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## FULL BENCH—Unions—Application for Alteration of Rules—

**2013 WAIRC 00421**

APPLICATION PURSUANT TO S.62 - ALTERATION OF REGISTERED RULE 25 - OFFICERS; APPLICATION FOR DECLARATION PURSUANT S 71(2)

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**FULL BENCH**

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| **CITATION** | : | 2013 WAIRC 00421 |
| **CORAM** | : | THE HONOURABLE J H SMITH, ACTING PRESIDENT<br>ACTING SENIOR COMMISSIONER P E SCOTT<br>COMMISSIONER S J KENNER |
| **HEARD** | : | TUESDAY, 25 JUNE 2013 |
| **DELIVERED** | : | THURSDAY, 11 JULY 2013 |
| **FILE NOS** | : | FBMB 6 OF 2011, FBM 3 OF 2013 |
| **BETWEEN** | : | THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)<br>Applicant<br>AND<br>(NOT APPLICABLE)<br>Respondent |

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| Catchwords | : | Industrial Law (WA) - application pursuant to s 71 of the *Industrial Relations Act 1979* (WA) for a declaration relating to qualifications of persons for membership of a State organisation and State Branch of a Federal organisation and offices which exist within the State organisation and State Branch - application pursuant to s 62(2) and s 71(5) for the Full Bench to authorise registration of alteration to registered rules to provide for the holding of offices in the State organisation by persons who hold offices in the applicant's counterpart Federal body |
| Legislation | : | *Industrial Relations Act 1979* (WA) s 7(1), s 55, s 56, s 56(1), s 62, s 62(2), s 71, s 71(1), s 71(2), s 71(3), s 71(4), s 71(5);<br>*Fair Work (Registered Organisations) Act 2009* (Cth). |
| Result | : | Declaration issued and order made |
| **Representation:** | | |
| Counsel: | | |
| Applicant | : | Mr S Millman |
| Solicitors: | | |
| Applicant | : | Slater & Gordon |

**Case(s) referred to in reasons:**

Jones v Civil Service Association Inc [2003] WASCA 321; (2003) 84 WAIG 4

Re an application by the Civil Service Association (1993) 73 WAIG 2931

Re Bonny [1986] 2 Qd R 80

Re The Australian Workers' Union, West Australian Branch, Industrial Union of Workers [2012] WAIRC 01004; (2012) 92 WAIG 1882

**Case(s) also cited:**

Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) [2010] WAIRC 00101; (2010) 90 WAIG 133

The Construction Forestry Mining and Energy Union of Workers [2011] WAIRC 00422; (2011) 91 WAIG 1034

The Construction, Forestry, Mining and Energy Union of Workers [2011] WAIRC 01175; (2011) 92 WAIG 6

*Reasons for Decision*

**SMITH AP and SCOTT ASC:**

**Introduction**

1 The Full Bench had before it two applications. The first was FBM 3 of 2013 which is an application made under s 71(2) and s 71(4) of the *Industrial Relations Act 1979* (WA) (the Act) for a declaration that the rules of a counterpart Federal body:

(a) relating to the qualifications of persons for membership are deemed to be the same;

(b) prescribing the offices which exist in a Branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) are deemed to be the same as the rules prescribing the offices which exist in the State organisation.

2 The second application, FBMB 6 of 2011, was made pursuant to s 62(2) and s 71(5) of the Act. The applicant, as a registered organisation (State organisation) under the Act, sought the authorisation of the Full Bench for the Registrar to register an alteration to its rules to add a new paragraph r 25(h) as follows:

> Each office in the Union may, from such time as the Executive may determine, be held by the person who, in accordance with the rule of the Australia Education Union, Western Australian Branch, holds the corresponding office in that body.

The purpose of both applications is that the applicant seeks to obtain a s 71 certificate to enable the offices that exist in the State organisation to be held by the persons holding the corresponding offices in its counterpart Federal body. Prior to the issuance of a certificate, the Full Bench must issue a declaration pursuant to s 71 of the Act and the applicant's rules must be altered. After hearing counsel for the applicant on 25 June 2013, the Full Bench was of the opinion the applications should be granted and the following declaration issued by this Full Bench in FBM 3 of 2013 on 1 July 2013:

1. The Australian Education Union Western Australian (WA) Branch is the counterpart Federal body of The State School Teachers' Union of W.A. (Incorporated).

2. The rules of the applicant and the counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same, in accordance with s 71(2) of the Act.

3. The rules of the counterpart Federal body prescribing the offices which exist in the Branch are hereby deemed to be the same as the rules of the applicant prescribing the offices which exist in the applicant, in accordance with s 71(4) of the Act.

The Full Bench also made the following order in FBMB 6 of 2011 on 1 July 2013:

> THAT the Registrar is hereby authorised to register an alteration to the rules of the applicant by inserting the following r 25(h):
>
> (h) Each office in the Union may, from such time as the Executive may determine, be held by the person who, in accordance with the rule of the Australia Education Union, Western Australian Branch, holds the corresponding office in that body.

3 These reasons set out the reasons why we made the decisions to issue the declaration and issue the order.

**Application for s 71 certificate – FBM 3 of 2013**

4 Pursuant to s 71(1) of the Act, the counterpart Federal body, in relation to a State organisation, means the Western Australian Branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act*, the rules of which:

(a) relate to the qualifications of persons for membership; and

(b) prescribe the offices which shall exist within the Branch,

are, or, in accordance with s 71, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter.

5 The counterpart Federal body of the applicant is The Australian Education Union Western Australian (WA) Branch: r 21 of the rules of the Australian Education Union (National rules).

6 The State organisation makes the application to enable the orderly and efficient administration and co-ordination of its functions and duties and its counterpart Federal body. Obtaining a declaration is the first step to obtaining a s 71 certificate to

enable the offices that exist in its rules, to be held by persons holding corresponding offices in its counterpart Federal body. A certificate will exempt the State organisation from holding elections for its offices as defined in s 7(1) of the Act. A certificate will also enable it to make an agreement relating to the management and control of funds with the Australian Education Union of which the counterpart Federal body is a Branch.

**(i) Are the qualifications of persons for membership substantially the same?**

7 Pursuant to s 71(2) of the Act, the rules of the State organisation and its counterpart Federal body relating to the qualification of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same.

8 Under s 71(3) of the Act, the Full Bench may form the opinion that the rules of the State organisation and the counterpart Federal body are substantially the same notwithstanding that a person who is:

(a) eligible to be a member of the State organisation is, by reason of his being a member of a particular class of persons, ineligible to be a member of that State organisation's counterpart Federal body; or

(b) eligible to be a member of the counterpart Federal body is, for the reason referred to in paragraph (a), ineligible to be a member of the State organisation.

9 Substantial means what is 'real or of substance as distinct from ephemeral or nominal' or 'considerable or in the main or essentially': ***Re an application by the Civil Service Association*** (1993) 73 WAIG 2931; ***Re Bonny*** [1986] 2 Qd R 80, 82.

10 In a statutory declaration made on 23 April 2013 by Patricia Byrne, the vice-president of the State organisation and branch vice-president of the counterpart Federal body, Ms Byrne sets out an analysis of comparison of the rules relating to the qualification of persons for membership and an analysis of a list of members and the categories of membership of the State organisation and the counterpart Federal body as at 16 April 2013. In doing so, she sets out the following categories of persons eligible to be members of the State organisation and the counterpart Federal body as follows:

[I]n general terms, the following are eligible to be members of the State Organisation and the Counterpart Federal body:

a. Teachers employed by or on behalf of the State of Western Australia;

b. Teachers employed by any institution providing technical and further education in Western Australia, including in a temporary capacity;

c. Teachers employed by or on behalf of the State of Western Australia (ie government) in pre-school centres provided that such teachers hold or are enrolled for the purpose of obtaining a teaching academic qualification;

d. Any person employed by any employer or in any place referred to in paragraphs 10(a) to (c) above as an education officer, guidance officer, counsellor or demonstrator;

e. Teachers employed by and in a Community College in Western Australia;

f. School teachers who are employed on a part-time (fractional[1]) basis in the supervision and/or coordination of student teachers during their periods of practice teaching in schools who are also eligible as per paragraphs 10(a) to (e) above;

g. Certain persons elected or appointed to a position within the organisation[2]; and

h. Persons who are qualified to be and desire to be employed in any of the categories of persons otherwise eligible to be members.

Footnote [1]: NB The Counterpart Federal body Rule 5(2)(e) refers to 'non-fractional', compared with 'fractional' in the State Organisation Rule 4(a)(vi). I verily believe that the reference to 'fractional' in the State Organisation rule is an error. In any event, neither organisation currently has any members employed in these categories, as at 16 April 2013.

Footnote [2]: See State Rules 4(a)(vii) and (viii) and National Rules 5(2)(1) and 5(14).

11 Ms Byrne sets out the categories of persons who are eligible to be members of the State organisation who may not be eligible to be members of the counterpart Federal body as follows:

a. any member of the State Organisation who has rendered long and meritorious service to the State Organisation may, upon retirement, be appointed as an Honorary Life Member (see the State Rules at Rule 4(b));

b. exchange teachers who are members of a teachers' organisation in the State or country from which they have come may be appointed by the Executive as an Honorary Member (see the State Rules at Rule 4(c));

c. persons who are not trained teachers but who because of their special expertise are placed in charge of a class in any area of the educational service may be a Special Category Members (see the State Rules at Rule 4(d));

d. teachers retired from the Department of Education and Training because of age or invalidism may be admitted as Retired Teacher Members at the discretion of the Executive Member may be Retired Teacher Members (see the State Rules at Rule 4(e)); and

e. retired employees and former members of the State Organisation, including all categories who are not eligible for any other form of membership may be Associate Members (see the State Rules at Rule 4(f)).

12 Ms Byrne also sets out the categories of persons eligible to be members of the counterpart Federal body, who may not be eligible to be members of the State organisation as follows:

a. independent contractors who, if they were employees performing work of the kind which they usually perform as independent contractors, would be eligible for membership (see the National Rules at Rule 5(15)) [Re The State School Teachers' Union of W.A. (Incorporated) 2008 WAIRC 01597];

b. persons who are qualified to be and desire to be employed in any of the categories of persons otherwise eligible to be members, but who are not registered with the relevant employer as available for work, and have not worked as a teacher for at least two years and who no longer have a contract of employment with the relevant employer (see the State Rules at Rule 4(a)(ix));

c. Branch Professional Officers [See National Rule 5(14). A 'Branch Professional Officer' is not defined but may include an elected organiser (of which there are currently none) or persons covered by virtue of State Rule 4(a)(viii)] and persons who have been (but are no longer) elected or appointed to a position of Federal Officer, Federal Professional Officer, Branch Officer or Branch Professional Officer (see the National Rules at 5(14)).

13 Ms Byrne then states in her statutory declaration that there were approximately 15,687 persons who were members of the State organisation as at 16 April 2013 and approximately 15,170 persons who were members of the counterpart Federal body. Of the categories of persons who are eligible to be members of the State organisation but not the counterpart Federal body Ms Byrne says as at 16 April 2013 there were:

(a) 11 honorary life members;

(b) no honorary members;

(c) one special category member;

(d) 407 retired teacher members;

(e) approximately 98 associate members;

(f) no persons elected or appointed who are eligible to be members of the State organisation and not the counterpart Federal body.

14 Her inquiries also reveal as at 16 April 2013 that there were no persons who were eligible to be members of the counterpart Federal body in the categories of members who were not eligible to be members of the State organisation.

15 When regard is had to the nature of the categories of persons who are ineligible to be members of the State organisation and the counterpart Federal body, we were satisfied that a finding could be made that the eligibility rules of the State organisation and the counterpart Federal body are substantially the same as, in essence, there is a significant similarity of coverage between both organisations. The evidence of Ms Byrne shows that the vast majority of persons who are actual members of the State organisation are also members of the counterpart Federal body. This is because the common categories of members are those that are engaged in the centre of the teaching profession.

**(ii) Are the offices that exist in the counterpart Federal body the same as the offices of the applicant?**

16 When determining whether the offices that exist in the counterpart Federal body are the same as the offices of the State organisation, it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules: ***Jones v Civil Service Association Inc*** [2003] WASCA 321; (2003) 84 WAIG 4 [35] (Pullin J). It is, however, not necessary to find that all of the powers and functions of the offices in the counterpart Federal body are the same as all of the powers and functions of the offices of the State organisation. In ***Re The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** [2012] WAIRC 01004; (2012) 92 WAIG 1882 the Full Bench observed [54]:

> [S]uch a finding is not required and, in any event, would be difficult to find in most applications that come before a Full Bench under s 71 of the Act, as counterpart federal bodies are bodies that are part of much larger organisations whose principal affairs and concerns are determined by a national body that extends beyond the limits of one state.

17 Pursuant to s 71(4) of the Act, the rules of a counterpart Federal body prescribing the offices which shall exist are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for each office in the State organisation there is a corresponding office in the counterpart Federal body.

18 Rule 25(a)(i) and r 25(a)(ii) of the rules of the State organisation (State rules) create the executive as the offices of president, senior vice-president, vice-president; such other number of additional members to be known as ordinary members, as determined from time to time by State council; and an Aboriginal or Torres Strait Islander representative. The executive is the management committee of the State organisation: r 3A State rules. Between meetings of State council, the executive is empowered to control the affairs of the State organisation and exercise all powers of State council except with respect to rule alteration, imposition of levies, determination of entrance fees and subscriptions, or any other matter expressly reserved by resolution of State council: r 24 State rules.

19 Pursuant to r 6 of the Branch rules of the counterpart Federal body, the Branch executive is the committee of management of the Branch and consists of the branch president, branch senior vice-president, branch vice-president, 14 ordinary executive members, and an Aboriginal and Torres Strait Islander executive member.

20 The members who hold office of the State organisation and the counterpart Federal body are all elected for periods of three years and the Branch executive, like the State executive, is vested between meetings of the Branch council, the management of the Branch and has all powers of Branch council except to amend the Federal Branch rules or Branch rules; the power to determine entrance fees and subscriptions, impose a levy, or any power expressly reserved to itself by decision of Branch council: r 5(1) Branch rules. Both the State organisation and the counterpart Federal body have an emergency committee. Pursuant to r 29(a) of the State rules, the emergency committee consists of the president and four other persons, each of whom must also be a member of the executive whilst serving on the committee. Subject to any express limitation on the powers of the emergency committee imposed by State council or by executive, the emergency committee may exercise all of the powers of executive between meetings of executive: r 29(g) State rules. The counterpart Federal body also has a Branch emergency committee and it similarly consists of the branch president and four other Branch executive members who are required to be elected by and from members of the Branch executive: r 5.1(2) Branch rules. It is empowered in a similar manner to the State

emergency committee to exercise all of the powers of the Branch executive between meetings of Branch executive, subject to any express limitation on the powers imposed by Branch council or Branch executive: r 5.1(6) Branch rules.

21 The roles of the president, senior vice-president and vice-president can be considered together. Their roles in the State organisation are principally set out in r 27 of the State rules. Rule 27(a), r 27(b) and r 27(c) provide as follows:

**(a) PRESIDENT**

(i) The President shall be a full-time paid officer of the Union, and shall:

(a) be the Chief Executive Officer of, and principal spokesperson for the Union;

(b) be responsible to the State Council and the Executive for the implementation of their decisions and directions;

(c) preside at and conduct all meetings of the Executive and State Council and sign the minutes thereof;

(d) in consultation with the General Secretary, convene meetings of State Council and Executive;

(e) ensure, as far as possible, that the Rules of the Union are performed and observed by officers and members of the Union;

(f) request and receive an explanation from any officer or member of the Union in any case where he/she believes that the Rules of the Union may not have been performed or observed and report thereon to the State Council and/or Executive.

(ii) The President shall reside in the metropolitan area during his/her term of office.

(iii) The President shall be an ex officio member of any committee of the Union other than a committee of a branch.

(iv) In the absence of the President, his/her duties shall be performed by the Senior Vice-President. In the absence of both the President and the Senior Vice-President the Vice-President shall perform the duties of the President. In the simultaneous absence of the President, Senior Vice-President and Vice-President, the Executive may appoint a member to carry out the duties of the President.

**(b) SENIOR VICE-PRESIDENT**

(i) The Senior Vice-President shall be a full-time paid officer of the Union. In the absence of the President, his/her duties shall be performed by the Senior Vice-President.

(ii) The Senior Vice-President shall reside in the metropolitan area during his/her term of office.

**(c) VICE-PRESIDENT**

(i) The Vice-President shall be a full-time paid officer of the Union. In the absence of the Senior Vice-President, his/her duties shall be performed by the Vice-President.

(ii) The Vice-President shall reside in the metropolitan area during his/her term of office.

22 The duties of the branch president are set out under National r 40: r 7.1 of the Branch rules and the duties of the branch senior vice-president are set out in National r 41: r 7.2 of the Branch rules. Rule 40 of the National rules provides:

(1) The Federal President shall:

(a) Preside at and conduct all meetings of Federal Conference and Federal Executive and sign the minutes thereof;

(b) In consultation with the Federal Secretary convene meetings of Federal Conference and Federal Executive;

(c) Exercise a deliberative vote only if he or she so desires at all meetings of Federal Conference and Federal Executive but shall not have a casting vote;

(d) Ensure as far as possible that the Rules of the Union are performed and observed by Officers and members of the Union;

(e) Request and receive an explanation from any Officer or member of the Union in any case where he/she believes that the Rules of the Union may not have been performed or observed and report thereon to Federal Executive and Federal Conference;

(f) Be the chief executive officer of and principal spokesperson for the Union;

(g) Be responsible to the Federal Conference and the Federal Executive for the implementations of their decisions and directions.

(2) The Federal President shall be an ex-officio member of any committee of the Union other than a committee of a Branch.

23 Rule 41 of the National rules provides:

The Deputy Federal President shall exercise all of the rights and powers and perform all of the duties of the Federal President in the absence of the Federal President or whenever the Federal President requests or Federal Conference or Federal Executive instructs him/her so to do.

24 The duties of the branch vice-president are provided for in r 7.3 of the Branch rules. That rule provides that the branch vice-president shall exercise all of the rights and powers and perform all of the duties of the branch president in the absence of the branch president and branch senior vice-president and can carry out such other duties as are determined from time to time by the Branch executive or Branch council.

25 The duties of the Federal president are the same as the duties of the president of the State organisation with the exception that under r 40(1)(c) of the National rules the branch president can exercise a deliberative vote only if he or she so desires at all meetings of Federal conference and Federal executive, but shall not have a casting vote.

26 The prescribed duties of the branch senior vice-president are similar to the functions of the senior vice-president of the State organisation. The branch senior vice-president is required to perform the duties of the branch president in his or her absence or whenever the Federal president requests or Federal conference or Federal executive instructs him or her to do so: r 7.2 of the Branch rules and National r 41.

27 The only difference in the roles of the president, senior vice-president and vice-president as opposed to the roles of the branch president, branch senior vice-president and branch vice-president which could on one view be regarded as material is that the three offices in the State organisation carry out functions and powers as trustees of the State organisation. Rule 20 of the State rules provides as follows:

> (a) The property of the Union shall be vested in three Trustees who shall be the President, the Senior Vice-President and the Vice-President.
>
> (b) If the President, the Senior Vice-President or the Vice-President retires or ceases to hold office for any reason he/she shall be deemed to have vacated the office of Trustee.
>
> (c) A vacancy occurring in the office of Trustee shall be filled by the Executive in the manner provided by Rule 26 of these Rules.
>
> (d) During any period in which a Trustee is unable to perform his/her duties as Trustee, the Executive may appoint a member to act as a Trustee during that period.
>
> (e) A Trustee so appointed shall be deemed to have retired from the office of Trustee upon the expiration of the term of office of Acting President, Acting Senior Vice-President or Acting Vice-President to which he/she was appointed.
>
> (f) The Trustees shall not dispose of any Union property vested in their names unless authorised by Conference or Executive.
>
> (g) The Trustees shall hand over all Union property to their successors, or to such persons as Conference or the Executive may appoint.
>
> (h) No part of the income or property of the Union shall be paid or transferred by way of pecuniary profit to any member, but officers, members or servants of the Union may receive remuneration for any services actually rendered to the Union.
>
> (i) The President, the two Vice-Presidents, the General Secretary and another full-time employee of the Union appointed by Executive shall be authorised to sign all cheques. Two signatures shall be necessary, one of which shall be that of the President or of a Vice-President and the other that of the General Secretary or the aforementioned Executive appointee.

28 It is part of the functions of the president, the senior vice-president and the vice-president of the State organisation that they are also trustees and as such they are empowered with these additional functions under r 20 of the State rules.

29 There are no positions of trustees in the Branch. Also, there are no specific equivalent powers and functions of the duties of the trustees imposed on any specified office in the Branch. Under National r 62 the property of each Branch is vested in a Branch fund. National r 62 provides as follows:

> (1) There shall be a Branch Fund for each particular Branch which shall consist of:-
>
> (a) Any real or personal property of which the Branch of the Union by the Rules or by any established practice not inconsistent with the Rules, has, or in the absence of any limited term lease, bailment or arrangement, would have, the right of custody, control or management;
>
> (b) The amounts of entrance fees, subscriptions, fines fees or levies received by the Branch, less so much of those amounts as is payable by the Branch to the Union;
>
> (c) Any interest, rents or dividends derived from the investment of the Fund;
>
> (d) Any superannuation or long service leave fund operated or controlled by the Branch for the benefit of its officers or employees;
>
> (e) Any sick pay fund, accident pay fund, funeral fund or like fund operated or controlled by the Branch for the benefit of its members;
>
> (f) Any property acquired wholly or mainly by expenditure of the monies of the Fund or derived from other assets of the Fund; and
>
> (g) The proceeds of any disposal of parts of the Fund.
>
> (2) The Rules relating to a Branch Fund shall not be altered except with the consent of the Branch concerned.
>
> (3) Until each Branch makes Federal Branch Rules providing for the management and control of Branch Funds sub-rules 61(3), (4), (5) and (6) of the Federal Rules shall apply as if references to Federal Conference, Federal

Executive, the Union, Federal President, Federal Secretary and Federal Officer were references to Branch Council, Branch Executive, the Branch, Branch President, Branch Secretary and Branch Officers.

30 Under r 62(3) of the National rules, r 61(3), r 61(4), r 61(5) and r 61(6) apply until each Branch makes rules providing for the management and control of Branch funds. It is notable that the Branch has made a rule that the power to disburse monies from the Branch fund is vested in the Branch council under r 3(d) of the Branch rules. Consequently, r 61 of the National rules does not apply.

31 Whilst the power to disburse monies from the Branch fund is vested in the Branch council, the president, senior vice-president and vice-president of the State organisation cannot dispose of any property vested in them as trustees without the authorisation of 'conference' or executive: r 20(f) State rules. Although the term 'conference' is not currently defined in the State rules, it is the former name of State council. Until 1994, the body that carried out similar powers and functions of the State council was conference. The conference structure was replaced in its entirety by State council when alterations made to the rules were registered on 12 August 1994: Appl 409 of 1994. Unfortunately, consequential amendments were not made to change the name of conference to State council in r 20. From the submissions made by counsel in this matter, it appears the failure to amend was an oversight.

32 As it is clear that the president, senior vice-president and vice-president cannot act alone in disposing of the property of the State organisation without the authority of at least the executive and perhaps State council if the reference to conference in r 20 can be read to mean State council, it is apparent that the functions and duties conferred on these offices by r 20 is not dissimilar to the power vested in Branch council as the Branch executive (subject to any power reserved by a decision of Branch council), is vested with the powers of Branch council between meetings of Branch council.

33 For these reasons, we are of the opinion that there is a substantial similarity between the functions, powers and duties of each of the offices of the applicant and the counterpart Federal body. Thus we formed the opinion that these offices can be deemed to be the same pursuant to s 71(4) of the Act and a declaration should be made that for each office in the State organisation there is a corresponding office in the counterpart Federal body.

**Application to amend rules of State organisation pursuant to s 71(5) and s 62(2) of the Act**

34 Section 71 of the Act contemplates that once a Full Bench is of the opinion that the offices of a counterpart Federal body can be deemed to be the same as the offices of a State organisation, the State organisation can, pursuant to s 71(5) and s 62 of the Act, alter its rules to provide that each office in the State organisation may, from time to time as the committee of management of a State organisation may determine, be held by the person who, in accordance with the rules of the counterpart Federal body, holds the corresponding office in that body.

35 Pursuant to s 62(2) of the Act, the Registrar is prohibited from registering an alteration or alterations to the rules of a State organisation to provide for the matters in s 71(5) unless the alteration or alterations are authorised by the Full Bench.

36 Before a Full Bench can authorise the alteration or alterations, the Full Bench must be satisfied the requirements of s 55 and s 56 of the Act have been complied with.

37 The application to alter the rules of the State organisation to provide for the matters in s 71(5) of the Act was part of FBM 6 of 2011. That application also sought to obtain the authorisation of the Full Bench to alter the applications of persons for membership. After issuing reasons for decision on 23 November 2011 ([2011] WAIRC 01058; (2011) 91 WAIG 2307) the Full Bench divided the application into FBMA 6 of 2011 and FBMB 6 of 2011 ([2011] WAIRC 01073; (2011) 91 WAIG 2312) and made an order in FBMA 6 of 2011 to authorise the Registrar to register the alterations to r 4, which is the qualifications for membership rule of the State organisation ([2011] WAIRC 01077; (2011) 91 WAIG 2313).

38 Whilst the application to obtain the authorisation of the Full Bench for the Registrar to register proposed r 25(h) was divided to form FBMB 6 of 2011, proposed r 25(h) was approved by State council at the same time as it approved the variations to r 4 that came before the Full Bench in FBM 6 of 2011. In its reasons for decision given on 23 November 2011, the Full Bench considered the steps that had been taken by the State organisation to approve the variations to r 4 and formed the view that the alterations had been authorised by the State organisation in accordance with its rules. It was also satisfied that s 62 and s 55 of the Act had been complied with and that no issue arose in respect of s 56(1) of the Act, as the variations did not deal with the procedural rules for elections and secret ballots.

39 As r 25(h) was authorised by the State organisation at the same time and in the same manner as the 2011 variations to r 4, this Full Bench formed the opinion that the requirements of the Act in respect of altering registered rules had been met. Consequently, it made the decision to authorise the Registrar to register the alteration to the rules of the State organisation, by inserting proposed r 25(h).

**KENNER C:**

40 In related proceedings in application FBM 6 of 2011, the applicant Union sought the authority of the Full Bench to alter its rules in relation to persons eligible for membership under rule 4 of its rules, and additionally, to make provision for matters set out in s 71(5)(a) of the Act, by the insertion of a new rule 25(h). The first part of application FBM 6 of 2011 was approved by the Full Bench, became application FBMA 6 of 2011 and was the subject of earlier reasons for decision and orders: (2011) 91 WAIG 2307;(2011) 91 WAIG 313. That part of the application seeking the approval of the Full Bench to authorise the Registrar to give effect to the new rule 25(h), was divided and became application FBMB 6 of 2011, given that the prerequisites for the making of a counterpart certificate in s 71 of the Act had not, at that, point been satisfied by the Union. The latter requirements are the subject of application FBM 3 of 2013, seeking the appropriate declarations.

41 The purpose of a certificate issued by the Registrar under ss 71(5)(c) and(d) of the Act is to enable offices of a State organisation to be held by persons holding the corresponding offices in its counterpart Federal body, without the requirement for a separate election of office bearers of the State organisation under the Act. Before such a certificate can be issued by the Registrar, the Full Bench must, under ss 71(2) and (4) of the Act, form the opinion that the rules of a State organisation and its

counterpart Federal body, that relate to qualifications of persons for membership are deemed to be the same. The Full Bench must also be satisfied that the rules of the counterpart Federal body prescribing the offices existing in that body are deemed to be the same as the rules of the State organisation prescribing offices which shall exist in it. The Union sought declarations that these requirements were met.

42 The relevant federal body in this case is the Australian Education Union, Western Australian (WA) Branch.

43 In support of the application Ms Byrne, the current Vice-President of the Union and the Vice-President of the Federal Branch, filed a statutory declaration setting out the relevant rules of the State Union and the Federal Branch in relation to eligibility for membership, those not eligible to be members and the numbers of persons in each category. Additionally, Ms Byrne's statutory declaration also set out the relevant rules of the State Union and the Federal Branch in relation to the offices in each organisation, their corresponding powers and the current office holders.

44 Having considered the material contained in Ms Byrne's statutory declaration, in conjunction with a consideration of the rules of the State Union, and the federal body, I was satisfied that the terms of ss 71(2) and (4) of the Act were met. The Full Bench was able to form the opinion that the rules in relation to the qualification of persons for membership and prescribing the offices which exist within the Federal Branch are, or are deemed to be, the same as the rules of the State Union relating to that corresponding subject matter. Accordingly, I was satisfied that the Full Bench could conclude that the AEU WA Branch is a "counterpart Federal body" as defined in s 71(1) of the Act and that the declarations sought by the Union could and should be made. I was also satisfied that application FBMB 6 of 2011, seeking the approval of the Full Bench for the Registrar to amend the Union's rules to insert a new rule 25(h), should be granted.

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**2013 WAIRC 00382**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) |
| | **APPLICANT** |
| | **-and-** |
| | (NOT APPLICABLE) |
| | **RESPONDENT** |
| **CORAM** | FULL BENCH |
| | THE HONOURABLE J H SMITH, ACTING PRESIDENT |
| | ACTING SENIOR COMMISSIONER P E SCOTT |
| | COMMISSIONER S J KENNER |
| **DATE** | MONDAY, 1 JULY 2013 |
| **FILE NO/S** | FBM 3 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00382 |

| | |
|---|---|
| **Result** | Declaration issued |
| **Appearances** | |
| **Applicant** | Mr S Millman (of counsel) and Ms E Palmer |

*Declaration*

This matter having come on for hearing before the Full Bench on Tuesday, 25 June 2013, and having heard Mr S Millman (of counsel) and Ms E Palmer on behalf of the applicant, the Full Bench, pursuant to its powers in s 71 of the *Industrial Relations Act 1979* (WA) (the Act), hereby declares that —

1. The Australian Education Union Western Australian (WA) Branch is the counterpart Federal body of The State School Teachers' Union of W.A. (Incorporated).
2. The rules of the applicant and the counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same, in accordance with s 71(2) of the Act.
3. The rules of the counterpart Federal body prescribing the offices which exist in the Branch are hereby deemed to be the same as the rules of the applicant prescribing the offices which exist in the applicant, in accordance with s 71(4) of the Act.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

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**2013 WAIRC 00383**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) |
| | **APPLICANT** |
| | **-and-** |
| | (NOT APPLICABLE) |
| | **RESPONDENT** |
| **CORAM** | FULL BENCH |
| | THE HONOURABLE J H SMITH, ACTING PRESIDENT |
| | ACTING SENIOR COMMISSIONER P E SCOTT |
| | COMMISSIONER S J KENNER |
| **DATE** | MONDAY, 1 JULY 2013 |
| **FILE NO/S** | FBMB 6 OF 2011 |
| **CITATION NO.** | 2013 WAIRC 00383 |

| | |
|---|---|
| **Result** | Order issued |
| **Appearances** | |
| **Applicant** | Mr S Millman (of counsel) and Ms E Palmer |

*Order*

This matter having come on for hearing before the Full Bench on Tuesday, 25 June 2013, and having heard Mr S Millman (of counsel) and Ms E Palmer on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders —

THAT the Registrar is hereby authorised to register an alteration to the rules of the applicant by inserting the following r 25(h):

(h) Each office in the Union may, from such time as the Executive may determine, be held by the person who, in accordance with the rule of the Australia Education Union, Western Australian Branch, holds the corresponding office in that body.

By the Full Bench

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

# PRESIDENT—Matters dealt with—

**2013 WAIRC 00718**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | WHEATBELT INDIVIDUAL & FAMILY SUPPORT ASSOCIATION INC. |
| | **APPLICANT** |
| | **-and-** |
| | MATTHEW MILLER |
| | **RESPONDENT** |
| **CORAM** | THE HONOURABLE J H SMITH, ACTING PRESIDENT |
| **DATE** | WEDNESDAY, 14 AUGUST 2013 |
| **FILE NO/S** | PRES 3 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00718 |

| | |
|---|---|
| **Result** | Order made |
| **Appearances** | |
| **Applicant** | Mr S Bibby (as agent) |
| **Respondent** | Mr G McCorry (as agent) |

*Order*

WHEREAS on 2 August 2013, the applicant filed an application for an order that the decision of the Commission made on 18 July 2013 in application U 229 of 2012 [2013] WAIRC 00432 (the decision) be stayed pending the hearing and determination of the appeal to the Full Bench in FBA 8 of 2013;

AND WHEREAS on 5 August 2013, the respondent's agent informed the Commission that his client consents to the stay of the decision.

NOW THEREFORE having heard Mr S Bibby as agent on behalf of the applicant and Mr G McCorry as agent on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders by consent that —

The decision made by the Commission on 18 July 2013 in application U 229 of 2012 [2013] WAIRC 00432 is stayed pending the hearing and determination of appeals FBA 8 of 2013 and FBA 6 of 2013.

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

# PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

**2013 WAIRC 00709**

**THE POLICE AWARD 1965**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | COMMISSION'S OWN MOTION |
| | **APPLICANT** |
| | **-v-** |
| | (NOT APPLICABLE) |
| | **RESPONDENT** |
| **CORAM** | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | FRIDAY, 9 AUGUST 2013 |
| **FILE NO/S** | APPL 79 OF 2007 |
| **CITATION NO.** | 2013 WAIRC 00709 |

**Result** Award varied and consolidated

*Order*

HAVING heard Mr R Horton and with him Ms J Baxter on behalf of The Western Australian Police Union of Workers and Mr B Entrekin on behalf of WA Police and with him Ms N Naeser on behalf of the Minister of Police, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT The Police Award 1965 be varied and consolidated in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 5th day of August 2013.

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

SCHEDULE

**1. Delete the entire contents of the Award and insert the following in lieu thereof:**

**PART 1 - APPLICATION OF AWARD**

1. - TITLE

This award shall be known as "The Police Award 1965" as amended and consolidated.

1B. - MINIMUM ADULT AWARD WAGE

(1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

(2) The minimum adult award wage for full-time employees aged 21 or more is $645.90 per week payable on and from the commencement of the first pay period on or after 1 July 2013.

(3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

(4) Unless otherwise provided in this clause adults employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

(5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

(6) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993* (WA).

(7) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.

(8) Subject to this clause the minimum adult award wage shall –

(a) Apply to all work in ordinary hours.

(b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

(9) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2013 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.

(10) Adult Apprentices

(a) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $557.20 per week on and from the commencement of the first pay period on or after 1 July 2013.

(b) The rate paid in the paragraph above to an apprentice 21 years of age or more is payable on superannuation and during any period of paid leave prescribed by this award.

(c) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

(d) Nothing in this clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5 June 2003.

2. - ARRANGEMENT

## 3. - TERM

This award shall operate for a period of three years from the beginning of the first pay period commencing on or after the date hereof.

## 4. - AREA AND SCOPE

This award shall apply to all members of the Western Australian Police Force and Aboriginal Police Liaison Officers appointed under the provisions of the *Police Act 1892* (WA), except those whose salaries are recommended or determined pursuant to the *Salaries and Allowances Act 1975* (WA), and shall operate over the whole of the State.

## 5. - DEFINITIONS

"Aboriginal Police Liaison Officer" means an employee appointed under Part IIIA of the *Police Act 1892* (WA).

"Camp of a Permanent Nature" for the purpose of Clause 17 (Camping Allowance) means single room accommodation in skid mobile or mobile type units, caravans, or barrack type accommodation or a vessel where the following are provided in the camp:

- water is freely available;
- ablutions including a toilet, shower or bath and laundry facilities;
- hot water system;
- a kitchen, including stove and table and chairs, except in the case of a caravan equipped with its own cooking and messing facilities;
- an electricity or power supply; and
- beds and mattresses except in the case of caravans containing sleeping accommodation.

For the purposes of this definition caravans located in caravan parks or other locations where the above are provided shall be deemed a camp of a permanent nature.

"Camp other than a Permanent Camp" for the purpose of Clause 17 (Camping Allowance) means a camp including a vessel where any of the requirements defined in a "Camp of a Permanent Nature" are not provided.

"Centre" means any station from which continuous duty is performed.

"Commissioned Officer" means an employee appointed as such under the provisions of the *Police Act 1892* (WA) or *Police Force Regulations 1979* or acting as such.

"Commissioner" means the Commissioner of Police appointed pursuant to the provisions of the *Police Act 1892* (WA).

"Country Officer in Charge" means an employee in charge of a police station outside the metropolitan area and who resides in that locality or an employee relieving in such position. For the purposes of this definition Rottnest Island is considered outside the metropolitan area.

"De-facto Partner" means a relationship (other than a legal marriage) between two persons, of either different sexes or the same sex, who live together in a "marriage-like" relationship, as provided for by the *Interpretation Act 1984* (WA).

"Dentist" has the same meaning as in the *Health Practitioner Regulation National Law (WA) Act 2010*.

"Dependant" in relation to an employee (other than for the purposes of District Allowance) means:

(a) partner;

(b) child/children; or

(c) other dependent family;

who reside with the employee or who rely on the employee for main support.

"Detective" means an employee who has been appointed as such.

"Emergency" means:

(a) an unforeseen urgent crisis;

(b) serious public disorder; and

(c) searches;

but shall not include normal police activity or the prevention of payment of any penalty provision covered by this award or normal police duty or a requirement to attend court outside a rostered shift.

"Family" in relation to an employee means the employee, partner and all dependent children attending school and to those dependent children living with the employee who are unemployed.

"Headquarters" means the place in which the principal work of an employee is carried out, as defined by the Commissioner.

"House" for the purpose of Clause 17 (Camping Allowance) means a house, duplex or cottage including transportable type accommodation which are self-contained and in which the facilities prescribed for a "Camp of a Permanent Nature" are provided.

“Incapacity” means unfitness for and absence from duty as a result of illness or injury and “incapacitated” shall be construed accordingly.

“Manager” means the Assistant Director of Health and Welfare Branch of WA Police.

“Medical Practitioner” has the same meaning as it has in the *Health Practitioner Regulation National Law (WA) Act 2010*.

“Medicare Benefits” has the same meaning as it has in the *Health Insurance Act 1973* (Cth).

"Metropolitan Area" means all of that area within a 50 kilometre radius of the Perth City Railway Station.

"Metropolitan Officer in Charge" means an employee in charge of a metropolitan police station or an employee relieving in such position. For the purposes of this definition Rottnest Island is considered outside the metropolitan area.

The following expressions shall have the following meaning in respect to motor vehicle allowance:

(a) "A year" means 12 months commencing on the 1st day of July and ending on the 30th day of June next following.

(b) "Metropolitan Area" means that area within a radius of 50 kilometres from the Perth City Railway Station.

(c) "South West Land Division" means the south west land division as defined by Schedule 1 of the *Land Administration Act 1997* (WA).

(d) "Rest of the State" means that area south of 23.5 degrees latitude, excluding the metropolitan area and the south west land division.

"North West" means all that part of the State north of the 26th parallel of latitude and shall be deemed to include Shark Bay.

"Operational Duties" throughout the award shall mean attendance by a Country Officer in Charge at such matters as serious or fatal traffic accidents, serious public disorder including domestics, urgent searches, serious crimes or attendance at his/her police station in such events but shall not include the requirement to perform routine daily tasks associated with the responsibilities of a Country Officer in Charge.

“Partner” means either a spouse or de facto partner.

"Part-time Employee" means an employee who is regularly employed to work less than 38 hours per week.

“Pharmacist” has the same meaning as it has in the *Pharmacy Act 2010* (WA).

“Police Officer” means an employee appointed under Part I of the *Police Act 1892* (WA).

"Practicable" means practicable in the fair and reasonable opinion of the Commissioner: provided that if any dispute shall arise as to whether in any case such opinion is fair and reasonable, the matter in dispute shall be referred for determination to a Board of Reference established under section 48 of the *Industrial Relations Act 1979* (WA).

"Public Event" shall be deemed to include the following: the Christmas/New Year Road Safety Campaign, Easter Road Safety Campaign, Channel 7 Christmas Pageant, Royal Agricultural Society Show, Australia Day Sky Show, Anzac Day Services and Marches, City to Surf Fun Run, and/or similar such events.

"Public Interest" means:

(a) protection of life or property caused by extraordinary events; and

(b) security for Heads of State/Public Figures and special events; and

(c) searches;

but shall not include normal police activity or the prevention of payment of any penalty provision covered by this award in normal police duty or a requirement to attend court outside a rostered shift.

"Public Transport" means any means of public transport approved by the Commissioner.

"Recruit in Training" means an employee undertaking Academy based initial training as a member of the police force.

“Region” means region of the State within the meaning of section 39(2) of the *Police Act 1892* (WA).

"Special Area" means:

(a) any portion of the State that is:

(i) east of longitude 119 degrees east; or

(ii) north of 26 degrees of south latitude;

(b) Yalgoo, Mount Magnet, Cue and Meekatharra; and

(c) any area outside the State designated a special area by the Commissioner.

"Spouse" means a person lawfully married to the employee.

"Union" means the Western Australian Police Union of Workers.

## PART 2 – SALARIES

### 6. - SALARIES

(1) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

| Rank | Existing Salary $ | Arbitrated Safety Net Adjustment $ | Total Annual Salary $ |
|---|---|---|---|
| (a) **Commissioned Officer Ranks** | | | |
| Commander | 73 307 | 17 881 | 91 188 |
| Chief Superintendent | 71 551 | 17 822 | 89 373 |
| Superintendent | 64 688 | 17 588 | 82 276 |
| Inspector - Base Rate | 57 047 | 17 328 | 74 375 |
| (b) **Sergeant Ranks** | | | |
| Senior Sergeant (Country OIC) Base Rate | 48 192 | 17 027 | 65 219 |
| Senior Sergeant | 46 192 | 16 959 | 63 151 |
| Sergeant (Country OIC) Base Rate | 42 500 | 16 834 | 59 334 |
| Sergeant | 40 500 | 16 766 | 57 266 |
| (c) **Other Ranks** | | | |
| Senior Constable (Country OIC) Base Rate | 38 500 | 16 698 | 55 198 |
| Senior Constable | 36 500 | 16 630 | 53 130 |
| First Class Constable | 34 000 | 16 545 | 50 545 |
| Constable | | | |
| 5th year of service & thereafter | 31 900 | 16 582 | 48 482 |
| 4th year of service | 31 000 | 16 551 | 47 551 |
| 3rd year of service | 30 100 | 16 521 | 46 621 |
| 2nd year of service | 29 000 | 16 483 | 45 483 |
| 1st year of service | 29 000 | 16 483 | 45 483 |
| Recruit in Training | 25 000 | 16 240 | 41 240 |
| (d) **Aboriginal Police Liaison Officers** | | | |
| Senior Aboriginal Police Officers | 30 487 | 16 534 | 47 021 |
| First Class Aboriginal Police Liaison Officer | 27 946 | 16 448 | 44 394 |
| Aboriginal Police Liaison Officer | 26 884 | 16 411 | 43 295 |

(e) The following transitionary arrangements applied to employees who as at 31 July 1992 were at the rank of Sergeant and qualified for promotion to the rank of Senior Sergeant.

(i) For employees at the substantive rank of Sergeant past service as a substantive Sergeant up to a maximum of six years was recognised and in addition to the rate for Sergeant - Base Rate the following additional amounts paid in recognition of that service.

| | |
|---|---|
| Category A<br>2 years service but less than 4 years | $582 per annum |
| Category B<br>4 years service but less than 6 years | $1246 per annum |
| Category C<br>6 years service or more | $2201 per annum |

(ii) Employees at the substantive rank of Sergeant who were not qualified for promotion to the rank of Senior Sergeant on 31 July 1992 but who passed examination for promotion to the rank of First Class Sergeant during 1992 translated in the same manner as those in subparagraph (i) of this paragraph effective from 18 December 1992.

(iii) Employees who were at the substantive rank of First Class Sergeant prior to 31 July 1992 translated to category C in subparagraph (i) of this paragraph.

(iv) Employees at the substantive rank of Sergeant and the brevet rank of First Class Sergeant prior to 31 July 1992 translate as category C in subparagraph (i) of this paragraph whilst in the brevet position and if qualified for promotion to the rank of Senior Sergeant at the time of reverting to Sergeant revert to the appropriate category in subparagraph (i) of this paragraph which recognises past service up to a maximum of 6 years since his/her substantive appointment at sergeant rank.

(f) With effect from 31 July 1992:

(i) Employees previously at the rank of Chief Inspector were in addition to the rate for Inspector - Base Rate paid a Performance Increment of $2940 per annum.

(ii) Employees at the rank of Inspector will be paid as Inspector - Base Rate and after 2 years substantive service at that rank will, subject to satisfactory performance assessed by an appropriate performance appraisal system, be eligible for a Performance Increment of $2940 per annum.

(iii) With effect from 12 March 1993 the amount of the Performance Increment is increased to $3003 per annum.

(g) With effect from 12 March 1993, in lieu of the amounts specified in subparagraph (i) of paragraph (e) the following additional amounts are payable:

| | |
|---|---|
| Category A | $600 per annum |
| Category B | $1285 per annum |
| Category C | $2201 per annum |

(h) With effect from the first pay period commencing on or after 31 July 1994 and subject to satisfactory performance assessed by an appropriate performance appraisal system, employees at the substantive rank of Senior Constable, Sergeant and Senior Sergeant are eligible to be paid Performance Increment 1.

In addition, subject to satisfactory performance assessed by an appropriate performance appraisal system, employees are eligible for Performance Increment 2 no earlier than 2 years after becoming eligible for Performance Increment 1.

| Rank | Per Annum $ |
|---|---|
| **Senior Constable** | |
| Performance Increment 1 | 600 |
| Performance Increment 2 | 685 |
| **Sergeant** | |
| Performance Increment 1 | 600 |
| Performance Increment 2 | 685 |
| **Senior Sergeant** | |
| Performance Increment 1 | 700 |
| Performance Increment 2 | 900 |

(i) Hours worked in excess of 40 in a week on a voluntary basis at sporting or other public events shall be considered ordinary hours of duty and paid in accordance with the hourly rate prescribed in subclause (2) of this clause.

(2) (a) For the purpose of ascertaining the rate per fortnight the following formula will apply:

$$\frac{\text{annual salary} \times 12}{313}$$

(b) For the purpose of ascertaining the rate per day the following formula will apply:

$$\frac{\text{rate per fortnight}}{10}$$

(c) For the purpose of ascertaining the rate per hour the following formula will apply:

$$\frac{(\text{annual salary} \times 12) \div 313}{80}$$

(3) An employee's salary shall be paid by direct funds transfer to the credit of an account as nominated by the employee at a bank, building society or credit union approved by the Under Treasurer or an Accountable Officer; provided that where such form of payment is impracticable or where some exceptional circumstances exist, and by agreement between the Commissioner and the Union, payment by cheque may be made.

(4) A constable shall not proceed to the 3rd year of service salary increment until satisfactory completion of the two year probationary period. The application of this provision shall not apply to any employee engaged prior to 6 July 1990.

(5) Where an employee has previous relevant experience in the Western Australia Police Force the Commissioner may take this into consideration in re-engaging such an employee. The Commissioner has absolute discretion to:

(a) exempt the employee from undertaking part or full academy training; and/or

(b) waive the requirements for the employee to undertake a period of probation; and/or

(c) appoint the employee to a rank and salary which recognises the previous relevant police force experience.

(6) (a) A part-time employee shall be paid a proportion of the appropriate full-time salary contained in this clause dependent on the number of ordinary hours worked. The salary shall be calculated in accordance with the following formula:

$$\frac{\text{Hours worked per fortnight}}{80} \quad X \quad \text{Full-time fortnightly salary}$$

(b) Subject to meeting the performance criteria applicable to a full-time employee a part-time employee shall be entitled to all available salary increments, on a pro rata basis by calculating the hours worked by the part-time employee each fortnight as a proportion of 80.

## PART 3 – HOURS OF WORK

### 7. - HOURS OF DUTY

(1) (a) The ordinary hours of duty for employees other than commissioned officers shall average 38 per week with the actual hours of work being 40 per week to be worked as 8 hours per day over any 5 days of the week.

(b) There shall be no fixed hours for commissioned officers who shall be on duty as required.

(c) An employee, other than a commissioned officer, rostered off duty who returns on a voluntary basis for additional duty at sporting or other public events shall be paid at the hourly rate provided in paragraph (c) of subclause (2) of Clause 6 (Salaries). In such instances the other provisions of this award are suspended and the provisions of Clause 8 (Overtime) of this award shall not apply.

In the event that cancellation of the sporting or other public event occurs within 12 hours of the contracted starting time for the sporting or other public event, employees not previously notified of the cancellation will be compensated by payment of two hours pay at the ordinary rate of pay.

(2) (a) For each ordinary eight hour day worked employees shall accrue 24 minutes to be taken as accrued paid time off. Such accrued paid time off shall accumulate to a maximum of 96 hours in each 12 month period.

(b) The accrued time off shall be taken at a time mutually convenient to the employee and the Commissioner at any time during the year when such entitlement is due or where a mutually convenient time cannot be agreed at a time determined by the Commissioner. Where the accrued time off is not taken as above residual time shall be taken in a block in the following year either before or in conjunction with annual leave. Where it is taken in conjunction with annual leave the first days of such leave shall be designated as being the accrued time off.

(c) Where an employee is required to return to work on a day allocated as accrued time off an alternative day shall be allocated unless such time was shown on a roster posted in accordance with subclause (7) of this clause.

(d) An employee other than a commissioned officer, who is required to return to work on a day allocated as accrued time off on a roster posted in accordance with subclause (7) of this clause shall be paid as a minimum payment at overtime rates for three hours plus one hour for travelling.

(e) Employees who:

(i) resign or retire from the Force and have accumulated accrued time off but have not taken this time off shall be paid for the total accumulated hours on termination at the ordinary rate of pay; or

(ii) terminate their employment and have taken accrued time off for which no entitlement has accrued shall have their salary reduced on termination by the total hours for which payment has been made out but for which the employee has no entitlement toward the accrued time off.

(f) The provisions of this subclause shall not apply to part time employees.

(3) (a) The ordinary hours of duty at a centre shall be worked in three shifts as set out hereunder which shall rotate weekly:

(i) Day Shift - Any shift which commences on or between the hours of 6.00am and 10.00am each day.

(ii) Afternoon Shift - Any shift which commences on or between the hours of 2.00pm and 6.00pm each day.

(iii) Night Shift - Any shift which commences on or between the hours of 7.00pm and 12.00 midnight each day.

(b) Subject to (v) hereof, at places other than a centre, shifts of eight continuous hours shall be worked as required by local conditions provided:

(i) where more than one shift is worked each day such shifts shall alternate weekly;

(ii) that due to local conditions at and in accordance with the safety and welfare requirements of the employees, additional employees may be rostered from day shift onto an afternoon shift or night shift in any week to cover known situations on particular days;

(iii) such changes as prescribed in subparagraph (ii) of this paragraph shall be indicated in advance on rosters when rosters are posted in accordance with subclause (7) of this clause; and

(iv) where employees are required to be rostered for day, afternoon and night shifts the afternoon and night shifts to be worked shall be distributed evenly between such employees.

(v) This subclause shall not apply to an officer in charge or to an employee relieving in such position who shall have no fixed daily hours.

(c) At non-centres where two employees are employed the daily hours may be worked as a broken shift:

(i) if both employees apply in writing for permission to work such shift; and

(ii) if both the Commissioner and Union agree.

(4) The starting times of shifts may be varied daily but must remain within the parameters of the identified day, afternoon or night shift.

(5) (a) Due to local conditions at non-centres and in accordance with the safety and welfare requirements of the employees, additional employees may be rostered from day shift on to afternoon or night shift to cover known situations on particular days.

(b) Such changes shall be indicated in advance on the rosters when the rosters are posted in accordance with subclause (7) of this clause.

(c) Liberty is reserved by the Union and the Commissioner to review its position in regard to the application of this particular subclause after the completion of six months' operation of the award.

(6) Each ordinary shift shall include a meal period of 40 minutes which shall commence at a time within the 3rd, 4th and 5th hours of the shift. This meal period shall be considered as time worked.

(7) A roster shall be posted at each place of employment not later than 1.00pm on the Thursday preceding the week to be worked showing shift duties and rest days for the ensuing week. Such roster may be varied or suspended by the Officer in Charge in an emergency or where such action is in the public interest.

(8) Subject to the provisions of this clause employees shall where practicable:

(a) Be given 24 hours' notice of any alteration of their roster shift.

(b) (i) Other than in an 'emergency' as defined in this award an employee shall be allowed at least eight consecutive hours off duty between the end of one ordinary shift and the commencement of the next ordinary shift.

(ii) Where an employee who has not had at least eight consecutive hours off duty since the completion of his/her last ordinary shift is fatigued due to authorised overtime and there are four hours or more of the next rostered shift remaining to be worked, the employee may, with the approval of his/her officer in charge, be excused from such part of the shift to allow the designated break and shall be deemed to have commenced that shift at the rostered start time. If a part shift is worked, a shift allowance, if appropriate, will be paid.

(iii) Where an employee who has not had at least eight consecutive hours off duty since the completion of his/her duty since the completion of his/her last ordinary shift is fatigued due to authorised overtime and there are less than four hours of the rostered shift remaining to be worked, the employee may, with the approval of his/her officer in charge, be excused from duty and shall be deemed to have worked the shift. However, in these circumstances, a shift allowance will not be paid.

(iv) Where the overtime incurred between ordinary shifts exceeds four hours (and the employee has not had at least eight consecutive hours off duty between the end of one ordinary shift and the commencement of the next) he/she may, with the approval of his/her officer in charge, be excused from the next rostered shift in lieu of the overtime incurred. In these circumstances, a shift allowance, if appropriate, will be paid.

(v) Overtime is to be documented in the usual way (e.g. court slip, report with overtime claim, etc).

(vi) An employee seeking to be excused from their next rostered shift or part shift must personally contact their officer in charge or another officer in authority for approval prior to the commencement of the shift. Such approval shall not be withheld except in an 'emergency' as defined.

(9) (a) The shift arrangements prescribed in subclause (3) of this clause may be varied to meet the needs of a particular station, non-centre or centre. Such changes must be premised on the understanding that the majority of the employees stationed in the section, station or branch must genuinely agree to the variation.

(b) Such variation in shift arrangements may include any variation or combination of a minimum of six, and up to a maximum of 10 hour shifts and in excess of five shifts in a week or 40 hours per week.

(c) Where shifts of other than eight hours are worked, meal periods and commencement time of meal periods allowed under subclause (6) of this clause and shift allowance provided under Clause 10 (Shift Allowance) of this award shall be allowed on a pro rata basis according to the number of hours in a shift.

(10) (a) Notwithstanding other provisions contained in this clause, a part-time employee may be employed to work less than 38 hours per week.

(b) An employee's regular part-time hours may be varied by the Commissioner with the consent of the employee and where this occurs, time worked up to eight hours on any day or a total of less than 38 hours in a week or any arrangement under subclause (9) of this clause is not overtime but an extension of the contract hours for that day or week.

(c) Other provisions apply on a pro-rata basis.

(11) Where practicable, an employee should be allowed four rostered weekends off duty over each period of 12 weeks.

8. - OVERTIME

(1) The Commissioner or any commissioned or non-commissioned officer may require employees to work reasonable overtime and employees shall work overtime in accordance with such requirements.

(2) (a) Overtime for localities or stations other than those determined by the Commissioner in subclause (7) of this clause shall mean:

(i) all time worked in excess of 40 hours in a week in the case of a Metropolitan Officer in Charge who shall have no fixed daily hours of duty; and

(ii) any time worked on weekly leave days on operational duties in the case of a Country Officer in Charge; and

(iii) all time worked in excess of 40 hours in a week or eight hours on any day in any other case for a full time employee, except for those working the arrangements provided in paragraph (c) of this subclause, recruits in training, Country Officers in Charge and Metropolitan Officers in Charge; and

(iv) all time worked in excess of 38 hours in a week or eight hours in a day in the case of a part time employee except for the arrangements provided in paragraph (c) of this subclause.

(b) Overtime shall be paid at the rate of time and one half for the first three hours and double time thereafter.

(c) The provisions contained in subparagraph (ii) and subparagraph (iii) of paragraph (a) of this subclause shall not apply where other ordinary hours shift arrangements are being worked in accordance with subclause (9) of Clause 7 (Hours of Duty). In such cases overtime shall be paid for periods in excess of the ordinary hours being worked on a shift.

(3) An employee who is required to return to work outside their rostered hours of duty shall be paid the following minimum payments at overtime rates:

(a) on either of their weekly leave days, three hours plus one hour travelling time.

(b) during any other off duty period, two hours inclusive of any travelling time.

(4) (a) Subject to the provisions of this subclause:

(i) an employee required to work a minimum of two hours' overtime in conjunction with a rostered shift, shall be allowed a meal break of 30 minutes at the completion of the first two hours' overtime;

(ii) an employee required to work a minimum of four hours' overtime when recalled to work outside his/her rostered shift, but not continuous to a shift, shall be allowed a meal break of 30 minutes within five hours 30 minutes of the overtime commencing.

In each instance, the employee shall be entitled to further meal breaks of 30 minutes after each further five hours of overtime from the previous meal period.

(b) An employee having a meal break in accordance with paragraph (a) of this subclause may be required to remain under the direction of a Senior Officer in Charge during such meal break and if so required the time shall be considered as time worked.

(c) (i) Where an employee has not been notified the previous day or earlier of a requirement to work overtime, the Commissioner shall provide the employee with a meal for each meal break the employee is entitled to pursuant to paragraph (a) of this subclause.

(ii) Where the Commissioner does not provide a meal and the employee certifies that he/she purchased a meal, the appropriate meal allowance outlined in Schedule C (Overtime Meal Allowance) of this award shall be paid to the employee in lieu of each such meal.

(iii) Provided that where any meal break prescribed by paragraph (a) of this subclause is unable to be taken by the employee due to operational requirements and the employee forgoes such meal break in accordance with paragraph (b) of this subclause a meal shall be provided by the Commissioner at the completion of the overtime or where no meal is supplied by the Commissioner and the employee certifies that a meal was purchased, the employee shall be paid the appropriate meal allowance outlined in Schedule C (Overtime Meal Allowance) of this award in lieu of such meal.

(d) When an employee who has been notified the previous day or earlier that the employee is required to work overtime and such employee supplies him/herself with a meal which is not partaken due to either:

(i) the overtime being cancelled on that day; or

(ii) the overtime being continuous to such an extent that the employee cannot partake of the meal;

such employee shall be paid the appropriate meal allowance outlined in Schedule C (Overtime Meal Allowance) of this award in lieu.

(e) An employee shall not be entitled to a meal allowance under the terms of this subclause if such an employee is already in receipt of a meal allowance for the prescribed meal period under Clause 21 (Travelling Allowance) or Clause 19 (Relieving Allowance) of this award.

(5) The following formulae shall be used in calculating the hourly rate for overtime:-

(a) Time and one half

| | | |
|---|---|---|
| $\frac{\text{Fortnightly salary}}{80}$ | x | $\frac{3}{2}$ |

(b) Double time

| | | |
|---|---|---|
| $\frac{\text{Fortnightly salary}}{80}$ | x | 2 |

(6) In calculating payment for overtime the following arrangements shall apply:

(a) No payment to be made for work performed under 15 minutes.

(b) Payments for 30 minutes shall be made for authorised overtime of between 15 and 30 minutes.

(c) The same procedure as contained in paragraph (a) and paragraph (b) of this subclause shall apply for each 30 minutes after the first.

(7) Notwithstanding any other provisions contained in this award, the Commissioner may determine localities or stations where an ongoing regular additional shift of eight hours each fortnight or an additional four hours per week shall be worked on a regular basis in accordance with the following arrangements.

(a) The additional eight hour shifts shall be rostered in advance and clearly shown on the roster.

(b) The allowance to be paid for the additional eight hours actually worked is separate from any other overtime provided in this clause. The allowance shall be paid at the rate of 13 times the base hourly rate prescribed in paragraph (c) of subclause (2) of Clause 6 (Salaries).

(c) A Country Officer in Charge who has no fixed daily hours shall be paid the allowance for working an additional four hours each week.

(d) The allowance shall not apply:

(i) for any period of paid or unpaid leave; or

(ii) for any period when an employee is attending an in-service course; or

(iii) when the additional hours are not actually worked.

(8) The provisions of this clause shall not apply to an employee who returns on a voluntary basis for additional duty at sporting or public events.

(9) The provisions of this clause do not apply to commissioned officers.

(10) The provisions of this clause do not apply to Country Officers in Charge except where the overtime is worked on weekly leave days and on operational duties as defined.

## PART 4 – ALLOWANCES

### 9. - ON CALL ALLOWANCE

(1) For the purpose of this clause:

"On-call" shall mean a situation in which an employee is rostered, or directed by a senior officer, to be available to respond forthwith for duty outside of their ordinary working hours or shift. An employee placed on call shall remain contactable by telephone or paging system for all of such time unless working in response to a call or with the consent of their appropriate senior officer.

"Close-call" shall mean a situation in which an employee is rostered, or directed by a senior officer, that they are or may be required to attend for extra duty sometime before their next normal time of commencing duty and that the employee is to remain at their residence and be required to be available for immediate recall to duty.

"Stand-by" shall mean a situation in which an employee is rostered or directed by a senior officer to remain in attendance at their place of employment at that time, overnight and/or over a non-working day, and may be required to perform certain tasks periodically or on an ad hoc basis. Such employee shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where practicable.

(2) An employee who is authorised by the Commissioner or a duly authorised senior officer to hold themself available under any of the conditions contained in subclause (1) shall be paid the appropriate allowance in accordance with the following scale:

| | | | | | | |
|---|---|---|---|---|---|---|
| **On-Call** | | | | | | |
| $\frac{20}{100}$ | X | $\frac{1}{38}$ | X | $\frac{6}{313}$ | X | Salary prescribed for a Constable in their fifth year of service for each hour or part thereof they are rostered for on-call duty. |
| **Close-Call** | | | | | | |
| $\frac{30}{100}$ | X | $\frac{1}{38}$ | X | $\frac{6}{313}$ | X | Salary prescribed for a Constable in their fifth year of service for each hour or part thereof they are rostered for close-call duty. |
| **Stand-by** | | | | | | |
| $\frac{40}{100}$ | X | $\frac{1}{38}$ | X | $\frac{6}{313}$ | X | Salary prescribed for a Constable in their fifth year of service for each hour or part thereof they are rostered for stand-by duty. |

(3) Payment in accordance with subclause (2) shall not be made in respect to any period for which payment is otherwise made in accordance with the provisions of Clause 8 (Overtime) when the employee is recalled to work.

(4) An employee, whilst in a restricted situation specified in subclause (1), shall receive a minimum payment of four hours regardless of the actual specified period.

(5) An employee rostered according to subclause (1) shall for the purpose of overtime, be deemed to have commenced duty at time of notification of recall.

## 10. - SHIFT ALLOWANCE

(1) Employees (other than commissioned officers, recruits in training and those working in excess of 40 hours in a week on a voluntary basis at sporting and other public events) shall be paid an allowance of $25.30 for each ordinary eight hour shift actually worked other than day shifts which commence on or between the hours of 6.00am and 10.00am on Monday to Friday.

(2) Employees (other than those designated as Officer in Charge or an employee relieving in such a position or who are working in excess of 40 hours in a week on a voluntary basis at sporting or other public events) who work shifts of other than eight hours duration under the provisions of subclause (9) of Clause 7 (Hours of Duty) shall be paid the shift allowance prescribed in subclause (1) of this clause where appropriate on a pro-rata basis.

(3) A part-time employee actually working ordinary shift hours of other than eight hours; on Monday to Friday commencing prior to 6.00am or concluding after 6.00pm; or at any time on a Saturday or Sunday, shall be paid a proportion of the appropriate allowance contained in subclause (1) of this clause.

## 11. - ADDITIONAL ALLOWANCES

(1) (a) Subject to the provisions of Clause 16 (Higher Duties) of this award, there shall be paid to an employee while occupying a position or performing any of the duties specified in Column 1 hereunder the appropriate annual allowance prescribed in Column 2.

| COLUMN 1 | COLUMN 2<br>$ per annum |
|---|---|
| Detectives, including Probationary Detectives and Members attached to Internal Affairs Unit, Internal Investigations Branch or Bureau of Criminal Intelligence Field Surveillance | 2014 |
| Members of the Gold Stealing Detection Staff who are not Detectives | 2014 |
| Members of the Protective Services and Counter Terrorist Intelligence Unit | 2014 |
| Members of the Liquor and Gaming Branch | 1647 |
| Sergeant in Charge, Mounted Police Section | 714 |
| Playing members, Police Pipe Band | 524 |

(b) Where an employee in receipt of an allowance for occupying a position contained in paragraph (a) of this subclause is temporarily transferred or seconded to a position in respect of which no allowance is payable, payment of such allowance shall cease after the expiration of a period of eight weeks from the date of commencement of the temporary transfer or secondment.

(2) Commissioned Officers and Sergeants and Constables appointed, seconded or attached to any of the squads, branches or occupying those positions designated above shall be paid the appropriate allowance on a pro rata basis provided that the employee is performing the duties for a period of five consecutive working days or more.

(3) (a) Where an employee stationed in the metropolitan area is not provided with quarters, the employee shall be paid $155 per annum in lieu of quarters and if the employee is a non commissioned officer or constable, $145 per annum in lieu of quarters.

Provided that the provision of this paragraph shall not apply in respect of any employee who commences employment on or after 1 March 1988.

(b) All employees stationed outside the metropolitan area, and who are not provided with quarters, shall be paid $600 per annum in lieu of quarters.

(4) Every member of the Force detailed to carry out duties in the member's civilian clothes for a period of five consecutive working days or more in any one calendar year shall be paid a clothing allowance at the rate of $900 per annum. This allowance shall also be paid to an employee who is no longer able to wear her uniform comfortably due to pregnancy.

(5) Each employee shall be paid a boot allowance of $140 per annum.

(6) Where a part-time employee is eligible for the payment of an allowance under this clause such allowance shall be calculated on the proportion of total hours worked by the employee in that year to the total standard hours had the employee been employed on a full-time basis for the year.

## 12. - PRO RATA PAYMENTS OF ALLOWANCES

(1) Wherever in this award an allowance is expressed as an annual rate pro rata payment only shall be allowed if an employee does not qualify for the allowance for a complete year.

(2) For the purpose of ascertaining a fortnightly or daily rate of an annual allowance the formula prescribed in subclause (2) of clause 6 (Salaries) shall apply.

(3) Daily rates of allowance computed in accordance with the foregoing formula shall only be payable in respect of days of ordinary duty only.

13. - DISTRICT ALLOWANCE

District allowance shall be paid in accordance with the applicable rates in force from time to time in the Public Service of Western Australia.

14. - MOTOR VEHICLE ALLOWANCE

(1) (a) An employee who is required to use their motor vehicle (car) for the performance of Police Duties shall be paid an allowance as per the following table:

| | Engine Displacement (in Cubic Centimetres) | | |
|---|---|---|---|
| Area and Details Rate per Kilometre | Over 2600cc to 2600cc | Over 1600cc | 1600cc & Under |
| Metropolitan Area | 89.5 | 64.5 | 53.2 |
| South West Land Division | 91.0 | 65.4 | 54.0 |
| North of 23.5° South Latitude | 98.6 | 70.6 | 58.3 |
| Rest of the State | 94.3 | 67.5 | 55.6 |

(b) An employee who is required to use their motor cycle for the performance of Police Duties shall be paid an allowance of 31.0 cents per kilometre necessarily travelled.

15. - PROPERTY ALLOWANCE

(1) In this clause:

"Agent" means a person carrying on business as an estate agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law.

"Dependent relative" in relation to an employee means a relative or other person who is solely dependent on the employee for support.

"Expenses" in relation to an employee means all costs incurred by the employee in the following areas:

(a) Legal fees paid to a solicitor, or in lieu thereof fees charged by a settlement agent, for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed shall be as set out in the non-contentious business cost determination made under section 275 of the *Legal Profession Act 2008* (WA).

(b) Disbursements duly paid to a solicitor or a settlement agent necessarily incurred in respect of the sale or purchase of the residence.

(c) Real Estate Agent's Commission to a maximum of 50 percent of the following amounts and a maximum of 50 per cent of any goods and services tax paid on the Real Estate Agent's Commission Fee:

| Contract Sale Price | Real Estate Agent's Commission |
|---|---|
| Up to $50,000 | 4.75% |
| Over $50,000 to $100,000 | $2,375 plus 3% on the amount over $50,000 |
| Over $100,000 to $150,000 | $3,875 plus 2.5% on the amount over $100,000 |
| Over $150,000 to $250,000 | $5,125 plus 2.25% on the amount over $150,000 |
| Over $250,000 | $7,375 plus 2% on the amount above $250,000 |

(d) Stamp Duty.

(e) Fees paid to the Registrar of Titles or to the officer performing duties of a like nature and for the same purpose in another State of the Commonwealth.

(f) Expenses relating to the execution or discharge of a first mortgage.

(g) The amount of expenses reasonably incurred by the employee in advertising the residence for sale.

"Locality" in relation to an officer means:

(a) Within the metropolitan area, that area within a radius of 50 kilometres from the Perth Central Railway Station, and

(b) Outside the metropolitan area, that area within a radius of 50 kilometres from an employee's headquarters when they are situated outside of the metropolitan area.

"Property" shall mean a "residence" as defined in this clause, including a block of land purchased for the purpose of erecting a residence thereon to the extent that it represents a normal urban block of land for the particular locality.

"Residence" includes any accommodation of a kind commonly known as a flat or a home unit that is, or is intended to be, a separate tenement, and the surrounding land, exclusive of any other commercial property, as would represent a normal urban block of land for the particular locality.

"Settlement Agent" means a person carrying on business as settlement agent in a State or Territory of the Commonwealth, being, in a case where the Law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that Law.

(2) (a) When an employee is transferred from one locality to another in the public interest or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, the

employee shall be entitled to be paid a property allowance for reimbursement of expenses incurred by the employee:

(i) In the sale of a residence in the employee's former locality, which at the date on which the employee received notice of transfer to their new locality:

(aa) the employee owned and occupied;

(bb) the employee was purchasing under a contract of sale providing for vacant possession; or

(cc) the employee was constructing for his or her own permanent occupation on completion of construction; and

(ii) In the purchase of a residence or land for the purpose of erecting a residence thereon for the employee's own permanent occupation in the new locality.

(b) An employee shall be reimbursed such following expenses as are incurred in relation to the sale of a residence:

(i) if the employee engaged an agent to sell the residence on the employee's behalf - 50 per cent of the amount of the commission paid to the agent in respect of the sale of the residence;

(ii) if the employee engaged a solicitor to act for them in connection with the sale of the residence - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor in respect of the sale of the residence;

(iii) if the land on which the residence is created was subject to a first mortgage and that mortgage was discharged on the sale, then an employee shall, if, in a case where a solicitor acted for the mortgagee in respect of the discharge of the mortgage and the employee is required to pay the amount of the professional costs and disbursements necessarily incurred by the mortgagee in respect of the discharge of the mortgage - the amount so paid by the employee; or

(iv) if the employee did not engage an agent to sell the residence on his or her behalf - the amount of the expenses reasonably incurred by the employee in advertising the residence for sale.

(c) An employee shall be reimbursed such following expenses as are incurred in relation to the purchase of a residence:

(i) if the employee engaged a solicitor or settlement agent to act for the employee in connection with the purchase of the residence - the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor or settlement agent in respect of the purchase of the residence;

(ii) if the employee mortgaged the land on which the residence was erected in conjunction with the purchase of the residence, then an employee shall, if, a case where a solicitor acted for the mortgagee and the employee is required to pay and has paid the amount of the professional costs and disbursements (including valuation fees but not a procuration fee payable in connection with the mortgage) necessarily incurred by the mortgagee in respect of the mortgage - the amount so paid by the employee; or

(iii) if the employee did not engage a solicitor or settlement agent to act for the employee in connection with the purchase or such a mortgage - the amount of the expenses reasonably incurred by the employee in connection with the purchase or the mortgage, as the case may be, other than a procuration fee paid by the employee in connection with the mortgage.

(d) An employee is not entitled to be paid a property allowance under subclause (2)(a)(ii) unless the employee is entitled to be paid a property allowance under subclause (2)(a)(i), provided that the Commissioner may approve the payment of a property allowance under subclause (2)(a)(ii) to an employee who is not entitled to be paid a property allowance under subclause (2)(a)(i) if the Commissioner is satisfied that it was necessary for the employee to purchase a residence or land for the purpose of erecting a residence thereon in his or her new locality because of his or her transfer from the former locality.

(e) For the purpose of this clause it is immaterial that the ownership, sale or purchase is carried out on behalf of an employee who owns solely, jointly or in common with:

(i) the employee's partner;

(ii) a dependent relative; or

(iii) the employee's partner and a dependent relative.

(f) Where an employee sells or purchases a residence jointly or in common with another person - not being a person referred to in subclause (2)(e) - the employee shall be paid only the proportion of the expenses for which the employee is responsible.

(g) An application by an employee for a property allowance shall be accompanied by evidence of the payment by the employee of the expenses, being evidence that is satisfactory to the Commissioner.

(h) Notwithstanding the foregoing provisions, an employee is not entitled to the payment of a property allowance:

(i) In respect of a sale or purchase prescribed in subclause (2)(a) which is effected:

(aa) more than 12 months after the date on which the employee took up duty in the new locality; or

(bb) after the date on which the employee received notification of being transferred back to the former locality;

provided that the Commissioner may, in exceptional circumstances, grant an extension of time for such period as is deemed reasonable.

(ii) Where the employee is transferred from one locality to another solely at the employee's own request or on account of misconduct.

16. - HIGHER DUTIES ALLOWANCE

(1) An employee who is directed by the employer to act in a position which has a minimum rate of pay higher than the ordinary rate of pay of his or her own substantive position and who performs the full duties and accepts the full responsibility of the higher position for a continuous period of 40 or more consecutive working hours, shall, subject to the provisions of this clause, be paid an allowance equal to the difference between the employee's own salary and the salary he or she would receive if he or she was permanently appointed to the position in which he or she is so directed to act.

(2) An employee who is directed by the employer to perform the duties of a higher classification which has a minimum rate of pay higher than the ordinary rate of pay of his or her own substantive position and who performs the full duties and accepts the full responsibility of the higher classification for a continuous period of 40 or more consecutive working hours, shall, subject to the provisions of this clause, be paid a Temporary Special Allowance equal to the difference between the employee's own salary and the salary he or she would receive if he or she was permanently appointed to the classification in which he or she is so directed to perform.

(3) Where an employee who has qualified for payment of higher duties allowance or temporary special allowance under this clause is required to act in another position or other positions which have a minimum rate of pay higher than the ordinary rate of pay of the employee's own substantive position, and he or she performs the full duties and accepts the full responsibility of the higher position for periods less than 40 consecutive working hours without any break in acting service, such employee shall be paid a higher duties allowance for such periods, provided that payment shall be made at the highest rate the employee has been paid during the term of continuous acting or at the rate applicable to the position in which he or she is currently acting - whichever is the lesser.

(4) Where an employee who is in receipt of an allowance granted under this clause and has been so for a continuous period of 12 months or more, proceeds on a period of approved leave of absence of not more than 240 hours, he or she shall continue to receive the allowance for the period of leave. Provided that this subclause shall also apply to an employee who has been in receipt of an allowance for less than 12 months if during his or her absence no other employee acts in the position in which he or she was acting immediately prior to proceeding on leave and he or she resumes in the position immediately on return from leave.

(5) Where an employee who is in receipt of an allowance granted under this clause proceeds on a period of approved leave of absence of more than 240 hours, he or she shall not be entitled to receive payment of such allowance for the whole or any part of the period of such leave.

17. - CAMPING ALLOWANCE

(1) An employee who is stationed in a "camp of a permanent nature" shall be paid the appropriate allowance prescribed by Item 1 or Item 2 of Schedule D (Camping Allowance) of this award for each day spent camping.

(2) An employee who is stationed in a "camp other than a permanent camp" or is required to camp out shall be paid the appropriate allowance prescribed by Item 3 or Item 4 of Schedule D (Camping Allowance) of this award for each day spent camping.

(3) (a) Where to contain the additional travelling costs and/or to avoid lost working time associated with returning to a location where accommodation is available or to ensure the security and safety of a vehicle/firearms/radio/or other equipment an employee camps beside or sleeps inside the vehicle:

(i) on an isolated outback patrol;

(ii) on heavy haulage patrolling duty from South Hedland to Carnarvon, Perth to Carnarvon and north to the Northern Territory border;

(iii) when escorting trucks conveying heavy machinery or equipment;

(iv) on Specialist Support Services country patrols in a mobile workshop; or

(v) on country patrols in a road safety van;

such employee shall be paid the appropriate allowance prescribed by Item 5 of Schedule D (Camping Allowance) of this award for each day spent camping.

(b) Except for those employees covered under subparagraph (ii) and (iii) of paragraph (a) of this subclause, where an allowance is provided under this subclause the provisions of Clause 8 (Overtime) of this award shall not apply to an employee travelling.

(4) An employee who occupies a "house" shall not be entitled to allowances prescribed by this clause.

(5) An employee accommodated at a Government institution, hostel or similar establishment shall not be entitled to allowances prescribed by this clause.

(6) Where an employee is provided with food and/or meals by the Commissioner free of charge, then the employee shall only be entitled to receive one half of the appropriate allowance to which he/she would otherwise be entitled for each day spent camping.

(7) (a) An employee shall not be entitled to an allowance under this clause for periods in excess of 91 consecutive days unless the Commissioner otherwise determines. Provided that where the provisions of Clause 21 (Travelling Allowance) of this award are availed of then such periods shall be included for the purposes of determining the 91 consecutive days.

(b) The Commissioner in reviewing any claim under this subclause may determine an allowance other than is contained in this clause.

(8) When camping, an employee shall be paid the allowance on weekly leave days if available for work immediately preceding and succeeding such days and no deduction shall be made under these circumstances when an employee does not spend the whole or part of those days in camp unless he/she is reimbursed under the provisions of Clause 21 (Travelling Allowance) of this award.

(9) (a) This clause shall be read in conjunction with Clauses 21 (Travelling Allowance), Clause 19 (Relieving Allowance) and Clause 20 (Transfer and Removal Allowance) of this award for the purpose of paying allowances and camping allowance shall not be paid for any period in respect of which travelling, transfer or relieving allowances are paid. Where portions of a day are spent camping the formula contained in subclause (4) of Clause 21 (Travelling Allowance) of this award shall be used for calculating the portion of the allowance to be paid for that day.

(b) For the purposes of this subclause arrival at headquarters shall mean the time of actual arrival at camp. Departure from headquarters shall mean the time of actual departure from camp or the time of ceasing duty in the field subsequent to breaking camp, whichever is the latter.

(10) An employee in receipt of an allowance under this clause shall not be entitled to receive the incidental allowance prescribed by Clause 21 (Travelling Allowance) of this award.

(11) Whenever an employee provided with a caravan is obliged to park the caravan in a caravan park such employee shall be reimbursed the rental charges paid to the authority controlling the caravan park, in addition to the payment of camping allowance.

(12) There is no requirement on the Commissioner to provide food, camping equipment or cooking utensils. Each of the allowances prescribed in Schedule D (Camping Allowance) of this award includes a component for the employee providing his/her own food, camping equipment and cooking utensils and as compensation for the degree of disability the employee is subject to associated with the nature of work and the accommodation utilised.

## 18. - DISTURBANCE ALLOWANCE

(1) An employee who is transferred in accordance with subclause (1) of Clause 20 (Transfer and Removal Allowance) of this award and incurs expenses in the areas referred to in subclause (2) of this clause as a result of that transfer shall be reimbursed the actual expenditure incurred upon production of receipts or such other evidence as may be required.

(2) (a) Costs incurred for the installation/connection/re-connection of a telephone at the employee's new residence provided a telephone had been installed at the employee's former residence. Save that reimbursement shall also be made where an employee is transferred and leaves the residence in which he/she had installed a telephone and returns to the former locality on subsequent transfer.

(b) Costs incurred with the connection or re-connection of water, gas and/or electricity services to the employee's household.

(c) Costs incurred with the re-direction of mail for a period of three months.

## 19. - RELIEVING ALLOWANCE

(1) An employee who is required to take up duty away from his/her usual headquarters within the Commonwealth of Australia on relief duty or to perform special duty and necessarily resides temporarily away from the employee's usual place of residence shall be reimbursed reasonable expenses on the following basis:

(a) Where the employee is supplied with accommodation and meals free of charge, reimbursement shall be in accordance with the rates prescribed in Item 7 of Schedule B (Relieving Allowance) of this award.

(b) Where the employee is fully responsible for his/her own accommodation, meals and incidental expenses and hotel, motel or roadhouse accommodation is utilised:

(i) for the first 49 days after arrival at the new locality reimbursement shall be in accordance with the appropriate rate prescribed by Items 1 or 4 of Schedule B (Relieving Allowance) of this award;

(ii) for the period in excess of 49 days after arrival at the new locality reimbursement shall be in accordance with the appropriate rate prescribed by Items 2 or 5 for employees with dependants or Items 3 or 6 for other employees. Provided that the period of reimbursement under this paragraph shall not exceed 42 days without the approval of the Commissioner; and

(iii) the employee is required to certify that he/she stayed at the accommodation outlined in the preamble of this paragraph for the period claimed and may be required to produce receipts or other evidence to support the claim.

(c) Where the employee is fully responsible for his/her accommodation, meals and incidental expenses and accommodation other then that covered in paragraph (a) or paragraph (b) of this subclause is utilised and he/she is not camping in accordance with Clause 17 (Camping Allowance) of this award the employee shall be reimbursed in accordance with Item 8 of Schedule B (Relieving Allowance) of this award.

(d) Where the employee is provided with accommodation free of charge and only some or no meals free of charge reimbursement for the appropriate breakfast, lunch and dinner not provided free of charge shall be in accordance with the appropriate breakfast, lunch or dinner rates prescribed in Item 9, 10 or 11 of Schedule B (Relieving Allowance) of this award.

(e) Where an employee who is required to relieve or perform special duties in accordance with the preamble of this subclause is authorised by the Commissioner to travel to the new locality in the employee's own motor vehicle, reimbursement shall be in accordance with the appropriate rate of hire as prescribed by Clause 14 (Motor Vehicle Allowance) of this award. Provided that the journey is by the shortest possible practical route the maximum reimbursement shall not exceed the cost of the fare by public conveyance which otherwise would be utilised for such return journey.

(2) The provisions of Clause 21 (Travelling Allowance) or Clause 17 (Camping Allowance) shall not operate concurrently with the provisions of this clause so as to permit an employee to be paid more than one allowance for the same period. Provided that where an employee is required to travel on official business which involves an overnight stay away from the employee's temporary headquarters the Commissioner may extend the period specified in subparagraphs (i) and (ii) of paragraph (b) of subclause (1) of this clause by the time spent in travelling or camping.

(3) An employee who is directed to relieve another employee or to perform special duty away from the employee's usual headquarters and is not required to reside temporarily away from his/her usual place of residence shall, if not in receipt of a higher duties or special allowance for such work, be reimbursed the amount of additional fares paid by the employee in travelling by public transport to and from the place of temporary duty.

(4) Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred the Commissioner may approve the payment of such reasonable additional costs incurred.

## 20. - TRANSFER AND REMOVAL ALLOWANCE

(1) Employees transferred from one headquarters to another:

(a) in the public interest;

(b) in the ordinary course of promotion and transfer; or

(c) on account of illness due to causes over which the employee has no control;

shall, if the transfer necessitates a change in the place of residence of the employee, be paid allowances in accordance with the following provisions of this clause.

(2) An employee when travelling on transfer in accordance with subclause (1) of this clause shall be paid the appropriate rate of travelling allowances in accordance with Clause 21 (Travelling Allowance) of this award.

(3) (a) In the case of an employee with dependants the allowance prescribed by subclause (2) of this clause shall be payable until the end of the day immediately following the day of arrival at his/her new headquarters.

(b) In addition, an employee with dependants who necessarily vacates his/her residence prior to departure for new headquarters shall be paid the appropriate travelling allowance from the time such employee necessarily vacates his/her residence (to be proved to the satisfaction of the Commissioner) until the time of such departure.

(c) The provision of paragraphs (a) and (b) of this subclause may be applied to an employee without dependants when the Commissioner considers that to establish the new residence it has been necessary for the Department to authorise the transport of the employee's household furniture, furnishings, domestic appliances and personal effects.

(4) Where an employee with dependants is transferred to headquarters at which quarters are not provided and the employee has not obtained reasonable accommodation for the transfer of his/her home at the expiration of the time for which travelling allowance is payable under subclause (3) of this clause, he/she shall be reimbursed actual reasonable accommodation and meal expenses for the employee and dependants less a deduction for normal living expenses at the rates prescribed in Item 17 and Item 18 of Schedule A (Travelling Allowance) of this award until obtaining such reasonable accommodation. Provided that such reimbursement shall not be made:

(a) unless the Commissioner is satisfied that the employee has taken all reasonable steps to secure reasonable accommodation; and

(b) for a period exceeding 77 days.

(5) (a) Where an employee with dependants is transferred under the provisions of subclause (1) of this clause such employee shall be paid an allowance as prescribed in Item 19 of Schedule A (Travelling Allowance) of this award for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport their furniture, effects and appliances, provided that the Commissioner is satisfied that the value of household furniture, effects and appliances moved by the employee is at least that prescribed in Item 20 of Schedule A (Travelling Allowance) of this award.

(b) In the case of an employee without dependants an application for any reimbursement for accelerated depreciation and extra wear and tear on furniture and effects will be subject to the receipt by the employee of the allowance under paragraph (c) of subclause (3) of this clause and shall be considered by the Commissioner.

(6) Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred by an employee on transfer appropriate reimbursement may be determined by the Commissioner.

(7) The lodging allowance prescribed in subclause (3) of Clause 11 (Additional Allowances) of this award shall not be payable during any period for which reimbursement is made pursuant to subclauses (4) and (6) of this clause.

(8) An employee shall be reimbursed the full freight charges necessarily incurred in respect of the removal of his/her motor vehicle.

(9) (a) Two employees who are married or living together on a bona-fide domestic basis and who transfer as a family unit from one station to another in accordance with subclause (1) of this clause shall not be entitled to each claim allowances of this award as an employee with dependants.

(b) Where the couple share accommodation then only one of the employees shall receive the full appropriate travel allowance, whilst the other employee shall be paid an allowance which covers incidental expenses and meals (breakfast, dinner, lunch) as prescribed in Schedule A (Travelling Allowance) of this award.

(10) (a) When an employee who is required to transfer in accordance with subclause (1) of this clause decides to travel to the new residence in his/her own vehicle in lieu of the reimbursement provided for in subclause (8) of this clause, reimbursement shall be in accordance with the appropriate rate of hire as prescribed by Clause 14 (Motor Vehicle Allowance) of this award provided that:

(i) the journey is by the shortest practical route;

(ii) the reimbursement does not exceed the cost of the fare of the employee, the employee's partner and dependant children by public conveyance which otherwise would be utilised for such journey; and

(iii) where the employee's partner and dependent children do not accompany the employee in the employee's own motor vehicle, the reimbursement does not exceed the cost of the employee's fare by the public conveyance.

(11) (a) When an employee is not transferred from one station to another as provided in subclause (1) of this clause but is required by the Commissioner to change residences in the same locality outside the metropolitan area, the provisions of Clause 18 (Disturbance Allowance) of this award and subclause (5) of this clause shall apply (but no other provisions in this clause shall apply).

(b) The provisions of this subclause shall not apply to employees who change residences for personal reasons unless it can be established by the employee that the change in residence is beneficial to the Commissioner.

## 21. - TRAVELLING ALLOWANCE

An employee who travels on official business shall be reimbursed reasonable expenses on the following basis:

(1) When a trip necessitates an overnight stay away from headquarters and the employee is supplied with accommodation and meals free of charge, reimbursement shall be in accordance with the rates prescribed in Item 1, 2 or 3 of Schedule A (Travelling Allowance) of this award.

(2) When a trip necessitates an overnight stay away from headquarters and the employee is fully responsible for his/her own accommodation, meals and incidental expenses and hotel, motel or roadhouse accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Items 4 to 8 of Schedule A (Travelling Allowance) of this award.

(3) When a trip necessitates an overnight stay away from headquarters and the employee is fully responsible for his/her own accommodation, meals and incidental expenses and accommodation other than camping or that covered in subclause (1) or subclause (2) of this clause is utilised, reimbursement shall be in accordance with the rates prescribed in Items 9 to 11 of Schedule A (Travelling Allowance) of this award.

(4) To calculate reimbursement under subclause (1), subclause (2) and subclause (3) of this clause for a part of a day, the following formulae shall apply -

(a) If departure from headquarters is:

before 8.00am - 100% of the daily rate.

8.00am or later but prior to 1.00pm - 90% of the daily rate.

1.00pm or later but prior to 6.00pm - 75% of the daily rate.

6.00pm or later - 50% of the daily rate.

(b) If arrival back at headquarters is:

8.00am or later but prior to 1.00pm - 10% of the daily rate.

1.00pm or later but prior to 6.00pm - 25% of the daily rate.

6.00pm or later but prior to 11.00pm - 50% of the daily rate.

11.00pm or later - 100% of the daily rate.

(c) The rate to be applied is that applicable for the locality/town in which the employee stays overnight, except for the final day or part thereof which is calculated at the rate for the previous overnight location.

(5) When a trip necessitates an overnight stay away from headquarters and the employee is provided with accommodation free of charge but only some or no meals free of charge, reimbursement shall be at the rate prescribed in item 1, 2 or 3 of

Schedule A (Travelling Allowance) of this award or for part of a day as proportioned in subclause (4) of this clause and reimbursed for the appropriate breakfast, lunch or dinner not provided free of charge in accordance with the breakfast, lunch or dinner rates prescribed in items 12, 13 or 14 of Schedule A (Travelling Allowance) of this award.

(6) (a) (i) When an employee stationed in the metropolitan area travels to a place outside of that area or an employee stationed outside of the metropolitan area travels to a place outside of a radius of 24 kilometres measured from the employee's headquarters and the trip does not involve an overnight stay away from headquarters, reimbursement for all meals claimed shall be at the rates set out in Item 12, 13 or 14 of Schedule A (Travelling Allowance) of this award, subject to the employee's certification that each meal claimed was actually purchased and consumed over a recognised meal period and the employee was outside of the respective area for the whole of the recognised meal period.

(ii) Provided that when an employee departs from headquarters before 8.00am and does not arrive back at headquarters until after 11.00pm on the same day the employee shall be paid at the appropriate rate prescribed in Items 4 to 8 of Schedule A (Travelling Allowance) of this award.

(b) For the purposes of this subclause:

(i) Where an ordinary hours shift is being worked the recognised meal break in that shift shall be 40 minutes in the case of an eight hour shift and on a pro rata basis where an ordinary hours shift of other than eight hours is being worked. Such meal period to be authorised by the Officer in Charge to commence at sometime within the 3rd, 4th or 5th hour of the shift and on a pro rata basis for ordinary hours shifts of other than eight hours.

For an ordinary hours shift only one meal may be purchased and consumed over the shift; and

(ii) Where the travel extends beyond an ordinary hours shift or ordinary hours shifts do not apply as in the case of an officer in charge or commissioned officers:

(aa) an employee travelling a minimum of 10 hours shall be entitled to a further meal break; and

(bb) for each further five hours travelled from the completion of the previous meal break, a further meal break.

(iii) In determining the appropriate rate for the meal where the meal period falls between the span of hours in Column 1 the appropriate rate prescribed in Column 2 shall apply.

| Column 1 | Column 2 |
|---|---|
| 6.00am or later but before 11.00am | breakfast |
| 11.00am or later but before 4.00pm | lunch |
| 4.00pm or later but before 10.00pm | dinner |
| 10.00pm or later but before 6.00am | supper |

(7) (a) An employee stationed in the metropolitan area who is disadvantaged financially by additional travelling costs incurred due to a requirement to attend an Academy course for a period of five days or more may be paid a special allowance.

(b) Each claim is to be dealt with on its individual merits with the maximum allowable reimbursement being the rate prescribed in Item 1 of Schedule A (Travelling Allowance) of this award.

(8) In addition to the rates contained in Schedule A (Travelling Allowance) of this award an employee shall be reimbursed reasonable incidental expenses (such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses) on production of receipts.

(9) If on account of lack of suitable transport facilities an employee necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the employee shall be reimbursed the actual cost of such accommodation.

(10) Reimbursement of expenses shall not be suspended should an employee become ill whilst travelling, provided such illness is recognised and approved in accordance with the provisions of the *Police Force Regulations 1979* or this award and the employee continues to incur accommodation, meal and incidental expenses.

(11) Reimbursement claims for travelling in excess of 14 days in one month shall not be passed for payment by a certifying officer unless the Commissioner or their nominee has endorsed the account.

(12) An employee stationed in the metropolitan area who is relieving at or temporarily transferred to any place within that area shall not be reimbursed the cost of meals purchased, but an employee travelling on duty within that area who for operational reasons is unable to return to headquarters for a scheduled meal and as a consequence is absent from his/her headquarters over the specified meal period shall be paid at the rate prescribed by Item 15 of Schedule A (Travelling Allowance) of this award for each meal necessarily purchased, provided that:

(a) a requirement to return to headquarters for a scheduled meal break would lead to additional travelling costs or cause lost working time due to travel which is in excess of the rate prescribed in Item 15 of Schedule A (Travelling Allowance) of this award;

(b) such travelling is not within the suburb in which the employee resides; and

(c) the employee's total reimbursement under this subclause for any one pay period shall not exceed the amount prescribed by Item 16 of Schedule A (Travelling Allowance) of this award.

A specified meal period for the purposes of this subclause shall be a meal period authorised by the Officer in Charge to commence at some time within the third, fourth and fifth hours of the employee's ordinary eight hour shift.

(13) An employee travelling on an aircraft (fixed or rotary wing) which travels outside a radius of 50 kilometres measured from the employee's headquarters and returns to the place of departure without landing at another place shall not be entitled to any allowance under this clause unless the trip extends for a period in excess of four hours and the employee certifies he/she purchased a meal for consumption on the trip. Where the aircraft lands at other than the departure point and the employee purchases and consumes a meal the provisions of this clause apply.

(14) Where interstate travel is involved the time differences are to be disregarded for the purposes of calculating travelling allowances and Western Australian time is to be used in claiming allowances involving an overnight stay.

(15) Where an employee claims reimbursement for meals or the daily rate specified for hotel or motel in Items 4 to 14 of Schedule A (Travelling Allowance) of this award the employee shall certify that the meals were purchased or hotel or motel accommodation was actually utilised. An employee may be required to produce receipts or other evidence to substantiate any claim.

Meal allowances shall not apply where a meal is supplied without charge to an employee.

(16) An employee shall only be paid one allowance for any one meal period.

(17) When it can be shown to the satisfaction of the Commissioner by the production of receipts that reimbursement in accordance with Schedule A (Travelling Allowance) of this award does not cover an employee's reasonable expenses for a whole trip the employee shall be reimbursed the excess expenditure.

### 22. - ADJUSTMENT OF REIMBURSEMENT ALLOWANCES

The rates applying to Motor Vehicle Allowance, Travelling Allowance, Transfer and Removal Allowance, Relieving Allowance, Camping Allowance and Overtime Meal Allowance contained in this award and relevant schedules shall be adjusted in accordance with movements in the corresponding rates under the *Public Service Award 1992*.

Where a separate formula is used to adjust the rates outlined in Schedule D (Camping Allowance) of this award, rates are to be adjusted in accordance with such formula.

## PART 5 - LEAVE OF ABSENCE

### 23. - ANNUAL LEAVE

Entitlement

(1) (a) Each employee shall be granted annual leave of 42 days (including 12 rest days) on full pay for each year of service. Provided that employees stationed in the North West shall be granted an additional seven days annual leave (including two rest days) on full pay for each year of service in the North West.

(b) Annual leave is to be paid for the number of hours the employee is required ordinarily to work in a six week period.

(c) With the consent of the Commissioner and the employee annual leave may be taken in more than one period.

(d) The entitlement to annual leave is cumulative and accrues pro rata on a weekly basis.

(2) (a) For the purposes of compiling the annual leave roster showing the commencing and finishing date of annual leave prescribed by subclause (1) of this clause each employee shall by no later than 30 June each year give notice to the Commissioner of the dates that the employee prefers to commence and finish the employee's annual leave in the year immediately following.

(b) The notice referred to in subclause (2)(a) of this clause shall:

(i) in the case of an application by an employee who is a Commissioned Officer be submitted to the office of the Commissioner of Police; or

(ii) in the case of an application by an employee who is a non-Commissioned Officer be submitted to the employee's Officer in Charge.

(3) Annual leave travel concessions

(a) Employees Stationed in Remote Areas

(i) The travel concessions contained in the table immediately following are provided to an employee, and their dependant(s), as defined in Clause 5 (Definitions) of this award, when proceeding on annual leave to either Perth, Geraldton or other place outside of the employee's district which is approved by the Commissioner, from Headquarters situated in the Annual Leave Travel Concession Areas 3, 5 and 6, and in that portion of Area 4 located north of $30^0$ South latitude, as provided by Schedule E (Annual Leave Travel Concession Boundaries) of this award.

(ii) Employees are required to serve a year in these areas before qualifying for travel concessions. However, employees who have less than a year's service in these areas and who are required to proceed on annual leave to suit the Commissioner's convenience or who are unable to complete the required 12 months' service in the area due to causes beyond the employee's control will be allowed the concessions. The concession may also be given to an employee who proceeds on annual leave before completing the year's service provided that the employee returns to the area to complete the year's service at the expiration of the period of leave.

(iii) The mode of travel is to be at the discretion of the Commissioner.

(iv) Provided the concession does not exceed the value of the fully refundable return economy airfare from his or her Headquarters to Perth an employee may elect to use the concession to purchase return economy airfare or equivalent motor vehicle allowance to any destination of his or her choice. Should the cost of the chosen return economy airfare be less than the value of the fully refundable return economy airfare to Perth the lesser amount shall be paid. Accommodation costs of any travel package arrangement will not be paid as part of this concession.

(v) Travel concessions not utilised within 12 months of becoming due will lapse.

(vi) Part-time or irregular part time employees are entitled to travel concessions on a pro rata basis according to the average number of hours worked per week. Travelling time shall be calculated on a pro rata basis according to the number of hours worked.

| Approved Mode of Travel | Travel Concession | Travelling Time |
|---|---|---|
| (aa) Air | Fully refundable return economy airfare for the employee and dependant(s). | One day each way. |
| (bb) Road | Full motor vehicle allowance rates, but reimbursement not to exceed the cost of the fully refundable return economy airfare. | North of $20^0$ South Latitude - two and one half days each way. Remainder - two days each way. |
| (cc) Air and Road | Full motor vehicle allowance rates for car trip, but reimbursement not to exceed the cost of the fully refundable return economy air fare for the employee, dependent partner and dependent children. | North of $20^0$ South Latitude - two and one half days each way. Remainder - two days each way. |

(b) Employees stationed in special areas:

(i) The travel concessions in the table immediately following are provided to an employee, and the employee's family as defined in Clause 5 (Definitions) of this award when proceeding on annual leave to either Perth or other place outside of the employee's district which is approved by the Commissioner from Headquarters other than those designated in subclause (3)(a) of this clause but within a "special area" as defined in Clause 5 (Definitions) of this award.

(ii) The travel concessions are only payable to an employee who has completed 12 months service in the special area or, if the employee has not completed 12 months service in the special area before proceeding on annual leave, does so on the employee's return from annual leave before the employee again takes annual leave.

(iii) The travel concession shall be repaid to the WA Police by the employee if the employee fails to complete 12 months service in the special area unless that failure is due to causes beyond the employee's control.

| Approved Mode of Travel | Travel Concession |
|---|---|
| (aa) Public Transport | Free return passes to Perth or other place approved by the Commissioner on public transport for the employee and the employee's family as defined in Clause 5 (Definitions) of this award. |
| (bb) Private Vehicle | Full motor vehicle allowance rates but reimbursement not to exceed the cost of public transport specified in (aa), above. |
| (cc) Public Transport and a Private Vehicle | Free return passes to Perth or other place approved by the Commissioner and the full motor vehicle allowance rate, provided that reimbursement is not to exceed the cost of public transport specified in (aa), above. |

(c) Employees other than those designated in subclause (3)(a) of this clause, whose Headquarters are situated outside a radius of 240 kilometres from Perth City Railway Station and who travel to Perth for their annual leave shall be granted by the Commissioner reasonable travelling time to enable them to complete the return journey.

To standardise the entitlement the following criteria is to be used:

(i) 240 kms to 499 kms - half day travelling each way but taken as one additional day;

(ii) 500 kms to 1000 kms - one days' travelling time each way;

(iii) in excess of 1000 kms and north of the 26th parallel - two and one half days each way, and all stations south of the 26th parallel but in excess of 1000 kms the equivalent of a counterpart north of the 26th parallel.

(4) Recrediting of annual leave where planned annual leave cannot be taken

(a) Where an employee on annual leave is recalled to attend at court from matters arising during the course of his/her duties or to perform other duties the employee shall be paid or be entitled to for each day or part thereof

additional payment at ordinary rates for the period of the recall including travelling time plus one day added to his/her annual leave or at the option of the employee two days added to his/her annual leave.

(b) Where an employee is required to attend court on an additional day granted for previous attendance under paragraph (a) of this subclause, he/she shall be entitled to an additional day for attending that court and two further days, a total entitlement of three days. Such additional days as defined under this subclause shall be taken at a time mutually agreed between the employee and the Commissioner.

(c) Where an employee has had to leave a holiday destination to travel for court and is then advised prior to starting work that his or her attendance is no longer required he or she shall be entitled to the additional annual leave days as provided in paragraph (a) of this subclause.

(d) Where an employee is ill during his/her period of annual leave and produces at the time or as soon as practicable thereafter medical evidence to the satisfaction of the Commissioner that he/she was as a result of illness confined to his/her place of residence or a hospital for at least seven days, the employee may, with the approval of the Commissioner, be granted at a time convenient to the Commissioner additional leave equivalent to the period during which he/she was so confined.

(e) Where an employee is required to attend for a promotional examination or promotional appeal hearing during the period of his/her annual leave he/she shall be granted a day in lieu. Such day to be added to his/her annual leave.

(5) Notwithstanding the provisions contained in this clause the salary payable to a part-time employee during the period of leave shall be calculated, based on the fortnightly salary at the time the leave is taken, in accordance with the following formula:

| | | |
|---|---|---|
| $\frac{\text{Hours worked per fortnight}}{80}$ | x | Full-time fortnightly salary |

(6) Annual leave loading

(a) A loading of 18.75% shall be paid to employees when proceeding on annual leave, calculated on the award rate of pay with respect to a maximum of five weeks annual leave. Provided that in no case shall the loading exceed the amount set out in the Australian Bureau of Statistics publication for "Average Weekly Total Earnings of All Males in Western Australia" for the September quarter immediately preceding the date the leave became due.

(b) Annual leave loading shall not be due in respect of any pro rata leave to which an employee is entitled on resignation.

## 24. - LONG SERVICE LEAVE

(1) An employee shall qualify for long service leave in the following terms:

(a) Subject to paragraph (d) of this subclause an employee who has completed seven years continuous service with the employer shall be entitled to 13 weeks' long service leave on full pay.

(b) For each subsequent period of seven years' service an employee shall be entitled to an additional 13 weeks' long service leave on full pay.

(c) Subject to the Commissioner's convenience and approval an employee may take the leave in not more than three separate periods subject to the following:

(i) the portion of long service leave shall be not less than four weeks entitlement and portions in excess of four weeks shall be in multiples of one week's entitlement and provided also that a minimum balance of long service leave of four weeks is available for utilisation.

(d) For the purposes of determining an employee's long service leave entitlement under the provisions of paragraphs (a), (b) and (c) of this subclause the expression "continuous service" includes any period during which the employee is absent on full pay or part pay but does not include:

(i) any period exceeding two weeks during which an employee is absent on leave without pay or unpaid parental leave, except where leave without pay is approved for the purpose of fulfilling an obligation by the Government of Western Australia to provide staff for a particular assignment external to the Public Sector of Western Australia;

(ii) any period during which an employee is taking a long service leave entitlement or any portion thereof except in the case of subclause (8) of this clause when the period excised will equate to a full entitlement of 13 weeks;

(iii) any service by an employee who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when their prior service had actually entitled the employee to the long service leave provided under this clause;

(iv) subject to paragraph (v) of this subclause, any period of service between the sixth anniversary date of the employee having accrued an entitlement to long service leave, or a deferred commencing date approved by the Commissioner pursuant to subclause (2) of this clause and the date on which the employee clears that entitlement;

(v) any service by the employee between the date by which long service leave entitlements are required to be cleared pursuant to a deferred commencing date approved by the Commissioner pursuant to subclause (2) of this clause and the date on which the employee clears the entitlement required;

(vi) any service by an employee who has been granted a deferment for the taking of long service leave by the Commissioner because of impending retirement pursuant to subclause (2) of this clause, between a deferred commencing date approved by the Commissioner and the date the employee retires or, clears a full entitlement to long service leave if the employee does not retire on the date nominated; and

(vii) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave.

(2) (a) Long service leave shall be taken at any time within six years of it becoming due, at the convenience of the Commissioner. Provided that the Commissioner may approve the deferment of the taking of long service leave beyond six years in exceptional circumstances. Provided further that such exceptional circumstances shall include retirement within seven years of the date of entitlement.

(b) Approval to defer the taking of long service leave may be withdrawn or varied at any time by the Commissioner giving the employee notice in writing of the withdrawal or variation.

(3) On application to the Commissioner a lump sum payment for the money equivalent of any:

(a) Long Service Leave entitlement for continuous service as provided in paragraph (a) and paragraph (b) of subclause (1) of this clause shall be made to an employee who resigns, retires, is retired or is dismissed or in respect of an employee who dies;

(b) Pro rata long service leave based on continuous service of a lesser period than that provided in paragraph (a) and paragraph (b) of subclause (1) of this clause for a long service leave entitlement shall be made:

(i) to an employee who retires at or over the age of 55 years or who is retired on the grounds of ill health if the employee has completed not less than 12 months continuous service before the date of retirement;

(ii) to an employee who, not having resigned is retired by the Commissioner for any other cause, if the employee has completed not less than three years continuous service before the date of retirement; or

(iii) in respect of an employee who dies, if the employee has completed not less than 12 months continuous service before the date of death.

(c) In the case of a deceased employee, payment shall be made to the estate of the employee unless the employee is survived by a legal dependant approved by the Commissioner, in which case payment shall be made to the legal dependent.

(4) The calculation of the amount due for long service leave accrued and for pro rata long service leave shall be made at the rate of salary of an employee at the date of retirement or resignation or death, whichever applies.

(5) (a) An employee who desires to be granted a period of long service leave shall give at least two months notice in writing of the fact and shall make application to the Commissioner. The application shall state the amount of leave required and the date from which the leave is to commence. In case of emergency and for reasons to be stated in writing, an employee may at any time apply to the Commissioner for any long service leave due.

(b) An employee may prior to commencing long service leave request approval for the substitution of another date for commencement of long service leave and the Commissioner may approve such substitution.

(6) Interstate:

(a) Where an employee was, immediately prior to being employed under the provisions of the *Police Act 1892* (WA), employed in the Service of the Commonwealth or of any other State of Australia and the period between the date when the employee ceased previous employment and the date of commencing employment does not exceed one week, that employee shall be entitled to long service leave determined in the following manner:

(i) The pro rata portion of long service leave to which the employee would have been entitled up to the date of appointment under the provisions of the *Police Act 1892* (WA) shall be calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the employee may become entitled under this clause; and

(ii) The balance of the long service leave entitlement of the employee shall be calculated upon appointment under the provisions of the *Police Act 1892* (WA) in accordance with the provisions of this clause.

(b) The maximum break in employment permitted by paragraph (a) of this subclause may be varied by the approval of the Commissioner provided that where employment under the provision of the *Police Act 1892* (WA) commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro rata annual leave paid out at the date the employee ceased with the previous employer or in the case of defence forces the employee applied to join the police force before ceasing the previous employment and was inducted into police training in the first available police academy school. This matter must be negotiated and documented as part of the recruitment process.

(c) An employee previously employed by the Commonwealth or by any other State of Australia shall not proceed on any period of long service leave until the employee:

(i) has served a period of not less than three years continuous service under this award; and

(ii) is entitled to 13 weeks long service leave on full pay.

The Commissioner may approve of an employee proceeding on long service leave prior to the employee completing three years continuous service.

(d) Nothing in this clause confers or shall be deemed to confer on any employee previously employed by the Commonwealth or by any other State of Australia any entitlement to a complete period of long service leave that accrued in the employee's favour prior to the date on which the employee commenced employment under the provisions of the *Police Act 1892* (WA).

Intrastate:

(e) Where an employee was immediately prior to being employed under the provisions of the *Police Act 1892* (WA), an employee in:

(i) the WA Public Service;

(ii) a statutory authority listed in Schedule 1 of the *Financial Management Act 2006* (WA);

(iii) either of the Houses of the Parliament of the State under the separate control of the President or Speaker or under their joint control;

(iv) Healthways (or replacement body); or

(v) the Nurses Board of W.A.,

and the period between the date when the employee ceased previous employment and the date of commencing employment under the provisions of the *Police Act 1892* (WA) does not exceed one week, that employee shall be entitled to 13 weeks of long service leave on full pay on whichever is the earliest date of:

(i) the date on which the employee would have become entitled to long service leave had the employee remained in the former employment; or

(ii) the date determined by:

(aa) calculating the pro rata portion of long service leave to which the employee would have been entitled up to date of appointment under the *Police Act 1892* (WA), in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the employee may become entitled under this clause; and

(bb) by calculating the balance of the long service leave entitlement of the employee upon appointment under the provisions of the *Police Act 1892* (WA) in accordance with the provisions of this clause.

(f) The maximum break in employment permitted by paragraph (e) of this subclause may be varied by the approval of the Commissioner provided that where employment under the provisions of the *Police Act 1892* (WA) commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro rata annual leave paid out at the date the employee ceased with the previous employer. This matter must be negotiated and documented as part of the recruitment process.

(g) An employee who was not paid out for accrued and pro rata annual leave held at the date of ceasing previous employment shall comply with the provisions of paragraph (e) of this subclause.

(h) In addition to any entitlement arising from the application of paragraph (e) of this subclause, an employee previously employed by a prescribed State body or statutory authority may, on approval of the Commissioner, be credited with any period of long service leave to which he/she became entitled during the former employment but had not taken at the date of appointment under the provisions of the *Police Act 1892* (WA), provided the employees' former employer had given approval for the employee to accumulate the entitlement.

(7) An employee who has elected to retire at or over the age of 55 years and who will complete not less than 12 months continuous service before the date of retirement may make application to take pro rata long service leave before the date of retirement.

(8) (a) A full time employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on both a full and part time basis may elect to take a lesser period of long service leave calculated by converting the part-time service to equivalent full time service.

(b) A full time employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on a part time basis may elect to take a lesser period of long service leave calculated by converting the part-time service to equivalent full time service.

(9) Notwithstanding the foregoing provisions in this clause, the Commissioner may direct an employee to take accrued long service leave and may determine the date of which such leave shall commence.

(10) Where an employee is ill during the period of long service leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the Commissioner that as a result of the illness the employee was confined to his/her place of residence or a hospital for a period of at least 14 consecutive calendar days, the Commissioner may grant sick leave for the period during which the employee was so confined and reinstate long service leave equivalent to the period of confinement.

(11) (a) An employee shall, when recalled from long service leave to attend at Court from matters arising during the course of their duties or to perform other duties, be paid or be entitled to for each day or part thereof additional payments at ordinary hours rates for the period of the recall including travelling time plus one day added to his/her long service leave or at the option of the employee, two days added to his/her long service leave.

(b) Where an employee is required to attend court on an additional day granted for previous attendance under paragraph (a) of this subclause he/she shall be entitled to an additional day for attending that court and two further days, a total entitlement of three days. Such additional days as defined under this paragraph shall be taken at a time mutually agreed between the employee and the Commissioner.

(c) Where an employee is required to attend for a promotional examination or promotional appeal hearing during the period of his/her long service leave he/she shall be granted a day in lieu.

25. - BEREAVEMENT LEAVE

(1) Employees shall be eligible for up to two days paid bereavement leave on the death of:

(a) the partner of the employee;

(b) the child, step-child or grandchild of the employee (including an adult child, step-child or grandchild);

(c) the parent, step-parent or grandparent of the employee;

(d) the brother, sister, step brother or step sister of the employee; or

(e) any other person who, immediately before that person's death, lived with the employee as a member of the employee's household.

Provided that at the request of an employee the Commissioner may exercise discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.

(2) The two days need not be consecutive.

(3) Bereavement leave is not to be taken during any other period of leave.

(4) Payment of such leave may be subject to the employee providing evidence, if so requested by the Commissioner, of the death and relationship of the employee to the deceased that would satisfy a reasonable person.

(5) An employee requiring more than two days bereavement leave in order to travel overseas in the event of the death overseas of a member of the employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave or leave without pay provided all accrued leave is exhausted.

26. - PARENTAL LEAVE

(1) Definitions

For the purposes of this clause:

(a) “Employee” includes full time and part time employees.

(b) “Parental Leave” shall be unpaid and/or paid leave as approved under this clause.

(c) “Adoption” in relation to a child, is a reference to a child who:

(i) is not the child or the step-child of the employee or the employee’s partner;

(ii) is, or will be, under 16 years old as at the day of placement, or the expected day of placement, of the child; and

(iii) has not lived continuously with the employee for six months or longer.

(d) “Primary Care Giver” means the person who assumes the principal role of providing care and attention to a child.

(e) “WA Public sector” means employing authorities as defined in section 5 of the Public Sector Management Act 1994 (WA).

(2) Entitlement to Parental Leave

(a) Subject to the requirements of this clause an employee is entitled to a period of up to 52 consecutive weeks’ unpaid parental leave in respect of the birth of a child to an employee or the employee’s partner or the adoption of a child.

(b) Subject to the requirements of this clause an employee who is the primary care giver, and who has completed 12 months’ continuous service in the WA Public Sector immediately preceding the parental leave, will be entitled to 14 weeks’ paid parental leave in respect of the birth of a child to an employee or the employee’s partner or the adoption of a child that will form part of the 52 week unpaid entitlement.

(c) The Commissioner may request evidence of primary care giver status.

(d) An employee seeking to adopt a child shall be entitled to two days’ unpaid leave for the employee to attend interviews or examinations as required for the adoption procedure. Employees working or residing outside the Perth Metropolitan Area are entitled to one additional day’s leave. The employee may take any paid leave entitlement in lieu of this leave.

(e) The period of paid parental leave can be extended by the employee taking double the leave on a half-pay basis and its effect is in accordance with subclause (11)(b).

(f) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed the entitlement provided at subclause (2)(b) or its half pay equivalent.

(g) Where both partners are employed in the WA Public Sector, the leave shall not be taken concurrently except for special circumstances and with the approval of the Commissioner.

(h) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners, employed within the WA Public Sector, assuming the role of primary caregiver.

(i) An employee must take paid and unpaid parental leave in one continuous period.

(j) Where less than the 52 weeks' parental leave is taken paid or unpaid, the unused portion of the leave cannot be banked or preserved in any way.

(3) Notice Requirements

(a) An employee is entitled to parental leave only after he or she has given the Commissioner at least eight weeks' written notice of his or her intention to take the leave, the date the employee proposes to commence parental leave and the proposed period of leave to be taken.

(b) An employee who has given their Commissioner notice of their intention to take parental leave shall provide the Commissioner with a medical certificate from a registered medical practitioner naming the employee, confirming the pregnancy and the estimated date of birth.

(c) An employee is not in breach of subclause (3)(a) by failing to give the required period of notice if such failure is due to the birth of the child taking place prior to the date the employee had intended to proceed on parental leave.

(d) An employee is not in breach of subclause (3)(a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(e) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period of leave elect to reduce or extend the period stated in the original application provided four weeks' written notice is provided.

(4) Commencement of Parental Leave

(a) A pregnant employee can commence the period of continuous parental leave any time up to six weeks before the expected date of birth.

(b) An eligible employee identified as the primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the day of placement of the child.

(c) The minimum period of absence on parental leave for a pregnant employee shall commence six weeks before the expected date of birth and end six weeks after the day on which the birth has taken place. However, an employee may apply to the Commissioner to vary this period provided her application is supported by a certificate from a registered medical practitioner indicating that the employee is fit to continue or resume duty within this minimum period.

(d) Where the pregnancy of an employee terminates other than by the birth of a living child, not earlier than 20 weeks before the expected date of the birth, the entitlement to paid parental leave remains intact and subject to the eligibility requirements of this clause. Such paid parental leave cannot be taken concurrently with any paid sick leave in accordance with Clause 27 (Entitlement to leave and allowances through illness or injury) of this award.

(e) The period of paid parental leave must be concluded within 12 months of the birth of the child.

(f) Where an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave, or return to work.

(5) Payment for Paid Parental Leave

(a) Paid parental leave will be paid at ordinary rates and will not include the payment of any form of allowance or penalty payment.

(b) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences.

(c) An employee is entitled to remain on paid parental leave if the pregnancy results in other than a live child; or the employee is incapacitated following the birth of the child; or the child dies or is hospitalised such that the employee or the employee's partner is not providing principal care to the child.

(6) Unpaid Partner Leave

(a) An employee who is not taking parental leave is entitled to one week's unpaid partner leave in respect of the:

(i) birth of a child to the employee's partner; or

(ii) adoption of a child;

taken immediately following the birth or, in the case of adoption, the day of placement of the child.

(b) An employee entitled to unpaid partner leave provided in subclause (6)(a), may elect to substitute any part of that leave with annual leave, long service leave and/or paid time off in lieu of overtime.

(c) An employee is entitled to request an extension to the period of unpaid partner leave up to a maximum of eight weeks.

(d) The Commissioner is to agree to an employee's request to extend their unpaid partner leave made under subclause (c) of this clause unless:

(i) having considered the employee's circumstances, the Commissioner is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(ii) there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of operations or business of the Commissioner and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:

(aa) cost;

(bb) lack of adequate replacement staff;

(cc) loss of efficiency; and

(dd) impact on the production or delivery of products or services by the Commissioner.

(e) The Commissioner is to give the employee written notice of the Commissioner's decision on a request to extend their unpaid partner leave. If the employee's request is refused, the notice is to set out the reasons for the refusal.

(f) An employee who believes their request to extend unpaid partner leave has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the Commissioner to demonstrate that the refusal was justified in the circumstances.

(g) Where the Commissioner agrees to an employee's request to extend their period of unpaid partner leave under subclause (6)(c), the Commissioner must allow an employee to elect to substitute any part of that period of unpaid partner leave with accrued annual leave, long service leave and/or time off in lieu of overtime.

(h) An employee on unpaid partner leave is not entitled to any paid sick leave in accordance with Clause 27 (Entitlement to leave and allowances through illness or injury) of this award.

(i) The total period of unpaid partner leave provided by this clause shall not exceed eight weeks.

(7) Transfer to a Safe Job

(a) Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue in her present duties, as is certified necessary by a registered medical practitioner, the duties shall be modified or the employee may be transferred to a safe position of the same classification until the commencement of parental leave.

(b) (i) A pregnant employee may work part time in one or more periods whilst she is pregnant where she provides her Commissioner with a medical certificate from a medical practitioner advising that part time employment is, because of her pregnancy, necessary or preferable.

(ii) The terms of part time employment undertaken in accordance with subclause (7)(b)(i) shall be in writing.

(c) In the absence of an alternative requirement, and unless otherwise agreed between the Commissioner and employee, an employee shall provide the Commissioner with four weeks written notice of an intention to:

(i) vary part time work arrangements made under subclause (7)(b); or

(ii) revert to full time employment during the employee's pregnancy.

(d) An employee reverting to full time employment in accordance with subclause (7)(c)(ii) will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to undertaking part time employment.

(e) If the transfer to a safe position is not practicable, the employee is entitled to be absent from the workplace on full pay for the period during which she is unable to continue in her present position.

(f) An employee who is absent from work pursuant to subclause (7)(e) shall be paid the amount she would reasonably have expected to be paid if she had worked during that period.

(g) An entitlement to be absent from the workplace on full pay is in addition to any leave entitlement the employee has.

(h) An entitlement to be absent from the workplace on full pay ends at the earliest of whichever of the following times is applicable:

(i) the end of the period stated in the medical certificate;

(ii) if the employee's pregnancy results in the birth of a living child – the end of the day before the date of birth; or

(iii) if the employee's pregnancy ends otherwise than with the birth of a living child – the end of the day before the end of the pregnancy.

(8) Interaction with Other Leave Entitlements

(a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or accrued long service leave for the whole or part of the period of parental leave.

(b) Where annual and/or long service leave is substituted that leave shall form part of the 52 weeks' parental leave entitlement.

(c) An employee on parental leave is not entitled to paid sick leave and other paid award absences.

(d) Where the pregnancy of an employee terminates other than by the birth of a living child then the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with a period of paid parental leave.

(e) Where a pregnant employee not on parental leave suffers illness related to the employee's pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or such further unpaid leave for a period certified as necessary by a registered medical practitioner.

(f) Subject to all other leave entitlements being exhausted, an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two years. The Commissioner is to agree to a request for extended unpaid parental leave unless:

(i) the Commissioner is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(ii) agreeing to the request would have an adverse impact on the conduct of operations or business of the Commissioner and those grounds would satisfy a reasonable person.

(g) The Commissioner is to give the employee written notice of the Commissioner's decision on a request for extended unpaid parental leave under subclause (8)(f). If the request is refused, the notice is to set out the reasons for the refusal.

(h) An employee who believes their request for extended unpaid parental leave under subclause (8)(f) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the Commissioner to demonstrate that the refusal was justified in the circumstances.

(i) Any period of leave without pay must be applied for and approved in advance and will be granted on a year by year basis. Where both partners work for the WA Public Sector the total combined period of leave without pay following parental leave will not exceed two years.

(9) Communication during Parental Leave

(a) If the Commissioner makes a decision that will have a significant effect on the status, responsibility level, pay or location of an employee's position whilst on parental leave, the Commissioner must take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of the decision on that position.

(b) An employee shall also notify the Commissioner of changes of address or other contact details that might affect the Commissioner's capacity to comply with subclause (9)(a).

(10) Return to Work

(a) An employee shall confirm the intention to return to work by notice in writing to the Commissioner not less than four weeks' prior to the expiration of the period of parental leave.

(b) An employee on return from parental leave shall be entitled to the same position, or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities, as the substantive position held immediately prior to proceeding on Parental Leave. Where an employee was transferred to a safe job pursuant to subclause (7)(a) the employee is entitled to return to the position occupied immediately prior to the transfer.

(c) An employee may return, subject to the approval of the Commissioner, on a part-time basis to the same position occupied prior to the commencement of leave or to a different position at the same classification level on a part-time basis in accordance with the part-time provisions of this award, or on a modified basis that involves the employee working on different days or at different times, or both; or on fewer days or for fewer hours or both, than the employee worked immediately before starting parental leave.

(d) Subject to the Commissioner's approval an employee who has returned on a part time basis may revert to full time work at the same classification level.

(e) Where the position occupied by the employee no longer exists the employee shall be entitled to a position of the same classification level with duties similar to that of the abolished position.

(11) Effect of Leave on Employment Contract

(a) Paid parental leave will count as qualifying service for all purposes.

(b) Qualifying service for any purpose is to be calculated according to the number of weeks of paid parental leave that were taken at full pay or would have been had the employee not taken paid parental leave at half pay. Employees who take paid parental leave on half pay do not accrue entitlements beyond those that would have accrued had they taken the leave at full pay.

(c) Absence on unpaid parental leave or extended unpaid parental leave shall not break the continuity of service of employees.

(d) Where an employee takes a period of unpaid parental leave or extended unpaid parental leave exceeding 14 calendar days in one continuous period, the entire period of such leave shall not be taken into account in calculating the period of service for any purpose. Periods of unpaid leave of 14 days or less shall count as continuous service.

(e) An employee on parental leave may terminate employment at any time during the period of leave by providing the required written notice.

27. - ENTITLEMENT TO LEAVE AND ALLOWANCES THROUGH ILLNESS OR INJURY

(1) An employee who becomes incapacitated shall as soon as possible:

(a) notify the employee's officer in charge of that fact and of the employee's whereabouts; and

(b) notify the Manager of the nature of the illness or the nature and cause of the injury, as the case may be.

(2) Except in respect of a day on which an employee becomes incapacitated while on duty, an application for leave by an employee on account of incapacity shall be supported by a certificate of a medical practitioner or, where the incapacity involves a dental condition, by a certificate of a dentist.

(3) The application shall be:

(a) in a form approved by the Commissioner; and

(b) submitted to the Manager, along with the certificate in its support.

(4) Subject to subclause (2) and to the compliance by the employee of subparagraphs (a) and (b) of subclause (3), the Commissioner may grant to an employee in respect of the employee's incapacity leave of absence with pay:

(a) for up to 168 days in a calendar year; and

(b) if so recommended by the Manager and subject to any terms or conditions recommended by the Manager, for a further period.

(5) Except where an employee is incapacitated through the employee's fault or misconduct, an employee is entitled to receive in respect of a period of leave of absence approved under subclause (4) and subject to any terms and conditions imposed under subparagraph (4)(b), any special allowances which the employee would have received under the award if the employee had not been incapacitated.

(6) The district allowance prescribed by the award ceases to be payable -

(a) after an incapacitated employee and the family of that employee have been absent from the employee's region for a continuous period exceeding six weeks; and

(b) for so long thereafter as that absence continues.

(7) In subclause (6) "family" means the partner and any children of the employee residing with the employee.

(8) (a) An employee who suffers illness or injury through the employee's fault or misconduct is not entitled to paid leave contained within the provisions of subclause (4) under subparagraphs (a) and (b) in respect of absence from duty resulting from that illness or injury.

(b) An employee who suffers illness or injury through the employee's fault or misconduct is not entitled in respect of that illness or injury to receive the benefits contained under Clause 30 (Medical and Pharmaceutical Expenses) of the award.

(c) Where the incapacity of an employee results from the carrying on by the employee of an occupation for which the employee received or expected to receive remuneration, outside of the employee's duties as an employee, the Commissioner may grant or refuse to grant paid leave to the employee in respect of the incapacity or may grant the employee leave at a reduced rate of pay.

(9) An incapacitated employee shall not during the employee's absence from duty engage for reward in any other occupation or activity.

(10) An employee who has been absent from duty because of incapacity for longer than four weeks shall, before returning to duty, submit to the Manager evidence of the employee's medical fitness to return to duty.

(11) (a) The Commissioner may direct an employee to submit to examination, at the expense of the Commissioner, by one or more medical practitioners nominated in each instance by the Commissioner and the employee shall obey such a direction.

(b) Where an employee has been examined under subclause (11)(a) and the examining medical practitioner expresses the opinion in writing to the Commissioner that the employee is unfit for duty because of illness or injury, the Commissioner may direct the employee to apply for leave on that ground and the employee shall obey such a direction.

28. - CARER'S LEAVE

(1) Employees are entitled to access up to 40 hours carer's leave per calendar year to provide care and support to a member of the employee's family or household who requires care support because of:

(a) an illness or injury of the member; or

(b) an unexpected emergency affecting the member.

(2) Where employees have exhausted the entitlements provided under subclause (1) of this clause they are able to access up to an additional 40 hours of their illness and injury leave entitlements as prescribed under clause 27 (Entitlement to Leave and Allowances Through Illness or Injury) of this award, per calendar year, to provide care and support to a member of the employee's family or household for the abovementioned reasons.

(3) For the purposes of this clause a "member of the employee's family or household" means:

(a) a partner of the employee;

(b) a child, step child or grandchild of the employee (including an adult child, step child or grandchild);

(c) a parent, step parent, or grandparent of the employee (whether they live with the employee or not);

(d) a sibling of the employee; or

(e) any other person who, at or immediately before the relevant time for assessing the employee's eligibility to take carer's leave, lived with the employee as a member of the employee's household.

(4) An employee who claims to be entitled to carer's leave is to provide the Commissioner with evidence that would satisfy a reasonable person of the entitlement.

(5) Carer's leave is not cumulative from year to year.

## PART 6 – MEDICAL AND HOSPITAL EXPENSES

### 29. - MEDICAL AND HOSPITAL EXPENSES THROUGH ILLNESS OR INJURY RESULTING FROM DUTIES.

(1) Subject to the provisions contained within subclause (8)(b) of Clause 27 (Entitlement to Leave and Allowances Through Illness or Injury) of this award, the Commissioner shall pay the reasonable medical and hospital expenses incurred by an employee as a result of illness or injury arising out of or in the course of the employee's duties or suffered by the employee in the course of travel to or from a place of duty.

### 30. - MEDICAL AND PHARMACEUTICAL EXPENSES.

(1) Subject to the provisions contained within subclauses (8)(a) and (8)(b) of Clause 27 (Entitlement To Leave And Allowances Through Illness or Injury) of this award, an employee who receives:

(a) any consultation, treatment or other service by a medical practitioner; or

(b) any X-ray or other service not provided by a medical practitioner but provided under a referral given by a medical practitioner, may claim from the Commissioner reimbursement of the amount paid for that service, less the amount of any Medicare benefits paid or payable, and the Commissioner may pay the claim.

(2) An employee is entitled to reimbursement by the Commissioner of the cost of a medicine supplied by a pharmacist on the prescription of a medical practitioner if the medicine was at the time of issue of the prescription specified in the Pharmaceutical Benefits Scheme.

(3) An employee claiming reimbursement of expenditure shall submit with the employee's claim:

(a) in the case of expenditure of a kind referred to in subclause (1):

(i) a receipt for the amount paid;

(ii) a statement of the amount received or receivable as Medicare benefits; and

(iii) where applicable, documentary evidence that the health service not provided by a medical practitioner was provided under a referral given by a medical practitioner;

and

(b) in the case of expenditure of a kind referred to in subclause (2), a receipt for the amount paid, and the Commissioner, before approving payment, may require the employee to supply additional information as to the identity of the person treated, the amount paid or, where applicable, the prescription.

## PART 7 – RETIREMENT, REMOVAL OR DEATH OF AN EMPLOYEE

### 31. - RETIREMENT, REMOVAL OR DEATH OF AN EMPLOYEE

(1) Retirement

An employee may retire on attaining the age of 55 years.

(2) Examination by Medical Board

(a) Where the Commissioner is of the opinion that an employee is not fit for further service, the Commissioner may direct the employee to be examined by a medical board.

(b) The medical board referred to in subparagraph (a) shall consist of three legally qualified medical practitioners nominated by the person who holds or acts in the office of Commissioner of Health under the *Health Act 1911* (WA).

(c) An employee shall not fail to carry out a direction given pursuant to subparagraph (a).

(d) Subject to the Act, where the medical board referred to in subparagraph (b) reports to the Commissioner that the employee in question is unfit for further active service the Commissioner shall advise the employee of the date the employee will cease duty.

(3) Allowances Paid on Death of an Employee

Where an employee dies the partner of the employee and such of the children of the employee as are under the age of 18 years are entitled to the allowances prescribed by Clause 21 (Travelling Allowance) and Clause 20 (Transfer and Removal Allowance) of the award for the conveyance of themselves and their furniture and effects to the Metropolitan area or to any part of the State approved of by the Commissioner.

(4) Leave Entitlement to be Paid Out

On the death of an employee the Commissioner may grant to the relatives of the employee who were dependent on the employee at the date of the employee's death the monetary equivalent, computed to the date of death, of:

(a) annual leave accrued and owing to the employee;

(b) long service leave accrued and owing to the employee; and

(c) pro rata leave for each completed week of service of the employee in the current year.

## PART 8 – INTRODUCTION OF CHANGE AND DISPUTE SETTLEMENT PROCEDURE

### 32. - INTRODUCTION OF CHANGE

(1) Employer's duty to notify

(a) Where the Commissioner has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the Commissioner shall notify the employees who may be affected by the proposed changes and the Union.

(b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the Commissioner's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

(2) Commissioner's duty to discuss change

(a) The Commissioner shall discuss with the employees affected and the Union, inter alia, the introduction of the changes referred to in subclause (1) hereof, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or the Union in relation to the changes.

(b) The discussion shall commence as early as practicable after a firm decision has been made by the Commissioner to make the changes referred to in subclause (1) hereof.

(c) For the purposes of such discussion, the Commissioner shall provide to the employees concerned and the Union, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on employees and any other matters likely to affect employees provided that the Commissioner shall not be required to disclose confidential information the disclosure of which would be inimical to the Commissioner's interest.

### 33. - DISPUTE SETTLEMENT PROCEDURE

(1) Any questions, difficulties or disputes arising under this award shall be dealt with in accordance with this clause.

(2) The employee/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution, within three working days.

(3) If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager's superior and an attempt made to find a satisfactory solution, within a further three working days.

(4) If the dispute is still not resolved, it maybe referred by the employee/s or Union representative to the employer or his/her nominee.

(5) Where the dispute cannot be resolved within five working days of the Union representatives' referral of the dispute to the employer or his/her nominee, either party may refer the matter to the Western Australian Industrial Relation Commission.

(6) The period for resolving a dispute may be extended by agreement between the parties.

(7) At all stages of the procedure the employee may be accompanied by a Union representative.

## PART 9 – NAMED PARTIES

### 34. - NAMED PARTIES

The names parties to this award are The Western Australian Police Union of Workers and the Commissioner of Police.

### SCHEDULE A - TRAVELLING ALLOWANCE

| ITEM | | DAILY RATE |
|---|---|---|
| ALLOWANCE TO MEET INCIDENTAL EXPENSES | | |
| 1 | WA - South of 26 degrees South Latitude | $ 14.55 |
| 2 | WA - North of 26 degrees South Latitude | $ 21.70 |
| 3 | Interstate | $ 21.70 |
| ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT A HOTEL, MOTEL OR ROADHOUSE | | |
| 4 | WA - Metropolitan | $ 305.45 |
| 5 | Locality South of 26 degrees South Latitude | $ 208.55 |
| 6 | Locality North of 26 degrees South: Latitude: | |
| | Broome | $ 456.70 |
| | Carnarvon | $ 255.15 |
| | Dampier | $ 366.70 |
| | Derby | $ 342.20 |
| | Exmouth | $ 292.70 |

| ITEM | | DAILY RATE |
|---|---|---|
| ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT A HOTEL, MOTEL OR ROADHOUSE—*continued* | | |
| 6 | Locality North of 26 degrees South: Latitude:—*continued* | |
| | Gascoyne Junction | $ 291.70 |
| | Halls Creek | $ 247.20 |
| | Karratha | $ 445.70 |
| | Kununurra | $ 331.70 |
| | Marble Bar | $ 271.70 |
| | Newman | $ 338.95 |
| | Nullagine | $ 256.70 |
| | Onslow | $ 273.30 |
| | Pannawonica | $ 192.70 |
| | Paraburdoo | $ 259.70 |
| | Port Hedland | $ 367.15 |
| | Roebourne | $ 241.70 |
| | Shark Bay | $ 240.20 |
| | South Hedland | $ 367.15 |
| | Tom Price | $ 320.20 |
| | Turkey Creek | $ 235.70 |
| | Wickham | $ 508.70 |
| | Wyndham | $ 254.70 |
| 7 | Interstate - Capital Cities: | |
| | Sydney | $ 304.90 |
| | Melbourne | $ 288.55 |
| | Others | $ 270.10 |
| 8 | Interstate - Other than Capital Cities | $ 208.55 |
| ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL, MOTEL OR ROADHOUSE | | |
| 9 | WA - South of 26 degrees South Latitude | $ 93.65 |
| 10 | WA - North of 26 degrees South Latitude | $ 128.25 |
| 11 | Interstate | $ 128.25 |
| TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED | | |
| 12 | WA - South of 26 degrees South Latitude: | |
| | Breakfast | $ 16.30 |
| | Lunch | $ 16.30 |
| | Dinner | $ 46.50 |
| | Supper | $ 26.36 |
| 13 | WA - North of 26 degrees South Latitude: | |
| | Breakfast | $ 21.20 |
| | Lunch | $ 33.20 |
| | Dinner | $ 52.20 |
| | Supper | $ 35.53 |
| 14 | Interstate: | |
| | Breakfast | $ 21.20 |
| | Lunch | $ 33.20 |
| | Dinner | $ 52.20 |
| MIDDAY MEAL | | |
| 15 | Rate per meal | $ 6.35 |
| 16 | Maximum reimbursement per pay period | $ 31.75 |

| ITEM | | DAILY RATE |
|---|---|---|
| DEDUCTION FOR NORMAL LIVING EXPENSES | | |
| 17 | Each Adult | $ 26.25 |
| 18 | Each Child | $ 4.50 |
| ACCELERATED DEPRECIATION AND EXTRA WEAR AND TEAR ON FURNITURE AND EFFECTS | | |
| 19 | Accelerated Depreciation | $ 557.00 |
| 20 | Value of Goods | $ 3,342.00 |

SCHEDULE B - RELIEVING ALLOWANCE

(a) HOTEL/MOTEL/ROADHOUSE

| | RATE PER DAY | | ITEM |
|---|---|---|---|
| | (i) WA Metropolitan | (ii) Locality South of 26 degrees South Latitude | |
| (i) First 49 days after arrival at new locality: | $ 305.45 | $ 208.55 | 1 |
| Period of relief in excess of forty-nine days: | | | |
| (ii) Employee with dependants | $ 152.70 | $ 104.30 | 2 |
| (iii) Employee without dependants | $ 101.80 | $ 69.50 | 3 |

(iv) Locality north of 26 degrees south latitude including Shark Bay:

| | ITEM 4 | ITEM 5 | ITEM 6 |
|---|---|---|---|
| TOWN | First 49 days after arrival at new locality | Period of Relief in excess of 49 days | |
| | | Employee with dependants | Employee without dependants |
| Broome | $ 456.70 | $ 228.35 | $ 152.25 |
| Carnarvon | $ 255.15 | $ 127.55 | $ 85.05 |
| Dampier | $ 366.70 | $ 183.35 | $ 122.25 |
| Derby | $ 342.20 | $ 171.10 | $ 114.05 |
| Exmouth | $ 292.70 | $ 146.35 | $ 97.55 |
| Fitzroy Crossing | $ 370.20 | $ 185.10 | $ 123.40 |
| Gascoyne Junction | $ 291.70 | $ 145.85 | $ 97.25 |
| Halls Creek | $ 247.20 | $ 123.60 | $ 82.40 |
| Karratha | $ 445.70 | $ 222.85 | $ 148.55 |
| Kununurra | $ 331.70 | $ 165.85 | $ 110.55 |
| Marble Bar | $ 271.70 | $ 135.85 | $ 90.55 |
| Newman | $ 338.95 | $ 169.50 | $ 113.00 |
| Nullagine | $ 256.70 | $ 128.35 | $ 85.55 |
| Onslow | $ 273.30 | $ 136.65 | $ 91.10 |
| Pannawonica | $ 192.70 | $ 96.35 | $ 64.25 |
| Paraburdoo | $ 259.70 | $ 129.85 | $ 86.55 |
| Port Hedland | $ 367.15 | $ 183.55 | $ 122.40 |
| Roebourne | $ 241.70 | $ 120.85 | $ 80.55 |
| Shark Bay | $ 240.20 | $ 120.10 | $ 80.05 |
| South Hedland | $ 367.15 | $ 183.55 | $ 122.40 |
| Tom Price | $ 320.20 | $ 160.10 | $ 106.75 |
| Turkey Creek | $ 235.70 | $ 117.85 | $ 78.55 |
| Wickham | $ 508.70 | $ 254.35 | $ 169.55 |
| Wyndham | $ 254.70 | $ 127.35 | $ 84.90 |

(v) Interstate

| | ITEM 4 | ITEM 5 | ITEM 6 |
|---|---|---|---|
| Capital Cities: | | | |
| Sydney | $ 304.90 | $ 152.45 | $ 101.60 |
| Melbourne | $ 288.55 | $ 144.30 | $ 96.15 |
| Others | $ 270.10 | $ 135.05 | $ 89.95 |
| Other Than Capital Cities: | $ 208.55 | $ 104.30 | $ 69.50 |

(b) INCIDENTAL EXPENSES

| | RATE PER DAY | ITEM |
|---|---|---|
| South of 26 degrees South Latitude | $ 14.55 | 7 |
| North of 26 degrees South Latitude | $ 21.70 | |
| Interstate | $ 21.70 | |

(c) OTHER THAN HOTEL OR MOTEL

| | | |
|---|---|---|
| South of 26 degrees South Latitude | $ 93.65 | 8 |
| North of 26 degrees South Latitude | $ 128.25 | |
| Interstate | $ 128.25 | |

(d) TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED

| | RATE PER DAY | ITEM |
|---|---|---|
| South of 26 degrees South Latitude | | 9 |
| Breakfast | $16.30 | |
| Lunch | $16.30 | |
| Dinner | $46.50 | |
| North of 26 degrees South Latitude | | 10 |
| Breakfast | $21.20 | |
| Lunch | $33.20 | |
| Dinner | $52.20 | |
| Interstate | | 11 |
| Breakfast | $21.20 | |
| Lunch | $33.20 | |
| Dinner | $52.20 | |

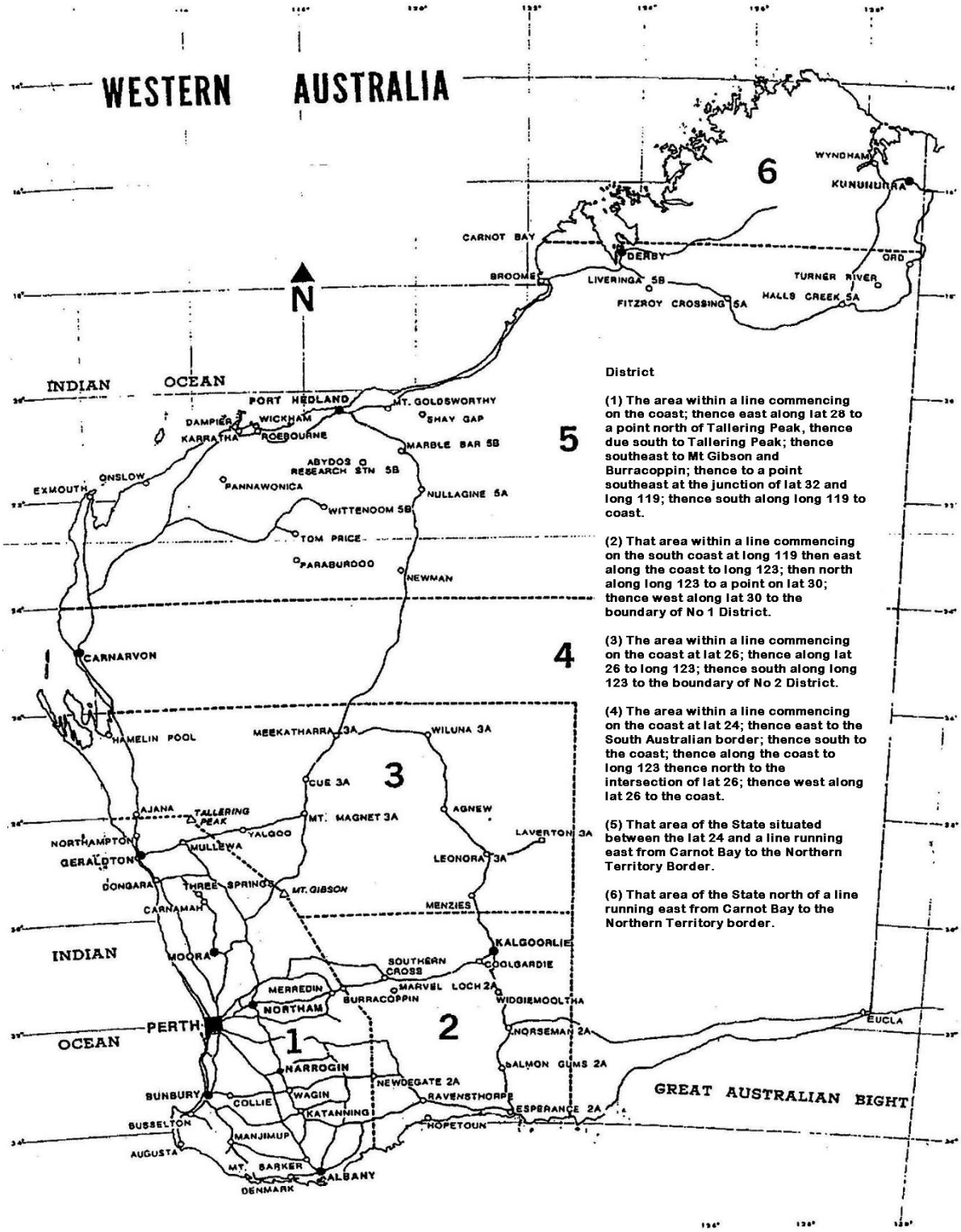
SCHEDULE C – OVERTIME MEAL ALLOWANCE

| Time | Meal | Allowance |
|---|---|---|
| 6.00am or later but before 11.00am | Breakfast | $10.30 per meal |
| 11.00am or later but before 4.00pm | Lunch | $12.65 per meal |
| 4.00pm or later but before 10.00pm | Evening Meal | $15.20 per meal |
| 10.00pm or later but before 6.00am | Supper | $10.30 per meal |

SCHEDULE D - CAMPING ALLOWANCE

| | RATE PER DAY | ITEM |
|---|---|---|
| South of 26 degrees South Latitude: | | |
| Permanent Camp - Cook provided by the Department | $56.41 | 1 |
| Permanent Camp - No Cook provided by the Department | $69.91 | 2 |
| Other Camping - Cook provided by the Department | $83.46 | 3 |
| Other Camping - No Cook provided by the Department | $96.96 | 4 |
| Camping beside or inside vehicle | $108.85 | 5 |
| North of 26 degrees South Latitude: | | |
| Permanent Camp - Cook provided by the Department | $74.36 | 1 |
| Permanent Camp - No Cook provided by the Department | $87.91 | 2 |
| Other Camping - Cook provided by the Department | $101.41 | 3 |
| Other Camping - No Cook provided by the Department | $114.96 | 4 |
| Camping beside or inside vehicle | $151.78 | 5 |

SCHEDULE E – ANNUAL LEAVE TRAVEL CONCESSION BOUNDARIES




**District**

**(1) The area within a line commencing on the coast; thence east along lat 26 to a point north of Tallering Peak, thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of lat 32 and long 119; thence south along long 119 to coast.**

**(2) That area within a line commencing on the south coast at long 119 then east along the coast to long 123; then north along long 123 to a point on lat 30; thence west along lat 30 to the boundary of No 1 District.**

**(3) The area within a line commencing on the coast at lat 26; thence along lat 26 to long 123; thence south along long 123 to the boundary of No 2 District.**

**(4) The area within a line commencing on the coast at lat 24; thence east to the South Australian border; thence south to the coast; thence along the coast to long 123 thence north to the intersection of lat 26; thence west along lat 26 to the coast.**

**(5) That area of the State situated between the lat 24 and a line running east from Carnot Bay to the Northern Territory Border.**

**(6) That area of the State north of a line running east from Carnot Bay to the Northern Territory border.**

# AGREEMENTS—Industrial—Retirement from—

**2013 WAIRC 00743**

**NOTICE**

**PRESTIGE CRANES/CFMEUW INDUSTRIAL AGREEMENT 2002-2005**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 44 of 2013

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Prestige Logistics Pty Ltd will cease to be a party to the *Prestige Cranes/CFMEUW Industrial Agreement 2002-2005, No AG 68 of 2003*, on and from the 7th day of September 2013.

DATED at Perth this 8th day of August 2013.

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

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**2013 WAIRC 00744**

**NOTICE**

**PRESTIGE LOGISTICS/CFMEUW INDUSTRIAL AGREEMENT 2002-2005**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 45 of 2013

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

Prestige Logistics Pty Ltd will cease to be a party to the *Prestige Logistics/CFMEUW Industrial Agreement 2002-2005, No AG 75 of 2004*, on and from the 7th day of September 2013.

DATED at Perth this 8th day of August 2013.

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

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**2013 WAIRC 00741**

**NOTICE**

**SISTERS OF THE HOLY FAMILY OF NAZARETH NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2012**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 41 of 2013

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Sisters of the Holy Family of Nazareth will cease to be a party to the *Sisters of the Holy Family of Nazareth Non-Teaching Staff Enterprise Bargaining Agreement, 2012, No AG 12 of 2012*, on and from the 30th day of August 2013.

DATED at Perth this 1st day of August 2013.

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

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**2013 WAIRC 00742**

**NOTICE**

**SISTERS OF THE HOLY FAMILY OF NAZARETH TEACHERS ENTERPRISE BARGAINING AGREEMENT 2012**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 42 of 2013

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Sisters of the Holy Family of Nazareth will cease to be a party to the *Sisters of the Holy Family of Nazareth Teachers Enterprise Bargaining Agreement 2012, No AG 46 of 2012*, on and from the 30th day of August 2013.

DATED at Perth this 1st day of August 2013.

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

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**2013 WAIRC 00746**

**NOTICE**

**WESTERN AUSTRALIA POLICE SERVICE OPERATION TAMAR ALLOWANCE AGREEMENT 2004**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 39 of 2013

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Commissioner of Police will cease to be a party to the Western Australia Police Service Operation Tamar Allowance Agreement 2004, No PSAAG 23 of 2004, on and from the 19th day of August 2013.

DATED at Perth this 28th day of July 2013.

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

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**2013 WAIRC 00745**

**NOTICE**

**WESTERN AUSTRALIA POLICE TRAFFIC ESCORT WARDENS INDUSTRIAL AGREEMENT 2007**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 38 of 2013

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Commissioner of Police will cease to be a party to the Western Australia Police Traffic Escort Wardens Industrial Agreement 2007, No AG 6 of 2008, on and from the 19th day of August 2013.

DATED at Perth this 28th day of July 2013.

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

# CANCELLATION OF—Awards/Agreements/Respondents—

**2013 WAIRC 00712**

**THE ABORIGINAL POLICE AIDES AWARD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | COMMISSION'S OWN MOTION |
| | **APPLICANT** |
| | **-v-** |
| | (NOT APPLICABLE) |
| | **RESPONDENT** |
| **CORAM** | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | MONDAY, 12 AUGUST 2013 |
| **FILE NO/S** | APPL 78 OF 2007 |
| **CITATION NO.** | 2013 WAIRC 00712 |

**Result** Award cancelled

*Order*

WHEREAS this is an application made on the Commission's own motion pursuant to Section 47 of the *Industrial Relations Act 1979* to cancel the Aboriginal Police Aides Award; and

WHEREAS on the 10th day of May 2013 the Commission directed the Registrar to make such enquiries as necessary as to whether there are any employees to whom the Award applies; and

WHEREAS the Commission was advised by the parties that it was their intention to seek to amend the scope of The Police Award 1965 to include those officers covered by The Aboriginal Police Aides Award and that upon this occurring, there would be no employees covered by the latter award; and

WHEREAS by general notice published in the Western Australian Industrial Gazette on the 26th day of June 2013 (2013) 93 WAIG 547 the Registrar gave general notice of the intention of the Commission to make an order to cancel the Award; and

WHEREAS on the 12th day of June 2013 the Registrar wrote to the parties to the Award serving them with copies of the notice; and

WHEREAS no objections have been received by the Commission in response to the general notice; and

WHEREAS on 9th day of August 2013 the Commission issued an order amending The Police Award 1965 to increase its scope by the inclusion of the Aboriginal Police Aides; and

WHEREAS therefore the Commission is of the opinion that there is no employee to whom the Award applies;

NOW THEREFORE, pursuant to the powers under s 47 of the *Industrial Relations Act 1979*, the Commission hereby orders:

THAT the The Aboriginal Police Aides Award be, and is hereby cancelled.

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

# UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

**2013 WAIRC 00066**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | VICTOR MANUEL AMAYA |
| | **APPLICANT** |
| | **-v-** |
| | CARINE HIGH SCHOOL |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | TUESDAY, 5 FEBRUARY 2013 |
| **FILE NO/S** | U 243 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00066 |

| | |
|---|---|
| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr V Amaya |
| **Respondent** | Ms S Bhar |

*Order*

WHEREAS on 30 November 2012 the applicant made application to the Commission under s 29(1)(b)(i) of the Industrial Relations Act 1979 alleging that on or about 11 November 2012 the applicant was harshly, oppressively and unfairly dismissed by the respondent;

AND WHEREAS by notice of application filed on 31 January 2013 the respondent filed an application under reg 36 of the Industrial Relations Commission Regulations 2005 seeking an order that the time for the respondent to file a notice of answer in the application be extended to 15 February 2013;

AND WHEREAS having considered the grounds in support of the application for an extension of time for filing an answer the Commission is satisfied that an order should be made;

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

THAT the time for the filing of a notice of answer by the respondent be and is hereby extended to 15 February 2013.

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

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**2013 WAIRC 00127**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | VICTOR MANUEL AMAYA |
| | **APPLICANT** |
| | **-v-** |
| | CARINE HIGH SCHOOL |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | THURSDAY, 7 MARCH 2013 |
| **FILE NO/S** | U 243 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00127 |

| | |
|---|---|
| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr A Quispe as agent |
| **Respondent** | Ms R Hartley of counsel |

*Order*

HAVING HEARD Mr A Quispe as agent on behalf of the applicant and Ms R Hartley of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the notice of application be amended to delete the named respondent "Carine High School" and insert in lieu thereof "Director General, Department of Education".

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

**2013 WAIRC 00412**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00412 |
| **CORAM** | **:** | COMMISSIONER S J KENNER |
| **HEARD** | **:** | THURSDAY, 7 MARCH 2013, WEDNESDAY, 15 MAY 2013 |
| **DELIVERED** | **:** | WEDNESDAY, 10 JULY 2013 |
| **FILE NO.** | **:** | U 243 OF 2012 |
| **BETWEEN** | **:** | VICTOR MANUEL AMAYA |
| | | Applicant |
| | | AND |
| | | DIRECTOR GENERAL, DEPARTMENT OF EDUCATION |
| | | Respondent |

| | | |
|---|---|---|
| Catchwords | **:** | Industrial law – unfair dismissal application – applicant seeking reinstatement – allegations of indecent assault – applicant subject to disciplinary investigation which resulted in findings of misconduct – whether the conduct occurred on the balance of probabilities – application of the *Briginshaw* standard – credibility of witness testimony – application dismissed |
| Legislation | **:** | Industrial Relations Act 1979 (WA); School Education Act 1999 (WA) s 240 |
| Result | **:** | Application dismissed |
| **Representation:** | | |
| Counsel: | | |
| Applicant | **:** | In person |
| Respondent | **:** | Ms R Hartley of counsel and with her Ms A Plummer |

**Case(s) referred to in reasons:**

*Briginshaw v Briginshaw* (1938) 60 CLR 336

*Reasons for Decision*

1 Mr Amaya was employed by the Department as a cleaner at the Carine Senior High School. He commenced employment in April 2008 and his employment was terminated by the Department in November 2012. The Department dismissed Mr Amaya for inappropriate conduct towards another employee in the workplace. Mr Amaya now complains that his dismissal was unfair. He seeks reinstatement. This is opposed by the Department.

2 The conduct in question occurred on 30 April and 1 May 2012 at the school. A co-worker of Mr Amaya, Ms Paul, complained to the school Principal that Mr Amaya had indecently assaulted her. It was contended by Ms Paul that on 30 April Mr Amaya made deliberate contact with Ms Paul's left breast by tracing the outline of a dolphin logo on Ms Paul's work uniform. On 1 May, Ms Paul complained that two incidents occurred. The first was at the start of her shift and occurred in the cleaners' storeroom. Ms Paul contended that Mr Amaya, whilst they were both in the storeroom, pushed the storeroom door almost closed and moved towards Ms Paul, with one hand outstretched directed towards her breast and the other hand outstretched and directed towards her vagina. Ms Paul had to turn away to avoid physical contact. The second incident on 1 May, involved Mr Amaya approaching Ms Paul from behind as she was sitting on a bench outside J Block, prior to starting her shift. Mr Amaya is said to have placed his hands on each side of Ms Paul's waist and squeezed her.

3 All such contact and attempts were said by Ms Paul to be unwelcome and were shocking to her.

4 As a result of the complaints, Mr Amaya was subject to a disciplinary investigation by the Department. Also, Mr Amaya was subject to an order under s 240 of the School Education Act 1999, barring him from the school premises, pending the outcome of the investigation. The investigation concluded that the misconduct had occurred. Mr Amaya was dismissed effective 8 November 2012. A complaint to the Western Australian Police in relation to Ms Paul's allegations was not proceeded with.

5 The issue in this case is whether, on the evidence, the conduct occurred. If it is established on the balance of probabilities that it did occur, there can be no question in my view, that the appropriate response of the employer would be dismissal.

**Allegation 1 - 30 April 2012**

6 The allegation against Mr Amaya was that on this day, he engaged in inappropriate conduct towards Ms Paul. It was said that Mr Amaya traced his finger around a dolphin logo on Ms Paul's work t-shirt. The logo is on the upper left side of the shirt. In doing so, Mr Amaya is alleged to have made contact with Ms Paul's left breast. At the time this was done, Mr Amaya also was alleged to have said to Ms Paul words to the effect "you have lovely dolphins on your t-shirt".

7 Ms Paul testified that she has been a cleaner at the school for about two years. Cleaners work a split shift. As set out in the Investigation Report, tendered as exhibit R5, the first portion of the shift is worked between 4am and 8am and the second portion is worked between 2pm and 6pm.

8 On Monday 30 April 2012, Ms Paul said she was sitting down and talking with other cleaners, including Mr Amaya. Mr Amaya was standing next to her, close to where she was seated. Ms Paul testified that Mr Amaya bent over her and with his right hand, touched the dolphin monogram on her work t-shirt. In doing so, Ms Paul said that Mr Amaya traced his finger around her left breast and made contact with her breast as he did so. Whilst doing this, Mr Amaya said words to the effect "I love your dolphins". In terms of how these words were spoken, Ms Paul testified that Mr Amaya emphasised the word "love" as he spoke. Ms Paul said she was not comfortable at all and was in shock. She said it was "a turn off it was not acceptable": 16T.

9 Mr Amaya gave evidence. He flatly denied that he had any such contact with Ms Paul as alleged or at all on this day. This was also his response to the investigators as contained in the Investigation Report.

**Allegation 2 - 1 May 2012**

10 On Tuesday 1 May 2012, Ms Paul went to the cleaners' storeroom to sign on for the afternoon shift as usual. The room, a photo of which was an annexure to exhibit R5, is rectangular in shape and approximately four metres long and two metres wide. It contains cleaning equipment with shelving on one side. A cork board with notices and a clock are on the far wall. A small ledge appears to be just below the cork board, where presumably, the employees sign on for their shift. From the photo, the room appears to be quite cramped inside.

11 Ms Paul testified that as she entered the room to sign on for duty, she saw Mr Amaya also inside the room. The door to the room was wide open at this point. As she moved into the storeroom, Ms Paul testified that Mr Amaya moved towards the door and pushed it shut, although it had not closed completely. At the same time, Ms Paul said she was turning to go out of the room and Mr Amaya was coming towards her. She testified that he was moving swiftly. Ms Paul said that Mr Amaya had his left hand poised to make contact with her breast and his right hand was directed towards her vagina. At this point Ms Paul said she had to quickly move her body to avoid Mr Amaya's contacting her. Ms Paul's evidence was that had she not done so, Mr Amaya would have definitely made contact with her breast and vagina. She said that she told Mr Amaya to "bugger off" and then left the storeroom.

12 After leaving the storeroom, Ms Paul said that she felt upset and shaken. At the end of her shift, Ms Paul said that the cleaners have to go the bin area where they empty their small rubbish bins into the larger bins. When she went to this area, she noticed that Mr Amaya was there. Ms Paul testified that Mr Amaya seemed to be waiting to say something to her. According to Ms Paul, Mr Amaya said words to the effect "sorry Rose". She took this as clearly referring to the incident in the storeroom that had occurred at the start of the shift. Ms Paul testified that in response she said to Mr Amaya "no no" and walked away. Mr Amaya gave evidence that both he and Ms Paul were in the storeroom at the start of shift. He said that Ms Paul was going into the room as he was leaving it. According to Mr Amaya, Ms Paul said words to the effect "look at my tummy I ate too much chips for lunch". Mr Amaya testified that in response to this, he patted Ms Paul on the stomach as he was leaving the room. He denied that he attempted to make any other contact with Ms Paul's body.

13 When Mr Amaya was under cross-examination, it was put to him that this was not what he had told the investigators in the course of the investigation. In the Investigation Report at p 14, Mr Amaya is recorded as having told the investigators that in the storeroom Ms Paul said to him words to the effect "she told me, 'look at my stomach I am full, I ate a lot of potatoes. Touch me so that you can see how bloated it is". Mr Amaya confirmed in cross-examination that this is what he said to the investigators. Mr Amaya was also taken to his initial response to the allegations in his letter of 14 May 2012, which was exhibit R1. In responding to the allegation about the storeroom incident, Mr Amaya repeated what he had said in his cross-examination initially, that Ms Paul had said "Look at my tummy, I ate too much chips for lunch". When it was put to him that there was no reference to Ms Paul asking Mr Amaya to touch her stomach to see how bloated it was, as he told the investigators, he said that he had forgotten to mention this. In her testimony, Ms Paul denied that she ever asked Mr Amaya at any time, to make contact with her stomach.

14 Further, when Mr Amaya was reminded of his statements to the investigators that from time to time he and would, in a friendly manner, put his arms over Ms Paul's shoulders or link arms to go off to work, Mr Amaya was unable to explain why he felt the need to apologise to Ms Paul straight after touching her stomach.

**Allegation 3 - 1 May 2012**

15 Later, on the same day as the storeroom incident, Ms Paul testified that she was sitting on the bench seats waiting to start work. She was talking to another cleaner, Ms Belloso. Ms Belloso was sitting on the bench opposite Ms Paul. According to Ms Paul, she heard a voice which she knew to be Mr Amaya's, saying words to the effect "where is Elaine". "Elaine" is Ms Reid, another cleaner, who was absent from work that afternoon. Ms Paul said she was leaning against a pillar, which was slightly narrower than her body width.

16 According to Ms Paul, Mr Amaya came from behind her and placed his hands on her waist and squeezed as he said "where is Elaine". Ms Paul said at the time Ms Belloso had turned towards her and had witnessed Mr Amaya's actions.

17 Ms Belloso gave evidence and confirmed that she was sitting on the benches outside J Block on the day in question. She said she was talking to Ms Paul before starting work. They were sitting about three to five metres apart. Ms Belloso testified that she saw Mr Amaya come up behind Ms Paul. He was making noises as if to scare her. Ms Belloso testified that he put his hands around her waist and said "where is Elaine?" According to Ms Belloso, Ms Paul looked "really nervous and uncomfortable": 46T. Ms Belloso also said that Ms Paul had told her about the other two incidents, with the dolphin logo and in the storeroom.

18 Evidence was also given by Ms Reid. When she got back to work on Wednesday 2 May after being away the day prior, Ms Paul said she wanted to speak to her. Ms Paul told Ms Reid about the incident when Mr Amaya squeezed her waist and also the other two incidents. According to Ms Reid, who has known Ms Paul for about eleven years, Ms Paul was angry and felt violated by what had happened. Ms Reid described Ms Paul as generally a relaxed person, but on the morning in question when she told her about these incidents, she did not seem the same.

19 As with the dolphin logo incident, Mr Amaya denied he had touched Ms Paul by putting his hands around her waist, or indeed had touched her at all on that day.

20 Evidence was also given by Mrs Amaya. She is the cleaner in charge at the school. Mrs Amaya said that when she became the head cleaner, the other cleaners, including Ms Paul, Ms Reid and Ms Belloso, "got it with me", because she stopped them leaving work early and made them do a proper job: 52T. In the context of Mrs Amaya's evidence, she was suggesting that the other cleaners were making up the allegations against her husband for this reason.

**Consideration**

21 The determination of the issues arising in this case, turn upon whether I accept the version of events as outlined by Mr Amaya, or those as outlined by Ms Paul. This involves findings of fact based on the evidence. Given the nature and seriousness of the allegations, I apply the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336. In *Briginshaw*, the High Court concluded that in civil cases, where findings of fact may indicate the commission of a crime or fraud, or the exposure to a civil penalty might result, a more rigorous application of the "on the balance of probabilities" test is to be applied. As was said by Dixon J at 361-362:

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

22 Having carefully considered all of the evidence, and having observed the witnesses give their evidence, without hesitation, I prefer the testimony of Ms Paul. I did not find Mr Amaya to be a credible witness. His evidence was at odds with independent evidence from Ms Belloso, in relation to the third incident involving the squeezing of Ms Paul's waist. Ms Belloso was an eye witness. Her evidence was essentially unchallenged. Furthermore, Mr Amaya's testimony was inconsistent with his own responses to the investigators in relation to the store room incident. I was not satisfied with Mr Amaya's explanation for this inconsistency, given its importance.

23 Also, Mr Amaya's version of events was replete with contradictions. For example, Mr Amaya said that both he and Ms Paul often engaged in friendly contact with him taking her arm or putting his arms on her shoulders at work, without any objection from Ms Paul. However, in contrast, in his evidence he said he felt the need to apologise to Ms Paul in the storeroom, after touching her stomach. Mr Amaya said this was because Ms Paul was "very delicate" and "she didn't like anybody touching her":11T. This was completely at odds with what Mr Amaya said about his and Ms Paul's friendly physical contact, from time to time.

24 By way of contrast, Ms Paul's evidence was generally consistent with her statements to the investigators. It was also consistent with her early reports of the incidents to her co-employees, Ms Reid and Ms Belloso. I found Ms Paul to be a credible and reliable witness. Her narration of the relevant events was largely unwavering.

**Conclusion**

25 Therefore, on all of the evidence, I am satisfied to the *Briginshaw* standard, that the allegations against Mr Amaya have been established. I have no hesitation in concluding that Mr Amaya's contact with Ms Paul was unwelcome, inappropriate, and in breach of the Department's relevant policies and codes of conduct.

26 I am not to any extent persuaded that the allegations made, were some form of "setup" of Mr Amaya as was alleged. There was no independent evidence to support such an assertion.

27 For these reasons, the application is dismissed.

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**2013 WAIRC 00413**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | VICTOR MANUEL AMAYA |
| | **APPLICANT** |
| | **-v-** |
| | DIRECTOR GENERAL, DEPARTMENT OF EDUCATION |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | WEDNESDAY, 10 JULY 2013 |
| **FILE NO/S** | U 243 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00413 |

| | |
|---|---|
| **Result** | Application dismissed |
| **Representation** | |
| **Applicant** | In person |
| **Respondent** | Ms R Hartley of counsel and with her Ms A Plummer |

*Order*

HAVING heard the applicant on his own behalf and Ms R Hartley of counsel and with her Ms A Plummer 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 00576**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00576 |
| **CORAM** | **:** | ACTING SENIOR COMMISSIONER P E SCOTT |
| **HEARD** | **:** | WEDNESDAY, 24 JULY 2013 |
| **DELIVERED** | **:** | FRIDAY, 2 AUGUST 2013 |
| **FILE NO.** | **:** | U 92 OF 2013 |
| **BETWEEN** | **:** | DAMIEN BRIDGE |
| | | Applicant |
| | | AND |
| | | JOHN ASHPLANT |
| | | Respondent |

| | | |
|---|---|---|
| CatchWords | **:** | Industrial law (WA) – Termination of employment – Claim of harsh, oppressive or unfair dismissal – Application referred outside of 28 day time limit – Application for extension of time dismissed |
| Legislation | **:** | *Industrial Relations Act* s 29(3) |
| Result | **:** | Application for extension of time dismissed |
| **Representation:** | | |
| Counsel: | | |
| Applicant | **:** | In person |
| Respondent | **:** | Mr M Ross, as agent |

**Case(s) referred to in reasons:**

*Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298

*Malik V Paul Albert, Director General, Department of Education of Western Australia* [2004] WSCA 51; (2004) 84 WAIG 683

*Miles & Ors t/as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch;* (1985) 65 WAIG 385

*Reasons for Decision*

1 The applicant claims that he was harshly, oppressively or unfairly dismissed by the respondent on 10 February 2013. The applicant had filed a previous application, U 27 of 2013, (the first application) on 25 February 2013. That application was filed within the 28 days allowed under the *Industrial Relations Act 1979* (the Act).

2 On 10 May 2013 the Commission issued an order dismissing that application for want of prosecution. The circumstances are that, having indicated his availability to attend a conciliation conference on 2 May 2013, and having confirmed his intention to attend in an email dated 15 April 2013, the applicant did not attend the conference nor did he contact the Commission to explain his failure to attend or to pursue the application.

3 On 12 June 2013, the applicant lodged with the Registrar a further application in the same terms as his previous application. This application is 13 weeks out of time.

4 Along with the Notice of Application, Mr Bridge provided to the Commission a letter which said (formal parts omitted):

> "My name is Damien Bridge And (sic) I need to re-submit an unfair dismissal claim due to the fact that I have been in jail in N.S.W for the past six weeks and as a result of my incarceration I missed a hearing approximately six weeks ago, case U/27 2013. Please accept my apologies and my submittal."

5 This letter was not provided to the respondent when the applicant served the Notice of Application.

6 The Commission convened on Wednesday, 24 July 2013 to hear the application for the substantive application to be received out of time. The parties agreed that the Commission ought to have recourse to the file in the first application as part of its considerations.

7 The applicant was employed by the respondent as a deckhand on a vessel owned by the respondent undertaking rock lobster fishing. This work was performed under the contract of employment between the parties commencing on 30 January 2013 whereby the applicant was employed "to work during the rock lobster season" (Exhibit 2). The contract did not have an expiry date but noted that the hours of work included "You agree to arrive punctually at the nominated port …" and that the contract may be terminated by either party giving one week's notice to the other party. There is also a provision, which is incomplete, which appears to include that the respondent "may terminate your employment without notice for serious misconduct or for breach of any of the terms of this agreement."

8 The applicant says that he worked as a lone deck hand with a Mr Boys, the skipper of the vessel. On Saturday, 9 February 2013, he left his mobile phone on the boat. He normally used the phone as an alarm clock. He had soccer training that evening and says that he was very tired and overslept. He did not attend for work on Sunday, 10 February 2013. He says that he called Mr Boys that night and was told that he was fired.

9 The respondent says the skipper was unable to contact the applicant. The boat could not go out to work that day at all due to the applicant's absence and therefore no income was earned by the skipper or the respondent that day. The respondent did not file a Notice of answer and counter proposal in this application. However, in the Notice of answer and counter proposal filed in the first application, he said that the "[s]kipper advised Damien on Sun evening to be at work for maintenance on ropes Monday morning. Damien did not arrive to work and no contact received by skipper." The respondent says that this is the information he has from Mr Boys. The applicant denies this and says that he was actually told on the Sunday night that he was fired.

10 The applicant says that for the last 10 years, he has worked for this skipper for approximately six months of each year during the season. He needs job security and wants to make this his career.

11 The respondent says that his records do not indicate that he has in fact employed the applicant on his vessel for the last 10 years. On the contrary, he says that in the financial years ending 30 June 2008 he did not employ the applicant; his complete 2009 records were not available to him on the day of the hearing; in the 2010 financial year, the applicant was employed and was paid approximately $50,000; in the 2011 financial year, he was paid approximately $16,000; in the 2012 financial year, he was not recorded as having been employed by the respondent. The respondent says the applicant may have been in an employment relationship with the skipper or with some other boat which the skipper was employed on during the times when the respondent's records do not show him as being an employee of the respondent.

**Consideration**

12 According to s 29(3) of the Act, the Commission may accept a referral of a claim of unfair dismissal "that is out of time if [it] considers that it would be unfair not to do so."

13 The tests to be applied as to whether the Commission ought to receive an application out of time are those set out in Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WSCA 51; (2004) 84 WAIG 683. In that decision, both Pullin J and Heenan J accepted the principles enunciated by Marshall J in Brodie-Hanns v MTV Publishing Ltd; (1995) 67 IR 298, as follows:

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

**Explanation for the delay**

14 As noted above, this application is filed 13 weeks out of time, in circumstances where 28 days is the prescribed time.

15 The applicant's explanation for failing to attend the proceedings in his previous application which led to it being dismissed for want of prosecution is that he was incarcerated in New South Wales. At the hearing on 24 July 2013, he produced a CORRECTIVE SERVICES NSW – DISCHARGE CERTIFICATE (Exhibit 1) which indicates that Bridge D was detained in custody from 23 April 2013 to 3 June 2013. This covered the time of the conference in the first application. He filed the second application on 12 June 2013, just over one week after he was released from custody. He says in his submissions to the Commission that he attempted to contact the Commission to advise of his being in custody through Prisoners' Aid and Welfare but they did not assist him. He says that he had no other means of communication with the Commission except through

personal contacts with family and friends. However, he has no contact with family and was in NSW alone. Therefore, the applicant says that he had no capacity to contact the Commission to advise that he was incarcerated. I find this surprising, firstly, that Prisoners' Aid and Welfare did not assist. Even if their assistance was sought but was not forthcoming, it seems unusual that the applicant would have had no capacity to write a letter to the Commission and have it posted from within the prison during the six weeks that he was incarcerated. Therefore, the explanation for the delay being that he was incarcerated, but more importantly that he did not have the capacity to contact the Commission, is not plausible and is not in favour of the extension of time being granted.

**Action taken to contest the dismissal**

16 The applicant says that he made no efforts to try to get his job back except by the applications he has made to the Commission. As noted earlier, his first application was within time. However, with the application having been dismissed on 10 May 2013, the respondent received no further indication that he was challenging the dismissal until he served the Notice of Application for U 92 of 2013 on the respondent on 10 June 2013 by mail. Therefore, the respondent would have been unaware of the applicant's intention to pursue the application from the time he failed to attend the conference on the 2 May 2013 until a few days after the 10 June 2013, nearly six weeks later. The respondent would have been entitled to believe that the matter was concluded.

**Prejudice to the respondent**

17 The respondent does not rely on any particular prejudice other that the normal expenditure and time in defending a claim of unfair dismissal. There is no suggestion that other witnesses dealing with the employment and the dismissal are unavailable.

**Merits of the application**

18 There are two aspects of the merits of the application which concern me. Firstly, according to the applicant he was dismissed for failure to attend for work on one occasion. Whether or not this is so is not possible to decide as the respondent was not in a position to, or prepared to, bring evidence of the particulars of the dismissal, as it appears the respondent was unaware that he could do so at this stage. In any event, any consideration of the merits of an application in these circumstances is only to be on a 'rough and ready' basis.

19 I accept that in this industry, the failure to attend affects more than simply the applicant performing his work, but also affects the capacity of the vessel to be utilised and means that others cannot earn income. The contract which the applicant signed makes note of the requirement to arrive punctually at the nominated port and that the respondent may terminate his employment without notice for serious misconduct or for breach of any of the terms of the agreement. In a claim of unfair dismissal, the Commission is not so much concerned with the lawfulness of the dismissal but with whether or not the respondent has exercised its lawful right to dismiss unfairly (Miles & Ors t/as The Undercliffe Nursing Home v the Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch (1985) 65 WAIG 385).

20 There is conflict also between what the applicant says about being told on the Sunday evening that he was dismissed and what the respondent says, that he was told to attend the next day for other work and that he failed to do so. In circumstances it might be said that the applicant has demonstrated that there is a case to be argued.

**Conclusions**

21 An applicant has an obligation to pursue his or her claim. In this case, the applicant has failed to notify the Commission of his unavailability to pursue his previous claim for reasons which I find difficult to accept.

22 The respondent was entitled to believe the matter was closed.

23 The application is out of time by an inordinate period in the context of the time allowed for such a claim to be referred to the Commission. The merits of the application, assessed in a rough and ready manner indicate that there is a case to be answered, yet the applicant has already had an opportunity to pursue that case but failed to take advantage of that opportunity. Even though he was incarcerated, and even if Prisoners' Aid and Welfare did not assist him, the applicant has not suggested that it was beyond his capacity or entitlement to write to the Commission about his inability to attend the conference in his previous application. The applicant struck me as a reasonably intelligent and competent person.

24 In all of the circumstances, I find that it would not be unfair to refuse the application to extend time in which to file the application. Should the applicant be keen to pursue a career in this industry, which is a seasonal one, he could pursue that by seeking a new contract for the next season.

25 An order will issue dismissing the application that the application be received out of time.

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**2013 WAIRC 00578**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | DAMIEN BRIDGE |
| | **APPLICANT** |
| | **-v-** |
| | JOHN ASHPLANT |
| | **RESPONDENT** |
| **CORAM** | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | FRIDAY, 2 AUGUST 2013 |
| **FILE NO/S** | U 92 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00578 |

| | |
|---|---|
| **Result** | Application that the application be received out of time dismissed |
| **Representation** | |
| **Applicant** | In person |
| **Respondent** | Mr M Ross, as agent |

*Order*

HAVING heard the applicant and Mr M Ross as agent on behalf of the respondent, the Commission, pursuant to the powers conferred 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.

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**2013 WAIRC 00572**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | COLLEEN CAMPBELL |
| | **APPLICANT** |
| | **-v-** |
| | STEFAN KOLM |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | THURSDAY, 1 AUGUST 2013 |
| **FILE NO/S** | B 20 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00572 |

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|---|---|
| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | Ms C Campbell |
| **Respondent** | Mrs S Kolm |

*Order*

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

AND WHEREAS on 14 May 2013 a conference between the parties was convened;

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

AND WHEREAS on 29 July 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

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**2013 WAIRC 00571**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | COLLEEN CAMPBELL |
| | **APPLICANT** |
| | **-v-** |
| | STEFAN KOLM |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | THURSDAY, 1 AUGUST 2013 |
| **FILE NO/S** | U 20 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00571 |

| | |
|---|---|
| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | Ms C Campbell |
| **Respondent** | Mrs S Kolm |

*Order*

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

AND WHEREAS on 14 May 2013 a conference between the parties was convened;

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

AND WHEREAS on 29 July 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

**2013 WAIRC 00713**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | MR JEROME CRITCH |
| | **APPLICANT** |
| | **-v-** |
| | TEN TIGERS PTY LTD ATF THE CJ & KA TONKIN TRUST T/AS TEN TIGERS CONSULTING |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | MONDAY, 12 AUGUST 2013 |
| **FILE NO/S** | U 107 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00713 |

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| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | No appearance |
| **Respondent** | No appearance |

*Order*

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

AND WHEREAS on 7 August 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

**2013 WAIRC 00271**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | JANELLE DRAPER |
| | **APPLICANT** |
| | **-v-** |
| | CITY OF ROCKINGHAM |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | WEDNESDAY, 8 MAY 2013 |
| **FILE NO.** | B 14 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00271 |

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|---|---|
| **Result** | Direction issued |
| **Representation** | |
| **Applicant** | Mr K Trainer (as agent) |
| **Respondent** | Mr B Taylor (as agent) |

*Direction*

WHEREAS on 17 April 2013 the Commission issued a directions order;

AND WHEREAS the Commission received a request from the applicant on 6 May 2013 under the liberty to apply clause for a further order;

AND WHEREAS the respondent consents to the further order;

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

1. The respondent provide formal discovery to the applicant of all documents relevant to the Bonus including the reports to Council and its committees by close of business on 10 May 2013;
2. The applicant's particulars as filed be withdrawn without prejudice to the applicant;
3. The applicant file and serve further and better particulars by close of business on 17 May 2013;
4. The respondent file and serve its response to the further and better particulars by close of business on 31 May 2013;
5. Each party file and serve a list of witnesses by close of business 7 June 2013;
6. The hearing dates of 15 May, 16 May and 17 May 2013 be vacated; and
7. There be liberty to apply for either party at short notice.

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

**2013 WAIRC 00436**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00436 |
| **CORAM** | **:** | COMMISSIONER S M MAYMAN |
| **HEARD** | **:** | MONDAY, 17 JUNE 2013 |
| **DELIVERED** | **:** | WEDNESDAY, 24 JULY 2013 |
| **FILE NO.** | **:** | B 14 OF 2013 |
| **BETWEEN** | **:** | MRS JANELLE DRAPER |
| | | Applicant |
| | | AND |
| | | CITY OF ROCKINGHAM |
| | | Respondent |
| CatchWords | **:** | Contractual benefits claim - entitlements under contract of employment – application successful – claim for costs *Industrial Relations Act 1979* (WA) |
| Legislation | **:** | *Industrial Relations Act 1979* (WA) s 26 and s 29(1)(b)(ii) |
| Result | **:** | Order issued |
| **Representation:** | | |
| Applicant | **:** | Mr K Trainer (as agent) |
| Respondent | **:** | Mr B Taylor (as agent) |

**Case(s) referred to in reasons:**

Belo Fisheries v Froggett (1983) 63 WAIG 2394

Heilbut Symons and Co v Buckleton (1913) AC 30

Hoyts Pty Ltd v Spencer (1919) 27 CLR 133

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Waroona Contracting v Usher (1984) 64 WAIG 1500

*Reasons for Decision*

1 This is an application filed pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (the Act) in which Mrs Janelle Draper (the applicant) alleges that on or about December 2012 she was denied a contractual benefit, namely a recycling bonus (the bonus) which the respondent commenced payment in 2008 to Mrs Draper.

2 Mrs Draper was first employed by the City of Rockingham (the respondent) on 1 February 2008. The respondent opposes the applicant's claims and submits Mrs Draper was mistakenly paid the bonus in 2008, 2009, 2010 and 2011 and that neither Mrs Draper's contract of employment nor her enterprise agreements (*City of Rockingham Enterprise Agreement 2005* and subsequently the *City of Rockingham Enterprise Agreement 2012*) oblige the respondent to pay the bonus. On a review in 2012 the respondent became aware the payment of the bonus to Mrs Draper had been an error, did not pay the bonus that year to Mrs Draper and, as a gesture of goodwill, elected not to recover the overpayments from the previous years.

**Applicant's Particulars of Claim**

3 Mrs Draper is a full-time permanent employee of the respondent engaged to carry out duties as a weighbridge administration officer at the Millar Road landfill site (the site). Mrs Draper is not eligible to be a member of the union known as the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth (the LGRCEU). At the time the applicant was first employed she was covered by the *City of Rockingham Enterprise Agreement 2005*.

4 The applicant's duties were performed exclusively at the site. The operation of the weighbridge and all associated administrative functions are integral to the operation of the site. As required (for example during lunch hours) on a regular basis, the applicant relieves the weighbridge operator, a position within the industrial coverage of the LGRCEU.

5 When Mrs Draper was employed a contract of employment was executed. At this stage there was no bonus system in operation on the site. On or about 2007, the then respondent's chief executive officer (the CEO) authorised discussions with a view to establishing a bonus payment at the site. In 2006 the respondent had resumed operation of the site in its own right rather than operate through a contractor. As part of that process the respondent had approved the establishment of a bonus scheme. The proposal approved by the council did not exclude any class of permanent employee from the bonus proposal.

6 The introduction of the bonus was undertaken by way of consultation and was conducted on behalf of the respondent by one of council's directors Mr Thompson and the site manager, Mr Rose. Once the deliberations were concluded the terms for entitlement were approved by Mr Thompson who was authorised by the respondent to deal with the matter. At all times the discussions were based on a whole of site approach and no permanent employee was excluded from the principle of entitlement. This approach was expressly referred to by Mr Thompson and conveyed to those working at the site.

7 The bonus was offered to and accepted by Mrs Draper and others working at the site involved in the operation of the site. At the time the bonus was offered to employees the respondent advised all persons at the site about the payment of the bonus:

> that the bonus was to be paid to all those persons who worked on the site except for casual employees and those who had not met a minimum period of service;
>
> furthermore, the bonus was not subject to a condition that to receive the bonus the employee must be eligible for membership of the union referred to as the LGRCEU; and
>
> neither of the aforementioned exceptions applied to Mrs Draper.

8 Bonus payments were made without requiring written amendments to the contract of employment. At the time the bonus payment was negotiated the bonus was not reflected in any form or any written amendment to a contract of employment or industrial instrument for any eligible employee. The result was that the parties had entered into a written collateral contract or, on the other hand, the parties had agreed to a modification to individual contracts of employment proposing to bind them and to continue in force for the years to follow.

9 In respect of at least five employees at the site including Mrs Draper the bonus was not included in a registered industrial instrument but continued to operate as an entitlement arising from the agreement that had been reached in 2008.

10 Nevertheless, the bonus has been reflected in an industrial instrument applying to employees eligible for membership of the LGRCEU and the respondent continued to make bonus payments to the applicant on the same footing as those persons eligible to be members of the LGRCEU.

11 The procedure for the respondent to make the bonus payments was such that each year it formally approved the bonus payment to the applicant. In 2008, 2009, 2010 and 2011 approved officers signed off on the payment being made to Mrs Draper.

12 In 2012, without notice to Mrs Draper the respondent elected to unilaterally withdraw from the agreement claiming that from the outset the payment had been made in error. It is interesting to note that the respondent made no attempt to withdraw the payments from those persons eligible to be members of the LGRCEU.

13 Nothing had changed in Mrs Draper's contractual terms of employment. She was entitled to the payment of the bonus at all times as she continued to meet the eligibility requirements for the payment of the bonus according to the terms that had been established in 2008. Alternatively, the bonus was a contractual benefit to which the applicant had become entitled to by virtue of custom and practice.

14 The method of calculating individual entitlements is not in dispute between either the applicant or the respondent.

15 From the first year the bonus was paid in 2008 other than the outside workforce there were five employees, Mrs Draper being one of those who were employed in administration to whom the bonus was paid between 2008 and 2011. With those five employees there was no reference within their enterprise bargaining agreement to the bonus. Mrs Draper was told in 2008 by the respondent that she was to receive the bonus. She was given a flyer that said the bonus was to be paid and Mrs Draper accepted the bonus and the principles upon which the bonus was to be calculated by the respondent. The payment of that

bonus prevailed for some four years until 2012. It was then that the respondent withdrew the bonus and Mrs Draper submits the respondent seemingly moved the principles on which the payment of the bonus was to occur each year. Suddenly the criteria changed so that the bonus only applied to the outside workforce.

16 Mrs Janelle Draper gave evidence that she is employed as a weighbridge administration officer by the respondent, first employed on 1 February 2008 and prior to that employed by the City of Armadale for a period of five years. Mrs Draper indicated that during the course of her interview by the respondent a comment was made regarding the recycling yard at the respondent's facility and the fact that they were looking at bringing the procedures in-house. The witness gave evidence she had spoken to the staff of Rockingham City when they had visited Armadale. A comment was made about this the process of implementing a bonus payment to all the staff at the facility at the time.

17 The witness explained that as a weighbridge administration officer she trained new weighbridge staff, covered for holidays, sick leave for weighbridge operators and during lunch breaks and where there was a need such as operators being overwhelmed by customers. Additionally the witness would go into the weighbridge area and assist to the best of her ability. In circumstances where the operator was under a lot of stress the witness would assist in processing traffic coming through to allow for a break.

18 The witness also prepared reports based on products coming in and landfill products going out including scrap cardboard, which is sent off site for sale, running of the weighbridge area is smooth. For any products going off-site for sale the witness receives a hard copy which is compiled at the end of each month and reports drawn up. The figures are checked, tonnages are compiled and reports prepared. This forms the basis of the calculations and the workings of the bonus. It is from these that Mr Rose asks the witness for the tonnages to provide the relevant information.

19 The witness gave evidence that she was working in her office one day when Mr Rose handed a copy of a memo to her and provided a copy to the weighbridge operator and at the time said to both of them it had been signed off and the bonus would be paid in November. The flyer that was handed to the witness was:

City of Rockingham

RECYCLE YARD

Bonus System

*To All Landfill Staff*

The bonus system will work as per previous discussions. This City of Rockingham have budgeted an income level of

$240,000 for sale of scrap

$171,000 for yard sales

These figures will be increased by 10% each financial year as a target for all the work to.

The bonus will work as follows:

All income in excess of the projected budget will be divided as 50% to Council and 50% to be divided to a value of $2,000 for all site employees.

Payments of the bonus will be calculated as at 31st October each year and paid in mid to late November.

The first payment will be late November 2008.

If you have any questions on this issue, please come and talk to me about it.

Regards,

Graham Rose

(exhibit Draper 3)

20 The witness confirmed she received a bonus in 2008 and in 2009. Mrs Draper gave evidence that she was aware Mr Rose had been working on the bonus issue because he had asked her for the report and as per the previous year it was paid into Mrs Draper's bank account. In 2010 Mrs Draper compiled the reports and gave them to Mr Rose and the bonus was paid. In 2011 the same process occurred. In 2012 the witness gave evidence she compiled her report and later provided it to Mr Rose following a request having been made by him. However as Mrs Draper indicated she did not receive the bonus in 2012. The weighbridge operators had made a comment that they had already received their bonus. Mrs Draper asked her colleagues if they had received their bonus and they had not so the witness went and saw Mr Rose and asked him why the bonus was not being paid to them. The witness advised her colleagues Ms Smedhurst and Ms Baulch. Ms Smedhurst is the reception officer and Ms Baulch, the waste education officer. Mrs Draper gave evidence that when she asked Mr Rose whether he was aware of what had happened in 2012 he said that he and his director Mr Thompson had signed off on all persons receiving the bonus:

> It means that he had compiled the paperwork as to the names and the amounts that were to be paid. He signed it and he took it to Mr Thompson and Mr Thompson then signed for payments to be made and the paperwork went from there to HR.

(ts 35)

21 The witness indicated that Mr Rose advised the witness she was on the list to be paid. He said he could not tell her why she had not been paid. The witness then advised she received a message from Mr Searcy that they were waiting until after New Year when there would be a discussion. The next communication was that Mr Rose called her into his office and advised that he had received a phone call from Mr Thompson who had made a phone call to Mr Rose stating that he had again instructed Mr Searcy that the bonus payment was to be paid to the three who had not received it. The witness indicated this was early December. And still the bonus payment was not made.

22 In February the witness gave evidence she received correspondence from the respondent, a letter which she considered upsetting in that it informed her she was not entitled to the bonus payment however the respondent would not look to recover the funds that had been previously paid in 2008, 2009, 2010 and 2011:

> 5 February 2013
>
> Ms Janelle Draper
>
> 9 Bunbury Place
>
> ROCKINGHAM WA 6168
>
> Dear Janelle
>
> Re: Landfill Recycling Bonus Allowance
>
> Firstly I must apologise for the delay in response due to the Christmas break and subsequently leave period, it has been a couple of months since this issue was raised.
>
> You would be aware that we have been researching and discussing the Landfill Recycling Bonus Allowance and your eligibility for this allowance. I regret to inform you that as this allowance is provided for in the City's Outside Workforce Enterprise Agreement 2011 and your terms and conditions of employment is under the City's Enterprise Agreement 2012, you are not eligible to receive the bonus allowance.
>
> At this stage the City will not be seeking recovery of the bonuses you have received in previous years.
>
> I wish you all the best in your continuing employment at the City's landfill facility.
>
> Yours faithfully
>
> CHRIS THOMPSON
>
> DIRECTOR ENGINEERING & PARKS SERVICES

(exhibit Draper 4)

23 The witness gave evidence that the respondent at no stage explained why the payment of the bonus had been an error. Mrs Draper indicated her position had not changed and that she was still doing the same work. Her contract of employment had not changed and she was mystified as to why after four years of receiving the bonus the payment was stopped without any comment.

24 Mr Andrew Johnson gave evidence as secretary of the LGRCEU a position he has held since the beginning of 2005. Mr Johnson gave evidence that he had been involved in negotiating enterprise bargaining agreements (EBA's) with the respondent since 1995 initially, in his role as the industrial officer with the same union. The witness gave evidence that he was involved in discussions relating to a bonus for the site staff, having been approached by the director of engineering and parks and services Mr Thompson relating to implementing a bonus for all staff at the Millar Road site. Mr Thompson spoke of the instructions of the then CEO Mr Holland. The witness was asked why he was using the word 'all' relating to his evidence. In his response the witness indicated there had been no communication or indication that any staff were to be excluded. Mr Thompson had indicated he was looking to the LGRCEU to provide the name of the person who could draft up an appropriate contract that would deal with what the CEO required. Mr Johnson indicated that Mr Trainer could deal directly with Mr Thompson on the issue.

25 In cross-examination Mr Johnson gave evidence that the union was authorised in the implementation of the bonus through their shop stewards to enter into discussions. Whenever the membership elects delegates the election is confirmed with the union and the LGRCEU issues a letter of authority to the CEO, in this case with the respondent so there is a very clear understanding that they are authorised to represent the LGRCEU. There were two shop stewards authorised at that time, one was a person by the name of Mr Barker and the other, Mr Walker.

**Respondent's Particulars of Claim**

26 On 1 April 2006 the respondent's operations at Millar Road were brought in-house. Between October and November 2006, Mr Thompson engaged Mr Trainer as a consultant to advise the respondent on the implementation of a bonus.

27 In 2006 the respondent drew up the Marshall Report the purpose of which was to consider the financial viability of Millar Road following the in-sourcing. The Marshall Report was tabled at the respondent's council meeting in November 2006 where the possibility of the bonus was briefly considered.

28 The respondent submits the only time where council considered implementing the bonus (independently of its consideration of the *Outside Workforce Enterprise Agreement 2008*) is contained in the Marshall Report itself. The enterprise agreement referred to did not apply to Mrs Draper's employment.

29 The respondent advised that Mr Trainer finished his consultancy with the respondent in June 2007 some six months prior to Mrs Draper commencing her employment. There were however in late 2006 and early 2007 discussions with staff members at Millar Road, the purpose of which were to discuss how the bonus would work. Typically at such discussions Mr Rose would be present as manager, waste and landfill operations, Mr Thompson and various other members of staff. Following a period of consultation a memo was placed on the notice board. The respondent submits that the placement of the notice was with the authority of the then CEO, Mr Holland.

30 The respondent denies that the Millar Road discussions nor the memo could have formed an offer as part of a collateral contract with the applicant or an amendment to the applicant's employment as:

> The objective intention of the respondent was that the Bonus Memo and the Millar Road Discussions were carried out to provide information to the staff and to consult as to a proposed Recycling Bonus. The Bonus Memo was authored in mid-

> 2007 but referred to a bonus which was first to be paid in November 2008. The Bonus Memo and Millar Road Discussions were representational and not promissory. There was therefore no intention to create legal relations and no offer to either enter into a collateral contract with employees or amend the employment contracts of the employees.
>
> (extract of respondent's particulars of claim [15a])

Formal approval for the bonus was not sought from council until 25 November 2008 when the *Outside Workforce Enterprise Agreement 2008* was approved. The respondent submits that there was no binding arrangement to be made with the employee until the approval of the outside workforce agreement;

> On 31 October 2006, Mr Holland had directed Mr Thompson that a business plan relating to the Recycling Bonus should be developed and that such business plan should be provided to Council. In early 2007 Mr Holland withdrew this direction on the basis that the bonus would formally be considered by Council when it was required to approve the execution of the *Outside Workforce Enterprise Agreement 2008* on 25 November 2008. It was clearly the intention of Mr Holland that the bonus could not be agreed to by the respondent and was not satisfied to implement the bonus unless such bonus was approved by Council.
>
> (extract of respondent's particulars of claim [15c])

31 If the Western Australian Industrial Relations Commission (the Commission) finds that the discussions and the memo makes up a binding offer to the employees the respondent submits such an offer could not be a collateral contract or an amended employment contract with Mrs Draper because Mrs Draper was employed on 1 February 2008 and therefore could not have been party to the memo or the discussions both of which occurred on or before mid 2007.

32 The bonus was paid to Mrs Draper on:

> 10 December 2008;
>
> 25 November 2009;
>
> 10 November 2010; and
>
> 20 July 2011.

33 The respondent submits that Mrs Draper's written contract does not specify an entitlement to the bonus. The persons who signed off the bonus as applying to Mrs Draper were mistaken. In responding to the issue of custom and practice the respondent suggests to be incorporated into a contract of employment it must be so notorious that everybody in the industry or trade in services and employment contract on the basis that the custom is presumed to have been incorporated into the contract.

34 The respondent notes that there has been no submission on the part of the applicant that there is a practice of paying the bonus throughout the waste industry in Western Australia. For this reason the submission made by the applicant's representative that the bonus should be implied into Mrs Draper's employment contract through custom and practice should fail. To imply a term by virtue of custom and practice is at the time the contract of employment created. The parties created Mrs Draper's employment contract on 1 February 2008. On that date the bonus could not have been incorporated as part of the employment contract as it was not paid for the first time until 10 December 2008.

35 Mrs Draper's employment terms and conditions are governed by a contract of employment and an enterprise bargaining agreement (the *City of Rockingham Enterprise Agreement 2005* as replaced by the *City of Rockingham Enterprise Agreement 2012).* It is the respondent's view that in the circumstances the terms and conditions of Mrs Draper are clear and her contract cannot be varied for the purpose of manufacturing an existing contract already made.

36 In introducing their submissions the respondent suggested the general discussions relating to the bonus occurred before Mrs Draper was employed. The discussions ended in mid to late 2007 and Mrs Draper was not employed until 1 February 2008. Further, the general discussions relating to the bonus were made with all staff and in the view of the respondent could not have formed an amendment to Mrs Draper's contract because the council at the time had not ratified the bonus. Section 5.36 (3) of the *Local Government Act 1995* (WA) requires the CEO to be satisfied with the proposed arrangements for a person to be employed by a local government. In other words no one can be employed in local government unless approved by the CEO.

37 This particular aspect of the respondent's submissions were objected to by the applicant's representative Mr Trainer on the basis that it was asserted in writing that the bonus did not require the approval of council. Mr Trainer was concerned that at the eleventh hour this aspect of the case seemed to be emerging putting the applicant at a disadvantage given that several submissions had been made and the applicant had done all that was reasonably practicable to extract the relevant documents from the respondent's representative prior to the proceedings commencing and this information had not been forthcoming. In response to Mr Trainer's objection the respondent submitted that Mr Thompson as the director did have the authority to put a bonus in place.

38 Mr Christopher Thompson gave evidence as director of engineering and park services with the respondent. Mr Thompson has been employed with the respondent for 10 years. The witness gave evidence of contractors working in the recycling yard and the direction from the CEO to bring the waste in-house and how keen they were for the staff to be involved and to introduce a bonus/profit arrangement. The idea was that everyone would participate in and to make sure everyone contributed to the process of recycling waste in the landfill ensuring materials were able to be recycled. In the long term this would save as it was about collecting scrap materials including scrap metals and cardboard and anything that had a useful life that could be sold off site to merchants.

39 In cross-examination Mr Thompson revealed when the proposal for the bonus went to council (exhibit Draper 1) it referred to employees and there was no exclusion by industrial coverage. Mr Thompson confirmed through examining exhibit Draper 7 that Mrs Draper in 2008 received a bonus payment even though she was not an outside employee. Furthermore the witness confirmed there were other employees who were not eligible for membership of the LGRCEU. Mr Thompson agreed in

examining exhibit Draper 8 that Mrs Draper was a permanent employee that had more than six completed months of service with the respondent and was therefore eligible to participate in the bonus scheme as she worked at the Millar Road land fill site. Mr Thompson confirmed that casual employees and persons who had not been employed for a period of six months were not entitled to the bonus payment. Mr Thompson gave evidence that the bonus payment did not operate to exclude persons eligible to be members of the West Australian Municipal, Administrative, Clerical and Services Union of Employees and that it was for the whole operation.

40 In cross-examination Mr Thompson was asked to examine exhibit Rockingham 2, in particular, the highlighted area and an email from the witness dated Friday 13 October 2006 sent to the LGRCEU. The witness confirmed that the documents did not specify anyone who worked at the landfill site who was to receive the bonus was to be excluded by virtue of their eligibility for membership of the LGRCEU:

> The intent would be that the whole operations be given an opportunity to share the reward because they all play a role in its success in the minimisation of waste ending at – hitting the tip face.
>
> (ts 77)

41 The witness clarified that 'whole operation' included those persons who are weighbridge operators which included Mrs Draper. The witness gave evidence that Mrs Draper is as involved in the reduction of waste as others operating around the weighbridge area.

42 Mr Thompson gave evidence that in the years 2008 to 2011 he would approve individual employees eligible to receive the bonus payment and then send it to Mr Searcy who would organise payment through HR. At no stage did Mr Searcy advise that any of the persons referred to in exhibit Draper 12 were not eligible to receive the bonus.

43 In 2012 an internal memorandum was sent to the witness from Mr Rose dated 7 August 2012 (exhibit Draper 13). The witness identified these as the eligible staff to receive the bonus in 2012 and they were signed off by the witness. Listed amongst the staff was Mrs Draper. Mr Thompson advised that following the drawing together of the document he was contacted by Mr Searcy who indicated he was of the view there were some workers (including Mrs Draper) who were not part of the outside workforce and therefore should not receive the bonus. The witness indicated that was not the criteria for eligibility and that there were persons listed in the document, some 17 of them, three less than the number of the witness had recommended in the first instance. The witness indicated that he discussed the matter again with Mr Searcy as the witness was leaving for the UK for a seven week period of leave and he wanted it resolved before he left.

44 The witness gave evidence that he had a discussion with Mr Rose concerning the entitlement of the three people including Mrs Draper as it bothered him. In addition he had several conversations with Mr Searcy. The witness gave evidence that he returned to Australia in early January 2013 but before leaving to go overseas an email had been sent to Mr Searcy identifying that the employees, including Mrs Draper, should be paid the bonus based on the experience in previous years.

45 The witness indicated the email referred to would be provided to the Commission by way of the respondent's representative. Mr Thompson was asked about the correspondence dated 5 February 2013 (exhibit Draper 4) which, under the witness' signature, advised Mrs Draper she would not be receiving the bonus payment for 2012. When asked about correspondence the witness responded that the letter was prepared through the HR department:

> All right. Had - when you signed this letter, had your change - had you changed your mind in respect of Janelle Draper receiving the payment? --- No, I hadn't.
>
> (ts 85)

46 Mr Graham Arthur Rose gave evidence for the respondent as manager of waste and landfill operations. The witness indicated he had held the position for about eight years and had been involved in discussions leading up to the implementation of a bonus at the site, discussions that had commenced on or about 2006. Mr Rose gave evidence that the flyer promoting the introduction of the bonus was distributed to the staff in either in late 2007 or early 2008.

47 In cross-examination the witness was asked whether he recalled presenting the flyer to Mrs Draper back in 2008. His answer was in the negative however he did respond that he did present the flyer to all staff who were to receive the bonus. Mr Rose was asked to consider exhibit Draper 11 and the list of those persons who are entitled to receive the bonus. The witness confirmed that all of the persons and the numbers associated with each person reflected an employee number. Furthermore, Mrs Draper was not the only employee who was eligible to receive the bonus who was not a member of outside staff there were some for others also within that category. The witness gave evidence as to the process that would occur each year in that the documents necessary to work out what had been sold, the income that had been received and the total figures as to whether the amount exceeded budget the figures that would come primarily from Mrs Draper. From those figures a report would be received that the witness would submit to Mr Thompson for consideration each year. Mr Rose examined exhibit Draper 12 and confirmed that a similar approach had been adopted.

48 The witness indicated that in 2012 there was a discussion with Mr Searcy that took place in Mr Thompson's office. Basically he was informed at that meeting that the administration staff for the landfill would not be receiving the bonus in 2012 and it appeared to him that no reason was given other than the person had to be employed under the outside workforce enterprise agreement, a principle that had never been applied previously.

49 About a week later the witness received an email from Mr Thompson and had a phone conversation with him regarding the matter. The email was a copy of an email that had been forwarded to Mr Searcy however the witness did not see the answer that was sent to Mr Thompson. The witness gave evidence that when he spoke with Mr Thompson and informed him he had been thinking about the situation and that it was playing on his mind that he may not have done the right thing and he wanted to make adjustments to make sure things were right before he went away, in that the administration staff were paid the bonus.

50 Mr Benjamin Richard Searcy gave evidence for the respondent as manager human resources development, a position he has held for approximately 12 years. The witness indicated he had first been involved in discussions to implement the bonus when he met with Mr Trainer, Mr Johnson and Mr Thompson in 2006 in relation to implementing the recycling bonus payment. Mr Searcy was next involved when he became involved in negotiating an enterprise bargaining agreement for the outside workforce in 2008. Mr Searcy did not recall any discussions about the bonus applying to the administrative staff. However, after the first meeting in 2006 with the LGRCEU the witness indicated he was not involved until the negotiations of the EBA until 2007 or 2008.

51 The witness was asked to examine exhibit Draper 9 in cross-examination, in essence the instructions that Mr Thompson authorised for the setting up of the bonus. The witness was asked whether the instructions as reflected in exhibit Draper 9 were correct. He answered in the affirmative. The witness was asked to confirm a section of the exhibit:

> 7. The intention is to make the payment to each person employed - casuals and contractors (including labour hire) will not be included.

The witness confirmed that section of the exhibit was correct.

52 The witness confirmed he had processed but not approved the payments for Mrs Draper in 2008, 2009, 2010 and 2011. It wasn't until after the outside staff EBA had been approved that he reviewed the payments in 2012. In his mind the witness reflected there were people on the list that were not entitled to receive the bonus. The witness met with Mr Thompson after he had received an email that said they felt they should be paid because they have been paid in the past at the landfill facility: Mr Trainer put the following question to the witness:

> Well, the question is this and it is simple. Mr Thompson gave evidence which is completely contradictory to what you're saying. He said that there was a meeting, yes, Mr Rose attended that meeting. Both say they did not agree that these people should not get a bonus in your saying the wrong. Is that correct?--- I can't comment on their evidence but I - I can tell you that we had considerable discussion and I showed them the Enterprise Agreements and said, "This is why I don't think that the staff should be paid," and they agreed with that. I - from memory - that they agreed after considerable discussion.
>
> (ts 116)

53 The witness confirmed by way of exhibit Draper 14 that the criteria in his mind to determine eligibility for the bonus payment were:

> 1. Must be employed under the outside workforce EBA.
>
> 2. Must have commenced employment prior to 31 December 2011.
>
> 3. If absent from work for greater than three (3) months during the financial year 2011/12, any time exceeding the three months absence to be removed on a weekly pro–rata basis from the payment.

**Applicant's Concluding Submissions**

54 The applicant submits the Commission's role in such matters is judicial rather than arbitral. The applicant contends that the written contract of employment relating to Mrs Draper does not contain all of the terms agreed between the parties in particular one term not contained is, in the view of the applicant, the bonus.

55 The evidence demonstrates that the negotiations for the bonus were undertaken by the respondent primarily by Mr Thompson and Mr Rose. Mr Thompson's evidence in particular established that the bonus was based on all of the staff gaining the entitlement. Furthermore, Mr Thompson confirmed the structure of the bonus at exhibit Draper 8:

56 The email from Mr Trainer dated 5 November 2006 establishes that the only staff to be excluded are those on leave without pay, casuals and contract staff (including labour hire) (exhibit Draper 9).

57 Mr Thompson wrote an email on 13 October 2006 where it was said:

> … recycling yard is the front end of the, the intent would be **that the whole operations** be given the opportunity to share in the rewards because they all play a role … (my emphasis)
>
> (exhibit Draper 5 and exhibit City of Rockingham 2)

58 From the evidence of Mrs Draper it was suggested to her from the time of her interview that she may be entitled to a bonus should she be employed at the site even though position to which she was employed was not covered by the LGRCEU EBA. Mr Rose confirmed during his evidence that the bonus was to apply to all staff at the site in accordance with the arrangements set out in exhibit Draper 8 and the flyers circulated to employees. The notice that had been drafted by Mr Searcy dealing with negotiation for the workforce refers to:

> 'A recycling bonus scheme to include **all** site staff … (my emphasis)
>
> (exhibit City of Rockingham 4)

59 The applicant submits the bonus was negotiated as applicable to all staff on the site. A relevant matter is that when the bonus was first paid in 2008 there was no industrial instrument in force requiring the payment of the bonus.

60 Mrs Draper's representative submits that Mr Thompson in his evidence was unwilling to agree as to what his own handwriting reflected:

> … run along contract then modify EBA next time
>
> (exhibit Draper 10)

61 In 2008, 2009, 2010 and 2011 the bonus payment became a customary claim.

62 Based on the evidence Mr Searcy says he conducted an audit in 2012 and concluded that Mrs Draper and others not covered by the LGRCEU EBA were not entitled to the bonus. Mrs Draper was not consulted prior to the decision to refuse that payment.

63 The Commission finds it most unlikely that it took the City of Rockingham four years 2008, 2009, 2010 and 2011 to discover the error that it had been paying Mrs Draper the bonus payment for all those years and it wasn't until Mr Searcy conducted the audit in 2012 that the error was located.

64 Mr Searcy's notice internal notice is an interesting document in that it is unauthorised, it revises the bonus and for the first time it inserts membership of the outside workforce as the qualifying criteria. The revised approach was not referred to the CEO nor was it supported by Mr Rose or Mr Thompson both of whom were directly involved in the negotiations of the bonus at first instance. Mrs Draper was not consulted in the view of the applicant Mr Searcy should be regarded as unhelpful.

65 The applicant submits that this issue is a matter of contract and offer was made in 2008 to the applicant's initially at interview and then by way of express offer through a flyer being distributed by Mr Rose, Mrs Draper's manager.

66 The evidence demonstrates that the applicant accepted the offer by way of acceptance of the payments arising from the bonus in 2008, 2009, 2010 and 2011. The acceptance was by way of payments being made into her bank accounts. The respondent had intended to be bound in the view of the applicant is as Mr Thompson's handwritten notes earlier mentioned (exhibit Draper 10) had referred '… run along contract, then Modify EBA next time CEO leaving'.

67 Mrs Draper says that the respondent amended her contract of employment by way of adding a new term creating an entitlement to the bonus payment. In 2012 the respondent denied that benefit. It is the view of the applicant that the bonus is payable and the applicant seeks an order to that effect.

68 Finally the applicant reserves the right to make an application for costs should it succeed in the matter.

**Respondent's Concluding Submissions**

69 Mrs Draper's employment contract commenced on 14 February 2008 (exhibit Draper 2). The employment contract does not specify the provision of a recycling bonus although on the applicant's evidence the issue of Rockingham City Council considering implementing a bonus was raised. The respondent submitted the bonus was not promised to Mrs Draper as part of her interview.

70 It is accepted by the respondent that a memorandum detailing the bonus (exhibit Draper 3) was provided to Mrs Draper and other administration employees by Mr Rose. Although subsequently the respondent submits that the distribution was made in late 2007 prior to the applicant's employment in 2008 then it could not have constituted an offer to Mrs Draper.

71 Mr Rose had no memory during his evidence that he had distributed the memo directly to Mrs Draper suggesting some doubt on his part.

72 If the memo was provided to staff during Mrs Draper's employment the respondent submits it was circulated as a preliminary step to discussions relating to the outside workforce enterprise bargaining negotiations which did not cover Mrs Draper. Additionally the memo was not a contractual document given Mrs Draper did not agree to enter into a collateral contract with the respondent and following her initial employment on 1 February 2008 did not agree to any amendments to her employment contract.

73 Turning to the question of custom and practice as earlier submitted, it must be so notorious that everybody in the industry or trade entered into an employment contract on the basis that the custom is presumed to have been incorporated into the contract as per the decision in *Con-Stan Industries of Australia Pty Ltd and Another v Norwich Winterthur Insurance (Australia) Ltd* [1985-1986] 160 CLR 226, 236 which was applied by the Full Bench of the WAIRC in *The State School Teachers Union of WA v Davis* (2012) WAIRC 0966; (2012) 92 WAIRC 1870 [36]. In order to imply a term into a contract of employment based on custom and practice the respondent submitted that such a term would need to have been implied at the point at which the contract was established, that being 14 February 2008, see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 [38].

74 If the Commission should find there was no express contractual offer of a bonus made directly to Mrs Draper it is the view of the respondent that there can be no collateral contract nor any amendments to the employment contract. Similarly, if the Commission finds that the bonus cannot be implied by custom and practice then it is the view of the respondent that the terms of Mrs Draper's employment would be governed only by the written terms as stated in her employment contract none of which require the respondent to pay the bonus. Therefore there can be no denial of a contractual benefit under s 29(1)(b)(ii).

75 The respondent provided several emails referred to during the evidence. The emails related to the payment of the bonus. The first email was sent:

> From: Chris Thompson
>
> Sent: Monday, 26 November 2012 10:38 AM
>
> To: Graham Rose; Ben Searcy
>
> Cc: James Henson

> Subject: Landfill Bonus Office staff
>
> hi guys this one has still been bothering me. Whilst I hear Bens comments about not being outside EBA staff it is still bothering me that we are changing.
>
> Graham stuff girls sent on Thursday we already had an considered and does not assist.
>
> I should have changed my call on matter before I left but it is bothering me as I think we have made the wrong call.
>
> My heart says that we should pay the girls because we already have for 4 or 5 years now so we would if been eligible.
>
> I reckon there is paperwork somewhere to support why we paid them being all landfill staff except management.
>
> Therefore as I believe also that this issue will get bigger and cause bad will I now authorize that the admin landfill staff plus Education/promotion Officers be reinstated to receive bonus subject to them meeting our other bonus guidelines.
>
> Money is there to pay it.
>
> I need to clear up a few work things before I go and so I have clear mind. This one was bothering me.
>
> Cheers CT
>
> Sent from Chris Thompson's iPhone

76 On Wednesday, 21 November Mr Rose sent an email to Mr Thompson which specified the following:

> Hi Chris,
>
> As a follow up to the issue as to if the office staff should receive this payment as in past years since the inception of the bonus, 06/07 seems to be the first one and as stated on the information form which you have a copy, it's clearly states ALL site Staff. The 2008 EBA agreement page 15, item 9.6 also clearly states ALL Landfill Staff will be eligible.
>
> Cheers
>
> Graham Rose - Manager Waste and Landfill Services
>
> telephone + 61 8 9528 8550

77 Mr Searcy on 21 November 2012 sent an email to Mr Thompson as follows:

> You happy with the decision still standing? The agreement being referred to is the OUTSIDE workforce agreement, so although they work on site, this would also mean that managers, coordinators etc would be entitled to it if we went by this interpretation.
>
> Ben Searcy - Manager Human Resource Development
>
> telephone + 61 8 9528 0377

**Conclusion**

78 I have heard the evidence given by Mrs Janelle Draper, Mr Andrew Johnson, Mr Chris Thompson, Mr Graham Rose and Mr Ben Searcy and I have considered their evidence carefully. I found Mrs Draper to be a reliable, credible and honest witness. Her recollection of events was at all times clear and consistent. I therefore accept her evidence. The evidence of Mr Johnson, Mr Thompson and Mr Rose was also clear and consistent. I therefore accept their evidence particularly Mr Thompson's evidence over the evidence of Mr Searcy's evidence which was at times vague. Mr Searcy's evidence directly contradicted Mr Thompson's evidence. For these reasons I prefer the evidence given by Mr Thompson particularly in Mr Searcy's recollection of a meeting he attended with Mr Rose and Mr Thompson in that his memory of what occurred at that meeting was that Mr Rose and Mr Thompson considered that the staff should not be paid the bonus payment. In fact Mr Thompson's evidence was that the staff such as Mrs Draper should continue to be paid the bonus payment. The Commission prefers the evidence of Mr Thompson to that of Mr Searcy. Mr Searcy appeared at times also to have a guarded memory of having received a written direction to pay the bonus to Mrs Draper from his director Mr Thompson. Mr Searcy gave evidence that a document he prepared that was sent to the respondent's council had expressly approved the bonus for those covered by the LGRCEU and not others. On close examination the document expressed no such matter. The Commission on the basis of the widespread or inconsistencies is left with no option but to reject the evidence of Mr Searcy in its totality.

79 The Commission has considered carefully the verbal and written submissions of Mrs Draper and the City of Rockingham and the evidence of their associated witnesses. The Commission finds that Mrs Draper's date of commencement of employment with the respondent to be 1 February 2008, a matter that is not in dispute.

80 The claim by Mrs Draper before the Commission is one for an alleged denial of a contractual benefit relating to the respondent's failure to make good a bonus payment in 2012. The law in relation to these matters in the Commission is well settled. For Mrs Draper to be successful in her claim a number of aspects must be recognized. The claim must relate to an industrial matter under s 7 of the Act and the claimant must be an employee. The benefit must be a contractual benefit to which there is an entitlement arising under the applicant's contract of service. The relevant contract must be a contract of service and the benefit claimed must not arise under an award or order of this Commission. Additionally, the benefit must have been denied by the employer. The Commission finds in the affirmative for all of these matters.

81 The duty is on the Commission to act according to equity, good conscience and the substantial merits of the case and consider the relief to be ordered in the event the claim is proved *Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.

82 The Commission finds that Mr Thompson was authorised by the then CEO of the respondent to determine who should receive the bonus.

83 The Commission finds the terms of Mrs Draper's employment to be governed by:

> the written terms of her employment contract as finalised on 14 February 2008;
>
> a collateral contract (which was offered by the respondent by way of the distribution of a written memo some time in 2008 and accepted by Mrs Draper) providing the payment of bonus annually; and
>
> the *City of Rockingham Enterprise Agreement* 2005 and subsequently the *City of Rockingham Enterprise Agreement 2012*.

84 The CCH Macquarie Dictionary of Law revised edition, Sydney: CCH (2000) defines a collateral contract as:

> an ancillary contract in which the promisor (not necessarily party to the main contract) makes a contractual promise in consideration of which the primacy enters into the main contract. Also *collateral agreement; collateral warranty.*

Butterworth's Employment and Law Dictionary, Sydney: Butterworth's (1997) defines a collateral contract as:

> A contract the consideration for which is the making of some other contract. A collateral contract may be either antecedent or contemporaneous to the main contract: *Hoyts Pty Ltd v Spencer* (1919) 27 CLR 133. It has an independent existence, and possesses in full the character and status of a contract: *Heilbut Symons and Co v Buckleton* (1913) AC 30. The collateral contract must not be inconsistent with the main contract: *Hoyts Pty Ltd v Spencer* (1919) 27 CLR 133.

85 The Commission finds the terms of Mrs Draper's collateral contract as offered by the respondent in 2008 and accepted by Mrs Draper in the same year to be not inconsistent with her main employment contract as signed shortly after commencing her employment with the respondent in February 2008.

86 The Commission finds that in 2012 the respondent unilaterally and without notice to Mrs Draper, denied her payment of the bonus.

87 The Commission finds it most unlikely that it took the City of Rockingham four years 2008, 2009, 2010 and 2011 to discover the error that it had been paying Mrs Draper the bonus payment for all those years and it wasn't until Mr Searcy conducted the audit in 2012 that the error was located. The Commission therefore rejects the respondent's submission that Mrs Draper was paid the bonus payment for the first four years of Mrs Draper's employment in error.

88 The Commission finds that in 2012 Mr Thompson directed Mr Searcy to pay the bonus having re-thought the issue. Mr Thompson advised Mr Searcy and Mr Rose by way of email that he had made the 'wrong call' (email sent from Mr Thompson to Mr Searcy and Mr Rose dated 26 November 2012) given they had already been paying the girls the bonus for some four years. The Commission finds Mr Searcy failed to comply with the views of Mr Thompson to reinstate the bonus and as a consequence the respondent failed to pay the bonus to Mrs Draper and other administration staff in 2012 thereby denying Mrs Draper her contractual entitlement.

89 The Commission finds, based on the email of Mr Thompson to Mr Searcy dated 26 November 2012, that the administrative landfill staff of the respondent, one of which was Mrs Draper, was authorised for 2012 to receive the bonus payment. The Commission finds Mrs Draper was in 2012 denied the bonus payment by the respondent. Accordingly, an order will issue requiring the respondent pay Mrs Draper her 2012 contractual entitlement namely the bonus payment of $2,080.00 within seven days of the order issuing.

90 The applicant reserved her right to make an application for costs should she succeed in the matter. Accordingly, the applicant's representative has seven days from the day the reasons for decision issue to provide written submissions on the issue of costs, providing a copy to the respondent and the respondent has seven days thereafter to respond in writing to the Commission similarly, providing a copy to the applicant's representative.

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**2013 WAIRC 00438**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | MRS JANELLE DRAPER |
| | **APPLICANT** |
| | **-v-** |
| | CITY OF ROCKINGHAM |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | **MONDAY, 29 JULY 2013** |
| **FILE NO/S** | B 14 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00438 |

| | |
|---|---|
| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr K Trainer (as agent) |
| **Respondent** | Mr B Taylor (as agent) |

*Order*

HAVING HEARD Mr K Trainer on behalf of Mrs J Draper (the applicant) and Mr B Taylor on behalf of the City of Rockingham (the respondent) the Western Australian Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby:

(1) DECLARES that the respondent denied the applicant a benefit under her contract of employment, namely a bonus payment in 2012.

(2) ORDERS that the respondent pay the applicant $2080 within seven days of the date of this order issuing.

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

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**2013 WAIRC 00560**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | MRS JANELLE DRAPER |
| | **APPLICANT** |
| | **-v-** |
| | CITY OF ROCKINGHAM |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | MONDAY, 29 JULY 2013 |
| **FILE NO.** | B 14 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00560 |

| | |
|---|---|
| **Result** | Correction Order Issued |
| **Representation** | |
| **Applicant** | Mr K Trainer (as agent) |
| **Respondent** | Mr B Taylor (as agent) |

*Correction Order*

WHEREAS an error occurred in the Order issued on the 29 July 2013 (2013 WAIRC 00438) in application B 14 of 2013,

NOW THEREFORE Commissioner, in order to correct her error and pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT the preamble to the Order be corrected in paragraph 1 by adding the word 'orders' after the word 'hereby'.

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

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**2013 WAIRC 00574**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00574 |
| **CORAM** | **:** | COMMISSIONER J L HARRISON |
| **HEARD** | **:** | TUESDAY, 4 DECEMBER 2012 |
| **WRITTEN SUBMISSIONS** | | TUESDAY, 18 DECEMBER 2012, FRIDAY, 18 JANUARY 2013, FRIDAY, 5 APRIL 2013, FRIDAY, 26 APRIL 2013 |
| **DELIVERED** | **:** | THURSDAY, 1 AUGUST 2013 |
| **FILE NO.** | **:** | B 166 OF 2012 |
| **BETWEEN** | **:** | JOANNA LANDSHEER |
| | | Applicant |
| | | AND |
| | | MORRIS CORPORATION (WA) PTY LTD |
| | | Respondent |

| | | |
|---|---|---|
| Catchwords | : | Contractual benefits claim - Entitlements under contract of employment - Claim for underpayment of wages - Increase in daily hours without an increase in salary - Applicant's claim not made out - Application dismissed |
| Legislation | : | *Industrial Relations Act 1979* s 7, s 26(1)(a) and s 29(1)(b)(ii) |
| | | *Interpretation Act* 1984 s 56 |
| Result | : | Dismissed |
| **Representation:** | | |
| Applicant | : | Mr T Hammond (of counsel) and Ms J Banaszak and later Ms M Lalli (of counsel) |
| Respondent | : | Mr A Cameron (as agent) |

**Case(s) referred to in reasons:**

*Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867

*Balfour v Travel Strength Ltd* (1980) 60 WAIG 1015

*Belo Fisheries v Froggett* (1983) 63 WAIG 2394

*Hollis v Vabu* (2001) 207 CLR 21

*Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704

*Noel Edward Knight v Alinta Gas Ltd* (2002) 82 WAIG 2392

*Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307

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

*Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193

*Ware v Amaral Pastoral Pty Ltd (No 5)* (2012) NSWSC 1550

*Waroona Contracting v Usher* (1984) 64 WAIG 1500

*Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454

*Reasons for Decision*

1 On 9 August 2012 Joanna Landsheer (the applicant) lodged an application claiming that she was due unpaid wages under her contract of employment with Morris Corporation (WA) Pty Ltd (the respondent). The respondent disputes that the applicant is owed the unpaid wages she is seeking.

**Background to this application**

2 On 2 November 2011, the applicant lodged a claim in the Industrial Magistrates Court (the Court) alleging that the respondent was in breach of an Australian Workplace Agreement (AWA) which governed her employment and the respondent had underpaid her $39,454.26. After the claim was lodged the parties agreed that the applicant's AWA had never been lodged for approval and that the un-lodged AWA had the status of a common law contract of employment. When the Court found that it did not have jurisdiction to deal with this claim as the applicant's employment was governed by a common law contract this application was then lodged as an application to enforce the applicant's common law contract of employment.

3 During the proceedings, the issue of an award possibly applying to the applicant instead of and/or in addition to the applicant's common law contract was raised and the Commission asked the parties to make submissions after the hearing as to whether an award applied to the applicant's employment. The applicant submitted that the *Hospital Industry (General) Award 2010* (the 2010 Award) may cover the applicant from 1 January 2010 and if it did so any enforcement of the terms of this instrument would be dealt with in another place. The respondent indicated that no award covered the applicant and the applicant remained employed pursuant to the terms of her common law contract.

4 At a further conference held after the hearing of this matter, the respondent now claimed that the applicant had been covered by the *Morris Corporation (WA) Pty Ltd Employee Collective Agreement 2009* (the ECA) since on or about 27 July 2009 after it was approved by the Australian Government Workplace Authority. The applicant argued that the ECA does not apply to her conditions of employment. The Commission understands that both parties agree that the terms of the applicant's common law contract constitute additional terms and conditions over and above the 2010 Award and/or the ECA. It is within this context that the Commission is to determine this application and interpret the terms of the applicant's common law contract to determine whether the applicant is due the unpaid wages she is claiming.

5 The following facts are not in dispute:

(1) The applicant commenced employment with the respondent as a kitchen hand on 28 March 2008.

(2) A written contract of employment containing the applicant's terms and conditions of employment was agreed between the parties and signed by the parties on or about 28 March 2008 (the Contract).

(3) The Contract is not a registered Australian Workplace Agreement but a common law contract.

(4) The Contract states that it ceases operation on 27 March 2013.

(5) The Contract states in part the following:

(a) the applicant's base salary was $1432.69 per week, plus superannuation of $128.94 per week (clause 7);

(b) salary was paid weekly in arrears (clause 7);

(c) in the event of a significant change in working conditions, the respondent may conduct a review of the applicant's remuneration (clause 7);

(d) ordinary hours of work are 38 hours per week averaged over a 12 month period (clause 9);

(e) ordinary hours of work will be worked within a daily spread of 12 hours (clause 9);

(f) an indicative roster cycle was two weeks on at 10 hours per day and one week off (clause 9); and

(g) in the event of changes to the applicant's regularly rostered hours of work the respondent may conduct a review of the applicant's remuneration (clause 9).

(6) On or about 13 March 2009, the respondent unilaterally increased the number of hours the applicant was required to work from 10 to 12 per day.

(7) The applicant's weekly wage remained the same.

(8) The applicant did not consent to work more hours for the same rate of pay.

**The claim**

6 The applicant's revised claim as at 26 April 2013 is based on the applicant working a shift of 11.5 hours and not 12 hours as the applicant had a half hour paid break during the 12 hour shift. This claim is as follows: on the basis of working 12 hours per day, the applicant's loss is $61,907.76 in wages and $5,571.70 in superannuation as at 13 May 2013. The applicant was paid an hourly rate of $30.70 per hour up until 13 March 2009 and from 13 March 2009 to the present, her hourly rate was reduced to $25.58 per hour. The applicant's loss is the difference between $30.70 x 56 hours ($1,719.20) and $25.58 x 56 hours ($1,432.69) which is $286.61 per week, multiplied by the weeks worked since 13 March 2009 to 13 May 2013 (216 weeks). The applicant's lost superannuation since 13 March 2009 equates to $5,571.70 (9% of $286.61 = $25.79 x 216 weeks). In addition to lost wages and superannuation the applicant is seeking orders that for as long as the respondent requires the applicant to work a seven day week/12 hour shift when rostered on, she will be paid no less than an additional $286.61 per week in weekly wages averaged over a 52 week year and the respondent is to pay the applicant an additional $25.79 per week in superannuation entitlements.

7 The applicant tendered her pay slips for 3 June 2008, 3 March 2009, 24 March 2009 and 31 March 2009. These payslips confirm that when she commenced employment she was paid $1,432.69 gross per week she worked 10 hour shifts and was paid a base rate of pay of $30.7048 per hour for 46.66 hours per week (70 hours + 70 hours + 1 week off = 140 hours ÷ 3 weeks = 46.66 hours). In March 2009 the hourly rate on the applicant's payslips changed to $25.5837 per hour for working 56 hours per week when the respondent increased her hours from 10 hours per day to 12 hours per day (84 hours + 84 hours + 1 week off = 168 hours ÷ 3 weeks = 56 hours). The applicant continues to work these additional two hours per day for which she claims she has not been paid, including a half hour paid lunch break.

**Evidence**

Applicant

8 At the applicant's interview prior to commencing employment with the respondent she was told she would be working 10 hour shifts over seven days for two weeks and she then had one week off. Travel to and from the Cloudbreak site was approximately one and a half hours each way by plane and was unpaid. After she commenced employment she was not expected to work any more than a ten hour day and when working 10 hour shifts the applicant had a half hour unpaid lunch break.

9 In March 2009 the respondent's Project Manager, Mr Gary Potter told the applicant and other employees on site that they would now be working 12 hour shifts. The applicant was told that if she did not accept the increased hours then there was no longer a job for her with the respondent. The applicant then started working 12 hour shifts and her pay remained unchanged. The applicant did not think she could do anything about this change at the time. The applicant did not receive anything in writing about the reason for the change to 12 hour shifts. After the introduction of 12 hour shifts employees asked for pay increases at group meetings but the respondent did not respond. The applicant continues to work 12 hour shifts on the same weekly rate of pay she was paid when she commenced employment with the respondent in 2008. The applicant said that working 12 hour shifts, which commence at varying times, cuts down her recreation time and she has less sleep.

10 Under cross-examination the applicant said she was aware that a meeting was held to explain the increase in hours to 12 hour shifts on site but she was off site at the time. When working 12 hour shifts the applicant has a half hour paid break for lunch plus two other short breaks.

11 Ms Lynn Mori worked for the respondent as a peggy/cleaner at Cloudbreak between 10 June 2008 and May 2012. Before commencing employment with the respondent she was told that her roster would be over 10 hours, as outlined in clause 9 of her contract, which had the same terms and conditions as the applicant's contract. On 11 March 2009 she attended a meeting conducted by Mr Potter, Ms Mori was told that from the following day Fortescue Metals Group (FMG), the mine's owner, wanted the respondent's employees to work 12 hour days as the respondent was the only contractor working 10 hour days. When Mr Potter was asked if wages would increase for working the extra hours, employees were told no and that if employees did not accept this change they no longer had a job with the respondent. Ms Mori stated that she sometimes worked extra time

over and above her 12 hour shift. Ms Mori stated that working a 12 hour shift caused fatigue and there was no opportunity for recreation. She only had time to have meals and sleep.

12 Ms Mori could not recall meeting a representative from the respondent's human resource section who discussed the reason for the hours being increased with employees.

Respondent

13 Ms Fiona Berkin is the respondent's Director of Marketing. In March 2009 she was the respondent's Chief Executive Officer. Ms Berkin stated that in March 2009 the respondent had no option but to increase employees' shifts to 12 hours at Cloudbreak. FMG told its contractors to cut costs and if contractors did not accept this ultimatum then they no longer had a contract with FMG. The respondent decided that the best way to deliver cost savings was to cut its labour and products (food) costs which were its main expenses. Ms Berkin stated that FMG was a major client. Eighty per cent of the respondent's business in Western Australia was with FMG and 40% of its overall business. The respondent therefore wanted to continue its relationship with FMG. If employees did not work a 12 hour day then the respondent would lose the contract and employees would be out of work. Ms Berkin stated that Ms Margaret Thompson, the respondent's Executive of Human Resources, visited the Cloudbreak site to explain the changes in hours worked to employees.

14 Under cross-examination Ms Berkin stated that the respondent is privately owned and has approximately 1000 employees. She could not recall how many employees it employed in 2009. Ms Berkin could not confirm whether a statement made in the Brisbane Business News in May 2010, which the applicant claims is also on the respondent's website, that the respondent achieved 100% profit growth and 30% increase in revenue in 2009 was accurate. Ms Berkin had no view about whether an increase to employee's working hours from 10 hours to 11.5 or 12 hours was a significant change but she conceded that if an employee's downtime at a mine site is reduced by approximately 40% that is a significant change. Ms Berkin stated that there was nothing in writing confirming there was consultation with employees about the increase in hours to 12 hour shifts and she was unable to say if staff were consulted. She was aware however that Ms Thompson went to site to speak to employees. Ms Berkin stated that 12 hour shifts were common on mine sites.

**Submissions**

Applicant

15 The applicant submits that the unilateral change to the terms and conditions of her employment when her hours were increased from 10 hours to 12 hours without an increase in her wages is a breach of her contract of employment as there are no terms, express or implied, in the Contract allowing the respondent to do this.

16 When determining the terms of a contract of employment the Commission can look at the surrounding circumstances and a totality of the relationship between the parties when determining its meaning (***Hollis v Vabu Pty Limited*** (2001) 207 CLR 21, [24]). For 12 months the applicant was consistently paid the rate specified in the Contract for a 10 hour day over 14 days followed by seven days off. The Contract foreshadows that the parties can alter the fundamental terms of the Contract but only after a review has been undertaken (see clauses 7 and 9).

17 The Encyclopaedic Australian Legal Dictionary describes 'may' as follows:

> Most interpretation Acts provide that the term 'may', where it is used in conferring a power, is to be construed as meaning that the power is able to be exercised or not exercised, at the power-holder's discretion … However, despite these provisions, in numerous decisions courts have held that 'may' means 'must', having regard to the object of the statute or the surrounding text: for example, *Smith v Watson* (1906) 4 CLR 802; [1906] HCA 80.

The *Interpretation Act* 1984 (WA) at s 56 defines 'may' as it is found in the legislative context as follows:

> (1) Where in a written law the word **may** is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion.
>
> (2) Where in a written law the word **shall** is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

18 The applicant submits that the Contract cannot be interpreted in a vacuum divorced from industrial realities (see ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355). Nowhere in the Contract is there an express term whereby the parties agreed to the employer unilaterally altering the number of hours worked without providing commensurate additional remuneration especially after employing the applicant for a year on the same terms and conditions. The applicant also argues that '[a] purported agreement which leaves the content of the agreement entirely at the discretion of one party is not contractual in nature' (see ***Riverwood International Australia Pty Ltd v McCormick*** (2000) 177 ALR 193, [111]).

19 As there is no express term permitting the respondent to unilaterally vary a fundamental term of the Contract, consideration needs to be given to whether there are any implied terms permitting it to do so and there is no evidence that a unilateral change in working hours without commensurate pay can be said to be an implied term of the Contract.

20 The applicant has a right to remuneration in return for work undertaken and the applicant argues that there is an implied agreement that reasonable remuneration be paid to an employee. For a term to be implied at law it must be necessary to make the implication, that is, without the term the contract would be rendered nugatory, worthless or be seriously undermined. A term will not be implied if it is unjust or unreasonable to imply it (see ***Young & Marten Ltd v McManus Childs Ltd*** [1969] 1 AC 454). The Commission can look at the Contract as well as the surrounding circumstances in which the Contract was made however evidence of the parties' actual intention or their negotiations is not admissible for the purpose of implying a term. The five strict requirements for implication in respect of terms implied in facts, which govern implications in formal contracts, are:

> (1) the term must be reasonable and equitable;

(2) the term must be necessary to give business efficacy to the contract;

(3) the term must be obvious;

(4) the term must be capable of clear expression; and

(5) the term must not contradict any express term of the contract.

21 It is essential that any term sought to be implied operate reasonably and equitably between the parties and a term will only be implied if it is necessary to make the contract effective in a business sense. A term will be implied if the contract is unworkable without it and the test for obviousness is whether from an objective point of view the parties would have regarded the term as too obvious to require express provision. The term must also have been obvious to both parties at the time of entry into the contract. For a term to be implied it must be capable of clear expression and be reasonably certain in its operation and if the Commission finds that a term could be implied it is unlikely that at the same time it would find that the term would be incapable of clarity. The term sought to be implied must be consistent with the remaining terms of the contract and not contradict any express term and the term must also not deal with a matter already sufficiently dealt with in the contract. A term may be implied into a contract by reasons of a custom or usage in the market, trade or industry including established usage or professional practice and must be notorious, certain, legal and reasonable and this implication is subject to any express terms of a contract. There must also be evidence of general acceptance of the custom or practice.

22 The applicant disputes the respondent's claim that she is covered by the ECA which applied from 27 July 2009. The applicant cannot be bound to an agreement she had no part in and there is nothing in the ECA to indicate it has retrospective application. The applicant was precluded from taking part in any discussions in relation to this agreement and she is not a party to the agreement. It is common ground that the applicant did not vote for the ECA applying to her and the respondent told her she was unable to do so because she was bound by the Contract. Clause 1.4.1 of the ECA could only apply to the applicant where she had either taken part in the agreement process or commenced employment subsequent to that time. In this case the applicant was neither. There is no evidence to indicate she was notified that she was covered under the ECA or that her rights and entitlements had changed in any way. In the absence of any evidence to suggest the applicant's employment is covered by the ECA, she remains employed by the respondent pursuant to the Contract.

23 The only way the Commission can quantify the applicant's loss for the purpose of this claim is by reference to the Contract and the extent to which the applicant has been underpaid pursuant to an applicable award or enterprise bargaining agreement is not within the Commission's jurisdiction. Furthermore, the ECA has no terms which could be implied into the applicant's contract of employment allowing the respondent to alter these terms without consultation or agreement with the applicant.

24 The right to be paid for the service performed by an employee is at the heart of the wages / work bargain. There is no express term in the Contract making the variation of working increased hours for the same remuneration lawful. Neither are there any terms one could properly imply into the Contract in order to suggest the respondent could alter such terms without consultation or agreement with the applicant.

Respondent

25 The Commission is to interpret the Contract 'judicially' and determine whether there has been a denial of a benefit (see ***Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)*** (1999) 79 WAIG 1867). Under the express terms of the Contract the respondent could expect an employee to work 12 hour shifts with no increase in the weekly rate of pay. The respondent claims that the terms of clause 9 of the Contract, read subject to clause 13, enables it to unilaterally increase the applicant's hours with no adjustment to her wages. The respondent argues that under the terms of clause 9 of the Contract it is not mandatory for the respondent to review the applicant's remuneration if there is a change in rostered hours but this 'may' occur. Clause 7 of the Contract sets out the weekly remuneration to be paid to the applicant for work undertaken in accordance with clause 9 irrespective of the number of hours worked, including overtime, or the type of roster worked.

26 The respondent submits that the terms of the Contract are clear and that to import a term as proposed by the applicant would override the Contract. In the alternative the respondent argues that if there is found to be a reduction in the hourly rate of pay that is not allowed for in the Contract this would constitute a repudiation of the applicant's contract of employment with the respondent and not an underpayment. Employees accepted that they were to work increased hours and this constituted reasonable, albeit begrudging acceptance.

27 The respondent argues that the Commission has no power to issue a prospective order for the payment of future wages due to the applicant whilst she remains employed by the respondent.

28 The respondent confirmed that in June 2009 it lodged the ECA with the Australian Government Workplace Authority and on 20 July 2009 the Workplace Authority issued a notice stating that the agreement passed the no-disadvantage test and would come into operation seven days after that date. This agreement applies 'within the Commonwealth of Australia' (clause 1.2.1(b)) and covers Kitchen Attendants (clause 4.1.1). The respondent therefore contends that as of 27 July 2009 the applicant's employment was governed by the ECA. Notwithstanding the fact that the agreement specifies that it 'wholly supersedes any prior arrangement between the parties and fully constitutes the terms and conditions of employment' (clause 1.4.1) the respondent has continued to pay the applicant at the higher rate of pay specified in the Contract. The annual salary that would be paid to the applicant as a Kitchen Attendant grade 3 pursuant to the ECA is $66,665.51. The Contract provides for a weekly salary of $1,432.69 (clause 7) which gives an annual wage of $74,499.88. The applicant has therefore been better off under the Contract than what she is entitled to under the ECA.

**Consideration**

29 The claim before the Commission is one for an alleged denial of a contractual benefit and the law as to these matters is well settled. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to an industrial matter pursuant to s 7 of the Act and the claimant must be an employee, the claimed benefit must be a contractual

benefit that being a benefit to which there is an entitlement under the applicant's contract of service, the relevant contract must be a contract of service, the benefit claimed must not arise under an award or order of this Commission and the benefit must have been denied by the employer: ***Hotcopper Australia Ltd v David Saab*** (2001) 81 WAIG 2704; ***Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)***. The meaning of 'benefit' has been interpreted widely in this jurisdiction: ***Balfour v Travel Strength Ltd*** (1980) 60 WAIG 1015; ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307.

30 In determining whether a contractual entitlement is due to the applicant the onus is on the applicant to establish that the claim is a benefit to which she is entitled under her contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit which has been denied under this contract having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts***).

31 A contractual agreement between parties is to be interpreted using the ordinary words of the contract unless there is ambiguity. In ***Noel Edward Knight v Alinta Gas Ltd*** (2002) 82 WAIG 2392 His Honour, Sharkey P stated the following:

> Somewhat axiomatically, there is no scope for interpreting a contract unless there is ambiguity or the words in issue are otherwise susceptible to more than one meaning (see *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (op cit) at page 352 per Mason J and see also *Rankin v Scott Fell and Co* (op cit)).
>
> There are no strict rules of law governing the interpretation of contracts apart from the relevant rules of evidence. The plain, ordinary or natural meaning of the words used by the parties to express a term will prevail unless the context warrants otherwise. However, the process of construction of a contractual provision means more than merely assigning to the words of a written instrument their plain and ordinary meaning (see *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (op cit) at page 348 per Mason J). The parties' apparent or objective intentions, as evidenced by the context in which they contracted, control the process of interpretation, an issue which the court necessarily approaches objectively (see *The Life Insurance Co. of Australia Ltd v Phillips* [1925] 36 CLR 60) [54] – [55].

32 In ***Ware v Amaral Pastoral Pty Ltd (No 5)*** (2012) NSWSC 1550 the preconditions necessary to imply a term of a contract were outlined:

> The five preconditions necessary to found an implied term of a contract were stated by the Privy Council in ***BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*** (1977) 180 CLR 266 at 283, being that '(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'. In the case of written contracts that are complete on their face, these requirements have been endorsed by the High Court many times (e.g. ***Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*** [1979] HCA 51; 144 CLR 596 at 605-6; ***Codelfa*** at 347 and 404) [165].

33 I find that at all material times the applicant was an employee of the respondent and she was employed under a contract of service. I find that this claim is an industrial matter for the purposes of s 7 of the Act as it relates to wages the applicant claims are due to her arising out of her employment with the respondent. It also appears on the evidence before the Commission that the benefit that the applicant is claiming does not arise under an award or order of this Commission. The issue to be determined therefore is what were the terms of the applicant's contract of employment with the respondent and whether it was a term of this contract of employment that the applicant is entitled to the payment of the additional hours worked by her since March 2009 as well as superannuation entitlements on this amount.

34 The facts relevant to the applicant's employment with the respondent are as set out in paragraph 5 of this decision.

35 I find that the Contract constituted the applicant's terms and conditions of employment with respect to her employment at the Cloudbreak site. This contract, which commenced on 27 March 2008, provides that after 27 March 2013 its terms and conditions can continue to apply for up to another five years without any changes to the Contract, including the annual salary (see Exhibit A1, clause 2). The Contract also states that it covers all matters pertaining to the employment relationship to the exclusion of any award or agreement (clause 3).

36 Terms of the Contract relevant to the applicant's claim are as follows:

> **7. REMUNERATION**
>
> **Details of your annualised salary package are set out in the table below.**
>
> | | |
> |---|---|
> | Base Salary Rate: | $1432.69 per week |
> | Superannuation | $ 128.94 per week |
> | **Total Salary Rate** | **$1561.63 per week** |
>
> Subject to clauses **Error! Reference source not found.**, **Error! Reference source not found.** and **Error! Reference source not found**. [sic] your salary is paid by the Company to compensate you fully in respect of all entitlements, including payment for work in accordance with Clause 9 – Hours of Work / Rosters, additional hours of work, location, travel and all other factors associated with this position. The salary includes payment for approved leave and gazetted public holidays whether worked or not.
>
> The Company will make superannuation contributions on your behalf in accordance with the *Superannuation Guarantee (Administration) Act 1992*.
>
> Your remuneration is directly linked to the position and in the event of you transferring to another position and/or operation, it will be reviewed in line with the new position.

The salary will be paid 1 weekly [sic] in arrears. The salary will be paid by direct transfer into your nominated account with a bank, or other recognised financial institution.

In the event of a significant change in working conditions the Company may conduct a review of your remuneration.

**9. HOURS OF WORK / ROSTERS AND DUTIES**

Subject to clause 13, your ordinary hours of work are 38 hours per week averaged over a 12-month period, plus all reasonable additional hours necessary to complete your assigned work. You and the Company agree that any hours worked in excess of 38 hours per week averaged over a 12 month period are reasonable based on your personal circumstances and the operational requirements of the business.

Subject to clause 13, your ordinary hours of work will be worked within a daily spread of 12 hours.

Your hours of work will be in accordance with the requirements of your work area, as advised to you by your supervisor, or other authorised Company officer ("Project Working Hours"). The applicable roster will be provided to you.

An indictative [sic] roster cycle will be two weeks (14 days on) one week off (7 days off)

(see table below)

| | Mon | Tue | Wed | Thu | Fri | Sat | Sun |
|---|---|---|---|---|---|---|---|
| Week one | 10 | 10 | 10 | 10 | 10 | 10 | 10 |
| Week two | 10 | 10 | 10 | 10 | 10 | 10 | 10 |
| Week three | R&R | R&R | R&R | R&R | R&R | R&R | R&R |
| Week Four | 10 | 10 | 10 | 10 | 10 | 10 | 10 |
| Week Five | 10 | 10 | 10 | 10 | 10 | 10 | 10 |
| Week Six | R&R | R&R | R&R | R&R | R&R | R&R | R&R |

The Company may vary shift rosters and hours of work. The Company may transfer you to or from day work to shift work, and from one shift panel to another, to meet its operational requirements.

In the event of changes to your regularly rostered hours of work, the Company may conduct a review of your remuneration.

Your position is **Kitchen Hand** with the Company. Your duties are defined in your role description. You may be required to work in any areas or sites and undertake other duties as required commensurate with your skills, competence and training.

You will comply with all reasonable instructions from officials of PMA and Team 45.

You will assist in the training of other employees as required by the Company. You will undertake training courses in relation to enhancing or broadening your work skills as required by the Company.

Position descriptions will be periodically updated to reflect changes to your position, as the nature of your position and the level of responsibility may vary significantly during the term of your employment. Where significant changes to the organisation or performance of your work are proposed, you will be consulted.

**13. SHIFT WORK**

a) Except as varied by this Clause, all other aspects of the AWA shall apply to the working of shift work.

b) The Company has the right to direct Employees to work shift work as required and the Employees shall work the shift work as directed. Shift work will be worked and paid for in accordance with this clause 13.

c) Shift work is deemed to be any arrangement of Project Working Hours where the majority of the Ordinary Hours are worked outside of the spread of Ordinary Hours defined in clause 9 of this AWA.

d) Ordinary Hours for shift Employees will comprise thirty-eight (38) hours per week averaged over a defined work cycle and will not commence before 5.00pm on Sunday night. Such Ordinary Hours are the specified hours under each shift Employee's terms of employment by reference to which annual leave and personal/carer's leave accrue.

e) Prior to the commencement of shift work, the Company shall seek the agreement of the Employees involved. Failing agreement, the Company will provide to the Employees concerned one (1) week's notice of the commencement of shift work and the starting and finishing times of Ordinary Hours of the shifts.

MEAL BREAK - SHIFT WORK

f) Employees working night shift shall be entitled to stop work for a half-hour without deduction of pay for the purpose of taking a meal break.

g) The Company may stagger the times for Employees to take meal breaks to meet operational requirements.

REST PERIODS - SHIFT WORK

h) The Company shall structure the Project Working Hours for Employees working night shift to include one (1) half-hour rest break to be taken without deduction of pay by Employees working the Project Working Hours on any night shift.

37 After considering the terms of the Contract I find that the Contract allows the respondent to require the applicant to work 12 hour shifts without an increase to the salary she is to be paid, as specified in the Contract. I therefore find the applicant's claim that she be paid for the additional hours she worked after 13 March 2009, has not been made out.

38 It was not in dispute that the applicant was told at her interview that she would be working 10 hour shifts, the Contract had an 'indicative' roster of 10 hour shifts in clause 9 and the applicant worked 10 hour shifts up to 13 March 2009. However, Clause 7. - Remuneration states that the applicant is to be paid an annualised salary in full compensation for all hours worked in accordance with Clause 9. – Hours of Work/Rosters and Duties. Clause 9 provides that, subject to Clause 13. – Shift Work, the applicant is to work 38 hours per week averaged over a 12 month period plus all reasonable additional hours necessary to complete her assigned work. It states that her ordinary hours of work are to be worked within a daily spread of 12 hours, which is the current number of hours the respondent requires the applicant to work, and it refers to the applicant working two weeks on and one week off. Clause 9 also provides that the respondent may vary the applicant's shift roster and hours of work. It states that the applicant's hours of work will be in accordance with the requirements of the applicant's work area, as advised by her supervisor, and a roster will be provided accordingly. Clause 7. – Remuneration refers to the salary paid to the applicant being in full compensation for the hours worked by the applicant plus any additional hours of work. Given these terms of the Contract I find that the respondent can require the applicant to work up to 12 hours in any shift without any adjustment to her annual salary.

39 I reject the applicant's argument that the respondent could not increase her hours without reviewing her remuneration and increasing her annual salary in return for working additional hours. It was not in dispute that when the applicant's hours changed to a 12 hour shift the applicant was not consulted about the impact of this change on her income nor was there a review of the applicant's remuneration. Clauses 7 and 9 of the Contract state, however, that the respondent 'may' conduct a review of the applicant's remuneration in the event of a significant change to her working conditions and if her regularly rostered hours of work change. I find that the reference to 'may' in clauses 7 and 9 refers to any review being discretionary and it was therefore not mandatory for the respondent to conduct a review of the applicant's remuneration when her hours were increased (see the *Concise Oxford Dictionary* (8th ed, 1990) where 'may' is defined as 'expressing possibility').

40 I reject the applicant's argument that it is necessary to imply additional terms into the Contract as there is no express term in the Contract allowing the respondent to unilaterally vary a fundamental term of the Contract, that is, increasing the hours to be worked by the applicant without the applicant being paid additional remuneration. I have already found that the Contract contains terms which allow and contemplate the applicant working up to 12 hours in each shift for the same rate of pay as when she worked a 10 hour shift without a review of her remuneration being required. In the circumstances I find that there is no basis for implying any additional terms into the Contract.

41 Whilst it may be unfair to require an employee to work additional hours with no increase to an employee's remuneration that is not the basis for determining whether the applicant is due the wages she is seeking in this instance. This claim requires an interpretation of the terms of the Contract not whether the terms of the Contract were unfair to the applicant.

42 There is no need to deal with any prospective order for wages owing to the applicant as the applicant's claim has not been made out.

43 I have found that the applicant is not due the benefits she is claiming she is owed under the Contract. When also taking into account s 26(1)(a) of the Act considerations and the duty on the Commission to consider the relief being sought on the basis of equity, good conscience and the substantial merits, I will dismiss this application.

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**2013 WAIRC 00573**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | JOANNA LANDSHEER |
| | **APPLICANT** |
| | **-v-** |
| | MORRIS CORPORATION (WA) PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER J L HARRISON |
| **DATE** | THURSDAY, 1 AUGUST 2013 |
| **FILE NO/S** | B 166 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00573 |

| | |
|---|---|
| **Result** | Dismissed |
| **Representation** | |
| **Applicant** | Mr T Hammond (of counsel) and Ms J Banaszak and later Ms M Lalli (of counsel) |
| **Respondent** | Mr A Cameron (as agent) |

*Order*

HAVING HEARD Mr T Hammond of counsel and Ms J Banaszak and later Ms M Lalli of counsel on behalf of the applicant and Mr A Cameron as agent 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.) J L HARRISON,
[L.S.] Commissioner.

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**2013 WAIRC 00719**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | IAN LURATI |
| | **APPLICANT** |
| | **-v-** |
| | THE CHARIS CLEANING GROUP |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | THURSDAY, 15 AUGUST 2013 |
| **FILE NO/S** | U 105 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00719 |

| | |
|---|---|
| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | Mr I Lurati |
| **Respondent** | Ms C Leighton Smith |

*Order*

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

AND WHEREAS on 8 August 2013 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS on 13 August 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

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**2013 WAIRC 00702**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | LUKE MARGARITIS |
| | **APPLICANT** |
| | **-v-** |
| | MS SHARYN O'NEILL<br>DIRECTOR: STANDARDS AND INTEGRITY<br>DEPARTMENT OF EDUCATION |
| | **RESPONDENT** |
| **CORAM** | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | THURSDAY, 8 AUGUST 2013 |
| **FILE NO/S** | U 95 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00702 |

| | |
|---|---|
| **Result** | Application dismissed |
| **Representation** | |
| **Applicant** | Ms S Millman of counsel |
| **Respondent** | Ms R Young of counsel |

*Order*

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

WHEREAS on the 25th day of June 2012 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed to engage in further discussions; and

WHEREAS on the 14th day of June 2013 the Commission convened a hearing for mention; and

WHEREAS at that hearing the applicant's representative sought time to obtain further instructions; and

WHEREAS on the 17th day of June 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.

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**2013 WAIRC 00401**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00401 |
| **CORAM** | **:** | COMMISSIONER S M MAYMAN |
| **HEARD** | **:** | TUESDAY, 2 APRIL 2013 |
| **DELIVERED** | **:** | FRIDAY, 5 JULY 2013 |
| **FILE NO.** | **:** | U 229 OF 2012 |
| **BETWEEN** | **:** | MATTHEW KENNETH MILLER |
| | | Applicant |
| | | AND |
| | | WHEATBELT INDIVIDUAL & FAMILY SUPPORT ASSOCIATION INC. |
| | | Respondent |

| | | |
|---|---|---|
| CatchWords | **:** | Termination of employment - Harsh, oppressive or unfair dismissal –– Applicant unfairly dismissed – Application upheld – Compensation ordered - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) |
| Legislation | **:** | *Industrial Relations Act 1979* (WA) |
| | | *Minimum Conditions of Employment Act 1993* (WA) |
| | | *Vocational Educational Training Act 1996* (WA) |
| | | *Income Tax Assessment Act 1936* (WA) |
| | | *Associations Incorporation Act 1987* (WA) |
| Result | **:** | Compensation awarded |
| **REPRESENTATION:** | | |
| Applicant | **:** | Mr G McCorry (as agent) |
| Respondent | **:** | Mr S Bibby (as agent) |

**Case(s) referred to in reasons:**

*Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635

*Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217

*Browne v Dunn* (1893) 6 R.67

*Haines v Bendall* [1991] HCA 15

*Malec v JC Hutton Pty Ltd* (1990) 92 ALR 545

*Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385

*Narwal v Aldi Foods Pty Ltd* [2012] FWA 2056; BC201271417

*Sheldrick v WT Partnership (Aust) Pty Ltd* [1998] FCA 1794

*The Shire of Esperance v Mouritz* (1990) 71 WAIG 891

*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165

*WT Partnership (Aust) Pty Ltd v Sheldrick* [1999] FCA 843

*Reasons for Decision*

1 Mr Matthew Kenneth Miller (the applicant) first started work with the Wheatbelt Individual and Family Support Association Inc. (the respondent) on 17 November 2009.

2 On 11 February 2011 the applicant commenced a traineeship with an expected completion date of 11 August 2012. The applicant was employed as a carer under a twofold employment contract; one for 20 hours a week as a registered trainee and another for eight hours plus a week as a casual employee. The applicant had worked for a period of more than two years for the respondent prior to the traineeship commencing.

3 On 1 November 2012 the applicant filed the application with the Western Australian Industrial Relations Commission (the Commission) stating he had been unfairly dismissed from his employment, had had his traineeship cancelled with insufficient reason and without following the correct procedures.

4 The respondent denied the applicant had been unfairly dismissed. Further, there was no commitment given that the respondent would provide further employment beyond the conclusion of the traineeship. The respondent submitted the incident concerning the falsifying of hours on a timesheet had not been brought to the attention of the board until the chief executive officer (CEO) had resigned her employment. The respondent submits the Commission must find there was no unfairness and requests the Commission should dismiss the application.

**Applicant's Submissions**

5 The applicant was initially employed on a casual basis working 25 to 38 hours a week for which he was paid accordingly. The applicant was employed in total by the respondent for three years from November 2009 through to October 2012. In 2011 the applicant and another employee who was also engaged on a casual basis were offered traineeships. In the applicant's case the traineeship offered was a Certificate III in Disability Work and the traineeship was due to run for 18 months ending approximately in August 2012.

6 About 13 October 2012 the applicant received a text message from Ms King, the respondent's co-ordinator requesting the applicant attend a meeting the following Wednesday for a traineeship review. The text message read as follows:

> Hi can you please attend a traineeship review next wed 17th 11.30 at this office. Trish is unable to support David Fridays can work the shifts as you have no supports on that day. Are you ok to start next Friday. Cheers
>
> (exhibit Miller 4)

7 The applicant was somewhat concerned and prior to the meeting approached the acting CEO who informed him that there was nothing to it, it was simply a review meeting relating to the traineeship. On the day in question, namely 17 October 2012, Ms Baker was in attendance as was a person from the ApprentiCentre, Mr Fordham who was in charge of the applicant's traineeship. The applicant was advised that were not enough hours available for him in relation to his traineeship. Mr Fordham then left the office and the applicant was advised his employment was to be terminated, in part due to an incident that had occurred some 18 months earlier, an incident for which the applicant had, at the time been disciplined by the CEO and a warning letter had been placed upon his file.

8 Following the meeting the applicant spoke with Mr Fordham and was advised there was no problem having his traineeship extended. Following his termination the applicant received an unsigned letter, purportedly from Ms Baker the chairperson of the respondent's board:

> Wheatbelt Individual & Family Support Association Inc.
>
> Dear Matthew,
>
> Further to our meeting of 17 October 2012 you were advised that your trainee-ship 391313T1 ended on 11th August 2012.
>
> At the meeting it was noted there were issues concerning your performance that were of concern to the Organisation.
>
> In the circumstances the Organisation has prepared to agree to a termination of your contract by mutual consent.
>
> If you could please come in and sign a copy of this letter I will then make arrangements to pay your outstanding monies into your bank account.

Yours sincerely

Kathy Baker

Chairman (exhibit Miller 2)

9 The correspondence was neither signed nor dated. The applicant says the termination was unfair. Shortly after he was terminated the applicant obtained alternative employment. The applicant has continued to work for this family for two days a week. The applicant asserts there was no available alternative employment opportunities in the York area.

10 As a consequence of the applicant's termination of employment the applicant has suffered an ongoing loss of $250 per week. Mr McCorry, on behalf of the applicant submits that reinstatement is not feasible and that the applicant should be compensated for his loss and his ongoing losses in the calculation of compensation. It is submitted that any payments made by way of compensation for unfair dismissal are taxable as an eligible termination payment at 31.5%. The applicant submitted that the compensation should be subject to the upper limit of the Commission's jurisdiction and be adjusted to place the applicant in the same position he would have been had he not been terminated.

11 Mr Miller gave evidence as the applicant. He was first employed by the respondent in 2009, initially as a basic support worker on a casual basis for 10 to 15 hours a week which increased the longer he stayed with the respondent and by February 2011 the applicant gave evidence he was employed for 25 to 28 hours per week. In February 2011 the applicant commenced his traineeship for approximately an 18 month period. Under the traineeship agreement the applicant was working 20 hours a week.

12 The applicant gave evidence he worked extra hours, approximately five to eight hours regularly each week and occasionally more than that. When asked how often, the witness responded 'once every couple of months if there was an emergency with one of the clients I was working with' (ts 6). The applicant gave evidence that he was paid approximately $19.60 per hour for the traineeship and for casual work, $23.10 per hour.

13 The witness gave evidence that he had been employed by his mother who had been employed by the organisation for some 10 years. The witness understood she had arranged the traineeship with the organisation although the witness was not sure that was the case.

14 The applicant gave evidence when he received notification from Ms King to attend the traineeship review meeting he discussed the issue with his TAFE lecturer Merilyn. It was her suggestion the witness should raise the issue with the acting CEO later in the day. Following a conversation between the applicant and acting CEO the applicant claimed it would simply be a review to consider where the witness was up to and whether he was likely to finish his traineeship by the end of the year.

15 The applicant gave evidence he was somewhat concerned he may be in trouble with his job given his mother had recently ceased working with the respondent and had commenced legal action in the Commission against the respondent. The applicant gave evidence that when the meeting started on 17 October 2012 Mr Fordham had explained that the respondent had decided not to renew the applicant's contract. At that stage Mr Fordham left. Ms Baker informed the applicant his employment would no longer be continued. The witness gave evidence Ms Baker advised the reason for the termination was an event that had occurred some 18 months earlier. Ms Baker further advised the applicant that the termination had nothing to do with the witness's mother. The applicant in response advised Ms Baker at the time the matter had been investigated by the then CEO, he had paid the respondent restitution, apologised to the client and received a warning from the respondent.

16 Following his termination the applicant was informed by Ms Baker that he could continue working for the next two weeks if he wished however not beyond that particular date. The witness gave evidence he received a letter (exhibit Miller 2) on or about 30 October 2012. The witness responded to that letter by email addressed to Ms Baker and the respondent's board:

Tuesday, 30 October 2012 10:29 AM

Dear Kathy (and WIFSA Board),

At a meeting with yourself and Levi Fordham from the Apprenticentre on 17th October 2012, I was dismissed from my Traineeship and all other employment with WIFSA.

I was told I was being dismissed because: –

**1) I was not completing sufficient hours (20 hpw) to meet my Traineeship.**

I point out that:

a) it is the employer's responsibility to ensure they are providing me with sufficient hours to meet my Traineeship Agreement.

b) I had frequently requested an increase in my hours over the past year.

c) Levi Fordham, Apprenticentre, also advised you, on 17th October 2012, of WIFSA's failure to provide me with sufficient hours and of your failure to follow WIFSA's Policies and Procedures regarding sufficient warnings prior to dismissal.

**2) I had incorrectly filled out a Timesheet <u>18 months</u> prior.**

This matter was dealt with by the CEO in full accordance with the WIFSA's Policies and Procedures. I was given a Verbal Warning, I apologised to those involved, returned incorrect wages to WIFSA and the matter was closed.

There have been **NO** other issues <u>ever</u> raised about my performance.

On 25th October I received an undated letter from yourself, as attached, asking me to sign a document with a totally incorrect version of events, e.g. that the decision to terminate my employment was "by

> mutual consent", that there were performance issues and that you would withhold my "outstanding monies" unless I signed the abovementioned document.
>
> The issues of my Traineeship termination and employment dismissal are being addressed elsewhere. Meanwhile, I ask that you immediately release the "outstanding monies" I am entitled to and cease further coercionary correspondence.
>
> Matthew Miller
>
> 29th October 2012

(exhibit Miller 3)

17 The applicant gave evidence that he was paid his outstanding monies several days after the email was sent.

18 On the Friday following the applicant's dismissal, he was contacted by a client of the respondent. She asked the applicant to start working Fridays and Tuesdays with her son and the applicant identified he received approximately $250 per week. To the best of the applicant's knowledge there was no other organisation in the area doing the same work as the respondent within a 45 minute drive.

19 In cross-examination the respondent asked the applicant to identify the three different rates of pay received from the respondent, reflecting on the contract. The applicant identified he was guaranteed 40 hours per fortnight at the traineeship level of $17 per hour and any hours worked above were to be paid at the casual rate of $20 per hour (exhibit WIFSA 1). The applicant identified a third rate received for casual IT support, that being $34.65 per hour (exhibit WIFSA 2). In this capacity the applicant worked some 20 hours per year although from July 2012 through to his termination he worked only one hour at the higher rate.

20 The applicant confirmed that his training contract contained a clause specifying:

> This contract expires if it reaches the term of apprenticeship/traineeship referred to in question 4 without the apprentice/trainee having attained all the required competencies or a request for an extension of the contract having been endorsed by the State/Territory Training Authority.

(exhibit WIFSA 1)

21 The applicant agreed in cross-examination that he had falsified a timesheet some 18 months earlier. Further, the applicant agreed that on the 17 October 2012 Mr Fordham had suggested he had the option of going elsewhere in finding other work with another employer and continuing his studies. The applicant indicated he had approached his lecturer at Northam TAFE to seek an extension of his traineeship and it was his understanding she had informed him the matter was proceeding.

22 The applicant agreed that there may have been a conflict of interest with respect to his mother acting in the capacity of CEO.

**Respondent's Submissions**

23 Mr Bibby identified the respondent as an incorporated body, incorporated in accordance with the *Associations Incorporation Act 1987* (WA). The respondent (WIFSA) is a small organisation run by a voluntary board consisting of a chairperson, a vice chairperson, a treasurer and seven elected board members. WIFSA is set up to provide services to disabled persons residing in the wheatbelt of Western Australia. It is a non-profit charitable organisation and its main purpose is to support people with disabilities together with their families. The families are principally supported by the provision of funding for the purpose of respite care.

24 The respondent submitted that on 11 August 2012 the training contract of the applicant came to an end. The CEO of the organisation resigned without notice and Ms Baker the chairperson of the organisation was called upon to manage the organisation from that point. Ms Baker asserts that the board had no understanding of what had been occurring within the organisation. Following a number of discussions with one of the employees, Ms Baker became aware of an issue concerning the applicant's past performance; namely an incident that had occurred the year before.

25 Ms Baker made enquiries as to what she should do in the circumstances and in the process sought advice from the Department of Training (the Department). Mr Fordham examined relevant documents and advised there was no compulsion on the respondent to renew the applicant's traineeship agreement. There were a number of discussions following the advice received from Mr Fordham in early October and then consultation took place with the board. It was the board's view there was no obligation to renew the traineeship agreement and on that basis the board decided to terminate the applicant's employment.

26 The respondent submitted there had been no unfair dismissal in the matter and the traineeship agreement was simply terminated. The reason for the termination was in part discovering what had occurred in September 2011; the incident where Mr Miller had falsified the timesheets.

27 Ms Katrien Baker gave evidence. Her occupation is as the co-ordinator of the Merredin Retirement Village. Ms Baker is the respondent's chairperson of the board. She has operated in that capacity for some three years. Ms Baker gave evidence that the organisation receives funding primarily through Disability Services to support families in the wheatbelt for respite to help either the family or the person with the disability. The organisation employs up to 30 persons.

28 The witness gave evidence that Ms King spoke to her and advised her that the applicant had falsified his hours sometime earlier but that the board had not been made aware of it. Furthermore, the client had become involved to verify the hours. The witness gave evidence that in her view it was gross misconduct and in breach of the disability standards. When the witness first became aware of it she discussed it initially with the vice chairperson and then with an executive committee member, the treasurer and one other board member.

> Okay? --- Having taken it back to the executive committee, it was agreed that in view of the information that had come to light about Matthew's conduct and that we were under no contractual obligation to extend the traineeship, that we wouldn't.
>
> (ts 32)

29 The witness offered the applicant the opportunity to work out two weeks given his contract had expired. In response the applicant indicated he wanted to continue to work for the respondent:

> 'Well, I'm sorry, that's not going to happen, and I think you know why'. And I did state that it had nothing to do with his mother, it was purely on his conduct and performance. Matt then said that that's something that happened 18 months ago, and had been resolved. And I stated no it hadn't been resolved because the board wasn't made aware of it, I had only just been made aware of it recently. And had the board been informed at the time of the incident, it would have been dealt with very differently. Matthew then got up and said he was going to seek legal advice, and that was the end of the conversation. (ts 33)

30 A further payout to the applicant of two weeks' pay was made as a gesture of goodwill. The concept of 'mutual termination' in the letter of termination (exhibit Miller 2) was specified as a gesture of goodwill. In cross-examination Ms Baker indicated she had been on the board for some 14 years. In that time she indicated Ms Miller, the CEO had attended the monthly meetings however had, at no stage raised employment issues, matters or concerns of that nature with the board.

31 The witness stated she did not consider it unfair to terminate someone some 18 months after the incident had occurred when the incident had been committed by a 19 year old person who had been dealt with by the CEO at the time and was known to at least the working staff of the respondent. When asked if she considered the action taken by the applicant some 18 months earlier to be misconduct the witness replied – 'Yes and no' (ts 38).

32 Ms Laurel Tina King then gave evidence for the respondent as manager of services coordination having been employed with the respondent for some four years. In that capacity she gave evidence she works alongside families and support workers. Ms King gave evidence that she had somewhat of a personal friendship with Ms Miller during her employment with the respondent. Ms Miller and Ms King would sit down and have lunch and talk about family and on several occasions she socialised on a personal level outside of work.

33 The witness went on to say, she raised with Ms Baker in 2012, following the resignation of the CEO, an incident that had occurred the previous year regarding the applicant which, in the witnesses' view, had not been resolved. The witness had never seen any documentation of the meeting nor received any feedback. The witness had maintained regular contact with the client, Shane who was involved in the incident that had occurred in September 2011.

34 The witness confirmed she had sent an SMS text to the applicant's mobile phone on 11 October 2012 offering the applicant more work (exhibit Miller 4). The witness was unaware of any discussions that were going on between Ms Baker and the applicant at this time.

35 In cross-examination the witness was asked whether she would normally cite any documentation associated with a disciplinary matter to which she responded in the negative. The witness indicated she did attend a meeting where she was informed the meeting was to be documented and she was to be provided with minutes however the witness specified she did not see any minutes.

**Procedural Matters**

36 The parties gave brief concluding submissions on the day of the hearing. A number of legal issues were raised in the course of those submissions relating to contract law. Following a request from the respondent's representative the Commission extended to each of the parties the opportunity to provide further submissions in writing by close of business on 9 April 2013.

**Applicant's Concluding Submissions**

37 The applicant worked for the respondent for approximately three years, initially on a casual basis and subsequently as a trainee with contract hours of 40 per fortnight payable at a particular rate ($19.64 per hour at the relevant date) and any hours in addition to the 40 per fortnight payable at casual rates of $23.10 per hour. He worked sufficient hours in the 2011/12 financial year to earn a total income of $26,903 upon which he paid $1,826 tax (exhibit Miller 1).

38 The traineeship established, pursuant to the *Vocational Education and Training Act 1996* (WA) was for a period of 18 months. Paragraph (h) of that traineeship contract specified:

> this contract expires if it reaches the term of the apprenticeship/traineeship referred to in question 4 without the apprentice/trainee having attained all the required competencies or a request for an extension of the contract having been endorsed by the State/Territory Training Authority.
>
> (exhibit WIFSA 1)

The term of the applicant's contract expired on 11 August 2012 and was not extended. The applicant's employment came to an end at that time.

39 The applicant continued to work for the respondent, continued to attend his traineeship studies and it is submitted by the applicant, continued to be directed by and paid by the respondent for the work performed. Thereby a new contract of employment was established by the conduct of the parties - Macken's Law of Employment (6th edition) 333 - 334 and the cases cited therein and a discussion by the English and Wales Court of Appeal in *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217 where their Lordships considered that an implied contract of employment could be established without any express intention by the parties to enter into the legal relationship.

40 Turning to the incident of November 2011 whereby the applicant was disciplined by the then CEO it is submitted the applicant committed an act of misconduct some 18 months prior to his termination by submitting an incorrect timesheet for which he

was incorrectly paid. The matter was investigated the applicant admitted the misconduct, reimbursed the employer and apologised to the client of the respondent who was ultimately responsible for paying the applicant his remuneration. He was 19 years old at the time and he was provided with a warning by the CEO. According to exhibit Miller 3 [2] of his e-mail:

> This matter was dealt with by the CEO in full accordance with WIFSA's Policies and Procedures. I was given a Verbal Warning, I apologised to those involved, returned incorrect wages to WIFSA and the matter was closed.

41 The CEO acts with the authority of the board. On the evidence of Ms Baker for a number of years disciplinary matters and other matters involving staff have never been brought to the attention of the board which the applicant's representative says is conclusive of the matter. The misconduct was dealt with. It was decided, whether rightly or wrongly that termination was not appropriate in the circumstances. The board is bound by the decision of the CEO. Whether the CEO should have done it differently is irrelevant. It is not open for the board some 18 months down the track to rely upon the conduct that has already been dealt with by the CEO, investigated and the applicant disciplined.

42 It is well established that a piece of misconduct in the past can be relevant to a decision to terminate in the future because of performance or other misconduct issues. It is something that may go to the weight of whether or not a termination should occur. In this case there is nothing relevant in the applicant's performance.

43 The CEO ceased to be employed by the respondent in contentious circumstances on or about mid-August 2012. The chairperson of the respondent's board took over the operational control of the respondent pending the appointment of a replacement CEO which took place at the beginning of October 2012. The alleged misconduct committed by the applicant in November 2011 was discovered when the chairperson asked the respondent's co-ordinator Ms King if there were any problems the board need to address. It was at this point Ms King informed Ms Baker there was an 18 month old issue that she, Ms King did not know what the outcome of the investigation had been. The chairperson was particularly concerned that Shane (the client) had been brought into the investigation describing the applicant's conduct in getting the client involved in the investigation as unforgivable even though there was absolutely no evidence that the applicant had anything to do with getting the client involved in the investigation.

44 On 17 October 2012 the applicant was terminated by the chairperson. The stated reasons were that the respondent could not provide him with 20 hours per week to satisfy the traineeship requirements and in addition there were performance issues. The uncontradicted evidence of witnesses that apart from the single act of misconduct 18 months previously for which the applicant had been disciplined, there had been no performance issues and furthermore an additional shift had been offered the previous week for the applicant which suggests no shortage of work.

45 The respondent's chairperson subsequently wrote to the applicant following his termination offering to 'agree to a termination of your contract by mutual consent' (exhibit Miller 2). The exhibit further suggested that he if came in and signed a copy of the letter he would be paid his outstanding entitlements. The applicant refused and subsequently was paid his entitlements without such a signature.

46 The evidence suggests there was a dismissal. The dismissal, the applicant submits was unfair because the misconduct the applicant was apparently terminated for was the conduct of involving a client in a disciplinary investigation. The applicant firstly submits there is no evidence that the applicant involved the client in the investigation and furthermore there is no evidence that he initiated or conducted the investigation or behaved improperly during the investigation. Furthermore, the involvement of the client in the investigation does not amount to misconduct by the applicant. There was nothing he did in participating in the investigation that amounted to a repudiation of the contract of employment that that justified dismissal.

47 The misconduct which he does admit to was dealt with in accordance with the authority of the CEO to deal with such matters and does not warrant summary termination some 18 months later. Absent some evidence of gross impropriety, the decision of the CEO to discipline the applicant by giving him a warning was within the legitimate scope of her authority and binds the board. It is not for the board to overturn the decision of the CEO, apparently made in good faith 18 months previously, and there is no evidence that the applicant's performance, character or conduct since that time warranted taking that single act of misconduct into consideration about his future. Furthermore, the board is, in the applicant's view, estopped from relying on the misconduct as any basis for termination of the applicant's employment.

48 Turning to the issue of remedy the applicant submitted that reinstatement on all the circumstances is impracticable and compensation should be awarded.

49 The applicant was earning approximately $482 (nett) per week in the previous financial year. The applicant submitted that the rates of pay under the *Minimum Conditions of Employment Act 1993* (WA) were increased by 3.4% with effect from 1 July 2012, (2012) WAIRC 00346; 92 WAIG 557, 568. The applicant's nett income therefore for the 2012/2013 financial year could reasonably be expected to have increased proportionally to $498 per week.

50 The applicant mitigated his loss by obtaining alternative employment. His income from alternative employment is $250 (nett) per week. His nett economic loss for the period November 2012 onwards is $248 per week therefore the applicant's nett losses to the date of the hearing is 21 weeks multiplied by $248 which equals $5,208.

51 The applicant submits had he not been unfairly dismissed he could have reasonably expected to remain employed by the respondent indefinitely or at least for a period of some 12 months beyond the conclusion of his traineeship period.

52 The applicant's loss over the 12 month period would be approximately $12,500. It is this amount the applicant would have earned in 6 months from the respondent, the maximum period allowable under the *Industrial Relations Act 1979* (WA).

53 The Commission is required to have regard for the fact that the applicant worked for a public benevolent institution and is therefore entitled to tax concessions on his earnings (exhibit Miller 1). The *Income Tax Assessment Act 1936* (Cth) allows for any payments made by way of compensation for termination of employment to be an eligible termination payment. The *Taxation Administration Act 1953* (Cth) requires tax to be withheld from an eligible termination payment of under $180,000 at the rate of 31.5%.

54 Any award of compensation is designed for the injured employee back, so far as is reasonably can be achieved, in the position he would have been if his employment had not been terminated as per the discussion in *Haines v Bendall* [1991] HCA 15. That requires the applicant to be compensated on a nett basis, on the basis of a nett loss of $248 per week. Where tax obligations have the effect of changing the nett outcome of the judgement it is permissible to gross up the nett payment to allow for the obligation to withhold tax from the compensation payment *Sheldrick v WT Partnership (Aust) Pty Ltd* [1998] FCA 1794 and *WT Partnership (Aust) Pty Ltd v Sheldrick* [1999] FCA 843. The Commission should therefore make a compensation order in nett terms that the respondent is to pay to the applicant a nett amount to accommodate the tax liabilities. The applicant submitted that amount to be $248 per week payable with the tax liability of 31.5%, a total of $362 per week.

**Respondent's Concluding Submissions**

55 The respondent submits following consultation with the Department and becoming aware of their contractual rights under the contract with the applicant, the respondent determined not to continue the traineeship arrangement that had commenced in February 2011 (exhibit WIFSA 1). A meeting was arranged with Mr Fordham of the Department for 17 October 2012 to advise the applicant that the respondent would not renew his traineeship. Yet, if as the applicant asserts, the central reason for the termination was the misconduct that had occurred in September 2011, it would have been unnecessary to have Mr Fordham travel to York to attend the meeting to effect the termination.

56 The uncontradicted evidence of Ms Baker was that the misconduct was not the operative factor in deciding not to continue with the training agreement. Rather, after consulting with fellow board members about the advice received by Mr Fordham, the respondent exercised its right not to continue with the training arrangement. As further evidence that the termination was not primarily motivated by a desire to terminate the applicant for misconduct Ms Baker offered the applicant two weeks' notice and provided the applicant with the offer of working this period out, an offer clearly inconsistent with a termination for misconduct. The termination was affected by letter posted to the applicant in late October 2012 (exhibit Miller 2). There is no mention of misconduct.

57 The applicant claimed he was employed as a casual IT consultant for between 20 to 30 hours per year. The respondent asserts there is no documentary evidence of this arrangement however exhibit WIFSA 2 indicates pay-roll made one payment to the applicant for one hour at $34.65.

58 In Macken's Law of Employment (6th edition) chapter 4 - Formation of a Contract of Employment, the tests concerning the terms that apply to an employment contract are sourced by looking at the intention of the parties based on whether a reasonable person would be bound by the arrangement. Referring to the decision of *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165, 179 where the High Court noted:

> It is not the subjective of beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

59 In response to the applicant's submission that an implied contract of employment came into existence on 13 August 2012 that was binding on the parties, the respondent suggests it is not open to make such a finding, as the circumstances of this matter are vastly different to the facts as considered in *Brook Street.* The respondent submits the applicant was not part of a 'triangular relationship' where he was working for a labour hire agency and 'end user' of the agencies' services.

60 Although the traineeship expired on 12 August 2012 the parties continued to honour the arrangement and act on the basis of its terms. In light of the decision of the High Court in *Toll* the respondent submits, given the meeting on the 17 October 2012, the Commission must find that the terms of the traineeship agreement were still operative as of that date.

61 The evidence before the Commission confirms the submission made by the respondent in the aforementioned paragraph:

> the applicant's occupation is described as a trainee in disability work, disability support worker plus information technology support;
>
> the wage paid was $19.64 per hour;
>
> the applicant notes in his application that 'I have been unfairly dismissed from employment and had my traineeship cancelled';
>
> the applicant notes the reason given by the employer was for failing to fulfil the allotted traineeship hours; and
>
> under the 'remedy' sought the applicant notes 'the loss of my traineeship' which had 2 to 3 months to run.

62 The respondent submitted relevant details were that the applicant continued to work after 12 August 2012, continued to attend TAFE under the original agreement and receive payment in exactly the same terms. The applicant indicated in evidence he had approached his lecturer for an extension to his traineeship agreement however agreed there was nothing formalised in regard to the extension.

63 The applicant submitted there was a new contract in place on and from 12 August 2012 (ts 57). The respondent submits that this must be disregarded by the Commission as the applicant did not at any time raise this in his opening statement, his evidence in chief or cross-examination. Further this was not part of the original application. The applicant has had every opportunity as part of the hearing to amend its claim. Whilst the Commission is not bound by the rules of evidence, the rule of *Browne v Dunn* [1894] 6 R 67 would suggest that the evidence should be disregarded.

64 If the Commission does find that there has been an unfair dismissal then the question of loss is significantly affected by a finding on when the training arrangement might end.

65 The respondent submitted that by 17 October 2012 the applicant had not taken steps to formally extend his traineeship agreement nor completed his units and it was open for the employer to end the training agreement. The Commission therefore must find that the parties terminated the contract in accordance with the terms. The respondent submits that the termination was not unfair.

66 The respondent submitted that Ms Baker's evidence confirmed that the meeting of 17 October 2012 came about as a result of a number of events. Firstly, the discussion between Ms King and Ms Baker where Ms Baker first learned of the misconduct undertaken by the applicant in 2011. Ms Baker then conveyed that information to the board members and rather than moving to terminate the contract of the applicant Ms Baker contacted the Department regarding the respondent's obligations relating to the applicant's traineeship. This information was conveyed back to the board and members were advised they were under no contractual obligations to renew the contract. It was at this point the board decided to to terminate the contract. Ms Baker then arranged the meeting for 17 October 2012 and on behalf of the board offered to pay the applicant two weeks' pay in addition to the applicant's entitlements. In making this decision the board took into consideration the incident of November 2011.

67 The respondent submitted that the applicant's mother handled the disciplinary process relating to the misconduct. This was clearly a conflict of interest. Ms Baker considered the matter to have implications for the respondent particularly with its responsibilities to funding agencies. It is the view of the respondent that the board should have been notified of the event at the time. The Commission, when considering this particular incident should have regard for the decision of the Industrial Appeal Court in *The Shire of Esperance v Mouritz* (1990) 71 WAIG 891, 899 where J Nicholson noted:

> The mere fact that the employee did not have a proper opportunity to explain or has not been warned of the possibility of termination does not automatically entitle the applicant to a remedy. No injustice will result if the employee could be justifiably dismissed.

68 The principles of the Full Bench decision in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8 are, in the respondent's view, required to be followed in in this matter. Those principles include:

> If, and only if, there is a finding of unfair dismissal - then the Commission may make a finding as to loss.
>
> It is the responsibility of the employee in this matter to establish, on the balance of probabilities his loss or injury.
>
> Further, the employee has a duty to mitigate his loss - which is an obligation that a reasonable and prudent person would have taken.
>
> Any exercise of the Commission's discretion must not be arbitrary.

At paragraph (q) of that decision it notes 'As to deciding questions of future loss, assistance can be derived from Malec v JC Hutton Pty Ltd (1990) 92 ALR 545, where Deanne, Gaudron and McHugh JJ held that the court must assess the degree of probability that an event would have occurred or might occur, and adjust its award of damages to reflect the degree of probability'.

69 The respondent submitted in light of the principles of *Bogunovich* it is inappropriate to base future earnings on a group certificate that could include work that may not have continued into the future. To do so would, in the respondent's view, be arbitrary.

70 If the Commission finds that the applicant was unfairly dismissed, in light of the above principles on the balance of probabilities the contract would not have continued past the termination date of 17 October 2012. It was the applicant's uncontradicted evidence that he would have finished his course and therefore his traineeship by the end of the year (ts 9). For the TAFE 2012 year the final term concluded on 14 December 2012. The respondent submits the loss could therefore only be between the date of termination and the end of the TAFE term 2012.

71 It was the evidence of the applicant that he would have finished his course and therefore his traineeship by the end of the year (ts 9). In light of the principles in *Bogunovich* the respondent submitted loss could only be between 17 October 2012 and the end of the TAFE term. There was no evidence led by the applicant requiring the employer to offer future employment to the applicant after the traineeship had ended.

72 Turning to the question of calculation of loss the evidence demonstrates that the contract was terminated on 17 October 2012. The respondent paid the applicant two weeks in the form of a goodwill payment which can be interpreted as two weeks' notice. Given TAFE would have closed on 14 December 2012 the applicant would therefore have had a total of 8.2 weeks of the training agreement to conclude.

73 This amounts to the following:

> period of projected employment 17 October 2012 to 14 December 2012 - 8.2 weeks;
>
> 20 hours per fortnight at $19.64 per hour which equals $392.80 per fortnight or $196.40 per week;
>
> 8.2 weeks x $196.40 = $1610.48;
>
> less two weeks' pay = $392.80
>
> **$1217.68 gross**

74 The respondent submits that on the balance of probabilities the maximum the Commission is confined to in terms of loss is $1217.68 gross but given the applicant's earnings exceeded this amount after the traineeship agreement had ended, in fact the applicant earned $250 a week, hence in the respondent's submission, there is no compensation liable to be awarded.

75 The applicant relies on *Sheldrick* in circumstances where the Commission determines loss, the amount can be increased to take into account the taxation. In awarding damages the court took into account the fact that the matter was dealt with offshore and made allowances for the fact that the employee would be liable to taxation on this lump sum in Australia given his remuneration was tax free. Given the employee was terminated without notice, the court in these circumstances accepted the evidence of the employee's accountant that he would be liable for taxation on the lump sum payment on his return to Australia. On appeal, the employer sought to have the damages reduced by the taxation rates that would have been paid in Asia. Given that this was not argued in the first instance the Federal Court declined to interfere with the decision of the primary judge.

76 The respondent's view is that the *Sheldrick* case is not relevant to the present matter and in the event any compensation is awarded it is to be paid in accordance with the appropriate rate under the *Income Tax Assessment Act 1936* (Cth).

77 The applicant refers to Macken's Law of Employment (6th edition) 333 – 334 as the authority cited. The respondent is of the view that the reference relates to constructive dismissal or alternatively termination of a contract by the effluxion of time and accordingly, has no relevance to this matter. The respondent submits that the applicant was terminated in accordance with the terms of the training agreement on 17 October 2012.

**Commission's Conclusions**

**Credibility**

78 I listened carefully to the evidence given by each witness and, in addition, closely observed each witness both in the giving of their evidence and their demeanour. I find that the applicant gave his evidence in a forthright and confident manner. The Commission has also listened carefully to the evidence of Ms Baker and Ms King. It is the Commission's view that all witness evidence was given clearly and to the best of each person's ability. There is nothing in the evidence of Mr Miller which I consider to be untruthful or implausible.

**Findings**

79 I have considered carefully both the verbal and written submissions of the applicant and the respondent.

80 The applicant worked for the respondent for a period of three years, initially in 2009, as a casual and then subsequently from 11 February 2011 as a trainee in Certificate III, Disability Work with a nominal term of 18 months with the C Y O'Connor Institute in Northam. In that capacity the applicant was guaranteed a minimum of 40 hours per fortnight at the traineeship level of $17 per hour. Any hours worked over and above the 40 hours per fortnight were to be paid at a casual rate of $20 per hour. All other conditions of employment were in accordance with the *Minimum Conditions of Employment Act 1993* (exhibit WIFSA 1).

81 The applicant asserted that a new contract operated on and from 12 August 2012 whereas, conversely the respondent submits the existing training agreement continued on foot without modification. The respondent submits the applicant's submission is to be rejected given the 'new contract' concept was not raised until the applicant's closing submissions, therefore pursuant to the rule of *Browne v Dunn* the respondent suggests the submission should be rejected. Given the Commission is not bound by the rules of evidence, I consider that it would be fair to admit the submission, subject to the proviso that the Commission has regard for the provisions of s 26(1)(b) of the Act and:

> shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; and

The submission accordingly, may receive a lesser weight.

82 Both parties led significant submissions and evidence on the event that occurred in late 2011. One party suggested the month was September and the other party suggested the relevant month was November. Not a lot rests on the relevant month as the applicant concedes to the conduct, accepts that the conduct was inappropriate and that he was disciplined at the time. Therefore the Commission will refer to the incident as having occurred in 'late 2011'.

83 I find the notice of termination came as a shock to the applicant and was unexpected. Before 17 October 2012 the applicant had no knowledge of his impending termination, nor was he warned by his employer of any performance concerns other than the single verbal warning back in 2011, more than a year earlier. This may not render a termination unfair as was recognised by the Industrial Appeal Court, in particular by Nicholson J, in *Mouritz*, if there was an acceptable reason for the dismissal. However, the Commission finds in this matter there was not an acceptable reason for the dismissal as the matter relied upon by Ms Baker for the dismissal had already been dealt with in 2011 by the then CEO. The applicant was disciplined for the incident that occurred in late 2011 when the CEO:

> investigated the matter;
>
> required the applicant to pay restitution;
>
> required the applicant to apologise to the client; and
>
> issued the applicant with a verbal warning.

84 In this matter the respondent, in 2011, became aware of the applicant's misconduct and promptly reacted and dealt with the issue in accordance with the nature and severity of the particular matter *Narwal v Aldi Foods Pty Ltd* [2012] FWA 2056; BC201271417 [44]. The Commission finds the respondent in 2011 did not consider the applicant's behaviour warranted termination.

85 I find that when Ms Baker and the board made the decision to terminate the applicant in 2012, based on Ms Baker's own evidence 'it was purely on his conduct and performance' referring to the same incident of late 2011 (ts 33). Ms Baker went on to say in response to the applicant's stated desire to continue working for the respondent 'Well, I'm sorry that's not going to happen, and I think you know why' (ts 33). Seemingly, in Ms Baker's view because the CEO at the time failed to report the matter to the board some 18 months earlier, the applicant was being terminated.

86 The Commission finds, based on the evidence, that any matters of an employment nature would not normally be dealt with as board matters by the respondent. I find such had been the practice for at least a decade. It appears to the Commission Ms Baker's distress was not a concern with the applicant but with the applicant's mother for failing to report the matter to the board yet the then CEO's failure to do so would have been inconsistent with what had been normal practice for the previous 10 years.

87 Further, the applicant had already been disciplined for the incident concerned some 18 months earlier. The Commission considers the respondent was disciplining the applicant for the events of 2011 a second time; on this occasion however he was being terminated. It seems at no stage did the respondent take into account that the applicant had already been disciplined for the same event.

88 The test of determining whether or not a termination is unfair is well settled and accordingly I apply the decision of the Industrial Appeal Court *Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385. The question to be answered is whether the employer's right to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to an amount to an abuse of the right. The Commission finds Mr Miller was not afforded 'a fair go all round'. The Commission rejects the submission of the respondent that the action of the applicant in 2011 did not cause the termination. That is contrary to the evidence in particular of Ms Baker.

89 Reinstatement in this matter is not being sought by the applicant. I am satisfied on the evidence that the working relationship between the applicant and respondent has broken down such that an order for reinstatement would be impracticable. It is clear on the evidence that the applicant satisfied the onus to seek out alternative employment, in fact did so immediately following his termination. Since the termination by the respondent the evidence demonstrates the applicant has been employed in other employment. Therefore I am satisfied the applicant took reasonable steps to mitigate his losses. In the Commission's view compensation should be awarded.

90 Turning to the question of loss the respondent suggests there was no evidence led by the applicant suggesting the employer was to offer future employment to the applicant after the traineeship had ended. Ms Baker however gave evidence that the applicant, in the meeting on 17 October 2012, said:

> 'I want to continue working at WIFSA'. (ts 33)

91 While this evidence led by applicant does not of itself suggest future employment. Together with the two years employment the applicant had with the respondent prior to his traineeship commencing the overall picture suggests there had been an ongoing employment picture. There seems to have been no reason for the employment to cease. The Commission is of the view that the applicant would have continued to be employed by the respondent once his traineeship had been concluded. I make that conclusion on the basis of his employment prior to the commencement of his traineeship at first instance. Without the decision to terminate the applicant, in my view, would still be employed.

92 While the Commission accepts that the respondent took advice from the Department before it terminated the applicant, the actual decision to terminate was made by the respondent's board and not the Department.

93 The Commission also finds the respondent's assertion that there was a shortage of hours to be confusing at best given the applicant was requested by the coordinator to work an additional five hours per week on a Friday just one week before he was terminated.

94 I therefore now turn to the question of compensation. I apply the principles set out in *Bogunovich.* I accept the applicant has had difficulty in accessing employment given that he lives in a small community.

95 The Commission accepts the view of the respondent with respect to *Sheldrick*, the taxation arrangements were not relevant to a case within Australia therefore taxation rates are appropriate to be dealt with under the *Income Tax Assessment Act 1936* (Cth).

96 I find that the applicant had a reasonable prospect of ongoing work with the respondent if he had not been unfairly terminated. On this basis it is my view that had the applicant not been unfairly terminated he would have had an expectation of ongoing employment with the respondent for at least 10 months. Having regard to all of the circumstance of the case I conclude that the applicant should be compensated for his loss.

97 I find the applicant's loss to be as follows:

> Lost wages for 10 months (in the Commission's view is a reasonable length of time for the applicant to have remained working with the respondent); however the Commission is capped at s 23A under the Act in the awarding of compensation at six months.

98 The Commission accordingly awards the applicant compensation in the form 19 weeks.

99 Prior to making an Order in relation to this application the parties are directed to confer and report to the Commission within seven working days of the issuance of these reasons for decision as to an appropriate dollar amount to be paid to the applicant. The reason for this approach is there appears to be some confusion between the submissions relating to the applicant's rates of pay at the time of termination based on weekly and fortnightly concepts.

100 I suggest the Mr McCorry and Mr Bibby consult on a draft minute.

**2013 WAIRC 00432**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | MR MATTHEW KENNETH MILLER |
| | **APPLICANT** |
| | **-v-** |
| | WHEATBELT INDIVIDUAL & FAMILY SUPPORT ASSOCIATION INC. |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | THURSDAY, 18 JULY 2013 |
| **FILE NO/S** | U 229 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00432 |

| | |
|---|---|
| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr G McCorry (as agent) |
| **Respondent** | Mr S Bibby (as agent) |

*Order*

WHEREAS ON 5 July 2013 the Western Australian Industrial Relations Commission (the Commission) issued in its Reasons for Decision in this matter that Mr Miller (the applicant) had been unfairly dismissed from his employment with Wheatbelt Individual & Family Support Association Inc. (the respondent) and that the applicant was entitled to be paid 19 weeks' remuneration as compensation;

AND WHEREAS the applicant's representative and the respondent's representative were required to confer within seven days of the Reasons for Decision issuing as to the appropriate amount to be paid to the applicant;

AND WHEREAS on 11 July 2013 the respondent advised the Commission in writing that the applicant's contracted weekly rate of pay was $392.80 per week, hence an amount of $8,964.20 gross was owed;

AND WHEREAS on 11 July 2013 the applicant advised the Commission in writing that they were seeking an order for $9,829.94;

AND WHEREAS having considered the written submissions from Mr G McCorry on behalf of the applicant and from Mr S Bibby on behalf of the respondent;

NOW the Commission considers the compensation for Mr Miller ought include in addition to the 20 hours per week; an average of 3.5 hours at the casual rate per week and, for 14 of the 19 weeks' compensation, a 3.4% increase based on the 2012 State Wage Case (92 WAIG 568).

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

1. DECLARES THAT the dismissal of Mr Miller by the respondent was unfair and that reinstatement or re-employment is impracticable.

2. ORDERS THAT the respondent pay Mr Miller 19 weeks' remuneration less the sum of $4,750 being the wages received in the period since the termination. The respondent to pay the sum of $4,474.90 gross within 30 days of the date of this order issuing.

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

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**2013 WAIRC 00716**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00716 |
| **CORAM** | **:** | COMMISSIONER S M MAYMAN |
| **HEARD** | **:** | MONDAY, 20 MAY 2013 |
| **DELIVERED** | **:** | MONDAY, 12 AUGUST 2013 |
| **FILE NO.** | **:** | U 50 OF 2013 |
| **BETWEEN** | **:** | MICHAEL PATRICK O'MEARA |
| | | Applicant |
| | | AND |
| | | JOHN PAUL COLLEGE |
| | | Respondent |

| | | |
|---|---|---|
| CatchWords | : | Industrial law - Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred out of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Acceptance of referral out of time not granted |
| Legislation | : | *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(2), s 29(3) |
| Result | : | Order Issued |
| **Representation** | | |
| Applicant | : | Mr M O'Meara |
| Respondent | : | Ms C Jones |

**Case(s) referred to in reasons:**

Azzalini v Perth Inflight Catering (2002) WAIRC 06766; (2002) 82 WAIG 2992.

Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298.

Jackamarra v Krakouer 1998) 195 CLR 516

Malik v Albert, Director General, Department of Education of Western Australia (2004) WASCA 51; (2004) 84 WAIG 683.

*Reasons for Decision*

1 This is an application considered under s 29(3) of the *Industrial Relations Act 1979* (WA) (the Act) for an extension of time. The substantive application is filed under s 29(1)(b)(i) by Mr Michael O'Meara (the applicant). Mr O'Meara claims that he was harshly, oppressively and unfairly dismissed by John Paul College (the respondent) on 1 February 2013. If that date were followed that would put Mr O'Meara's application four days out of time.

2 Conversely, John Paul College (the respondent) submits Mr O'Meara was not terminated, he in fact resigned on 25 September 2012 and ceased being employed on 18 October 2012. Recognising that the respondent suggests the applicant resigned which of itself is a jurisdictional issue if, the date cited by respondent were to be accepted as the relevant date that would make Mr O'Meara's claim 140 days out of time.

3 Given the diverse points of view between the applicant and the respondent relating to the dates of termination or alternatively, the date of resignation, the Western Australian Industrial Relations Commission (the Commission) will consider the parties' submissions and make specific findings in relation to the issues.

4 The application was filed in the Commission on 4 April 2013, outside of the 28 day time limit as prescribed in s 29(2) of the Act.

5 The Commission in considering the application, is to have regard to the principles as laid out in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** (2004) 84 WAIG 683, in particular Heenan J, with whom Steytler J agreed, held at [74] that the principles enunciated by Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298, ought to be applied when the Commission is considering whether or not to accept a referral of a claim for unfair dismissal out of time under s 29(3) of the Act. Those principles are as follows:

1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
2. Action taken by the applicant to contest the termination, other than applying under the Act, will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
3. Prejudice to the respondent including prejudice caused by the delay will go against the granting of an extension of time.
4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
6. Consideration of fairness between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion.

6 In considering the submissions of both parties the Commission will also have regard for the comments of Steytler J at [25] in ***Malik*** when he observed:

> The Commissioner is empowered to accept a late referral if it would be "unfair" not to do so and, while an assessment of the merits 'in a fairly rough and ready way' (see ***Jackamarra v Krakouer*** (1998) 195 CLR 516 at [9]) will often be an important consideration, there is nothing in the words of s.29(3) which imports any obligation, on the part of an applicant, to establish any degree of merit (and it should not be overlooked, in this regard, that the Commission is given broad powers to dismiss a matter summarily under s.27(1)(a) of the Act). It is, of course, difficult to imagine that it would ever be unfair to an application to deny him or her the right to lodge a referral out of time where it was positively shown that the applicant had no prospect of success.

7 In applying these guidelines the Commission also takes into account that the Act provides a 28 day timeframe to lodge an application and whether the Commission's discretion ought be exercised in relation to a matter of this nature is confirmed in the negative unless it would be unfair not to do so.

**Background**

8 It was not in dispute that the applicant worked with the respondent as head of religious education based in Kalgoorlie. The applicant was first employed on 1 January 2012.

9 The applicant and the respondent were required to put their submissions to the Commission in writing.

**Applicant's evidence**

10 It is the view of the applicant as earlier indicated that his service was terminated on the date he received confirmation from the principal of the respondent school, John Paul College that he was no longer employed from 1 February 2013. It is conceded by the applicant that a delay occurred, and the application was therefore four days out of time.

11 The applicant submitted that it was 'never his intention to resign' (applicant's submission). The applicant suggests on a number of occasions after September the principal Mr Hoyne asked the applicant for his resignation in writing. The applicant submits that the respondent was not satisfied that a resignation had been received.

12 The applicant submitted that the length and reason for the delay related to a friend's suggestion that contact be made with Fair Work Australia. It was not until the respondent opposed the jurisdiction of Fair Work Australia that the applicant reverted to the Commission website and then used the wrong form. The next delay related to the payment of the fee. This compounded the delays.

13 The applicant submitted he was subjected to difficulties from early on in his time with the respondent. For example, in his position as head of religious education the applicant was being subjected to constant enquiry and censure from the person who was previously in the position. On 13 September 2012 the applicant was presented with a written warning from the deputy principal and the principal (appendix A).

14 The warning spoke of lateness to class, confusion over timetables and inappropriate language being used in the classroom. It is the view of the applicant that the issues mentioned were not detailed. Shortly after receiving a written warning the applicant wrote to the respondent advising he had considered resigning however in the alternative sought to take leave for the remainder of the week commencing 13 September 2012, a request which was denied by the respondent (appendix C).

15 The applicant then asserts he found a document a letter of offer dated 23 April 2012 from the respondent (appendix D):

> Dear Michael
>
> I acknowledge your resignation as Religious Education Co-ordinator from 05 April 2012. You are invited to continue as a teacher at John Paul College under the terms and conditions of **The Roman Catholic Archbishop of Perth Teachers Enterprise Bargaining Agreement 2009**.
>
> The details of your employment are as follows:
>
> **STATUS**: 1. **Fulltime**
>
> 2. Probationary from 23 April 2012 to 31 December 2012
>
> (*ongoing employment is subject to successful professional appraisal*)
>
> **SALARY**: Classification is **Step 10**
>
> Commencement Salary is **$88,045** (excluding benefits available under the Catholic Education Office of WA Remote Area Package and Teacher Housing Scheme)
>
> Yours sincerely
>
> Mr Joseph Hoyne
>
> PRINCIPAL

16 The applicant submitted he had not seen the document previously and was unaware he was now on probation. Furthermore, the applicant was denied any appraisal. It is the view of Mr O'Meara that the administration team of the respondent operated as 'investigator, judge and jury in the case of my demise' (applicant's submission).

17 The applicant considers on the one hand teachers and students seemingly hold Mr O'Meara in high regard while the principal and deputy principal have gone to such lengths to ensure the applicant was terminated seems somewhat incongruous.

**Respondent's evidence**

18 The respondent states in its submissions that the applicant was offered a contract position as head of religious education commencing 1 January 2012, a position the applicant resigned from as the applicant was unable to carry out the role. That resignation took effect on or about 5 April 2012 and the applicant was then offered a position as a teacher from 23 April 2012 to 31 December 2012 subject to a successful performance appraisal.

19 The respondent submits that on 24 September 2012 the applicant attended a meeting with the principal and advised him of his intention to resign. The respondent asserts the following day an email was received from the applicant containing a resignation:

> From: O'Meara, Mike
>
> Sent: Tuesday, 25 September 2012 6:07 PM
>
> To: Hoyne, Joe; Francesconi, Troy

> Cc: hushabye@live.com.au
>
> Subject: Yesterday's Meeting
>
> Thank you for your time yesterday.
>
> As I explained I do not feel comfortable working in this environment, therefore, it is my intention to leave John Paul College.
>
> The exact timeframe needs to be finalised, but I will not leave the College in a situation where there is a staffing difficulty. I will be returning in Term 4.
>
> Once the present Year 12 class graduate I anticipate that I will move on.
>
> I appreciate your offer forgoing the need for me to give the standard 6 weeks' notice of my intention to leave.
>
> Hopefully I will be able to give more specific detail by the end of the forthcoming holiday break.
>
> The events of the last few weeks have cause a significant degree of confusion.
>
> I will need time to make arrangements and to liaise with the rental agency here in Kalgoorlie.
>
> Also, as I previously mentioned, there are ongoing financial considerations that will need my attention.
>
> Yours Respectfully
>
> Michael P O'Meara

(annexure 5)

20 On 27 September 2012 Mr Hoyne responded to the applicant asking:

> … please forward to me formal written notification of your intentions to resign from your teaching position from the College. … Can I please have a signed letter by Wednesday 17 October so as I am able to put arrangements in place for your classes to be covered for the remainder of the year.

(annexure 6)

21 The applicant notified on 17 October 2012 that he was to make a claim for workers compensation and the respondent submits the applicant did not receive any payment for sick leave or wages following 18 October 2012, the date the respondent cites as the date of resignation. In correspondence dated 30 November 2012 (annexure 8) the applicant refers to leaving employment with the respondent in circumstances which were unsatisfactory. This correspondence was forwarded to the director of the Catholic Education Office.

22 The respondent's insurer disputed the workers' compensation claim submitted by the applicant and following notification of the dispute, the applicant advised the respondent he was making arrangements to return to work in Kalgoorlie.

23 The respondent submits that the applicant should have lodged an application for unfair dismissal within 28 days of the date the alleged employment was terminated. Given the applicant lodged the application for an unfair dismissal on 4 April 2013 the respondent submits that such a delay should not be allowed and it is not equitable in the circumstances.

24 Furthermore there appears to be no acceptable explanation for the applicant's failure to lodge his claim, according to the respondent, apart from deliberately desisting from making a claim until such time as the outcome of the applicant's claim for workers compensation was known.

25 Referring to the merits of the claim in relation to the substantive application the respondent submits there was no termination by the employer at all. Furthermore, the applicant during his employment had unsatisfactory performance.

26 The respondent submits that given the applicant resigned, there is no dismissal to attract the jurisdiction of the Commission therefore it is open for the Commission to find that the application ought be dismissed.

27 The respondent submits that no action was taken by the applicant to withdraw his resignation or to contest the termination and therefore it is the view of the respondent that an extension of time is not appropriate. The applicant merely suggested that he had been given a period of leave without pay and had not resigned. This is disputed by the respondent. At no stage did the applicant say he had been compelled to resign by the respondent.

28 The respondent considers there would be no prejudice to the applicant if the Commission fails to accept the application pursuant to s 29(3) of the Act given there is no jurisdiction, the applicant was never terminated and, according to the respondent, there is no merit to the substantive claim.

29 The respondent submits that a number of persons would need to give evidence in relation to this application. Due to the lapse of time memories will have dimmed and accordingly the respondent would be prejudiced in presenting its case. The lapse of time now precludes in the respondent's view, consideration of reinstatement.

30 The matter needs to be disposed of expeditiously not just in the interests of the applicant and the respondent, but also in the public interest for which the Commission is to have regard. In accordance with ***Azzalini v Perth Inflight Catering*** (2002) WAIRC 06766; (2002) 82 WAIG 2992 an extension of time is not automatic and the discretion that rests with the Commission to extend time should allow for justice between the parties.

31 The respondent submits that allowing an extension of time would in fact be an injustice and be unfair in all the circumstances. Having regard for the principles considered by Marshall J in ***Brodie–Hanns*** the Commission must be positively satisfied that the prescribed period should be so extended and the prima facie position should be complied with unless there is an acceptable explanation for the delay which makes it equitable to so extend.

**Conclusion**

32 I have considered the submissions of the applicant, and the respondent and in respect of each of the submissions, the associated attachments.

33 The relevant principles to apply in matters of this nature are set out as earlier mentioned in ***Malik***.

34 The terms of s 29(3) make it clear that the decision regarding the extension of time is a discretionary one.

> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.

35 Fairness, in this sphere, has a legislative starting point in the choice made by the Parliament that 28 days is a sufficient period in the public interest for the commencement of such a claim. The longer the delay the more difficult it will be to show unfairness of the dismissal, but even in instances of long delays there may be particular circumstances which reveal that it would be unfair not to accept a late referral.

36 One of the preliminary considerations for the Commission to make is whether there is any merit in the applicant's claim. The Commission finds that a number of concerns were raised by the respondent about the applicant's performance, and the Commission accepts that there was confusion by the applicant about these concerns. Furthermore, the applicant was counselled about the concerns.

37 In this matter the date of resignation/termination is in dispute. Mr O'Meara claims that he was harshly, oppressively and unfairly dismissed by the respondent on 1 February 2013 putting Mr O'Meara's application some four days out of time. The respondent however submits Mr O'Meara was not terminated but in fact resigned on 25 September 2012 and ceased being employed on 18 October 2012, making Mr O'Meara's claim considerably out of time. Having considered the submissions of the parties, in particular Mr O'Meara's email to Mr Hoyne dated 25 September 2012, the Commission finds that correspondence to be a foreshadowed intention to resign (the Commission's emphasis) with the precise date of resignation yet to be determined. In the correspondence the applicant makes it clear he will return in Term 4, 2012 and will leave sometime during that period which in 2012 (16 October – 18 December 2012), specified by the applicant as the point at which the year 12 students graduated. The Commission also notes that at that stage the applicant seemed somewhat remorseful about his actions.

38 The Commission finds the applicant intended to resign from his employment in late October, a course he had been considering for a number of weeks however the applicant's resignation correspondence of 25 September 2012 was overtaken by his notification on 17 October 2012 to claim for workers' compensation. The applicant did not receive any payments for sick leave or wages following 18 October 2012, the date the respondent cites as Mr O'Meara's date of resignation.

39 The Commission finds the applicant was terminated by the respondent on and from 18 October 2012 without notification to the applicant and without payment in lieu. While there is some merit in the applicant's claim, that being the failure by the respondent to notify the applicant of the termination, it is the view of the Commission that such failure was overcome by:

1. a significant delay by the applicant to lodge his unfair dismissal claim in the Commission (139 days),
2. prejudice to the respondent caused through a number of persons that would have to give evidence surrounding this application;
3. prejudice being greater to the respondent than to the applicant; and
4. the lapse in memory of critical events almost one year later.

40 The Commission finds that this application is out of time by a significant period, some 139 days, based on the Commission's calculations. The Commission does not consider that in the interim period the applicant has actively contested the termination other than to lodge the application. The Commission does not consider that there are specific situations which have made the applicant's situation unfair not to accept his referral out of time.

41 It is the Commission's view that in all of the circumstances it would be unfair for the Commission to exercise its discretion to grant an extension of time within which to file this application. For these reasons an extension of time in order to lodge this application is refused. An order will issue to that effect.

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**2013 WAIRC 00710**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | MICHAEL PATRICK O'MEARA |
| | **APPLICANT** |
| | **-v-** |
| | JOHN PAUL COLLEGE |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | MONDAY, 12 AUGUST 2013 |
| **FILE NO/S** | U 50 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00710 |

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| **Result** | Order Issued |
| **Representation** | |
| **Applicant** | Mr M P O'Meara |
| **Respondent** | Ms C Jones |

*Order*

HAVING HEARD Mr Michael Patrick O'Meara (the applicant) and Ms Carmen Jones on behalf of the respondent, the Western Australian Industrial Relations Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) (the Act), hereby:

(1) DECLARES that it would be unfair for the Commission to grant an extension of time under s 29(3) of the Act for Mr O'Meara to file his application.

(2) ORDERS that the application be dismissed.

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

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**2013 WAIRC 00411**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | IAN RAYMOND ROWE |
| | **APPLICANT** |
| | **-v-** |
| | BHP BILLITON WAIO PTY LTD T/A BHP IRON PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | TUESDAY, 9 JULY 2013 |
| **FILE NO/S** | B 71 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00411 |

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| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | Ms E Douglas |
| **Respondent** | Ms E Jones |

*Order*

WHEREAS the applicant filed a notice of discontinuance, 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.

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

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**2013 WAIRC 00569**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | PARVEZ SHAIKH |
| | **APPLICANT** |
| | **-v-** |
| | MR D. RAZMOUSKI |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | WEDNESDAY, 31 JULY 2013 |
| **FILE NO/S** | B 10 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00569 |

| | |
|---|---|
| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | No appearance |
| **Respondent** | No appearance |

*Order*

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

AND WHEREAS on the 5 March 2013 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on the 19 April 2013 a further conference was convened with the applicant;

AND WHEREAS on the 29 July 2013 this matter was listed for hearing for the applicant to show cause why his application should not be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT the application be, and is hereby discontinued.

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

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**2013 WAIRC 00568**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | PARVEZ SHAIKH |
| | **APPLICANT** |
| | **-v-** |
| | MR D. RAZMOUSKI |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | WEDNESDAY, 31 JULY 2013 |
| **FILE NO/S** | U 10 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00568 |

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|---|---|
| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | No appearance |
| **Respondent** | No appearance |

*Order*

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

AND WHEREAS on the 5 March 2013 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on the 19 April 2013 a further conference was convened with the applicant;

AND WHEREAS on the 29 July 2013 this matter was listed for hearing for the applicant to show cause why his application should not be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT the application be, and is hereby discontinued.

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

**2013 WAIRC 00725**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

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|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00725 |
| **CORAM** | **:** | ACTING SENIOR COMMISSIONER P E SCOTT |
| **HEARD** | **:** | FRIDAY, 28 JUNE 2013 |
| **DELIVERED** | **:** | FRIDAY, 16 AUGUST 2013 |
| **FILE NO.** | **:** | U 32 OF 2013 |
| **BETWEEN** | **:** | ERIC STOTHERS |
| | | Applicant |
| | | AND |
| | | TOLL ENERGY LOGISTICS PTY LTD |
| | | Respondent |

| | | |
|---|---|---|
| CatchWords | **:** | Industrial Law (WA) - Unfair dismissal - Jurisdiction - Termination, Change and Redundancy General Order - Non-excluded matter of the Fair Work Act 2009 - Occupational health and safety - Industrial instrument - National system employee - NAPSA |
| Legislation | **:** | *Fair Work Act 2009* (Cth) s 26, s 26(2)(a), s 27, s 27(1)(d), s 27(2)(c)<br>*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)<br>*Industrial Relations Act 1979* s 29AA(3), s 29AA(3)(a), s 29AA(3)(b)<br>*Occupational Safety and Health Act 1984*(WA) s 24<br>*Workplace Relations Act 1996* (Cth) |
| Result | **:** | Application dismissed for want of jurisdiction |
| **Representation:** | | |
| Applicant | **:** | Mr R Lumley of counsel |
| Respondent | **:** | Mr A Cameron as agent |

*Reasons for Decision*

1 The applicant claims that he was harshly, oppressively or unfairly dismissed from his employment with the respondent. The applicant filed written submissions on 4 April 2013 and 27 June 2013. The respondent replied by written submissions dated 26 April 2013 and during the course of the hearing on 28 June 2013.

2 The applicant agrees that the respondent is a constitutional corporation but says that the Commission has jurisdiction to hear the matter for two reasons. Firstly, he says the prohibition on the Commission dealing with a claim of harsh, oppressive or unfair dismissal due to an industrial instrument not applying to his employment, does not apply in this case (s 29AA(3)(a) and(b) of the *Industrial Relations Act 1979* (WA) (the IR Act)). He says this is so because an industrial instrument, namely, the Commission's General Order on Termination, Change and Redundancy of 1 June 2005 (2005) WAIG 1681 applies. He says that consequently the matter comes within the Commission's jurisdiction.

3 Secondly, the applicant says that the reason for dismissal was that he allegedly breached safety procedures by operating machinery that was tagged 'out of service'. This is a non-excluded matter pursuant to s 27(1)(d) of the *Fair Work Act 2009* (Cth) (the FW Act) and therefore, the Commission's jurisdiction is not excluded by the FW Act.

4 The respondent says that the Termination, Change and Redundancy General Order no longer applies to the applicant's employment. It became a Notional Agreement Preserving State Award (NAPSA) under the *Workplace Relations Act 1996* (Cth) (the WR Act). However, it was cancelled as a NAPSA for the purposes of the federal jurisdiction. Therefore, it no longer has application to the employment of a national system employee.

5 In respect of the argument that the applicant is entitled to bring the claim to the Commission on the basis that ss 26 and 27 of the FW Act, taken together, do not exclude a claim of unfair dismissal brought under the IR Act where the IR Act deals with rights or remedies incidental to occupational health and safety, the respondent says that it could not be said that the unfair dismissal jurisdiction of the Commission could be enlivened on the basis of it being a jurisdiction in some way incidental to occupational health and safety.

**CONSIDERATION AND CONCLUSIONS**

**Does an industrial instrument apply?**

6 Section 29AA(3) provides that the Commission shall not determine an unfair dismissal claim where, firstly, an industrial instrument does not apply to the employment; and secondly, the employee's salary exceeds the prescribed amount. There appears to be no dispute between the parties that the latter condition applies. Given the use of the word 'and', it is necessary

for the first condition to also apply. According to *Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* (2006 WAIRC 05220) the General Order on Termination, Change and Redundancy is an industrial instrument which applied to all employees in Western Australia.

7 The Termination, Change and Redundancy General Order became a NAPSA in respect of national systems employees and continued to apply. However, for the purposes of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), the *General Order on Termination, Change and Redundancy* (WA), CCT matter number 2011/1284, was terminated insofar as it operated as a NAPSA by order of Senior Deputy President Harrison on 29 July 2011 (PR512464).

8 Therefore, for the purposes of s 29AA(3), an industrial instrument does not apply to the applicant's employment with the respondent. There is no contention that the applicant's salary exceeded the prescribed amount. Accordingly, the Commission is prohibited from determining the claim.

**Non-excluded matter**

9 As to the question of whether the claim is one which deals with a non-excluded matter under s 27 of the FW Act, I note the following.

10 The scheme of the FW Act in this regard is set out in ss 26 and 27. Section 26 provides that the FW Act applies to the exclusion of all State and Territory industrial laws so far as they would otherwise apply in relation to a national system employer or national system employee (s 26(1)).

11 A State or Territory industrial law is defined as including a general State industrial law (s 26(2)(a)). The IR Act is a general State industrial law (s 26(3)(c)).

12 Section 27 of the FW Act specifies those laws to which s 26 does not apply. Section 27 says that s 26 does not apply to a law of a State or Territory so far as the law deals with rights or remedies incidental to any non-excluded matter, in this case, by reference to s 27(2)(c), occupational health and safety.

13 There is scant case law to assist in the determination of this issue. Creighton and Stewart note in *Labour Law* (5th ed) at 119:

> A legislative note offers as an example a law providing a right of entry to premises for a purpose associated with workers compensation, occupational health and safety or, outworkers.

14 The authors suggest that the list of non-excluded matters appears to have arisen from the subjects Victoria declared to be outside its initial referral of powers in 1996, however, the list has been modified since then.

15 They go on to note the scope of protection given to the States by the list of non-excluded matters remains uncertain (120). They refer to the decision of the Full Court of the Federal Court in *Endeavour Coal Pty Ltd v CFMEU* (2007) 165 FCR 1, which found that the equivalent provisions in the WR Act protect State laws that deal directly with the subjects listed as non-excluded, but not laws that merely authorised the court or tribunal to deal with that or other matters. Creighton and Stewart go on to note the lack of certainty as to what constitutes laws 'so far' as they deal with non-excluded matters.

> There may also be awkward questions of characterisation in applying s 27(1), which preserves the effect of certain laws 'so far as' they deal with certain non-excluded matters. For example, workers compensation and occupational health and safety statutes typically regulate termination of employment in various situations, notably where there is some element of 'victimisation'. The New South Wales Commission has taken the view that such provisions are to be regarded as laws that deal with workers compensation or occupational health and safety, so that they can still apply to national system employers. But it might equally be said that they are 'really' laws on termination and hence caught by the general exclusion in s 26(1). Similarly, in *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* the New South Wales Commission took the view that State regulation of occupational health and safety could extend to any matter, including wage rates, that can be seen to have a bearing on health and safety. To the extent that this decision was concerned with regulation by award, it is inconsistent with the subsequent ruling in *Endeavour Coal.* But it begs the question: could a State statute on health and safety validly seek to set wage rates or regulate working time in a particular industry or occupation, so as to enhance employee safety? (citations omitted).

16 The question then arises, is the IR Act a law which deals with rights or remedies incidental to occupational health and safety.

17 The definition of incidental, is significant. It means:

> 1. Happening or likely to happen in fortuitous or subordinate conjunction with something else.
> 2. Incurred casually or in addition to the regular or main amount: *incidental expenses. – Noun.*
> 3. Something incidental, as a circumstance.
> …
> 5. Incidental to, liable to happen in connection with; naturally appertaining to.
>
> (Macquarie Dictionary (3rd ed))

18 According to its long title, the IR Act is '[a]n Act to consolidate and amend the law relating to the prevention and resolution of conflict in respect of industrial matters, the mutual rights and duties of employers and employees, the rights and duties of organisations of employers and employees, and for related purposes.'

19 The objects are set out in s 6. Objects of Act. They are:

> **6. Objects of Act**
>
> The principal objects of this Act are —
>
> (a) to promote goodwill in industry and in enterprises within industry; and
>
> (aa) to provide for rights and obligations in relation to good faith bargaining; and
>
> (ab) to promote the principles of freedom of association and the right to organise; and

(ac) to promote equal remuneration for men and women for work of equal value; and

(ad) to promote collective bargaining and to establish the primacy of collective agreements over individual agreements; and

(ae) to ensure all agreements registered under this Act provide for fair terms and conditions of employment; and

(af) to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises; and

(ag) to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises; and

(b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes; and

(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality; and

(ca) to provide a system of fair wages and conditions of employment; and

(d) to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes; and

(e) to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations; and

(f) to encourage the democratic control of organisations so registered and the full participation by members of such an organisation in the affairs of the organisation; and

(g) to encourage persons, organisations and authorities involved in, or performing functions with respect to, the conduct of industrial relations under the laws of the State to communicate, consult and co-operate with persons, organisations and authorities involved in, or performing functions with respect to, the conduct or regulation of industrial relations under the laws of the Commonwealth.

20 'Industrial matter' is defined in s 7. Terms used as:

***industrial matter*** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —

(a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;

(b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;

(c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;

(ca) the relationship between employers and employees;

(d) any established custom or usage of any industry, either generally or in the particular locality affected;

(e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;

(f) in respect of apprentices, these additional matters —

(i) their wage rates and, subject to the Vocational Education and Training Act 1996 Part 7 Division 2, other conditions of employment; and

(ii) the wages, allowances and other remuneration to be paid to them, including for time spent in performing their obligations under training contracts registered under the Vocational Education and Training Act 1996 Part 7 Division 2, whether at their employers' workplaces or not; and

(iii) without limiting subparagraphs (i) and (ii), those other rights, duties and liabilities of them and their employers under such contracts that do not relate to the training and assessment they are to undergo, whether at their employers' workplaces or not;

(g) any matter relating to the collection of subscriptions to an organisation of employees with the agreement of the employee from whom the subscriptions are collected including —

(i) the restoration of a practice of collecting subscriptions to an organisation of employees where that practice has been stopped by an employer; or

(ii) the implementation of an agreement between an organisation of employees and an employer under which the employer agrees to collect subscriptions to the organisation;

*[(h)deleted]*

(i) any matter, whether falling within the preceding part of this interpretation or not, where —

(i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and

(ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;

and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include —

(j) compulsion to join an organisation of employees to obtain or hold employment; or

(k) preference of employment at the time of, or during, employment by reason of being or not being a member of an organisation of employees; or

(l) non-employment by reason of being or not being a member of an organisation of employees; or

(m) any matter relating to the matters described in paragraph (j), (k) or (l).

21 An examination of the remainder of the IR Act does not disclose that it is a law which deals with rights or remedies incidental to occupational health and safety matters. In particular, rights or remedies regarding unfair dismissal are not, according to the definition of *incidental*, happening or likely to happen in fortuitous or subordinate conjunction with occupational health and safety. They are not naturally appertaining to occupational health and safety.

22 Therefore, merely because the reason for dismissal may be due to some alleged breach of occupational health and safety requirements, does not provide the necessary 'subordinate conjunction.' There are many circumstances which might raise a similar issue.

23 As Creighton and Stewart suggest, and by reference to the *CFMEU (NSW) v Brolrik Pty Ltd* (2007) 167 IR 214, laws which deal with occupational health and safety, such as the *Occupational Safety and Health Act 1984* (WA) (OS and H Act) are such laws, not the law dealing with industrial matters. The OS and H Act has as its long title:

> An Act to promote and improve standards for occupational safety and health, to establish the Commission for Occupational Safety and Health, to provide for a tribunal for the determination of certain matters and claims, to facilitate the coordination of the administration of the laws relating to occupational safety and health and for incidental and other purposes.

24 The OS and H Act deals with resolution of issues at the workplace relating to occupational safety and health (s 24), breaches duties by employers and employees (ss 19 to 20A inclusive), and other such matters pertaining to occupational safety and health.

25 For those reasons, I include that the IR Act is not a law so far as it deals with rights and remedies incidental to occupation health and safety. Therefore, ss 26 and 27 of the FW Act do not act to maintain the Commission's jurisdiction to deal with this claim by a national system employee, even though the reason for dismissal may be an alleged breach of occupational health and safety procedures.

26 The application will be dismissed for want of jurisdiction.

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**2013 WAIRC 00723**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | ERIC STOTHERS |
| | **APPLICANT** |
| | **-v-** |
| | TOLL ENERGY LOGISTICS PTY LTD |
| | **RESPONDENT** |
| **CORAM** | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | FRIDAY, 16 AUGUST 2013 |
| **FILE NO/S** | U 32 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00723 |

**Result** Application dismissed for want of jurisdiction

*Order*

HAVING heard Mr R Lumley of counsel on behalf of the applicant and Mr A Cameron as agent for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed for want of jurisdiction.

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

**2013 WAIRC 00749**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00749 |
| **CORAM** | **:** | COMMISSIONER S M MAYMAN |
| **HEARD** | **:** | WEDNESDAY, 26 JUNE 2013 |
| **DELIVERED** | **:** | MONDAY, 19 AUGUST 2013 |
| **FILE NO.** | **:** | U 43 OF 2013 |
| **BETWEEN** | **:** | K.S. THALAKADA<br>Applicant<br>AND<br>SCOTT VICTOR AIROLDI, WEST KIMBERLEY LANDSCAPING AND KERBING<br>Respondent |

| | | |
|---|---|---|
| CatchWords | **:** | Termination of employment - Harsh, oppressive and unfair dismissal - Principles applied - Summary dismissal - Application dismissed |
| Legislation | **:** | *Industrial Relations Act 1979* (WA) s 27(1) |
| Result | **:** | Application dismissed |
| **Representation:** | | |
| Applicant | **:** | Mr K S Thalakada |
| Respondent | **:** | Mr S V Airoldi |

**Case(s) referred to in reasons:** Newmont Australia Ltd v Australian Workers' Union West Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 ALL ER 285

*Reasons for Decision*

1 On 19 March 2013 Mr Thalakada (the applicant) referred an application to the Western Australian Industrial Relations Commission (the Commission) claiming he had been unfairly dismissed on 26 February 2013 by Scott Victor Airoldi; Kimberley Landscaping and Kerbing (the respondent). The applicant seeks $5,000 in compensation and $1,000 relocation costs.

2 The respondent at the outset advised that his organisation had been incorrectly named in the application and that the correct name was West Kimberley Landscaping and Kerbing. Accordingly, as a result the respondent sought leave to amend their name. Given the applicant consented to this course of action and the Commission's powers under s 27(1) of the *Industrial Relations Act 1979* (WA) (the Act) and having formed the view that it was appropriate in the circumstances to grant the amendment I issued an order that Kimberley Landscaping and Kerbing be deleted and the named respondent in this application be substituted with West Kimberley Landscaping and Kerbing in lieu thereof. An order issued on Thursday 5 July 2013 ((2013) WAIRC 00398; (2013) 93 WAIG 626).

3 The respondent opposed the unfair claim brought by the applicant, submitting the applicant was dismissed summarily for misconduct and the Commission should issue an order dismissing the application.

**Background**

4 The applicant commenced employment with the respondent on 1 February 2013 as a cleaner employed between 6:00 am and 7:00 am and 2:00 pm and 9:30pm on Monday to Friday at Halls Creek District High School. The task of the applicant was to clean and maintain the school premises. The applicant was paid in accordance with the provisions of the *Contract Cleaners Award, 1986*. Rental accommodation was provided to the applicant by the employer for $120 per week.

5 The date of the applicant's termination was 26 February 2013, his employment was terminated summarily, that is, he was terminated without payment in lieu. The applicant specified in his application that during his employment his gross, hourly wage was $23.

**Applicant**

6 Mr Sam Thalakada gave evidence that his job was to clean and maintain the school. In evidence he confirmed he was introduced to the site as the person who was in charge and during his employment he asked for a meeting with Mr Airoldi in relation to the state of the accommodation, in particular the air-conditioner which was faulty. The witness gave evidence that when he met with Mr Airoldi he raised the need for another table and he raised the public area that needed cleaning. In addition he raised the need to get rid of all the flies. The witness indicated when they met Mr Airoldi said it was not his problem and suggested the witness buy his own flycatcher and in addition buy some tables. The witness suggested that the air-conditioners were so loud some staff were putting blue tack in their ears so they could sleep at night. The witness indicated the issues were never rectified. Mr Airoldi suggested the applicant could find somewhere else to live and he did. He was given 48

hours to find alternative accommodation. The applicant gave evidence that under the *Residential Tenancies Act 1987* (WA) the tenant should be given seven days' notice by the landlord.

7 Mr Thalakada gave evidence that he continued working at the school. Mrs Airoldi instructed the witness how to clean the toilets at work, raising concerns that the witness was not cleaning them properly. The witness sensed that the employer was raising the issue to try to get rid of him. Mr Thalakada gave evidence that Mr Airoldi was called to the site and terminated the applicant. The witness asked about his pay in lieu. Mr Airoldi instructed the witness to leave the premises immediately and the following day the witness received an SMS message from the respondent advising him that he had been summarily dismissed for misconduct. The witness gave evidence that in his view the dismissal by the employer was in relation to the questions the applicant had raised on behalf of the employees and himself about the accommodation.

8 The witness gave evidence that since his termination he has been employed for two months at $750 gross per week. Since then he has again become unemployed.

9 In cross-examination the witness indicated he had not signed tenancy agreement when he first commenced living in the accommodation.

10 Mr Jay Frost gave evidence as a cleaner employed with the respondent. Mr Frost considered the accommodation provided by Mr and Mrs Airoldi was inadequate. Mr Frost gave lengthy evidence relating to a back injury. Mr Frost gave evidence that he was given a medical certificate from the medical centre to continue working. Mr Frost did indicate that Mr Airoldi was not well liked in the town.

11 Mr Thalakada submitted the policies and procedures for termination were not followed in that he was not allowed to rectify the issue raised by the respondent. In particular, he was not allowed to clean the particular toilet pipe. Furthermore, the applicant was not given any prior warnings and was just told to get out. Therefore, the applicant submits that he has been unfairly dismissed.

**Respondent**

12 Mr Scott Airoldi gave evidence that he and Mrs Airoldi advertised on Gumtree for cleaners. Mr Airoldi explained that Mrs Airoldi runs the contract and the witness gets involved only as required. Mrs Airoldi is the supervisor at the school and the liaison person. At the time that Mr Thalakada was employed the witness gave evidence they had previously had problems retaining staff employed in the area as casual employees come and go so quickly. There had been limited continuity of service. On this occasion the witness gave evidence they decided to employ Mr Thalakada and two others as permanent employees rather than casuals.

13 At the commencement of their employment Mrs Airoldi undertook an orientation program with the three new staff. It is important to note that Mr Thalakada's credentials by virtue of his resume were outstanding. The resume suggested he had owned his own cleaning business for a number of years; he was very experienced in occupational health and safety and was experienced in chemical handling. Mr Airoldi gave evidence the respondent was unable to ring the applicant's previous employer so the witness indicated Mr Thalakada was employed on the basis of his resume from Three Ways Roadhouse in Tenant Creek in the Northern Territory.

14 During the orientation phase Mr Airoldi gave evidence that he observed Mr Thalakada standing beside a bucket waiting for the floor to dry. When asked what he was doing Mr Thalakada responded that he was waiting for the water to dry. Mr Airoldi asked:

> "Where's your wet signs?" He said, "They're in the cleaning (indistinct)." And I said, "Well, look, as per policy, you need your wet - your wet floor signs. These signs need to be out whenever you wet a floor. Have a look in your manual, There's photos of it." Sam then informed me, "Well, there's a wet sign on the bucket." And I said, "Well, that's not sufficient."
>
> (ts 25)

15 The next issue was when the principal of the school contacted the respondent as he could not find any staff in the school. The school was open; the gates were open however there were no staff.

16 Mr Airoldi gave evidence that the next issue raised was when the witness' landscaping crew including Mrs Airoldi were travelling to Turkey Creek to carry out work. The witness had seen the staff accommodation which had bones everywhere, food scraps and cooking utensils and plates on the tables. The witness asked Mr Thalakada to clean it up and also to clean the toilet which was quite dirty. The witness considered his request to be reasonable and indicated that Mr Thalakada's response was very insulting about the accommodation suggesting it was substandard and that suggested the employer should supply fly screens. Furthermore, Mr Thalakada suggested it was the responsibility of the employer to provide a comfortable environment for the employees to return to at the end of the employee's working day.

17 The witness gave evidence that his supply of accommodation was to help staff out and at $120 a week for staff quarters including power, water, washing machine and toilet ablutions it was certainly quite cheap in Halls Creek when you consider the cost of housing/accommodation in the area in general. The discussion between the witness and Mr Thalakada degenerated into a yelling match. Mrs Airoldi stepped in and after they left the witness gave evidence he was not happy with the outcome of that day's events and given they were leaving again the next morning the witness approached Mr Thalakada again and it is fair to say that during the course of the discussion the witness became offended. The witness indicated he was unable to get a word in and Mr Thalakada was not listening to the matters being raised. It is also fair to say that once again Mrs Airoldi intervened and they left without anything being resolved. The following morning the witness met with Mr Thalakada to resolve the matter. He became quite insulting about the accommodation and the matter was unable to be resolved yet again.

18 On 22 February 2013 the witness suggested after one of the unresolved arguments about the accommodation with Mr Thalakada:

> 'We've got two issues here. We've got two issues in the fact that accommodation's one issue, but the issue is your whole attitude in general to me to where I'm not going to – I'm not going to tolerate this sort of thing. If I need to talk to you about something I need to have an open channel of communication.'
>
> (ts 30)

19 Mr Airoldi gave evidence that he and Mrs Airoldi and Mr Thalakada were right outside the cleaning store trying to deal with issues relating to toilet cleaning given there had been a complaint from the school. Mr Airoldi gave evidence that the applicant was dawdling and that it appeared to him that his wife was intimidated because she had gone back inside the cleaning store. The applicant had become quite argumentative and finally Mrs Airoldi said to him alright you can have your week's notice. It was at this point the witness intervened and said 'that this has been going on for a long time why don't we meet in the morning.' The witness stated they needed to speak with Labour Relations from the Department of Commerce.

20 At that point, according to the witness Mr Thalakada turned around and said:

> If you didn't have children, I'd bury you.
>
> (ts 31)

21 The witness gave evidence that Mr Thalakada repeated the threat in the same way and he was terminated by the witness on the spot. He was directed to leave the premises. Mr Airoldi gave evidence he contacted the police regarding the threat that had been made and instructed Mr Thalakada to be at the office at 9:00 am the following morning to conclude his employment arrangements. Mr Airoldi's evidence was that he received a text the following morning from the applicant advising that he, the applicant, would not be available.

22 Mr Airoldi gave evidence that his response to the applicant was he was livid, instructed the applicant to 'Get out. Get out, mate.' (ts 33). Mr Airoldi gave evidence that he and Mrs Airoldi and Mr Thalakada were in the process of talking about one week's notice when the applicant issued that threat and it was at that point that the employer thought why should anyone have sustain a threat issued in the manner, it was issued by Mr Thalakada.

23 By the witness' interpretation it was gross misconduct and at that point as Mr Thalakada had left the premises that afternoon, he was terminated.

24 Mrs Carol Airoldi gave evidence for the respondent. She had employed the applicant Mr Frost and Amy around about the same time and gave evidence that they were paid under the *Contract Cleaners' Award, 1986*. Each staff member had 12 - 13 hours orientation at the school. Mrs Airoldi gave evidence that the applicant had supervised work on 4 and 5 February 2013 as part of his orientation program. Mrs Airoldi gave evidence that each staff member was allocated a particular area as part of the contract. For example Amy and Mr Thalakada worked together. However, there was a problem with the toilets and although she could not remember the precise date, she received a call from the principal to inform her that he could not find any staff at the school, there were not any lights on and there were alarms going off. Mrs Airoldi went across herself to find Amy and Mr Thalakada in the wrong part of the school and it seemed to the witness that they were not carrying out their job as required. The witness gave further evidence regarding the accommodation and the demands regarding the flies and the lack of cleanliness. The witness claimed Mr Thalakada was confronting and at times quite condescending. Mrs Airoldi then talked about the cleaning report received from the school which was substandard and disappointing. Out of a five the Airoldi's had received a two which had never been received in the past. Mrs Airoldi indicated that the contract was very important to them and the one thing was that if the toilets were not clean there needed to be significant retraining of staff to bring the contract up to the required standard. The next afternoon she gave the staff instructions on how to precisely clean and demonstrated what the Education Department expected and indeed what she expected.

25 It was at this point that Mr Thalakada took over and instructed her to give him a weeks' notice and he would leave. She continued to demonstrate to both employees on how to clean the toilets as she wanted to get back to work. It was then that she heard:

> What does she know about cleaning?
>
> (ts 63)

It was after this that the witness gave evidence the next thing Mrs Airoldi heard:

> Well, if you didn't have kids I'd bury you. And I – I'm like, "What?" and Scott was the same. I think his reaction was the same, so – and then when Scott said, "What?" he's like, "Well, if you didn't have four kids I'd bury you." And Scott just asked him to leave, escorted him off the property.
>
> (ts 63)

26 Mrs Airoldi gave evidence that there were a number of occasions when the alarms were set by 8:30 pm or 8:35 pm yet the cleaners were not supposed to finish until 9:30pm. On his timesheet Mr Thalakada signed off at 9:30 pm. In cross-examination Mr Thalakada submitted that there were faults in the alarm system.

**Conclusion**

27 I have heard the evidence given by Mr Thalakada, Mr Frost, Mr Airoldi and Mrs Airoldi. I have considered their evidence carefully and I found Mr Airoldi to be a reliable, credible, and honest witness. Similarly, Mrs Airoldi and Mr Frost, although at times Mr Frost became somewhat forceful in the giving of his evidence, it did not however affect the credibility of the evidence given. In relation to the evidence given by Mr Thalakada broadly speaking I found his evidence to be credible with one exception and that related to the denial of the threat issued to Mr Airoldi. Where Mr Thalakada denies issuing that threat I prefer the evidence given by Mr Airoldi and accordingly accept Mr Airoldi's evidence over Mr Thalakada's evidence. The Commission therefore considers that Mr Thalakada did issue the threat as suggested by Mr Airoldi.

28 The Commission has considered carefully the verbal and written submissions of Mr Thalakada, Mr and Mrs Airoldi and the evidence of the associated witness. The Commission finds that Mr Thalakada's date of commencement of employment with the respondent to be 1 February 2013, a matter that is not in dispute.

29 Mr Thalakada submitted the policies and procedures for termination were not followed in that he was not allowed to rectify the issue raised by the respondent and in particular, he was not allowed to clean the particular toilet pipe. Furthermore, the applicant was not given any prior warnings and was just told to get out. The Commission finds that Mr Thalakada was ultimately dismissed for misconduct and it was the single act, the threat issued by Mr Thalakada to Mr Airoldi which when considered, demonstrates the employee defied an essential condition of his contract of employment. Up until that point Mrs Airoldi had expressed a willingness to pay Mr Thalakada out with one week's pay in lieu which had been requested by the applicant. In these circumstances the Commission finds it was unnecessary for Mr and Mrs Airoldi to issue a warning. Accordingly the Commission does not consider the procedures for termination were not followed.

30 The termination was a summary dismissal for misconduct and therefore the respondent carries an evidentiary onus to establish the facts on which the decision to dismiss was based as to the principles outlined in ***Newmont Australia Ltd v Australian Workers' Union West Australian Branch, Industrial Union of Workers*** (1988) 68 WAIG 677. Where an employee is to be dismissed for misconduct, in particular a single act of misconduct, that behaviour must be of the nature which demonstrates the employee repudiating the contract of employment or one of its essential conditions and for that reason the disobedience complained of should really suggest a deliberate flouting of the contractual conditions ***Laws v London Chronicle (Indicator Newspapers) Ltd*** [1959] 2 ALL ER 285. It must be remembered that summary dismissal for misconduct is the most extreme penalty available to an employer. It is not always the case that a single incident of a behaviour complained of would amount to gross misconduct justifying summary dismissal. In considering matters such as examining the facts surrounding a summary dismissal it must be remembered that a rigid approach is not consistent with the requirements of s 26 of the Act. Consideration by the Commission must be determined in accordance with equity, good conscience and the substantial merits of the case.

31 The Commission finds the respondent has established the facts on which the decision to dismiss was based and in so doing has established the evidentiary onus termination for summary dismissal for misconduct carries. The onus then turns to the applicant when considering questions of fairness in relation to determination in accordance with equity, good conscience and the substantial merits of the case.

32 The Commission finds in all the circumstances that the behaviour of the applicant in particular the attitude of Mr Thalakada combined with the uncalled for threat to the well-being of Mr Airoldi is of such a nature that it suggests a considered violation to the contractual conditions of employment. The Commission finds the threat issued by Mr Thalakada to Mr Airoldi amounted to conduct that justified his summary dismissal.

33 The Commission therefore finds the applicant has failed to make out his claim in respect of alleged unfair dismissal and accordingly an order will now issue dismissing the application.

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**2013 WAIRC 00750**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | K.S. THALAKADA |
| | **APPLICANT** |
| | **-v-** |
| | SCOTT AIROLDI |
| | WEST KIMBERLEY LANDSCAPING AND KERBING |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | MONDAY, 19 AUGUST 2013 |
| **FILE NO/S** | U 43 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00750 |

| | |
|---|---|
| **Result** | Application dismissed |
| **Representation** | |
| **Applicant** | Mr K S Thalakada |
| **Respondent** | Mr S V Airoldi |

*Order*

HAVING heard Mr K S Thalakada (the applicant) and Mr S V Airoldi (the respondent), the Western Australian Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT the application be, and is hereby dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

**2013 WAIRC 00433**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | MARGARET WHIPP |
| | **APPLICANT** |
| | **-v-** |
| | PETER AND JULIE WELLS PA WELLS FAMILY TRUST T/A NORWESTA CARAVAN PARK |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | TUESDAY, 23 JULY 2013 |
| **FILE NO/S** | U 80 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00433 |

| | |
|---|---|
| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | Mrs M Whipp |
| **Respondent** | Mrs J Wells |

*Order*

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

AND WHEREAS on 10 July 2013 a conference between the parties were convened;

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

AND WHEREAS on 11 July 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 |
|---|---|---|---|---|
| Amirh Haidar Vaisi Rayegany | Governing Council Polytechnic West | U 75/2011 | Chief Commissioner A R Beech | Agreement Reached |

# CONFERENCES—Matters arising out of—

**2013 WAIRC 00425**

**DISPUTE RE STANDARD OF RISK ASSESSMENTS CONDUCTED BY EMPLOYER**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00425 |
| **CORAM** | **:** | COMMISSIONER S M MAYMAN |
| **HEARD** | **:** | THURSDAY, 11 APRIL 2013 |
| **DELIVERED** | **:** | MONDAY, 15 JULY 2013 |
| **FILE NO.** | **:** | C 5 OF 2012 |
| **BETWEEN** | **:** | THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH |
| | | Applicant |
| | | AND |
| | | PUBLIC TRANSPORT AUTHORITY |
| | | Respondent |

| | | |
|---|---|---|
| CatchWords | : | *Industrial Relations Act 1979* (WA) – *Occupational Safety and Health Act 1984* (WA) – occupational health and safety issues - rail industry – risk assessments - occupational health and safety delegates - election of occupational safety and health representatives – written submissions |
| Legislation | : | *Industrial Relations Act 1979* (WA) s 44;<br>*Occupational Safety and Health Act 1984* (WA) s 29 |
| Result | : | Application discontinued |
| **Representation** | | |
| Applicant | : | Mr C Fogliani |
| Respondent | : | Mr R Farrell (of counsel) |

*Reasons for Decision*

1 The substantive application in these proceedings was lodged by the Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the applicant union) on 16 January 2012. An amended application was lodged on 18 January 2012 which broadened the scope of the original application. In that amended application the applicant union sought independent risk assessments from the Public Transport Authority (the respondent). It was alleged by the applicant union there had been insufficient consultation and cooperation with occupational health and safety representatives (OSH reps) and other employees in the workplace when developing risk assessments. Further, the failure of the respondent to reassess the risk assessments had, in the view of the applicant union, rendered the working environment unsafe. The applicant union sought orders from the Western Australian Industrial Relations Commission (the Commission).

2 Following a series of conferences on 6 February 2012 a minute was issued by the Commission to assist in the resolution of the dispute between the applicant union and the respondent and at a speaking to the minutes on 7 February 2012 the preamble to the minute was amended and an interim order issued.

3 The interim order (2012) WAIRC 00057; (2012) 92 WAIG 181 that issued on 7 February 2012 reflected:

> WHEREAS on 16 January 2012 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the applicant) notified the Western Australian Industrial Relations Commission (the Commission) of an alleged industrial dispute between the applicant and the Public Transport Authority (the respondent) and requested an urgent conference be convened pursuant to s 44 of the *Industrial Relations Act 1979* (the Act);
>
> AND WHEREAS on 17 January 2012 and 31 January 2012 a series of conferences were convened without a resolution being reached to the alleged dispute;
>
> AND WHEREAS having listed a further conference on 2 February 2012 and heard the applicant and the respondent;
>
> AND WHEREAS having heard at a Speaking to the Minutes on Monday, 6 February 2012 the views of the applicant who sought to have two separate orders, the interim order and a more comprehensive order arising out of the application and the respondent who put the view that the application may not require an additional order, the Commission is of the view, the application will in due course involve a more comprehensive order;
>
> AND WHEREAS having received a request from the respondent on Monday, 6 February 2012 under the liberty to apply clause for a further order;
>
> AND WHEREAS the Commission refers the parties to clauses dealing with dispute resolution procedures and bans and limitations in the applicable enterprise agreements and enterprise order;
>
> NOW THEREFORE the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders -
>
> (1) THAT the applicant and the respondent enter into consultation on the general occupational health and safety issues in dispute with a view to identifying a list of those matters;
>
> (2) THAT attendees at the consultation on the general occupational health and safety issues will be determined by agreement between Mr Fogliani and Mr Farrell;
>
> (3) That a copy of this interim order is to be placed in operational workplaces; and
>
> (4) That liberty to apply is reserved to the parties in relation to this order.

4 A further order was issued on 17 April 2012 (2012) WAIRC 00234; (2012) 92 WAIG 538 requiring the provision of a document by the respondent to the applicant union:

> (1) That the respondent provide to the applicant union, as soon as is practicable, a copy of the correspondence provided by the WorkSafe Western Australia Commissioner, dated 23 March 2012, to the respondent, dealing with the issue of the appointment of delegates pursuant to the *Occupational Health and Safety Act 1984*.
>
> (2) That the applicant union have regard that the document is to be used at the 'workplace' (as defined in the *Occupational Health and Safety Act 1984*) of the respondent to promote the appointment of delegates and ultimately the election of occupational health and safety representatives.

5 Each of the orders remains live.

6 A series of conferences pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) were held throughout the year, culminating in the election of OSH reps from among railcar drivers. The parties are to be congratulated for their efforts as the Commission appreciates the task of election and implementation has been a lengthy process.

7 The majority of the conferences relating to this application were held in January, February and April of 2012. On 23 March 2013 my Associate wrote to the parties on behalf of the Commission advising:

> On 8 January 2013 Commissioner Mayman convened a meeting of the parties at the Public Transport Centre to finalise all outstanding issues in relation to this file. The meeting resulted in the process being put in place for the election of occupational health and safety reps with respect to rail car drivers.
>
> As all outstanding issues were finalised at this meeting it is the intention of the Commission to close this file. If the Commission does not hear from the parties within seven days the file will be closed.

8 The respondent wrote foreshadowing that it would consent to the file closing suggesting if a conference was relisted the respondent would apply to have the application dismissed. The respondent considered occupational health and safety matters ought to be pursued by way of a dispute resolution processes contained within the existing enterprise order. Alternatively it would be open to the applicant union to file a new application pursuing an industrial issue as it arose.

9 The applicant union opposed the closure of the file suggesting there were a large number of items still in dispute. Whilst the applicant union agreed that they had OSH reps they still did not have an occupational health and safety committee and employees were unaware as to how to report hazards in the workplace.

10 The Commission listed a conciliation conference for 11 April 2013. With no agreement able to be reached at the conference the Commissioner's Associate wrote on 16 April 2013, providing each party with an opportunity to submit their views in writing with respect to:

> whether the Commission ought close the file; C 5 of 2012; and
>
> in addition, the parties were to advise the Commission as to the status of existing orders.

**Applicant Union**

11 The applicant union is opposed to closing the file. The main purpose of the application was the need for the respondent to undertake risk assessments in consultation with its employees which remains, in the applicant union's view, an outstanding issue. As of 18 April 2013 the respondent did not involve the applicant union or the employees in the risk assessment process.

12 The applicant union considers that all stakeholders must be involved in risk assessments as per cl 5.2 of the *AS/NZS ISO 31000:2009: Risk Management – Principles and Guidelines* and cl 1.3 of the *WA Government Risk Management Guidelines*.

13 The applicant union considers that a large number of employees currently are not aware as to how to report hazards in the workplace. It is suggested the respondent has a system which is difficult to use.

14 Although railcar OSH reps have been elected the applicant union advised that s 29 of the *Occupational Safety and Health Act 1984* has yet to be resolved given that transit officers have yet to agree on the number of OSH reps to be elected.

15 Training was reported on, particularly in relation to policies and site specific risk management processes and hazard reporting. The applicant union asserted employees did not receive any ongoing training specifically to safety. Furthermore, the applicant union is seeking the implementation of a Take 2 process to enable a system of reporting and dealing with hazards in the workplace. The written submissions from the applicant union reported that the respondent required 'on time running' rather than 'safe on time running', and went on to submit that closing the application would not be in line with the objects of the Act, that being to prevent and resolve conflict in relation to industrial matters. The applicant union advised it would seek leave for an appeal to the Full Bench given the number of outstanding issues causing industrial unrest. Dismissing the application in the view of the applicant union would antagonise the workforce and create further unrest.

16 Turning to the question of the current status of the orders the applicant union raised the interim order 2012 WAIRC 00057. The order remains current. The applicant union referred in particular to the view contained in the order that there would be a more comprehensive order issued at a later stage.

**Respondent's Submissions**

17 The respondent considered the Commission ought to dismiss application C 5 of 2012 under the powers conferred by s 27(1)(a) of the Act and close the file.

18 The Commission has made two orders in the course of this application. The more recent order, made on 17 April 2012 (2012 WAIRC 00234) required the provision of a document by the respondent to the applicant union. The document has been provided therefore the order has been complied with and need not remain in force.

19 The respondent's view was that orders (2) and (3) of order (2012) WAIRC 00057 have been complied with and need not remain in force. Further, there were 12 general occupational health and safety issues in dispute that were submitted by the applicant union following the consultation workshop held on 6 March 2012 and facilitated by Mr Linton Pike. On that basis order (1) in the view of the respondent has been complied with and does not need to remain in force. Order (4), that there be an ongoing liberty to apply in relation to this order is, in the view of the respondent, no longer necessary.

20 The respondent submitted the interim order therefore need not remain in force. While a more comprehensive order was thought about, in the view of the respondent, the applicant union had failed to progress the issues.

21 The respondent included a list of matters it had considered the Commission had dealt with pursuant to C 5 of 2012:

> a risk assessment, the substantive application, the result of which the union was consulted as part of the process;

a series of conferences held under this application have resulted in the election of OSH reps, with the identified issues in dispute or – for Transit Officers (see following) - agreement to engage in the process under the *Occupational Safety and Health Act 1984* for resolving that question.

22 A Memorandum of Understanding between the respondent and Transit Officer Delegates (also agreed with previous Transit Officer OSH Reps) has been reached and provides as follows:

**The Transit Officer OSH reps to be elected at the Depot:**

a) The parties are unable to agree on the number of occupational safety and health representatives. To resolve the dispute the following actions will be taken:

1. The Public Transport Authority of Western Australia's proposed number of 19 Occupational Safety and Health Representatives will be accepted, without prejudice, as a starting position. This will facilitate the immediate election for Occupational Safety and Health Representatives;

2. The proposed 19 OSH reps will be allocated as follows:

Midland Depot - 3 OSH reps;

Fremantle Depot – 2 OSH reps;

Joondalup Depot – 3 OSH reps;

Armadale Depot - 4 OSH reps;

Perth Precinct – 4 OSH reps; and

Mandurah Depot – 3 OSH reps.

Note: As agreed by the parties to this agreement the inner and outer Mandurah depots will be considered one depot.

b) The parties will refer the unresolved question of the number of OSH reps to the WorkSafe Commissioner in accordance with s 30(6) of the *Occupational Safety and Health Act 1984* who were to either resolve the question to the satisfaction of the parties or will refer the matter to the Occupational Safety and Health Tribunal for determination.

23 Contrary to the view expressed by the applicant union there is no further role for occupational safety and health delegates appointed under s 29 of the *Occupational Safety and Health Act 1984*. A method for resolving the number of Transit Officer OSH reps has been agreed.

24 The respondent submits that the matters identified with the applicant on 6 March 2012 in many cases have been progressed by the respondent together with employees. Since OSH reps have been elected and those persons have been trained it is the view of the respondent there is the capacity of such persons to progress occupational health and safety matters through the OSH regime, matters that have been reinforced over the past year.

25 The respondent submits they are not aware of any attempt by the applicant union to progress since 22 August 2012 the resolution of any of the matters identified as being a matter in dispute. Other than the s 29 delegates of the *Occupational Safety and Health Act 1984* which for the rail car drivers, was finally resolved on 8 January 2013.

26 The respondent suggests:

> The applicant has demonstrated through its actions (and omissions) that it regards the application C 5 of 2012 as an open–ended "omnibus" file, at conferences and hearings of which unverified claims about specific alleged safety incidents and issues can be raised as a "first resort", often with no prior attempt to report them under the OSH representative process or to notify and resolve them under the relevant industrial instrument's Dispute Resolution procedure.
>
> ([16] respondent's submissions)

27 A decision to dismiss the application under s 27 of the Act does not determine a decision on the substantive merits of the various issues as noted in March 2012. Furthermore, the respondent suggests it remains open for the applicant where it considers an issue still requires resolution to seek to resolve that issues through the respondent's OSH processes or alternatively by way of an industrial issue. Additionally the relevant dispute resolution procedure is ratified by the Commission in the current enterprise order may be progressed and would permit matters to be brought before the Commission.

28 The respondent submits to dismiss the application pursuant to s 27 of the Act is an appropriate exercise of the discretion held by the Commission in relation to bringing matters before the Commission in a more orderly and prioritised manner having regard for s 26(d)(vii) of the Act:

> (ag) to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises;

Leaving where necessary, the Commission to further the objects of the Act to provide conciliation and, where necessary, arbitration.

**Conclusion**

29 The Commission has given careful consideration to the written submissions of the applicant union and the respondent. In addition, the Commission has closely examined the orders issued on 7 February and 17 April 2012.

30 The total number of conciliation conferences held pursuant to this application since the matter was first lodged in the Registry 16 January 2012 has been approximately ten. The bulk of those conferences were held in January and February of 2012. In August 2012 and January 2013 the process of election of OSH reps and subsequent implementation from amongst railcar

drivers took place. Whilst there was a conference called in April 2013 that conference was called of the Commission's own motion.

31 It is important to stress that the Commission recognises the applicant union's support for occupational health and safety issues and promotion of same amongst its members. For that the applicant union is to be congratulated.

32 There exists a number of dispute settlement procedures relating to the respondent and the applicant union's members and persons eligible to be members whether those procedures relate to occupational health and safety or industrial matters. Having regard for industrial matters the Public Transport Authority (Transperth Train Operations Rail Car Drivers) Enterprise Order 2011 - cl 48:

> **Dispute Resolution Procedure**
>
> In the event of a problem, grievance, question, dispute, claim or difficulty that affects one or more employees, or arises from the employees' work or contract of employment, the following procedure shall apply:
>
> (a) At first instance the matter shall be raised by or on behalf of the employee(s) with the immediate supervisor of the affected employees.
>
> (b) If the matter is not resolved at that level, it may be raised by or on behalf of the employee(s) with the relevant supervisor's manager.
>
> (c) If the matter is not resolved at that level, then it may be raised with the Branch Secretary of the Union and the Executive Director, People and Organisational Development and the Parties will attempt to resolve the matter prior to either party referring the matter to the WAIRC.
>
> (d) If the matter is still not resolved it may be referred to the WAIRC for resolution.
>
> (e) The parties bound by this Order will maintain and will not disrupt the provision of services to the public while disputes are being dealt with under this procedure.

33 Each of the Public Transport Authority (Transit Officers) Industrial Agreement 2013, Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011, Public Transport Authority Railway Employees (Network and Infrastructure) Industrial Agreement 2011, Public Transport Authority Railway Employees (Trades) Industrial Agreement 2011, contain a dispute resolution clause.

34 Pursuant to s 24(2) of the *Occupational Safety and Health Act 1984* it is the responsibility of the respondent:

> **24. Resolution of issues at workplace**
>
> (1) Where an issue relating to occupational safety or health arises at a workplace the employer shall, in accordance with the relevant procedure, attempt to resolve the issue with —
>
> (a) the safety and health representative; or
>
> (b) the safety and health committee; or
>
> (c) the employees,
>
> whichever is specified in the relevant procedure.
>
> (2) For the purposes of subsection (1), the ***relevant procedure*** means the procedure agreed between the employer and the employees as applying in respect of the workplace concerned or, where no procedure is so agreed, the procedure prescribed for that purpose in the regulations.
>
> (3) Where attempts to resolve an issue as mentioned in subsection (1) do not succeed and there is both a safety and health representative and a safety and health committee in respect of the workplace concerned, the safety and health representative shall refer the issue to the safety and health committee for it to attempt to resolve the issue.
>
> (4) If a person contravenes subsection (1) or (3), the person commits an offence.

35 The Commission notes in reg 2.6 of the *Occupational Safety and Health Regulations 1996* there is a default procedure for the resolution of occupational safety matters:

> **2.6. Procedure prescribed (Act s. 24(2))**
>
> (1) If no procedure has been agreed between an employer and employees for the resolution of issues relating to occupational safety and health arising at the workplace then this regulation applies for the purposes of section 24(2) of the Act.
>
> (2) Subject to subregulation (3), where there is a safety and health representative in respect of the workplace the employer is to arrange to meet with the employees and that representative at a time that is as soon after the issue arises as is mutually convenient.
>
> (3) Where there is a safety and health representative in respect of the workplace but it is not practicable for the employer to meet with the employees and that representative within a reasonable time, the employer is to communicate orally with the employees and that representative at a time that is as soon after the issue arises as is mutually convenient.
>
> (4) Where there is not a safety and health representative in respect of the workplace concerned, the employer is to arrange to meet with the employees or a person authorised by them to represent them at that meeting at a time that is as soon after the issue arises as is mutually convenient.

36 Some of the matters raised by the applicant union as outstanding, for example, the transit officer delegate issues are matters where there are procedures contained within Part IV of the *Occupational Safety and Health Act 1984* with which to raise such issues. The Commission notes in passing that none of the provisions contained within Part IV refer to the role of a union in the election process from:

the appointment of a delegate through to;

the consultation process with the employer as to how many OSH reps the workplace may have;

inclusive of the carrying out of the election of the OSH rep(s).

37 Whilst the Commission accepts that it is normal for employees who are union members to consult their union as part of the occupational health and safety process it must be accepted by the applicant union that they are unable to formally direct their membership under the *Occupational Safety and Health Act 1984* on matters relating to occupational health and safety.

38 The Commission also notes that a Memorandum of Understanding has been reached between the respondent and the transit officer delegates relating to the election of OSH reps.

39 In the Commission's view, with the exception of the election of the railcar driver and OSH reps by 8 January 2013, C 5 of 2012 has, in large part been left idle since August 2012. While the applicant union in April listed a number of matters as outstanding it cannot be said they have pursued those matters before the Commission with any vigour, indeed in large part not at all. It is the Commission's view that many of the matters raised may be more effectively progressed by a series of separate applications or alternatively, at the workplace level. That is what the regime of OSH reps their rights of representation, inspection, access to regular inspection of the workplace, access to training and rights as OSH committee members sets in place under the .*Occupational Safety and Health Act 1984.*

40 It is the view of the Commission pursuant to s 44(6)(c) that the applicant union who referred the matter to the Commission in the first instance has demonstrated by its failure to actively pursue the matters it considers outstanding that it either has an insufficient interest in those matters which I do not consider is the case. However, the Commission is of the view that some of the issues may be being pursued by the OSH reps at the workplace level and if so, this is a positive development.

41 Turning to the orders, firstly the order issued on 17 April 2012 (2012 WAIRC 00234), the Commission is of the view that the document sought by the applicant union; namely correspondence from the WorkSafe Commissioner dealing with his view on the appointment of delegates pursuant to the *Occupational Health and Safety Act 1984.* The document has now been provided by the respondent to the applicant union to assist in the appointment of delegates and ultimately the election of OSH reps. The Commission is of the view, with respect to the respondent to this matter, it should not have been necessary to be referred to an arbitrated hearing for such an issue to be resolved.

42 To that end the Commission is of the view the order has now served its purpose and accordingly order 2012 WAIRC 00234 can be cancelled in all respects.

43 The order 2012 WAIRC 00057 that issued on 7 February 2012 will be addressed on a clause by clause basis. The consultation referred to in order (2) on general occupational health and safety issues has clearly already taken place between Mr Fogliani and Mr Farrell. A copy of the interim order as reflected in order (3) was placed in operational workplaces back in February 2012 and to that extent the terms of that particular order have therefore been met.

44 The respondent and the applicant union entered into consultation in March 2012 facilitated by Mr Linton Pike and identified a list of health and safety matters in dispute between the parties. Some of the matters have been resolved such as the election of OSH reps from among the railcar drivers and the gradual training of those OSH reps together with an agreement for time off for OSH reps to inspect the workplace and attend meetings.

45 It is the view of the Commission that this order has also served its purpose and whilst I recognise the applicant union was particularly keen on the potential for the issuance of a comprehensive order it is important to recognise the prospect of such an event was only ever reflected in the preamble of 2012 WAIRC 00057 and never within the order itself. To that end the Commission is of the view the order has now served its purpose and accordingly order 2012 WAIRC 00057 will be cancelled in all respects. Having said that the words contained in the order's preamble will always be able to be referred to in the future by both the respondent and the applicant union.

46 Circumstances have changed in that the applicant union no longer appears to be actively pursuing occupational health and safety issues through the Commission, certainly not by way of this application.

47 Having considered the matter carefully the Commission is of the view that it ought exercise its powers pursuant to s 27 of the Act.

48 The applicant union stressed in the written submissions the urgency of each of the occupational health and safety issues raised, yet since those submissions have been made there has not been a single request for a conference within a three month period.

49 The Commission intends to issue an order discontinuing this file, C 5 of 2012. Having said that, it remains open at any stage for the applicant union or indeed the respondent to refer matters to the Commission on a case by case basis and in a more orderly fashion having regard for the prioritisation of health and safety matters in the workplace.

**2013 WAIRC 00423**

**DISPUTE RE STANDARD OF RISK ASSESSMENTS CONDUCTED BY EMPLOYER**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH |
| | **APPLICANT** |
| | **-v-** |
| | PUBLIC TRANSPORT AUTHORITY |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | MONDAY, 15 JULY 2013 |
| **FILE NO/S** | C 5 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00423 |

| | |
|---|---|
| **Result** | Orders cancelled and application discontinued |
| **Representation** | |
| **Applicant** | Mr Cory Fogliani |
| **Respondent** | Mr Richard Farrell (of counsel) |

*Order*

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

1 THAT Order 2012 WAIRC 00057 issued on 7 February 2012 be cancelled in all respects.

2 THAT Order 2012 WAIRC 00234 issued on 17 April 2012 be cancelled in all respects.

3 THAT this application be and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

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**2012 WAIRC 00704**

**DISPUTE RE OVERTIME**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | THE PUBLIC TRANSPORT AUTHORITY |
| | **APPLICANT** |
| | **-v-** |
| | AUSTRALIAN SERVICES UNION, WESTERN AUSTRALIAN BRANCH |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | FRIDAY, 27 JULY 2012 |
| **FILE NO/S** | C 35 OF 2012 |
| **CITATION NO.** | 2012 WAIRC 00704 |

| | |
|---|---|
| **Result** | Order issued |
| **Representation** | |
| **Applicant** | Mr R Farrell |
| **Respondent** | Mr G Upham |

*Order*

HAVING heard Mr R Farrell on behalf of the applicant and Mr G Upham on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

1. THAT the notice of application be amended to delete the named respondent "Australian Services Union, Western Australian Branch and insert in lieu thereof the name "Western Australian Municipal, Administrative, Clerical and Services Union of Employees".

2. THAT The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees be granted leave to intervene.

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

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**2013 WAIRC 00570**

**DISPUTE RE OVERTIME**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | THE PUBLIC TRANSPORT AUTHORITY |
| | **APPLICANT** |
| | **-v-** |
| | WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S J KENNER |
| **DATE** | TUESDAY, 30 JULY 2013 |
| **FILE NO/S** | C 35 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00570 |

| | |
|---|---|
| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | Mr R Farrell |
| **Respondent** | Ms R Smith |

*Order*

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

THAT the matter be and is hereby discontinued by leave.

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

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# CONFERENCES—Notation of—

| Parties | | Commissioner | Conference Number | Dates | Matter | Result |
|---|---|---|---|---|---|---|
| Health Services Union of Western Australia (Union of Workers) | The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA) | Scott A/SC | PSAC 14/2013 | N/A | Dispute re employer's treatment of union member | Dispute re employer's treatment of union member |
| Health Services Union of Western Australia (Union of Workers) | The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA) | Scott A/SC | PSAC 5/2013 | 11/03/2013 4/07/2013 | Dispute re reclassification claim | Discontinued |

| Parties | | Commissioner | Conference Number | Dates | Matter | Result |
|---|---|---|---|---|---|---|
| State School Teachers' Union of W.A. (Incorporated) | Director-General of the Department of Education and Training | Scott A/SC | C 198/2013 | 17/04/2013<br>24/04/2013 | Dispute re termination of employment | Discontinued |
| The State School Teachers' Union of W.A. (Incorporated) | Department of Education | Scott A/SC | C 42/2012 | 1/08/2012<br>19/09/2012<br>21/02/2013<br>4/04/2013 | Dispute re suspected breach of discipline | Discontinued |
| United Voice Western Australian Branch | The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as: Mimidi Park Mental Health Unit, Rockingham Hospital | Harrison C | C 209/2013 | 1/07/2013 | Dispute re rostering | Discontinued |
| United Voice Western Australian Branch | The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as: Mimidi Park Mental Health Unit, Rockingham Hospital | Harrison C | C 208/2013 | 1/07/2013 | Dispute re rostering | Discontinued |

# PROCEDURAL DIRECTIONS AND ORDERS—

**2013 WAIRC 00437**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** ANDJELKO BUDIMLICH;
HUGH SUTHERLAND ROGERS;
EXPEDIT (STAN) CARVALHO

**APPLICANTS**

**-v-**

J-CORP PTY LTD

**RESPONDENT**

**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT

**DATE** FRIDAY, 26 JULY 2013

**FILE NO.** B 63 OF 2013, B 64 OF 2013, B 65 OF 2013

**CITATION NO.** 2013 WAIRC 00437

**Result** Direction issued

**Representation**

**Applicant** Mr P Mullally as agent

**Respondent** Mr B Di Girolami of counsel

*Direction*

WHEREAS these are applications pursuant to Section 29(1(b)(ii) of the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of July 2013 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the Commission is of the opinion that the issuing of the Directions will assist in the conduct of the hearing of the matters;

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

1. THAT in respect of the question of the Commission's jurisdiction to hear application B 64 of 2013:
   - (a) the matter will be listed for hearing on the jurisdiction issue for 1 hour for oral submissions;
   - (b) the applicant will initiate a Statement of Agreed Facts to be filed and that such statement be filed 7 days before the hearing;
   - (c) the parties will file detailed submissions:
     - (i) the applicant 14 days prior to the hearing; and
     - (ii) the respondent 7 days prior to the hearing.
2. THAT in respect of the substantive matters in all three applications;
   - (a) the applicant will file and serve Further and Better Particulars by the 29th day of July 2013 and the respondent will file and serve any response by the 19th day of August 2013;
   - (b) the hearing of the substantive matters will be listed for 3 consecutive days not before mid-September 2013, the hearings in respect of Mr Carvalho and Mr Budimlich in applications B 65 of 2013 and B 63 of 2013 respectively shall be heard jointly and first, and the hearing in respect of Mr Rogers, application B 64 of 2013, shall be heard on the next day;
   - (c) all evidence-in-chief will be by witness statement:
     - (i) the applicant to file and serve any witness statements 21 days prior to the hearing;
     - (ii) the respondent to file and serve any witness statements 7 days prior to the hearing;
     - (iii) such witness statements shall constitute the whole of the evidence-in-chief of the witnesses.
   - (d) the parties will each file and serve an Outline of Submissions 2 days prior to the hearing and together file a Statement of Agreed Facts 2 days prior to the hearing;
   - (e) the respondent respond to the application for discovery filed on the 16th day of July 2013 by the 2nd day of August 2013.

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

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**2013 WAIRC 00721**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | MR KEVIN KEANE; MR DAMIEN CLARKE |
| | **APPLICANTS** |
| | **-v-** |
| | ADVANCE FORMWORK PTY LTD |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | FRIDAY, 16 AUGUST 2013 |
| **FILE NO.** | B 100 OF 2013, B 101 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00721 |

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| **Result** | Direction issued |
| **Representation** | |
| **Applicant** | Mr K Sneddon (of counsel) |
| **Respondent** | Ms S Holmes (of counsel) |

*Direction*

HAVING heard Mr K Sneddon (of counsel) on behalf of the applicants and Ms S Holmes (of counsel) on behalf of the respondent the Western Australian Industrial Relations Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs -

THAT the hearing be set down for 29, 30 and 31 October 2013;

THAT discovery is to be informal;

THAT the parties draw up an agreed statement of facts;

THAT the applicant file in the Commission and serve on the respondent any signed witness statements upon which it intends to rely no later than 2 October 2013;

THAT the respondent file in the Commission and serve on the applicant any signed witness statements upon which it intends to rely no later than 9 October 2013;

THAT the applicant file in the Commission and serve on the respondent an outline of submissions no later than 18 October 2013;

THAT the respondent file in the Commission and serve on the applicant an outline of submissions no later than 23 October 2013;

THAT the parties have liberty to apply at short notice.

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

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**2013 WAIRC 00424**

**DISPUTE RE PROPOSED FORCED INTRODUCTION OF ON-CALL STAFF**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | THE AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH |
| | **APPLICANT** |
| | **-v-** |
| | 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 SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER S M MAYMAN |
| **DATE** | FRIDAY, 12 JULY 2013 |
| **FILE NO.** | C 203 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00424 |

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| **Result** | Recommendation issued |
| **Representation** | |
| **Applicant** | Ms J McCulloch |
| **Respondent** | Ms M Muccilli |

*Recommendation*

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979 (the Act)* on 28 May 2013 and whereby the Australian Nursing Federation Industrial Union of Workers Perth (the applicant union) sought the Western Australian Industrial Relations Commission's (the Commission) assistance on issued relating to the introduction of on-call in the mental health service.

WHEREAS on 31 May 2013 a conference was held and the parties were unable to reach an agreement and following the conference there were discussions between the applicant union and 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 (the respondent) in an attempt to find a suitable form of words.

AND WHEREAS the parties were unable to find a suitable form of words and a further conference was held on 12 July 2013 and following further discussions between the parties which included constructive involvement by the respondent and the applicant union, the respondent requested an adjournment to seek instructions and what had been an agreement was subsequently withdrawn.

WHEREAS the applicant union supports a form of words issuing the respondent maintains its opposition.

NOW THEREFORE the Commission makes the following recommendation:

(1) If a prospective or current employee of North Metropolitan Mental Health Service applies for a job which has as a prime condition of employment to participate in on-call, multi disciplinary team then it is considered that the employee upon employment may be required as part of his or her employment to work on-call in accordance with the provisions of Clause 28 of the *Registered Nurses, Midwives and Enrolled Mental Health Nurses – Australian Nursing Federation – WA Health Industrial Agreement 2010.*

(2) The ANF considers this recommendation is limited to matters arising out of the dispute relating to the North Metropolitan Mental Health Service and cannot be used as a precedent unless agreed to by both parties.

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

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**2013 WAIRC 00582**

**PUBLIC SERVICE AWARD 1992**

**GOVERNMENT OFFICERS' SALARIES ALLOWANCES AND CONDITIONS AWARD 1989**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2013 WAIRC 00582 |
| **CORAM** | **:** | PUBLIC SERVICE ARBITRATOR<br>ACTING SENIOR COMMISSIONER P E SCOTT |
| **HEARD** | **:** | TUESDAY, 30 JULY 2013 |
| **DELIVERED** | **:** | WEDNESDAY, 7 AUGUST 2013 |
| **FILE NO.** | **:** | P 6 OF 2006, P 7 OF 2006 |
| **BETWEEN** | **:** | THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED<br>Applicant<br>AND<br>DEPARTMENT OF COMMERCE AND OTHERS<br>Respondents |

| | | |
|---|---|---|
| CatchWords | **:** | Application for discovery – Principles of discovery – Privileged documents – Immunity of Cabinet documents – Legal professional privilege – Public interest in parties not being required to discover internal documents in negotiations or arbitration process |
| Legislation | **:** | *Industrial Relations Act 1979* s 6, s 27(1)(o), s 32, s 44 |
| Result | **:** | Application for discovery dismissed |
| **Representation:** | | |
| Applicant | **:** | Ms K Hagan and Ms S Van Der Merwe |
| Respondents | **:** | Mr D Matthews of counsel and Ms H Hooley |

*Reasons for Decision*

1 In 2006 the applicant applied to amend the *Public Service Award 1992* and the *Government Officers' Salaries Allowances and Conditions Award 1989* (the awards) to increase the rates of salary for specified callings on the grounds of increased work value.

2 Following a number of conferences convened by the Public Service Arbitrator (the Arbitrator) and lengthy negotiations between the parties, an agreement was reached. This agreement was reflected in a Memorandum of Understanding (MOU) between the parties. The MOU was attached as a schedule to orders of the Arbitrator made on 13 March 2008 (2008 WAIRC 00160), reflecting the parties' agreement. Increases in the salaries of specified callings were applied from 1 July 2007 and adjustments made to the salaries set out in subsequent enterprise agreements according to the terms of the MOU.

3 The MOU also set out a number of issues which still required resolution. Over the following years, the parties continued to work towards resolution of those issues. During that time there were regular conciliation conferences and progress reports to the Arbitrator and, ultimately, all issues set out in the MOU have been concluded.

4 Towards the end of that process, the Arbitrator, in conference, enquired of the parties how the applications ought to be brought to conclusion. The applicant advised that it sought to have the awards varied to reflect the salary increases, to maintain the safety net to reflect what it says were the agreed work value changes. The respondents objected, saying that they had never agreed to the awards being amended, that the MOU finalised the matter and that the awards could not be amended without the Commission being satisfied that the Principles had been met, in particular, the Work Value Principle.

5 The applicant sought that the Commission determine the issue and the matter was set down for hearing for a preliminary question of whether there was any impediment to the awards being amended, particularly by reference to the respondents' argument that the issue had been settled.

6 On 30 April 2013 the applicant sought discovery, production and inspection of:

(a) documents between the respondents, which included the Department of Premier and Cabinet, (or the Public Sector Commission) and the Department of Commerce's predecessor, DOCEP, concerning:

(i) the substance of the CSA's claim and the substance of the work value reports;

(ii) the need or otherwise for the CSA to provide clarification or additional information between the date of submission of the work value reports and the settlement of the MOU on 9 January 2008;

(b) the agencies' written responses to DOCEP on those work value reports;

(c) documents concerning consultation, additional research undertaken for the development of DOCEP's assessment between the date of submission of the work value reports and the settlement of the MOU on 9 January 2008.

7 In response, Robert Michael Gordon Horstman, Executive Director, Labour Relations Division of the Department of Commerce, submitted an affidavit in which he described how the Department had dealt with the claim, particularly the process of drafting the MOU and seeking responses from agencies with regard to work value reports. He attached to his affidavit a list of documents within the scope of the application for discovery and claimed that all documents were privileged and not discoverable.

8 Subsequently an affidavit of Helen Mary Dooley was filed to clarify information she had provided to Mr Horstman and she set out further investigations in respect of documents exchanged between various agencies and respondents in the process. She attached to her affidavit a modified list of documents, HMD1.

9 The respondents' objections are on a number of grounds, under three categories relating to the development process for the MOU. Document 11 is said to be privileged on the basis of it being a decision of a subcommittee of Cabinet. Documents 1, 2, 9 and 10 are said to be privileged as they relate to deliberations of a decision of a subcommittee of Cabinet, and the remainder are said to relate to internal work done on the MOU and that it is not in the public interest to release those documents.

10 The applicant says that the documents are relevant to a matter in issue and may advance the applicant's case or damage the other party's case. The documents are also said to be likely to be crucial evidence in the respondents' case and they ought to be discovered.

11 The applicant says that the immunity of Cabinet documents is not absolute; that these matters are no longer current and controversial as they were resolved some time ago; the Labour Relations Expenditure Review Committee of Cabinet no longer exists; there is a different government in power, and the core matter in dispute is whether the work value changes were resolved. Mainly, the applicant relies on the matters being relevant to the administration of justice.

12 As to the deliberations of the Cabinet subcommittee, the applicant says that the Cabinet subcommittee is one step removed from any decision or deliberations of Cabinet.

13 As to the third category of documents, the applicant says that these relate to internal work in the production of the MOU, and there is no general principle that internal working documents are to be privileged in this jurisdiction.

14 The respondents say that where parties are legally represented in negotiations, there is no question that documents developed during the negotiation process would be subject to legal professional privilege. In the industrial relations environment, the parties are not often represented by lawyers and therefore, strict legal professional privilege would not apply. However, *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch and The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel and others* ((1995) 75 WAIG 1801) the Full Bench extrapolated from the principle of legal professional privilege to apply that concept to documents in matters before the Commission.

15 The respondents also say that the issue is whether the documents would demonstrate, one way or the other, that the respondents agreed to the work value claims made by the applicant to enable the applicant to put to the Commission that increased work value had been demonstrated, thus justifying the amendment of the awards. The applicant's alternative is to run a full work value case.

16 The respondents say that it does not matter whether the Cabinet subcommittee still exists, but rather the privilege attaches to Cabinet and its deliberations. The fact that the matters are currently before the Commission demonstrates that they are, in fact, still current and controversial.

17 The respondents say that the Commission's primary obligation is to settle matters before it by agreement between the parties. It is contrary to the interests of settlement of matters that documents prepared by parties during their negotiations, whether they are successful or otherwise, be potentially available to go into the hands of the other side. This would discourage parties from being robust in their consideration and analysis of claims and strategies, and the strengths and weaknesses of their respective cases, particularly in putting those things in writing. This applies to both sides of a dispute. A party ought to be able to put in writing those matters which will assist in internal consideration of settlement without fear that those things might fall into the hands of the other side. This is particularly so given that the same parties negotiate on a regular basis and are frequently before the Commission. Disclosure of internal views and information which are none of the business of the other side, should not be available to the other side and may lead to those things not being recorded for fear that they may be subject to discovery.

**The Principles of Discovery**

18 The principles of discovery are set out in *Sankey and Whitlam and Others* [1978] 142 CLR 37. Both parties agreed that the decision of the Federal Court of Australia in *Spencer v Commonwealth of Australia* [2012] FCAFC 169 encapsulates the principles as they have developed. Those principles are that Cabinet papers, which include papers brought into existence for the purpose of preparing a submission to Cabinet, are immune from discovery but that immunity is not necessarily absolute.

However, they belong to a class of documents which ought not be examined by the court except, perhaps, in very special circumstances. As noted by Gibbs ACJ in *Sankey and Whitlam* (at 43):

> If a strong case has been made out for the production of the documents, and the court concludes that their disclosure would not really be detrimental to the public interest, an order for production will be made.

19 It is, therefore, part of the balancing process of deciding whether there is detriment to the public interest involved in the disclosure and whether that is outweighed by the public interest in the advancement of justice.

20 I note that in regard to the disclosure of documents developed by parties to matters in this jurisdiction, the Full Bench in *ALHMWU and The Western Australian Hotels and Hospitality Association Incorporation and Others* (1995) 75 WAIG 1801 at 1808 the Full Bench said:

> We would hold that documents which would normally be the subject of legal privilege or litigation where practitioners are concerned would be, as a matter of equity, good conscience and the substantial merits of the case, barred from discovery or production to the other side in any proceedings. Otherwise the result would be unconscionable and in contravention of the requirement that the Commission act according to equity and good conscience (see the Full Commission of the Industrial Commission of South Australia in Taranto (1980) Pty Ltd t/a Esquire Motor Inn v. Wood 29 AILR paragraph 307 where the Commission held:-
>
> > 'The rules relating to privilege were equally applicable before the Industrial Tribunal where the parties were represented by either legal practitioners or by lay advocates. Were that not so, a party represented by counsel could claim privilege for its instructions to counsel, and yet claim to be permitted to require the other parties represented by a lay advocate to produce for inspection all its instructions to the advocate and, where thought to be of use, to call for the production of the documents and tender them as evidence against the other party, or, if they were not produced, to prove their contents by some other method.'
>
> We would apply that dictum, except that we would say that the rules relating privilege should be applied by virtue of s. (26)(1)(a) of the Act. We do not think that we can hold that privilege can exist, as a matter of law, except between a legal practitioner and his/her client.
>
> However, it is obvious that Ms Blaskett's written submissions or notes thereof, 'briefs', witness proofs, etc, could not be required to be disclosed on the basis of what we have just held (see, too Club Managers Association v. Cabra Vale and District Ex-Active Servicemen's Club 22 AILR paragraph 436 (Industrial Commission of NSW) per Liddy J).

**Consideration and conclusions**

21 The Commission has the jurisdiction to order the production of documents (s 27(1)(o) of the *Industrial Relations Act 1979* (the Act)).

22 The principle objects of the Act include:

> (ag) to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises; and
>
> (b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;
>
> (s 6 – Objects of Act)

23 Section 32 – Conciliation and arbitration of industrial matters - requires the Commission to endeavour to resolve matters in dispute by conciliation unless it is satisfied that resolution of the matter would not be assisted by doing so. Section 44 provides for the Commission to convene conferences and summons parties for the purpose of conciliation and requires that '[i]n endeavouring to resolve any matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to a conference under this section to reach an agreement on terms for the resolution of the matter.'

24 Therefore, it is clear that the Commission is to focus on the parties reaching agreement as a priority. In considering whether it is in their interests to reach agreement, parties will consider the strengths and weaknesses of their own and the other side's cases. Particularly in the government sector this is usually set out in writing. It is appropriate that the Commission encourage parties to develop their considerations of the resolution of disputes by a thorough examination of all aspects of the matter and by frank assessments of their strategies including in internal documents.

25 Given that the parties to the awards regularly negotiate, it would be contrary to the interests of the parties and to the public interest generally, for them to be discouraged from a thorough analysis and frank expression of views within their internal documents for fear that those documents may be disclosed to the other side as part of a subsequent litigation. In those circumstances, the views of the Full Bench in *ALHMWU v The Western Australian Hotels and Hospitality Association Incorporated and others* are most apposite. Therefore, internal documents prepared by the parties as part of their considerations for the resolution of this claim which led to the parties entering into the MOU, should not be disclosed to the other side in respect of arbitration of any matter arising from that dispute. It would be entirely contrary to the objects of the Act to do so. As Mr Matthews for the respondents says, they ought to be treated as analogous to legal professional privilege. All of the documents contained within the list relate to the respondents' internal considerations of the resolution of the two applications, whether they are internal documents within the departments and agencies, documents between those agencies or documents prepared for consideration by a subcommittee of Cabinet.

26 The administration of justice, but more particularly, the settlement of industrial disputes and thereby the public interest, would be impaired by the disclosure of documents which have been prepared as part of the process which lead to the settlement of a substantive part of the dispute between the parties.

27 A class of the documents sought to be discovered relates to the deliberations of a subcommittee of Cabinet and that subcommittee and the particular Cabinet no longer exist. It is the purpose for which the documents were produced for consideration by a Cabinet subcommittee which is of significance and attracts privilege. The fact that the contents of the

documents may now be said to support one party or the other's case in a matter relating to the controversy between the parties of whether or not the awards ought to now be amended, is a factor going to whether or not the matters are still current and controversial. In this case, there is dispute between the parties as to whether the respondents accepted the work value claims of the various specified callings put forward by the applicant. That is, the documents may disclose the basis on which the respondents entered into the MOU, which is now part of the dispute. Therefore, while the MOU settled the claims, the issue has arisen as to whether the awards should be amended. The issues which went before the Cabinet subcommittee are, therefore, still current and controversial. This also supports the refusal to order discovery of the documents.

28 In all of the circumstances, the respondents should not be required to discover the documents set out in attachment HMD1 to Ms Dooley's affidavit as part of the consideration of whether there exists any impediment to the awards being amended. This also means that the documents are not able to be used by the respondents in the matter and, therefore, cannot be evidence to support the respondents' case.

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**2013 WAIRC 00584**

**PUBLIC SERVICE AWARD 1992**

**GOVERNMENT OFFICERS' SALARIES ALLOWANCES AND CONDITIONS AWARD 1989**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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|---|---|
| **PARTIES** | THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED |
| | **APPLICANT** |
| | **-v-** |
| | DEPARTMENT OF COMMERCE AND OTHERS |
| | **RESPONDENTS** |
| **CORAM** | PUBLIC SERVICE ARBITRATOR |
| | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | WEDNESDAY, 7 AUGUST 2013 |
| **FILE NO** | P 6 OF 2006, P 7 OF 2006 |
| **CITATION NO.** | 2013 WAIRC 00584 |

**Result** Application for discovery dismissed

*Order*

HAVING heard Ms K Hagan and with her Ms S Van Der Merwe on behalf of the applicant and Mr D Matthews of counsel and with him Ms H Dooley for the respondents, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the application for discovery be, and is hereby dismissed.

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

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**2013 WAIRC 00434**

**DISPUTE RE VOLUNTARY REDUNDANCY**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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| **PARTIES** | HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) |
| | **APPLICANT** |
| | **-v-** |
| | MINISTER FOR HEALTH |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE ARBITRATOR |
| | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | TUESDAY, 23 JULY 2013 |
| **FILE NO** | PSAC 18 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00434 |

**Result** Interim order amended

*Order*

WHEREAS this is an application made pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS at a conference convened on Tuesday 25 June 2013, the Public Service Arbitrator (the Arbitrator) issued interim orders in this matter, and these included that either party may apply to amend or rescind the orders; and

WHEREAS on 22 July 2013 the respondent sought the amendment to the orders and the applicant advised that it does not object to the orders being amended; and

WHEREAS having considered the circumstances as advised by the parties and the proposed amendments to the orders, the Arbitrator is of the opinion that the amendments are appropriate;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that the order issued on Tuesday 25 June 2013 (2013 WAIRC 00374) be varied and that the following orders are to apply:

1. THAT the respondent grant to Mr Benjamin Dent:
   (a) leave without pay for eight weeks commencing on and from the date GDA commences delivery of medical imaging technology services to Busselton Hospital; and
   (b) authorisation to undertake external employment with GDA until 2 August 2013.
2. THAT the Union has leave to apply to extend the period of leave without pay should the matter not be resolved.
3. THAT either party have leave to apply to further amend or rescind these orders upon giving 24 hours' notice to the other party and to the Arbitrator.
4. THAT the parties are to report back to the Arbitrator in a conference at a date to be fixed, for the purposes of further conciliation.

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

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**2013 WAIRC 00428**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

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| **CITATION** | **:** | 2013 WAIRC 00428 |
| **CORAM** | **:** | ACTING SENIOR COMMISSIONER P E SCOTT |
| **HEARD** | **:** | MONDAY, 1 JULY 2013 |
| **DELIVERED** | **:** | TUESDAY, 16 JULY 2013 |
| **FILE NO.** | **:** | U 245 OF 2012 |
| **BETWEEN** | **:** | OLIVIA PERKINS |
| | | Applicant |
| | | AND |
| | | MRS KATHLEEN CRUSE AND MR BARRY CRUSE |
| | | Respondents |

| | | |
|---|---|---|
| CatchWords | **:** | Application for witness summons – Application to summons counsel to produce documents – Legal professional privilege – Implied waiver of privilege – Disclosure of legal advice in witness statements – Waiver not limited to documents in evidence before the court |
| Legislation | **:** | *Industrial Relations Act 1979* (WA)<br>*Hairdressers Award 1989* |
| Result | **:** | Direction issued |
| **Representation:** | | |
| Applicant | **:** | Mr N Marouchak of counsel |
| Respondent | **:** | Mr T Petherick of counsel |

*Reasons for Decision*

1 The applicant claims that she was harshly, oppressively or unfairly dismissed from her employment as a hairdresser by the respondents on the 20 November 2012. In preparation for the hearing of the matter, the parties filed witness statements.

2 The matter was listed for hearing to commence on 1 July 2013.

3 Late on 30 June 2013 the applicant filed an application that the hearing be adjourned and that a witness summons filed with that application, requiring the respondents' counsel, Mr Trent Petherick, to produce books, papers or other documents, be granted on the grounds that:

> 1. The Respondents waived legal professional privilege by disclosing the contents of legal advice in their witness statements filed on 19 June 2013, specifically, in respect to Ms Cruse's statement at paragraphs 22, 23, 24 and 54, and in respect to Mr Cruse's statement at paragraphs 9 and 10.
>
> 2. Legal submissions supporting the above are attached and marked "A".

4 The summons to witness was addressed to Trent Petherick. It sought that he appear before the Commission to produce all books, papers, or other documents in his possession or under his control in any way relating to the proceedings and in particular but not exclusively:

> All legal advice given to, and communication with, Kathleen Cruse And Barry Cruse regarding:
>
> 1. the potential redundancy of employees at Kathleen Cruse And Barry Cruse's hair salon business the subject of these proceedings; and
>
> 2. the potential restructure of staff at Kathleen Cruse And Barry Cruse's said hair salon business; and
>
> 3. the potential redundancy of Ms Olivia Perkins employment at the said hair salon by Kathleen Cruse and Barry Cruse.

5 The applicant subsequently amended the period of the production sought to include from 13 November 2012 to 26 November 2012.

6 The Commission heard the application at the commencement of the hearing on 1 July 2013. The respondents were given the opportunity to provide submissions, in writing, on the basis of having had very short notice of the application. The respondents filed submissions on Tuesday 2 July 2013 and the applicant filed a response on Wednesday 3 July 2013.

7 Following this, becoming concerned at the potential for the matter to become increasingly complex and costly, the Commission convened a further conference for the purpose of attempting to resolve the matter by conciliation, on Monday 8 July 2013 at 2.30pm. As a consequence of that conference, the matter was held in abeyance for seven days to enable the parties to further consider their positions. The Commission was advised on Monday 15 July 2013 that the matter was not resolved following the conciliation conference and that the issue of the application to summons counsel for the respondents, required determination.

8 The issue for determination is whether Ms Cruse's witness statement constitutes a waiver of legal professional privilege in respect of advice given by Mr Petherick, the respondents' counsel, and whether, as a consequence, Mr Petherick ought to be required to produce documents relating to legal advice given to Ms Cruse.

**The contents of the witness statement**

9 In the witness statement of Kathleen Cruse filed on 19 June 2013, Ms Cruse says at paragraphs 22, 23, 24 and 54, as follows:

> 22. On the 13th November 2012, I met with our Lawyers, Trent Petherick, in Mandurah, to discuss restructuring, proposals for restructuring, and the correct procedure to be adopted when implementing same. The main problems with the business we were an over staffed [sic] whereby the financial performance of the business was not reflected by the number of staff. In particular, now that Rachael Matthews was a senior hair stylist, we were overstaffed with senior stylists. Moreover, I wish to become more involved in the business and work additional hours (expand) [sic].
>
> 23. There was an obvious difficulty with permanent staff that caused lack of flexibility. Our work flow was not constant throughout the day and often permanent staff would have considerable periods where they were unproductive and had nothing to do. Trent Petherick suggested exploring the options of disestablishing a permanent position and creating a casual position that would assist in alleviating this issue.
>
> 24. Trent Petherick carefully explained the consultative requirements in digesting a restructuring proposal to staff and that any decision could not be made until a consultation had fully occurred. He also carefully explained that the consultation must be genuine and meaning-full and this was not only a legal requirement but also important for staff morale. I fully appreciated the legal position and confirmed that I required his assistance every step of the way to ensure that the process was handled fairly.
>
> …
>
> 54. However, I had an open mind on the position. I wanted to hear Olivia's views as there may have been a better way of restructuring. Furthermore, anything that Olivia stated to me would have needed to be discussed with my husband before making a final decision. We would have also sought the advice of our lawyer to ensure that any resulting termination of Olivia's position at that time was lawful.

10 A witness statement filed by Barry Hillier Cruse on the 19 June 2013 contained the following paragraphs:

> 9. On 13 November 2012, Kay met with an Employment Lawyer to discuss restructuring. Essentially, the outcome of that advice was to look at proposals for restructuring including addressing the issue of being over staffed with senior stylists. This included considering the option of disestablishing one permanent position and creating a casual position that would have the advantage of providing more flexible utilisation of staff resources.

10. We were well aware of our consultative requirements in considering a restructure proposal. We were also aware of our obligations to be completely fair to staff. Furthermore, we always ensure that we adhere to our legal obligations.

11 The applicant says that the respondents have waived legal professional privilege impliedly on the basis that they have disclosed not merely the fact that they have obtained legal advice, but in disclosing the legal advice received, or least some of it. The applicant refers to authorities to support her claim that the respondents have disclosed privileged communications in order to advance their position, constituting a waiver of privilege and that it is unfair to prevent disclosure of the balance of the communications.

12 The respondents say firstly, that a witness statement maintains privilege. The witness statements in this case have not been tendered under oath in open court and have not been received into evidence. Further, they do not intend to lead in evidence the statements made in the paragraphs referred to in Ms Cruse's witness statement.

13 The respondents say if there has been an implied waiver, it is limited to the communications on 13 November 2012.

14 They also say that there are compelling reasons why the Commission should not allow the summons. These include:

a. The extent of the evidence is limited to general information provided at initial consultation and to require counsel for the respondents to discontinue and become a witness in the case would not be expedient;

b. The application is an abuse of process and motivated to increase costs and difficulties with the respondents' preparation of their case;

c. The general information provided to the respondents at the consultation on 13 November 2012, was not advice, but legal information available in the public domain. Ms Cruse obtained the same information from Wageline. Therefore, the alleged waiver is minimal and relates to the effect of the information;

d. Counsel for the respondents has no independent recollection of the initial consultation some nine months ago;

e. There can be no meaningful benefit in allowing the application. Even if paragraphs 23 and 24 were led into the evidence there would be no inconsistency between counsel's limited recall and that of Ms Cruse.

15 The respondents say that it is not their intention to adduce into evidence paragraphs 23 and 24 of Ms Cruse's witness statement and, therefore, there can be no allegation of inconsistency between reference to the material and maintenance of the privilege.

16 The respondents also say that although the authorities referred to by the applicant indicate that a statement of a potential witness is protected by legal professional privilege, they also note that '[i]t is controversial whether the delivery of a copy of the statement to other parties pursuant to rules of court where the delivery is a precondition to the right to call that witness waives the privilege, at least for the purpose of that proceeding'. They say that one view is that the privilege is waived because the disclosure is considered voluntary and because it 'is not possible to assert a right to refuse to disclose in respect of a document which has already been disclosed'. That view has been applied to finalised proofs of evidence and affidavits which have been served. However, they say there is a substantial line of contrary authority. The respondents say that by not adducing those paragraphs into evidence, the inconsistency between the material and the maintenance of privilege is averted.

17 The respondents also say, in respect of the extent of the waiver, that in one case the court required only the disclosure of the substance of the advice and not its detail.

18 The respondents also say that paragraphs 23 and 24 of Ms Cruse's statement are limited to the effect of the advice and not its detail, and therefore privilege is not waived.

19 The respondents also rely on issues of fairness as noted above, criticising the lateness of the application; the inconvenience and cost to the respondents should their counsel become a witness in the matter and need to be replaced as their counsel; is an abuse of process and the alleged waiver is minimal and relates to the effect of information rather than legal advice.

**Legal Professional Privilege**

20 The principle of legal professional privilege is set out in *Australian Civil Procedure* (8th ed) at [10.430]:

> 'In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 42-43 Gleeson CJ, Gaudron, Gummow and Hayne JJ declared that legal professional privilege is a principle of substantive law that may be invoked to prevent disclosure of communications between a client and a lawyer for the dominant purpose of giving or obtaining legal advice or providing legal services. Legal professional privilege is intended to preserve confidentiality between legal adviser and client. As such, the privilege protects from disclosure communications between a client and a legal adviser for the purpose of obtaining confidential legal advice. It also protects from disclosure documents prepared for use in existing or anticipated litigation. The same applies to answering an interrogatory directed to privileged information.
>
> The policy underlying legal professional privilege is that frank and complete disclosure between a legal adviser and a client is necessary for the proper conduct of litigation. On a broader basis, confidentiality between the legal profession and its clients is necessary because of the nature of the legal system. Generally, it is in the public interest for legal transactions to be conducted through legal practitioners. It is said that a client must be able to approach a legal practitioner with the certainty that the practitioner cannot be compelled to disclose confidential communications.'

21 At common law, anyone who has the benefit of legal professional privilege may waive it (*Mann v Carnell* (1999) 201 CLR 1) either expressly, by not claiming it or by implication.

22 The court may require the disclosure of privileged material where there has been partial disclosure, in the interests of fairness:

> 'There is likely to be unfairness where the undisclosed material throws a different light on the meaning of what is disclosed. Short of unfairness though, inadvertent disclosure does not dislodge privilege: *Hongkong Bank of Australia Ltd v Murphy* [1993] 2 VR 419 at 441… [l]egal professional privilege is waived if the client puts in issue the content of legal advice (*Hongkong Bank of Australia Ltd v Murphy* op cit at 434-438) … [t]here is no general waiver of legal professional privilege if otherwise privileged information is disclosed for a specific and limited purpose. Disclosure of this nature effects a waiver only for the specific purposes of the disclosure'. *Australian Civil Procedure* (8th ed) [10.470].

23 An examination of paragraphs 22, 23 and 24 in particular of Ms Cruse's statement indicates that on 13 November 2012, she met with her lawyer in Mandurah to discuss restructuring the staffing arrangements of the business and the correct procedure to be adopted. She noted that 'Trent Petherick suggested exploring the options of disestablishing a permanent position and creating a casual position that would assist in alleviating this issue' [23].

24 Mr Petherick is also said to have:

> 'carefully explained the consultative requirements in digesting a restructuring proposal to staff and that any decision could not be made until a consultation had fully occurred. He also carefully explained that the consultation must be genuine and meaning-full and that it was not only a legal requirement but also important for staff morale. I fully appreciated the legal position and confirmed that I required his assistance every step of the way to ensure that the process was handled fairly' [24].

25 It is clear from these paragraphs that Ms Cruse consulted Mr Petherick for the purpose of obtaining legal advice and perhaps also general counsel as to two things:

1. The legal requirements for consultation with staff as part of a restructuring arrangement; and
2. Managing the process fairly.

**Was there legal advice or general information?**

26 Whilst the respondents say that the information provided was available from other sources such as Wageline, I note that the information apparently provided arises from legislative instruments such as the *Industrial Relations Act 1979* (WA) relating to questions of unfair dismissal; possibly the *Hairdressers Award 1989* which sets out requirements for terminating a contract of employment, and finally the General Order of the Commission dealing with termination, change and redundancy (2005 WAIRC 01715), which sets out the requirements for the introduction of change, the employer's duty to notify, consult and provide notice. Ms Cruse's statement also indicates that Mr Petherick gave her legal advice about handling the processes arising from the legal requirements to consult and give notice. In this context, I find that whilst it is said that the purpose of the consultation with Mr Petherick was to receive general business advice, what she also received and intended to receive constituted legal advice.

**Is the witness statement capable of providing a waiver?**

27 Although the witness statement has not yet been received into evidence, it has been filed in the Commission and served on another party, being the applicant.

28 Steytler J dealt with whether there can be implied waiver of privilege only at trial and not before, in *Hoad v Nationwide News Pty Ltd and others* [(1998) 19 WAR 468]. His Honour examined the authorities and found that there can be implied waiver in circumstances where the documents in question have not yet been used in court (p 475). He did so, relying on *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 (per Gibbs CJ at 482-483 and Dawson J at 498). In that case, the High Court examined the judgment of Hobhouse J in *General Accident Fire & Life Assurance Company Ltd v Tanter (*[1984] 1 WLR 100) which was said to have limited the implied waiver to the trial. However, Gibbs CJ, in particular, in *Maurice* found that Hobhouse J was examining the situation of fairness in respect of the conduct of the trial only and had not determined the issue of whether it limited waiver to the trial only.

29 Therefore, I find that even though the paragraphs in Ms Cruse's statement which are said to waive privilege have not yet been received into evidence, they nonetheless can be relied upon to amount to a waiver of privilege and in fact do so waive.

30 As to the issues of fairness, it seems that the purpose of the disclosure within the witness statement was to provide some support to the respondents' case that the applicant was not dismissed by the respondents but that the respondents were in the process of undertaking consultation with employees, in particular with the applicant, in accordance with the requirements of the General Order, that the intention was to restructure the staffing complement, and that the timing of the consultation with Mr Petherick is significant in the sequence of events.

31 Mr Petherick says that the consultation, referred to in those paragraphs, which occurred on the 13 November 2012 'was an initial $50 consultation'. He says that inspection of the file reveals a client instruction sheet was completed by Ms Cruse and there are some handwritten notes on the back of the instruction sheet taken by counsel. These notes relate to the nature of the advice only. There is no letter of advice following the initial consultation on 13 November 2012.

32 I note that the summons is for Mr Petherick to appear before the Commission to 'produce all books, papers, or other documents in [his] possession or under [his] control in any way relating to the proceedings…' That part of the summons which might otherwise require Mr Petherick to appear and give evidence has been struck through. Therefore, I conclude that the applicant does not seek to examine Mr Petherick on the matters the subject of the waiver including the documents sought to be produced.

**Conclusion**

33 Ms Cruse's witness statement has at least partially waived legal professional privilege by referring not only to the fact of having sought and obtained legal advice, but also disclosing, albeit in general terms, the nature of the advice. The fact of the consultation, its timing, its subject matter and the advice in that consultation are important matters in the circumstances of this case. There is no other reference to matters of legal professional privilege which appear to have been waived by the statement. I find that requiring the respondents to produce any documents after 13 November 2012 is not justified by the waiver.

34 Therefore, I find that it is fair to require Mr Petherick to answer the summons by producing to the Registrar the instruction sheet completed by Ms Cruse and the handwritten notes on the back of the instruction sheet taken by counsel at the consultation on 13 November 2012, and will issue a direction accordingly.

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**2013 WAIRC 00427**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | OLIVIA PERKINS |
| | **APPLICANT** |
| | **-v-** |
| | MRS KATHLEEN CRUSE AND MR BARRY CRUSE |
| | **RESPONDENTS** |
| **CORAM** | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | TUESDAY, 16 JULY 2013 |
| **FILE NO.** | U 245 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00427 |

| | |
|---|---|
| **Result** | Direction issued |
| **Representation** | |
| **Applicant** | Mr N Marouchak of counsel |
| **Respondent** | Mr T Petherick of counsel |

*Direction*

HAVING heard from Mr N Marouchak of counsel for the applicant and Mr T Petherick of counsel for the respondents, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs:

1. THAT Mr T Petherick produce to the Registrar of the Western Australia Industrial Relations Commission the client instruction sheet completed by Ms Kathleen Cruse and containing on the back, hand written notes made by Mr Petherick in respect of Ms Cruse's consultation with Mr Petherick on 13 November 2012.

2. THAT such document to be produced by 4.30 pm on Tuesday 23 July 2013.

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

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# INDUSTRIAL AGREEMENTS—Notation of—

| Agreement Name/Number | Date of Registration | Parties | | Commissioner | Result |
|---|---|---|---|---|---|
| Shire of Harvey Leschenault Leisure Centre Enterprise Agreement 2013 AG 8/2013 | 16/07/2013 | Western Australian Municipal, Administrative, Clerical and Services Union of Employees | Shire of Harvey | Commissioner J L Harrison | Agreement registered |

# PUBLIC SERVICE APPEAL BOARD—

**2013 WAIRC 00426**

**APPEAL AGAINST THE DECISION TO TERMINATE THE EMPLOYMENT ON 17 DECEMBER 2012**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | GARRY MILNE CAMPBELL |
| | **APPELLANT** |
| | **-v-** |
| | DEPARTMENT OF CORRECTIVE SERVICES |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD |
| | ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN |
| | MS R OWEN - BOARD MEMBER |
| | MS B CONWAY - BOARD MEMBER |
| **DATE** | TUESDAY, 16 JULY 2013 |
| **FILE NO** | PSAB 2 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00426 |

| | |
|---|---|
| **Result** | Appeal dismissed |
| **Representation** | |
| **Appellant** | Ms J Kiely of counsel |
| **Respondent** | Ms N Sager and Ms T Borwick |

*Order*

WHEREAS this is an appeal to the Public Service Appeal Board (the Board) pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS a Directions hearing was convened on the 15th day of March 2013; and

WHEREAS the parties entered into discussions prior to the appeal being listed for hearing; and

WHEREAS on the 12th day of June 2013 the appellant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

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**2013 WAIRC 00246**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 JANUARY 2013**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | RONALD CROSS |
| | **APPLICANT** |
| | **-v-** |
| | COMMISSIONER FOR CORRECTIONS, |
| | DEPARTMENT OF CORRECTIVE SERVICES |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD |
| | COMMISSIONER S J KENNER - CHAIRMAN |
| | MR G RICHARDS - BOARD MEMBER |
| | MR M HAMMOND - BOARD MEMBER |
| **DATE** | FRIDAY, 19 APRIL 2013 |
| **FILE NO.** | PSAB 4 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00246 |

| | |
|---|---|
| **Result** | Direction issued |
| **Representation** | |
| **Applicant** | Mr M Shipman |
| **Respondent** | Ms K Jack and with her Mr D Akerman |

*Direction*

HAVING heard Mr M Shipman on behalf of the applicant and Ms K Jack and with her Mr D Akerman on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the appellant file and serve upon the respondent any witness statements upon which he intends to rely no later than 14 days before the date of hearing.

(2) THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely no later than seven days before the date of hearing.

(3) THAT the parties file and serve on one another a written outline of submissions no later than three days prior to the date of hearing.

(4) THAT the appeal be listed for hearing for two days on dates to be fixed.

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

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

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**2013 WAIRC 00365**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 JANUARY 2013**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | RONALD CROSS |
| | **APPELLANT** |
| | **-v-** |
| | COMMISSIONER FOR CORRECTIONS, DEPARTMENT OF CORRECTIVE SERVICES |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD |
| | COMMISSIONER S J KENNER - CHAIRMAN |
| | MR G RICHARDS - BOARD MEMBER |
| | MR M HAMMOND - BOARD MEMBER |
| **DATE** | MONDAY, 17 JUNE 2013 |
| **FILE NO** | PSAB 4 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00365 |

| | |
|---|---|
| **Result** | Direction issued |
| **Representation** | |
| **Appellant** | In person |
| **Respondent** | Ms T Borwick |

*Direction*

The Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

THAT the direction of Friday 19 April 2013 be and is hereby revoked.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

**2013 WAIRC 00422**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 JANUARY 2013**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | RONALD CROSS |
| | **APPELLANT** |
| | **-v-** |
| | COMMISSIONER FOR CORRECTIONS, DEPARTMENT OF CORRECTIVE SERVICES |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD |
| | COMMISSIONER S J KENNER - CHAIRMAN |
| | MR G RICHARDS - BOARD MEMBER |
| | MR M HAMMOND - BOARD MEMBER |
| **DATE** | THURSDAY, 11 JULY 2013 |
| **FILE NO** | PSAB 4 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00422 |

| | |
|---|---|
| **Result** | Appeal discontinued |
| **Representation** | |
| **Appellant** | In person |
| **Respondent** | Ms T Borwick |

*Order*

WHEREAS the appellant sought and was granted leave to discontinue the appeal, 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 discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

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**2013 WAIRC 00281**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 16 JANUARY 2013**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | ANTHONY LAWRENCE |
| | **APPELLANT** |
| | **-v-** |
| | COMMISSIONER FOR CORRECTIONS, DEPARTMENT OF CORRECTIVE SERVICES |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD |
| | COMMISSIONER S J KENNER - CHAIRMAN |
| | MS B CONWAY - BOARD MEMBER |
| | MS C THOMPSON - BOARD MEMBER |
| **DATE** | TUESDAY, 14 MAY 2013 |
| **FILE NO.** | PSAB 5 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00281 |

| | |
|---|---|
| **Result** | Directions issued |
| **Representation** | |
| **Applicant** | Ms L Kennewell |
| **Respondent** | Ms N Sagar and Mr D Hughes |

*Direction*

HAVING heard Ms L Kennewell on behalf of the applicant and Ms N Sagar 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 directs –

(1) THAT the appellant file and serve upon the respondent any witness statements upon which he intends to rely no later than 21 days before the date of hearing.

(2) THAT the respondent file and serve upon the appellant any witness statements upon which it intends to rely no later than seven days before the date of hearing.

(3) THAT the parties file and serve on one another any agreed statement of facts no later than three days prior to the date of hearing.

(4) THAT the appeal be listed for hearing for two days on dates to be fixed.

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

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

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**2013 WAIRC 00429**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 16 JANUARY 2013**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | ANTHONY LAWRENCE |
| | **APPELLANT** |
| | **-v-** |
| | COMMISSIONER FOR CORRECTIONS, DEPARTMENT OF CORRECTIVE SERVICES |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD |
| | COMMISSIONER S J KENNER - CHAIRMAN |
| | MRS CHRISTINE THOMPSON - BOARD MEMBER |
| | MS BETHANY CONWAY - BOARD MEMBER |
| **DATE** | TUESDAY, 16 JULY 2013 |
| **FILE NO** | PSAB 5 OF 2013 |
| **CITATION NO.** | 2013 WAIRC 00429 |

| | |
|---|---|
| **Result** | Application discontinued |
| **Representation** | |
| **Appellant** | Ms L Kennewell |
| **Respondent** | Mr N Cinquina |

*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,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

**2013 WAIRC 00703**

**APPEAL AGAINST DISMISSAL**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | JESSIE WHITE |
| | **APPELLANT** |
| | **-v-** |
| | KIM SNOWBALL |
| | DIRECTOR GENERAL |
| | DEPARTMENT OF HEALTH |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD |
| | ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN |
| | MR S SEEDS - BOARD MEMBER |
| | MR B DODDS - BOARD MEMBER |
| **DATE** | THURSDAY, 8 AUGUST 2013 |
| **FILE NO** | PSAB 13 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00703 |

**Result** Appeal dismissed

*Order*

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS on the 16th day of July 2013 the appellant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

# RECLASSIFICATION APPEALS—

**2013 WAIRC 00704**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | MS BERYL CAWLEY |
| | **APPLICANT** |
| | **-v-** |
| | DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE ARBITRATOR |
| | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | THURSDAY, 8 AUGUST 2013 |
| **FILE NO** | PSA 7 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00704 |

**Result** Application dismissed

*Order*

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 25th day of February 2013 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider her position; and

WHEREAS on the 26th day of June 2013 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

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

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**2013 WAIRC 00705**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | MS CHERYL EVANS |
| | **APPLICANT** |
| | **-v-** |
| | DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE ARBITRATOR |
| | ACTING SENIOR COMMISSIONER P E SCOTT |
| **DATE** | THURSDAY, 8 AUGUST 2013 |
| **FILE NO** | PSA 6 OF 2012 |
| **CITATION NO.** | 2013 WAIRC 00705 |

**Result** Application dismissed

*Order*

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 25th day of February 2013 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider her position; and

WHEREAS on the 26th day of June 2013 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

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

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# 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 33/2013 | Dispute re bonus payments | Harrison C | N/A | Concluded |

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# NOTICES—Union Matters—

**2013 WAIRC 00733**

NOTICE

**FBM No. 4 of 2013**

NOTICE is given of an application by the Health Services Union of Western Australia (Union of Workers) to the Full Bench of the Western Australian Industrial Relations Commission for alterations to its rule 3 – Constitution.

The proposed alterations seek to insert into the rules, new subrules 3.(1)(k) and 3.(1)(l). The proposed alterations are highlighted in **bold and underlined** text below:

**3 – CONSTITUTION**

(1) The Union shall consist of workers engaged in Professional, Administrative, Technical, Supervisory or Clerical capacities including workers employed in any classification of work which at the 1st day of July, 1982, was covered by an Award or a deemed consent Award to which the union was a party, employed by:-

(a) Any private hospital.

(aa) Any public hospital and including all salaried employees (being professional, administrative, clerical, technical and supervisory employees) (including those listed in Schedule A to these Rules) employed by the boards of any public hospital constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services and also including all salaried employees (being professional, administrative, clerical, technical and supervisory employees) (including those listed in Schedule A to these Rules) employed by the Metropolitan Health Service Board in the Graylands Selby-Lemnos and Special Care health Services.

Provided that those persons who are employed in any hospital or institution established under the Mental Health Act 1962 (as amended)shall not be eligible for membership of the Union and provided further that the following persons shall not be eligible for membership of the Union: all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Metropolitan Health Service Board or by any other Western Australian State Government person, enterprise or corporation in the Perth Dental Hospital and Community Dental Services or any other entity howsoever described or named which provides any of the services provided by Perth Dental Hospital or by the Dental Services Branch of the Health Department of Western Australia as at 30 April 1998 (referred to collectively as the "Dental Hospital") other than employees who as at 6 May 1998 were financial members of the HSOA until such time as they resign, retire or are permanently transferred or redeployed from the Dental Hospital or cease to be a member of the HSOA.

(ab) Any aged care facility, nursing home, and/or health care facility for the aged, chronically ill and or disabled including but not limited to any high care, low care, day care, respite care and/or rehabilitation and/or restorative service for the aged, chronically ill and/or disabled, and any residential and/or community care service or hostel in or about or in connection with and/or ancillary to the provision of such services including employees engaged as Physiotherapy, Occupational Therapy and/or Diversional Therapy Assistants and/or Activity Assistants but not including any other employee of such services who at the 30th of April 2004 was eligible for membership of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch, any employee of a local government authority in the provision of ancillary and community care services or any employee employed under Part 3 — Public Service, of the Public Sector Management Act, 1994, any employee of the Disability Services Commission of Western Australia, any employee of a public authority employed in residential facilities associated with state schools and/or juvenile hostels administered by the Department of Community Development.

(b) The Hospital Laundry and Linen Service.

Provided that any classification of work covered by an Award or Agreement to which the Metropolitan Laundry Employees' Industrial Union of Workers or the Western Australian Clothing and Allied Trades' Industrial Union of Workers is a party as at the 24th of October, 1975, shall be excluded and any worker performing the duties of such classification of work shall not be eligible for membership of the Union.

(c) The Western Australian School of Nursing or any service ancillary to the practice of medicine including institutions or facilities solely or substantially engaged in providing Medical Laboratory services, Radiological services, Physiotherapy services, Occupational Therapy services, Speech Therapy services or Social Work services.

Provided that any person who is employed as an officer or temporary employee under and within the meaning of the Public Service Act, 1904, or who is determined by the Western Australian Industrial Commission to be a "government officer" shall not be eligible for membership of the Union.

Provided further that any person employed in Doctors' surgeries or any wholesale or retail distributing or manufacturing organisation shall not be eligible for membership of the Union.

Provided also that any person who is employed by the St. John Ambulance Association for the purpose of operating first aid and/or ambulance services shall not be eligible for membership of the Union.

Provided further also that all salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed by the Board of the Western Australian Centre for Pathology and Medical Research and/or any other Western Australian State Government controlled person, enterprise or corporation who is presently or henceforth the employer of employees in the said Western Australian Centre for Pathology and Medical Research shall not be eligible for membership of the Union.

(d) The Western Australian Division of the Red Cross Society in facilities or services other than those referred to in paragraphs (a) and (c) of subrule (1) of this Rule.

Provided that any person who is employed as a Clerk shall not be eligible for membership of the Union under this paragraph.

(e) The Spastic Welfare Association of Western Australia (Incorporated) in facilities or services other than those referred to in paragraphs (a) and (c) of subrule (1) of this Rule.

Provided that any person employed as a Tradesman and who is performing the usual duties of his trade shall not be eligible for membership of the Union.

(f) The Silver Chain Nursing Association (Inc.) in facilities or services other than those referred to in paragraphs (a) and (c) of subrule (1) of this Rule.

(g) The Slow Learning Children's Group of Western Australia (Inc.) in facilities or services other than those referred to in paragraphs (a) and (c) of subrule (1) of this Rule.

(h) Dentists, provided that membership of the Union shall be limited to Dental Therapists.

(i) Paraplegic-Quadriplegic Association of Western Australia (Inc.), Good Samaritan Industries or F.C.B. Industries in facilities or services other than those referred to in paragraphs (a) and (c) of subrule (1) of this Rule.

For the purposes of this paragraph only, the word "Supervisory" appearing in the preamble to subrule (1) shall include categories of work which oversee and/or supervise the execution or performance of tasks by or the actions and activities of persons who are not employees under Western Australian industrial law.

(j) Any non-Government employer engaged primarily in health services, provided that membership of the Union shall be limited to Audiologists, Chiropodists, Clinical Psychologists, Dietitians, Occupational Therapists, Nucleographers, Physiotherapists, Psychologists, Social Workers, Speech Therapists and Welfare Officers, howsoever designated.

**(k) Notwithstanding any preceding provision of this rule, employers in or in connection with the industry of compounding, dispensing, preparation, manufacture, distribution and sale of drugs, medicines, chemicals and medicinal substances and without limiting the forgoing, also including persons who are:**

**(i) registered Pharmacists employed as Managers or Managing Assistants of a Friendly Society, a retail pharmacy, the dispensary of a Medical Practitioner or Hospital or Public Institution;**

**(ii) assistants who are Registered Pharmacists;**

**(iii) students who are undergoing training prescribed by the Australian Pharmacy Council, engaged or usually engaged in Western Australia as prescribed by law in retail pharmacies and dispensaries connected with Friendly Societies or Hospitals or Public Institutions or conducted as part of the practice of duly qualified Medical Practitioners in the compounding dispensing preparation manufacture distribution and sale of all those drugs medicines chemicals and medical substances which are included in the British Pharmacopoeia, the British Pharmaceutical Codex, the Australian Pharmaceutical Formulary and the formularies issued on behalf of any Public Hospital or similar institution or are used for the alleviation treatment of cure of diseases of the human body."**

**(l) Subject to subrule (aa) of this rule, Dentist's, employers in the industry of Dental Mechanics including dental prosthetics and/or dental laboratories associated therewith, and the term "Dental Mechanics" shall be construed to cover the following:-**

**(i) Dental Technicians, meaning and including dental mechanics skilled in the mechanics of prosthetic dentistry;**

**(ii) Dental Trainee Technicians;**

**(iii) Dental Attendants and Assistants:**

**(iv) Dental Receptionists; and**

**(v) all persons in the industry not registered as dentists.**

Provided further that an employee who is solely or substantially engaged in providing his services to other employees of his employer and who is eligible for membership as at the 30th April, 1985, of another registered State organisation within the meaning of the Industrial Relations Act, 1979, shall not be eligible for membership of the Union under this paragraph.

Provided also that persons employed by the University of Western Australia or by the Western Australian Institute of Technology or by Murdoch University shall not be eligible for membership of the Union.

Any person who is eligible for membership in accordance with the registered rules of the Royal Australian Nursing Federation (Western Australian Branch) Industrial Union of Workers as at the 1st of August, 1966, shall not be eligible for membership of the Union.

(2) (a) A member who has given long and distinguished service to the Union may be awarded Life Membership by the Committee of Management which shall determine, from time to time, the benefits to be granted to Life Members.

(b) Upon retirement from employment, a Life Member shall become an Honorary Life Member.

(c) Honorary Life Members shall retain all the rights and benefits of Union membership except in the following:-

(i) the right to nominate for election to any office in the Union;

(ii) the right to nominate, second or endorse any candidate for election to any office in the Union;

(iii) the right to vote in any election for an office in the Union.

(3) Where a member's employment terminates and that member is in receipt of financial assistance from the Union involving worker's compensation, dismissal or other employment related matter, the member may retain financial membership of the Union.

(4) Subject to sub-rule (3) hereof, no person shall be eligible for membership of the Union who is not an employee within the meaning of the Industrial Relations Act, 1979.

The matter has been listed before the Full Bench at 2:15 pm on Wednesday, the 2nd day of October 2013. A court location for the matter to be heard will be determined at a later date. Contact the Registry on Level 16 for court location details (08 9420 4444). A copy of the Rules of the organisation and the proposed rule alterations may be inspected at Level 16, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005*.

S. HUTCHINSON
DEPUTY REGISTRAR 22 July 2013