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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2016 WAIRC 00767

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR COMMERCE
	APPELLANT
	-and-
	MINISTER FOR HEALTH and AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS, PERTH
	RESPONDENTS
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	ACTING SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 22 SEPTEMBER 2016
FILE NO	FBA 13 OF 2014
CITATION NO	2016 WAIRC 00767

Result Appeal discontinued

Order

HAVING heard Mr R Bathurst (of counsel) on behalf of the appellant and on behalf of the respondent, Minister for Health, and Ms B E Burke (of counsel) on behalf of the respondent, Australian Nursing Federation, Industrial Union of Workers, Perth, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and reg 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders that —

The appeal be and is hereby discontinued by leave.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2016 WAIRC 00652

INTERPRETATION OF CLAUSE 23 OF THE ROMAN CATHOLIC ARCHBISHOP OF PERTH TEACHERS ENTERPRISE BARGAINING AGREEMENT 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES (IEUWA)
	APPLICANT
	-v-
	ROMAN CATHOLIC ARCHBISHOP OF PERTH
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 11 JULY 2016
FILE NO.	APPL 14 OF 2016
CITATION NO.	2016 WAIRC 00652

Result Directions issued

Directions

HAVING heard Mr D Stojanoski (of counsel) on behalf of the applicant and Mr I Curlewis (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the parties file a statement of agreed facts by 13 July 2016.
2. THAT the respondent file and serve any witness statements upon which it intends to rely by 19 July 2016.
3. THAT the applicant file and serve an outline of submissions by 26 July 2016.
4. THAT the respondent file and serve an outline of submissions by 2 August 2016.

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

2016 WAIRC 00747

INTERPRETATION OF CLAUSE 23 OF THE ROMAN CATHOLIC ARCHBISHOP OF PERTH TEACHERS ENTERPRISE BARGAINING AGREEMENT 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00747
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	THURSDAY, 4 AUGUST 2016
DELIVERED	**:**	FRIDAY, 9 SEPTEMBER 2016
FILE NO.	**:**	APPL 14 OF 2016
BETWEEN	**:**	INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES (IEUWA) Applicant AND ROMAN CATHOLIC ARCHBISHOP OF PERTH Respondent

CatchWords	**:**	Industrial Law (WA) - Interpretation of industrial agreement - Principles of construction considered - Alteration of hours of work - Meaning of 'major changes'
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 46
Result	**:**	Declaration issued
Representation:		
Applicant	**:**	Mr S Millman (of counsel)
Respondent	**:**	Mr I Curlewis (of counsel)

Case(s) referred to in reasons:

Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99

Amcor Ltd v Construction, Forestry, Mining and Energy Union [2005] HCA 10; (2005) 222 CLR 241

City of Wanneroo v Holmes (1989) 30 IR 362

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337

Director General, Department of Education v United Voice WA [2013] WASCA 287; (2014) 94 WAIG 1

Health Services Union of Western Australia (Union of Workers) v The Director General of Health [2012] WAIRC 01117; (2013) 93 WAIG 1

Kucks v CSR Ltd (1996) 66 IR 182

Lane v Arrowcrest Group Pty Ltd (t/as Roh Alloy Wheels) (1990) 27 FCR 427

McCourt v Cranston [2012] WASCA 60

Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451

Re Harrison; Ex parte Hames [2015] WASC 247

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2015] WAIRC 00797; (2015) 95 WAIG 1503

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165

Reasons for Decision

1 This is an application made under s 46 of the *Industrial Relations Act 1979* (WA) (**Act**) to declare the true interpretation of the 'Roman Catholic Archbishop of Perth Teachers Enterprise Bargaining Agreement 2012 (Agreement No. AG 33 of 2012)' (**EBA**).

2 The applicant (**Union**) seeks an interpretation of clause 23 and clause 24 of the EBA.

3 Clause 23 of the EBA states:

23. – CHANGE

(1) Employer's duty to notify

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

(b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the employer'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 the restructuring of jobs. Provided that where this Agreement makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

(2) Employer's duty to discuss change

(a) The employer shall discuss with the employees affected and the IEUwa, inter alia, the introduction of the changes referred to in 1 (b) of this clause, 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 the union, in relation to the changes.

(b) The discussions shall commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in 1 (a) of this clause.

(c) For the purposes of such discussion, the employer shall provide in writing 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 any employer shall not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

4 Clause 24 of the EBA states:

24. – CONDITIONS OF EMPLOYMENT

(a) The parties acknowledge that all policies of the Catholic Education Commission of Western Australia are binding. However, the Teachers Workloads policy shall only be changed with the agreement of both parties.

(b) The parties acknowledge that the following Conditions of Employment of Teachers in Catholic Schools in WA is an official statement of the Catholic Education Commission of Western Australia and as such applies to all teachers employed in a Catholic school in Western Australia.

5 The Teachers Workloads Policy (**Policy)** relevantly states:

2. Scheduled Class Time

2.1 Primary

…The maximum teaching week will remain 27.5 hours per week of scheduled class time, inclusive of morning tea but exclusive of lunch.

6 The EBA deals with hours of work. The Policy deals with hours of instruction.

7 The Union says that the respondent (**Archbishop**) has unilaterally changed the Policy and increased hours of work, triggering clause 23 of the EBA.

8 The Archbishop says he has not made a definite decision to introduce any major change and there are no significant effects on employees. Clause 23 does not apply and he has not changed the Policy.

Questions to be answered

9 Leave was granted for the Union to amend the questions to which it sought answers and on 10 June 2016 the Union filed an amended schedule to its application.

10 At the hearing, the Union asked the Commission to consider different questions. The Archbishop opposed that application and leave was not granted to amend the questions at the hearing.

11 The Union chose to continue with its application. Accordingly, it seeks answers to the following questions:

1. Whether an alteration of work hours is a 'significant effect' that requires the parties to consult under clause 23 of the EBA? (**Question 1**)
2. What is the effect of clause 24 of the EBA and the Policy on any alteration of work hours pursuant to clause 23 of the EBA? (**Question 2**)

Relief sought

12 The Union seeks:

a) a declaration as to the true interpretation of clause 23 of the EBA and the Policy 'as imported via' clause 24 of the EBA; and

b) an order varying clause 23 of the EBA and the Policy 'as imported via' clause 24 of the EBA 'for the purpose of remedying any defect therein or giving fuller effect thereto.'

Evidence

13 The parties each filed one witness statement and written submissions. At the hearing, the Union called Melissa Janet Cook and the Archbishop called Carmen Jones to give evidence.

14 Ms Cook gave evidence that the Good Shepherd Catholic Primary School and at least another 38 schools changed their school hours, resulting in an increase in hours of work, without consulting the Union and inconsistent with the Policy.

15 Ms Jones gave evidence that the Policy has not been changed. There has been an increase of 10 minutes per day to hours of instruction but there has been no change to the time teachers are required to be at school for the school day. In effect, teaching hours have changed but hours of work have not. Ms Jones conceded that under the Policy the principal could require teachers to start work 15 minutes before the start of classes, rather than 10 minutes as is the current arrangement. That would have the effect of increasing hours of work by 5 minutes per day. Ms Jones gave evidence that the Good Shepherd Catholic Primary School does not consider that it has introduced any 'major changes'.

The Union's submissions

16 At the hearing, the Union clarified that its references to 'consultation' in its application and submissions are references to the notification and discussion requirements under the EBA.

Clause 23 of the EBA

17 In its outline of submissions, the Union submits on a plain and ordinary meaning of the text of the clause:

a) any alteration to the hours of work is a 'significant effect'; and

b) the employer has a duty to notify the employees and the Union.

18 At the hearing, the Union submitted that any alteration of hours of work is a 'significant effect' and is thereby a 'major change'.

19 The Union's written submissions focus on 'significant effects' and do not deal with 'major changes'.

20 In response to my question at the hearing about the meaning of 'major changes', the Union said that on the plain and ordinary wording of clause 23 of the EBA, one cannot have 'major change' unless it has 'significant effects'. Anything that has 'significant effects' must be a 'major change'. The use of the verbs 'are' and 'to be' in 'are likely to' is a condition precedent to 'major change'. The 'significant effect' is the crux that clause 23(1)(a) of the EBA is built around. It gives meaning to the whole of clause 23 of the EBA.

21 Further, the Union submits that if 'major changes' could include something other than a 'significant effect', then clause 23(2)(a) of the EBA would have no work to do because of its reference to clause 23(1)(b) of the EBA.

22 The Union says that the specific overrides the general. While it did not expand on this, I understand its submission to be that 'significant effects' are specific, 'major changes' are general and therefore anything that is a 'significant effect' must be a 'major change'.

23 The Union also submits that 'major change' is only required for notification (clause 23(1) of the EBA) and not discussion (clause 23(2) of the EBA).

24 It submits that the Commission must consider the following three matters when deciding whether an alteration of work hours is a 'significant effect' that requires the parties to consult under clause 23 of the EBA:

a) Is an alteration of hours of work a 'significant effect'? The Union says yes.

b) Does the alteration need to be significant to be of 'significant effect'? The Union says no.

c) Does that require the parties to consult or discuss the change?

25 When asked what it says about 'major changes', the Union says the 'major change' here is the alteration of work hours.

26 The Union submits that the Commission cannot conclude that in order for an alteration to be a 'significant effect', it must be a significant alteration in the hours of work, because that would be contrary to the express words used.

27 The Union says that the answer to Question 1 is: where an alteration of work hours is contemplated by the employer, that requires the employer to consult with the affected employees and the Union.

Clause 24 of the EBA

28 At the hearing, the Union submitted, and the Archbishop agreed, that the Policy is not incorporated into the EBA.

29 The Union submits that the clear and unambiguous meaning of clause 24 of the EBA is that the Policy can only be changed with the agreement of both parties.

30 To answer Question 2, the Union says the Commission needs to appreciate where the Policy sits within the EBA and what is the proper meaning of clause 24(a) of the EBA.

31 The Union says that the Commission must ask whether the Policy can be changed other than with the agreement of the parties. The Union says it cannot. The Commission must then ask whether hours of work can be changed if the Policy has not changed. The Union says they cannot, because the only way to change the hours is to change the Policy or to breach the Policy.

32 The Union says that if there is a change in the hours of work for the purposes of the Policy, then either:

a) the Archbishop has unilaterally changed the Policy; or

b) the Archbishop is in breach of the Policy.

33 The Union submits that the Commission should conclude that the Archbishop has by its conduct unilaterally changed the Policy, rather than breached the Policy. It says a change in hours must necessarily mean a change in Policy.

34 The Union submits although the Policy is not incorporated into the EBA, it is referenced in the EBA. It is clear from clause 24 of the EBA that a unilateral change to the Policy is a breach of the EBA.

35 The Union says that the Commission should declare that a true interpretation of clause 24(a) of the EBA and answer to Question 2 is: the Policy 'can only be changed by agreement between the parties.'

The Archbishop's submissions

36 The Archbishop says that clause 23 and clause 24 of the EBA are unambiguous. They speak for themselves and there is no need for the Commission to consider extrinsic evidence.

Jurisdiction

37 In its outline of submissions, the Archbishop submits that there is no dispute between the parties about the interpretation of clause 23 of the EBA. The Archbishop submits that even if there is a dispute about interpretation (which he does not concede), the application is misconceived because the Union should instead pursue the arbitration of the industrial dispute that exists between the parties.

Clause 23 of the EBA

38 The Archbishop says that the Union relies fundamentally on its contention that hours of work are by definition a 'significant effect'. It says that contention is simplistic and derives its logic from reading clause 23(1)(b) of the EBA in isolation.

39 The Archbishop submits that for clause 23 of the EBA to apply:

c) there must be an introduction of 'major changes'; and

d) the 'major changes' must be likely to have 'significant effects' on employees.

40 He says there has been no 'major change' or any material effect on employees.

41 Further, the Archbishop says that a common sense approach must be taken. An alteration of hours of work is unlikely to be a 'significant effect' if the alteration is minor and does not in a practical sense impact in any material way on employees. If such a common sense approach is not taken, a minor change in work hours, for example an increase of 5 minutes, would be a 'significant effect'.

42 The Archbishop says that the unambiguous meaning of the EBA is 'that changes in work hours must constitute **significant** increases or decreases – not just a minor change' (original emphasis) in order to amount to a 'significant effect'

43 Accordingly, the answer to Question 1 is: 'no' because an alteration of work hours cannot be read in isolation from the rest of the clause.

Clause 24 of the EBA

44 The Archbishop submits that the Union is estopped from making this application because of its conduct in:

e) agreeing to the same wording in the 2014/2015 EBA of clause 23 and clause 24;

f) maintaining the Policy outside the EBA; and

g) agreeing to participate in the 2015 review of the Policy.

45 At the hearing, the Archbishop submitted that the Commission has no jurisdiction to deal with Question 2 because the Policy is not before the Commission. I understand that submission to refer to the Policy not being incorporated into the EBA.

46 The Archbishop submits that he has not changed the Policy. He says if he has done anything wrong, he has breached the policy and that does not fit under clause 24. The Commission lacks the jurisdiction to opine about Question 2 because the Policy is not incorporated into the EBA. The parties agree that the Policy is not incorporated into the EBA. They also agree that the Commission is not the appropriate forum to bring a breach of EBA claim.

47 He says the meaning of clause 24(a) is clear: a unilateral change in the Policy is a breach of the EBA.

48 If the Commission finds that it has jurisdiction to deal with clause 24 of the EBA, then the Archbishop says the answer to Question 2 is: 'no effect' because the EBA and the Policy are separate documents. They operate in tandem but not in synergy.

49 The Archbishop agrees that under clause 24 of the EBA the Policy can only be changed with the agreement of both the parties. He submits that is the clear wording of the clause and both witnesses gave evidence to that effect.

The law

50 The principles of construction of industrial agreements are set out by Smith AP and Scott ASC, with whom Harrison C agreed, in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2015] WAIRC 00797; (2015) 95 WAIG 1503 [37] - [40]:

> 37 In ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2014) 94 WAIG 1 Pullin J, with whom Le Miere J agreed, briefly set out some of the principles that apply to the interpretation of industrial agreements. These are the principles that apply to interpretation of contracts. At [18] - [19] Pullin J stated:
>
> > The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 [40]; ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22].
> >
> > Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337, 352; ***McCourt v Cranston*** [2012] WASCA 60 [23].
>
> 38 Justice Buss in ***Director General, Department of Education v United Voice WA*** considered other principles that also apply to the construction of industrial instruments. He observed at [81] - [83]:
>
> > The construction of an industrial agreement involves ascertaining what a reasonable person would have understood the parties to the agreement to mean. The language of the agreement should be understood in the light of its industrial context and purpose. See ***Amcor Ltd v Construction, Forestry, Mining and Energy Union*** [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ & McHugh J).
> >
> > In ***Kucks v CSR Ltd*** (1996) 66 IR 182, Madgwick J observed:
> >
> > > It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention *in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon*. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. *And meanings which avoid inconvenience or injustice may reasonably be strained for*. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand (184). (emphasis added)
> >
> > See also ***City of Wanneroo v Holmes*** (1989) 30 IR 362, 378 - 379 (French J); ***Amcor*** [96] (Kirby J), [129] - [130] (Callinan J).
> >
> > The words of a clause in a written agreement are to be given the most appropriate meaning which they can legitimately bear. A court must have regard to all of the provisions of the agreement with a view to achieving harmony among them. See ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** [1973] HCA 36; (1973) 129 CLR 99, 109 - 110 (Gibbs J). These propositions are applicable to instruments generally, subject to any particular rules of construction which have been developed in relation to a particular kind of provision or instrument.
>
> 39 These principles were applied by Smith AP and Beech CC (with whom Harrison C agreed) in ***Health Services Union of Western Australia (Union of Workers) v The Director General of Health*** [2012] WAIRC 01117; (2013) 93 WAIG 1 [36] - [42] and more recently by Beech J in ***Re Harrison; Ex parte Hames*** [2015] WASC 247 [50] - [52]. As Beech J pointed out in ***Re Harrison*** the starting point of construction is the text and the need to avoid a narrow or pedantic approach does not detract from the fact that construction is a text-based activity [53].
>
> 40 It is also an important principle of construction that when considering the whole of an instrument, not only may the meaning in one part be revealed in another but the words of every clause must if possible be construed so as to render them all harmonious one with another: ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** (1973) 129 CLR 99, 109 (Gibbs J).

Consideration

51 The Union did not address the Archbishop's submission that the Union is estopped from applying to the Commission for an interpretation under s 46 of the Act.

52 In my view, the Union is entitled to seek a declaration as to the true interpretation of the EBA in circumstances where the parties disagree about the meaning of its clauses.

53 I agree with the parties that the Commission does not have jurisdiction to enforce a breach of an industrial agreement.

54 The Union and the Archbishop submit that there is no need for the Commission to look at extrinsic evidence in declaring a true interpretation of the EBA. I agree.

55 In my view, neither party's interpretation of the clauses is entirely correct.

Clause 23 of the EBA

56 The Archbishop says that a change in hours of work must be a significant increase or decrease in order to amount to a 'significant effect' for the purpose of clause 23 of the EBA. I disagree.

57 I agree with the Union's submission that it is clear from the wording of clause 23 of the EBA that *any* alteration of hours of work is a 'significant effect'.

58 Whether an alteration of work hours requires the parties to 'consult', as the Union puts it, under clause 23 of the EBA depends on whether the employer has made a definite decision to introduce 'major changes' in program, organisation, curriculum, structure or technology that are likely to have 'significant effects' on employees.

59 The Union says that a 'major change' is one that has 'significant effects' and anything that has 'significant effects' must be a 'major change'. I disagree. The two might, but will not always, be one and the same.

60 'Major' is a comparative term. Whether a change is major is a question for evidence. It is not for the Commission to say whether a decision to introduce a 'major change' was made. If anything, that would be a matter for the Industrial Magistrate in an application for enforcement of the EBA.

61 However, in interpreting clause 23 of the EBA and answering the Union's questions, it is necessary to consider the meaning of 'major change'.

62 The parties did not refer the Commission to any decisions in which the meaning of 'major change' was considered.

63 Von Doussa J's reasoning in ***Lane v Arrowcrest Group Pty Ltd (t/as Roh Alloy Wheels)*** (1990) 27 FCR 427 is relevant.

64 In that case, his Honour considered clause 45 of the Vehicle Industry Award 1982, which is very similar to clause 23 of the EBA.

65 Clause 45 of that award provides:

> 45 – INTRODUCTION OF CHANGE
>
> *Employer's duty to notify*
>
> (a) (i) Where an employer 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 employer shall notify the employees who may be affected by the proposed changes and their union.
>
> (ii) 'Significant effects' include termination of employment, major changes in the composition, operation or size of the employers 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 the 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.
>
> *Employer's duty to discuss change*
>
> (b) (i) The employer shall discuss with the employees affected and their union, inter alia, the introduction or the changes referred to in subclause 45(a) 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 their union in relation to the changes.
>
> (ii) The discussions shall commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in subclause 45(a) hereof.
>
> (iii) For the purposes of such discussion, the employer shall provide in writing to the employees concerned and their 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 matter likely to affect employees provided that any employer shall not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests

66 Von Doussa J notes that to enliven the procedures laid down in clause 45 of the award, there must first be a definite decision by the employer to introduce 'major changes' and secondly, the likelihood that 'significant effects' as defined will result: ***Lane*** (434).

67 His Honour states:

> It is evident from the clauses that the notion of 'major changes' is directed to the impact which alteration to a presently existing situation will have on management and administration whereas the notion of 'significant effects' is directed to the impact which the alterations are likely to have on the employees and their employment
>
> …
>
> The language of [clause 45 of the award] assumes that there may be changes in production, etc, that are likely to have 'significant effects' on employees which do not amount to 'major changes'. It is only in the case of 'major changes' that the procedures laid down in those clauses come into play. It follows that the clauses recognise that there may be circumstances where (to use the language of the definition of 'significant effects' in cl 45) 'major changes in the composition…of the employer's workforce' and even 'elimination…of…job tenure' will not constitute 'major changes in production, program, organisation, structure or technology'. In context, the word 'major' in cl 45(a)(1)…is a comparative term used to describe the magnitude of the changes which are likely to have one or more of the effects constituting 'significant effects'. It is necessary to determine the presently existing situation which is to be used as the comparator when determining whether the magnitude of the changes are sufficient to characterise them as 'major' (434).

68 His Honour goes on to say that whether a change is a 'major change' is to be judged having regard to all the circumstances of the particular case: ***Lane*** (434). This requires consideration of such diverse factors as the history of the employer's business operations, the nature and number of different aspects of the employer's operations, and the degree of assimilation between them having regard to management administration and workplace structures: ***Lane*** (435). Relevantly, Von Doussa J says:

> …evidence would be required to establish the presently existing position regarding the production, program, organisation, structure or technology which will be affected by the contemplated change, as it is against this situation which the comparative effects of the change must be assessed (435).

69 I agree with Von Doussa J's reasoning.

70 I am not persuaded by the Union's argument that 'major changes', being general, must be constrained by reference to 'significant effects', being specific. I agree with Von Doussa J that the notion of 'major changes' relates to the impact on management and administration, while 'significant effects' relates to the impact on employees.

71 In addition to words being given their plain and ordinary meaning, all words should be given meaning and effect. The word 'major' has been included in clause 23(1)(a) of the EBA to describe the change introduced by the employer. On a plain reading of the clause, not every change introduced by an employer will enliven the obligations contained in the clause 23 of the EBA.

72 I do not accept the Union's submission that anything that has a 'significant effect' must be a 'major change'.

73 In clause 23(1)(a), where the Union points to the verb 'to be' as a condition precedent to major change, I note that the clause uses the verb 'to have' rather than 'to be'. It is clear that the 'significant effects' are likely to be *had* on employees, rather than that the 'significant effects' *are* the major change. If there is a condition precedent, it is that there must be a definite decision by the employer to introduce 'major changes'.

74 I disagree with the Union's submission that if 'major changes' could include something other than a 'significant effect', then clause 23(2)(a) of the EBA would have no work to do because of its reference to clause 23(1)(b) and not clause 23(1)(a) of the EBA. Clause 23(2)(a) of the EBA requires the employer to discuss the changes, which are defined as significant effects, with employees and the Union.

75 If anything, clause 23(2)(b) of the EBA makes it clear that 'major changes' and significant effect changes are not necessarily one and the same. The employer must discuss the significant effect changes as early as practicable after it has made a definite decision to introduce 'major changes'.

76 There may be changes which have a 'significant effect' on employees which do not amount to 'major change' for the purpose of clause 23 of the EBA. It is a question for evidence.

77 I disagree with the Union's submission that 'major change' is only required for notification under clause 23(1) of the EBA and not for discussion under clause 23(2) of the EBA. In my view, the employer's obligations under clause 23(1) of the EBA (to notify) *and* clause 23(2) of the EBA (to discuss) are only enlivened once it has made a definite decision to introduce 'major changes' that are likely to have 'significant effects' on employees.

78 Coming to the Union's question then, it is clear that an alteration of hours of work is a significant effect. Whether an alteration of hours of work triggers the notification and discussion requirements in clause 23 of the EBA depends on whether the requirements of the clause are met, namely:

a) there must be a definite decision by the employer to introduce major changes; and

b) the alteration of hours of work is a likely effect of the major changes.

<u>Clause 24 of the EBA and the Policy</u>

79 I agree with the parties that the clear and unambiguous meaning of clause 24 of the EBA is that the Policy can only be changed with the agreement of the parties. The EBA requires the parties to agree to a change to the Policy in order for the Policy to be changed.

80 Under clause 24 of the EBA, a unilateral change to the Policy would, prima facie, amount to a breach of the EBA.

81 Neither party gave evidence nor submitted that the Policy had been changed by agreement. The Archbishop's evidence and submissions were that he had not changed the Policy. The Union's evidence and submissions were that it had not agreed to a change to the Policy.

82 Whether or not the Archbishop has changed the Policy is a question for evidence. However, I do not agree with the Union's submission that an alteration of hours of work means that the Archbishop must have changed the Policy. Hours of work may be altered in breach of a policy that remains unchanged.

83 It is not necessary that I make a finding here in relation to whether the Archbishop changed the Policy. If I am wrong about that, I note that I am not persuaded on the evidence that the Archbishop changed the Policy.

84 Question 2 is awkwardly worded. In essence, because the alteration of hours of work is pursuant to clause 23 of the EBA, it asks: what is the effect of clause 24 of the EBA and the Policy on an alteration of hours of work that is the likely result of a definite decision to introduce major change?

85 There may be no effect. For example, if the alteration of hours of work did not increase hours of instruction beyond 27.5 hours per week (which is the maximum hours of instruction under the Policy), then the alteration of hours of work would not be inconsistent with the Policy and the answer would be 'no effect'.

86 The effect may be that the employer would be in breach of the Policy, for example, if the alteration of hours of work increases the hours of instruction beyond 27.5 hours per week.

87 To the extent that an alteration of hours of work is the likely result of the employer's decision to introduce major changes, and the alteration of hours of work is the result of the employer unilaterally changing the Policy, the effect would be that the employer would not have complied with clause 24 of the EBA.

88 The parties agree that the Policy is not incorporated into the EBA. It follows that the Commission would not be able to vary the Policy as contemplated by the relief sought by the Union.

Conclusion

Question 1 – Whether an alteration of work hours is a 'significant effect' that requires the parties to consult under clause 23 of the EBA?

89 The answer to Question 1 is: Any alteration of hours of work is a significant effect for the purpose of clause 23 of the EBA. Whether an alteration of hours of work obliges the employer to notify and discuss the changes with the Union and employees depends on whether the employer has made a definite decision to introduce major changes. If the employer has made a definite decision to introduce major changes and an alteration of hours of work is likely to be an effect of the major changes, then the employer is obliged to notify the Union and employees in accordance with clause 23(1) of the EBA and discuss with the Union and employees in accordance with clause 23(2) of the EBA.

Question 2 – What is the effect of clause 24 of the EBA and the Policy on any alteration of work hours pursuant to clause 23 of the EBA?

90 The answer to Question 2 is: No effect, except to the extent that an alteration of hours of work is the likely result of the employer's decision to introduce major changes, and the alteration of hours of work:

a) increases the hours of instruction beyond the maximum hours of instruction under the Policy, then the effect would be that the employer would not have complied with the Policy; or

b) is the result of the employer unilaterally changing the Policy, then the effect would be that the employer would not have complied with clause 24 of the EBA.

91 There is no need for an order varying clause 23 or clause 24 of the EBA.

92 A declaration will issue accordingly.

2016 WAIRC 00763

INTERPRETATION OF CLAUSE 23 OF THE ROMAN CATHOLIC ARCHBISHOP OF PERTH TEACHERS ENTERPRISE BARGAINING AGREEMENT 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES (IEUWA)
	APPLICANT
	-v-
	ROMAN CATHOLIC ARCHBISHOP OF PERTH
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 21 SEPTEMBER 2016
FILE NO.	APPL 14 OF 2016
CITATION NO.	2016 WAIRC 00763

Result	Declaration issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr I Curlewis (of counsel)

Declaration

HAVING heard Mr S Millman (of counsel) on behalf of the applicant and Mr I Curlewis (of counsel) on behalf of the respondent;

AND HAVING given reasons for decision, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby declares for the purposes of the Roman Catholic Archbishop of Perth Teachers Enterprise Bargaining Agreement 2012 (**EBA**) –

1. THAT any alteration of hours of work is a significant effect for the purposes of clause 23 of the EBA.

2. THAT whether an alteration of hours of work obliges the employer to notify and discuss changes with the union and employees depends on whether the employer has made a definite decision to introduce major changes.

3. THAT if the employer has made a definite decision to introduce major changes and an alteration of hours of work is likely to be an effect of the major changes, then the employer is obliged to notify the union and employees in accordance with clause 23(1) of the EBA and discuss with the union and employees in accordance with clause 23(2) of the EBA.

4. THAT clause 24 of the EBA and the Teachers Workload Policy (**Policy**) have no effect on any alteration of work hours pursuant to clause 23 of the EBA, except to the extent that an alteration of work hours is the likely result of the employer's decision to introduce major changes and the alteration of hours of work:

   (a) increases the hours of instruction beyond the maximum hours of instruction under the Policy, then the effect would be that the employer would not have complied with the Policy; or

   (b) is the result of the employer unilaterally changing the Policy, then the effect would be that the employer would not have complied with clause 24 of the EBA.

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

INDUSTRIAL MAGISTRATE—Claims before—

2016 WAIRC 00786

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2016 WAIRC 00786
CORAM	**:**	INDUSTRIAL MAGISTRATE M PONTIFEX
HEARD	**:**	WEDNESDAY, 21 SEPTEMBER 2016
DELIVERED	**:**	WEDNESDAY, 21 SEPTEMBER 2016
FILE NO.	**:**	M 11 OF 2016
BETWEEN	**:**	MARC LONGLEY JONES
		CLAIMANT
		AND
		CLOUGH PROJECTS PTY. LTD.
		RESPONDENT

CatchWords	**:**	Adjournments
Legislation	**:**	*Fair Work Act 2009* *Industrial Magistrates Courts (General Jurisdiction) Regulations* 2005
Case(s) referred to in reasons	**:**	***Myers v Myers*** [1969] WAR 19 ***Minister for Immigration and Multicultural Affairs v Bhardwaj*** [2002] HCA 11 ***Compass Group (Australia) Pty Ltd v National Union of Workers*** [2015] FWCFB 8040 ***Fashion Flair Pty Ltd v Department of Industrial Relations*** (1999) 92 IR 271 ***Re: Application for Redundancy Award*** (1994) 53 IR 419
Cases also cited	**:**	***Transport Workers' Union (NSW) v Veolia Environmental Service (Australia) Pty Ltd*** [2013] NSWIRComm 22
Result	**:**	Application granted
Representation:		
Claimant	**:**	Mr M. Jones appeared on his own behalf.
Respondent	**:**	Mr M. Borlase (industrial officer) for the respondent

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by her Honour)

1 I have had the chance to read the claimant's submissions, heard further from the claimant, and heard the respondent's submissions. I will deal with the matter today and give extemporary reasons for my decision in this application. The parties will be provided with those reasons in writing in due course.

2 In this matter, the court is dealing with an application by the respondent for the trial listed on 5 October 2016 to be vacated and relisted to a further date. This application is opposed by the claimant. At all times in this application the onus is on the respondent, on the balance of probabilities, to persuade the court to make the order that it seeks.

3 Before commencing my determination of this particular application, it is important to set out the background to the matter.

4 The claim before the court is a claim for a redundancy payment pursuant to s119(1) of the *Fair Work Act 2009* (FW Act). Mr Marc Longley Jones (Mr Jones) filed his claim on 28 January 2016 and the claim is for the sum of $19,728. The claim is defended on the basis set out in the response filed on 1 March 2016, which is that the respondent states that its obligations to provide redundancy payments pursuant to s119 of the FW Act do not extend to circumstances where an employee's employment is terminated due to the ordinary and customary turnover of labour. The respondent states that this is what occurred with Mr Jones' employment.

5 Section 119 of the FW Act relevantly states:

> *(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:*
>
> *(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour.*

6 The effect of s119 of the FW Act is that it creates an entitlement to redundancy payment in certain situations, but that entitlement does not result in payment if the employment was terminated because of the ordinary and customary turnover of labour. Clearly that is the essential element in dispute in this claim.

7 The application by the respondent to vacate the trial was made on the basis as set out in Mr Michael Borlase's (Mr Borlase) affidavit sworn 2 September 2016 and attached to the application of the same date. Essentially, the ground is that Ms Nada Jevtic (Ms Jevtic), a recruiter for the respondent responsible for the recruitment of Mr Jones has crucial evidence relating to this issue, which is the significant issue in dispute in the matter. That recruiter ceased being employed by the respondent in 2011, was located, but was unable to attend the trial date. Ms Jevtic is a willing witness and will attend to give evidence at trial, but has prearranged travel arrangements from Australia which prevent her attending at the trial on 5 October 2016.

8 Mr Borlase has made submissions, which I will return to later, as to why Mr Jevtic's evidence is crucial and Mr Jones has provided written submissions in response.

9 It is important that I note the actual test that I will be applying in determining this application and that is essentially that:

> *Where the refusal to adjourn would result in serious injustice to one party an adjournment should be granted unless, in turn, this would mean serious injustice to the other party:* ***Myers v Myers*** [1969] WAR 19

It is fundamental to the administration of justice that persons are given the full opportunity to present their case. The refusal of an adjournment may amount to a denial of procedural fairness if it is likely to deny a party a reasonable opportunity to present his or her case: see ***Minister for Immigration and Multicultural Affairs v Bhardwaj*** [2002] HCA 11; (2002) 209 CLR 594 [40] and the various cases which rely on that case.

10 In particular I would also note reg 5 of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (Regulations) which clearly sets out the court's duties in dealing with cases. These duties bind this Court and direct my inquiries within that framework. It states that:

> *(1) A Court is to ensure that cases are dealt with justly.*
>
> *(2) Ensuring that cases are dealt with justly includes ensuring –*
>
> *(a) that cases are dealt with efficiently, economically and expeditiously.*
>
> *(b) so far as is practicable, that the parties are on an equal footing; and…*
>
> *(c) that a Court's judicial and administrative resources are used as efficiently as possible.*

11 This imports not only the position of the parties, but also the desired outcome that the Court's resources are not wasted as well.

12 I would note that whilst the timing of the respondent's application to adjourn this case is not ideal, neither could it be described, in my view, as particularly dilatory. The notice of trial was given on 9 June 2016. I understand from the affidavit that the witness contact was on 31 August 2016, which was well within the time allowed to file the witness statement due on 14 September 2016, all going well. The witness' arrangements are of course, beyond the control of the respondent and this application was made on 2 September 2016, immediately or as soon as practical after that issue became known to the respondent.

13 Mr Borlase has submitted that the respondent will suffer substantial injustice if Ms Jevtic's evidence is not able to be presented to the court. Her evidence goes not only to the particular circumstances of Mr Jones' employment or recruitment, but as to the business practices of the respondent and as to the consistency of how the position was described to other applicants and employees. This is an important issue, a very important issue, and I think it is appropriate that I set out what the court will be doing when it looks at Mr Jones' claim.

14 As I have said, the court will be deciding whether or not Mr Jones' claim for redundancy falls within the exclusion in s 119(1)(a) of the FW Act. It is clear from the case law that it is necessary in each case to look at the factual circumstances in which the redundancy occurred and the cause of the termination of employment to determine whether or not it was due to the ordinary and customary turnover of labour. That particular phrase has been given a significant amount of judicial attention and does not turn solely on a consideration of the terms of the written contract of employment, if there is one.

15 In ***Compass Group (Australia) Pty Ltd v National Union of Workers*** [2015] FWCFB 8040, which Mr Borlase has referred to, the Commission noted:

> ***[24]*** *The importance of the questions to be asked at the time it is determined that the employment has come to an end is not to be underestimated, with the product of such inquiry demanding that each case will depend on its own circumstances.*
>
> ***[25]*** *We have considered a number of single member decisions regarding the exception. In our view these decisions do not suggest that the approach outlined above is incorrect.*
>
> ***[26]*** *We also note the reasoning of the Industrial Court of NSW in the matter of* ***Transport Workers' Union (NSW) v Veolia Environmental Service (Australia) Pty Ltd****, which gave practical application to the circumstantial inquiry we have referred to. In that matter, being a civil penalty action under the Fair Work Act 2009 Haylen J:*
>
> - *Followed earlier reasoning of the NSW Court and Commission that establishing whether a termination did not take place in the ordinary and customary turnover of labour is a question of fact, which requires regard to be had to 'the normal features of the business wherein the employee worked', as well as whether it was customary to dismiss employees regardless of their service history upon the loss of contracts;*
> - *Considered that other decided cases on the question of 'ordinary and customary turnover of labour' have examined whether there is a known or understood lack of continuity of work; and*
> - *Distinguished the circumstances of the employee who was the subject of the case from the proposition put forward by his former employer that, with the end of its contract, his employment would end as well. Instead, the employee had performed work at other contract sites as well as the one for which the contract had been lost; and it was not customary for employees to be dismissed upon the loss of a contract. He was not a seasonal or casual employee and his rate of pay was not loaded for those factors, or the intermittency of his employment. In all, he had 'a settled expectation of continuing employment and that expectation increased with the length of his employment and his engagement on other contract work held by the respondent'.*
>
> ***[27]*** *In order to determine whether the exception applies in a given case it is necessary to consider the normal features of the business and then determine whether the relevant terminations are properly described as falling within the ordinary and customary turnover of labour in that business. This is a question of fact, to be determined on the basis of the circumstances of each termination and each business. It necessarily focuses on the business circumstances of the employer.*

16 There is also further guidance in ***Fashion Flair Pty Ltd v Department of Industrial Relations*** (1999) 92 IR 271, which is to the effect that:

> *The concept of the 'ordinary and customary turnover of labour' has been considered in subsequent cases. It has frequently been observed that whether an entitlement to redundancy or severance pay accrues upon termination depends upon whether there was a 'settled' expectation of continued employment or whether the employees were aware that their employment was for a specified period or task [280].*

17 Other cases are ***Re: Application for Redundancy Award*** (1994) 53 IR 419 and ***Australian Workers' Union v Leyton Contractors***, an unreported decision. In ***Re: Application for Redundancy Award***, the Commissioner stated:

> *Taking a balanced view of the case as a whole, it is appropriate that this aspect of terminations, traditional as it is, be distinguished from redundancies arising from economic recession and financial stress, technological change and company reconstruction or restructuring. Terminations in the context of the general turnover of labour are the norm; they are expected: there is no basis for thinking that some 'settled expectation' has been lost. The occurrence of the likely or expected event should not bring with it an unnecessary and unwarranted additional burden on the employer and a windfall gain for the employee (444).*

18 It is clear from those matters that when the court considers Mr Jones' case, it will consider his contract of employment and any subsequent extensions of that, but it will also consider the matters raised in the ***Compass*** decision and whether or not there was a settled expectation of continued employment. I accept that, as outlined to me today in Mr Borlase's submissions, that Ms Jevtic's evidence will be relevant and I am told, crucial to the employer's presentation of its defence on that issue. In saying that, I am in no way suggesting or pre-judging the likely outcome of the matter. It is a matter to consider before the matter comes to trial when considering the question of injustice to the parties.

19 Mr Jones' written submissions have pointed out that he has, to date, suffered a nine month delay in receiving a redundancy payment, even before any proposed reschedule to the trial date. Quite clearly I accept that he will suffer the prejudice of a delay in obtaining his redundancy payment, should he ultimately be successful.

20 He also points out the parole evidence rule in relation to the construction of his written contract of employment. However, I hope I have made quite clear that the court's inquiry goes well beyond the written terms of that actual employment contract, although that is a particular matter of importance in the consideration of the case.

21 Mr Jones questions the accuracy of recollection of Ms Jevtic. That will be something which will be tested and can only be properly tested if she appears in person before this court. Mr Jones has pointed out that he feels the respondent has been disingenuous and tardy in locating Ms Jevtic and I have already commented on that.

22 I accept that Mr Jones will suffer the injustice of a delay to his case and that is against a background where one of the things this court is required to do is deal with the case efficiently and expeditiously. Those requirements of course do not have any greater weight that the need to ensure that court cases are dealt with justly.

23 Having weighed the injustices to both parties, it is clearly inevitable that whichever way the matter is decided, one of the parties will, by definition, suffer an injustice. In this case, I am persuaded by the respondent that it will suffer a significant injustice as it will not have the opportunity to present its defence by way of the crucial evidence of Ms Jevtic which will go to the matters that I have described. I do accept that her evidence will impact on the Industrial Magistrates Court's inquiries as to whether the redundancy payments are precluded under s119(1)(a) of the FW Act, if it is found that the termination was due to the ordinary and customary turnover of labour.

24 Mr Jones will suffer injustice from the delay. He is clearly seeking a significant entitlement monetarily from the termination of his employment. Whilst I accept that is an injustice, in my view it is not as significant as that which will be suffered by the respondent. To some extent, whilst it may be cold comfort to Mr Jones at this point, the provisions of the FW Act and the regulations of the Industrial Magistrates Court provide for interest to be payable on any sum awarded, which may go some way to amelioration of the hardship suffered.

25 For those reasons, I do grant the application of the respondent to vacate the hearing, which is due to be held on 5 October 2016.

M. PONTIFEX

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2016 WAIRC 00826

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMILY FRIEND
	APPLICANT
	-v-
	CHRIS CLEARY
	ADDISON AND STEELE SPECIALTY COFFEE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 14 OCTOBER 2016
FILE NO/S	B 105 OF 2016
CITATION NO.	2016 WAIRC 00826

Result	Application dismissed
Representation	
Applicant	Ms E Friend on her own behalf
Respondent	Mr C Cleary on his own behalf

Order

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

WHEREAS on Monday, 15 August 2016, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conference, the parties reached agreement in principle to settle the dispute, which included that the applicant would file a *Form 14 – Notice of withdrawal or discontinuance*; and

WHEREAS by letter dated Monday, 15 August 2016, the Commission confirmed the terms of the parties' agreement; and

WHEREAS on Wednesday, 12 October 2016, the Commission received a *Form 14 – Notice of withdrawal or discontinuance* from the applicant.

NOW THEREFORE, 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.) P E SCOTT,
[L.S.] Chief Commissioner.

2016 WAIRC 00771

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00771
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 19 SEPTEMBER 2016
DELIVERED	**:**	FRIDAY, 23 SEPTEMBER 2016
FILE NO.	**:**	B 103 OF 2016, B 104 OF 2016
BETWEEN	**:**	ROBERT KINNEEN
		Applicant
		AND
		PHILIP GEORGE JONATH;
		WHELANS
		Respondents

CatchWords	**:**	Claim B 103 of 2016 – Contractual benefits claim – Claim based on Professional Training Agreement between claimant and respondent – No contract of employment – Claim dismissed
		Claim B 104 of 2016 – Contractual benefits claim – Preliminary matter – Relationship between contract of employment and Professional Training Agreement – Matter to proceed to full hearing
Legislation	**:**	*Licensed Surveyors Act 1909*
		Licensed Surveyors (Licensing and Registration) Regulations 1990
Result	**:**	Claim B 103 of 2016 dismissed
		Claim B 104 of 2016 matter to proceed to full hearing
Representation:		
Claimant	**:**	In person
Respondent	**:**	In person (B103 of 2016)
Respondent	**:**	Mr E Dolfi, as agent (B 104 of 2016)

Reasons for Decision

1 On or about 21 March 2007 the claimant was offered, and accepted, employment with the respondent to matter B 104 of 2016, Whelans, as a "Survey Party Leader."

2 During the course of that employment the claimant entered into a Professional Training Agreement (which was attached to the Notice of Claim) with the respondent to matter B 103 of 2016, Mr Philip Jonath. Mr Jonath was an employee of Whelans.

3 The Professional Training Agreement was an agreement under regulation 4 *Licensed Surveyors (Licensing and Registration) Regulations 1990.*

4 Under the *Licensed Surveyors (Licensing and Registration) Regulations 1990* a "supervising surveyor" provides professional training to a person who desires to obtain a "certificate of competency" under the *Licensed Surveyors (Licensing and Registration) Regulations 1990*.

5 A "certificate of competency" entitles the holder to hold himself out as a licensed surveyor under the *Licensed Surveyors Act 1909*.

6 Mr Jonath left the employment of Whelans in early 2011, before the claimant had sat the examinations provided for in regulation 10 *Licensed Surveyors (Licensing and Registration) Regulations 1990* which an applicant for a certificate of competency must pass.

7 The claimant sat the examinations in around March 2011 and failed. Soon after he resigned from his employment with Whelans.

8 On 29 June 2016 the claimant lodged claims with the Western Australian Industrial Relations Commission against Whelans and Mr Jonath alleging that both had failed to allow him a benefit to which he was entitled under his contract of employment.

9 Without prejudice to the articulation of his claim in his Notices filed on 29 June 2016 the claimant informed me at the hearing on 19 September 2016 that his claim was that it was a term of his contract of employment that he would "be provided with training to become a licensed surveyor." The claimant alleges that Whelans and Mr Jonath failed to provide him with that training.

10 By its Notice of Answer filed 14 July 2016 the respondent Whelans said that the Professional Training Agreement was legally separate from the claimant's contract of employment. Whelans said that the Professional Training Agreement was a "personal agreement" between the claimant and Mr Jonath.

11 The respondent Whelans says that even if the claimant was "denied" the benefit of the successful completion of the training Mr Jonath promised to provide under the Professional Training Agreement that neither the provision of that training nor its quality was a matter arising under its contract of employment with the claimant.

12 By his Notice of Answer filed 15 July 2016 the respondent Mr Jonath said that there had never been a contract of employment between him and the claimant.

13 A conciliation conference was held on 18 August 2016 but the matters were not resolved.

14 In light of the contents of the Notices of Answer filed by the two respondents I decided that it might be worthwhile to explore the issues of the relationship between the Professional Training Agreement and the claimant's employment contract, if any, and Mr Jonath's claim that he never employed the claimant, at a preliminary hearing.

15 The point of the hearing was to give the parties the opportunity to address me, by way of evidence and submissions, on whether the claimant's claim against the respondent Whelans was truly one of denial of a benefit under the contract of employment and whether a claim could be brought against the respondent Mr Jonath.

16 In relation to the respondent Mr Jonath the claimant agreed at the preliminary hearing that Mr Joanth had never been his employer. Accordingly, I held that claim would be dismissed. Claim B 103 of 2016 is dismissed because the Western Australian Industrial Relations Commission has no jurisdiction in relation to it, there never having been an employment relationship between the claimant and Mr Jonath.

17 In relation to the claim against the respondent Whelans the claimant gave evidence and also called as a witness Mr Gregory John Ireland, a senior manager of Whelans, who was in attendance at the hearing.

18 Relevantly the claimant gave evidence that he was employed as a "Survey Party Leader" following an interview with Mr Brian Hill, Managing Director, Whelans and Mr Gary Sullivan. The claimant gave evidence that he had discussed the training he needed to become a licensed surveyor at the interview. The claimant thought that a written contract of employment had been entered into but he did not have a copy nor had his attempts to obtain a copy from the respondent Whelans as part of discovery been successful. Whelans had told him that if there was such as a document they no longer had it (a position repeated by the representative for Whelans at the hearing).

19 The claimant was able to provide a letter to him dated 21 March 2007 from Mr Hill which relevantly provided as follows:

> As discussed it would be our intention to have you inducted and comfortable with our work processes as quickly as possible with the aim to have you performing a Survey Party Leaders role as soon as you able [sic]. To this end training and a mentoring contact will be made available and a formal review of your progress will be made after the 3 months probationary period.
>
> Assuming this review is favourable it would be reasonable to expect that your salary package could be increased and an Articled Position offer made so that you can ultimately become a Licensed Surveyor.

20 Essentially the claimant gave evidence that it was a term of his contract of employment that Whelans would facilitate him becoming a licensed surveyor including finding him a person to enter into a Professional Training Agreement with him and to ensure that person did what was required by way of providing and organising training to get him up to the required level. The claimant is saying, further, that if the person who Whelans had enter the Professional Training Agreement left before the training was complete, the term remained operative requiring Whelans to facilitate a new Professional Training Agreement or complete the claimant's training in some other way.

21 The respondent Whelans did not usefully contribute to the preliminary hearing. It called no evidence, asked no questions of witnesses and made no submissions. It was, of course, not obliged to do so.

22 I am left in the position however that I could not possibly decide, on the material before me, whether or not it was a term of the claimant's contract of employment that the respondent Whelans would provide him with whatever training was required to become a licensed surveyor. I would not, at this time, find that there was no such term of the contract. If there had been a written contract of employment introduced into evidence or if oral evidence had been given by someone from the respondent Whelans about the terms of the claimant's engagement I may have been assisted but these things did not occur.

23 I will need to consider and decide at a full hearing:

(1) the material terms of the claimant's contract of employment; and

(2) if there was a term such as that alleged by the claimant, whether it was breached.

24 Claim B 103 of 2016 will be dismissed. My associate will be in contact with the parties in relation to programming of the hearing of B 104 of 2016.

2016 WAIRC 00770

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT KINNEEN
	CLAIMANT
	-v-
	PHILIP GEORGE JONATH
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 23 SEPTEMBER 2016
FILE NO/S	B 103 OF 2016
CITATION NO.	2016 WAIRC 00770

Result	Claim dismissed
Representation	
Applicant	In person
Respondent	In person

Order

HAVING heard the applicant on his own behalf and the respondent on his own behalf, on 19 September 2016; and

HAVING given Reasons of Decision in which I determined to dismiss the claim for want of jurisdiction;

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

The claim be dismissed.

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

2016 WAIRC 00773

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRAVIS MYLES
	APPLICANT
	-v-
	HARVESTAIRE PTY, LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 27 SEPTEMBER 2016
FILE NO/S	U 101 OF 2016
CITATION NO.	2016 WAIRC 00773

Result	Application dismissed

Order

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

WHEREAS on Friday, 12 August 2016 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the conference adjourned on the basis that the applicant would seek advice regarding whether the Commission has jurisdiction to deal with this claim; and

WHEREAS on Thursday, 18 August 2016, the respondent emailed a *Form 14 – Notice of withdrawal or discontinuance* to the Commission said to be filed on the applicant's behalf; and

WHEREAS on Wednesday, 14 September 2016, the Commission wrote to the applicant advising that the *Form 14 – Notice of withdrawal or discontinuance* had been filed, and unless the applicant contacted the Commission within seven days, an order dismissing the application would issue; and

WHEREAS the applicant has not contacted the Commission.

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.] Chief Commissioner.

2016 WAIRC 00781

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00781
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	FRIDAY, 17 JUNE 2016
DELIVERED	**:**	WEDNESDAY, 28 SEPTEMBER 2016
FILE NO.	**:**	B 53 OF 2016
BETWEEN	**:**	BHUPINDER NARWAL Claimant AND MADILINK AUSTRALIA PTY. LTD Respondent

CatchWords	**:**	Industrial law (WA) - Contractual benefits claim - Claim for notice within trial period - Principles applied - Claim allowed
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Claim allowed; payment ordered
Representation:		
Applicant	**:**	In person
Respondent	**:**	M F Niaz

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings taken from the transcript as edited by the Commission)

1 Mr Bhupinder Narwal seeks payment of one month of pay in lieu of being given notice when his employment with the respondent came to an end. Mr Narwal says that Mr Niaz, on behalf of the respondent company, promised to pay him once months' notice if he were terminated as part of his contract of employment, both verbally in a meeting that took place between Christmas and New Year 2015 and also by incorporating that term into a written contract of employment between the parties.

2 Mr Niaz for the respondent denies that the issue of notice was discussed with Mr Narwal. In relation to the written contract of employment (Exhibit 1 in these proceedings) Mr Niaz points out that the document is not signed by him, nor anyone on behalf of the respondent company, and he says that he never verbally agreed that that document was the contract of employment between Mr Narwal and the respondent. Exhibit 1 provides that each party is to give the other four weeks' notice. The document has been signed by Mr Narwal, but not by the respondent or anyone on behalf of the respondent. There was controversy in these proceedings about the document and how it came to be produced.

3 I do not need to resolve that dispute for the reason that it was not signed and there is no compelling evidence that there was an oral agreement that the document was to comprise the contract of employment between Mr Narwal and the respondent. Exhibit 1 can be put to one side.

4 I do not accept that there was a detailed discussion about all of the terms and conditions of Mr Narwal's employment on a date between Christmas and New Year's 2015, as Mr Narwal said there was, in which annual leave, sick leave and notice were all discussed. My reasons for this are that this was a new business, having opened on 22 December 2015 according to the evidence of Mr Niaz. And I accept that the circumstances of Mr Narwal having contact with Mr Niaz are largely as Mr Niaz described them; that is Mr Niaz had asked a friend and fellow restauranteur to recommend employees to him. The friend had recommended Mr Narwal and Mr Niaz discussed with Mr Narwal the possibility of Mr Narwal joining him on a probationary or provisional basis to see how things worked out. I find it extremely unlikely that as part of that discussion there would have been detailed discussion about terms and conditions of employment, such as annual leave, sick leave and notice. And I find it even more unlikely, indeed highly improbable, that had there been such discussions that Mr Niaz would have agreed to give Mr Narwal one month's notice if things didn't work out. The details of that discussion as Mr Narwal gave them, in my respectful view, seemed to have occurred to Mr Narwal "on the fly" in the course of these proceedings.

5 I accept however that Mr Narwal did in fact come to be employed by Mr Niaz as a full time employee. I do not accept that he was never employed and was only ever with the respondent company on a trial basis and then as a casual employee. Even if an employee is on a trial period, or working on a probationary or provisional basis, they are still employed and Mr Narwal was employed by the respondent. Things such as Mr Niaz giving Mr Narwal the keys to the business on occasions reinforce my belief that he came to be an employee of the respondent company and that an employment relationship arose.

6 I find that Mr Narwal was initially employed on a full time basis, even though it was on a trial basis, and my reasons for that emerge from the evidence given, which reveals that Mr Niaz did need a full time employee. He said that he needed some help with the business, he needed someone to do an all rounder's job, but primarily to make the naan bread, and I accept that, but there was also other work involved in the position in terms of the cutting and preparation of food and delivery of food, and that when he talked with his friend he discussed that he was looking for a permanent employee.

7 I also find that when Mr Niaz talked with Mr Narwal, as he accepts that he did somewhere between Christmas and New Years, probably 28 December 2015, he told him he was looking for a permanent employee and I find that Mr Narwal became that permanent employee even though he did so on a trial or probationary basis.

8 I also find that Mr Narwal gave up his employment at Dome Cafe to take up the job with the respondent. Mr Niaz suggested in questioning to Mr Narwal that Mr Narwal had been sacked from his employment at Dome Cafe, but he did not produce any evidence in support of that and Mr Narwal denied that that had been the circumstance of the ending of his employment with Dome Cafe. I accept the trial period was not a success and that Mr Niaz told Mr Narwal this and that thereafter Mr Narwal worked for Mr Niaz in a different way and probably on a casual basis for a short period of time.

9 The question is whether Mr Narwal should have been given any notice, or payment in lieu of notice, when the trial period as a full time employee ended and he moved across to casual employment. As a matter of contract all employment contracts have terms implied into them and one of the terms that is implied into employment contracts is that reasonable notice be given, or payment made in lieu of that notice. It is open to me to find that implied into the contract of employment that clearly arose between Mr Narwal and the respondent was a reasonable notice period.

10 The only question in this matter is what was reasonable. This is to be determined, when it is not expressly provided, and I find it was not expressly provided here, by what is reasonable at the time the employment came to an end. In this case Mr Narwal had given up his job at Dome Cafe to work for the respondent. When the trial was brought to an end and his full time employment was also brought to an end he was offered some casual work, but not a great deal of casual work. I consider that, and mainly because Mr Narwal had given up other work to take up the job with Mr Niaz's company, even if on a trial basis, that the reasonable period of notice was one week.

11 Accordingly I find that Mr Narwal was entitled to one week's notice and as he was not given that notice, nor was any payment made in lieu of him being given that notice, I order that Mr Narwal be paid by the respondent one week of salary in lieu of notice and that is an amount of $880, it having been established in these proceedings that Mr Narwal was paid $22 an hour for the hours that he in fact did work for the respondent.

12 I will make an order that the amount of $880 be paid by the respondent to the applicant within 30 days and paperwork will be provided to you both setting that out in due course.

13 That is my decision. These proceedings are now adjourned.

2016 WAIRC 00367

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BHUPINDER NARWAL
	CLAIMANT
	-v-
	MADILINK AUSTRALIA PTY. LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 20 JUNE 2016
FILE NO/S	B 53 OF 2016
CITATION NO.	2016 WAIRC 00367

Result	Claim upheld in part; payment ordered
Representation	
Applicant	In person
Respondent	Mr F Niaz (Director)

Order

HAVING heard Mr B Narwal, on his own behalf, and Mr F Niaz, for the respondent, on 17 June 2016;

AND HAVING given reasons for decision at the hearing of 17 June 2016;

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

THAT the respondent pay to the claimant the sum of $880.00 on or before 19 July 2016.

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

2016 WAIRC 00788

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR. ASHWIN PANCHAL
	APPLICANT
	-v-
	UTOPIA C.A. PTY LTD.
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 7 OCTOBER 2016
FILE NO/S	B 5 OF 2016
CITATION NO.	2016 WAIRC 00788

Result	Application dismissed

Order

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

WHEREAS on Friday, 8 July 2016, the Commission issued an order ([2016] WAIRC 00645; (2016) 96 WAIG 689) requiring the applicant to advise the Commission, within 21 days, of the status of related matters before the Fair Work Commission and his intentions with respect to this application; and

WHEREAS the applicant advised the Commission about the matter before the Fair Work Commission, however he did not indicate his intentions regarding the matter before this Commission; and

WHEREAS on Wednesday, 28 September 2016, the Commission wrote to the applicant, noting that the applicant had not fully complied with the Order and requesting an update by Wednesday, 5 October 2016; and

WHEREAS there has been no further contact by the applicant.

NOW THEREFORE, 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.) P E SCOTT,
[L.S.] Chief Commissioner.

2016 WAIRC 00712

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANGELA RITA RODRIGUES
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 18 AUGUST 2016
FILE NO/S	U 109 OF 2016
CITATION NO.	2016 WAIRC 00712

Result	Discontinued by leave
Representation	
Applicant	Mr S Butcher of counsel
Respondent	Ms F Bajrovic

Order

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

THAT the application be and is hereby discontinued by leave.

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

2016 WAIRC 00825

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YVONNE ROGERS
	APPLICANT
	-v-
	SHARYN O'NEILL
	DIRECTOR GENERAL OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 14 OCTOBER 2016
FILE NO/S	U 96 OF 2015
CITATION NO.	2016 WAIRC 00825

Result	Application discontinued
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr D Anderson of counsel

Order

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

WHEREAS on Monday, 8 August 2016, the applicant's counsel informed the Commission that the parties had reached in principle agreement to settle the dispute, and that the applicant would file a *Form 14 – Notice of withdrawal or discontinuance* in respect of this application in due course; and

WHEREAS on Monday, 11 October 2016, the applicant's counsel filed *Form 14 – Notice of withdrawal or discontinuance*.

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

THAT the application be, and is hereby discontinued.

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

2016 WAIRC 00822

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00822
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	MONDAY, 22 AUGUST 2016 TUESDAY, 23 AUGUST 2016 WEDNESDAY, 24 AUGUST 2016 THURSDAY, 1 SEPTEMBER 2016 FRIDAY, 2 SEPTEMBER 2016
DELIVERED	**:**	THURSDAY, 13 OCTOBER 2016
FILE NO.	**:**	U 211 OF 2015
BETWEEN	**:**	JEAN STEWART Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Industrial law (WA) - Termination of employment - Unfair dismissal - Teacher - Substandard performance - Performance issues - Performance assessment process - Australian Professional Standards for Teachers - Improvement Action Plan - Denial of transfer during IAP - Role of mentor and mentee
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(i) *Public Sector Management Act 1994* (WA) Part 5, s 79(1), s 79(3) *School Education Act 1999* (WA) s 64, s 239
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr D Stojanoski of counsel
Respondent	**:**	Ms S Teoh of counsel and with her Ms J Coates

Reasons for Decision

1 Ms Stewart seeks reinstatement as a teacher. She was dismissed on the ground that her performance was substandard. She says that her performance was not substandard, and that the process leading to the decision to terminate her employment was flawed and unfair.

2 The respondent says that prior to reaching a conclusion that Ms Stewart's performance was substandard, she applied a fair and reasonable process and denies that the dismissal was either substantively or procedurally unfair.

Substandard performance

3 **Part 5 – Substandard performance and disciplinary matters** of the *Public Sector Management Act 1994* (PSM Act) applies to teachers employed by the respondent (see s 239 of the *School Education Act 1999* (SE Act)). Section 79(1) of the PSM Act defines substandard performance as:

> [T]he performance of an employee is substandard if and only if the employee does not, in the performance of the functions that he or she is required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions.

4 Subsection (2) sets out the matters to which regard is to be had in determining whether the performance of an employee is substandard. They are:

Without limiting the generality of the matters to which regard may be had for the purpose of determining whether or not the performance of an employee is substandard, regard —

(a) shall be had —

(i) to any written selection criteria or job specifications applicable to; and

(ii) to any duty statement describing; and

(iii) to any written work standards or instructions relating to the manner of performance of,

the functions the employee is required to perform; and

(b) may be had —

(i) to any written selection criteria or job specifications applicable to; and

(ii) to any duty statement describing; and

(iii) to any written work standards or instructions relating to the manner of performance of,

functions similar to those functions.

5 The duties and functions of teachers are set out in very general terms in s 64 of the SE Act, as well as clause 12 – Teachers – Duties, Responsibilities and Attendance Hours of the *Teachers (Public Sector Primary and Secondary Education) Award 1993*.

6 Teachers do not have a job description form (see evidence of Director, Workforce Policy & Coordination, Ms Porter [14]), so the Australian Professional Standards for Teachers (the Standards) are used by teacher registration authorities, employers, universities and the State School Teachers' Union of Western Australia (Porter [12]). These standards were developed by the Australian Institute for Teaching and School Leadership (AITSL) and have been endorsed by all Directors General and Ministers for Education across Australia.

7 The Standards are set out in four levels of Graduate, Proficient, Highly Accomplished and Lead. There are seven Standards with sub-standards.

8 Ms Porter gave evidence that all teachers must be registered with the Teacher Registration Board of Western Australia (TRBWA) in order to practice teaching in Western Australia. She also said:

> A teacher is required to transition to Full Registration with the TRBWA within 3 years of graduation by demonstrating that they meet the Professional Standards for Teachers in Western Australia at the Proficient Level.
>
> Witness statement of Christine Porter
>
> Exhibit R6, [18]

9 She discussed the process of an assessment of an alleged substandard teacher as taking 'place during the Improvement Action Plan (IAP) period which usually spans one school term and is intended as an additional opportunity for improvement with ongoing support' (Exhibit R6, [24]). An assessor visits the school on two separate days during the IAP period and undertakes classroom observations, interviews the teacher, the principal and other relevant personnel, and examines the teacher's planning documents.

Background

10 Ms Stewart commenced employment with the respondent as a teacher, predominantly in early childhood teaching, in 2007. This was her first job as a teacher since qualifying. She worked the whole of her employment with the respondent at Kambalda East Primary School, in the Goldfields Region of the State.

2012

11 In 2012, the school principal, Ms Delfs, came to the view that there were a number of issues related to Ms Stewart's performance that needed to be addressed. I note at this point that all teachers are required to meet with their line managers to discuss their performance, to identify areas needing attention or to enhance their performance and ways to address them, including professional development and training. This is to be distinguished from the process associated with substandard performance.

12 Ms Delfs' main concerns with Ms Stewart's performance were:

a. classroom management;

b. the provision of teaching and learning programs;

c. planning;

d. running effective classroom assessments;

e. teacher judgements relating to student work; and

f. relationships with colleagues and parents.

Witness statement of Denise Delfs

Exhibit R5, [46]

13 From April to November 2012, Ms Delfs, as Ms Stewart's line manager, met Ms Stewart on a number of occasions and raised issues regarding Ms Stewart's performance, provided her with both positive and negative feedback, and identified ways for Ms Stewart to address the concerns. The meetings and discussions are documented in correspondence between Ms Delfs and Ms Stewart.

14 Ms Delfs says that in 2012, Ms Stewart received a number of developmental and support opportunities, being:

a. literacy planning support from Mrs Carmel Stock, Literacy Specialist;

b. attended WAPPA Early Years Writing Professional Learning;

c. work shadowing at O'Connor Primary School (with a focus on classroom management);

d. on-going support from the Goldfields Behaviour Centre regarding a particular student;

e. support and advice from visiting teachers to inform Individual Education Planning for a particular student;

f. classroom management strategies foundation with Mr Matt Jackowyna;

g. professional learning in DFS working memory;

h. professional learning in Word Shark, Nessy;

i. professional learning in in KBPN Writing Moderation; and

j. whole staff professional development including 1, 2, 3 Magic behaviour management, the Standards, Australian Curriculum: English and on-entry assessment data analysis.

Witness statement of Denise Delfs

Exhibit R5, [45]

15 Ms Stewart does not challenge that these developmental and support arrangements were put in place.

16 Whilst Ms Delfs' notes and correspondence contain some comments of encouragement and recognition of efforts Ms Stewart had made, Ms Delfs says that Ms Stewart did not show much improvement in 2012 despite these support and development arrangements.

2013

17 In February 2013, Ms Delfs met with Ms Stewart and set out her view of Ms Stewart's 2012 performance management plan and that she had met some of the performance indicators negotiated. However, they were quite basic. She also set out further work Ms Stewart was to do, and support she was to receive from a variety of individuals in relation to particular issues.

18 Throughout 2013, Ms Delfs continued to meet with Ms Stewart, with her deputy, Mr Walker, and Ms Stewart's support person, Ms Crothers. These meetings were for the purpose of dealing with a range of performance issues. Issues were raised, strategies to address them identified, resources and supports were provided or referred to. Her subsequent performance was then reviewed, feedback provided, and new tasks and goals set.

19 In the meeting on 16 May 2013, Ms Stewart asked for a different line manager, saying she felt she was never going to meet Ms Delfs' expectations.

20 On 31 May 2013, Ms Delfs wrote to Ms Stewart acknowledging that Ms Stewart's 'overall planning shows an emerging understanding of the connection between planning, lesson delivery and assessment' (Exhibit R5, DD21). She noted an area of improvement. She also listed six issues that needed attention. Ms Delfs also noted that Ms Stewart was struggling to keep track of improvements suggested, and maintain them. She required Ms Stewart to take advice about planning from either herself or another named person.

21 Ms Delfs also responded to Ms Stewart's request for a different line manager to manage her performance. She said that she believed that she was best placed to remain as Ms Stewart's performance manager because of Ms Stewart's specific needs as an early childhood teacher and 'the journey we are undertaking to improve your performance' (Exhibit R5, DD21). She invited Ms Stewart to put her request in writing, stating her reasons if she was unhappy with Ms Delfs' decision. No written request was made.

22 Assessments, feedback and direction to various supports and resources continued through to the end of October 2013.

23 Ms Delfs says Ms Stewart had the following support and development opportunities in 2013:

a. Ms Rachel Kelly in Term 1 2013 – Literacy Support;

b. Ms Lois Neagle in Term 2 2013 - Literacy Coach and Specialist from O'Connor Primary School, one on one for three months of 2013;

c. Australian Curriculum professional learning in English, Science and History; and

d. ECE Network professional learning.

Witness statement of Denise Delfs

Exhibit R5, [76]

2014

24 In 2014, Ms Delfs was concerned to improve the pre-primary students' prospects, given her concerns about them in Ms Stewart's class. Ms Delfs decided that it would be best to remove Ms Stewart from being in charge of her own classroom and to place Ms Stewart in Duties Other Than Teaching (DOTT) and teacher support roles. As I understand it, this meant that Ms Stewart provided relief teaching for a number of other teachers to enable them to perform their other duties. Those teachers might remain in the classroom, doing work such as planning, while Ms Stewart took the class. In this way, Ms Stewart would also receive coaching and mentoring from Ms Manning and Ms Troode, whose classrooms she worked in.

25 So for term 1 2014, there were no formal classroom observations of Ms Stewart, nor any performance management.

26 On 30 April 2014, Ms Delfs met Ms Stewart to discuss and prepare Ms Stewart's performance management plan. Ms Delfs notes that:

> Her performance management plan provided for the following agreed support:
>
> a. access to Teacher Development School/Professional Learning Kindergarten;
> b. workshadowing at Kalgoorlie Primary School;
> c. attending Kambalda West District High School after school sessions in ICT;
> d. access to Coaching Accredited Trainer observations;
> e. professional learning in coaching conversations (Cambridge)
> f. T3 Effective Classroom Observation PL (Cambridge);
> g. release for peer observations;
> h. mentoring from Mrs Troode; and
> i. professional learning in providing feedback to students.
>
> Witness statement of Denise Delfs
>
> Exhibit R5, [82]

27 In this performance management plan, Ms Stewart acknowledged that she was only at 'Graduate' level in relation to Standard 2.6; between 'Graduate' and 'Proficient' level in relation to Standard 5.2, and between 'Graduate' and 'Proficient' level in relation to Standard 6.3, seven years after graduating as a teacher.

28 Also in this meeting, they set goals for Ms Stewart to achieve.

29 Ms Delfs also advised Ms Stewart that she, Ms Delfs, would be on leave in term 2 and she would not be able to observe Ms Stewart in the classroom during that term. She would therefore resume doing so in term 3.

30 In 2014, Ms Stewart utilised a number of development and support opportunities:

> a. afternoon sessions on School Development Planning and implementation in Literacy and Numeracy;
> b. Effective Peer Observations training;
> c. Peer coaching;
> d. History Network;
> e. IStar Lesson Design, Brightpath (Assessment Tool) Training;
> f. Framework for Understanding Poverty Day 1;
> g. ICafes @ Kambalda West DHS (using technology in the classroom);
> h. ILearn @ Kalgoorlie PS and classroom visits (use of IPads in the classroom);
> i. One World Global Education;
> j. Teacher Performance and Development (AITSL);
> k. Early Year Network (Kalgoorlie);
> l. Mentoring from Mrs Manning in literacy;
> m. Mentoring from Mr Walker in mathematics; and
> n. Modelling of parent meetings by myself, Mr Walker and Mrs Manning.
>
> Witness statement of Denise Delfs
>
> Exhibit R5, [84]

31 Ms Delfs says that late in 2014, after a particular incident and following an observation of Ms Stewart in her classroom, she lacked confidence in Ms Stewart's ability to manage classroom behaviour and in her overall performance as a teacher. She reviewed the process that had been undertaken to that point and concluded that every avenue to improving Ms Stewart's performance had been exhausted, including the provision of a number of mentors, professional learning, targeted observations and workshadowing. She formed a preliminary opinion that Ms Stewart's performance was substandard in spite of a significant amount of support and assistance being provided since 2012. She sought advice as to what she ought to do.

32 On 5 December 2014, Ms Delfs arranged to meet Ms Stewart with Mr Walker, and Ms Crothers as Ms Stewart's support person. She advised Ms Stewart that she believed Ms Stewart's performance may be substandard in the areas of Standards 4 and 7 for a Proficient teacher level, and that she intended to refer the matter to the Regional Executive Director.

2015 – The Improvement Action Plan and Investigation

33 On 14 January 2015, Mr Gillam, Executive Director, Workforce for the respondent, wrote to Ms Stewart advising her that he had received a report alleging that her performance may be substandard in regard to Standards 4 and 7; that he intended to cause an investigation, informing her of the possible penalties should there be a finding that her performance was substandard and inviting her to provide a written response to the allegations (Agreed document 3).

34 On 22 January 2015, Ms Stewart responded, amongst other things, denying that her performance was substandard, setting out aspects of her teaching practice, referring to mitigating factors and requesting a transfer. In respect of the mitigating factors and the transfer request, she wrote:

> My husband was diagnosed with prostate cancer at the beginning of the year and made redundant in 2014. As such 2014 was a personally challenging year for me.
>
> I have been very honest with my Principal about my issues at the school, with the benefit of hindsight I suspect the Principal could not take my candour and has misunderstood my intention to seek her support on occasions. Because of ongoing concern about my relationship I had requested a change of line manager but this was denied on the grounds that she felt that she was the best placed person to improve my performance.
>
> With this in mind I request a transfer to West Kambalda and a fresh start with my performance assessment in 2015. I believe this is an achievable request and can be managed as a smooth transition. The other pre-primary teacher would just have to travel five or so kms and remain in her existing home as she resides in the same geographical area.
>
> Agreed document 4, page 3

35 Mr Gillam responded on 11 February 2015, saying that he had considered Ms Stewart's response but it had failed to persuade him that he should not progress the matter. He did not specifically respond to her request for a transfer.

36 Mr Gillam proposed in his letter that if Ms Stewart responded denying the allegation of substandard performance, an investigation would be undertaken, between 23 March 2015 and 12 June 2015. Given that Ms Stewart had just returned to her teaching role from providing DOTT relief in 2014, he proposed to give her a short period to readjust to the pre-primary classroom environment. As part of this, he proposed, subject to Ms Stewart's agreement, 'prior to commencement of the investigation period, to further assist [her] with some components of [her] alleged substandard performance' by providing an external mentor.

37 Mr Gillam then set out the investigation process itself, including the appointment of an assessor, Ms Fielder, and what she would do.

38 He noted that during the period of support, investigation and observation, Ms Stewart was being provided with a further opportunity to improve her performance and demonstrate that she could attain and sustain a satisfactory level of performance as a teacher. An IAP would be developed and implemented in conjunction with Ms Delfs. The IAP would 'clearly identify those areas in which [Ms Stewart was] required to show improvement, what support and assistance [would be] provided to [her and] how improvement [would] be measured and targets … met'. Ms Stewart was informed that '[i]nformation gathered through the IAP process and any outcomes will be provided to the investigator and will form a part of the investigation' (Agreed document 5).

The IAP

39 On 16 March 2015, Ms Coates, Labour Relations Advisor with the Department, sent Ms Stewart an email providing information about the IAP period (Agreed document 6). It included advice that:

- The period of the IAP was designed to provide her with an opportunity to demonstrate her ability to 'attain and sustain the required level of performance in the stated areas of alleged substandard performance'.
- Ms Delfs would continue to support her, would meet her the next week to discuss the parts relating to the alleged substandard performance and how they relate to the Australian Professional Standards for Teachers; and would be included in the IAP.
- For each assessment day, she would be required to provide certain documents.
- What would happen during each visit of the assessor.
- Feedback from the assessor would be provided directly to Ms Delfs but not directly to Ms Stewart.
- Ms Delfs had arranged for her to have a professional mentor and support person, Ms Manning (Skehan) during the IAP period. The email said:

  > … I encourage you to meet with Ms Manning to formulate an agreed format for the support to be provided. The support can be, for example, the exchange of information and discussion about various aspects of teaching, including observing your teaching practice, or an offer for you to shadow one of her classes. It is to your benefit to utilise this mentoring arrangement beyond this first meeting and to actively engage in the arrangement.

- Concurrent with the IAP period, there would be an investigation into whether or not her performance was substandard. This would be undertaken by Ms Butler.
- The Department recognised that it was a stressful time and reminded Ms Stewart that the Department's employee assistance programme was available to provide confidential counselling, and set out the telephone number of the service provider.

40 The IAP for the period 23 March 2015 to 12 June 2015 was then established between Ms Delfs and Ms Stewart. It dealt with Standards 4 and 7. The focus areas, descriptors of satisfactory performance, strategies and support were set out.

41 A variety of supports and assistance was provided to Ms Stewart, including support from Ms Colling from the Goldfields Behaviour Centre to assist her to 'develop and action behaviour management planning for challenging students' and other outcomes, as requested on 31 March 2015 (Exhibit R8, TMC2). Ms Colling and a colleague observed Ms Stewart's classes on 22 April 2015. Her observations were that:

a. there was not much behaviour management in the classroom at all;

b. there was very limited structure in the classroom;

c. the children were doing their own thing and not following instructions – for example, some of the children were listening, some were not and the children were not performing the same tasks;

d. the children did not have any boundaries – for example, there were no rules about sitting on the mat or how you behave on the mat and it was evident that the children did not know how to sit on the mat;

e. Mrs Stewart did not attempt to transition the children from one activity to the next;

f. there was no set routine – for example, there was no routine for sitting on the mat such as sit in a circle and put your hand up when you want to speak;

and

g. there were no behaviour management strategies in place or rule structure that was implemented consistently.

Witness statement of Toni Colling

Exhibit R8, [31]

42 In her evidence, Ms Colling gave examples of some of those issues.

43 Ms Colling undertook a further observation on 1 May 2015, but says 'that Mrs Stewart's behaviour management of the class was the same as before, if not worse', and gave examples (Exhibit R8, [38]). In her evidence, Ms Colling also commented on Ms Stewart's performance in accordance with Standard 4.1, 4.2 and 4.3. She said:

> In my experience as a line manager, I have performed many observations of different teachers. In my opinion, Mrs Stewart's performance was at the lowest end of the scale.

Witness statement of Toni Colling

Exhibit R8, [46]

44 Ms Colling says that her colleague, Ms Adams, helped develop a behaviour management plan for Ms Stewart, and these strategies were modelled for Ms Stewart.

45 Also, in March 2015, Ms Gooding, a Teacher Consultant, Classroom Management Strategies with Statewide Services within the Department of Education, was appointed to provide Ms Stewart with classroom management strategies. Ms Gooding was the external mentor referred to in Mr Gillam's letter of 11 February 2015. She provided that support on four dates in March 2015.

46 In May 2015, following an incident where Ms Stewart became very upset about the classroom's Education Assistant's work and spoke loudly and rudely to Ms Delfs, Ms Delfs decided to provide Ms Stewart with additional assistance, and an additional Education Assistant was to be allocated to Ms Stewart. Ms Delfs says that due to Ms Stewart's conduct in the incident, and knowing the pressure Ms Stewart was under, she arranged for her to be relieved and sent her home. Ms Delfs did not report Ms Stewart's behaviour.

47 Ms Fielder, an AITSL accredited assessor, undertook an initial assessment of Ms Stewart's performance on 24 March 2015 and a final assessment on 9 June 2015. She reported that Ms Stewart's performance had improved slightly between the two assessments but that her performance did not meet the Proficient level against any of the seven Standards. Ms Fielder also presented a Summative Assessment report on 16 June 2015, summarising her assessment of Ms Stewart's performance in relation to Standards 4 and 7 (Agreed document 11).

48 Ms Delfs continued to manage Ms Stewart's performance by meeting with her to discuss her observations of Ms Stewart's classroom and her documentation.

The Investigation Report

49 Ms Butler, Principal Labour Relations Advisor, prepared a report to Mr Gillam dated 6 October 2015 (Exhibit R11, MB3). In this, she brought together the history of the matter and the reports available as a result of steps taken in the IAP and the assessments, and dealt with issues raised with her by Ms Stewart. She concluded that there was 'reasonable evidence for [Mr Gillam] to consider making a finding that Ms Stewart's performance is substandard against' Standards 4 and 7. Mr Gillam then received advice from the Manager Labour Relations, and formed a preliminary view that Ms Stewart's performance was substandard.

50 Following receipt of the investigation report and advice, Mr Gillam wrote to Ms Stewart a letter dated 22 October 2015. He informed her that based on consideration of all the documentation, his 'initial preliminary view' was confirmed, that Ms Stewart's performance was substandard. He also advised that he was of the view that termination of employment was the most appropriate course of action. He advised Ms Stewart that if she wished to respond to either the findings or the proposed sanction, she was to do so within 10 working days.

51 Ms Stewart's lawyers responded by letter dated 17 November 2015 asserting that there was an 'interpersonality conflict' between Ms Stewart and Ms Delfs, and challenged the procedural fairness of the process in that Ms Stewart had been assessed against all of the Standards, not just those against which she was alleged to be substandard. It also raised a concern that Ms Stewart's support person and mentor, Ms Manning, moved away from the school approximately a week after the IAP and substandard performance process began and another mentor was not provided, and that Ms Stewart 'received no further support during the process in that regard'. It said that had Ms Stewart's request for a transfer to another school prior to any allegations of substandard performance been granted, she may never have been placed on a substandard performance process, or, if she had, the process would have been able to have been undertaken objectively.

52 The letter also referred to findings of the Expert Review Group (ERG) report into the school in 2012, asserting that this made it reasonable to assume that Ms Stewart had not been properly managed.

53 It also asserted that the respondent had not taken account of the mitigating factors raised in Ms Stewart's letter of 22 January 2015.

54 It then invited the respondent to discontinue the process, or alternatively, to transfer Ms Stewart to another school so that the process could be undertaken again, without Ms Delfs' involvement.

55 Finally, the letter asked Mr Gillam to indicate what consideration he had given to the penalty other than dismissal.

56 Mr Gillam wrote to Ms Stewart a letter of 27 November 2015, terminating Ms Stewart's employment. In it, he said that he had taken account of Ms Stewart's lawyer's letter but that he was not convinced by any of its comments that he should amend his decision.

The applicant's grounds

57 The grounds in support of the application as filed and expanded can be distilled as:

1. Ms Stewart's performance was not substandard.
2. The process leading to the dismissal was unfair because:
   (a) There was a reasonable apprehension of bias by Ms Delfs towards Ms Stewart. As Ms Delfs oversaw the IAP and was involved in the substandard performance process, those processes are unfair.
   (b) Ms Delfs was associated with a number of people who were supposed to support or assess Ms Stewart. These associations were due to Ms Delfs' husband being the principal of the school where those people were located.
   (c) Ms Gooding and Ms Fielder, two of the people who were to support or assess Ms Stewart, had a conflict of interest and bias.
   (d) Ms Delfs initially, and the respondent subsequently, unreasonably refused Ms Stewart's request for a change in line manager and a transfer to another school. That change of line manager and transfer would have had the effect of allowing Ms Stewart to be objectively assessed, or she may never have been placed on a substandard performance process.
   (e) The person appointed as Ms Stewart's mentor and support person in the IAP, Ms Manning, moved away from the school very soon after she commenced in that role, and was not replaced.
   (f) The allegation of substandard performance related to two particular standards within the Standards at Proficient Teacher level. However, Ms Stewart was assessed against all seven Standards. This denied her procedural fairness.
3. In 2012, immediately prior to Ms Delfs beginning to raise issues regarding Ms Stewart's performance, in the ERG report, the school had been the subject of criticism regarding its management in a number of areas. This is said to lead to a conclusion that the applicant was not properly managed and given the opportunity to develop her skills. Therefore, if there is any substandard performance, the responsibility for that lay with the school's management, that is, with Ms Delfs.
4. The respondent failed to take account of Ms Stewart's personal circumstances.
5. Ms Stewart was not invited to bring a support person to the meeting on 1 December 2015, at which her employment was terminated.
6. The respondent failed to take account of the range of penalties available under s 79 of the PSM Act when deciding to terminate the employment.

Issues and conclusions

58 The test to be applied to a claim of harsh, oppressive or unfair dismissal is whether the employer has abused its right to dismiss (*Miles & Others 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; (1985) 17 IR 179).

59 The various factors which might make a dismissal unfair are set out by Heenan J in *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 893 at [72] – [73]:

> 72 Because there is such a wide variety of factors which may affect any individual case, no universal or exhaustive list of the circumstances which may constitute harsh, oppressive or unfair dismissal can be given. Often, however, the issue in a particular case will require a consideration of the length or quality of the employee's service, the culture of the workplace, the prospects for other employment of the individual employee, and the employer's treatment of past incidents and of other employees. Where misconduct is alleged or relied upon

there will be a burden on the employer to demonstrate that the alleged incident did occur and also to evaluate any mitigating circumstances. Factors such as these going to the reasons for the particular dismissal are frequently referred to in the authorities in this area as matters of "substantive" fairness, as opposed to issues of 'procedural' fairness which relate to the manner in which the employee was notified of the proposed termination, what opportunity, if any, he or she was given to respond and the time and method employed in effecting the termination. This distinction between substantive and procedural issues going to the question of whether or not a particular dismissal was harsh, oppressive or unfair can be useful in certain cases but it entails the danger of regarding the statutory test as having separate application and different meanings in different contexts. Such an approach must be rejected because, however the issue may arise, the decision for the Commission, or a court in any particular case, is simply whether the individual termination of employment was harsh, oppressive or unfair and that test must always be applied without any gloss. For a criticism of how the distinction between procedure and substance in this area is elusive and how it may be unhelpful and contrary to the true meaning of the statutory phrase, see McHugh and Gummow JJ in ***Byrne & Frew v Australian Airlines Ltd*** (*supra*) at 465.

73 In this State a test which has been adopted by the Commission, and approved by this Court, is to consider whether the dismissal amounted to an abuse of an employer's right to dismiss thus rendering the dismissal harsh or oppressive - ***Bogunovich v Bayside Western Australia Pty Ltd*** (1998) 78 WAIG 3635; ***Miles v Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous (WA) Branch*** (1985) 17 IR 179; 65 WAIG 385, IAC and ***Robe River Iron Associates v The Association of Draughting, Supervisory and Technological Employees, WA Branch*** (1987) 76 WAIG 1104, IAC. In cases where the alleged harsh, oppressive or unfair nature of the dismissal relates to the procedure followed by the employer in effecting the termination of employment it has been held in this State that a failure to adopt a fair procedure by the employee can lead to a finding that the dismissal was harsh, oppressive or unfair - ***Bogunovich v Bayside Western Australia Pty Ltd*** (*supra*), *but a lack of procedural fairness may not automatically have this result* - ***Shire of Esperance v Mouritz (No 1)*** (1991) 71 WAIG 891 IAC.

(Emphasis added)

60 I also note that this is a matter referred to the Commission in the circumstances where s 78(2) of the PSM Act applies to the dismissal. Section 78(5) provides that:

> If it appears to the Industrial Commission or the Public Service Appeal Board that the employing authority failed to comply with a Commissioner's instruction or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the Industrial Commission or Public Service Appeal Board —
>
> (a) is not required to determine the reference or allow the appeal solely on that basis and may proceed to decide the reference or appeal on its merits; or
>
> (b) may quash the decision or finding and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommenced by the employing authority if the employing authority continues the disciplinary process.

Assessment of the evidence

61 I found Ms Delfs to be a truthful witness. Her evidence was consistent and plausible, and was supported by other evidence. She is highly thought of by her colleagues and appeared to be very professional.

62 By contrast, Ms Stewart appeared to misunderstand questions asked of her on a number of occasions in cross-examination. She gave the impression of not having good comprehension.

63 Ms Stewart made claims about the comments contained in the ERG report without having read the report itself. She also accepted that the report referred to perceptions of preferential treatment as referred to in the report are not the same as actual preferential treatment.

64 The evidence regarding Ms Stewart's level of understanding and her taking a very literal approach to instructions given to her, supports my own observations of her as misinterpreting or misunderstanding in forming ideas and views, and of taking things very literally. I do not find that she was dishonest. However, where her evidence conflicts with that of Ms Delfs and Mr Walker in particular, I prefer the latter evidence.

Ground 1 – Ms Stewart's performance

65 Ms Stewart called a number of witnesses to give evidence of their experience of her performance. None of them, with the exception of Kathryn Ryland, was a teacher, nor did they have any real understanding of the requirements of the profession or of the Standards.

66 Shelly Hepworth was a Teacher's Aide at the school in 2012 and 2013, and worked with Ms Stewart while Ms Stewart's Teacher's Aide was away on sick leave.

67 She assumed the Standards applied to anyone working at the school, and was not aware that they applied to teachers and not to Education Assistants. She accepted that she was not qualified to assess a teacher against the Standards.

68 Lana Normandale knows Ms Stewart because Ms Stewart taught her son. However, it is not known when this was. Ms Normandale is not a teacher or involved in teaching.

69 Jane Doyle's daughter was in Ms Stewart's classroom in 2010. Ms Doyle gave a witness statement in which she, too, commented on Ms Stewart's performance in respect of Standard 7. However, this evidence is of no probative value as Ms Doyle's experience of Ms Stewart related to a period well before Ms Stewart's performance was being managed or assessed.

70 Ms Crothers was a Teacher's Aide. I will deal with the problems associated with her evidence later. However, I give it no weight.

71 Carmen Bowler's son was in Ms Stewart's class in 2015. There is no evidence to indicate that she is in any way qualified to comment on Ms Stewart's performance.

72 Kathryn Ryland worked as a teacher in both primary and secondary schools. Her experience of Ms Stewart's teaching was for a period of one lesson, as part of a joint peer teaching programme between the high school at which she taught and Kambalda East Primary School.

73 Ms Ryland's peer observation of Ms Stewart is of very little assistance in assessing Ms Stewart's competency given its duration. Ms Ryland was not aware that Ms Stewart was in charge of a class that was not her own which had its own protocols, behavioural approaches and other regimes set in place, not by Ms Stewart but by the teacher whose class it was. Ms Ryland also assumed that Ms Stewart had set the classroom up for the morning.

74 Ms Stewart also suggests that if she was such a poor teacher, she would not have been involved in a peer observation project where Ms Ryland observed her classroom for the purpose of that teacher gaining benefit. Ms Delfs gave evidence that there was no reason to exclude Ms Stewart from such a project; it did not relate to her performance management. Ms Stewart may also have gained some insight and benefit from this project by observing another teacher, and by having to reflect on her own teaching as part of that process.

75 Ms Ryland gave her own assessment of Ms Stewart's performance as part of her evidence, but it is clear that she is not qualified as an assessor nor is she sufficiently familiar with the Standards as they relate to the requirements of teaching at the level required of Ms Stewart.

76 On the other hand, a number of witnesses who were experienced as teachers, assessors and teacher managers, gave extensive evidence of Ms Stewart's performance.

77 Ms Fielder is an accredited assessor in Early Childhood Education. She assessed Ms Stewart's performance as not meeting the standard of proficiency required of a teacher of more than four years' experience, in not merely the two Standards against which Ms Stewart's performance was alleged to be substandard, but in relation to all seven Standards, when Ms Stewart had been a teacher for eight years.

78 Ms Delfs, having worked with Ms Stewart for a number of years, and attempting to improve Ms Stewart's performance, believed her performance to be substandard in respect of the two Standards and hence instigated the IAP and the investigation.

79 Mr Walker, a teacher and administrator for more than 25 years, described Ms Stewart as being one of the weakest teachers he had seen in over 25 years of teaching (ts 269).

80 Ms Manning, who worked with Ms Stewart for some time prior to the IAP, described Ms Stewart as one of the worst in her experience (ts 355).

81 Ms Toni Colling, a teacher and school administrator for more than 20 years, after observing Ms Stewart's classroom management, described her performance as being 'at the lowest end of the scale' (Exhibit R8, [46]).

82 In all of the circumstances, the evidence of witnesses called by the respondent about Ms Stewart's level of performance is consistent and was not undermined in cross-examination. I accept that evidence.

83 Therefore, I have no hesitation in concluding that Ms Stewart's performance, as a teacher of eight years, was substandard as alleged. This was so after a significant period of attempts to improve her performance from 2012 to 2015, by Ms Delfs, by the assistance of a number of other people, and by training and development opportunities.

84 In accordance with the definition of substandard performance under s 79(1) of the PSM Act, she did not, in the performance of the functions she was required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions. This assessment is made against written work standards relating to the manner of performance of the functions of a teacher, being the AITSL Standards for a teacher at Proficient level.

85 This ground is not made out.

Ground 2(a) – a reasonable apprehension of bias against Ms Stewart by Ms Delfs?

(i) Allegations of targeting by Ms Delfs

86 Ms Stewart cites a number of incidents as being the basis of her claim of apprehended bias. The first is that in 2012, Ms Stewart says she reported to the Department's Standards and Integrity section that she had observed Ms Delfs shake a student. She believed that because of this, Ms Delfs disliked her and began to target her and question her performance.

87 Mr Donald Brown, then Coordinator Regional Operations, Goldfields Education Office, says that Ms Stewart sent an email to the mandatory reporting service of the Department of Child Protection (DCP). Ms Stewart was not aware that mandatory reporting to DCP relates only to child sex abuse and thought it related to abuse generally.

88 Ms Delfs does not dispute that the event occurred. She says that she received a text message from Ms Stewart stating that the student's father had rung to complain that his son had been shaken. Ms Delfs says that she was not aware who made the complaint to Standards and Integrity – that she may have reported it herself or she may have called the District Office about it. The complaint was not pursued by the parent, and Standards and Integrity took no further action on the issue.

89 Ms Stewart refers to the second incident which occurred in a staff meeting in about 2013, when 'Ms Delfs asked the staff to be honest and give her feedback on how they felt when she herself gave feedback to staff' (Exhibit A5, [28]). Ms Stewart said that Ms Delfs told the meeting that her supervisor had told her 'she was very bad at giving feedback to people. So she asked the forum before the activity…' (ts 47). Ms Stewart says she responded in front of the other staff that Ms Delfs would mostly 'give a negative at the end of the feedback sentence' (Exhibit A5, [28]). She believed Ms Delfs did not take this 'in a good way'. She says that she believes that since that 'time Ms Delfs began to seriously target' her 'and it became apparent that an interpersonality conflict had developed' (Exhibit A5, [29]).

90 Ms Delfs' explanation is that the ERG report, to which I will refer later, had found that the feedback process at the school was inadequate and a recommendation was made to 'refresh' the school's performance in that regard.

91 She says that soon after the ERG report was released, on 1 and 2 February 2013 there was school planning day. The agenda included a session headed 'Ways to give Feedback: Peer Review to be presented by Denyse' (Ms Delfs). Ms Delfs says that she asked the group how they thought she gave feedback. She says she did not recall what Ms Stewart's feedback was, but she asked Ms Stewart's permission to share her feedback to her with the group. She says she did not take any response personally.

92 I accept Ms Delfs' explanation. She asked for a response as part of a training session. Having obtained a response from Ms Stewart, she shared it with the whole group. It is unlikely, in those circumstances, that she took the response as an affront.

93 The issue for the Commission is whether, as Ms Stewart asserts, Ms Delfs commenced targeting Ms Stewart as a consequence of these issues.

The evidence regarding Ms Delfs' attitude

94 Ms Hepworth was a Teacher's Aide at Kambalda West District High School in 2011 and at Kambalda East Primary School in 2012 and until June 2013, for 0.6 FTE. She would fill in as Teacher's Aide in Ms Stewart's classroom when Ms Stewart's Teacher's Aide was away. She was unable to indicate how often that was.

95 Ms Hepworth said she found Ms Delfs very difficult to talk to and, in her experience, 'Ms Delfs used to be nice to your face but behind your back she would not be a very nice person' (Exhibit A4, [8]). She says she was able to witness and was aware that Ms Delfs did not like Ms Stewart and that a personality conflict 'likely' existed (Exhibit A4, [9]).

96 Ms Hepworth said in her witness statement that she was aware in 2012 that an ERG 'conducted a performance review of [the school] and that at the time it failed a performance review' (Exhibit A4, [11]). She also said that she 'did not notice any changes since the [time] the ERG conducted a performance review … until the time I left the school in 2013. Nothing in my view changed' (Exhibit A4, [12]). Yet, in cross-examination, she said she did not read all of the ERG report and cannot remember what formal findings were made. She did not know what strategies were implemented as a result of the ERG 'but I do know there was a – a big change within the school, you know, after the report' although she could not recall what the change was. When pressed on the difference between the evidence in the witness statement and her last comment, she said that there were changes put in place but she did not really notice it (ts 29). She says she was told that the school was not up to standard and that it was below average. She saw that as being that the school had failed.

97 I found Ms Hepworth's evidence to be of little probative value. Her credibility was undermined by her comments about matters not within her knowledge or expertise. It was also undermined by her firstly, denying in her witness statement that there were changes after the ERG report and then saying in her evidence that there was a big change within the school, and her comments referred to earlier about the teaching standards.

98 Ms Ryland gave evidence in [20] of her witness statement that she came to believe that if Ms Delfs did not like someone, she would target them. However, Ms Ryland acknowledged that this and another comment negative towards Ms Delfs were based on hearsay or gossip (ts 129 – 130).

99 Ms Crothers' evidence was likewise of no probative value. In fact, it was also very problematic. She gave evidence by video link from Kalgoorlie. A witness statement signed by her but undated was filed on 20 June 2016. After a number of questions in cross-examination, it became clear that Ms Crothers was referring to a witness statement she had brought with her to the hearing, which differed in some significant aspects from that which had been filed.

100 Ms Crothers' witness statement filed on 20 June 2016 contained [23] in which she said:

> I am aware Ms Stewart requested a transfer to another school because of her interpersonality conflict with Ms Delfs …

101 Yet in the witness statement she had brought with her, which she had signed and also dated, and also read out (at ts 142 – 143) she said:

> It would not surprise me if Ms Stewart requested a transfer due to the treatment she was receiving at the hands of Ms Delfs.

102 Ms Crothers also indicated that she did not remember the date of the meeting she had referred to in [23] as being 16 May 2013, and said she probably got that date from Ms Stewart's notes.

103 In [24], she said:

> Ms Delfs acts in a professional manner, but emotion wise she wears staff down and does not have good interpersonal skills. If Ms Delfs likes you, she gets on well with you, but if she does not then she will make your time at East Kambalda Primary School very difficult.

104 However, in cross-examination, Ms Crothers said she always got on well with Ms Delfs, she never had a problem with her and she had always been there when she needed to talk to her (ts 139 and 141).

105 In [25] of her witness statement, Ms Crothers was critical of Ms Delfs' conduct regarding another teacher, although she cannot recall the date, she agreed that it happened in or before 2010 (ts 280). She also accepted that she did not know the circumstances surrounding the incident, but accepted that Ms Delfs was doing her job.

106 She had said she was wary of Ms Delfs because of that incident but said in cross-examination that she would be wary 'like I'd be wary of, um, any boss' (ts 141).

107 In relation to Ms Delfs, Ms Crothers said in [22] of her witness statement that:

> If Ms Delfs decides she does not like you as a teacher or staff member, then she will be out to get you in any way possible.

108 When she was asked to read out [22], Ms Crothers suggested that that was not what she intended and she was asked how it should be worded. She said, 'I don't know. That just seems really harsh. That's not the thing that I was trying to get across, that – that – I don't know what to say about that. It's not what I – this is not what I am here about and it just seems like it's getting out of my hands and I just don't know how to control it' (ts 272). She also said in respect of [22] that it was people who said things to her second hand, 'I didn't witness it, so I probably shouldn't have said it in the first place' (ts 280).

109 Ms Crothers explained the process of her witness statement being developed by way of a number of drafts being sent to her for her to correct and return, and of her signing both the one that she referred to initially by video link and the one that was filed. She says 'obviously I shouldn't have done it because I really don't know what I am doing. This has just gotten so far away from what – I'm not here to attack Mrs Delfs. I don't want to do that. I wanted to support Jean [Stewart]' (ts 278). She eventually said, 'I shouldn't have agreed to do this'.

110 Ms Crothers commented in the witness statement filed in the Commission about the so called 'interpersonality conflict' between Ms Stewart and Ms Delfs. Yet her evidence in cross-examination was that performance meetings can be difficult. Ms Crothers accepted that during the meetings she attended with Ms Stewart as her support person, Ms Delfs was quite professional.

111 She said that in one meeting, Ms Stewart asked for time out as she was upset and Ms Crothers asked her if she wanted to go and have a drink of water, but Ms Stewart decided to stay in the room. Ms Stewart never requested to not go to class following a performance meeting because she was upset.

112 Ms Crothers agreed that she and Ms Stewart were friends outside of school and Ms Stewart confided in her.

113 Therefore, the evidence said to be critical of Ms Delfs brought by the applicant and her witnesses to support her own assertions about Ms Delfs, has been significantly undermined, if not completely negated.

114 On the other hand, the respondent called evidence from a number of witnesses who support Ms Delfs' approach as being quite professional and proper towards Ms Stewart.

115 Mr Walker, the deputy principal, described Ms Delfs as being 'calm, professional and compassionate' in performance meetings with Ms Stewart. He said he felt that she was trying to help Ms Stewart improve. He recalled Ms Stewart being upset on a couple of occasions but that Ms Delfs would always ask her if she needed some time (Exhibit R7, [17]).

116 Mr Walker also said that she was the best principal he had worked with and he considered her to be tough but fair and very professional ([42]). He never saw any bias or preferential treatment by Ms Delfs and did not witness any conflict between Ms Delfs and Ms Stewart, except that Ms Stewart may have been a bit cold and gave an abrupt answer to questions in meetings.

117 Under cross-examination, Mr Walker said that during some performance meetings, Ms Stewart would be tearful. He said that performance conversations were difficult conversations, and contained hard information to hear. However, Ms Delfs would always make sure Ms Stewart was alright, and would see if Ms Stewart needed some time.

118 Ms Manning, who was appointed as Ms Stewart's support person during the IAP commencing 23 March 2015, says that she had a professional, not social, relationship with Ms Delfs. She did not witness any conflict between Ms Delfs and Ms Stewart, nor did she observe any bias or preferential treatment by Ms Delfs. Her evidence was largely unchallenged and I found her to be a credible witness.

(ii) Timing of meetings

119 While it was not a ground of the application, both Ms Stewart and Ms Crothers gave evidence that they believed Ms Delfs deliberately arranged meetings for the issues of Ms Stewart's performance to be discussed prior to school and that this left Ms Stewart required to go into class in a distressed state. However, in cross-examination, Ms Stewart accepted that meetings needed to be either before or after class. She also agreed that she never asked to be relieved of the obligation to attend class after a meeting due to being upset.

120 The evidence demonstrates that meetings were arranged at a number of different times during the day, according to the availability of Ms Stewart, her support person, Mr Walker and Ms Delfs.

121 Further, there was an occasion as outlined earlier in [46], outside of such a meeting, where Ms Stewart became angry and distressed, blamed Ms Delfs for problems she was experiencing and was verbally abusive towards Ms Delfs. Ms Delfs handled this situation very professionally, and on seeing Ms Stewart's distress, directed her not to return to the classroom but to go home, and she arranged for another teacher to take over from Ms Stewart. Directing her to go home was not a punitive measure, but to assist Ms Stewart to recover from her emotional outburst and to not place her in a situation of being in a classroom while she was in that state.

Conclusions regarding reasonable apprehension of bias by Ms Delfs

122 There is no evidence that Ms Delfs commenced targeting Ms Stewart after either of the two incidents she relies on. Ms Delfs commenced detailed management of Ms Stewart's performance in April 2012. The incident regarding the report of shaking the student occurred in August that year (Exhibit R9, DKB 1), and the comment regarding giving feedback was made in February 2013 (Exhibit R5, [21]).

123 Given the evidence, I find that there is no basis for concluding that there was a reasonable apprehension of bias by Ms Delfs towards Ms Stewart. Rather, she had difficult conversations where she was attempting to manage and improve the performance of a teacher under her management. As Mr Walker says, such information is difficult to hear.

124 Having observed Ms Stewart as she gave her evidence and having noted the reports about her performance, it is clear to me that Ms Stewart has been searching for reasons why she has come to the point in her career where she has been found to be of substandard performance, and is attributing blame to many others. There is no evidence beyond Ms Stewart's assertion that Ms Delfs targeted her. In fact, her evidence is that Ms Delfs went to a considerable amount of effort to identify areas of Ms Stewart's performance that required improvement; she provided her with many opportunities for learning and development; gave her positive and negative feedback on her efforts as the process continued; provided her with support and guidance, and gave her every reasonable opportunity to improve. Yet, in spite of that, Ms Stewart's performance remained substandard. It was objectively assessed by Ms Fielder as not meeting the professional standards for a proficient teacher.

125 As I noted earlier, Mr Walker, Ms Colling and Ms Manning all say that Ms Stewart was one of the weakest teachers in their experience or was at the lowest end of the scale. Therefore, Ms Delfs' assessment of Ms Stewart's performance was correct, and her approach was objective.

Ground 2(b) & (c): Ms Delfs' association with a number of people through her husband being the principal of a school where those people were located

(i) Ms Gooding

126 In 2014, Ms Gooding commenced as a part-time Teacher Consultant, Classroom Management Strategies (CMS), Statewide Services for the Goldfields Education Region. At that same time, she held a part-time teaching position at O'Connor Primary School. In her CMS role, she said she works autonomously but reports to a line manager located in Perth.

127 In her capacity as a teacher, she reported to the principal of O'Connor Primary School, Mr Steve Delfs, who is Ms Delfs' husband.

128 In 2015, she ceased her part-time teaching role and worked full-time as a Teaching Consultant. Ms Gooding became involved in providing support to Ms Stewart after being contacted by Ms Delfs. This was prior to the commencement of the IAP process, not during it.

129 Her involvement with Ms Stewart was part of what Mr Gillam had advised Ms Stewart in his letter of 11 February 2015 would be a period of readjustment to the classroom after her time providing DOTT relief in 2014. Ms Delfs chose Ms Gooding because the only other available CMS consultant was not at the same level of accreditation as Ms Gooding, and was located at Ms Stewart's school. Having assistance from someone located outside of the school was seen by Ms Delfs as being neutral.

130 Ms Gooding was to be an external mentor, to observe Ms Stewart's classroom and provide her with confidential feedback. She observed Ms Stewart's classroom on four occasions in March 2015.

131 By the time she undertook this mentoring, Ms Gooding, although still located at O'Connor Primary School, was no longer a teacher reporting to Mr Delfs.

132 Ms Stewart gave evidence of feeling that Ms Gooding was likely to be biased against her for the reason only that Ms Gooding's principal was Ms Delfs' husband. Aside from this feeling, there is nothing to support a suggestion of anything untoward in Ms Gooding's involvement. On the contrary, Ms Gooding's role was to assist Ms Stewart and to provide her with confidential feedback and guidance. She was not there to assess her, to report on her in any way or to do anything other than to give Ms Stewart the benefit of her assistance.

133 As to any relationship between Mr and Ms Delfs and Ms Gooding, the evidence is that they met once on 8 August 2015, so that Ms Gooding could obtain their advice about Malta, where she was preparing to visit. This was approximately five months after her last contact with Ms Stewart. There is no other evidence of a personal, as opposed to professional, relationship between them.

134 Ms Stewart's suspicion is baseless, and builds on her baseless suspicion of others who sought to guide and help her.

(ii) Ms Fielder

135 Ms Fielder was appointed by Mr Gillam, not by Ms Delfs.

136 Ms Stewart says that Ms Fielder's position as being from O'Connor Primary School where Mr Delfs was principal, compromised her objectivity. Ms Stewart wrote to the Department objecting to Ms Fielder undertaking the assessment. She did so on the basis of a possible conflict of interest due to a purported friendship between Ms Fielder and Ms Delfs.

137 Ms Fielder was asked to provide a statement to Labour Relations of the Department of Education as to the nature of the relationship, if such existed, and whether she believed a conflict existed as a result of the nature of the relationship which could result in bias in her assessment of Ms Stewart's teaching practice.

138 Ms Fielder provided a statement to the Department noting that she had known Ms Delfs since 2003 in a professional capacity. She set out the professional contacts that they had had, and described them as sporadic and needs-based in a reactive way. She said she visited Kambalda Primary School on occasions and had met Ms Stewart on a number of occasions, both at her school and at professional events in the network.

139 She also set out that she had known Mr Delfs over a number of years and had been under his direct leadership for the past six years. She described their working relationship as excellent and that this working relationship had occasionally called on them to attend similar social events that may have involved their partners but that they did not have a close social network.

140 She also noted that Mr and Ms Delfs have children of a similar age group to her own and that given the size of the town, they occasionally see each other at social events, however, they are not in a close social network. She also disclosed a recent social interaction between her daughter and Ms Delfs, whereby her daughter sought advice before travelling overseas to an area where Ms Delfs had previously travelled.

141 On the basis of this advice, the Department decided to proceed to use Ms Fielder to undertake the assessment.

142 Ms Fielder is one of only three AITSL accredited assessors in the Department of Education, and the only early childhood education assessor in the Goldfields Region.

143 Ms Stewart has done no more than raise a suspicion regarding Ms Fielder's relationship with Ms Delfs through her husband, but I am satisfied with Ms Fielder's explanation and her professionalism, particularly as she gave her evidence.

144 I find that there was no personal relationship or allegiance between Ms Fielder and either Ms Delfs or her husband which might raise any reasonable question of bias or conflict on Ms Fielder's part, such that she should not have undertaken the assessment of Ms Stewart's performance.

145 In those circumstances, I find that these grounds are not made out.

Ground 2(d): Request for a new line manager and a transfer

146 Ms Stewart asked for a new line manager to manage and assess her performance. This was on 16 May 2013, during the performance management process and well before the IAP. Ms Delfs refused the request but invited Ms Stewart to provide reasons in writing for her request. Ms Stewart did not do so, nor did she raise the matter with the Department until nearly two years later, in January 2015 when she responded to Mr Gillam's letter in which he advised her of the allegation that her performance was substandard.

147 The reasons given by Ms Delfs for not changing Ms Stewart's line manager are that she was the person within the school with the most experience and training in the area that was being assessed – that is, early childhood education. Mr Walker was not appropriate given his areas of work in upper primary school. That is a valid reason.

148 Further, there is no evidence of bias or prejudice on Ms Delfs' part. The evidence makes clear that Ms Delfs is highly professional and objective. There is no evidence that she was harsh or unfair to Ms Stewart. She was an appropriate person to manage Ms Stewart's performance.

149 As to the issue of a transfer, as mentioned above, this was not raised by Ms Stewart until January 2015.

150 In his evidence, Mr Gillam noted that Ms Stewart had not stated any grounds or provided any evidence to suggest that Ms Delfs had treated Ms Stewart unfairly or was biased against her. All she wrote in her letter was that she suspected Ms Delfs could not take her candour. More would be needed for a transfer to another school to be warranted during a substandard performance process. He explained the desirability of not transferring an employee during a substandard performance process or investigation without good reason. The evidence available to him of the process to that point did not indicate an issue. Likewise, these are valid reasons to deny Ms Stewart's request for a transfer.

151 Finally, I note that during closing submissions, counsel for the applicant asserted that 'the applicant made numerous' requests for a temporary transfer for the purpose of her performance being tested (ts 387). There appear to have been two, not numerous, such requests. The first was made in Ms Stewart's response to Mr Gillam's letter advising her of the allegations that her performance was substandard and inviting her response (Agreed document 4). The second was in response to Mr Gillam's advice that he had formed the view that the performance was substandard (Agreed document 13).

152 There is no evidence that either a new line manager or a transfer would have made any difference to the outcome, or that their refusal was unfair.

Ground 2(e): Ms Manning as support person

153 Ms Manning was appointed as Ms Stewart's support person and mentor as part of the IAP, commencing on 23 March 2015.

154 Ms Manning had previously observed Ms Stewart teaching as part of her DOTT relief in 2014.

155 On 10 March 2015, before the formal commencement of the IAP, at her own instigation, Ms Manning approached Ms Stewart and mentioned that she was to be Ms Stewart's support person. She then spent some time working with her and by email on 11 March, sent Ms Stewart a copy of the minutes of their meeting (Exhibit R12, SMS 5).

156 On Thursday, 12 March 2015 at 4.16 pm, Ms Stewart sent Ms Manning an email marked urgent, asking for Ms Manning to edit her daily workpad planning template to enable her to submit it to Ms Delfs on Monday, 16 March 2015. Ms Manning sent an email to Ms Stewart on Saturday, 14 March 2015 setting out some feedback and direction.

157 Ms Delfs arranged for Ms Stewart and Ms Manning to spend a full day together on Monday, 30 March 2015.

158 Ms Manning appears to have been informed just before the end of term 1, which finished on Thursday, 2 April 2015, that she was to undertake the role of acting Deputy Principal of a school some hundreds of kilometres away. She was to commence this position at the beginning of term 2, 20 April 2015. Before her move was announced to the staff, Ms Manning told Ms Stewart of her move.

159 Ms Stewart said in her evidence that she understood she had lost her formal mentor, but Ms Manning would give her any support on an informal, friendly basis.

160 Ms Manning says she advised Ms Stewart that she would still be available for support whenever she needed it. She would return to Kambalda every second weekend and would be happy to meet Ms Stewart, otherwise she was available by phone or email. Ms Manning says that because of the nature of her new role, she would be more accessible, and could have arranged to come and observe Ms Stewart in her classroom, or for Ms Stewart to shadow her.

161 At a staff meeting on 31 March 2015, immediately before the end of term, Ms Delfs announced Ms Manning's impending departure, saying she would be very busy in her new role. She denies saying that no one was to get in touch with Ms Manning.

162 The second term commenced on 20 April 2015. On 23 April 2015, Ms Manning emailed Ms Stewart to let her know that she was still available if Ms Stewart needed anything. She said she was always available by email, and also provided her mobile number if Ms Stewart wanted a chat (Agreed document 8). Ms Stewart responded the next morning, saying she would take up the offer.

163 Not having heard from Ms Stewart for a while, on 19 May 2015, Ms Manning emailed Ms Stewart asking how she was, noting that she had not heard from her for a while and saying 'just wanted to check you're alive!!' She ended the email by saying 'Remember I'm here if you need anything!'

164 Ms Stewart responded three weeks later, on Thursday, 11 June 2015:

> Yes I am still alive. I only became aware that you were still my support person at another meeting between Denyse and I on Friday the 8th of May, 2015.
>
> When you sent me the previous message I thought you were sending it as a friend and I appreciated your concern and support. Because you had commenced[sic] your new job at your new school I didn't feel like I could impose on your time. Others from school mentioned you were finding it a very busy time keeping up in your new role.
>
> I explained to Mrs Delfs that as a consequence of being in the audience on that Tuesday when we were informed of your transfer and new role as deputy principal at Kellerberrin school. I took it that you were no longer my support person. At that gathering when you stated that you were willing to help anyone who needed help even when you moved. Mrs Delfs was very explicit at that time that whilst it was very kind of you that you would be too busy in your new role. With her stating that this lead[sic] to me feeling like I was set sail in a boat rudderless all through the holidays and the subsequent weeks.
>
> The strain has been enormous and lead[sic] to me to making uncharacteristic choices that I have never undertaken previously. Mrs Delfs has met with me and dealt with these matters and has informed me that you are only to be used as someone who I can call or email to as support.
>
> Agreed document 8, page 3
>
> and Exhibit A5, Att. 7

165 Ms Manning responded the next Monday morning, on 15 June 2015, saying:

> I am disappointed to hear you didn't know I was here to support you? I spoke to you one on one in my room before I announced my new position to the rest of staff, stating that despite me relocating I would still be available to support you via phone or email. I also mentioned that I would be in Kambalda frequently should you like to catch up. While I remember Denyse saying I would be busy in my new role I felt this was in response to Kate and I discussing remaining team members in the peer observation. I also felt that the reply you sent me on the 24th of April stating you would definitely take me up on my offer implied you were aware I was here to support you.
>
> I'm also not sure what staff members informed you I am "finding it a very busy time" as I haven't spoken to any teaching staff there in detail since relocating.
>
> While my time here is busy, it is a very different busy to the classroom, and as previously stated, I am constantly on email so easily able to reply and offer support.
>
> I hope that the misunderstanding has been cleared up. I am more than happy to offer you support via phone, email or face to face meeting (when in the same location) now and at any time in the future.
>
> Agreed document 8, page 2

166 There is no evidence of Ms Stewart seeking any assistance or support from Ms Manning from 12 March 2015 until the end of the IAP or Investigation, in spite of Ms Manning's offers of assistance and repeated clarification of her availability. If there was any misunderstanding on Ms Stewart's part about Ms Manning's availability, Ms Manning's emails of 23 April, 19 May and 15 June 2015 clarify it.

167 There appears to be a suggestion that an inference ought to be drawn that it was known when Ms Manning was appointed as Ms Stewart's support person, that she was about to be transferred not only to another school but hundreds of kilometres away. There is no evidence to support this.

168 Further, Ms Manning advised Ms Stewart the day before her move was announced to the staff generally that she was moving but she advised Ms Stewart that she would continue to provide her with support. Whilst I accept that Ms Stewart may have been confused the next day when she heard that Ms Manning was moving and that she would be very busy in her new role, to such an extent that she could not maintain another particular support role unrelated to Ms Stewart's situation, however, this occurred at the end of term. Within a week after the return from those holidays, on 23 April 2015, not having heard from Ms Stewart, Ms Manning contacted Ms Stewart by email to confirm that she was still available to support her. Ms Stewart thanked her for that.

169 Having not heard from Ms Stewart further for some time, Ms Manning again contacted Ms Stewart on 19 May 2015 to check that she was alright.

170 It is unfortunate that in the circumstances of Ms Stewart's husband being very ill and her mother being aged, that Ms Manning asked the question, 'are you alive?' Whilst this might have upset Ms Stewart, without Ms Manning knowing of it, this could be seen as nothing more than the use of a common phrase which might have been viewed as being a little thoughtless but it was not malicious.

171 It was also clear that Ms Manning's role as support person was to provide support and assistance, but did not necessarily require her to observe Ms Stewart in her classroom. If she was required to do so, it was possible for that to occur by Ms Manning travelling to Kambalda. Ms Manning's husband remained in Kambalda while she moved and Ms Manning returned to Kambalda regularly every second weekend. While it was argued that Ms Stewart and Ms Manning could not reasonably have met on the weekends for Ms Manning to provide support to Ms Stewart, Ms Manning was willing to do so.

172 I also note, although it is contentious within the teaching profession, particularly in the public sector, teachers' work is not limited to school hours, Monday to Friday, and evidence in other cases before me makes clear that teachers regularly work on weekends. There was nothing to preclude Ms Stewart and Ms Manning getting together if necessary. In any event, the use of technology would allow Ms Stewart to contact Ms Manning, and Ms Manning to provide her with support if she wished.

173 The inference in cross-examination, that Ms Manning could not have assisted Ms Stewart because Ms Stewart could not make or take telephone calls during class, is ludicrous. It is highly unlikely that Ms Stewart would have sought advice from any mentor or support person, whether they were located at the school or another school close by, during a class.

174 Ms Porter gave evidence of the type of support that a mentor or support person would provide. It is notable that the person does not need to be located at the school, and there is a range of types of assistance and support that can be given, including through technology.

175 I note that in her email on 16 March 2015, Ms Coates explained the role of a mentor, and encouraged Ms Stewart to 'actively engage in the arrangement'.

176 The provision of a support person or mentor does not place the onus on the mentor to follow up or pursue contact to further the mentoring or support. The onus is on the person being provided with support. Ms Stewart did not make use of the support being provided to her beyond the initial stage. It was Ms Manning who followed up, not Ms Stewart.

177 If Ms Stewart had any concerns about a lack of a support person being immediately available to her, she should have raised it. She did not do so.

178 This issue was raised in Ms Stewart's lawyers' letter of 17 November 2015, asserting that when Ms Manning moved to another school, '[n]o explanation was provided to [Ms Stewart] as to whether Ms Manning was to remain as [Ms Stewart's] mentor and assistance provider' (Agreed document 13). This is clearly not so. It also asserts that Ms Stewart received 'no further support during the process in that regard' and this is also not correct.

Ground 2(f): Assessment against all Standards

179 The Initial and Final assessments of Ms Stewart's performance were done by reference to all seven professional teaching Standards. The Summative Assessment was against only the Standards contained in the allegation.

180 The evidence of both Ms Porter and Ms Fielder is that the Standards are interrelated and do not stand alone. They each gave examples. They said that for a proper assessment to be done, the performance needs to be assessed against all Standards. Ms Porter says that '[i]t would be artificial to assess the Standards in isolation'. That 'is why the TRBWA and the Department require teachers to be at the Proficient level across all seven Standards, and an assessor will appraise across all seven Standards, with a focus on the identified Standards of concern' (Exhibit R6, [34]). I accept the evidence that it is necessary to assess against all Standards for a proper and thorough assessment of performance to be made because the performance against each of the Standards cannot be done in isolation.

181 As it happened, Ms Stewart was unsatisfactory in respect of all Standards.

182 In terms of the decision to terminate, Ms Butler explained in her report to Mr Gillam, and commented that the assessment ought to be in respect of only the two Standards where allegations of substandard performance had been made (Exhibit R11, [36]; ts 338).

183 Mr Gillam's evidence makes it quite clear that he made his decision based only on the allegations in respect of two particular Standards. He said that had Ms Stewart's performance been satisfactory in respect of those two Standards but unsatisfactory in the other Standards, he would have not made a decision to dismiss but the matter would then have raised questions about her performance in respect of other Standards.

184 The assessment for the purposes of making a decision about termination of employment was of the two Standards about which the allegations were made. Ms Stewart's performance was unsatisfactory in respect of the Standards where it was alleged that her performance was substandard.

185 Ms Stewart's counsel also referred to the requirements under the *School Education Act Employees (Teachers and Administrators) General Agreement 2014* for teachers not to have an unreasonable workload. The inference that is sought to be drawn, I think, is that assessing her against all of the standards would have placed an unreasonable workload upon Ms Stewart. However, there was no evidence relating to workload.

186 Ms Stewart is reported in the second assessment as saying that the fact of her being assessed against all Standards was distressing as she thought she was being assessed against only Standard 4 and Standard 7. In responding to questions from Ms Butler, Ms Stewart said that assessment against all proficiencies as opposed to against only the two mentioned to Mr Gillam's letter had 'lead[sic] to confusion about where I should be putting my energies and attention' (Exhibit R11, MB3, INV5). Was Ms Stewart disadvantaged by this?

187 Ms Stewart suffered considerable stress while undergoing the IAP and the assessment. She says she was confused about the assessment. However, I find that, as a teacher, she was required to be proficient against all Standards, and should have been able to demonstrate that proficiency on any day. To meet the Standards both individually and collectively, she needed to be able to do all things required by the Standards at the same time. Performance of one Standard supported performance of others, as demonstrated by Ms Porter's and Ms Fielder's evidence.

188 There is no allegation of any particular detriment, nor any evidence of it, except for confusion and stress. Given the lengthy history of failed attempts to improve Ms Stewart's performance before the IAP and the formal assessments, when that particular stress and confusion were not present, I conclude that it did not adversely affect the outcome in terms of Mr Stewart's actual performance. Therefore, this ground is not made out.

Ground 3: The ERG Report

189 Ms Stewart alleges that Ms Delfs is responsible for not managing her properly and this is reflected in the ERG report, that was critical of the school's performance management and feedback.

190 In August 2012, the ERG reported on an assessment of the school and commented on the leadership of the school in respect of performance management.

191 Amongst its eight major findings was the following:

> 5. Regular quality feedback and follow up support, normally associated with performance management processes, is inadequate. This compromises the school's accountability ethos, staff development and the provision of professional learning.
>
> Witness statement of Jean Stewart
>
> Exhibit A5, attachment 2, page 3

192 By June 2013, a follow up review had been conducted. Mr Perris, who was responsible for overseeing the implementation of the ERG's prescribed improvements, wrote to Ms Delfs thanking her and the staff involved, saying that their approach was thorough and professional (Exhibit R2, KCP 2).

193 By December 2013, the Director General was satisfied that the school had 'met expectations regarding improvement and sustainability in relation to all findings' (Exhibit R2, KCP 3).

194 In any event, Mr Perris clarified that the ERG findings 'did not relate specifically to the performance of the Principal or Deputy Principal as line managers nor did the Review personally criticise the Principal or Deputy Principal' (Exhibit R2, [21]).

195 I note that the ERG report was two years before any action was taken which placed Ms Stewart's employment in jeopardy. The issue raised by the ERG report was resolved within six months.

196 This ground is not made out.

Ground 4: Mitigating Factors – Ms Stewart's husband and mother

197 In her correspondence to Mr Gillam dated 22 January 2015, regarding whether her performance was substandard, Ms Stewart referred to the difficulties she had had in 2014 in respect of the illness of her husband and retrenchment from his job. She said this made 2014 'a personally challenging year for [her]' (Agreed document 4).

198 This comment was made at the point where Mr Gillam was deciding whether an IAP and assessment and investigation of her performance were to be undertaken. He decided to do so, but first, he gave Ms Stewart a period of readjustment in the classroom.

199 Ms Stewart's reference to having had a personally challenging year related to 2014. There was no evidence presented that Ms Stewart's husband's circumstances or her aged mother's needs had any detrimental effect on Ms Stewart during the IAP, assessment or investigation, in 2015.

200 Ms Stewart gave no indication that she needed support or assistance in respect of either of those circumstances. She presented herself for work or took leave, but did not provide the reason for the absence as being related to either of those things.

201 This ground is not made out.

Ground 5: Ms Stewart was not invited to bring a support person

202 This ground was not pursued.

Ground 6: Alternative penalties

203 Ms Stewart alleges that there was a denial of fairness because Mr Gillam did not consider any alternatives to termination of employment when other penalties were available.

204 In his letters to Ms Stewart dated 14 January 2015 and 11 February 2015, Mr Gillam set out the penalties available under s 79(3) of the *Public Sector Management Act 1994*. However, Mr Gillam was not cross-examined on that matter.

205 Therefore, I am unable to draw any conclusion about this ground, except that Mr Gillam appears to have been aware of the range of penalties available.

Conclusion

206 I have concluded that when assessed objectively, Ms Stewart did not attain or sustain a standard reasonably expected of a teacher, by reference to standards applicable to that role. Even if there had been a denial of procedural fairness, contrary to my findings, they would not have adversely affected Ms Stewart's performance in the IAP and assessment process such as to warrant the matter being remitted to the respondent.

207 The dismissal was not harsh, oppressive or unfair.

208 The application must be dismissed.

2016 WAIRC 00823

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEAN STEWART
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 13 OCTOBER 2016
FILE NO/S	U 211 OF 2015
CITATION NO.	2016 WAIRC 00823

Result	Application dismissed
Representation	
Applicant	Mr D Stojanoski, of counsel
Respondent	Ms S Teoh, of counsel and with her, Ms J Coates

Order

HAVING heard Mr D Stojanoski, of counsel on behalf of the applicant and Ms S Teoh, of counsel and with her, Ms J Coates 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.] Chief Commissioner.

2016 WAIRC 00777

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00777
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 21 SEPTEMBER 2016
DELIVERED	**:**	TUESDAY, 27 SEPTEMBER 2016
FILE NO.	**:**	U 111 OF 2016
BETWEEN	**:**	JOHN MICHAEL TOSA
		Applicant
		AND
		BUSSELTON PEST AND WEED CONTROL
		Respondent

CatchWords	:	Industrial law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal - Held termination due to downturn in respondent's business - Held process of dismissal unfair and harsh - Compensation awarded
Legislation	:	*Industrial Relations Act 1979* (WA)
Result	:	Application allowed; compensation awarded
Representation:		
Applicant	:	In person
Respondent	:	Mr F Hughes

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings taken from the transcript as edited by the Commission)

1 Mr Tosa brings a claim for unfair dismissal in relation to the termination of his employment with the respondent. He commenced work with the respondent in November 2015 and his employment continued through to 1 July 2016, when he was terminated by Mr Stewart Porteous, who was essentially the manager of the respondent in Busselton.

2 Mr Tosa had been employed on the weed control side of Busselton Pest and Weed Control. There was discussion in relation to Mr Tosa becoming fully qualified in relation to the pest control side of the business while in its employ, and Mr Tosa undertook studies related to that, which were not completed at the time of his termination.

3 There is dispute about the reasons why Mr Tosa was terminated. Mr Tosa says that he was terminated because he had failed to sign an agreement (Exhibit 1 in these proceedings) under which he would agree to refund to Busselton Pest and Weed Control the amount of $2,500 if he was dismissed for disciplinary reasons or resigned during the period of his training to get the full pest control qualification, or in the 12 months following completion of that training. Mr Tosa says because of his failure to sign that agreement the respondent decided to dismiss him. Mr Tosa says however that rather than cite this reason the respondent took an opportunity arising out of conversations he had had with members of staff of the respondent on 1 July 2016, namely Mrs Nita Hughes and Ms Heidi May, to invent a reason to dismiss him. Mr Tosa says that the respondent alleged to him that he had acted poorly in those conversations and terminated him as a result of the allegations relating to his conduct in those conversations, but the real reason behind the dismissal was his failure to sign Exhibit 1. Mr Tosa says he did not act inappropriately in those conversations.

4 The respondent, for its part, says that Mr Tosa's dismissal had nothing to do with the conversations and that he was never told it did. The respondent says that Mr Tosa was dismissed because of a downturn in work, that this had been discussed between the owner of the business, Mr Francis Hughes, and Mr Porteous for some weeks leading up to the decision to terminate Mr Tosa and that matters had come to a head in those discussions on the afternoon of Thursday, 30 June 2016. Mr Hughes and Mr Porteous gave evidence that in that discussion a decision was made that someone would have to be let go and that the decision was made that Mr Tosa would be terminated because he was the least experienced of the persons working with the respondent and also because he was not fully qualified, whereas the other person who was under consideration for termination, John Appleyard, who had started at the same time as Mr Tosa, was fully qualified.

5 The respondent says the decision was made on that Thursday and Mr Porteous says that he made a decision to communicate the decision to terminate Mr Tosa in the afternoon of the Friday, 1 July 2016, rather than in the morning of the Friday, so that Mr Tosa's exit, which would be immediate, would be less embarrassing for him. Mr Porteous said he told Mr Tosa that his employment was ending because of a downturn in work and gave evidence that it had nothing to do with the conversations and that Mr Tosa's conduct in those conversations was not cited as a reason for the termination.

6 The respondent says that the decision to let Mr Tosa go had already been made before the Friday when the conversations occurred. Mr Hughes said that on the Friday his wife reported to him that a conversation between her and Mr Tosa had gone badly from the point of view that Mr Tosa had been overly forthright, I think is the best way of describing it, in the conversation. Mr Porteous said that Mrs Hughes had reported to him that Mr Tosa had been bombastic in the conversation. Mr Hughes, in evidence, however, maintained that he only learned of the conversation after the decision had been made to terminate Mr Tosa, and indeed after the decision to terminate Mr Tosa had been communicated to Mr Tosa by Mr Porteous.

7 Mr Hughes denies that it was ever in his mind that Mr Tosa would be dismissed as a result of Mr Tosa's alleged conduct in the conversations and denies that Mr Tosa was dismissed because of his conduct. As I have said Mr Porteous also gave evidence that Mr Tosa was not terminated for his conduct on that day. Mr Hughes went on to deny Mr Tosa's alleged conduct in the conversations was a pretext for dismissing Mr Tosa when the real reason was that he had failed to sign Exhibit 1. Mr Hughes denies that Mr Tosa was dismissed because of his refusal to sign Exhibit 1. Mr Hughes maintains that Mr Tosa was let go because of a downturn in the business, that this had been building up for some time and that the ultimate decision was made on the Thursday night before the Friday when that decision was communicated to Mr Tosa.

8 I accept that Mr Tosa's employment was terminated because of the downturn in the business. Mr Hughes' evidence in regard to the business experiencing a downturn was compelling. It was supported by the evidence of Mr Porteous and, although it would be difficult for Mr Tosa, in any event, to undermine that evidence, he not being intimately involved in the financial side of the business, Mr Tosa made no serious attempt to undermine the evidence that the business was in downturn as at that July date. Mr Tosa agreed that from his scanning of paperwork related to work within the business in the months leading up to his dismissal it looked like there was a downturn in work.

9 I also accept the evidence of Mr Hughes and Mr Porteous that a significant contract with the City of Busselton was ending around the time that Mr Tosa was dismissed, that is around the July time, and that there was no guarantee of the respondent getting a new contract and getting work out of that contract. I accept that that state of affairs would have been playing on the mind of the employer at that time and would have fed into the discussions that were had between Mr Hughes and Mr Porteous about the future of the business.

10 I accept that Mr Tosa was let go because of a downturn in business. I accept there was a real downturn in business. I accept also that letting someone go was an appropriate response to that. I accept that Mr Hughes and Mr Porteous discussed the matter on 30 June 2016 and that a decision was made to dismiss Mr Tosa for the reasons given. I had two witnesses giving the same account and nothing to undermine their accounts.

11 I then turn to the question of the process that was followed in relation to Mr Tosa being dismissed.

12 Mr Porteous says that in terms of process, there was a conversation on Thursday night – Mr Hughes supports that – and that on the Friday he told Mr Tosa that he was being dismissed and it was because of a downturn in work and that he would be paid a week's pay in lieu of notice, but that his involvement with the respondent was over and Mr Tosa then packed up his gear and Mr Porteous drove him home.

13 In terms of the lead up to that, and the extent to which Mr Tosa had been informed by his employer that business was bad and that might have implications for his employment, the evidence is not clear and, from the respondent's point of view in my mind, not satisfactory. It would seem that shortly before 1 July 2016 Mr Tosa approached Mr Porteous on the road outside Portavin Winery and expressed his concerns about the amount of work the respondent had and its implications for his employment, and that Mr Porteous told him that things were a bit quiet and he didn't even feel that his own job was safe. I also accept that Mr Hughes had said at toolbox meetings words to the effect that things were financially not travelling very well, that everyone had to do everything properly, the business could not afford any complaints, that the City of Busselton contract was coming to an end, and that that may have implications for the employment of employees. I accept that the business was not travelling well and that the risks to its future were known by the employees of the respondent.

14 However, it also appears clear that no one ever sat down with Mr Tosa and said to him directly that there are implications for his employment arising out of issues A, B and C, whatever they may have been, and a discussion then had about what might be done and whether there were alternatives to the ending of Mr Tosa's employment. That is, even leading up to and on that date when the decision was made to terminate the employment, there was no discussion between Mr Hughes or Mr Porteous with Mr Tosa about whether Mr Tosa might go on a period of furlough or something like that until things picked up, or that he was told that he could have a period of leave without pay but there was no need at that point in time to terminate employment and that they could come back to it and talk about it if things picked up. There was no discussion with Mr Tosa about whether he would be the right person to go and whether Mr Tosa could make a case for not being the person to leave, and that some other person might leave, or whether there could be a job-share arrangement entered into or reduced hours or any of those kind of discussions. In terms of the process, I find more could have been done. I think there was a need for a bit more clarity in the conversations that were had with Mr Tosa about what was going on within the business and the implications for his employment and whether termination could be avoided.

15 So on that basis, and that basis alone, I consider there was some unfairness in simply telling Mr Tosa on 1 July 2016 that that was the end of his employment and that he should pack up his bags and that was it.

16 In terms of the compensation that will be payable, it is clear that this is not a case where there would be great award of compensation. Mr Tosa had only been employed by the respondent for a little over six months. I think for the failure of the employer to have more fulsome discussions with Mr Tosa about the state of the business and the implications for his employment and its failure to talk about whether Mr Tosa was the person who ought to go, and at that time, or whether something else could be done, the employee should be compensated by the payment of one week of further wages, which at the time was $850.

17 So my order will be that the respondent pays to the claimant the sum of $850 within 30 days. I said at the hearing that the amount of compensation should be paid less tax but I consider I was wrong to say that as the amount awarded is compensation for the circumstances surrounding the dismissal and not for lost wages.

2016 WAIRC 00774

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN MICHAEL TOSA
	APPLICANT
	-v-
	BUSSELTON PEST AND WEED CONTROL
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 27 SEPTEMBER 2016
FILE NO/S	U 111 OF 2016
CITATION NO.	2016 WAIRC 00774

Result	Application allowed; compensation ordered
Representation	
Applicant	In person
Respondent	Mr F Hughes

Order

HAVING heard the applicant on his own behalf and Mr F Hughes for the respondent, on 21 September 2016; and

HAVING given Reasons for Decision in which I determined the applicant was dismissed unfairly and that compensation should be awarded;

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

The respondent pay to the applicant the sum of $850.00 within 30 days of the date of this order.

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

2016 WAIRC 00789

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRAYDEN CLARENCE WEST
	APPLICANT
	-v-
	STARGAP PTY LTD T/AS ADVENTURE OUT AUSTRALIA
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 7 OCTOBER 2016
FILE NO/S	B 83 OF 2016
CITATION NO.	2016 WAIRC 00789

Result	Application discontinued

Order

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

WHEREAS on Monday, 18 July 2016, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the conference adjourned on the basis that the respondent would consider seeking legal advice; and

WHEREAS on Wednesday, 28 September 2016, the parties advised the Commission that they had reached in principle settlement; and

WHEREAS on Wednesday, 5 October 2016, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of this 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.) P E SCOTT,
[L.S.] Chief Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Corinne Armstrong	Morris Corporation (WA) Pty Ltd	B 95/2016	Commissioner D J Matthews	Discontinued
Joshua Smith	A & A Plastic Strip Curtains	U 127/2016	Senior Commissioner S J Kenner	Discontinued
Shania Dee Forth	Tammy Narelle Henddiksen Lick Ya Lips Fish & Chips	U 199/2015	Commissioner D J Matthews	Discontinued
Steven Lorimer	The Brand Agency Pty Ltd	B 114/2016	Commissioner D J Matthews	Discontinued

CONFERENCES—Matters referred—

2016 WAIRC 00772

DISPUTE RE CONDITIONS OF EMPLOYMENT FOR UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

DEPARTMENT OF HEALTH

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT

DATE TUESDAY, 27 SEPTEMBER 2016

FILE NO/S CR 34 OF 2009

CITATION NO. 2016 WAIRC 00772

Result Matter dismissed

Order

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on Tuesday, 20 September 2016, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of the matter.

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

THAT the matter be, and is hereby dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority of Western Australia	Kenner SC	C 21/2015	9/09/2015	Dispute re alleged overpayment	Discontinued
United Firefighters Union of Australia West Australian Branch	Commissioner Wayne Gregson Department of Fire and Emergency Services	Scott CC	C 6/2015	19/03/2015	Dispute re Clause 57 of the Western Australian Fire Services EBA	Concluded

Parties		Commissioner	Conference Number	Dates	Matter	Result
Western Australian Police Union of Workers	Commissioner of Police	Matthews C	PSAC 14/2016	12/07/2016	Dispute re eligibility for the Forensic Qualifications Allowance of the Western Australia Police Industrial Agreement 2014	Discontinued
Western Australian Prison Officers Union of Workers'	Minister for Corrective Services Department of Corrective Services	Kenner SC	C 30/2015	17/09/2015 30/10/2015 3/08/2016	Dispute re alleged non-compliance with the Daily Deployment Staff Agreement 2012	Discontinued

CORRECTIONS—

2016 WAIRC 00758

THE ORDER OF SERVANTS OF MARY INCORPORATED (SERVITE FRIARS) (SERVITE COLLEGE COUNCIL INC) NON-TEACHIHG STAFF ENTERPRISE BARGAINING AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES AND OTHERS

APPLICANTS

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE MONDAY, 19 SEPTEMBER 2016

FILE NO/S AG 9 OF 2016

CITATION NO. 2016 WAIRC 00758

Result Correction order issued

Representation

Applicants Ms M Cook (Independent Education Union of Western Australia, Union of Employees)

Ms J Maccarone (Catholic Education Western Australia as agent for Order of Servants of Mary Incorporated (Servite Friars) (Servite College Council Inc))

Mr J Robb (United Voice WA)

Ms L Chandler (Australian Nursing Federation, Industrial Union of Workers, Perth)

Order

WHEREAS on 10 March 2016 the Independent Education Union of Western Australia, Union of Employees, Order of Servants of Mary Incorporated (Servite Friars) (Servite College Council Inc), United Voice WA, and the Australian Nursing Federation, Industrial Union of Workers, Perth applied to the Commission to register 'The Order of Servants of Mary Incorporated (Servite Friars) (Servite College Council Inc) Non-Teaching Staff Enterprise Bargaining Agreement, 2014' as an industrial agreement pursuant to s 41 of the *Industrial Relations Act 1979* (WA) and attached a copy of the agreement to the application;

AND WHEREAS a hearing to register the agreement was held on 21 June 2016;

AND WHEREAS at the hearing on 21 June 2016 the parties, by consent, provided to the Commission a replacement cover page for the agreement which corrected a typographical error;

AND WHEREAS the Commission registered the copy of the agreement provided by the parties on 10 March 2016 as amended by the parties at the hearing on 21 June 2016 as 'The Order of Servants of Mary Incorporated (Servite Friars) (Servite College Council Inc) Non-Teaching Staff Enterprise Bargaining Agreement, 2014' ([2016] WAIRC 00376);

AND WHEREAS the Commission identified an error in the registration order which issued on 21 June 2016;

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

THAT the order [2016] WAIRC 00376 be corrected by deleting the words:

> THAT the agreement made between the parties filed in the Commission on 10 March 2016 entitled 'The Order of Servants of Mary Incorporated (Servite Friars) (Servite College Council Inc) Non-Teaching Staff Enterprise Bargaining Agreement, 2014' attached hereto be registered as an industrial agreement in replacement of 'The Servite College Council Non-Teaching Staff Enterprise Bargaining Agreement, 2012' which by operation of s 41(8) is hereby cancelled.

and inserting in lieu:

> THAT the agreement made between the parties filed in the Commission on 10 March 2016 entitled 'The Order of Servants of Mary Incorporated (Servite Friars) (Servite College Council Inc) Non-Teaching Staff Enterprise Bargaining Agreement, 2014' as amended by the parties on 21 June 2016 attached hereto be registered as an industrial agreement in replacement of 'The Servite College Council Non-Teaching Staff Enterprise Bargaining Agreement, 2012' which by operation of s 41(8) is hereby cancelled.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2016 WAIRC 00780

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 23 MARCH 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR AMARIJT HANSRA
	APPLICANT
	-v-
	MR JAMES MCMAHON DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 28 SEPTEMBER 2016
FILE NO/S	APPL 17 OF 2016
CITATION NO.	2016 WAIRC 00780

Result	Order issued
Representation	
Applicant	Ms J Knoth of counsel
Respondent	Mr R Andretich of counsel

Order

WHEREAS this is an appeal against a decision to take removal action against the appellant pursuant to s 106(2) of the *Prisons Act 1981*; and

WHEREAS on 15 August 2016 the Commission held a directions hearing; and

WHEREAS at the conclusion of that hearing the parties agreed to mediation pursuant to the *Employment Dispute Resolution Act 2008*; and

WHEREAS the mediation did not proceed; and

WHEREAS on 23 September 2016 the appellant provided to the Commission a Minute of Consent Order; and

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under section 27(1)(v) of the *Industrial Relations Act 1979 (WA)*, and by consent, hereby orders –

1. The appellant's appeal in APPL 17 of 2016 be stayed until the appellant's application for judicial review filed in the Supreme Court of Western Australia (Court) on 15 September 2016 is determined by the Court, or until further order of the Commission.
2. The appellant is to report back to the Commission within 7 days of the Court's determination of the judicial review application.

(Sgd.) P E SCOTT,
Chief Commissioner,
[L.S.] On behalf of the Western Australian Industrial Relations Commission.

2016 WAIRC 00785

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NIGEL BEVERLY
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 5 OCTOBER 2016
FILE NO/S	APPL 41 OF 2016
CITATION NO.	2016 WAIRC 00785

Result	Programming Order issued
Representation	(by written correspondence)
Appellant	Mr D Jones, of counsel
Respondent	Mr N John, of counsel

Order

WHEREAS this is an appeal against a decision to take removal action against the appellant pursuant to s 33P of the *Police Act 1892*; and

WHEREAS by order of 15 August 2016 the hearing of the appeal was adjourned pending the outcome of conciliation [2016] WAIRC 00706; and

WHEREAS on 16 September 2016 the Commission was informed that the parties were not able to reach a settlement after conciliation; and

WHEREAS on 4 October 2016, the respondent provided to the Commission a Minute of Consent Order;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s 27(1)(v) of the *Industrial Relations Act 1979 (WA)*, and by consent, hereby orders –

1. THAT the parties comply with reg 92 of the *Industrial Relations Commission Regulations 2005* within 28 days of the date of this Order, being by Wednesday, 9 November 2016.
2. THAT the appeal be listed for hearing on Wednesday, 15 February 2017 and Thursday, 16 February 2017.
3. THAT the appellant file his outline of submissions by Wednesday, 1 February 2017.
4. THAT the respondent file his outline of submissions by Wednesday, 8 February 2017.
5. THAT the parties have liberty to apply.

(Sgd.) P E SCOTT,
Chief Commissioner,
[L.S.] On behalf of the Western Australian Industrial Relations Commission.

2016 WAIRC 00821

DECLARATION PURSUANT TO SECTION 42H

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS & CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANTS
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 12 OCTOBER 2016
FILE NO.	APPL 53 OF 2016
CITATION NO.	2016 WAIRC 00821

Result	Declaration made
Representation	
Applicant	Ms R Cosentino of counsel and with her Mr P Hunt
Applicant	Ms J Moore
Respondent	Mr T Clark and with him Ms C Pickering

Declaration

HAVING heard Ms R Cosentino, of counsel, for the Western Australian Police Union of Workers and with her Mr P Hunt and Ms J Moore for the Civil Service Association of Western Australia Incorporated and Mr T Clark and with him Ms C Pickering for the respondent on 6 October 2016 and 12 October 2016; and

WHEREAS I gave oral reasons for decision at the conclusion of proceedings on 12 October 2016; and

WHEREAS I stated I would provide written reasons for decision upon the request of any party to the matter;

NOW THEREFORE I pursuant to the section 42H *Industrial Relations Act 1979* (WA) declare that the bargaining between the Western Australian Police Union of Workers and the Civil Service Association of Western Australia Incorporated and the Commissioner of Police has ended.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2015 WAIRC 00901

REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY OWEN COLLARD
	APPLICANT
	-v-
	DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT
	STEVE GLEW EXECUTIVE DIRECTOR SERVICE STANDARDS AND CONTRACTING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 SEPTEMBER 2015
FILE NO/S	APPL 143 OF 2015
CITATION NO.	2015 WAIRC 00901

Result	Extension of time granted
Representation	
Applicant	No appearance required
Respondent	Mr D Matthews of counsel

Order

HAVING heard Mr D Matthews on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 2 October 2015.

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

2016 WAIRC 00762

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUZANNE BROWN
	CLAIMANT
	-v-
	N & M THOMAS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 20 SEPTEMBER 2016
FILE NO/S	B 108 OF 2016
CITATION NO.	2016 WAIRC 00762

Result	Orders made
Representation	
Applicant	In person
Respondent	Ms S Maddern (of Counsel) and Ms J Vincent (of Counsel)

Order

HAVING heard the Ms S Brown on her own behalf and Ms S Maddern, of Counsel, on behalf of the respondent on 20 September 2016;

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

1. The hearing listed for 4 and 5 October 2016 be vacated;
2. The respondent is to file and serve an Amended Notice of Answer and Outline of Submissions by 4 October 2016.

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

2016 WAIRC 00056

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	J'DIGTA TECHNOLOGY PTY LTD
	APPLICANT
	-v-
	ALLIED EXPRESS TRANSPORT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 5 FEBRUARY 2016
FILE NO/S	RFT 2 OF 2016
CITATION NO.	2016 WAIRC 00056

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	No appearance required

Order

WHEREAS on 3 February 2016 the applicant filed a notice of referral to the Road Freight Transport Industry Tribunal;

AND WHEREAS on 3 February 2016 the applicant applied to the Tribunal for an order abridging the time for the filing of a notice of answer and counter proposal in respect of the herein application pursuant to Regulation 99D(4) of the Industrial Relations Commission Regulations, 2005;

AND WHEREAS the Tribunal has considered the application for an abridgement of time for filing a notice of answer and counter proposal ex parte in Chambers;

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007, hereby orders –

THAT the respondent do file a notice of answer and counter proposal in answer to the herein application within 5 days of service of the notice of referral on the respondent.

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

2016 WAIRC 00782

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUY COURT
	APPLICANT
	-v-
	MATT SHARP, BIS INDUSTRIES
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 29 SEPTEMBER 2016
FILE NO/S	RFT 8 OF 2016
CITATION NO.	2016 WAIRC 00782

Result	Order made
Representation	
Applicant	Mr R Moore (as agent)
Respondent	Ms J Scott (of counsel)

Order

HAVING heard Mr R Moore, as agent, on behalf of the applicant and Ms J Scott, of counsel, on behalf of the respondent on 29 September 2016;

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

(1) The applicant is to file and serve particulars of his claim by 31 October 2016.

(2) The respondent is to file and serve a response to the applicant's particulars of claim by 14 November 2016.

(3) The hearing be listed for two days in early December.

(4) The parties have liberty to apply.

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

2016 WAIRC 00764

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BONIFASSI NICOLAS; NICOLAS BONIFASSI **APPLICANT** **-v-** E.J.FILLAUDEAU AND J.J.MAINDOK; EMMANUEL FILLAUDEAU AND J.J. MAINDOK **RESPONDENT**
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 21 SEPTEMBER 2016
FILE NO/S	U 33 OF 2016, B 33 OF 2016
CITATION NO.	2016 WAIRC 00764

Result	Name of applicant and respondent amended
Representation	
Applicant	Ms S Bonifassi (as agent)
Respondent	Mr G McCorry (as agent)

Order

WHEREAS these are applications pursuant to s 29(1)(b)(i) and s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS at the hearing on 24 August 2016 the parties agreed to the name of the applicant in the unfair dismissal application being amended;

AND WHEREAS at the hearing on 24 August 2016 the parties agreed to the name of the respondent in the unfair dismissal and denial of contractual benefits applications being amended;

AND WHEREAS the Commission is of the opinion that it is appropriate to amend the name of the applicant in the unfair dismissal application and the name of the respondent in the unfair dismissal and denial of contractual benefits applications;

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

1. THAT the name of the applicant in the unfair dismissal application be amended to 'Nicolas Bonifassi'.

2. THAT the name of the respondent in the unfair dismissal and denial of contractual benefits applications be amended to 'E.J Fillaudeau and J.J Maindok trading as Fillaudeau's'.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary Teachers Enterprise Bargaining Agreement 2015 - The AG 29/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Congregation of the Presentation Sisters (WA) Inc Teachers Enterprise Bargaining Agreement 2015 - The AG 25/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees The Congregation of the Presentation Sisters (WA) Inc	(Not applicable)	Commissioner T Emmanuel	Agreement registered
John XXIII College Inc. Teachers Enterprise Bargaining Agreement 2015 AG 26/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees John XXIII College Inc.	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Loreto Nedlands Limited Teachers Enterprise Bargaining Agreement 2015 AG 30/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees Loreto Nedlands Limited	(Not applicable)	Commissioner T Emmanuel	Name of applicant amended; Agreement registered
Mercy Education Limited Teachers Enterprise Bargaining Agreement 2015 AG 27/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees Mercy Education Limited	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Norbertine Canons Incorporated Teachers Enterprise Bargaining Agreement 2015 AG 24/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees Norbertine Canons Incorporated	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Order of Servants of Mary Incorporated (Servite Friars) (Servite College Council Inc) Teachers Enterprise Bargaining Agreement 2015 AG 35/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees Order of Servants of Mary Incorporated (Servite Friars) (Servite College Council Inc)	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Roman Catholic Archbishop of Perth Teachers Enterprise Bargaining Agreement 2015 - The AG 31/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees The Roman Catholic Archbishop of Perth	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Roman Catholic Bishop of Broome Teachers Enterprise Bargaining Agreement 2015 - The AG 32/2016	11/10/2016	The Roman Catholic Bishop of Broome The Independent Education Union of Western Australia, Union of Employees	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Roman Catholic Bishop of Bunbury Teachers Enterprise Bargaining Agreement 2015 - The AG 28/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees The Roman Catholic Bishop of Bunbury	(Not applicable)	Commissioner T Emmanuel	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Roman Catholic Bishop of Geraldton Teachers Enterprise Bargaining Agreement 2015 - The AG 34/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees The Roman Catholic Bishop of Geraldton	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Trustees of Edmund Rice Education Australia Teachers Enterprise Bargaining Agreement 2015 AG 33/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees Trustees of Edmund Rice Education Australia	(Not applicable)	Commissioner T Emmanuel	Name of applicant amended; Agreement registered
Trustees of the Marist Brothers Province of AustraliaTeachers Enterprise Bargaining Agreement 2015 - The AG 36/2016	11/10/2016	The Independent Education Union of Western Australia, Union of Employees The Trustees of the Marist Brothers Province of Australia	(Not applicable)	Commissioner T Emmanuel	Name of applicant amended; Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2016 WAIRC 00784

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 2 MAY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES RICHARD TITELIUS

APPELLANT

-v-

DIRECTOR GENERAL
DEPARTMENT OF THE ATTORNEY GENERAL

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MRS L KENNEWELL - BOARD MEMBER
MR G EDWARDS - BOARD MEMBER

DATE MONDAY, 3 OCTOBER 2016

FILE NO PSAB 8 OF 2016

CITATION NO. 2016 WAIRC 00784

Result Discontinued by leave

Representation

Appellant In person

Respondent Mr D Anderson of counsel

Order

HAVING heard the appellant on his own behalf and Mr D Anderson of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby discontinued by leave.

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

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2015 WAIRC 00902

REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY OWEN COLLARD
	APPLICANT
	-v-
	DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT
	CHERYL BARNETT EXECUTIVE DIRECTOR METROPOLITAN SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 SEPTEMBER 2015
FILE NO/S	APPL 144 OF 2015
CITATION NO.	2015 WAIRC 00902

Result	Extension of time granted
Representation	
Applicant	No appearance required
Respondent	Mr D Matthews of counsel

Order

HAVING heard Mr D Matthews on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 2 October 2015.

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

2016 WAIRC 00084

REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY OWEN COLLARD
	APPLICANT
	-v-
	DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT
	CHERYL BARNETT EXECUTIVE DIRECTOR METROPOLITAN SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 FEBRUARY 2016
FILE NO.	APPL 144 OF 2015
CITATION NO.	2016 WAIRC 00084

Result	Direction issued
Representation	
Applicant	In person
Respondent	Mr D Anderson of counsel

Direction

HAVING heard Mr B Collard on his own behalf and Mr D Anderson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the applicant file and serve an amended notice of referral by no later than 22 February 2016.

(2) THAT the respondent file and serve an amended notice of answer no later than 7 days from service of the applicant's amended notice of referral.

(3) THAT the application be listed for hearing for one day on a date to be fixed.

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

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

2016 WAIRC 00733

REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00733
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 11 APRIL 2016
DELIVERED	**:**	TUESDAY, 30 AUGUST 2016
FILE NO.	**:**	APPL 144 OF 2015
BETWEEN	**:**	BRADLEY OWEN COLLARD
		Applicant
		AND
		CHIEF EXECUTIVE OFFICER DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT
		Respondent

Catchwords	**:**	*Industrial Law (WA) - Whether or not Regulations have been fairly and properly applied - Principles applied - Relevant provisions of the Regulations have been fairly and properly applied - Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA)
		Public Sector Management Act 1994
		Public Sector Management (Redeployment and Redundancy) Regulations 2014
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr D Anderson of counsel
Solicitors:		
Respondent	**:**	State Solicitors Office

Case(s) referred to in reasons:

Perth Finishing College v Watts (1989) 69 WAIG 2307

Reasons for Decision

Background

1 Mr Collard was originally employed by the Department of Child Protection as a Level 5 Senior Officer Aboriginal Services at the Department's Fremantle District Office. Mr Collard took extended approved leave without pay from the Department in 2008. He did not return to the Department until February 2015. The circumstances of his return to employment at the Department and what occurred subsequently during the course of 2015 have become controversial between the parties.

2 During Mr Collard's absence on extended leave without pay, on 31 May 2009, Mr Collard's Level 5 position was, as a result of restructuring of the Department's operations, deemed surplus to requirements and was abolished. From 1 June 2009, Mr Collard was placed on the Department's "Internal Surplus List". Mr Collard was informed of this at the time.

3 On his return to work in February 2015, Mr Collard was assigned general duties consistent with his classification level.

4 Mr Collard was subsequently notified by letter dated 14 August 2015 of his formal designation as a redeployee under the terms of the then newly made *Public Sector Management (Redeployment and Redundancy) Regulations 2014* which substantively commenced on 1 May 2015. The Department, in accordance with its obligations under the Regulations, undertook a search for a suitable alternative position for Mr Collard. Positions were identified and considered. Most appositely, a position was identified as Senior Aboriginal Officer in the Department's Armadale office. By letter dated 14 December 2015, Mr Collard was formally notified by the Department of his proposed transfer to this position under reg 10 of the Regulations.

5 In these proceedings, Mr Collard now complains that in doing so, the respondent failed to comply with the terms of the Regulations in relation to his registerable status and his transfer. He has brought his claim before the Commission under s 95(2) of the *Public Sector Management Act 1994*.

Statutory provisions

6 It is convenient at this point to set out the relevant statutory provisions. Section 95 of the PSM Act is in the following terms:

> (1) In this section —
>
> ***section 94 decision*** means a decision made or purported to be made under regulations referred to in section 94 (other than a decision which is a lawful order by virtue of section 94(4)).
>
> (2) A section 94 decision may be referred to the Industrial Commission —
>
> (a) under the *Industrial Relations Act 1979* section 29(1)(a); or
>
> (b) by an employee aggrieved by the decision,
>
> as if it were an industrial matter that could be so referred under that Act.
>
> (3) A referral under subsection (2) must be made within the period after the making of the decision that is prescribed under section 108.
>
> (4) The *Industrial Relations Act 1979* applies to and in relation to a section 94 decision referred under subsection (2) as if the decision were an industrial matter referred to the Industrial Commission in accordance with that Act.
>
> (5) In exercising its jurisdiction in relation to a decision referred under subsection (2), the Industrial Commission must confine itself to determining whether or not regulations referred to in section 94 have been fairly and properly applied to or in relation to the employee concerned.
>
> (6) The Industrial Commission does not have jurisdiction in respect of a section 94 decision if the employment of the employee concerned is terminated.

7 The relevant regulations for the purposes of a "section 94 decision" as referred to in s 95(1) of the PSM Act are the Regulations. Part 2 and the Regulations generally, make provision for procedures and processes to take place for employees employed in government departments and organisations as defined in s 3(1) of the PSM Act, who are subject to redeployment, retraining and redundancy. Part 2 – Registerable employees provides as follows:

> **8. Consultation with employees who may become registrable**
>
> (1) An employing authority may, in accordance with the Commissioner's instructions, make a determination that an employee may become a registrable employee.
>
> (2) As soon as practicable after making the determination, the employing authority must give the employee written notice of all relevant information relating to the determination.
>
> (3) Without limiting subregulation (2), the notice must include the following —
>
> (a) the reasons why the employee may become a registrable employee;
>
> (b) any measures the employing authority considers could be taken that would avoid the employee becoming a registrable employee;
>
> (c) the likely period within which the employee may become a registrable employee;
>
> (d) if other employees in the same department or organisation are the subject of a determination of the kind referred to in subregulation (1) that was made at the same time as the determination in respect of the employee, the number of those employees.
>
> (4) The employing authority of an employee given a notice under subregulation (2) must consult the employee in relation to the matters set out in the notice.
>
> (5) Nothing in this regulation requires an employing authority to disclose confidential information that the employing authority considers would be contrary to the interests of its department or organisation to disclose.
>
> (6) Notice given to an employee under subregulation (2) does not constitute notice for the purposes of regulation 9(1).
>
> (7) The determination may be revoked at any time.
>
> (8) If the determination is revoked, the employing authority must give the employee written notice of the revocation.

9. Employee must be notified if registrable or to become registrable

(1) An employing authority must give an employee written notice that —

(a) the employee's office, post or position is or is to be abolished and the employee may be —

(i) transferred under regulation 10; or

(ii) registered under regulation 18;

or

(b) the employee is, or will become, surplus to the requirements of the employee's department or organisation and the employee may be —

(i) transferred under regulation 10; or

(ii) registered under regulation 18.

(2) The notice may be revoked at any time.

(3) If the notice is revoked, the employing authority must give the employee written notice of the revocation.

10. Transfer of registrable employees

(1) The employing authority of an employee who —

(a) has been given a notice under regulation 9(1); and

(b) is a registrable employee,

may transfer the employee to another office, post or position in the department or organisation (the ***new office, post or position***) at the same or equivalent level of classification.

(2) An employee who is transferred under subregulation (1) must receive pay at the rate applicable to the new office, post or position on and from the date of that transfer.

(3) An employee who is on a fixed term contract —

(a) may be transferred under subregulation (1) to another office, post or position in the department or organisation under a new fixed term contract on the same or equivalent terms; and

(b) cannot be transferred under subregulation (1) to another office, post or position under a new fixed term contract on terms that are not the same or equivalent.

(4) The duration of the new fixed term contract of an employee to whom subregulation (3) applies must not extend beyond the duration of the fixed term contract under which the employee was previously employed.

8 For present purposes, reg 11 in Part 3 is also relevant and it provides:

11. Registrable employees may be offered voluntary severance

(1) In this regulation —

notified employee means an employee who has been given notice under regulation 9(1).

(2) The employing authority of a notified employee may offer voluntary severance to the employee if the employing authority is satisfied that the employee cannot be transferred within his or her department or organisation.

(3) The offer must —

(a) specify a period of not less than 8 weeks after the offer is made within which the employee may accept or refuse the offer; and

(b) provide for the employee to accept the offer and resign from his or her employment with effect on and from a day that is not later than 4 weeks after the day on which the offer is accepted; and

(c) provide for the making of a severance payment under regulation 13 to the employee.

(4) The offer must include a notification that refusal to accept the offer may result in the employing authority registering the employee under regulation 18 and that, if the employee is registered and not offered suitable employment, the employee's employment may be terminated under Part 6.

(5) An acceptance of an offer must be in writing signed by the employee.

9 Before considering the evidence, I make some observations about these provisions and their interpretation.

10 It is clear that before a matter may be referred to the Commission, there must be a "decision made" or "purported to be made" "under regulations referred to in section 94". A decision made "under" the Regulations is one that is made by virtue of, pursuant to or in accordance with and conformable to them: *Perth Finishing College v Watts* (1989) 69 WAIG 2307 at 2312 citing *Garbin v Wild (1965)* WAR 72 and *R v Clyne ex parte Harrop* (1941) VR 200 per O'Bryan J at 201.

11 As to a decision "purported to be made", there is no reason in my view to give this phrase other than its ordinary and natural meaning. This would encompass a decision in the sense of "1.That which is conveyed or expressed … 2.That which is intended to be done or effected by something…" (*Shorter Oxford English Dictionary*). Of course, the necessary nexus must exist between the purported decision and it being taken "under" the Regulations as referred to above. There is no issue taken in this case that the Department made a relevant decision for the purposes of s 95(1) of the PSM Act.

12 By s 95(2) of the PSM Act, once a relevant decision has been taken, either an employer with a sufficient interest in the matter, or the employee aggrieved by the decision, may refer the matter to the Commission. On such a referral, the matter before the Commission is taken to be an industrial matter for the purposes of the IR Act. Such a referral is required to be made within the period of 21 days after the relevant decision, as prescribed by s 95(3) of the PSM Act and reg 44 of the Regulations. Presumably, the power to extend time in s 27(1)(n) of the IR Act would be able to be exercised in an appropriate case. The present application was referred to the Commission within the 21 day time limit.

13 On a matter having been validly referred to the Commission under s 95(2), by s 95(5), the exercise of the Commission's jurisdiction is confined and is not at large. This is despite the terms of ss 95(2) and (4) of the PSM Act, which, when read together, would appear to suggest that all of the powers of the Commission under the IR Act are able to be exercised.

14 The terms of s 95(5) limit the Commission's jurisdiction to a determination as to "whether or not" the regulations have been "fairly and properly" applied. In my view, the phrase "fairly and properly applied" should, in the absence of any indication to the contrary in the terms of s 95 or the Regulations, be construed in accordance with their ordinary and natural meaning. "Fairly", relevantly means "2. Equitably, candidly, impartially … 3. Becomingly; proportionately … legitimately …". Further, "properly" relevantly means "1. Excellently; genuinely, thoroughly … 2. Suitably, appropriately …". (*Shorter Oxford English Dictionary*). Of course, given that such a matter referred to the Commission is to be taken as an industrial matter and the IR Act applies to it, the jurisdiction of the Commission, even so confined, is to be discharged in accordance with equity, good conscience and the substantial merits of the case: s 26(1) IR Act.

15 The Commission, in determining whether reg 10 has been fairly applied, in my view, is required to consider objectively, the circumstances of the transfer, in light of all the evidence. When read with reg 11(2), the employer must be "satisfied" that the employee "cannot" be transferred within his or her department or organisation, before a voluntary severance can be considered. This necessarily implies that the employer has taken all reasonable steps to locate a suitable alternative position for the employee and none is available. The use of the word "cannot" in reg 11(2), strongly suggests that if an employee can be transferred, as opposed to being offered a voluntary severance, they should be.

16 This process should involve consideration of the circumstances of the employer, as well as those of the employee. These circumstances will ordinarily involve the employee's skills, experience qualifications and attributes. Furthermore, the employer's interests will obviously involve a proper assessment of any positions which are available and into which the registrable employee can be transferred, in light of the attributes of the employee. There is nothing in the Regulations that requires the employer to create a position for a registrable employee where none otherwise exists.

17 It is not necessary in this case, for reasons which follow, for consideration to be given to the scope of the Commission's powers, should a finding be made that the Regulations have not been fairly and properly applied in any particular case. In the absence of any argument on the issue, that matter can await another day.

Consideration

18 Mr Collard referred to his return to work in February 2015. He said in his evidence that up until that time he had little or no contact from the department. In the month prior to his return to work, in January 2015, Mr Collard met with Mr Mace, the Department's District Director at the Fremantle office, to discuss Mr Collard's return. Mr Collard testified that Mr Mace informed him that he would return to a similar position that he held previously.

19 On and after his return to work at the Fremantle office, Mr Collard maintained that he constantly sought to clarify his employment status as a redeployee. He was provided with interim work in a temporary position at this time. Sometime later, in August 2015, Mr Collard received a letter from Ms Barnett, the Executive Director Metropolitan Services of the Department. In it, Ms Barnett referred to the abolition of Mr Collard's substantive Level 5 position as Senior Officer Aboriginal Services at the Fremantle office, in May 2009 and his placement on the department's internal Surplus List since that time. The letter further referred to the Regulations, which had just been introduced, and that were to be applied to his circumstances. The letter further referred to the Department taking advice on the application of the new Regulations, from the Public Sector Commission and the State Solicitor's Office.

20 Ms Barnett informed Mr Collard that in accordance with reg 9 of the Regulations, he was formally deemed to be a "registrable employee". This meant that Mr Collard may be transferred under reg 10 or "registered" under reg 18. Ms Barnett further informed Mr Collard that assistance had been given to him in an endeavour to obtain another position within the department. Mr Collard was requested to provide further information in relation to his experience and an updated curriculum vitae, and details of any training courses that could be provided to him. Mr Collard was also informed at this time that although voluntary severance may be offered under reg 11 of the Regulations, where there was a reasonable likelihood an employer would not be able to offer alternative employment, the Department did not consider this to be applicable, given Mr Collard's skills and classification level. In the course of this process, Mr Collard had been given assistance by the Department's human resources staff.

21 A little later, on 14 December 2015, Mr Collard said he received a further letter from Ms Barnett. This letter informed him of a proposed transfer under reg 10 of the Regulations, to a Level 5 position of Senior Officer Aboriginal Services at the Department's Armadale office. The proposed transfer was to a similar position that Mr Collard previously held in the Fremantle office. The transfer would take effect from 21 December 2015. Mr Collard was invited to comment on the proposed transfer. He did by email of 15 December 2015.

22 In his response, Mr Collard objected to the proposed transfer. He contended that the position as proposed by the respondent was not consistent with his skills and experience. Given his leave without pay, and the experience he gained in other employment outside of the public sector, Mr Collard said that there had been no proper assessment of his attributes, despite him raising these matters with the human resources staff and management of the Department. Mr Collard also raised other possible placements into areas of the Department such as Residential Care. Additionally, Mr Collard complained that given his caring responsibilities for family members, travelling to Armadale for work would make these responsibilities more difficult to fulfil. Mr Collard further complained generally that he had not been treated with integrity, impartiality and transparency.

23 Additionally, Mr Collard, in his evidence, referred to a breach of public sector standards that he instituted, which was not progressed by the Department because of their view as to the effect of the Regulations and the avenue of an appeal to this Commission. Further allegations were made by Mr Collard that Mr Mace and Ms Barnett had, as a result of internal communications, demonstrated a lack of bona fides in dealing with his requests and had defamed him and subjected him to baseless attacks.

24 These contentions were denied by the Department. It submitted that on his return to work, following his extensive leave without pay to pursue other employment opportunities, Mr Collard was provided with a reintegration and induction program to assist his return to the workplace. Mr Collard was given meaningful work to do at his classification level in accordance with an approved job description. Mr Collard was requested to provide updated information to the Department in relation to his skills and experience and a revised curriculum vitae, in order that the human resources staff could assist in placing Mr Collard in a suitable alternative position.

25 The suggestion by Mr Collard that on his return to work in February 2015 and subsequently, his status as a redeployee was not made clear by the Department was rejected. It was contended that as a result of the Regulations not coming into effect until May 2015, and guidance material to employers being available from March 2015, the Department was not able to confirm Mr Collard's status under the new regime until it did. Further, the Department's human resources staff informed Mr Collard in June 2015, that the Department was establishing processes in accordance with the new Regulations. He would be provided guidance and confirmation of his status as soon as the Department was in a position to do so.

26 The Department also noted that its efforts in these early stages were resisted by Mr Collard. This ultimately led to the institution of disciplinary action in relation to Mr Collard failing to comply with lawful and reasonable directions in the workplace. As to the suggestion that officers of the Department engaged in inappropriate behaviour towards Mr Collard, this was denied. The Department maintained that Mr Collard was engaging in obstructive behaviour on his return to work and that the communications obtained by him referred to in his evidence, reflected a degree of frustration by the officers concerned. In any event, the senior officer involved subsequently apologised to Mr Collard.

27 On behalf of the Department, evidence was led from Ms Barnett. She testified that since Mr Collard's return to work in early 2015, it had been looking for a permanent position for him to transfer into. Ms Barnett outlined the restructuring that took place at the Department whilst Mr Collard was on leave without pay. One result of that restructuring was that there were not many Level 5 positions available. Two areas had been earlier identified as possibilities, one in the CHILDFIRST area and the other in the Aboriginal Engagement Coordination Unit. While these were identified, given Mr Collard's resistance to these positions, the Department did not press the issue of a possible transfer into them.

28 On the other hand, there was a Level 5 position identified at the Armadale office and also one at the Midland office. Ms Barnett said that the Department took into account Mr Collard's personal circumstances in terms of travelling to and from the workplace, and concluded that Armadale would be preferable, as it is a similar travel distance to the Fremantle office. Furthermore, the Armadale District Office, being the biggest district office in the State, has a large percentage of aboriginal children in need. A position was required to engage with aboriginal families in that area.

29 Ms Barnett referred to her letter of 14 December 2015, proposing the transfer to the Armadale position and Mr Collard's response. Ms Barnett testified that the Department took into account the matters Mr Collard raised in his email of 15 December 2015. However, she said that there were simply no Level 5 positions available at the Fremantle office. The alternative position in the Midland district office was considered less suitable than the Armadale position. In terms of Mr Collard's general skills and experience, Ms Barnett testified that she engaged with the human resources staff and also the Executive Director in charge of the Residential Care area of the Department. As to that area, Ms Barnett said the availability of positions was very limited, and most were at a more junior level being Level 2 and 3. There are some management positions at Level 6 and 7. The one alternative Level 5 position in that area, for a Recreation Officer, was not vacant and accordingly, no opportunities were available to Mr Collard to be transferred into.

30 In relation to other higher level positions, Ms Barnett testified that she had previously spoken with Mr Collard and met with him. She thought this was sometime after he had made a voluntary severance application. She explained to him that while he would be returning to work at his previous classification level, given the experience and skills he had obtained whilst away from the Department, he should consider other promotional positions and his experience would make him competitive for these types of roles.

31 As to Mr Collard's personal circumstances and his family responsibilities, Ms Barnett said that in the letter of transfer, she specifically referred to Mr Collard discussing flexible working arrangements with the District Director at the Armadale Office, to take into account his family responsibilities. She understood that there have been negotiations to that end.

32 In terms of the assessment of Mr Collard's skills and experience, and his complaint that there was not a proper formal assessment, Ms Barnett said that all of Mr Collard's skills, experience, training including reference to his updated curriculum vitae, were taken into account. Additionally, the Department obtained feedback from colleagues and others in the Fremantle office and the positive responses in relation to Mr Collard's abilities and capacities. The Department was confident that they had suitably assessed Mr Collard's attributes for the available positions.

33 Whilst it was not particularised in Mr Collard's claim, a large complaint as it emerged on the evidence and submissions, was to the Department's transfer of him under reg 10. Accordingly, and as counsel for the respondent conceded during the course of the proceedings, the Commission would proceed to deal with and determine the matter on this basis also.

34 I have carefully considered all of the evidence led in this matter, both oral and documentary. Mr Collard bears the onus of establishing, on the balance of probabilities, that the Department has failed to fairly and properly apply the relevant regulations in this case. I am far from persuaded that this has been established.

35 As to the requirements of reg 9, they are procedural. There is no doubt that the Department duly notified Mr Collard by written notice that his position had been abolished and that he may be transferred or registered in accordance with the Regulations. As to reg 10, the Department properly applied it. Reg 10 enables an employer to transfer an employee who has been duly notified under reg 9, which occurred in this case. The condition upon such a transfer is that it is to an office, post or position at the same or equivalent level of classification, which occurred in this case. That is, any transfer must be "at level".

36 In this case, in relation to the fairness of the transfer, I am satisfied on the evidence that the Department paid due regard to Mr Collard's background skills and experience, in the context of his previous position with the Department. I accept also that the Department did encourage Mr Collard to seek higher level positions which for reasons only known to him, he seems not to have done so. I am further satisfied on the evidence that the Department did take into account Mr Collard's personal circumstances as best as they could be accommodated. The offer of flexible work arrangements was a reasonable response in the circumstances.

37 As to the complaint by Mr Collard that there was undue delay and some obfuscation in dealing with his status as a redeployee, in fairness, the Department had to come to terms with the new regime introduced by the Regulations. I am satisfied that on the basis of the material before the Commission, as soon as it was practicable to do so, in light of the provision of relevant advice, Mr Collard's status was confirmed. All reasonable steps were taken by the Department to accommodate his interests. Furthermore, the Department also granted Mr Collard very extensive leave without pay to pursue other employment opportunities outside of the public sector. The evidence was that the initial period of leave without pay granted was some two years, and this was extended by two year increments on two further occasions. Given the length of time that Mr Collard had been away from his workplace, at his request, which the employer accommodated, in my view Mr Collard cannot now be seen to complain that he has been treated unfairly following his request to return to work at the Department. In my view, the Department took all reasonable steps to reintegrate Mr Collard back into its operations and afforded him a fair go.

38 Finally, as to the contention put by Mr Collard that in failing to deal with his breach of standards complaint, the Department has acted inappropriately, I am not persuaded to this view. In any event, these proceedings have overtaken any such process. Mr Collard has had a full opportunity to put his case and advance his contentions and evidence as to why he considered his transfer to have been unfair.

39 Having regard to all of the foregoing, I am of the view that Mr Collard has been given a fair go and the relevant provisions of the Regulations have been fairly and properly applied in this case. I also add that regrettably, due to other heavy work commitments and a period of leave, my decision in this matter has been handed down somewhat later than would ordinarily be the case. The order to issue also reflects the proper name of the employer.

40 The application is dismissed.

2016 WAIRC 00736

REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY OWEN COLLARD
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 31 AUGUST 2016
FILE NO/S	APPL 144 OF 2015
CITATION NO.	2016 WAIRC 00736

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D Anderson

Order

HAVING heard the appellant on his own behalf and Mr D Anderson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the name of the respondent be amended by deleting the name "Department for Child Protection and Family Support Cheryl Barnett Executive Director Metropolitan Services" and inserting in lieu thereof the name "Chief Executive Officer Department for Child Protection and Family Support".

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

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

2016 WAIRC 00700

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUSTIN MATTHEW LANE
	APPLICANT
	-v-
	CENTRAL INSTITUTE OF TECHNOLOGY (TAFE)
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 11 AUGUST 2016
FILE NO/S	APPL 24 OF 2016
CITATION NO.	2016 WAIRC 00700

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Mr R Bathurst of counsel

Order

HAVING heard the applicant on his own behalf and Mr R Bathurst of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders by consent –

THAT the application be and is hereby discontinued by leave.

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

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2016 WAIRC 00743

REFERENCE OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	**:**	2016 WAIRC 00743
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 24 JUNE 2016, TUESDAY, 16 AUGUST 2016
DELIVERED	**:**	MONDAY, 5 SEPTEMBER 2016
FILE NO.	**:**	OSHT 4 OF 2016
BETWEEN	**:**	STEVE KAPE
		Applicant
		AND
		THE GOLDEN MILE LOOPLINE RAILWAY SOCIETY INC.
		Respondent

Catchwords	:	*Industrial Law (WA) - Occupational Safety and Health - Whether termination on grounds of redundancy was genuine - Whether employee was dismissed as a result of raising occupational safety and health issues - Preliminary issue - Whether Tribunal has jurisdiction - Whether employee was an elected safety and health representative - Principles applied - Responsibilities exercised were not those of a safety and health representative for the purposes of the Occupational Safety and Health Act 1984 - Application dismissed*
Legislation	:	*Occupational Safety and Health Act 1984* (WA) ss 3(1), 29(1), 30, 31, 35A, 35C, 35D, 51G(1), 51I(2)
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	In person
Respondent	:	Ms H Millar of counsel
Solicitors:		
Respondent	:	Ellery Brookman Barristers and Solicitors

Case(s) referred to in reasons:

Hoffman v Paladin Energy Pty Ltd (2016) 96 WAIG 594

Hoffman v Paladin Energy Pty Ltd [2016] WAIRC 00715

Reasons for Decision

1 Mr Kape was employed in February 2015 as the Works Manager for The Golden Mile Loopline Railway Society Inc. (Golden Mile). Golden Mile operates a heritage railway line project at Boulder in the goldfields region of the State. As the Works Manager, Mr Kape reported to the General Manager and was responsible for all technical aspects of the operations and the implementation of Golden Mile's rail safety policy. Mr Kape was also responsible for the oversight of technical staff and volunteers.

2 In December 2015 Mr Kape's employment was terminated by Golden Mile on stated grounds of redundancy. Mr Kape contested this. He maintained the purported redundancy was not genuine and complained that the reason he was dismissed was because he raised occupational safety and health issues with his employer in about November 2015. Mr Kape maintained that as he was the "occupational safety and health representative" on the project, he was discriminated against by Golden Mile, contrary to s 35A of the *Occupational Safety and Health Act 1984*. Mr Kape commenced these proceedings before the Tribunal under s 35D of the OSH Act for a remedy. At a directions hearing on 24 June 2016 the Tribunal raised the issue of its jurisdiction to hear Mr Kape's claim, on the basis of his alleged status as a safety and health representative for the project. It is trite to observe that a court or tribunal must be satisfied that it has jurisdiction to hear and determine any matter before it. The matter was listed for hearing to determine this preliminary issue, which is the subject of these reasons.

3 It is convenient at this point, before considering the evidence, to comment on some relevant statutory provisions. The Tribunal is established under Part VIB of the OSH Act. By s 51G(1) the Tribunal has jurisdiction to hear and determine matters that may be referred to it under a number of provisions of the legislation. Relevantly for present purposes, is s 35C, which enables a person to refer to the Tribunal a claim that the person's employer has caused them disadvantage, contrary to s 35A. Section 35A is in the following terms:

> **35A. Discrimination against safety and health representative in relation to employment**
>
> (1) An employer or a prospective employer must not cause disadvantage to a person for the dominant or substantial reason that the person —
>
> (a) is or was a safety and health representative; or
>
> (b) is performing or has performed any function as a safety and health representative.
>
> (2) For the purposes of subsection (1) an employer causes disadvantage to a person if the employer —
>
> (a) dismisses the person from employment; or
>
> (b) demotes the person or fails to give the person a promotion that the person could reasonably have expected; or
>
> (c) detrimentally alters the person's employment position; or
>
> (d) detrimentally alters the person's pay or other terms and conditions of employment.
>
> (3) For the purposes of subsection (1) a prospective employer causes disadvantage to a person if the prospective employer refuses to employ the person.
>
> (4) An employer or prospective employer that contravenes subsection (1) commits an offence.

4 In s 3(1) of the OSH Act there are a number of defined terms. One of them, relevant to this case, is the definition of "safety and health representative". It provides as follows:

> ***safety and health representative*** means a safety and health representative elected under Part IV Division 1;

5 Part IV Div 1 of the OSH Act prescribes a number of matters in relation to safety and health representatives. Relevant for the purposes of the present matter before the Tribunal, are those parts of Div 1 prescribing a scheme for the election of safety and health representatives. By s 29(1) an employee working in a workplace may give notice to their employer requiring the election of a safety and health representative for that workplace. If such a notice is given, delegates must be appointed to hold discussions with the employer about the matters set out in s 30(4). These include the number of safety and health representatives; the areas of the workplace where the safety and health representatives will have responsibilities; how vacancies may be dealt with and by whom and how an election is to be conducted. The employer itself may, under s 30(2), initiate the same process.

6 When these matters have been attended to, an election is then required under s 31. Such an election is required to be by secret ballot. If, after completion of the necessary preliminary processes, set out above, there is only one eligible candidate nominated, that person is taken to be elected. Once an election has taken place, the results are to be notified to the employer and the Worksafe Commissioner.

7 Mr Kape gave evidence. He referred to a number of documents that he submitted in support of his claim, tendered as exhibit A1, including his contract of employment as Works Manager and the job description for the position. He also referred to a number of emails passing between himself and the General Manager of Golden Mile, in relation to safety matters, and the letter of termination of his employment on the grounds of redundancy dated 11 December 2015.

8 Mr Kape said that as the Works Manager for Golden Mile, he was responsible for all safety matters on the site. As referred to in the role description for his position, he testified that he was required to supervise staff and volunteers, which may involve up to 20 people on site at a time. When it was raised with him what steps took place under the OSH Act concerning the election of a safety and health representative, Mr Kape acknowledged that there had been no election process as required by the legislation. Mr Kape said that despite his health and safety responsibilities, he had not been "officially" elected. He blamed this on what he described as a lack of governance by Golden Mile on the site. It was clear from Mr Kape's testimony that none of the requirements for the election of a safety and health representative under Div 1 of Part IV of the OSH Act had been met.

9 For the following reasons, which I can shortly state, the Tribunal has no jurisdiction to hear and determine Mr Kape's claim. The Tribunal's jurisdiction in relation to occupational safety and health matters in this State is specific and is not general. It is only in respect of the specific matters identified in the OSH Act as being able to be referred to the Tribunal, that are amenable to the Tribunal's jurisdiction and powers: *Hoffman v Paladin Energy Pty Ltd* (2016) 96 WAIG 594 (affirmed on appeal in *Hoffman v Paladin Energy Pty Ltd* [2016] WAIRC 00715).

10 The position of "safety and health representative", to which ss 35A and 35C of the OSH Act refer, unambiguously, is the position as defined in s 3(1) of the OSH Act. That is, under the legislation, to be a safety and health representative, for the purposes of the Tribunal's jurisdiction, a person is required to be elected in accordance with the scheme set out in Div 1 of Part IV of the OSH Act. While Mr Kape had health and safety responsibilities as the Works Manager for Golden Mile, which is not unusual in a managerial position, the responsibilities he exercised were not those of a safety and health representative for the purposes of the OSH Act. It is not sufficient to attract the Tribunal's jurisdiction, for a person to maintain that they perform, or have performed, any function of a safety and health representative. The person must do so, or have done so, as a duly elected safety and health representative, as prescribed by the legislation.

11 One final matter requires comment. By Notice of objection received in the Registry on 14 August 2016, Mr Kape objected to Ms Millar appearing as counsel on behalf of Golden Mile. This matter was not raised by Mr Kape before the Tribunal. This Notice did not come to my attention until after the conclusion of the hearing. In any event, I directed my Associate to inform the parties that in accordance with s 51I(2) of the OSH Act, a legal practitioner may appear before the Tribunal as of right and leave of the Tribunal is not required. Accordingly, the objection made by Mr Kape cannot be sustained.

12 For the foregoing reasons, the application to the Tribunal must be dismissed.

2016 WAIRC 00744

REFERENCE OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	STEVE KAPE
	APPLICANT
	-v-
	THE GOLDEN MILE LOOPLINE RAILWAY SOCIETY INC.
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 5 SEPTEMBER 2016
FILE NO/S	OSHT 4 OF 2016
CITATION NO.	2016 WAIRC 00744

Result	Application dismissed
Representation:	
Applicant :	In person
Respondent :	Ms H Millar of counsel

Order

HAVING heard the applicant on his own behalf and Ms H Millar of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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

VOCATIONAL EDUCATION AND TRAINING ACT 1996—Appeals dealt with—

2016 WAIRC 00380

APPEAL AGAINST THE DECISION TO TERMINATE TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JARROD BELFORD
	APPELLANT
	-v-
	DEPARTMENT OF TRAINING AND WORKPLACE DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 22 JUNE 2016
FILE NO.	APA 3 OF 2016
CITATION NO.	2016 WAIRC 00380

Result	Directions issued

Directions

HAVING heard Mr D Vilensky (as agent) on behalf of the appellant and Mr A Mason (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the parties file a statement of agreed facts by 13 July 2016.
2. THAT the appellant file and serve written submissions by 13 July 2016.
3. THAT the respondent file and serve written submissions by 27 July 2016.
4. THAT the parties have liberty to apply at short notice.

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

2016 WAIRC 00666

APPEAL AGAINST THE DECISION TO TERMINATE TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JARROD BELFORD
	APPELLANT
	-v-
	DEPARTMENT OF TRAINING AND WORKPLACE DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 19 JULY 2016
FILE NO.	APA 3 OF 2016
CITATION NO.	2016 WAIRC 00666

Result Directions issued

Directions

HAVING heard Mr D Vilensky (as agent) on behalf of the appellant and Mr A Mason (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the parties file a statement of agreed facts by 20 July 2016.
2. THAT the appellant file and serve written submissions by 20 July 2016.
3. THAT the respondent file and serve written submissions by 3 August 2016.
4. THAT the parties have liberty to apply at short notice.

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

2016 WAIRC 00691

APPEAL AGAINST THE DECISION TO TERMINATE TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JARROD BELFORD

APPELLANT

-v-

DEPARTMENT OF TRAINING AND WORKPLACE DEVELOPMENT

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE THURSDAY, 11 AUGUST 2016
FILE NO. APA 3 OF 2016
CITATION NO. 2016 WAIRC 00691

Result Directions issued

Directions

HAVING heard Mr D Vilensky (of counsel) on behalf of the appellant and Mr A Mason (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the respondent file and serve by 24 August 2016 written submissions about whether the Commission should dismiss or refrain from further hearing or determining the matter.
2. THAT the appellant file and serve by 7 September 2016 written submissions in reply.
3. THAT the parties have liberty to apply at short notice.

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

2016 WAIRC 00765

APPEAL AGAINST THE DECISION TO TERMINATE TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00765
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	WEDNESDAY, 10 AUGUST 2016
WRITTEN SUBMISSIONS	**:**	WEDNESDAY, 24 AUGUST 2016; THURSDAY 8 SEPTEMBER 2016
DELIVERED	**:**	THURSDAY, 22 SEPTEMBER 2016
FILE NO.	**:**	APA 3 OF 2016
BETWEEN	**:**	JARROD BELFORD Appellant AND DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT Respondent

Catchwords	:	Industrial Law (WA) - Vocational education and training - Appeal against decision to cancel training contract - Appellant has entered into a new training contract - Whether it is in the public interest to hear and determine the appeal
Legislation	:	*Vocational Education and Training Act 1996* (WA) s 60G(2)
		Industrial Relations Act 1979 (WA) s 23A, s 26(1), s 27(1)(a)
		Fair Work Act 2009 (Cth)
Result	:	*Appeal to be listed for hearing*
Representation:		
Appellant	:	Mr D Vilensky (of counsel)
Respondent	:	Mr A Mason (of counsel)

Cases referred to in reasons:

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00451; (2014) 94 WAIG 787

Barton v Alf Barbagallo and the Trustee for Barbagallo Investments Trust [2005] WAIRC 02845; (2005) 85 WAIG 3788

Bull v Mobilecom Pty Ltd (2000) 80 WAIG 385

Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia [1987] HCA 27; (1987) 72 ALR 1; (1987) 21 IR 151

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others (1987) 68 WAIG 4

Reasons for Decision

Background

1 On 22 February 2016, the Department of Training and Workforce Development (**Department**) terminated Mr Jarrod Belford's training contract with Swan Transit Services Pty Ltd (**Swan Transit Services**). On 4 March 2016, Mr Belford lodged an appeal to the Commission against that decision. He asks that the Commission set aside the decision and reinstate his training contract.

2 At the start of the hearing on 10 August 2016, counsel for Mr Belford informed the Commission and the Department that Mr Belford recently entered into a new training contract with another employer. His new employer is Minprovise Pty Ltd (**Minprovise**).

3 The Department objects to the Commission further hearing the matter, saying that it is not in the public interest for the Commission to hear and determine Mr Belford's appeal.

4 The hearing was adjourned with the parties agreeing that I should make a decision about this issue on the papers once they had filed written submissions.

The Department's submissions

5 The Department says it would be inappropriate to grant the relief sought by Mr Belford. It would produce an absurd result because it would undermine the statutory scheme of the *Vocational Education and Training Act 1996* (WA) (**VET Act**).

6 It argues that the Commission should not exercise its jurisdiction to decide a question that is academic in the sense that any order or outcome is useless, hypothetical, premature or concerns a dead issue.

7 The Department says if Mr Belford were successful, he would be bound by two training contracts. It is implicit in the VET Act that an appellant should not hold more than one full-time training contract because it would be impossible to fulfil the obligations of both training contracts.

8 The Department says setting aside the Department's decision is analogous to an order for reinstatement under s 23A of the *Industrial Relations Act 1979* (WA) (**IR Act**). It argues that it is well accepted such an order is not appropriate where an applicant has subsequently obtained new employment: ***Bull v Mobilecom Pty Ltd*** (2000) 80 WAIG 385; ***Barton v Alf Barbagallo and the Trustee for Barbagallo Investments Trust*** [2005] WAIRC 02845; (2005) 85 WAIG 3788.

9 The Department says a successful appeal would not provide any utile result for Mr Belford because it would give him a training contract and an employment relationship for which he cannot fulfil the obligations that will bind him.

10 It also argues that a successful appeal would effectively frustrate his training contract with Minprovise.

11 The Department says the appeal would be contrary to s 26 of the IR Act if the appellant has the ulterior purpose of seeking reinstatement only to later leave his employment with Swan Transit Services. The Department submits that the Commission lacks jurisdiction to make decisions predicated on future discretionary acts of a party and the appellant's argument that if he is successful, he will choose to fulfil his obligations under one of his training contracts.

Mr Belford's submissions

12 Mr Belford says the Commission has an obligation to rehear the matter once Mr Belford has invoked the Commission's jurisdiction. The Commission must be satisfied proceedings are not necessary or desirable in the public interest before dismissing the appeal or refraining from hearing and determining the appeal.

13 He says the Commission should not dismiss or refrain from hearing his appeal unless there is a very good reason to do so, and there is no good reason in the circumstances.

14 Mr Belford says there is a heavy onus on the Department to demonstrate that it is in the public interest to refrain from further hearing the appeal.

15 Mr Belford submits his appeal does not concern an academic, useless, merely hypothetical or premature question. It does not involve a dead issue. He is not seeking a remedy he cannot fulfil, nor is he seeking an ulterior purpose.

16 The Commission must have regard to its obligations under s 26(1) in exercising its discretion under s 27(1)(a) of the IR Act. It would be unconscionable if the Department could evade an adverse finding or order simply because Mr Belford has another job.

17 Mr Belford argues that the public interest should not prejudice appellants who try to mitigate their loss by obtaining new employment. It would be preposterous to expect Mr Belford to go on welfare until the appeal is determined.

18 Mr Belford says if the Department were successful in its application to dismiss his appeal, such an outcome could 'act as a deterrent to and would prejudice the rights of parties seeking other apprenticeship opportunities.'

19 Mr Belford says that the onus on the Department is particularly heavy where there is no other tribunal with jurisdiction to fully resolve the dispute. Mr Belford's unfair dismissal application to the Fair Work Commission was dismissed under the 'double-dipping' provisions in the *Fair Work Act 2009* (Cth) because he had lodged this appeal to the Commission. It would set a dangerous precedent to be denied a remedy in two jurisdictions.

20 Mr Belford says that given the objects of the VET Act, which include 'to establish a State training system for the effective and efficient provision of vocational education and training to meet the immediate and future needs of industry in the community' and 'to provide for people, such as apprentices, to be trained for some occupations under training contracts with employers', it cannot be in the public interest to encourage unemployment. Simply because Mr Belford could end up with a choice between two training contracts is not a good reason for the Commission to conclude it is not in the public interest to hear and determine his appeal.

21 Mr Belford says his training contract with Minprovise is subject to a probation period until 18 October 2016. That training contract is uncertain and could be cancelled for a number of reasons. At the hearing, Mr Belford said the workplace was also further from home, involving an hour-long commute, and in a less secure industry, whereas the training contract with Swan Transit Services is with a secure quasi-government employer, close to home and not subject to a probation period.

22 Finally, Mr Belford argues that the outcome of his appeal may determine whether a fine is payable under s 60(G)(2) of the VET Act. It is in the public interest to ensure accountability and compliance with legislation.

The law

23 Section 27(1)(a) of the IR Act provides:

> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it –
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied –
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> …
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

24 In exercising my discretion under s 27(1)(a) of the IR Act, I must have regard to s 26(1)(a) to s 26(1)(c) and act according to equity, good conscience and the substantial merits of the case: ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1987) 68 WAIG 4.

25 The reasoning of Smith AP in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2014] WAIRC 00451; (2014) 94 WAIG 787 at [49] to [60] is relevant.

26 Clearly s 27(1)(a) of the IR Act involves the exercise of a broad discretion. A party is entitled to invoke the Commission's jurisdiction and prima facie expect it to be exercised: ***Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia*** [1987] HCA 27; (1987) 72 ALR 1; (1987) 21 IR 151 (12-13); (162) (***Re QEC***) (Deane J).

27 The onus is on the Department to persuade the Commission that, in the circumstances, Mr Belford's prima facie right to have the Commission hear his appeal should be overridden.

28 Where the public interest lies often depends on a balancing of interests, including competing public interest and is very much a question of fact and degree: ***Re QEC*** (5); (154) (Mason CJ, Wilson & Dawson JJ).

Consideration

29 I agree with Mr Belford and the Department that there is an onus on the Commission to exercise its jurisdiction once called upon by a party to do so.

30 In asking that I dismiss or refrain from further hearing Mr Belford's appeal, the Department must persuade me that Mr Belford's prima facie right to have his appeal heard should be overridden.

31 I am not persuaded it should be.

32 I do not think that the outcome would be useless or hypothetical. It does not concern a dead issue. This appeal is not merely academic nor does it raise a premature question.

33 While I agree with Mr Belford that it is in the public interest to ensure accountability and compliance with legislation, that submission is of limited relevance to the circumstances of this matter.

34 There is nothing before me to suggest, and I am not persuaded, that Mr Belford has an ulterior purpose in pursuing his appeal.

35 Under s 23A of the IR Act, the Commission may order an employer to compensate an employee where reinstatement is impracticable. Whether reinstatement is impracticable is a question of fact. Further, the two cases cited by the Department in support of its argument are distinguishable. In ***Bull***, the applicant did not seek reinstatement. In ***Barton***, Woods C did not amend the applicant's claim to include unfair dismissal because he considered reinstatement unlikely in circumstances where the applicant resigned voluntarily and started employment with a competitor during his notice period. That applicant also did not seek reinstatement.

36 The circumstances of this matter are quite different and Mr Belford seeks reinstatement.

37 The Department argues that in making my decision I cannot consider Mr Belford's future acts. However, it also submits that I should take into account Mr Belford's future ability to fulfil his obligations under two training contracts. I consider that approach to be unfair and not in accordance with s 26(1)(a) of the IR Act.

38 I do not agree that if Mr Belford were successful, granting him relief would have an absurd result which undermines the statutory scheme of the VET Act.

39 I accept that under the VET Act, the Department would not approve an apprentice entering into two full-time training contracts. However this appeal concerns the Department's decision to terminate the training contract Mr Belford had with Swan Transit Services. In my view, Mr Belford's right to invoke the Commission's jurisdiction to rehear the matter should not be overridden because he has entered into another training contract.

40 If successful, Mr Belford could fulfil his obligations under his training contract with Swan Transit Services. That would have consequences for his training contract with Minprovise.

41 There are competing public interests. However, it is not in the public interest to discourage an appellant from seeking new employment or to prejudice an appellant who seeks to mitigate his loss.

42 In circumstances where Mr Belford prefers his training contract with Swan Transit Services to one with Minprovise for reasons including security and convenience, I consider it is a matter for Mr Belford as to how he chooses to proceed in the event that he is successful in his appeal.

43 Having regard to my obligations under s 26(1) of the IR Act, I am not persuaded that I should dismiss or refrain from hearing Mr Belford's appeal.

Conclusion

44 The Commission will hear Mr Belford's appeal.

2016 WAIRC 00769

APPEAL AGAINST THE DECISION TO TERMINATE TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JARROD BELFORD
	APPELLANT
	-v-
	DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 23 SEPTEMBER 2016
FILE NO/S	APA 3 OF 2016
CITATION NO.	2016 WAIRC 00769

Result	Appeal to be listed for hearing
Representation	
Appellant	Mr D Vilensky (of counsel)
Respondent	Mr A Mason (of counsel)

Order

HAVING heard Mr D Vilensky (of counsel) on behalf of the appellant and Mr A Mason (of counsel) on behalf of the respondent;

AND HAVING given reasons for decision, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –

THAT this appeal be listed for hearing.

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

2016 WAIRC 00680

APPEAL AGAINST THE REFUSAL TO REGISTER A TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SMS OPERATIONS PTY LTD TRADING AS SWICK MINING SERVICES
	APPELLANT
	-v-
	CHIEF EXECUTIVE DEPARTMENT TRAINING AND WORKFORCE DEVELOPMENT
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 1 AUGUST 2016
FILE NO/S	APA 5 OF 2016
CITATION NO.	2016 WAIRC 00680

Result	Discontinued by leave
Representation	
Appellant	Ms R Ward
Respondent	Mr R Andretich of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
EK Smith & NB Smith T/as NB & EK Smith Transport	Toll Transport Pty Ltd T/as Toll Ipec	Kenner SC	RFT 16/2016	27/09/2016	Dispute re alleged termination of contract	Discontinued
PD Cook Pty Ltd as trustee for the Cook Family Trust	Toll Transport Pty Ltd T/as Toll Ipec	Kenner SC	RFT 15/2016	27/09/2016	Dispute re alleged termination of contract	Discontinued
ZDM Transport Pty Ltd T/as ZDM Transport	Owens Transport Pty Ltd	Matthews C	RFT 11/2016	31/08/2016	Referral of dispute	Discontinued

NOTICES—Award/Agreement matters—

2016 WAIRC 00776

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 43 of 2016

APPLICATION FOR A NEW AGREEMENT TITLED

"COMMUNITY LEGAL CENTRES ASSOCIATION (WA) INC EMPLOYMENT AGREEMENT 2016"

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

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

2. - PARTIES BOUND

2.1 This Agreement will apply to approximately 5 employees of the Community Legal Centres Association (Western Australia) Inc (CLCA).

This agreement is between the Community Legal Centres Association (Western Australia) Inc and the Western Australian Municipal Administrative, Clerical and Services Union of Employees and extends to and binds all employees who are eligible to be members of the respondent union.

3. - SCOPE

3.1 This Agreement shall apply to all staff employed by the Community Legal Centres Association (Western Australia) Inc in accordance with the classification and rates of pay provided for in Table 3 - Employment Agreement Wages.

TABLE 3 – EMPLOYMENT AGREEMENT WAGES

Community Services Worker - Levels 1-9

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

27 September 2016

2016 WAIRC 00827

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. PSAA 1 of 2016

APPLICATION FOR A NEW AWARD TITLED

"WA HEALTH DENTAL TECHNICIANS (DENTAL HEALTH SERVICES) AWARD 2016"

NOTICE is given that an application has been made to the Public Service Arbitrator, on 11 October 2016, by *The Civil Service Association of Western Australia Incorporated* under the *Industrial Relations Act 1979* for the above named Award.

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

4. - SCOPE

This Award shall apply to Dental Technicians who are members of or eligible to be members of the Civil Service Association of Western Australia Incorporated, employed by the Employer in the classifications prescribed in "Schedule B - Wages" within Dental Health Services (an administrative entity of the Employer as at the date of registration).

5. - TERM OF AWARD

This Award has effect on and from the date of registration until such time as it is cancelled or replaced.

SCHEDULE B - WAGES

Apprentice Dental Technician Years 1-4

Adult Apprentice Dental Technician (21 years and over)Years 1-4

Dental Technician Years 1-4

Dental Technician Advanced Level I Years 1-4

Dental Technician Advanced Level 2 Years 1-4

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

12 October 2016