER 2012
FILE NO/S	CRB 1 OF 2012
CITATION NO.	2012 WAIRC 00865

Result	Application dismissed
Representation	
Applicant	Mr C Collins of counsel
Respondent	Ms T Sweeney

Order

HAVING heard Ms C Collins of counsel on behalf of the applicant and Ms T Sweeney on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the applicant's application for leave to re-open the proceedings be and is hereby dismissed.

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

2012 WAIRC 01090

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2012 WAIRC 01090
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 28 MARCH 2012, THURSDAY, 29 MARCH 2012, FRIDAY, 1 JUNE 2012, TUESDAY, 17 JULY 2012, TUESDAY, 25 SEPTEMBER 2012, FRIDAY, 7 SEPTEMBER 2012
DELIVERED	**:**	FRIDAY, 7 DECEMBER 2012
FILE NO.	**:**	CRB 1 OF 2012
BETWEEN	**:**	UNITED VOICE WA Applicant AND THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD. Respondent

Catchwords	**:**	Industrial law (WA) – Dispute as to proposed redeployment of employees – Positions abolished – Application of Western Australian Government / Liquor, Hospitality and Miscellaneous Union Redeployment, Retraining and Redundancy Certified Agreement 2004 – Question whether position is 'suitable alternative employment' – Principles applied – Declaration made.
Legislation	**:**	Industrial Relations Act 1979 s 44(9)
Result	**:**	Declaration issued
Representation:		
Applicant	**:**	Ms E Palmer and later Ms C Collins of counsel
Respondent	**:**	Ms T Sweeney

Case(s) referred to in reasons:

Hans Continental Smallgoods Pty Ltd v Farrell [2005] NSWIRComm 1103;

ALHMWU v SCGH (1996 Print N7046 unreported AIRC 6 December 1996);

Clothing and Allied Trades Union of Australia v Hot Tuna Pty Ltd (1988) 27 IR 226;

ALHMWU v SCGH (1996) 69 IR 279.

Case(s) also cited:

Krysti Guest v *Kimberley Land Council* [2009] WAIRComm 443;

Krysti Guest v Kimberley Land Council [2009] WAIRComm 1155;

Guest v Kimberley Land Council Aboriginal Corporation (2010) WASCA 53;

Autodesk Inc v Dyason (No 2) [1993] HCA 6;

Australian Chamber of Manufacturers v Derole Nominees Pty Ltd Print 14414 (12 September 1990);

Lawrie v Coles Supermarkets Australia Pty Ltd [2008] SAlRC 54;

National Union of Workers v Linfox Australia Pty Ltd [2008] AlRC 647;

Target Australia Pty Ltd and Shop, Distributive and Allied Employees Association (FWA PR903553);

Derole Nominees Pty Ltd v *ACM (1990)* 140 IR 123;

ALHMWU v *SCGH* [1996] Print N2465 (Unreported, Dight C, 14 June 1996);

Baywood Products Pty Ltd v *Mr Mervyn Inall* [2010] FWA 9303 (Unreported, Ashbury C, 2 December 2010).

Reasons for Decision

Background and history

1 This matter has some history. The application, brief background and the relief sought are set out in the Commission's earlier reasons for decision of 17 July 2012: (2012) WAIRC 00438. The bulk of the cases for the parties were heard on 28 and 29 March 2012. At the conclusion of those proceedings, further matters were to be dealt with in relation to two of the claimants, Ms D'Rozario and Ms Stanciu. As to Ms D'Rozario, the Public Sector Commission was required to further consider some issues relevant to her circumstances. As to Ms Stanciu, a medical assessment was required to determine her suitability for

some of the work considered by the Minister to be suitable alternative employment. The parties foreshadowed the possible need to call further evidence and/or make further submissions, subject to the outcome of those latter events. Accordingly, to accommodate these issues, the Commission adjourned the application to a date to be fixed.

2 Shortly after the adjournment of the hearing, on 4 April 2012, the Union made an application to call further evidence on matters arising from the evidence of one of the Minister's witnesses, Ms Glatz. This was opposed by the Minister.

3 Before the issue of the reopening of the case by the Union was heard, the Union advised my Associate on 23 April 2012, that the parties had reached an agreement in relation to Ms D'Rozario's claim and therefore a determination of her circumstances was no longer necessary. In relation to Ms Stanciu, an occupational medical assessment had been completed, which revealed that Ms Stanciu was not medically fit to undertake the position offered by the Minister as suitable alternative employment. The Minister subsequently offered Ms Stanciu another position that he considered suitable. Ms Stanciu disputed that this was so.

4 The Union also expressed the view that in accordance with the relevant provisions of the Western Australian Government / Liquor, Hospitality and Miscellaneous Union Redeployment, Retraining and Redundancy Certified Agreement 2004 ("the RRR Agreement"), Ms Stanciu was entitled to elect to leave her employment and be paid severance pay. Both responses of Ms Stanciu were disputed by the Minister. The Union requested the proceedings be relisted to determine these issues. A convenient date to relist the matter to deal with these issues could not be found until 1 June 2012.

5 At the hearing on 1 June, the Union foreshadowed that it still intended to press the issue of leave to reopen its case, but would not do so until the issues concerning Ms Stanciu were determined. Additionally, the Union made an application to amend the s 44(9) referral, to include reference to an issue that had arisen between the parties, in relation to the calculation of severance pay, should the Union's claim be successful. In the course of the proceedings on 1 June, the Commission partially granted the Union's application to amend the s 44(9) referral.

6 At the conclusion of the hearing on 1 June, the Commission advised the parties that it would determine Ms Stanciu's claim as a discrete issue, with the substantive proceedings being adjourned to a later date. On 21 June, a proposed amended s 44(9) referral was forwarded to my Chambers by the Union. Also, my Associate was informed that the representative for the Minister was to be on leave for five weeks from 25 June.

7 Somewhat surprisingly, on 28 June, by way of an email to my Associate, the Union advised that it had requested the Minister to reclassify the position of Menu Assistant to a higher classification level. A copy of a letter of 23 March 2012 from the Union to the Minister contained this request. The Union asserted in its email of 28 June to my Associate, that the issue of the correct classification for the Menu Assistant positions was "integral to the issue of suitable alternative employment, which is currently before the Commission". The Union also requested that the Commission delay its determination of the suitable alternative employment issue, pending the reclassification request. The Commission was unaware at the hearing on 1 June, that such a request had been made by the Union to the Minister.

8 On 29 June, the Minister notified my Associate that it strongly opposed the Union's request that the proceedings be delayed pending a determination of the reclassification request. The Minister also advised the Union, by letter of 28 June, that the reclassification request was incompetent and would not be considered by the Minister.

9 The Commission did not accede to the Union's request to delay the matter. On 17 July 2012, the Commission handed down its decision in relation to Ms Stanciu, upholding her claim, and also the Commission's reasons for, in part, granting the Union's application to amend the s 44(9) referral: (2012) WAIRC 00438. The Commission also divided the proceedings, so that orders and declarations in relation to Ms Stanciu and the other employees could be dealt with separately.

10 Because of the number and variety of issues that had arisen in the proceedings to date, the Commission listed the matter for mention on 7 September 2012, being the first opportunity to do so after the decision regarding Ms Stanciu had been handed down. At that hearing, the Union informed the Commission that the Union would not proceed with the reclassification request. As counsel for the Union was not then in a position to deal with submissions on its leave to reopen application, the Commission made directions for the hearing of the issue based on written submissions, with those written submissions to be filed by 21 September 2012.

11 In a decision handed down on 25 September 2012, the Commission refused the Union's request to reopen its case, and in view of that decision, formally reserved its decision on the substantive issues in dispute.

12 I have spent some time outlining the procedural history of this matter, by reason of the time elapsed from the dates of the initial hearings to the publication of these reasons. It will be apparent from the above recital, that much of the time period involved is due to a requirement for the Commission to determine discrete issues in the case, and also, to accommodate various requests, in particular those made by the Union.

13 In the case of the three remaining employees the subject of the claim, the Public Sector Commission made a determination on 13 January 2012 that the alternative position of Food Services Attendant, was suitable alternative employment for the purposes of the RRR Agreement.

Contentions of the parties

14 The Union submitted that in accordance with the relevant provisions of cl 8(1) of the RRR Agreement, for the purposes of determining the suitability of alternative employment, a number of factors should be considered. These include the wage of the alternative position; the relevance of the duties and responsibilities to the qualifications, experience and competence of the employee; and the particular circumstances of the employee concerned. Furthermore, by the terms of the RRR Agreement, the employee may elect within three months from the date the position becomes redundant, to leave the services of the employer, if no suitable alternate employment is found for the employee. In such a case, severance payments become payable under the Agreement.

15 Furthermore, it was contended by the Union that the Minister had no sound basis for, and was premature in asserting, that where suitable alternative employment could not be identified for the affected employees, they would be registered as redeployees. In this regard, it was submitted that whether severance payments should made to an employee in the absence of suitable alternative employment, is not a matter which falls to the unilateral determination by the employer, but rather, is to be determined in accordance with the relevant provisions of the RRR Agreement: *Hans Continental Smallgoods Pty Ltd v Farrell* [2005] NSWIRComm 1103. That is the outcome which the Union is seeking should the Commission find that the positions offered to the employees are not suitable alternative employment.

16 As to the broad approach to apply, the Union submitted that the RRR Agreement should be read with the WA Health – LHMU Support Industrial Agreement 2007, in particular cl 52.1. Clause 52 of this industrial agreement deals with disputes in relation to redundancy and redundancy type situations. By this provision, which refers to such disputes being resolved by way of a "Dispute Panel", the matter is to be determined having regard to "a just resolution to the dispute having regard to the particular circumstances and what is fair and reasonable". On this footing, the Union therefore submitted that the fairness and reasonableness of the outcome is a relevant consideration for the purposes of determining the present proceedings.

17 Additionally, the Union referred to the terms of the Public Sector Redeployment Standard, in particular the obligation on an employer to ensure that redeployment decisions are equitable and have paid sufficient regard to employee interests. Employee interests in this context, include the employee's personal circumstances and their career considerations.

18 In terms of the specific issues concerning suitable alternative employment for the affected employees, the Union made a number of submissions. Firstly, it was contended that each employee, having been offered the alternative position of ward based Food Service Attendant HWGA Level 1/2, will suffer a reduction in pay. This is relevant, given that the employees are low paid employees and the impact of any reduction in income is significant.

19 Secondly, the Union contended that the duties and responsibilities of the Food Service Attendant position will involve a significant diminution of the affected employees' duties and responsibilities. Specifically, the work of a Food Service Attendant is more menial and narrow in scope, involving considerable physical exertion and tasks of a repetitive nature. In particular, the position offered provides very limited patient contact, which was an important feature of the Menu Assistant position. Additionally, the employees would no longer be required to exercise their administrative or computing skills and there will be no ability to supervise, mentor or train other staff.

20 The contention advanced by the Union was to the effect that the former Menu Assistant position was far more varied and interesting, and required the employees to exercise a broader range of skills for which they had training and experience. It was said the employees will be "deskilled", because the training and experience they possess will be unable to be sufficiently exercised in the Food Service Attendant position, meaning that the alternative position offered is not sufficiently relevant to the employees' competence and experience. A factor emphasised in this regard, was the considerable degree of job satisfaction that the employees attained through interaction with patients and assisting in resolving issues concerning their food choices and dietary requirements.

21 Thirdly, the Union submitted that the Food Service Attendant position carries a significantly lower status and seniority to that of the Menu Assistant. In fact, the affected employees commenced in the Food Service Attendant position many years ago, and to now accept the alternative offers would be tantamount to a demotion.

22 Fourthly, in relation to the work location and environment, the Union contended that the employees' work environment as Food Service Attendants would be different. They would be required to spend more time working in areas such as the hospital kitchen, pantry and cafeteria, and far less time in the wards and on administrative duties.

23 Fifthly is the issue of the interests of the employees and their particular circumstances. In this respect, the Union submitted that the alternative positions of Food Service Attendant entail a significantly higher level of physical demand than the employees' former positions. Given that the employees concerned range from 56 to 67 years of age, the additional physical demands will be significant. At this late stage of their working careers, the Union contended that it is industrially unfair to require the employees to accept a significant career change, amounting to a demotion. The employees also have substantial caring responsibilities which affect the hours available to work. They also have significant financial responsibilities which impact on their personal circumstances.

24 Finally, it was submitted that the employees have rendered between 15 and 20 years of loyal and satisfactory service to the employer. Given their age and stage at which they have reached in their working lives, the Union submitted that the employer has really offered the employees "Hobson's choice: take what the respondent wants them to accept or nothing".

25 The Union contended that all of these factors should be taken into consideration by the Commission, in assessing, objectively, whether the Food Service Attendant position offered, is suitable alternative employment for the purposes of the RRR Agreement.

26 The Minister made a number of submissions. He contended that the abolition of a number of the Menu Assistant positions has arisen from a realignment of the catering services provided by the Patient Support Services area of Sir Charles Gairdner Hospital. As a part of the process developed to introduce the changes, the affected employees were offered opportunities to meet with human resources staff at the hospital, prior to the offers of alternative employment being made. The Minister submitted that the employees did not take up the offer to meet, which meant that the employees' personal circumstances and preferences were not made known at the time.

27 In September 2011, the alternative positions of Food Services Attendants were offered, which were disputed by the employees and the Union. As a general submission, the Minister contended that the employees did not take up the opportunities given to them to engage in the redeployment process. Indeed, on the Minister's submission, a number of the employees did not raise their personal circumstances regarding the offers of positions, until they were considered by the Public Sector Commission, which made its determination in January 2012 that the Positions offered were suitable alternative employment.

28 As to that issue, having regard to the terms of the RRR Agreement, the Minister contended that the Food Service Attendant positions are suitable alternative employment. Firstly, as to the rate of pay, for the affected employees the wage rate is very similar to that payable for a Menu Assistant. The differential at the maximum rate of pay for both positions is some $25.82 per week. The Minister also refers to the income maintenance provisions of the RRR Agreement, which will ensure that the employees' previous rates of wages will be maintained for 12 months in the new position.

29 In relation to the location of the work, the Minister contended that the employees will remain at the hospital and there is no change in that respect. In terms of the duties and responsibilities of the positions offered, the Minister submitted that the employees will remain in the catering services area. The duties that will be required of them are consistent with their qualifications, experience and competence. Merely because the new positions may require a lower level of responsibility and skills does not necessarily mean that the positions are not suitable alternative employment: *ALHMWU v SCGH* (1996 Print N7046 unreported AIRC 6 December 1996). The Minister also submitted that the employees will have the same ordinary hours of duty in their new positions as in their former positions.

30 In relation to the circumstances of the employees, whilst noting the contention of the Union that the employees are over qualified for the alternative positions, the possibility for promotion by applying for the new Food Service Supervisor positions was available. However, the employees chose not to apply for these positions because of resultant changes to their rostered hours of work which their personal circumstances could not accommodate.

31 Finally, in the event the Commission determines that the positions offered by the Minister are not suitable alternative employment, then an opportunity should be provided to the Minister to put amended offers of alternative employment to the affected employees. This is because, on the Minister's submission, from the terms of the RRR Agreement read as a whole, the focus should be on redeployment, as opposed to the payment of severance pay.

Relevant legal principles

32 Based on the authorities, the Minister agrees with the Union's submissions, that the test as to whether an offer of alternative employment is suitable alternative employment for the purposes of the RRR Agreement is an objective one: *Clothing and Allied Trades Union of Australia v Hot Tuna Pty Ltd* (1988) 27 IR 226. This is clearly the case.

33 Additionally, the parties are agreed that the proceedings are in the nature of a hearing de novo, enabling the Commission to consider for itself whether the positions offered are suitable alternative employment, and are not in the nature of an appeal from the determination of the Public Sector Commission: *ALHMWU v SCGH* (1996) 69 IR 279.

Agreement provisions

34 In this case, the parties to the RRR Agreement have, by its terms, defined what is to be regarded as "suitable alternative employment" for the purposes of the Agreement. The relevant provision is found in cl 8 – Redeployment and Retraining. Subclauses (1) and (2) provide as follows:

> 8. REDEPLOYMENT AND RETRAINING
>
> Suitable Alternative Employment
>
> (1) Subject to this clause and to Clause 7, each employee whose position is redundant shall be transferred to suitable alternative employment either within his/her Department/Authority or with the consent of another Government employer, to that Government employer.
>
> Suitable alternative employment shall be defined as that which provides the employee with a position which:
>
> a) is for an indefinite period in a permanent position with a Government employer;
>
> b) has a wage or salary as close as possible to that of the employee's existing position; and
>
> c) does not require the employee to change his/her place of residence in order to take up the position, and has regard to:
>
> i) the relevance of the duties and responsibilities, to the qualifications and experience of the employee and the competence of the employee; and
>
> ii) the ordinary hours of duty being in general no less than those worked by the employee in his/her original position.
>
> Alternative employment or training
>
> (2) a) The suitability of alternative employment or training shall be determined by the Public Sector Management Division of the Department of Premier and Cabinet after consultation with the employer, employee and Union concerned in accordance with subclause (1) of this clause and having regard for the particular circumstances of each employee.
>
> Any dispute between the parties over whether a position falls within the definition of suitable alternative employment as prescribed by subclause (1) of this Clause, subject to subclause 8(2)(c) may be referred to the Commission by any party to the dispute.
>
> . . .

35 Therefore, the parties have, by their agreement, delineated the scope of issues to be determined in assessing whether the employment offered to Ms Padberg, Ms Carroll and Ms Tisdale, is suitable alternative employment for the purposes of the RRR Agreement. Consistent with the relevant legal principles, that consideration is to be performed in an objective manner.

The evidence

Ms Padberg

36 Berendina Padberg is 67 years of age and has been employed at Sir Charles Gairdner Hospital for 15 years starting in January 1997. Ms Padberg commenced her employment as a Food Service Attendant Level 1/2 as a casual employee working 25 hours a week. At that time, her duties included cleaning and delivering meals and tea and coffee to patients. In July 1997, Ms Padberg was appointed as a Menu Assistant Level 3/4, still working 25 hours a week but on a permanent part time basis. Ms Padberg was promoted to this position. Ms Padberg has had, prior to her employment at the hospital, many years' experience in catering.

37 Ms Padberg gave evidence about her duties and responsibilities and how the Food Service Attendant position offered to her is not, as she regards it, suitable alternative employment.

38 In relation to her wage rate, Ms Padberg understands that if she is redeployed as a Food Service Attendant, she will receive income maintenance for 12 months under the terms of the RRR Agreement. However, after that time, she will not receive any wage increases until there is parity between the Food Service Attendant wage rate of pay and the rate of pay she is receiving under the RRR Agreement.

39 A central focus of Ms Padberg's evidence, as with the other employees, was the duties and responsibilities of both positions. The overall thrust of Ms Padberg's testimony was that the duties of a Food Service Attendant are far less involved than the Menu Assistant position. At pars 16-18 of Ms Padberg's witness statement, she summarised the duties of the two positions and their differences as follows:

> 16. The main duties of a Menu Assistant are:
>
> • handing out menu cards;
>
> • assisting patients to complete menu cards;
>
> • deal with patients who are upset about meals;
>
> • liaise with nursing staff about changed dietary requirements;
>
> • receive calls about changed dietary requirements;
>
> • organising the meal trolley in accordance with changed dietary requirements;
>
> • collecting menu cards;
>
> • supervising the meal service (which is conducted by Food Service Attendants) to ensure that every patient has a meal and has the correct meal;
>
> • delivering snacks to the ward;
>
> • scanning and processing the menu cards;
>
> • entering special meal requests into the computer database;
>
> • take meal trolleys out of dish washing room and cleaning and sterilising the trolleys;
>
> • delivering late meals to patients who have arrived after meal time; and
>
> • taking sandwiches to Emergency and Observation wards.
>
> 17. My understanding of the Food Service Attendant role is that the main duties would be:
>
> • topping up water jugs on the wards;
>
> • handing out meals;
>
> • handing out tea and coffee;
>
> • collecting cups and saucers;
>
> • washing cups and saucers; and
>
> • cleaning the pantry.
>
> 18. One major difference between the Menu Assistant and Food Service Attendant roles is patient interaction. My duties as a Menu Assistant involved a lot of patient interaction. This was the most rewarding part of my job and gave me the greatest job satisfaction. Assisting patients is what motivates me and I take pride in the fact that I help patients. Without patient interaction, I would find my job completely unfulfilling and I believe I would have no job satisfaction.

40 Ms Padberg said that one of the major concerns that she has, is that as a Food Service Attendant, she would have very little quality interaction with patients, which she does have now as a Menu Assistant. Her evidence was that the focus of the Food Service Attendant position was "getting the meals out as quickly as possible and moving on to the next ward or task." Further aspects of her former position which she considers will be lost include exercising problem solving skills and also supervising the meal services, which are carried out by Food Service Attendants.

41 Furthermore, in her particular case, being 67 years of age, Ms Padberg noted the more physically demanding aspect of the Food Service Attendant position, compared to her formal role.

42 Ms Padberg also gave evidence in relation to her qualifications, experience and competence acquired in her 15 years of service to the hospital. In particular, she emphasised the need for excellent communication and interpersonal skills when dealing with patients as a Menu Assistant. This requires a good understanding of patient needs and having empathy with their

circumstances. Additionally, Ms Padberg said she exercised supervisory and computer skills and also was required to have some knowledge of dietary requirements and how various illnesses might be affected by diet.

43 Dealing with patient complaints was another matter referred to which Ms Padberg said required her to exercise problem solving and conflict resolution skills. Overall, Ms Padberg regarded the offer of a Food Service Attendant position as a demotion, effectively forcing her back to a position she initially occupied some 15 years ago, which she said would be demoralising to her.

44 In relation to the Food Service Supervisor position, Ms Padberg considered that this role was probably the most closely aligned to the Menu Assistant position, however she was unable to apply for it, given her family caring responsibilities and inability to work the hours required. In relation to hours of work generally, Ms Padberg testified that whilst she acknowledged that the Minister had agreed to maintain her hours of work, they involve starting 30 minutes earlier than the usual start time for the Food Service Attendant position. Ms Padberg is unaware of what duties the hospital may wish to assign to her during this 30 minute period, and she is concerned that they may involve menial tasks such as dishwashing etc.

45 Overall Ms Padberg testified that she regarded the proposal of the Minister as harsh and unfair. At her age, given her length of service, Ms Padberg said she would find it very difficult to find other employment at the same level as her former Menu Assistant position.

Ms Carroll

46 Anna Carroll is 56 years of age and she has been employed at the hospital for 20 years since August 1992. As with Ms Padberg, Ms Carroll commenced service as a Food Service Attendant Level 1/2, on a permanent part time basis working 40 hours per fortnight. In 1997 Ms Carroll was promoted to the position of Menu Assistant Level 3/4, again on a permanent part time basis, but working 50 hours per fortnight. Ms Carroll has a background in hotel catering.

47 In terms of the particular impact on her, apart from the comparison of the duties in the positions as described in the evidence of Ms Padberg, Ms Carroll said that one of the main factors for her in a comparison of the positions is patient interaction. As a Menu Assistant, Ms Carroll felt involved in helping patients and making their hospital experience better. Her contact with patients was what Ms Carroll described as the basis of her job satisfaction, which she does not consider she would have as a Food Service Attendant.

48 Ms Carroll also made the point in her testimony, as with Ms Padberg, that to be redeployed to the position of a Food Service Attendant would be a demotion to a position she held 20 years ago.

49 In terms of qualifications and training, Ms Carroll testified that about three years ago she obtained a Certificate III in Health Support Services at the request of the hospital. Ms Carroll has also done computer training courses at the hospital. None of these skills will be required if she takes up the Food Service Attendant role. Additionally, Ms Carroll noted, as did Ms Padberg, the experience and competence she has gained as a Menu Assistant, which she did not consider she would be able to exercise as a Food Service Attendant. Ms Carroll gave similar evidence to Ms Padberg regarding hours of work. Whilst the usual hours of work will remain the same for Ms Carroll, she noted that as Food Service Attendants did not normally start until 30 minutes later than her usual start time, she too was concerned as to what menial duties she might be given in the first half an hour of her shift.

50 According to Ms Carroll's evidence, after providing excellent service for 20 years, she feels that she is being unfairly treated by her effective demotion to the position of Food Service Attendant.

Ms Tisdale

51 Susan Tisdale is 56 years of age and has been employed at the hospital for 18 years. Ms Tisdale started work as a Cafeteria Assistant Level 3/4 and in February 1995, started work as a Food Service Assistant Level 1/2 working 36 hours a fortnight on a permanent part time basis. Later, in 1997, Ms Tisdale started work as a Menu Assistant Level 3/4, working on a permanent part time basis and presently working 50 hours per fortnight.

52 Ms Tisdale gave similar evidence to Ms Padberg and Ms Carroll in relation to the differences in her duties and responsibilities as a Menu Assistant and as a Food Service Attendant.

53 In her testimony, Ms Tisdale emphasised the patient interaction in her former job as a Menu Assistant, as the most enjoyable aspect of the role. She testified that given the nature of a hospital environment, the capacity to interact with patients and make their hospital stay more enjoyable, was the source of greatest job satisfaction for her. The patient interaction involved identifying problems about food and menus with patients, and helping to rectify them. In contrast, Ms Tisdale viewed the Food Service Attendant position as one where meals are simply handed out to patients with little or no opportunity to interact with them.

54 In terms of her experience and competence, Ms Tisdale emphasised the patient interaction experience as involving her liaising with a number of other staff, including nurses, dieticians, speech therapists and others. The work did require her to have some knowledge of dietary needs of patients to help them with their menu choices. Over the 15 years she has been in the Menu Assistant position, Ms Tisdale said that she has gained considerable knowledge and experience, she cares about patient well-being, and takes pride in her work.

55 The effective demotion to a Food Service Attendant position, a job she held over 16 years ago, to Ms Tisdale's mind, is insulting. The work involved is far less challenging, and involves menial and repetitive tasks. Ms Tisdale does not consider she will get any job satisfaction from the role compared to her former position as a Menu Assistant. Whilst the new position of Food Services Supervisor is far more aligned to the Menu Assistant position, Ms Tisdale said she could not apply for the position, as she cannot work full-time as she is caring for her elderly parents.

Mr Ohia

56 Frank Ohia is an organiser employed by the Union. Mr Ohia has been involved in the present dispute with the Menu Assistants since July 2011. At that time, Mr Ohia testified that he received a letter from the hospital advising of changes to staffing levels affecting the union members, which were to be implemented in January 2012. That involved the abolition of ten Menu Assistant positions. Attached to the letter was a briefing note, outlining the nature of the changes and the rationale for those changes. Mr Ohia testified that the note referred to the Menu Assistant positions being replaced with Food Service Supervisor positions, and that part of the reasoning behind the changes, was that Menu Assistants were dealing with patient complaints, which was not properly a part of their role. Also, Mr Ohia said that the briefing note he received referred to the affected Menu Assistants being "afforded the same principle as PSA staff displaced at SCGH recently" (sic). This referred to another restructuring, where Patient Service Assistant staff had been offered severance pay. Mr Ohia testified that he got the impression from this, that a similar severance pay option may be open to the Menu Assistants.

57 Mr Ohia gave evidence about a number of meetings from about mid July 2011, between himself, the affected employees, and human resources staff of the hospital. At those meetings, the restructuring was outlined and advice was given that suitable alternative positions would be found for the affected employees. The process continued and on 9 August 2011 at a further meeting, Mr Ohia advised the management of the hospital that the Food Service Attendant positions were not suitable and that the employees were seeking a voluntary severance, as was provided to the PSA staff. A representative of the management informed Mr Ohia that severance payments would not be made as alternative positions were being identified, and further, an offer of severance was not an option to the employer in this restructuring.

58 Mr Ohia remained involved in the matter up until the time that the Public Sector Commission determined in January 2012 that the positions offered to the employees were suitable alternative employment for the purposes of the RRR Agreement.

Ms Carson

59 Glenda Carson is the Manager Workforce Services for the North Metropolitan Area Health Service based at the hospital. Ms Carson had oversight of the restructuring in the Patient Support Services area at the hospital in relation to human resources matters. In July 2011, a Human Resources Plan for the changes affecting the Menu Assistant positions was prepared. The plan outlined the procedural steps to be followed in relation to the affected employees. The plan included reference to exploring options in the government health industry and other government organisations. These options referred to the redeployment process and the fact that voluntary severance payments would not be automatically offered to affected employees. They may only be offered to those employees for whom no suitable alternative employment could be found. At the same time in July, the affected employees received letters from the hospital, setting out the nature of the restructuring and the effect on their positions. The material included a Staff Preference Request, which sought an indication from the affected employees of their preferences for alternative positions that might be available. Additionally, a copy of the Human Resources Plan was enclosed.

60 In early August 2011, the affected employees were invited to meet with a hospital representative to discuss the options open to staff arising from the restructuring. Mr Ohia, on behalf of the employees, advised that the current options of redeployment made available by the hospital were not appropriate and the employees declined to meet with the hospital representative. Subsequently on 29 September 2011, the affected employees were advised by letter of the hospital's proposal to transfer them into suitable alternative employment, in accordance with the RRR Agreement. The position identified was the Food Service Attendant. Each of the affected employees disagreed with the decision to transfer and requested that the matter be referred to the Public Sector Commission for determination.

61 Subsequently, in about mid-October 2011, meetings were held between the affected employees, Mr Ohia from the Union and representatives of the hospital, to discuss the alternative offers. Those meetings did not resolve the issues in dispute and accordingly, a submission was made to the Public Sector Commission, requesting a determination as to whether the offers made to the affected employees were suitable alternative employment for the purposes of the RRR Agreement.

62 After conferring with the affected employees and Mr Ohia from the Union in the course of December 2011 and early January 2012, by letter of 13 January 2012, the Public Sector Commission advised that the offers made by the hospital were suitable alternative employment and the employees were notified accordingly.

Ms Glatz

63 Angela Glatz is the Acting Manager Patient Support Services at the hospital. Ms Glatz referred to the scope of Patient Support Services at the hospital covering areas such as catering, cleaning and linen and Hospital Service Assistants and Patient Transport. The areas concerned cover a mixture of support employee positions involving the Union and hospital salaried positions. Ms Glatz referred to the realignment of catering services at the hospital which meant the number of the Menu Assistant positions was reduced by ten. The full time G Block morning shift Menu Assistant positions were abolished. To provide a breakfast service to patients, new part time four hour morning Menu Assistant positions were created. All afternoon G Block Menu Assistant positions were abolished.

64 In particular, part of the rationale for the changes, involved the removal of the responsibility for listening to and escalating many patient complaints and queries relating to meals, which the hospital maintained was not a part of the Menu Assistant role. This work would be taken over by the newly created Food Services Supervisor position who would assume responsibility for these duties, along with the supervision of Food Services Attendants in the provision of lunch and dinner services to patients.

65 Ms Glatz referred to the consultation process involving the Union and the affected employees. In particular, she referred to a meeting held on 21 July 2011, following which, on 22 July, the Union was notified by the hospital that severance pay would not be offered to affected staff as the emphasis was on providing suitable alternative employment.

66 Ms Glatz made the point in her evidence, that where affected employees engaged with the process put in place by the hospital, a number of opportunities were made available. These alternative options included moving to other Level 3/4 positions outside

of catering or to change their rostered hours and work mornings in the remaining Level 3/4 Menu Assistant positions. Other vacant positions within the Patient Support Services area were offered to the affected employees, from catering, cleaning and other areas, however those alternatives did not receive any interest from the employees. Ms Glatz noted that in relation to Ms Tisdale, Ms Carroll, and Ms Padberg, all three staff members will remain located at the hospital; will have the same hours of work and roster as in their previous positions; will receive income maintenance in accordance with the RRR Agreement; and will receive a final rate of pay which is close to their former wage rate in the Menu Assistant position.

Mr Wilding

67 Paul Wilding is the Director Management and Practice, Agency Support Division, of the Public Sector Commission. Mr Wilding gave evidence about the process undertaken by the Public Sector Commission, in assessing whether the offers made by the hospital were suitable alternative employment for the purposes of the RRR Agreement. Mr Wilding outlined the process engaged in which involved consultations with the employer, the affected employees and the Union. He referred to the fact that the process involved consideration of the particular circumstances of each employee. The affected employees provided a written submission to the Public Sector Commission, setting out how their individual personal circumstances may affect their capacity to take up the alternative Food Services Attendant positions. Additionally, Mr Ohia of the Union also made submissions on behalf of the affected employees, highlighting their particular circumstances, which were taken into account in the final determination.

68 In the final assessment, a further independent evaluation took place by an officer of the Public Sector Commission. This independent assessment had regard to the details of the offer from the hospital, the options raised and the personal circumstances of each affected employee. Having undertaken that process, and having due regard to adjustments to hours and rosters in response to concerns raised by the employees, the Public Sector Commission considered that by implementing those changes, the positions offered were suitable alternative employment and a formal determination was accordingly made.

Consideration

69 I am satisfied on the evidence that the hospital engaged in a bona fide restructure of the Patient Services Section with the consequence that ten Menu Assistant positions have been abolished. The creation of the new Food Services Supervisor position is a broader role responsible for the overall provision of food service to patients, including menu requests. Examining the JDF for the new position in evidence, it assumes many duties formerly performed by the Menu Assistant role. I accept on the evidence that the Food Service Supervisor position is a higher level position, with a greater level of qualification required for appointment.

70 I also accept on the evidence, that the Food Services Attendant position, from the JDFs in evidence, does carry a lower level of responsibility than the Menu Assistant position. A comparison of the "Brief Statement of Duties" of the JDFs for both positions in evidence, shows that the Menu Assistant position is "responsible for" a range of functions in patient meal services. The Food Services Attendant position on the other hand, is primarily involved in "assisting with" a range of functions set out in the JDF. The Food Services Attendant, on the evidence, is primarily engaged in the delivery of meals and beverages to patients. The position is also responsible for the collection and washing of meal trays and items.

71 I also accept on the evidence, that while the Food Services Attendant ward based positions do involve some interaction with patients, that interaction is of a more limited nature to that associated with the Menu Assistant positions. The responsibility for establishing patient meal and dietary requirements, and communication of those requirements, has now largely shifted to the Food Service Supervisor position. As part of the new position, direct responsibility is also given for investigating and resolving patient complaints.

72 On the evidence, the concerns of Ms Padberg, Ms Carroll and Ms Tisdale with the alternate positions as Food Service Attendants are in three areas. They are firstly, that the Food Service Attendant position is demeaning, in that it involves a demotion to a position that the employees held many years ago, when they first started employment at the hospital. Secondly, the Food Service Attendant position gives them little or no patient contact which, in their former positions as Menu Assistants, was a source of substantial job satisfaction. Finally, and as a consequence of their experience in the Menu Assistant positions, the offer of the Food Service Attendant position fails to have regard to their past skills and experience.

73 I have no doubt from observations of the three employees concerned when giving their evidence, that all of them felt strongly as to these matters. I also have no doubt that the views expressed by them as to the job satisfaction that they obtained from their former work as Menu Assistants were very genuine. The employees have given many years of loyal service to the hospital and I accept their testimony that in their former positions, they felt they made some contribution to the hospital experience of patients.

74 In view of these findings, and in light of all of the evidence before the Commission, I turn to an objective assessment of the claims made, against the agreed criteria in cl 8(1) of the RRR Agreement.

Indefinite period in permanent position

75 This criterion in cl 8(1)(a) is satisfied in all three cases.

Wage or salary as close as possible

76 Based on the material before the Commission, the current wage for a Menu Assistant position is $848.68 per week or $22.83 per hour. The rate of wage for a Food Service Attendant position is $822.86 per week or $21.65 per hour. The difference is some $25.82 per week. Whilst for the affected employees any reduction in wage is of significance, I accept that, having regard to the various alternative positions canvassed with the affected employees, the wage is close to that of the former Menu Assistant position and that the criterion in cl 8(1)(b) is met.

Ordinary hours of duty

77 As a result of discussions with the employees, and consideration by the Public Sector Commission, the criterion for ordinary hours of duty as no less than those worked in the original position, as provided in cl 8(1)(c)(ii), is satisfied.

Change in place of residence

78 None of the employees is required, by the acceptance of the alternative employment, to change their place of residence. The criterion in cl 8(1)(c) is met.

Duties and responsibilities and qualifications, experience and competence of the employee

79 As noted above, this criterion was the element most disputed by the Union as to the provision of suitable alternative employment to the affected employees. I have already observed that the Food Service Attendant positions will involve less patient interaction than the former Menu Assistant positions. I accept on the evidence that in their former positions, Ms Padberg, Ms Tisdale and Ms Carroll did assist patients by escalating their concerns about food service to supervisors and other appropriate staff. Whether that was a part of their formal responsibilities is debatable. However, the fact is that the employees undertook this work with the knowledge of the hospital. The identified need to restructure the meal service section was in part, attributable to assigning this responsibility to the new Food Service Supervisor position.

80 In the Food Service Attendant position, the capacity for the employees to speak to patients about their dietary requirements will be minimised. Also, they will no longer be involved in the generation of menus and their distribution to patients, which means administration skills, in particular the use of computers, will not now be exercised.

81 While as Menu Assistants the employees did provide meals to patients and did collect the clean food trolleys etc, the Food Service Attendant position is primarily responsible for serving meals and beverages, and the recovery and cleaning of meal items from patients. Some re-stocking of pantries will also be required.

82 I accept, as already found on the evidence, that the capacity for the affected employees to maintain their previous level of job satisfaction will be more limited by reason of the changed nature of patient interaction. Nonetheless, the employees will still have patient contact, just perhaps not the same quantity and quality as previously. The position of Food Service Attendant also imposes some greater physical demands, but not markedly so. Importantly, the alternative positions offered, remain in the Patient Support Services area, and remain involved in catering by the supply of meals to patients.

83 The issue of job satisfaction, subjective as it is, is not a criterion prescribed by cl 8(1) of the RRR Agreement. There is no question that Ms Padberg, Ms Tisdale and Ms Carroll preferred their former Menu Assistant positions. That is manifestly clear on the evidence. It is important to note, however, that for the purposes of cl 8(1)(c) of the RRR Agreement, the suitable alternative employment offered must "have regard to" the qualifications, experience and competence of the employee. It does not require the suitable alternative employment to "meet" or to "equate to" these factors. This does not mean that suitable alternate employment cannot encompass a position that may have been performed by an employee in the past. The employees are certainly qualified and experienced to undertake such work.

84 Also, it seems that no issue is taken with the fact that the Public Sector Commission, in consultation with the affected employees, the Union and the employer, took into account the particular circumstances of each employee. In the case of Ms Padberg, Ms Tisdale and Ms Carroll, each of them has caring responsibilities. As a result of those issues identified by them, changes were proposed in relation to their hours of work, to accommodate those issues (see annexure GC 23 to Ms Carson's witness statement, exhibit R2).

85 Whilst the Commission understands that the employees would prefer to receive a severance payment, the obligation under the RRR Agreement, at least in the first instance, is for the employer to identify and offer suitable alternate employment, and that employees retain employment.

Conclusion

86 I have taken into account all of the evidence and the submissions. I consider that for the purposes of the RRR Agreement, the alternative employment offered by the Minister to Ms Padberg, Ms Tisdale and Ms Carroll is suitable alternative employment.

87 Accordingly, a declaration will be made to this effect.

2012 WAIRC 01095

DISPUTE REGARDING THE EMPLOYERS REDEPLOYMENT OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD.
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 11 DECEMBER 2012
FILE NO/S	CRB 1 OF 2012
CITATION NO.	2012 WAIRC 01095

Result	Declaration issued
Representation	
Applicant	Ms E Palmer of counsel and later Ms C Collins of counsel
Respondent	Ms T Sweeney

Declaration

HAVING heard Ms E Palmer of counsel and later Ms C Collins of counsel on behalf of the applicant and Ms T Sweeney on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby declares –

THAT the position of Food Services Attendant Level 1/2 offered by the respondent to Ms B Padberg, Ms S Tisdale and Ms A Carroll is suitable alternative employment for the purposes of clause 8 of the Western Australian Government/Liquor, Hospitality and Miscellaneous Union Redeployment, Retraining and Redundancy Certified Agreement 2004.

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

2012 WAIRC 00345

DISPUTE RE LONG SERVICE LEAVE ENTITLEMENTS OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	CJ KING AND CO PRINTERS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 11 JUNE 2012
FILE NO/S	CR 7 OF 2012
CITATION NO.	2012 WAIRC 00345

Result	Consent order issued
Representation	
Applicant	Ms D Butler
Respondent	Ms U Gajda-King

Order

HAVING heard Ms D Butler on behalf of the applicant and Ms U Gajda-King on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent, hereby orders –

(1) THAT in accordance with the terms of this order the respondent pay to the applicant's member, Ms Irene Seth the sum of $4000 in relation to pro rata long service leave, such sum constituting full and final settlement of the applicant's claims.

(2) THAT such payment is to be made by electronic funds transfer into an account to be nominated by Ms Seth.

(3) THAT the agreed sum of $4,000 be made by way of two payments, the first payment of $2,000 to be made by close of business Friday 15 June 2012 and the second payment of $2,000 to be made by close of business Monday 16 July 2012.

(4) THAT the respondent shall email an electronic receipt to the applicant confirming the payments to Ms Seth at the time of conducting the electronic transactions.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Inc	Commissioner Department of Corrective Services	Scott A/SC	PSAC 12/2011	N/A	Dispute re failure to negotiate by the employer with Union Member	Discontinued
The Civil Service Association of Western Australia Incorporated	Dr R Shean, Director General Department of Training and Workplace Development	Scott A/SC	PSAC 13/2011	15/09/2011 29/09/2011 13/10/2011	Dispute re employers failure to provide answers to union member	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Environment and Conservation	Scott A/SC	PSAC 34/2012	10/12/2012	Dispute re disciplinary action	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2013 WAIRC 00125

DISPUTE RE SUSPECTED BREACH OF DISCIPLINE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DANIEL SHORTILL

APPLICANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE THURSDAY, 7 MARCH 2013

FILE NO/S C 42 OF 2012

CITATION NO. 2013 WAIRC 00125

Result Name of applicant amended

Representation

Applicant Mr S Millman of counsel

Respondent Mr R Andretich of counsel

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS at a Directions hearing on the 21st day of February 2013 the applicant sought to amend the name of the applicant to "The State School Teachers' Union of W.A. (Incorporated)"; and

WHEREAS by email on the 5th day of March 2013 the respondent consented to amending the name of the applicant;

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

THAT the name of the applicant in the application be amended to "The State School Teachers' Union of W.A. (Incorporated)".

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

[L.S.]

2013 WAIRC 00088

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN BRENT MEWETT
	APPLICANT
	-v-
	DIRECTOR OF EDUCATION
	MS SHARYN O'NEILL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS D HOPKINSON - BOARD MEMBER
	MR K TRENT - BOARD MEMBER
DATE	TUESDAY, 19 FEBRUARY 2013
FILE NO.	PSAB 10 OF 2012
CITATION NO.	2013 WAIRC 00088

Result Direction issued

Direction

HAVING heard Mr K Trainer as agent on behalf of the appellant and Ms S Bhar on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT the parties undertake informal discovery with liberty to apply.
2. THAT all of the evidence in chief of each witness be by witness statement subject to the appellant's witnesses having the opportunity to reply to anything contained in the respondent's witness statements.
3. THAT the appellant file and serve witness statements four weeks prior to the date of the hearing.
4. THAT the respondent file and serve witness statements two weeks prior to the date of the hearing.
5. THAT the appeal be set down for hearing for a duration of five days.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2012 WAIRC 01123

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TREVOR VERNON HERRON
	APPLICANT
	-v-
	THE OWNERS OF ZENITH CITY CENTRO STRATA PLAN 55731
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 20 DECEMBER 2012
FILE NO.	U 221 OF 2012
CITATION NO.	2012 WAIRC 01123

Result	Direction issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr J Fiocco of counsel

Direction

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr J Fiocco of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT evidence in chief in this matter be adduced by way of affidavit. Evidence in chief other than that contained in the affidavits may only be adduced by leave of the Commission.

(2) THAT the applicant file and serve upon the respondent any affidavits upon which he intends to rely no later than 21 January 2013.

(3) THAT the respondent file and serve upon the applicant any affidavits upon which it intends to rely no later than 4 February 2013.

(4) THAT the applicant file and serve upon the respondent any affidavits in reply upon which he intends to rely no later than 11 February 2013.

(5) THAT the parties file and serve upon one another an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.

(6) THAT the matter be listed for hearing for one day on a date to be fixed.

(7) THAT the parties have liberty to apply on short notice.

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

2013 WAIRC 00108

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TREVOR VERNON HERRON
	APPLICANT
	-v-
	THE OWNERS OF ZENITH CITY CENTRO STRATA PLAN 55731
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 25 FEBRUARY 2013
FILE NO/S	U 221 OF 2012
CITATION NO.	2013 WAIRC 00108

Result	Application for production of documents dismissed
Representation	(via telephone)
Applicant	Mr P Mullally, as agent
Respondent	Mr D Barich, of counsel

Order

WHEREAS on 20 February 2013, the respondent applied for an order under regulation 20(2) of the *Industrial Relations Commission Regulations 2005* requiring the applicant to produce for inspection his tax returns for the 2010 and 2011 financial years;

AND WHEREAS the applicant objected to the making of the order;

AND HAVING HEARD Mr D Barich, of counsel for the respondent and Mr P Mullally, as agent for the applicant;

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

1. THAT the application for an order under regulation 20(2) of the *Industrial Relations Commission Regulations 2005* requiring the applicant to produce for inspection his tax returns for the 2010 and 2011 financial years is hereby dismissed.

2. THAT reasons for decision will issue subsequently.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2013 WAIRC 00089

DISPUTE RE NEGOTIATIONS WITH THE AUSTRALIAN NURSING FEDERATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR HEALTH INCORPORATED AS THE BOARD OF HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD AND INCORPORATED AS THE BOARD OF THE WA COUNTRY HEALTH SERVICE, UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)
	APPLICANT
	-v-
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 20 FEBRUARY 2013
FILE NO/S	C 175 OF 2013
CITATION NO.	2013 WAIRC 00089

Result	Orders and recommendation issued
Representation	
Applicant	Ms K Worlock and Mr M Warner
Respondent	Mr M Olson

Interim Orders and Recommendation

WHEREAS this is an application pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) filed on 19 February 2013 by which the applicant seeks interim orders that members of the respondent union (the ANF) cease industrial action taking place in public hospitals; and

WHEREAS on 10.30am on Wednesday 20 February 2013, the Commission convened an urgent conference for the purpose of conciliating between the parties, and

WHEREAS at the conference, the applicant informed the Commission that:

1. The parties had commenced negotiations for an agreement to replace the Registered Nurses and Enrolled Mental Health Nurses – Australian Nursing Federation – WA Health Industrial Agreement 2010 (the ANF Agreement) which expires on 30 June 2013;
2. The parties agreed to meet fortnightly commencing on 16 January 2013 to negotiate a new agreement;
3. The parties had met on three occasions since 16 January 2013;
4. With the calling of a State General Election, to be held on 9 March 2013, the Caretaker Conventions came into effect on 6 February 2013;
5. By that time the negotiations had not progressed to the point where it is possible to seek the required approval from the State Cabinet to make an offer to the ANF;
6. The applicant advised the ANF that no offer could be made until after the State Election on 9 March 2013;
7. The ANF had asserted that the Caretaker Conventions have no practical effect and do not prevent an offer being made;
8. On Monday, 18 February 2013, the ANF held a meeting of members employed in public hospitals;
9. At that meeting, members of the ANF passed a resolution to close one in five beds in every ward or unit in public hospitals, including where possible, Emergency Department cubicles, with specified exceptions;
10. On 18 February 2013, following the respondent's members' meeting, nursing staff returned to metropolitan public hospitals and initiated industrial action characterised as "closing beds";
11. The effect of the industrial action is that otherwise fully staffed hospital beds are not being utilised and nursing staff are refusing to provide nursing care to patients who would otherwise be accommodated in those beds; some patients have been turned away from staffed beds and are being returned to the Emergency Departments, and most remain in the Emergency Departments until such time as a bed becomes available;
12. Public hospitals are attempting to deal with the situation, however patient care and safety is being significantly compromised;
13. The current industrial action has had a cumulative effect on the number of patients who can safely be accommodated in Emergency Departments, and this has significant potential to adversely affect clinical outcomes for patients;
14. The industrial action not only directly concerns the parties but has a wider significance for the community in this State in particular but not limited to the interests of the community for whom nursing and clinical care is provided; and

WHEREAS the ANF acknowledges the impact its members' actions is having on patient care, however it has not taken action lightly. It says that its members are angry and frustrated at the lack of an offer from the applicant and disputes that the Caretaker Conventions preclude an offer being made; it cites previous negotiations held in 2001 as an example of the capacity to resolve the matter during the Caretaker period; that it is concerned at the lack of progress in negotiations todate and has genuine concern that there will be no resolution before the expiration of the Agreement; and

WHEREAS having considered the discussions during the conference, that Commission is satisfied that industrial action in the form of "closing beds" is having and will increasingly have an adverse effect upon patients of the Western Australian public health system and, further, that it is necessary that negotiations for a new Agreement proceed expeditiously and that the industrial action cease; and that to prevent the deterioration of industrial relations in respect of the matter in question until the parties are able to have further discussions at a time where the applicant will be able to properly make an offer to the ANF, and taking account of the equity and fairness, and the substantive merits of the case and in particular section 44(6)(ba)(i) and (6)(bb)(i), the Commission has formed the view that orders with respect to this application should issue;

NOW THEREFORE having heard Ms K Worlock and Mr M Warner on behalf of the applicant and Mr M Olsen on behalf of the ANF, the Commission, having regard to the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, hereby orders:

INTERIM ORDERS

1. THAT the Commission undertake further conferences between the parties, the first to be convened on Thursday, 21 February 2013 at 9.00 am for the purpose of the parties reporting back on a number of issues regarding the negotiation of a new Agreement and the current industrial action, in particular:
    a. The ANF is to:
        i. respond to the Minister as to the jurisdictions, levels and increments it says are appropriate for salary comparison purposes;
        ii. advise the Commission whether the Recommendation in this matter has been accepted and acted on by members;
    b. The Minister is to confirm that:
        j. Parking at Graylands will remain available until it is no longer required or until agreement is reached with the ANF, which agreement will not be unreasonably withheld;
        ii. Workloads (NHPPD) will remain unaltered;
        iii. Whether it is able to commit to an operative date for the first pay increase of the new agreement.
2. THAT the parties meet either in conferences convened by the Commission or under the auspices of the Commission not less than twice per week, at which the parties are to be represented by their senior officers, until otherwise decided by the Commission.
3. THAT the Minister be in a position to put to the Economic and Expenditure Review Committee of Cabinet, or its equivalent at its first meeting after the State Election, a proposal for the resolution of the matter including salary increases.
4. THAT there be liberty to apply by both parties in respect of these Orders.

RECOMMENDATION

THAT the ANF by its officers and employees lift all bans currently in place, in particular bed closures, in relation to the negotiation of a new Agreement to replace the ANF Agreement and to take no further industrial action.

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

2013 WAIRC 00093

DISPUTE RE NEGOTIATIONS WITH THE AUSTRALIAN NURSING FEDERATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR HEALTH INCORPORATED AS THE BOARD OF HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD AND INCORPORATED AS THE BOARD OF THE WA COUNTRY HEALTH SERVICE, UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)
	APPLICANT
	-v-
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 21 FEBRUARY 2013
FILE NO.	C 175 OF 2013
CITATION NO.	2013 WAIRC 00093

Result	Directions issued
Representation	
Applicant	Mr M Warner and Ms K Worlock
Respondent	Mr M Olson

Directions

WHEREAS on Wednesday 20 February 2013 the Commission issued orders in respect of negotiations between the parties for a new Agreement and a Recommendation for the lifting of industrial action, such industrial action being in the form of bed closures by members of the respondent (ANF) in public hospitals (the industrial action) [2013 WAIRC 00089]; and

WHEREAS at 9.00am on Thursday 21 February 2013, the Commission convened a conference at which the parties reported back regarding those issues set out in the Orders and Recommendations; and

WHEREAS the ANF informed the Commission that the members had not accepted the Recommendation to cease the industrial action and beds remain closed; and

WHEREAS the applicant says that it is unable to make any offers in respect of the negotiations for a new agreement on the basis of the Caretaker Conventions and refuses to make any offers; and

WHEREAS during the conference the ANF put forward a proposal for the purposes of reaching an in principle agreement; and

WHEREAS the Commission is of the opinion that it is necessary that the applicant formally respond to the proposal; and

WHEREAS having heard from the parties, the Commission is of the view that the ANF's failure to accept the Recommendation and to comply with it, and the applicant's refusal to make any offers has led to a further deterioration in industrial relations between the parties; and

WHEREAS the Commission is of the opinion that it is necessary in those circumstances to issue Directions for the purpose of preventing deterioration of industrial relations;

NOW THEREFORE having heard Mr M Warner and Ms K Worlock on behalf of the applicant and Mr M Olson on behalf of the ANF, the Commission, having regard to the interests of the parties directly involved, the public interest and to prevent further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, hereby directs:

1. THAT the applicant consider the ANF's proposal of:
   (a) a minimum salary increase of 12.75%;
   (b) the first part of such increase to be an increase of 5% for the first year from 1 July 2013;
   (c) with no loss of conditions;
   (d) if an agreement is not resolved by 30 June 2013, the dispute to be arbitrated,

   and formally respond to that proposal by 10.00 am Friday 22 February 2013.
2. THAT the ANF call a meeting of its members for no later than 1.00 pm Friday 22 February 2013 and:
   (a) discuss the applicant's response referred to in Direction 1; and
   (b) consider the Commission's Recommendation issued on 20 February 2013.
3. THAT the parties report back to the Commission at 4.00 pm Friday 22 February 2013.

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

2013 WAIRC 00100

DISPUTE RE NEGOTIATIONS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR HEALTH INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD AND INCORPORATED AS THE BOARD OF THE WA COUNTRY HEALTH SERVICE, UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)
	APPLICANT
	-v-
	AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 22 FEBRUARY 2013
FILE NO/S	C 175 OF 2013
CITATION NO.	2013 WAIRC 00100

Result	Interim order issued
Representation	
Applicant	Mr M Warner and Ms K Worlock (of counsel)
Respondent	Mr M Olson

Order

WHEREAS this is an application pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) filed on 19 February 2013 whereby the applicant sought interim orders that members of the respondent union (the ANF) cease industrial action taking place in public hospitals; and

WHEREAS on 20 February 2013 the Commission issued the following interim orders and recommendation:

INTERIM ORDERS

1. THAT the Commission undertake further conferences between the parties, the first to be convened on Thursday, 21 February 2013 at 9.00 am for the purpose of the parties reporting back on a number of issues regarding the negotiation of a new Agreement and the current industrial action, in particular:
    a. The ANF is to:
        i. respond to the Minister as to the jurisdictions, levels and increments it says are appropriate for salary comparison purposes;
        ii. advise the Commission whether the Recommendation in this matter has been accepted and acted on by members;
    b. The Minister is to confirm that:
        j. (sic) Parking at Graylands will remain available until it is no longer required or until agreement is reached with the ANF, which agreement will not be unreasonably withheld;
        ii. Workloads (NHPPD) will remain unaltered;
        iii. Whether it is able to commit to an operative date for the first pay increase of the new agreement.
2. THAT the parties meet either in conferences convened by the Commission or under the auspices of the Commission not less than twice per week, at which the parties are to be represented by their senior officers, until otherwise decided by the Commission.
3. THAT the Minister be in a position to put to the Economic and Expenditure Review Committee of Cabinet, or its equivalent at its first meeting after the State Election, a proposal for the resolution of the matter including salary increases.
4. THAT there be liberty to apply by both parties in respect of these Orders.

RECOMMENDATION

THAT the ANF by its officers and employees lift all bans currently in place, in particular bed closures, in relation to the negotiation of a new Agreement to replace the ANF Agreement and to take no further industrial action; and

WHEREAS after hearing further from the parties on 21 February 2013 the Commission issued the following directions:

1. THAT the applicant consider the ANF's proposal of:
    (a) a minimum salary increase of 12.75%;
    (b) the first part of such increase to be an increase of 5% for the first year from 1 July 2013;
    (c) with no loss of conditions;
    (d) if an agreement is not resolved by 30 June 2013, the dispute to be arbitrated,

    and formally respond to that proposal by 10.00 am Friday 22 February 2013.
2. THAT the ANF call a meeting of its members for no later than 1.00 pm Friday 22 February 2013 and:
    (a) discuss the applicant's response referred to in Direction 1; and
    (b) consider the Commission's Recommendation issued on 20 February 2013.
3. THAT the parties report back to the Commission at 4.00 pm Friday 22 February 2013; and

WHEREAS on 22 February 2013 the applicant responded to the ANF's proposal; and

WHEREAS the ANF's members had a meeting on 22 February 2013 and resolved to continue industrial action; and

WHEREAS at a report back conference on 22 February 2013 the applicant proposed a mechanism and framework for negotiating an industrial agreement which included a guaranteed operative date of 1 July 2013 for the first wage increase, meeting dates and a process for dealing with matters not agreed as at 30 June 2013; and

FURTHER the applicant proposed that a maximum wage / remuneration increase be limited to 12.75% to apply to employees covered by the new Agreement of three years duration; and

WHEREAS the ANF rejected the proposed negotiation mechanism and framework as the remuneration quantum proposed was insufficient; and

WHEREAS as there was no agreement between the parties on a process for moving forward the applicant sought the issuance of the following interim order:

> THAT the Federation and its members cease from taking any form of industrial action including but not limited to, work bans and closing beds; and

WHEREAS the applicant reiterated and detailed the significant and deleterious impact of over 300 beds at 11 public hospitals being closed, in particular the negative impact on patients at emergency departments, elective surgery being cancelled for seriously ill patients, including cancer patients, and congestion and delays due to ramping of ambulances; and

WHEREAS the ANF claimed that the bed closures were not having the extensive negative impact on patients claimed by the applicant and nurses were endeavouring to ensure that the most seriously ill patients were not disadvantaged notwithstanding a number of beds being closed; and

WHEREAS the Commission is satisfied that 'closing beds' has continued to have a deleterious and serious impact on the Western Australian public health system and its patients and that it is not in the public interest that this ban continue; and

WHEREAS the Commission is satisfied that the applicant's proposed mechanism and framework for negotiating a new industrial agreement is appropriate to be utilised by the parties in the terms discussed at the Commission except for the quantum proposed by the applicant which is in contest between the parties and is to be the subject of further negotiation in the Commission; and

WHEREAS when taking account equity and fairness and the substantive merits of the case and in particular s 44(6)(ba)(i) and s 44(6)(bb)(i) of the Act, the Commission has formed the view that orders with respect to this application should issue;

NOW THEREFORE having heard Mr M Warner and Ms K Worlock of counsel on behalf of the applicant and Mr M Olson on behalf of the ANF, the Commission, having regard to the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, hereby orders:

1. THAT the ANF by its officers and employees and members is to lift all bans currently in place, in particular bed closures, in relation to the negotiation of a new Agreement to replace the *Registered Nurses and Enrolled Mental Health Nurses – Australian Nursing Federation – WA Health Industrial Agreement 2010.*

2. THAT the ANF by its officers and employees and members take no further industrial action in relation to the negotiation of a new Agreement whilst negotiations for a new Agreement take place with the assistance of the Commission.

3. THAT the ANF by its officers and employees is to take reasonable steps to immediately inform its members about the terms of Orders 1 and 2 and direct its members to comply with these orders.

4. THAT the parties attend a conference to be convened in the Commission on Monday 25 February 2013 at 10.30 am to commence discussions about the framework, mechanism and remuneration quantum with respect to finalising the terms of a new Agreement to replace the *Registered Nurses and Enrolled Mental Health Nurses – Australian Nursing Federation – WA Health Industrial Agreement 2010.*

4. THAT this order is to remain in force until revoked or varied by the Commission.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Education Assistants' (Government) General Agreement 2013 AG 4/2013	11/02/2013	The Department of Education	United Voice WA	Commissioner S J Kenner	Agreement registered
Government Services (Miscellaneous) General Agreement 2013 AG 3/2013	11/02/2013	The Executive Director, Labour Relations Department of Commerce	United Voice WA	Commissioner S J Kenner	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 00032

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00032
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER- CHAIRMAN MR G BROWN - BOARD MEMBER MR T CLARK - BOARD MEMBER
HEARD	**:**	MONDAY, 22 OCTOBER 2012
DELIVERED	**:**	MONDAY, 21 JANUARY 2013
FILE NO.	**:**	PSAB 15 OF 2012
BETWEEN	**:**	GILLES GAUDET Appellant AND COMMISSIONER IAN JOHNSON DEPARTMENT OF CORRECTIVE SERVICES Respondent

Catchwords	**:**	Industrial law - Termination of employment - Appeal against deicsion of repondent to terminate appellant's employment - Appeal filed outside of 21 day time limit - application for extension of time to institute proceedings - Principles applied - Appeal dismissed.
Legislation	**:**	Public Sector Management Act 1994, ss 92 and 80A; Sentencing Act 1995, s 77(6)
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	Mr K Trainer as agent
Respondent	**:**	Ms K Jack and with her Mr D Hughes

Case(s) referred to in reasons:

Nicholas v Department of Education and Training (2008) 89 WAIG 817;

Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196;

Chan v The Nurses Board of Western Australia [2007] WASCCA 123;

Jackamara v Krakour (1998) 195 CLR 516;

Rose v Telstra Corporation Limited (1998) Print Q9292;

Farquharson v Qantas Airways Limited (2006) Print 971685

Case(s) also cited:

Reasons for Decision

1 The appellant Mr Gaudet was employed as a level 7 Team Leader by the Department of Corrective Services. His employment was terminated on 14 June 2012 following his conviction in the Perth Magistrate's Court on 151 counts of criminal damage under s 444 of the Criminal Code. Mr Gaudet was dismissed by the Department under s 92 of the Public Sector Management Act 1994 which enables an employer to take disciplinary action against an employee convicted of a serious offence.

2 Mr Gaudet now appeals against the decision of the Department to dismiss him. The appeal was filed on 27 July 2012, and is some 22 days outside of the 21 day time limit for instituting appeals under reg 107(1) of the Industrial Relations Commission Regulations 2005. Accordingly, Mr Gaudet is required to persuade the Appeal Board that the time for filing the appeal should be extended.

Relevant principles

3 The relevant principles applicable to an extension of time within which to bring an appeal before the Appeal Board are not in issue. Both parties referred to the decision of the Appeal Board in *Nicholas v Department of Education and Training* (2008) 89 WAIG 817. In *Nicholas*, the Appeal Board applied principles applicable to extensions of time for the institution of appeals against primary decisions in the Supreme Court of Western Australia, for example, as in *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196 and *Chan v The Nurses Board of Western Australia* [2007] WASCCA 123. The relevant factors to be taken into account include:

(a) The length of delay;

(b) Reasons for the delay;

(c) Whether the appellant has an arguable case; and

(d) Any prejudice to the other party.

4 As it is only if an appellant has an arguable case that the other factors will be necessary to consider, we will deal with this factor first.

Arguable case

5 As was held in *Jackamara v Krakour* (1998) 195 CLR 516, an assessment of the merits of a case in considering an extension of time to appeal, is necessarily done in a "rough and ready way". That requires a broad brush assessment by the appeal court of the merits of the appeal.

6 Mr Gaudet's testimony in these proceedings did not go to the merits, as his being charged, convicted and sentenced on 12 March 2012 for the criminal offences concerned is a matter of historical fact. However, the circumstances of the offending and the sentence imposed by the Perth Magistrate's Court, in the context of Mr Gaudet's employment, are relevant to the merits of his appeal.

7 The circumstances of Mr Gaudet's offending are not in issue and in summary are as follows. In the period December 2010 to October 2011, Mr Gaudet wilfully damaged some 151 cars, many of them luxury vehicles, by applying paint stripper to the paintwork. Some of the damaged vehicles were located in the Westralia Square commercial building car park in the Perth CBD, which was Mr Gaudet's workplace. In the Department's letter of dismissal of 14 June 2012 (exhibit A1), Mr Gaudet was advised it had been determined that not only were a number of the offences committed in Mr Gaudet's workplace car park, some were committed during Mr Gaudet's working hours.

8 At time of Mr Gaudet being charged by police for the offences, the matter attracted widespread media attention. This included reference to Mr Gaudet holding a senior position at the Department. In some media reports, copies of which were tendered in evidence, the Department was approached for comment.

9 On 12 March 2012 Mr Gaudet pleaded guilty to 151 counts of criminal damage under s 444 of the Criminal Code. A copy of the transcript of the proceedings was tendered in evidence as exhibit A6. In it, the presiding Magistrate observed that the maximum penalty in relation to each charge was ten years imprisonment on indictment and three years if dealt with summarily. The presiding Magistrate observed that the total damage caused to the vehicles by Mr Gaudet's conduct was some $402,000. His Honour noted the aggravating factors in relation to the offending as the extended period of time during which the offences were committed; the total of the damage caused to the vehicles; and the degree of premeditation required to commit the relevant offences, in that Mr Gaudet armed himself with a syringe, purchased paint stripper and then went out to find a suitable target vehicle. The presiding Magistrate noted that many of the vehicles targeted were in a very good condition and were well maintained.

10 It was also submitted on Mr Gaudet's behalf in the sentencing proceedings that at the material time, Mr Gaudet was suffering from a generalised anxiety disorder and a major depressive disorder arising from a particular obsessive compulsive behavioural disorder. A letter from Dr Watts, a clinical and forensic psychologist, dated 22 August 2012, tendered as exhibit A5, supported this being the condition of Mr Gaudet at the material time. The presiding Magistrate noted a number of personal references tendered to the court in support of Mr Gaudet. It was also noted that since being arrested, Mr Gaudet had voluntarily undergone psychological treatment.

11 Furthermore, in mitigation, the presiding Magistrate observed that to his credit, Mr Gaudet had made an apology to his victims and had made significant restitution in the sum of approximately $90,000 by the time of sentencing. The presiding Magistrate said that had Mr Gaudet not cooperated with police and made restitution to his victims, then he would have sentenced Mr Gaudet to an immediate term of imprisonment.

12 In the event, however, the presiding Magistrate sentenced Mr Gaudet separately in respect of a number of the offences. In respect of two charges Mr Gaudet was sentenced to a cumulative term of imprisonment of two years suspended for two years. In relation to a number of the other charges, Mr Gaudet was sentenced to 12 months imprisonment suspended for two years. In relation to the first 10 charges against him, Mr Gaudet was placed on an intensive supervision order for 24 months, accompanied by supervision and programme requirements. These required him to report within 72 hours of the sentence to community based corrections and to submit to any programme that they determined he would need to undertake. Mr Gaudet is required to make contact with them when they require it and he is not able to leave the State without permission. The presiding Magistrate made it clear to Mr Gaudet that any reoffending in the suspended sentence period would lead to Mr Gaudet's incarceration for the term of the sentence.

13 By letter of 19 March 2012 (exhibit R1), the Department informed Mr Gaudet that given his conviction on 12 March 2012, the Department was, under s 92 of the PSM Act, which empowers an employer to take disciplinary action against an employee found guilty of a serious offence, considering dismissing him. Prior to the imposition of any penalty, Mr Gaudet was given an opportunity of making a submission to the Department about the proposed penalty. Having considered Mr Gaudet's submissions of 12 April and 8 June 2012, the Department determined that it would take disciplinary action as a consequence of his convictions.

14 The Department noted in its letter of 14 June 2012, the seriousness of the convictions against Mr Gaudet. The Department also observed that a number of the offences occurred in the car park at Mr Gaudet's workplace and also that his conduct was not restricted to periods outside of working hours. The letter went on to inform Mr Gaudet that despite his exemplary period of service with the Department, the nature of the convictions, the circumstances under which they occurred, and the Department's

assessment of significant reputational damage to it, the relationship of trust and confidence between Mr Gaudet and the Department had been fractured and the appropriate penalty in the circumstances was dismissal.

15 A number of submissions were made by the parties in relation to this aspect of the case. The Department submitted that before dismissing Mr Gaudet, it gave serious consideration to all of the issues raised by him in his submissions. This included the fact that at the time Mr Gaudet was suffering a psychological disorder. Additionally, character references submitted by Mr Gaudet were also carefully considered. However, there were a number of significant aspects of Mr Gaudet's conduct which supported the decision to dismiss, including the significant period over which the offending occurred. Furthermore, emphasis was placed on the fact that some of the offending occurred at Mr Gaudet's workplace, including during Mr Gaudet's working hours.

16 Additionally, and importantly from the Department's perspective, was the submission that it clearly had suffered reputational damage as a consequence of Mr Gaudet's conduct, given the widespread media attention which the case attracted, and the necessity for the Department to make comment in the media. Reference was made to decisions such as *Rose v Telstra Corporation Limited* (1998) (Print Q9292) and *Farquharson v Qantas Airways Limited* (2006) (Print 971685) dealing with dismissals for out of hours conduct.

17 The Department contended that in this case, not only was there a clear connection between Mr Gaudet's offending and his employment, but even if characterised as completely out of hours conduct, it was of such a serious nature, given Mr Gaudet's position, and the close connection of it with the activities of the Department, that there was a clear case of a breach of trust and confidence. With the Department being responsible for the public prison system and community corrections throughout the State, Mr Gaudet's sentencing made his position plainly untenable.

18 Mr Gaudet, on the other hand, highlighted the advice of Dr Watts that given that Mr Gaudet was, at the material times, suffering from a psychological disorder, there was a significant mitigating circumstance. In the absence of such a circumstance, however, Mr Gaudet conceded, in our view correctly, that given the seriousness of the offending, and all of the associated features of it, the appeal would have little or no prospect of success. Mr Gaudet, in referring to the sentencing remarks of the presiding Magistrate, referred to the personal references provided to the court regarding his honesty and being a hardworking and conscientious employee.

19 Additionally, Mr Gaudet referred to the observations of the presiding Magistrate that in the circumstances, he was most unlikely to reoffend. Mr Gaudet was also critical of the Department's case in that they had not led any direct evidence of what they regarded as reputational damage to it as a consequence of Mr Gaudet's offending.

20 We have carefully considered all of the evidence and the submissions. For the following reasons, in our view, Mr Gaudet does not have an arguable case and the appeal has little or no prospect of success. It is therefore unnecessary to consider the other factors in determining whether the time for filing the appeal should be extended.

21 Of most significance in this case, are the circumstances of the offending, which are clearly set out in the sentencing remarks of the presiding Magistrate. The sheer number of the offences, the time period over which the offending took place and the consequential financial loss to the victims was described by the presiding Magistrate as "staggering". It is very clear from a fulsome reading of the sentencing remarks of the presiding Magistrate, that whilst recognising at the time Mr Gaudet was suffering from a psychological disorder that was not sufficient to preclude the imposition of a substantial term of imprisonment for the offences.

22 It is also clear that if it were not for Mr Gaudet's cooperation with police and his actions in restitution, he would have not received a suspended sentence. Of note in this respect, is the fact that a sentence of suspended imprisonment is taken to be a sentence of imprisonment, under s 77(6) of the Sentencing Act 1995. A suspended sentence does not lessen the gravity of the penalty imposed. The sentences imposed by the presiding Magistrate clearly reflect the seriousness of Mr Gaudet's offending, having regard to all of the circumstances.

23 Given that the Department is responsible for corrective services throughout the State, and given Mr Gaudet's position as a senior officer of the Department, in our view, the Department was correct in its submission that it was, in the circumstances, untenable for Mr Gaudet to remain employed. The reality is Mr Gaudet's offending, no doubt at least in part because of the nature and extent of it, received widespread public attention. This is not a case where an officer of the Department had engaged in a one off or isolated incident which led to a conviction. All of the circumstances of the case need to be considered.

24 Moreover, it should also be observed that the combined effect of ss 80A and 92 of the PSM Act are such that there is no presumption that dismissal will be the only outcome of an employee being convicted of a serious offence. Section 92 contemplates that the employing authority may take disciplinary action or improvement action or both, as a consequence of an employee being convicted of a serious offence. Plainly, in our view, all of the circumstances of the offending and of the employment need to be weighed in the balance in the employer's ultimate decision as to what action to take.

Conclusion

25 Whilst clearly Mr Gaudet's conduct and his subsequent conviction for the serious offences with which he was charged, no doubt have had a significant impact upon him, including the loss of his employment, we are not persuaded that having regard to all of the circumstances of the case, that the time for the lodgement of the appeal should be extended. The appeal is therefore dismissed.

2013 WAIRC 00031

APPEAL AGAINST DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GILLES GAUDET
	APPELLANT
	-v-
	COMMISSIONER IAN JOHNSON
	DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G BROWN - BOARD MEMBER
	MR T CLARK - BOARD MEMBER
DATE	MONDAY, 21 JANUARY 2013
FILE NO	PSAB 15 OF 2012
CITATION NO.	2013 WAIRC 00031

Result	Appeal dismissed
Representation	
Appellant	Mr K Trainer as agent
Respondent	Ms K Jack and with her Mr D Hughes

Order

HAVING heard Mr K Trainer as agent on behalf the applicant and Ms K Jack and with her Mr D Hughes on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 6/2013	Request for mediation re alleged breach of contract	Harrison C	N/A	Closed - No Consent

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2013 WAIRC 00085

REFERRAL OF DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BURGE HOLDINGS WA T/A BURGE TRANSPORT
	LUKE BURGE
	APPLICANT
	-v-
	TANK AND VESSEL ENGINEERING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 18 FEBRUARY 2013
FILE NO/S	RFT 11 OF 2012
CITATION NO.	2013 WAIRC 00085

Result	Application discontinued
Representation	
Applicant	Mr L Burge
Respondent	Mr B Roelofson

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.] Commissioner.

2012 WAIRC 00385

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLBOLT TRANSPORT PTY LTD
	APPLICANT
	-v-
	G.R FREIGHTLINES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 22 JUNE 2012
FILE NO.	RFT 2 OF 2012
CITATION NO.	2012 WAIRC 00385

Result	Direction issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr T Lyons of counsel

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr T Lyons of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the respondent file and serve upon the applicant a notice of answer with full particulars by 5 July 2012.

(2) THAT the parties have liberty to apply on short notice.

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

2013 WAIRC 00025

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2013 WAIRC 00025
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 24 APRIL 2012, MONDAY, 3 SEPTEMBER 2012, THURSDAY, 9 AUGUST 2012
DELIVERED	**:**	THURSDAY, 17 JANUARY 2013
FILE NO.	**:**	RFT 2 OF 2012
BETWEEN	**:**	COLBOLT TRANSPORT PTY LTD Applicant AND G R FREIGHTLINES PTY LTD Respondent

Catchwords	:	Owner-driver contract - Referral of dispute regarding payment of claim - Claim for demurrage - Obligations under Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010 - Implication of term into owner-driver contract - Principles applied - Jurisdiction of Tribunal to entertain set-off and counter claim - Declaration made; Order issued.
Legislation	:	Owner-Drivers (Contracts and Disputes) Act 2007 ss 17, 19, 26, 27, 37, 38 and 47.
Result	:	Declaration made; Order issued.
Representation:		
Counsel:		
Applicant	:	Mr A Dzieciol
Respondent	:	Mr T Lyons
Solicitors:		
Applicant	:	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch
Respondent	:	Gibson Lyons

Case(s) referred to in reasons:

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337

Hawkins v Clayton (1988) 164 CLR 539

O'Grady v Northern Queensland Co Ltd (1990) 169 CLR 356

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

R v Clyne, Ex parte Harrap [1941] VLR 200

Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596

Ware v Amaral Pastoral Pty Ltd (No 5) [2012] NSWSC 1550.

Reasons for Decision

1 Mr Collier, a director of Colbolt Transport and Mr Dowdell, a director of GR Freightlines, were friends. As sometimes occurs when friends do business together, Mr Collier and Mr Dowdell, as a result of the dispute presently before the Tribunal, are friends no longer. Both of them operate in the road freight transport industry. From about September 2011, Mr Collier and Mr Dowdell agreed that Mr Collier would provide haulage of freight for a business then conducted by Mr Dowdell, Mohegan Transport. Later, in December 2011, it was agreed between them that Mr Collier would perform work for GR Freightlines.

2 The work in issue in the present dispute, relates to three haulage trips undertaken by Colbolt for GR Freightlines in December 2011. The first trip was from Perth to York where $550 is claimed. The second was a trip from Perth to Wubin where $880 is claimed. The third trip, which represents the bulk of Colbolt's claim, is for a trip from Perth to Darwin, via Exmouth. The sum claimed is $13,527. This includes a claim for demurrage of $3,200 arising from a delay in Exmouth and a claim for accommodation expenses in the sum of $107. The total sum claimed for the three trips and other costs is $17,432.

3 Colbolt's claim is straightforward enough. However, there is a complication in this case. Both Colbolt and GR Freightlines asserted that there was a "contra" arrangement in place between them. Both parties allege different terms in relation to the contra arrangement. Colbolt contends that it was agreed between the parties that in return for GR Freightlines' mechanic providing greasing for Colbolt's truck, Colbolt would provide to the mechanic a carton of beer each week. Additionally, for other mechanical work on Colbolt's truck performed by GR Freightlines' mechanic, Colbolt would forfeit some of the haulage charges that it would otherwise claim against GR Freightlines. Colbolt would supply any parts in relation to work to be done on the truck.

4 GR Freightlines' understanding of the contra arrangement was different. Whilst GR Freightlines agreed that Colbolt would provide a carton of beer for the greasing work on Colbolt's truck, it was GR Freightlines' contention that other mechanical work would be charged at standard rates and be offset against any invoices rendered by Colbolt for services performed. GR Freightlines also contended that it agreed for Colbolt to use GR Freightlines' fuel card for trips and the cost of fuel would be deducted from Colbolt's invoices when they were paid.

5 Accordingly, both parties contended, by way of set-off and counterclaims, that if any money is owed from one to the other, then the sums involved should be set-off in accordance with the contra arrangement.

6 The issues to be determined in this matter include:

(a) The contract claims for the York, Wubin and Darwin trips;

(b) The terms of the contra arrangements between the parties; and

(c) Whether the Tribunal has jurisdiction and power to determine a set-off and counterclaim arising from the contra terms alleged by the parties.

York and Wubin trips

7 Based on the testimony of Mr Collier and Mr Dowdell, counsel for GR Freightlines accepted at the opening of its case that payment for these trips is owed. Accordingly, the Tribunal will make an order in relation to these two claims.

Darwin trip

8 Subject to the set-off and counter claims advanced by both parties, this was the nub of the claims made. Mr Collier testified that on or about 1 December 2011, he and Mr Dowdell agreed for Colbolt to provide a freight delivery to Darwin and to bring a local load back to Perth. This work involved the carriage of a load of steel from Perth to the Minilya Roadhouse and a trailer to be taken to Exmouth and delivered to the RAAF Base at Learmonth. At Exmouth, equipment was to be loaded and the load, which was to be an oversize load, transported to Darwin. In Darwin, Colbolt was to pick up two containers and transport them back to Perth.

9 Mr Collier contended that the agreed sum for this work was $9,000 plus GST, exclusive of fuel costs. It was common ground that Mr Collier used GR Freightlines' fuel card and the cost of fuel on a trip was deducted from the monies owed to Colbolt. GR Freightlines' position is different. It claims that on a proper consideration of the claims overall, including the contra arrangement for mechanical repairs, the total sum of $3,893.59 is owed to Colbolt.

10 There was a conflict on the evidence in relation to the Darwin trip. Mr Collier testified that immediately prior to commencing work for GR Freightlines, his relationship with the company he was then working with was not a good one and he was not in a sound financial. Initially, Mr Collier testified that he did a couple of "dog runs" for GR Freightlines. A "dog run" is a trip involving the transportation of trailers, in this case to Wubin, for other trucks to then take on to Darwin. Mr Collier said there was an agreed lump sum rate for this work exclusive of fuel. In addition to the "dog runs", Mr Collier testified that he also did a couple of trips to Broome for GR Freightlines, again, at an agreed lump sum rate of $5,000 plus GST. On these trips, Mr Collier testified that he also was required to unload the trailers and help others load other trucks. Mr Collier estimated that he spent 10 to 12 hours on unloading and loading on both trips. The York and Wubin trips took place on 2 December.

11 Mr Collier testified that on 2 December he had a discussion with Mr Dowdell regarding a trip from Perth to Exmouth, Darwin and return. Mr Collier was emphatic that the agreed lump sum rate was $9,000 for this trip, which was discussed in Mr Dowdell's office. According to Mr Collier, it was made clear to him that he had to be in Exmouth by the Sunday of that weekend. Contrary to the assertions of Mr Dowdell, Mr Collier strenuously denied that there was any discussion of a per kilometre rate for this or any other work he undertook for GR Freightlines.

12 On Saturday 3 December Mr Collier left Perth early in the morning and took freight to the Minilya Roadhouse as agreed. He said he unloaded on Sunday 4 December prior to lunch time. Mr Collier said that he arrived in Exmouth on Sunday afternoon. When he arrived at the RAAF base in Learmonth, he went to the gatehouse. At the gatehouse, Mr Collier testified he spoke to a person named "Phil" who was responsible for receiving goods. He was informed that there was an emergency of some kind and that he was not able to load prior to the following Thursday, that being 8 December.

13 Mr Collier's evidence was that he immediately rang Mr Dowdell to inform him of this and that there would be a delay. Mr Collier testified that Mr Dowdell agreed to accommodate him in a motel for three nights. Mr Collier also said that he mentioned to Mr Dowdell that he would have to claim for demurrage as a result of this delay. These costs should then be passed on to GR Freightlines' customer. Whilst it became controversial during the course of the proceedings, Mr Collier strongly denied that he was aware, prior to his departure from Perth, that there would be any delay in loading freight at Exmouth. Mr Collier testified that had he been aware of any delay, he would not have travelled on Saturday 3 December as he could have undertaken other jobs which had been offered to him earlier that week.

14 Subsequently, on Thursday 8 December, Mr Collier loaded the goods which constituted a wide load. He then proceeded to Darwin. Given the load was a wide load, and wide loads cannot be transported at night, Mr Collier took some four days to travel to Darwin. On arrival in Darwin, Mr Collier said he was scheduled to pick up two containers of freight. He said that he was informed by the client, NQX, that the containers had not arrived in the country and that apparently, Mr Dowdell had been informed of this by NQX. Mr Collier testified that he loaded other goods instead either on 14 or 15 December. He then returned to Perth and invoiced GR Freightlines for the trip, a copy of which invoice was tendered as exhibit A3. The invoice claimed $9,000 as the agreed rate and four days at ten hours per day at $80 per hour for demurrage, representing the delay in loading in Exmouth. Mr Collier also spent one nights' accommodation at a motel in Darwin on 12 December for which he claimed the sum of $98.

15 Mr Dowdell's version of the events in relation to the Darwin trip was somewhat different. According to Mr Dowdell, Colbolt did three trips in November 2011, one to Newman and two to Broome. All three trips were on an agreed per kilometre basis at the rate of $2.00 per kilometre. Reference was made to exhibits R2 and R3 in this regard. I note in passing that neither of these invoices, nor any others for that matter, made reference to the agreed rate of $2.00 per kilometre.

16 According to Mr Dowdell, GR Freightlines' client NQX had informed him that the goods would not be available for loading in Exmouth until later in the week of 4 December. Mr Dowdell testified that when discussing this trip with Mr Collier, in addition to agreeing to the fixed rate of $2.00 per kilometre, exclusive of the fuel levy, he also told Mr Collier that the freight would not be available for loading until between Monday and Wednesday of that week. Mr Dowdell testified that Mr Collier responded to the effect that he would go to Exmouth anyway over the weekend, to do some fishing. Mr Dowdell denied that he requested Mr Collier to leave on Saturday 3 December. He said he told Mr Collier that he could leave Perth on the following Monday or Tuesday.

17 Additionally, Mr Dowdell testified that he recalled two conversations with Mr Collier. The first was on the Sunday evening when Mr Collier informed him that he had arrived at Exmouth and that he had unloaded the goods at the Minilya Roadhouse that afternoon. A further call was made on the following Monday morning, when Mr Collier informed Mr Dowdell that he had been to the RAAF base to advise them that he had arrived and the trailers were in town. It was in that conversation, that

Mr Collier requested Mr Dowdell to provide a motel room in Exmouth. Mr Dowdell agreed to this request because Mr Collier did not have air-conditioning in the bunk area of the cab of his truck. Given the time of year, it would be very humid.

18 Mr Dowdell denied there was any discussion about demurrage, either before Mr Collier left Perth or when he arrived at Exmouth. In relation to the telephone calls, Mr Dowdell referred to a copy of Mr Collier's mobile telephone account, which was tendered as exhibit A15. On that account, it is revealed that a call was made by Mr Collier to Mr Dowdell at 6:16pm on Sunday 4 December. That call was for 1 minute 29 seconds. Mr Dowdell said that this was not long enough to discuss the issue of the delay in freight in Exmouth and the claim for demurrage. I note that the next call to Mr Dowdell was at 8:42am on Monday 5 December, which call was for 1 minute and 43 seconds. When Mr Dowdell was asked why he accommodated Mr Collier in a motel in Exmouth for several days, Mr Dowdell reiterated that Mr Collier did not have an ice pack in his truck so he "looked after him".

19 As noted, Mr Dowdell received the further call on Monday morning 5 December where he was informed by Mr Collier that the load would not be ready until Wednesday of that week. On 12 December Mr Dowdell said Mr Collier arrived in Darwin and requested an overnight stay in a motel which was refused. Mr Collier arrived back in Perth on 16 December.

20 In terms of the invoices provided by Colbolt, exhibits A3 and A6, Mr Dowdell said he did not accept the claim of $3,200 for demurrage. Given the fact that NQX had informed him that the load was not ready for dispatch until Wednesday or Thursday of the week of 5 December, there was no basis for GR Freightlines to now claim demurrage against its client. Mr Dowdell also testified that based upon his calculation for the Darwin trip at $2.00 per kilometre, a journey of some 8,700 kilometres leads to a total sum, inclusive of GST, of $19,140. Deducting fuel for the trip of $11,873.59 (see exhibit R5) the sum GR Freightlines says is owed to Colbolt for this trip, disregarding any contra arrangement, is $7,266.41.

21 Therefore, leaving aside the mechanical work which GR Freightlines said it performed for Colbolt, GR Freightlines accepted that Colbolt is owed a total of $8,696.41. This is comprised of $7,266.41 for the Darwin trip, and $1,430 for the York and Wubin trips.

22 In relation to the claim for demurrage, the Tribunal accepts that based on the testimony from Mr Dawson, a senior organiser with the Union, there is some consideration built into the guideline rates published by the Road Transport Freight Industry Council under s 27(1)(f) of the Act, for loading and unloading of freight. Mr Dawson's evidence was that the industry practice of approximately two to three hours could be used as a guide. This accepted industry practice does not include the case of extended delays or waiting time by drivers.

23 This issue is also dealt with, at least in part, by Division 8 reg 14 of the Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010. Regulation 14 provides as follows:

> **14. Particular payment that must be made to owner-driver**
>
> (1) If a hirer receives any additional payment or higher rate in respect of services provided to a customer to cover —
>
> (a) fluctuations in the cost of fuel; or
>
> (b) any other contingency,
>
> the hirer must pay to the owner-driver who actually provided those services a fair and reasonable amount to cover those fluctuations or that other contingency.
>
> (2) The contingencies referred to in subsection (1)(b) include where the owner-driver spent excess time —
>
> (a) loading or unloading goods or waiting to load or unload goods; or
>
> (b) waiting for goods to be made available for collection.

24 Regulation 14(2) is consistent with the testimony of Mr Dawson on this issue. The reference to "excess time" is to time spent loading or unloading goods, waiting to load or unload or waiting for goods to be made available for loading. I therefore accept Mr Dawson's evidence that some consideration in the hourly rates in the guideline rates for owner-drivers is included for loading and unloading and waiting times, as a matter of industry practice.

25 However, it is important to note that by reg 14(1), the obligation imposed by reg 14(2) only arises if "a hirer receives any additional payment or higher rate …" The interpretation of this provision was the subject of argument by counsel. On the one hand, counsel for GR Freightlines contended that reg 14(1), properly construed, means that the only circumstance in which payments will be made for the contingencies referred to in reg 14, will be where the hirer receives an additional payment from a customer. On the other hand, counsel for Colbolt submitted that this construction is not tenable. It would be inconsistent with the overall tenor of the legislation, which precludes the denial of payments to owner-drivers unless payments are received by the hirer from a customer.

26 In this case, both for the Darwin trip and for the trips undertaken generally, there was no evidence to establish that GR Freightlines received any additional amounts for services to customers. However, in my view, that is not the end of the matter.

27 The Code of Conduct, made by regulation, is established for the purposes of ss 26 and 27 of the Owner-Drivers (Contracts and Disputes) Act 2007. Section 26 enables the Governor, on the recommendation of the responsible Minister, to prescribe a Code of Conduct by regulation, for the purposes of the "engagement of owner-drivers under owner-driver contracts and conduct and practice under owner-driver contracts". Section 27 sets out the content that may be included in the Code of Conduct. Prior to its making, the Minister is required to consult the Council established by s 17 of the OD Act. By s 19 of the OD Act, the functions of the Council are set out. These include advice and recommendations to the Minister on the development and review of the Code of Conduct, and advice and recommendations to the Minister on commercial practices generally engaged in by owner-drivers and hirers in relation to one another.

28 Therefore in my view, it seems plain enough from s 17, when read with ss 26 and 27 of the OD Act that the Regulations prescribing the Code of Conduct have been made in consultation with and advice from, industry representatives through the Council, as to industry practices and appropriate commercial arrangements.

29 Even having regard to this, the Tribunal does not accept, however, the narrow construction placed on reg 14 by GR Freightlines. It does not constitute a complete code in relation to the circumstances in which an owner-driver may receive an additional payment. In my opinion, the terms of reg 14 do not preclude the inclusion of a term in an owner driver contract, expressly or by necessary implication, as to demurrage. What reg 14 does, is to prescribe what must occur, as a minimum, if a hirer receives a payment from a customer in the circumstances of reg 14(1)(a) or (b). The express inclusion of these matters does not limit payments to an owner-driver only to the case of a hirer being in receipt of such payments, where the contract is otherwise silent on the issue.

30 In this case, on the evidence, there was no suggestion by either party that there was an express term dealing with demurrage, although I note that on the evidence also, there seemed to be some common understanding that there would be a payment of demurrage, as referred to by Mr Dowdell, if no notice is given of a delay in the availability of freight. In the circumstances of this case, I would be prepared to imply a term in the owner-driver contract to the effect that where there is excessive delay in waiting for goods to be made available for collection, as expressly contemplated by reg 14(2)(b) of the Regulations, reasonable compensation be paid. That would only arise in circumstances where there was no prior notice of the delay. The tests as to the implication of a term in fact, in a contract are well settled. As was said by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282-283:

> Their Lordships do not consider it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be established: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

31 This approach has been affirmed by the High Court of Australia: *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. Additionally, in the case where the contract in question is oral or partly oral and partly in writing, as in the present matter, a less strict approach to the application of these factors may be appropriate: *Hawkins v Clayton* (1988) 164 CLR 539 per Deane J; *Ware v Amaral Pastoral Pty Ltd (No 5)* [2012] NSWSC 1550.

32 Given the major capital cost of a haulage rig, for an owner-driver to not receive some compensation for their fixed costs and income forgone from other sources of work, in the case of a significant, unexpected delay in goods being available for collection and loading, would in my opinion, be plainly unreasonable. For the same reason, it would be necessary to imply such a term to give business efficacy to a contract, in a commercial sense. Furthermore, in my opinion, an informed bystander with knowledge of the capital costs of a haulage rig and potential income forgone would come to the view that such a term would be obvious. I also see no issue arising as to the final two elements of the *BP Refinery* test that is the clarity of expression and consistency requirements.

33 I would, however, go one step further. Based upon the evidence from Mr Dawson, which was unchallenged, and also the evidence of Mr Dowdell, it seems to be an accepted industry custom, that in the case of unexpected or excessive delays, some compensation should be provided to both an owner-driver and a hirer by a customer. I would therefore be prepared to imply such a term on this basis also.

34 This leads to a consideration of the evidence. Having considered the testimony and documentary evidence carefully, I prefer Mr Collier's evidence as to this issue. It was common ground that at the time Colbolt agreed to commence carting goods for GR Freightlines, Mr Collier was struggling financially. This was also the case at the time of the Darwin trip. In my opinion, it is entirely inconsistent with this state of affairs, that Mr Collier would knowingly forgo other work which was available to him, and travel to Exmouth on Sunday 4 December, so he could remain idle for several days to go fishing. Also, the fact that GR Freightlines was prepared to pay for Mr Collier's accommodation for several days in Exmouth is, in my view, more consistent with Mr Collier waiting to load goods, rather than GR Freightlines in effect, subsidising Mr Collier's fishing trip.

35 The Tribunal therefore finds that some compensation should be paid to Colbolt for demurrage. I will allow eight hours per day over three days at $80 per hour leading to a total sum of $1,920.

36 As to the issue of the agreed lump sum rate or the per kilometre rate, on the evidence, given the history of the dealings between the parties, I prefer the evidence of Mr Collier on this issue also. The initial trips to York and Wubin for the "dog runs" were paid on a lump sum basis. All of the invoices tendered in evidence for the earlier trips to Newman and Broome refer to a fixed figure plus GST. None of the invoices for those trips make any reference to an agreed rate per kilometre. Mrs Collier, who also gave evidence, was responsible for maintaining the books of account for Colbolt. There was no reference in her testimony to any suggestion or direction, to include in the invoices tendered to GR Freightlines, anything other than the lump sums as claimed. All of the invoices produced by Colbolt and tendered to GR Freightlines, are consistent on this point. Accordingly the Tribunal finds that the agreed rate for the Darwin trip was $9,000 plus GST, exclusive of fuel.

Contra arrangements

37 As noted at the outset of these reasons, both Colbolt and GR Freightlines contended in their claim and answer respectively, that they entered into contra arrangements for the performance of services by Colbolt to GR Freightlines. GR Freightlines pleaded a set-off and counter claim in this respect. Colbolt pleaded in its revised particulars of amended claim, that if any monies are owing to GR Freightlines in relation to mechanical repairs, then a set-off is claimed for loading and unloading work not charged for by Colbolt. Two issues are to be determined. First is the jurisdiction and power of the Tribunal to entertain a set-off and counter claim. If the answer to that question is that the Tribunal has jurisdiction and power to deal with a set-off and counter claim, the second issue is how those matters should be resolved on the facts.

Jurisdiction and power

38 A set-off, either legal or equitable, is a defence to a plaintiff's claim. It may wholly or partially offset it. A counter claim on the other hand, is a separate cause of action in its own right, not dependant on the maintenance of a plaintiff's original claim. Provision for set-offs and counter claims, is normally made in Rules of Court (see for example in this State O 18 r 2 and O 12 r 17 of the Rules of the Supreme Court 1971).

39 The jurisdiction and powers of the Tribunal are set out in Part 9 of the OD Act. Relevant, for present purposes, are ss 37, 38 and 47. These sections provide as follows:

37. Terms used in this Part

(1) In this Part —

Chief Commissioner has the meaning given to that term in the IR Act section 7(1);

Commission has the meaning given to that term in the IR Act section 7(1);

Commissioner has the meaning given to that term in the IR Act section 7(1);

dispute means a dispute between one or more owner-drivers and one or more hirers arising under or in relation to this Act, the code of conduct or an owner-driver contract (including a payment dispute) and includes an allegation that a person has contravened this Act, the code of conduct or an owner-driver contract;

transport association means —

(a) the Transport Forum WA Inc.; or

(b) the Transport Workers Union of Australia, Industrial Union of Workers Western Australian Branch.

(2) For the purposes of this Act, a ***payment dispute*** arises if, by the time the amount claimed in a payment claim is due to be paid under an owner-driver contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed.

38. Industrial Relations Commission sitting as the Road Freight Transport Industry Tribunal

(1) By this section the Commission has jurisdiction to —

(a) hear and determine disputes that may be referred to the Commission under this Part; and

(b) enquire into and deal with any other matter in relation to the negotiation of owner-driver contracts that may be referred to the Commission under this Part.

(2) When sitting in exercise of the jurisdiction conferred by subsection (1) or under section 46, the Commission is to be known as the Road Freight Transport Industry Tribunal (the ***Tribunal***).

(3) A determination of the Tribunal on a dispute or matter mentioned in subsection (1) has effect according to its substance.

47. Determination of dispute where no resolution by conciliation

(1) If —

(a) a dispute is referred to the Tribunal; and

(b) the Tribunal takes action under section 44(2)(a); and

(c) section 44(5)(b) does not apply,

the Tribunal may hear and determine the dispute for the purposes of section 38(1)(a).

(2) The Tribunal does not have jurisdiction to make a determination under this section in respect of a matter arising in relation to the conduct of joint negotiations for an owner-driver contract.

(3) In making a determination mentioned in subsection (1), the Tribunal must endeavour to ensure that the matter is resolved —

(a) taking into account any agreement reached by the parties on any particular issue; and

(b) subject to paragraph (a), on terms that could reasonably have been agreed between the parties in the first instance or by conciliation.

(4) In making a determination mentioned in subsection (1), the Tribunal may do one or more of the following —

(a) order the payment of a sum of money —

(i) found by the Tribunal to be owing by one party to another party; or

(ii) by way of damages (including exemplary damages and damages in the nature of interest); or

(iii) by way of restitution;

(b) order the refund of any money paid under an owner-driver contract;

(c) make an order in the nature of an order for specific performance of an owner-driver contract;

(d) declare that a debt is, or is not, owing;

(e) order a party to do, or to refrain from doing, something;

(f) make any other order it considers fair, including declaring void any unjust term of an owner-driver contract.

(5) In making an order under subsection (4), the Tribunal cannot —

(a) insert a term into; or

(b) subject to subsection (4)(f), otherwise vary,

an owner-driver contract.

40 Also relevant to the present issue, is reg 10 of the Regulations which is in the following terms:

10. Deductions must be authorised by the contract or this section

(1) A hirer must not deduct any amount from money payable by the hirer to an owner-driver under an owner-driver contract unless the deduction is authorised either by —

(a) the contract; or

(b) this section.

(2) The deduction of an amount is authorised by this section if —

(a) the amount represents —

(i) a payment under an owner-driver contract that the owner-driver is liable to make, in accordance with section 9, for loss or damage incurred by the hirer as a result of a breach of contract or default (as defined in that section) on the part of the owner-driver; or

(ii) the reasonable value of any service, benefit or thing that the hirer has provided or arranged to be provided to the owner-driver;

and

(b) the hirer has given written notice to the owner-driver, not less than 14 days before the deduction is made —

(i) describing the liability or the service, benefit or thing; and

(ii) stating the amount to be deducted, when or from what money payable the deduction will be made, and the basis on which the deduction has been calculated.

41 For the purposes of the present matter, a "dispute" means a dispute between one or more owner-drivers and one or more hirers "arising under or in relation to … an owner-driver contract (including a payment dispute) and includes an allegation that a person has contravened … an owner-driver contract." By this provision, "under", means "by virtue of or pursuant to": *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307; *R v Clyne, Ex parte Harrap* [1941] VLR 200. Further, the phrase "in relation to", is one of substantial breadth. It has been held that such phrases as "relates to" or "in relation to", in legislation, are expressions of the widest import. What is required is no more than a connection, whether it be direct or indirect, between two subject matters: *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356. (See generally Pearce and Geddes *Statutory Interpretation in Australia* 6th ed at par 12.7).

42 Whilst Part 10A of the Industrial Relations Commission Regulations 2005 and the Regulations do not specifically refer to set-offs and counter claims in the sense used in other civil jurisdictions, I am satisfied that the Tribunal has jurisdiction to make orders in the nature of set-offs or counter claims, as long as the subject matter of the set-off or counter claim falls within the meaning of "dispute" in s 37 of the OD Act. The breadth of the range of orders that the Tribunal may make under s 47(4), including, for example, orders for payment of sums of money owing by one party to another under s 47(4)(a)(i); declarations of a debt owing under s 47(4)(d); and the making of any other order the Tribunal considers is "fair" under s 47(4)(f), which is particularly broad, supports this conclusion.

43 Regulation 10, dealing with specific deductions from monies payable to an owner-driver under a contract or by the regulation itself, seems to be a particular species of set-off that may be raised in a particular case. However, it does not, in my view, otherwise limit the breadth of possible set-offs or counter claims that may be brought before the Tribunal, as long as the requisite dispute is in existence, as defined in s 37 of the OD Act.

44 The next issue to determine is whether the set-offs and counter claims made, arise under or in relation to the owner-driver contract between Colbolt and GR Freightlines. As to this issue, Colbolt contended that the claim by GR Freightlines for mechanical services provided to Colbolt was under a separate subsidiary agreement between the parties. This argument was put on the basis that the parties separately agreed for GR Freightlines' mechanic to provide the mechanical services in exchange for which Colbolt would not charge all of its time for the provision of services, in particular loading and unloading.

45 On the other hand, GR Freightlines contended that particularly having regard to the terms of reg 10 of the Regulations, the set-off and counter claim can be dealt with by the Tribunal. This is so, as the argument ran, irrespective of the breadth of s 37 of the OD Act.

46 The Tribunal is not persuaded, on all of the evidence, that the arrangement for the performance of mechanical work by GR Freightlines on Colbolt's truck was the subject of a subsidiary agreement as contended by Colbolt. Given the evidence of Mr Collier and Mr Dowdell, the provision of greasing and the labour component of repairs to Colbolt's truck, was an integral part of the arrangement for the provision of services by Colbolt to GR Freightlines under the owner-driver contract. In my view, it goes without saying, that ensuring a truck used in heavy haulage is regularly serviced and maintained in good repair, is critical to the performance of an owner-driver contract. Moreover, such services may also be provided by a hirer to an owner-driver, as is expressly contemplated by reg 10(2) of the Regulations, quite independent of any contract between the parties.

47 In the alternative, however, if I am incorrect in this conclusion, if the owner-driver contract between Colbolt and GR Freightlines did not support the arrangement for work on Colbolt's truck, then I am satisfied that the terms of reg 10 come into play. I am not persuaded by Colbolt's submissions that if reg 10 is to be relied upon by GR Freightlines, that GR Freightlines has not complied with reg 10(2)(b), which requires specification of the proposed deductions. In this case, it is to be noted that no deductions have yet been made by GR Freightlines from monies due to Colbolt, in respect of the provisions

of the services. They are specifically the subject of dispute before the Tribunal, by way of the set-off and counter claims by GR Freightlines.

48 I am satisfied on the evidence before the Tribunal, as set out in exhibit R4, that there has been provided a description of the service, its quantification and the basis on which the deduction has been calculated. Whilst these matters were in dispute, as referred to in the testimony of Mr Dowdell, Mr Collier and Mr Blake, a qualified heavy vehicle mechanic, there is sufficient particularity for the purposes of reg 10(2)(b) of the Regulations.

Set-off and counter claims

49 There are two limbs to the contra-claims made. They are:

(a) Colbolt's assertion that it would not claim for all work done by loading and unloading freight in return for the labour component of mechanical repairs on Colbolt's truck; and

(b) GR Freightlines's assertion that it kept a record of work done on Colbolt's truck and that Colbolt would ultimately pay for such labour component of the work at standard rates by appropriate deductions from invoices rendered by Colbolt.

50 It is important to appreciate that, as the Tribunal noted at the outset of these reasons, both Mr Collier and Mr Dowdell were, at the time that Colbolt commenced performing services for GR Freightlines, friends. In that context, the evidence clearly showed that the contra arrangements were applied in a very informal manner. No doubt their friendship influenced how both parties dealt with one another in relation to these contra arrangements. Since the commencement of these proceedings, and the termination of their friendship, that previously informal and flexible arrangement between the parties, has now been very much formalised and is the subject of claim and counter claim.

51 It must be accepted that, in the ordinary course of events, all else being equal, the work done on Colbolt's truck by GR Freightlines' mechanic was not to be done for free. In my view on the evidence, some work was plainly performed to maintain Colbolt's truck in a good state of repair for the services provided to GR Freightlines and some consideration must be afforded for it. What was in issue was the quantity of the work claimed to have been done, and the quantity of some of the consumables also claimed by GR Freightlines against Colbolt.

52 Turning to Colbolt's contra arrangement that it would not charge for all of the work undertaken for GR Freightlines, particularly by way of loading and unloading. There are a number of significant difficulties with this claim. The particulars of claim are set out in attachments in exhibit R1, which is a letter of 24 April 2012 from the Union to GR Freightlines. Attached to the letter, are a number of revised invoices numbered 13 to 18 inclusive, claiming various hours for loading and unloading on trips and also for some unloading work in the metropolitan area.

53 The first difficulty with such claims is the lack of precision and certainty. No records were kept of any kind, of the work said to be undertaken in loading and unloading on the occasions in question. In that regard, Mr Collier's evidence was that he has estimated times taken in loading and unloading on behalf of GR Freightlines in a conservative fashion and "could have claimed much more". In my view, the evidence as to these matters is insufficient to provide a reasonable measure of compensation for such claims.

54 Secondly, and equally as importantly, is the very significant delay in pursuing such claims for compensation for loading and unloading. In the main, as exhibit R1 reveals, the claims were made against GR Freightlines some five to six months after the work was said to have been performed. This is a factor which in my view, also significantly impacts upon the reliability and accuracy of such claims to support a reasonable compensation order.

55 Thirdly, is the fact that the original invoices for the trips now the subject of amended claims, some months after the event, have already been paid by GR Freightlines. There are a number of consequences arising from this. First and foremost, GR Freightlines was entitled to, and plainly did, rely upon the presentation of the invoices by Colbolt for the work in question, as the total sum of monies due and payable. Those invoices were subsequently paid. To its clear detriment, GR Freightlines, if it now faces additional payments to Colbolt for loading and unloading and possibly also, additional demurrage, cannot now claim from its clients. This may or may not give rise to an equitable estoppel in the strict legal sense. However, and regardless, as a matter of equity and good conscience, it is now in my view, far too late for Colbolt to expect GR Freightlines to meet any additional costs for services which are said to have been rendered, particularly given the lack of specificity of the claims made.

56 I have reached similar conclusions in relation to the mechanical work provided by GR Freightlines. It is important to note that it was the uncontroverted evidence of Mr Dowdell, that the work performed on Colbolt's truck, apart from the basic regular greasing work, would be charged to Colbolt at "standard rates" and deducted from invoices rendered by Colbolt. The claimed work, as set out in exhibit R4, goes as far back as early September 2011. However, it is the case that no such deductions were ever made by GR Freightlines, from the many invoices tendered by Colbolt and paid by GR Freightlines. As with Colbolt's claims against GR Freightlines, in my view, it is now too late, and it would be unfair and inequitable, to order, well after the event, compensation for this work.

57 As with Colbolt's counter claim against GR Freightlines, given that Colbolt invoiced and was paid by GR Freightlines, without any such deductions having been made, and without any express arrangement on the evidence for future payment, then it may well also be the case that GR Freightlines is likewise estopped from now claiming such amounts against Colbolt. It is not necessary however to reach a firm conclusion on this point.

58 As to the consumables claimed by GR Freightlines, the quantum of these amounts was in dispute. Despite this, for the same reasons in dealing with the labour content of GR Freighlines' counter claim, I decline to make any order for these amounts. Also, I am not persuaded that there is any basis for an order in relation to Colbolt's claim for accommodation in Darwin in the sum of $107.00. That claim is refused.

Conclusion

59 Accordingly, on the basis of all of the evidence and the submissions, the Tribunal will make an order that GR Freightlines pay to Colbolt the total sum of $13,442. Those sums represent $1,430.00, inclusive of GST, for the York and Wubin trips admitted by GR Freightlines to be owed. Secondly, is the sum of $9,900.00, inclusive of GST, for the Darwin trip. Thirdly, is the sum of $2,112.00, inclusive of GST, for demurrage incurred by Colbolt in relation to the delay in loading in Exmouth. Interest on the total sum will be calculated at 6 per cent from 3 December 2011 to judgement in the sum of $899.00.

2013 WAIRC 00046

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	COLBOLT TRANSPORT PTY LTD
	APPLICANT
	-v-
	GR FREIGHTLINES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 29 JANUARY 2013
FILE NO/S	RFT 2 OF 2012
CITATION NO.	2013 WAIRC 00046

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr T Lyons of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr T Lyons of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby–

(1) DECLARES that the respondent is indebted to the applicant in the sum of $13,442.00.

(2) ORDERS the respondent to pay to the applicant the debt due plus interest in the total sum of $14,341.00 within 21 days of the date of this order.

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

2012 WAIRC 00823

REFERRAL OF DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GENE LAWSON
	APPLICANT
	-v-
	KINGSTYLE INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 10 SEPTEMBER 2012
FILE NO.	RFT 9 OF 2012
CITATION NO.	2012 WAIRC 00823

Result	Directions issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	No appearance

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and there being no requirement for the respondent to appear, the Tribunal, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT within 14 days of the date of this direction the respondent do file its notice of answer and counter proposal, and in that notice of answer and counter proposal provide particulars as to:

  (a) The basis on which the respondent disputes that Gene Lawson is entitled to be paid the sum of $13,251.15; and

  (b) Whether the respondent admits that it owes any other amount to Gene Lawson.

(2) THAT within 14 days of the date of this order the respondent do provide discovery of documents that it intends to rely upon at the hearing of this matter in opposition to the applicant's claim, including any documents that show that:

  (i) The respondent has paid the sum of $13,251.15 to Gene Lawson; or

  (ii) Documents that support the respondent's claim that Gene Lawson is not entitled to payment of the sum of $13,251.15;

  (iii) Any other documents that the respondent will seek to rely upon in this matter.

(3) THAT the documents referred to in par 2 be provided to the applicant's representative, the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

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

2012 WAIRC 00954

REFERRAL OF PAYMENT DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	GENE LAWSON
	APPLICANT
	-v-
	KINGSTYLE INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 29 OCTOBER 2012
FILE NO/S	RFT 9 OF 2012
CITATION NO.	2012 WAIRC 00954

Result	Direction
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr A Valentino

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr A Valentino on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby directs –

(1) THAT the referral be and is hereby adjourned by consent to a date to be fixed in early February 2013.

(2) THAT the direction of the Tribunal dated 10 September 2012 be and is hereby revoked.

(3) THAT by 15 December 2012 the respondent do file its notice of answer and counter proposal, and in that notice of answer and counter proposal provide particulars as to:

(a) The basis on which the respondent disputes that Gene Lawson is entitled to be paid the sum of $13,251.15; and

(b) Whether the respondent admits that it owes any other amount to Gene Lawson.

(4) THAT by 15 December 2012 the respondent do provide discovery of documents that it intends to rely upon at the hearing of this matter in opposition to the applicant's claim, including any documents that show that:

(i) The respondent has paid the sum of $13,251.15 to Gene Lawson; or

(ii) Documents that support the respondent's claim that Gene Lawson is not entitled to payment of the sum of $13,251.15;

(iii) Any other documents that the respondent will seek to rely upon in this matter.

(5) THAT the documents referred to in par (4) be provided to the applicant's representative, the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

(6) THAT the parties have liberty to apply on short notice.

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

2013 WAIRC 00069

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2013 WAIRC 00069
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 5 FEBRUARY 2013
DELIVERED	**:**	WEDNESDAY, 6 FEBRUARY 2013
FILE NO.	**:**	RFT 9 OF 2012
BETWEEN	**:**	GENE LAWSON Applicant AND KINGSTYLE INVESTMENTS PTY LTD Respondent

Catchwords	**:**	Owner-driver contract - Referral of dispute regarding payment of claim - Principles applied - Order issed.
Legislation	**:**	Owner-Drviers (Contracts and Disputes) Act 2007 s 9.
Result	**:**	Application granted. Order issued
Representation:		
Applicant	**:**	Mr A Dzieciol of counsel
Respondent	**:**	Mr A Valentino

Reasons for Decision

1 Mr Lawson claims that Kingstyle Investments Pty Ltd is indebted to him in the sum of $12,834.53 arising out of an owner-driver contract Mr Lawson and Kingstyle were parties to in the period from January 2008 to May 2011. Mr Lawson operated a tow truck and Kingstyle operated a towing business which traded by the name Autocare Towing Service. The matter was heard by the Tribunal on 5 February 2013. At the conclusion of the proceedings, the Tribunal announced that it would make an order in favour of Mr Lawson, with brief reasons to follow. These are the Tribunal's reasons.

2 It was not in dispute between the parties that at all material times between January 2008 and May 2011 Mr Lawson operated a tow truck and provided his services to Kingstyle under an owner-driver contract for the purposes of the Owner-Drivers (Contracts and Disputes) Act 2007. The period of the contract in dispute in these proceedings, is between January 2010 and March 2011. Mr Lawson contended that during this period, he provided towage services to Kingstyle and he has not been paid for those services.

3 Save for one aspect, to which I will return shortly, Mr Lawson's testimony was not seriously challenged. Mr Lawson said that he was approached by Kingstyle and offered work as a tow truck operator. Mr Lawson purchased a tilt tray tow truck and commenced working for Kingstyle in accordance with an owner-driver contract. The terms of the arrangement were oral and he mainly dealt with Mr Valentino's nephew "Leon" and the administration staff in Kingstyle's office.

4 Mr Lawson outlined in his testimony the system by which he received work from Kingstyle. This work was mainly for insurance companies. A call was made by Kingstyle's home base to Mr Lawson to notify him of a tow job which he could accept or decline. Whilst Mr Lawson's evidence was that the vast majority of his work was insurance related work, there was some private work done for mechanical workshops. He also undertook a very small amount of work on his own account. Mr Lawson received no direction not to undertake such private work.

5 Once Mr Lawson received and confirmed the tow job, he would transfer the job number to his invoice book and then undertake the towage work. Every few weeks or so, Mr Lawson said he would submit his invoices to the office at Kingstyle. Exhibit A1 was a book of invoices relating to insurance tow jobs undertaken by Mr Lawson over the relevant period in respect of which he has not been paid. Each invoice carries an invoice number, with particulars of the vehicle owner's details, authorisation, the pickup and drop off point, the payment details, including reference to the relevant insurance company and an order/claim number. Mr Lawson's uncontradicted evidence was he performed all of the services in connection with the some 129 invoices contained in exhibit A1.

6 Additionally, for the purposes of these proceedings, Mr Lawson prepared a schedule from his computer records which was exhibit A2, setting out the invoiced jobs, with full particulars, in respect of which no payment had been received from Kingstyle. Furthermore, exhibit A3 was a summary document prepared for the purposes of these proceedings, itemising the total amounts claimed by Mr Lawson in the total sum of $12,834.53. It was common ground that a term of the owner-driver contract between Mr Lawson and Kingstyle, involved a deduction of 25% from the gross invoiced sums, representing in effect, a commission payment payable to Kingstyle for sourcing the towage work.

7 Mr Lawson gave detailed evidence as to the system in operation whilst he was working for Kingstyle. He outlined the payment methodology and the invoicing procedure that was followed. The towage fees, according to Mr Lawson, were set by Kingstyle. They may have differed somewhat between insurance companies and for different types of work. When it was put to him in cross-examination by Mr Valentino, Mr Lawson strongly denied there was ever any agreement that if Kingstyle was not ultimately paid by an insurer, any payments previously paid by Kingstyle, were to be deducted from payments owing to Mr Lawson. This was the central contention of Kingstyle.

8 Kingstyle did not call any evidence on its behalf. This is despite the Tribunal cautioning Mr Valentino that in the event that no sworn evidence was adduced by Kingstyle, and there was a conflict in the contentions advanced by it and Mr Lawson, then the Tribunal may be obliged to accept the sworn testimony. Furthermore, Kingstyle did not dispute that Mr Lawson worked for the towing business under an owner-driver contract and performed the works as set out in Mr Lawson's testimony. As just noted, what Kingstyle contended, however, is that there was an agreement with the tow truck operators that if ultimately, Kingstyle did not receive payment from its insurer client, Kingstyle could deduct such sums of money from amounts already paid to the drivers.

9 The Tribunal was not persuaded on the evidence that this was so. As I have already observed, Kingstyle led no evidence to support such a contention and it was directly inconsistent with the sworn evidence of Mr Lawson, which evidence I accept. In any event, over the material time of the claims made by Mr Lawson, by s 9 of the OD Act, it is unlawful for a hirer to make payments to an owner-driver contingent on whether the hirer is ultimately paid by another person. Any such provision of an owner-driver contract, whether it is oral or written, or partly oral or partly written, has no effect.

10 I am satisfied that Mr Lawson gave his evidence honestly and accounted for the work he performed for Kingstyle during the material times. This was not disputed by Kingstyle. There was one minor discrepancy between exhibit A3 and exhibit A1. That relates to invoice number 65406, for work performed on 8 April 2010 in the sum of $100. There was no such invoice contained in exhibit A1 and therefore that claim will be disregarded for present purposes.

11 Having been satisfied that Mr Lawson had established his claim, the Tribunal makes an order for payment of the sum of $12,752. That sum represents the claimed amount less Kingstyle's 25% payment plus GST. The order will include interest at the rate of 6% per annum from 24 April 2011 to the date of the order in the sum of $1,320.

2013 WAIRC 00070

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	GENE LAWSON
	APPLICANT
	-v-
	KINGSTYLE INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 6 FEBRUARY 2013
FILE NO/S	RFT 9 OF 2012
CITATION NO.	2013 WAIRC 00070

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr A Valentino

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr T Valentino on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby–

(1) DECLARES that the respondent is indebted to the applicant in the sum of $12,752.

(2) ORDERS the respondent to pay to the applicant the debt due plus interest in the total sum of $14,072 within 21 days of the date of this order.

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