Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 9 WEDNESDAY 28 DECEMBER, 2016 Vol. 96—Part 2

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

96 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2016 WAIRC 00923

INTERPRETATION OF CLAUSE 9.3(A) OF THE SCHOOL EDUCATION ACT EMPLOYEES' (TEACHERS AND ADMINISTRATORS) GENERAL AGREEMENT 2014

INTERPRETATION OF CLAUSE 12(4)(A) OF THE TEACHERS (PUBLIC SECTOR PRIMARY AND SECONDARY EDUCATION) AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STATE SCHOOL TEACHERS' UNION OF W.A. (INC.)
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 DECEMBER 2016
FILE NO/S	APPL 29 OF 2016
CITATION NO.	2016 WAIRC 00923
Result	Application dismissed

Order

WHEREAS this is an application pursuant to s 46 of the *Industrial Relations Act 1979* filed on 25 May 2016; and

WHEREAS the application was listed for hearing on 13 and 14 December 2016; and

WHEREAS on 8 December 2016, the applicant's solicitors filed a *Form 14 – Notice of withdrawal or discontinuance* indicating it wished to withdraw 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 dismissed.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2016 WAIRC 00914

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2016 WAIRC 00914
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 9 NOVEMBER 2016
DELIVERED	**:**	WEDNESDAY, 7 DECEMBER 2016
FILE NO.	**:**	M 14 OF 2016
BETWEEN	**:**	VINCENT JOHN CICCARELLI

CLAIMANT

AND

HAZDRA PTY LTD T/AS BANKEN BUILDING (ACN 009 262 006)

RESPONDENT

Catchwords	**:**	Alleged contravention of the *Fair Work Act 2009* and the Building and Construction General On-site Award 2010 [MA000020] by failing to pay annual leave entitlements, annual leave loading, public holiday and sick pay entitlements – Whether the claimant was a casual employee.
Legislation	**:**	*Fair Work Act 2009*
Instruments	**:**	Building and Construction General On-site Award 2010 [MA000020]
Case(s) referred to in reasons	**:**	***Miller v Minister of Pensions*** [1947] 2 All ER 372
Result	**:**	Claim is proven (in part)
Representation:		
Claimant	:	In person
Respondent	:	Mr F. Banken (director)

REASONS FOR DECISION

Introduction

1 Hazdra Pty Ltd (the respondent) carries on business as a builder trading as Banken Building.

2 Mr Vincent John Ciccarelli (the claimant) worked for the respondent from 4 January 2010 until about 27 September 2015.

3 The respondent engaged the claimant with a view to taking him on as an apprentice. The claimant commenced his apprenticeship with the respondent in April 2010. In April 2013, the claimant successfully completed his apprenticeship and became a qualified roof carpenter.

4 Upon the completion of his apprenticeship, the claimant continued to work for the respondent as a qualified tradesman. His post-apprenticeship employment was the subject of two written contracts of employment. The first written contract was signed on 6 April 2013 and the second on 15 February 2014 (exhibit 5). The second contract of employment remained in force until the claimant resigned.

5 It is not in dispute that at all material times the Building and Construction General On-site Award 2010 [MA000020] (the Award) was applicable to the claimant's employment.

6 The claimant asserts that the respondent owes him $20,298.96 (gross) because it did not pay him his correct entitlements. He contends that he was not paid annual leave loading, for public holidays and sick days taken. Further he alleges that subsequent to the completion of his apprenticeship, the respondent failed to provide him with four weeks of paid annual leave.

7 The respondent denies the claimant's assertions. It contends that the claimant was, during his apprenticeship, paid his correct entitlements. It says that after the claimant's apprenticeship ended it employed him on a casual basis which meant that he was not, excepting any agreement to the contrary, entitled to public holiday, sick leave, annual leave and annual leave loading payments.

8 Although the respondent readily concedes that the contracts of employment (exhibit 5) do not specifically indicate that the claimant was employed as a casual, it says that the fact that he was paid at 25% above the Award rate, which is a 'good rate', evidences that at all material times he was a casual employee.

9 Mr Francis Banken (Mr Banken), the director of the respondent, points out that the claimant never complained about his pay or entitlements during the course of his employment and that it is somewhat unfair that he now does so, particularly having regard to the fact that the respondent has treated him fairly and generously throughout.

Issues

10 The issue to be determined in this matter are:

1. whether the claimant was, during the course of his apprenticeship, paid his correct entitlements and if not, the amount that is owed to him; and
2. whether the claimant was, after the completion of his apprenticeship, employed on a casual or alternatively full-time basis; and
3. if not employed as a casual, whether the claimant is owed entitlements.

Onus and Standard of Proof

11 The claimant carried the legal burden of proof for his claim whilst the respondent carries the legal burden of proving those things which it asserts.

12 The standard of proof required to discharge the respective burdens of proof is the balance of probabilities. This standard was explained by Lord Denning in ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374 as follows:

> *That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

13 Accordingly, where in these reasons I say that 'I am satisfied' of a fact or matter or otherwise make a finding as to a fact or matter, I am saying 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

The Facts

14 The facts are generally uncontentious.

15 The claimant's father found the claimant a job with the respondent.

16 The claimant was 19 years of age when he commenced his apprenticeship with the respondent. Whilst he was an apprentice, the claimant worked under the supervision of the respondent's director, Mr Banken.

17 The claimant's conditions of employment were subject to the Award and his hourly rate at commencement was $10.45. It was subsequently increased to $13.75 and then $16.19. Upon completion of his apprenticeship his hourly pay rate was $18.14.

18 It is not in dispute that throughout the claimant's employment with the respondent he usually worked a 40-hour week comprised of eight hours each day, Monday to Friday. On rare occasions, he also worked on Saturdays. Each Christmas period the respondent shut down its operations for about two weeks and the claimant did not work during such period. Further the claimant was instructed to not attend work when the weather was inclement or too hot.

19 The respondent's pay roll accounts were maintained by Mr Banken's mother, who manually recorded all relevant information in a wages book and in an exercise book. The claimant was initially provided with hand-written payslips, but in about 2011 that changed and he was thereafter provided with typed payslips.

20 Mr Banken's mother, who is elderly and unwell, was unable to give evidence in this matter. The respondent has produced an incomplete copy of the wages book she kept, however neither the original nor copy of the exercise book has been produced. The respondent has used those source documents to produce a table of hours worked by the claimant and of payment made to him. That schedule (exhibit 8) is attached to the respondent's response in this matter. The claimant says that he has adopted the information in the respondent's schedule in order to prepare his amended claim. He has prepared his own schedule outlining his claim (see exhibit 1).

21 When the claimant's apprenticeship ended Mr Banken agreed to keep him on as an employee. The parties then negotiated the terms of a contract of employment which was reduced to writing and signed on 6 April 2013.

22 The contract provided inter alia that the:

- claimant would be paid $35 per hour for an eight-hour day totalling $280 per day; and
- respondent would pay the claimant public holidays; and
- respondent would pay the claimant two weeks' holiday pay at 38 hours per week; and
- respondent would pay the claimant superannuation at 9.25% costed at $26 per day; and
- respondent would pay the claimant workers compensation cover costed at $35 per day.

23 The contract did not indicate whether the claimant' employment was full-time or casual. There is a now a dispute between parties as to whether the claimant was then engaged as a full-time employee or alternatively as a casual employee.

24 On 15 February 2014, the parties entered into another written contract of employment. Again there was no mention in that contract as to whether the claimant was employed on a full time or casual basis. That contract provided inter alia that the:

1. claimant would be paid at the rate of $40 per hour for an eight-hour day, amounting to $320 per day; and
2. respondent would pay some public holidays; and
3. respondent would pay the claimant two weeks' holiday pay at 38 hours per week; and
4. respondent would pay the claimant superannuation at 9.25% costed at $29.60 per day; and
5. respondent would pay the claimant's workers compensation cover costed at $44.80 per day.

25 The terms of the second written contract of employment remained in force until the claimant's employment with the respondent came to an end.

26 On 28 August 2015, the claimant gave the respondent four weeks' notice of the termination of his employment. Thereafter he gave the respondent a document in which he alleged that he had been underpaid.

27 On 30 September 2015, Mr Banken responded to the claimant's claim. His response (exhibit 3) which is unsigned, is somewhat difficult to follow but appears at the very least to concede that the claimant was, during the course of his apprenticeship, not paid for holidays occurring during the Christmas period shut down. At worst for the respondent, it could be construed that the respondent admitted to owing the claimant $9,788.95 (gross).

28 In any event, the respondent did not pay the claimant what he sought. Thereafter the claimant's accountant wrote a letter of demand on behalf of the claimant seeking the payment of $15,360. The claimant's accountant asserted that the claimant was owed 48 days of unpaid leave at the rate of $320 per day (exhibit 6). The accountant's letter appears to contain some arithmetical errors however that is of little significance. It suffices to say that the amount claimed was not paid. Thereafter the claimant lodged his claim seeking $15,360. He has subsequently recalculated the quantum of his claim.

Determination

Apprenticeship Period: 2010

29 With respect to the calendar year 2010, the claimant's claim is restricted to the non-payment of annual leave loading in the amount of $223.23 based on an entitlement of 160 hours for that year. In that regard I note that the claimant's entitlement is less than 160 hours because he did not commence working for the respondent until mid-way through January 2010. On my calculations his entitlement was therefore reduced to 153.85 hours of paid leave. The annual leave loading payable was therefore $200.61 and not the amount claimed.

30 The issue which remains is that of whether or not the leave loading was paid. The respondent asserts that it was and it is for the respondent to prove that. The respondent has produced pay slips (exhibit 7). The payslips for 17 December 2010 indicates the payment of annual leave loading in the amount of $277.95. That amount however, does not appear in the respondent's schedule. The figures in the payslip are inconsistent with the figures noted in the respondent's schedule.

31 I note that the payslips produced for the early part of the claimant's employment are a reconstruction of the hand-written payslips given to him at the material time and accordingly, should be treated with caution. However, I am satisfied that payslips for 17 December 2010 are accurate because they correlate precisely with what the claimant received by way of payment on 20 December 2010. The claimant's bank statement (exhibit 2) for December 2010 shows that the respondent paid him a net amount of $2,140.10. His payslips for 17 December 2010 show that he was paid a net amount of $576.95 for work and allowances and a net amount of $1,563.15 for holiday pay and leave loading ($277.95). The sum of those two amounts is $2,140.10 being the amount received by the claimant. It follows that the claimant was paid his annual leave loading for leave taken that year. The claimant's claim with respect to 2010 is not made out.

32 It appears however that during the material period the respondent overpaid the claimant $77.34 ($277.95 - $200.61).

Apprenticeship Period: 2011

33 The claimant's claim is for annual leave loading for leave taken in the pay periods ending 22 April 2011, 6 May 2011, 23 September 2011 and 23 December 2011. It suffices to say that none of the corresponding payslips (exhibit 7) indicate a payment of annual leave loading. Further the claimant's bank statements (exhibit 2) relevant to those dates correlate with the payslips. I conclude therefore, that no payment of annual leave loading was made in 2011. The payment of annual leave loading was required by cl 38.2(b) of the Award.

34 The claimant's claim with respect to 2011 also comprises a claim for unpaid public holidays. It is self-evident from the respondent's own records (exhibit 9) and payslips (exhibit 7) that the respondent did not pay the claimant holiday pay for Christmas and Boxing Day holidays in 2010 and New Year's Day in 2011. Those days were payable pursuant to cl 41.1 of the Award.

35 The claimant's claim is made out in its entirety with respect to 2011. I am satisfied that he is owed $319.55 in unpaid annual leave loading and $250.80 for unpaid public holidays. I accept that his calculations in exhibit 1 with respect to that period and other periods are accurate.

Apprenticeship Period: 2012

36 The claimant's claim with respect to unpaid annual leave loading relates to the leave taken for the pay periods ending 11 May 2012, 25 May 2012, 7 September 2012 and 21 December 2012. It suffices to say that the payment of annual leave loading is not indicated on any relevant payslips (exhibit 7) or any other document produced. I note also that the claimant's bank statements for the relevant periods do not indicate such payment. Consequently, I am satisfied that the claimant is owed $471.60 in annual leave loading which was not paid in 2012.

37 The claimant's 2012 claim also includes a claim for public holidays taken which were not paid, comprising Christmas Day and Boxing Day 2011, New Year's Day 2012 and also one sick leave day taken in the pay period ending 7 September 2012 but not paid.

38 A perusal of the pay slips and other documentary evidence indicate that the public holidays referred to above were not paid. I am therefore satisfied that the claimant is owed $330 in that regard.

39 As to the sick leave allegedly taken in the pay period ending 7 September 2012, I cannot be satisfied that two days' sick leave were in fact taken. In that regard the claimant says that his schedule (exhibit 1) is based on the information in the respondent's schedule (exhibit 8), however the two do not correlate. The respondent's schedule indicates that only one sick day was taken and another day was taken as leave without pay. The respondent's payslip shows that one of the two days taken was a sick day. The respondent's time and wages record (exhibit 9) does not assist the claimant. Absent of proof produced by the claimant that during the material period he took a sick day which was not paid, I cannot be satisfied of that fact. Essentially the claimant

relies on the respondent's records which are inconclusive. The claim in the amount of $145.12 for unpaid sick leave is accordingly not made out.

Apprenticeship Period: 2013

40 The claimant's claim with respect to this period relates solely to the non-payment of public holiday entitlements for Christmas Day and Boxing Day 2012 and New Year's Day 2013. The payslips produced by the respondent and the other documentary evidence produced by the respondent indicate that the claimant was not paid his entitlements for those days. It follows the claim is made out in that regard.

Post Apprenticeship

Was the Claimant a Casual Employee?

41 The outcome of the claimant's claim with respect to the post apprenticeship period is predicated on whether or not he was a casual employee.

42 Clause 14 of the Award deals with casual employment. It provides:

> ***14. Casual employment***
>
> *[Varied by PR542770]*
>
> ***14.1*** *A casual employee is one engaged and paid in accordance with the provisions of this clause.*
>
> ***14.2*** *A casual employee is entitled to all of the applicable rates and conditions of employment prescribed by this award except annual leave, paid personal/carer's leave, paid community service leave, notice of termination and redundancy benefits.*
>
> ***14.3*** *An employer, when engaging a person for casual employment, must inform the employee, in writing, that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, the actual or likely number of hours to be worked, and the relevant rate of pay.*
>
> ***14.4*** *A casual employee is entitled to payment for a minimum of four hours' work per engagement, plus the relevant fares and travel allowance and expenses prescribed by clauses 24—Living away from home—distant work and 25—Fares and travel patterns allowance on each occasion they are required to attend work.*
>
> ***14.5*** *A casual employee must be paid a casual loading of 25% for ordinary hours as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer's leave, community service leave, notice of termination and redundancy benefits and public holidays not worked.*
>
> *[14.6 substituted by PR542770 ppc 02Oct13]*
>
> ***14.6*** *A casual employee required to work overtime or weekend work will be entitled to the relevant penalty rates prescribed by clauses 36—Overtime, and 37—Penalty rates, provided that:*
>
> ***(a)*** *where the relevant penalty rate is time and a half, the employee must be paid 175% of the ordinary time hourly rate prescribed for the employee's classification; and*
>
> ***(b)*** *where the relevant penalty rate is double time, the employee must be paid 225% of the ordinary time hourly rate prescribed for the employee's classification.*
>
> *[14.7 substituted by PR542770 ppc 02Oct13]*
>
> ***14.7*** *A casual employee required to work on a public holiday prescribed by the NES must be paid 275% of the ordinary time hourly rate prescribed for the employee's classification.*
>
> ***14.8 Casual conversion to full-time or part-time employment***
>
> …

43 In order for a worker to be a casual employee under the Award he or she must be engaged and paid as such. Clause 14.3 of the Award requires that when engaging a person as a casual employee, the employer must inform the employee in writing that he is to be employed as a casual employee.

44 In this instance Mr Banken, on his own admission, never informed the claimant either orally or in writing that he was being engaged on a casual basis. Indeed, the written contracts of employment entered into by the parties do not indicate that the claimant was to be employed as a casual. It is clear that the respondent did not engage the claimant as a casual employee in the manner required by cl 14.3 of the Award and it follows that the claimant was not engaged as a casual employee.

45 I fear that the respondent's contention that the claimant was a casual employee is a recent invention aimed at defeating the claim. I say that because the respondent's own time and wages record (exhibit 9) consistently records the fact that the claimant was a full-time employee. The only place where casual employee is noted is on the first page which relates to a short period prior to termination. I also note that the time and wages record produced is not an original and it appears that with respect to that period there may have been a marking adjacent to the full-time designation which has been almost but not entirely obliterated. On the face of it appears that the designation was changed at some stage.

46 The claimant's evidence, which I accept, was that his engagement by the respondent was on a full-time basis and there was no suggestion of casual employment. I observe that such is consistent with the fact that he worked full time. I find the claimant was at all material times a full time employee.

47 What Mr Banken suggests is that because the respondent paid the claimant well above the Award rate that such evidences casual employment.

48 I reject his contention in that regard. The fact that an employer chooses to pay a full-time employee a rate well above the Award rate does not of itself convert a full-time employee's employment from full-time into casual employment. Mr Banken asserts the respondent paid the claimant 25% more than the Award required however the fact that claimant was on a 'good rate' as Mr Banken puts it does not make him a casual employee.

Post Apprenticeship Claim

49 The claimant's claim with respect to the post-apprenticeship period consists of a claim for annual leave entitlements not paid at termination together with annual leave loading thereon. He also seeks to recover unpaid annual leave loading on leave taken after his apprenticeship ended. Further he claims that he is owed entitlements for public holidays and sick leave taken which remain unpaid.

50 The claimant during the course of his employment, by virtue of cl 38.1 of the Award, accrued an annual leave entitlement. I am satisfied that at the termination of his employment he had accrued 258 hours of annual leave. In that regard, I accept his calculations set out in exhibit 1. It follows that the respondent was obliged to pay him his annual leave entitlement upon the termination of his employment. The applicable rate at termination was $40 per hour and accordingly the amount payable in that regard was $10,320. In addition, the respondent was obliged to pay the claimant annual leave loading thereon in the amount of $1,806.

51 The purported contractual arrangements entered into between the parties agreeing that the claimant would receive only two weeks' annual leave is clearly invalid. They could not contract out of the National Employment Standard that provides for four weeks' annual leave. Although there is scope in cl 7 of the Award to vary certain terms of the Award, it does not extend to annual leave.

52 With respect to annual leave loading I am satisfied that the claimant took annual leave in 2013 and 2014 but was not paid his annual leave loading entitlement with respect to such leave. In that regard I am satisfied that the claimant's calculations contained in exhibit 1 are correct and that he is entitled to recover the amounts of $466 with respect to leave taken in 2013 and $560 with respect to leave taken in 2014.

53 I now move to consider public holidays taken but not paid during the post apprenticeship period. I am satisfied on the claimant's evidence, confirmed by the respondent's own records (exhibit 5), that the claimant was not paid his public holiday entitlements for the Christmas period at the end of 2013. In that regard, I am satisfied that he was not paid for Christmas and Boxing Days 2013 and for New Year's Day in 2014. Similarly, he was not paid for Christmas and Boxing Days in 2014 and New Year's Day in 2015. Further, I accept that the claimant was not paid for another six public holidays in 2014.

54 In the contract of employment signed 15 February 2014, it was agreed that the respondent would pay the claimant 'some public holidays'. Again that provision which attempts to contract out the National Employment Standard is invalid. The Award flexibility provision in cl 7 of the Award does not assist. It follows that the claimant's claim with respect to the payment of public holiday entitlements accrued post the apprenticeship period is clearly made out.

55 The only remaining issue for determination is whether the claimant's claim for sick days taken in 2013, 2014 and 2015 but not paid, is made out.

56 The claim made with respect to 2013 relates to the pay periods ending 10 May and 7 June 2013. The claimant has based his claim on the respondent's schedule (exhibit 8) which he has used to compile his own schedule (exhibit 1). I observe however, that the two schedules are not consistent. The days the claimant asserts were taken as sick days are not noted on the respondent's schedule as being sick days taken. Rather the respondent's records show that they were leave days taken without pay. The claimant does not find assistance from the payslips (exhibit 7) or the wages record (exhibit 9) in proving that those days taken were taken as sick days. Absent any proof coming from the claimant that he was indeed sick on those days, his claim in that regard must fail.

57 I move to consider the claim for sick leave taken but not paid in 2014. Such claim relates to the pay period ending 6 June, 8 August and 14 November 2014. Similarly, for this period the claimant bases his claim on the respondent's schedule. Again in this instance, I observe that the schedules are not consistent in that the days the claimant records as being sick days are not similarly recorded on the respondent's schedule. The respondent records those days as being days of leave taken without pay. There is no assistance for the claimant in other documentary evidence before the court. The claimant bears the onus of proving that he took the sick leave days claimed for which he was not paid, however there is no evidence which is capable of establishing that he took those days off as sick leave and accordingly to that extent, that part of his claim fails.

58 With respect to 2015, the claimant asserts that during the pay period ending 10 April 2015, he took four days' sick leave for which he was not paid. In that regard, the same problems which befell him with respect to his sick leave claims for 2013 and 2014 befalls him with respect to 2015. In essence, he cannot establish on available evidence that the days taken off which he says were taken as sick leave were, in fact, taken for that purpose. The respondent's records indicate that the claimant took leave without pay and the claimant has not produced any evidence to establish that the days claimed were in fact taken as sick leave. It follows that the claimant's claim that regard is not proven.

Conclusion

59 The claimant's claim is partially successful in that he has made out his claim save for the following:

1. Sick leave:

Pay period ending 7 September 2012	$145.12
Pay period ending 10 May 2013	$249.65
Pay period ending 7 June 2013	$249.65
Pay period ending 6 June 2014	$320.00

Pay period ending 8 August 2014	$640.00
Pay period ending 14 November 2014	$320.00
Pay period ending 10 April 2015	$1,280.00
	$3,204.42

2. Annual leave loading:

2010	$223.23

60 Further, the claimant was overpaid $77.34 with respect to his annual leave loading in 2010 which must be taken into account.

61 The sum of the claimant's unsuccessful sick leave claim, annual leave loading claim and the overpayment made to him should be deducted from the $20,298.96 which he seeks.

62 Taking into account the necessary adjustments I am satisfied that the respondent owes the claimant $16,793.97.

G. CICCHINI

INDUSTRIAL MAGISTRATE

2016 WAIRC 00919

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2016 WAIRC 00919
CORAM	**:**	INDUSTRIAL MAGISTRATE M FLYNN
HEARD	**:**	THURSDAY, 27 OCTOBER 2016
DELIVERED	**:**	THURSDAY, 8 DECEMBER 2016
FILE NO.	**:**	M 21 OF 2016
BETWEEN	**:**	DARYL BRUCE SPAULL

CLAIMANT

AND

TOTAL BUSINESS TECHNOLOGY PTY LTD

FIRST RESPONDENT

LUKE ANDERSON

SECOND RESPONDENT

ALAN GREEN

THIRD RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Application for imposition of pecuniary penalties – contravention of civil penalty provisions on accrued annual leave and amounts payable in relation to performance of work - accessorial liability of directors – penalties imposed – costs and unreasonable act of unsuccessful respondent.
Legislation	**:**	*Fair Work Act 2009*.
Case(s) referred to in reasons	**:**	***Sponza v Coal Face Resources Pty Ltd*** [2015] FCCA 1140
Result	**:**	The second respondent pay the claimant, within 28 days of the date of this order, a pecuniary penalty in the amount of $17,280. The third respondent pay the claimant, within 28 days of the date of this order, a pecuniary penalty in the amount of $12,960. The second respondent pay the claimant's costs, fixed in the sum of $3,862.40.
Representation:		
Claimant	:	Mr Graham McCorry (agent) for the claimant
First Respondent	:	No appearance
Second Respondent	:	No appearance
Third Respondent	:	In person

REASONS FOR DECISION

Introduction

1 Mr Daryl Spaull (Mr Spaull) was employed by Total Business Technology Pty Ltd (the Company) from 24 March 2003 until 29 December 2015. He commenced claims against the Company (the Company Claim) and two directors of the Company, Mr Luke Anderson (Mr Anderson) and Mr Alan Green (Mr Green) (the Directors Claim) pursuant to the *Fair Work Act 2009* (Cth) (FWA).

2 The Company Claim concerns allegations by Mr Spaull of unpaid:

- accrued annual leave of 313.2601 hours ($14,156.92);
- long service leave of 480 hours ($30,293.04) and
- commission payments of $13,913.

3 As a result of the Company being placed in administration on 28 September 2016, the Company Claim, by order made on 26 October 2016, was stayed until further order of the court.

4 The Directors Claim concerns allegations that the directors were involved in contraventions, by the Company, of civil penalty provisions of the FWA that required the payment of accrued annual leave and the payment of commissions. Mr Spaull seeks orders against the two directors for the payment of pecuniary penalties arising from their accessorial involvement in the Company's contraventions (see s 550 and s 546 of the FWA). The maximum penalty for each civil penalty provision is $10,800. Two civil penalty provisions are alleged to have been contravened. Mr Spaull submits that each of Mr Anderson and Mr Green should be ordered to pay a pecuniary penalty of 80% of the maximum penalty, that is, that the court should make orders that Mr Anderson pay to Mr Spaull a pecuniary penalty fixed in the sum of $17,280 and that Mr Green pay to Mr Spaull a pecuniary penalty fixed in the sum of $17,280.

5 The Directors Claim proceeded to trial on 27 October 2016. Mr Spaull and Mr Green adduced evidence. Although, Mr Anderson did not attend the trial, it was necessary for Mr Spaull to satisfy me by evidence as to the appropriateness of making a discretionary order in the form of a civil penalty against him: ***Sponza v Coal Face Resources Pty Ltd*** [2015] FCCA 1140 at [8]- [9]. I have had regard to the whole of the evidence adduced at the trial in considering the case against each of Mr Anderson and Mr Green. The effect of the FWA is that Mr Spaull will succeed in the Directors Claim if I am satisfied of each of the following:

a. that the Company contravened a civil penalty provision**.** I must be satisfied that there was a failure by the Company to pay annual leave and this failure was a contravention of a civil penalty provision of the FWA and, further, there was a failure of the Company to make commission payments and this failure was a contravention of a civil penalty provision of the FWA;

b. that Mr Anderson and Mr Green were involved in the Company's contraventions. I must be satisfied that Mr Anderson and Mr Green were each *involved* in the Company's contravention of a civil penalty provision of the FWA such that, as a result of s 550 of the FWA, each 'is taken to have contravened' those provisions; and

c. that there should be an order that Mr Anderson and Mr Green pay a pecuniary penalty. The court should exercise the discretion conferred by s 546 of the FWA to order the payment of pecuniary penalties by Mr Anderson and Mr Green.

Jurisdiction, Practice and Procedure

6 In Schedule I of this decision, I have set out the law relevant to the jurisdiction, practice and procedure of this court in determining the Directors Claim. It is not in dispute and I am satisfied that:

- the Company, a corporation to which paragraph 51(xx) of the Constitution applies, is a national system employer; and
- Mr Spaull, an individual who was employed by the Company, is a national system employee.

7 On this application by Mr Spaull under s 539 of the FWA, Mr Anderson and Mr Green are *persons* amenable to the jurisdiction of the Court to make orders for the payment of a pecuniary penalty if the court is satisfied that there has been a contravention of a civil penalty provision (see s 546 of the FWA).

Did the Company Contravene a Civil Penalty Provision?

Annual leave

8 I am satisfied that:

a. when the employment of Mr Spaull ended on 29 December 2015, as a result of s 90(2) of the FWA, there was a statutory obligation upon the Company to pay him the amount that would have been payable to him had he then taken any annual leave which had accrued to that date (the Accrued Annual Leave obligation).

b. the amount that would have been payable to Mr Spaull had he taken that period of leave is the sum of $14,156.92. This finding is supported by an admission in the response to the claim filed by each director in which the number of annual leave hours claimed by Mr Spaull is conceded to be accurate. It is also supported by the evidence of Mr Green that his own investigations conducted in January 2016 revealed the Company Claim to be indefensible.

c. the Company has failed to discharge the Accrued Annual Leave obligation, that is, Mr Spaull has not been paid the amount of $14,156.92.

d. the failure to discharge the Accrued Annual Leave obligation is a contravention, by the Company, of a civil penalty provision of the FWA. The Accrued Annual Leave obligation is one of the 'National Employment

Standards' identified in the FWA (see s 61 of the FWA). The National Employment Standards are 'civil penalty provisions' of the FWA (see s 44 and s 539 of the FWA).

Commission payments

9 I am satisfied that:

a. as a result of s 323 of the FWA, there was a statutory obligation upon the Company to pay to Mr Spaull, on a monthly basis, any amounts payable to him in relation to the performance of his work. This obligation extended to any incentive based payments payable to Mr Spaull by the Company.

b. as a result of the terms of his contract of employment (evidenced by the terms of a letter from the Company dated 9 September 2015 and admitted into evidence as annexure A2 to exhibit 1), the Company had an obligation to pay to Mr Spaull, on a monthly basis, incentive based payments (called 'commission payments' by the parties) calculated in accordance with the terms of his contract of employment (the Incentive Based Payments obligation).

c. The Company failed to discharge the Incentive Based Payments obligation when it failed to make the following payments:

i. the September commission payment of $8,307, due on Thursday 9 October 2015, was not paid until 8 January 2016;

ii. the October commission payment of $2,718, due on Thursday 13 November 2015, has never been paid.

iii. the November commission payment of $4,729, due on Thursday 11 December 2015, has never been paid.

iv. the December commission payment, due on the second Thursday in January 2016, has never been paid. I infer that the December commission payment was $6,466 being the total claimed with respect to commission ($13,913) for October, November and December 2015 per the statement of claim of 11 March 2016 reduced by the October ($2,718) and November ($4,729) commission claims.

The findings above with respect to the September, October and November commission payments are supported by the terms of a letter from the Company dated 29 December 2015, signed by Mr Anderson and admitted into evidence as annexure E to exhibit 1. The findings with respect to the December commission payment are supported by the evidence of Mr Spaull as well as the evidence of Mr Green noted above regarding the results of his investigation in January 2016.

d. The failure to discharge the Incentive Based Payments obligation is a contravention, by the Company, of a civil penalty provision of the FWA (see s 323 and s 539 of the FWA).

Were Mr Anderson and Mr Green Involved in the Company's Contraventions?

10 In Schedule II of this decision, I have set out the law relevant to s 550 of the FWA. Section 550 of the FWA provides, in effect, that Mr Anderson and Mr Green will not be liable to a pecuniary penalty unless each was *involved* in the contravention, by the Company, of the civil penalty provision (identified above) by doing one of the things set out in (a)-(d) of the section. It is necessary to examine the evidence with respect to the state of mind and the conduct of each of Mr Anderson and Mr Green in order to determine whether I am satisfied that, with knowledge of the essential matters which go to make up the contraventions by the Company identified above, each of them intentionally participated in those contraventions.

11 I am satisfied that:

a. Mr Anderson, Mr McKenzie and Mr Green were directors of the Company during 2015 and, except for Mr Green who resigned with effect from 15 February 2016, remained directors of the Company after Mr Spaull ceased his employment on 29 December 2015.

b. in the period June 2015 to December 2015, Mr Anderson, Mr McKenzie and Mr Spaull were working from the Company's premises in Bunbury. During this period, Mr Anderson and Mr McKenzie were actively involved in the daily management of the business of the Company with Mr Anderson's role including being the immediate supervisor of Mr Spaull. Commencing in June 2015, Mr Green reduced his involvement in the management of the Company to: one to two days per month spent in the Company's premises in Bunbury; one day per month spent in Perth attending to a meeting with other directors and a meeting with the Company's accountants; and responding to ad hoc requests from Company's employees for advice.

These findings are supported by the evidence of Mr Spaull, particularly annexures B2, C1, C2 and C3 of exhibit 1 and the evidence of Mr Green.

12 I am satisfied that in September 2015, Mr McKenzie and Mr Green conducted negotiations with Mr Spaull which resulted in a change to the terms of his employment by the Company. The resulting terms being those set out in a document admitted into evidence as annexure A2 to exhibit 1 (a letter from the Company dated 9 September 2015 with provision to be signed by Mr McKenzie and Mr Spaull). This finding is supported by the evidence of Mr Spaull, including the email dated 9 September 2015 (of 3:08pm) from Mr McKenzie to Mr Spaull with a copy sent to Mr Anderson and admitted into evidence as annexure A1 to exhibit 1.

13 I am not satisfied that, in September 2015, Mr Green became aware of the terms as set out in the letter which is annexure A2. I accept that Mr Spaull was told by Mr McKenzie that the letter was subject to the approval of *all* the Directors and that, if correct, this would include Mr Green. However, this conflicts with the *direct* evidence of Mr Green that he was not aware of

the negotiations or the letter and that it was not something brought to his attention at that time. On this issue, I consider the direct evidence of Mr Green to be more reliable than the hearsay evidence of Mr McKenzie.

14 I am satisfied that on 15 December 2015, frustrated with the Company's failure to make the September, October and November commission payments and the apparent intransigence of his immediate manager, Mr Anderson, to ensure that the Company corrected this failure, Mr Spaull telephoned Mr Green to discuss the issue. Mr Green does not recall the conversation. However, when I contrast the bare denial of Mr Green with the detail of the evidence of Mr Spaull on what was said as well as the consistent conduct of Mr Spaull referring to the conversation in an email to Mr Anderson written on 15 December 2015 at 4:08 pm (annexure D of exhibit 1), I am satisfied that the conversation occurred and that the content was in accord with the evidence of Mr Spaull. The significance of the conversation was that it contained an express acknowledgment by Mr Green that:

- Mr Green knew that the Company had failed to pay commission payments due to Mr Spaull ('it is *just* your commissions that have not been paid'); and
- Mr Green had the ability to ensure that the Company's failure was corrected ('I will ring you back before 1.00 pm and let you know when the commissions will be paid').

15 I am satisfied that Mr Green failed to contact Mr Spaull by 1:00 pm on 15 December 2015 as promised and that this failure prompted Mr Spaull to decide to resign with effect from 29 December 2015. The decision was communicated by email from Mr Spaull to Mr Anderson at 4:08 pm on the same day ('after no progress with my pay not getting paid again (sic) and again Alan telling me that he would ring me by 1:00 today and I received nothing I have no other choice').

16 I am satisfied that on an unknown date between 15 - 29 December 2015, Mr Green became aware of the fact of the resignation of Mr Spaull on 15 December 2015 and that the reason for his resignation was the non-payment of commissions in October, November and December 2015. I accept Mr Green's evidence that his involvement with the Company's affairs during this period did not ordinarily include him being informed of matters affecting individual employees of the Company or being involved in decisions affecting individual employees. However, in cross-examination, Mr Green agreed that shortly after 15 December 2015 he became aware that Mr Spaull had resigned. In light of my findings of the content of the telephone conversation between Mr Spaull and Mr Green on the 15 December 2015, I am satisfied Mr Green also became aware that the reason for Mr Spaull resigning was Mr Green's failure to resolve Mr Spaull's complaint of non-payment of commissions.

17 I am satisfied that on an unknown date between 15 - 29 December 2015, Mr Anderson gave an instruction to administrative staff of the Company to the effect that Mr Spaull was *not* to be paid any amounts in discharge of the Accrued Annual Leave obligation and the Incentive Based Payments obligation. This finding is an inference drawn from me being satisfied of three facts. First, I accept the evidence of Mr Green that the usual practice of the Company was to pay employee entitlements at the end of employment 'upon a director's authorisation' and that Mr Spaull was not paid his entitlements because Mr Anderson or Mr McKenzie (or both) withheld that authorisation. Secondly, Mr Anderson was the immediate supervisor of Mr Spaull during the period June 2015-December 2015. Thirdly, Mr Anderson signed the letter from the Company dated 29 December 2015 (admitted into evidence as annexure E to exhibit 1) in which the non-payment of September, October and November commission payments is explicitly acknowledged.

18 I am satisfied that, as was the evidence of Mr Green:

a. Mr Green became aware in January 2016 of the failure of the Company to make payments to Mr Spaull with respect to his entitlements regarding annual leave and commission payments; and

b. Mr Green did not attempt to persuade Mr Anderson or Mr McKenzie to give the necessary director's authorisation to make payments to Mr Spaull; and

c. Mr Green did not himself initiate a director's authorisation for a payment.

19 In light of my findings, I am satisfied that Mr Anderson intentionally participated in each and every instance of the contravention by the Company of the Accrued Annual Leave obligation and each and every instance of the contravention of the Incentive Based Payments obligation. Mr Anderson knew of each obligation. Mr Anderson knew of each contravention. In expressly omitting to give his authorisation for the Company to make the necessary payments. He engaged in conduct that implicated him in each contravention. There was a practical causal connection between him and each contravention.

20 In light of my findings I am satisfied that, as at 15 December 2015, Mr Green intentionally participated in the contravention by the Company of the Incentive Based Payments obligation with respect to the non-payment of the September, October and November commissions. As a result of the telephone conversation on that day with Mr Spaull, Mr Green knew of each obligation and Mr Green knew of the Company's contravention. Mr Green had the ability to ensure that the Company's failure was corrected. By his wilful omission to authorise the payments to Mr Spaull, Mr Green was knowingly concerned in the contravention. There was a practical causal connection between him and those contraventions from 15 December 2015. The submission by Mr Green (in closing submissions) that his only role was to recommend to other directors that a payment be made is inconsistent with my findings on what was said by Mr Green to Mr Spaull in their telephone conversation on 15 December 2015.

21 I am also satisfied that, commencing in mid-January 2016, Mr Green intentionally participated in the contravention by the Company of the Incentive Based Payments obligation with respect to the non-payment of the October, November and December commissions and he intentionally participated in the contravention by the Company of the Accrued Annual Leave obligation. Mr Green gave evidence of his knowledge, from his investigations, of each obligation and of the Company's contravention. I repeat my findings that by his wilful omission to authorise the payments to Mr Spaull, Mr Green was knowingly concerned in those contraventions. There was a practical causal connection between him and those contraventions from the middle of January 2016 which continued until he ceased to be a director in February 2016.

Should There Be an Order That Mr Anderson and Mr Green Pay a Pecuniary Penalty?

22 In Schedule III of this decision I have set out the law relevant to s 546 of the FWA. Mr Spaull submits that each of Mr Anderson and Mr Green should be ordered to pay a pecuniary penalty of 80% of the maximum penalty of $10,800 for each contravention of two civil remedy provisions, s 44 (annual leave) and s 323 (commission payments) of the FWA, that is, that the court should order that each of Mr Anderson and Mr Green pay to Mr Spaull a pecuniary penalty fixed in the sum of $17,280.

23 I now consider the '(non-exhaustive) range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does, the amount of the penalty'.

The Nature and Extent of the Conduct Which Led to the Breaches

24 Mr Spaull had been an employee of the Company for over 12 years. Annual leave is a fundamental employment obligation. Mr Anderson's relevant conduct commenced with his involvement in the non-payment of the September commission (in October 2015) by the Company and continued with his involvement in the non-payment of the annual leave (in December 2015) by the Company until the Company went into liquidation on 28 September 2016. Given his role as the manager of Mr Spaull and one of the two directors with day to day involvement in decisions concerning the Company's operations and a role in authorising payments to employees, the role of Mr Anderson in each contravention could be characterised as 'instrumental'.

25 Mr Green's relevant conduct commenced with his involvement in the non-payment of the September, October and November commissions (on 15 December 2015) by the Company and continued with his involvement in the non-payment of the annual leave (in mid-January 2016) by the Company until he ceased as a director in February 2016. Given his role as one of three directors, albeit less active than the other two, and his authority regarding payments to employees, I would characterise his role in each contravention as 'significant'.

The Circumstances in Which That Conduct Took Place

26 It is an aggravating feature of the contraventions *and* of the involvement of each of Mr Anderson and Mr Green that no satisfactory explanation was ever proffered to Mr Spaull for the non-payment of commissions. Mr Anderson had that opportunity as each became due and Mr Green had that opportunity commencing on 15 December 2015. It is an aggravating feature of the contraventions and of the involvement of each of Mr Anderson and Mr Green that neither ever informed Mr Spaull of a risk of non-payment of his accrued annual leave. Mr Anderson had the opportunity to inform Mr Spaull of that risk after 15 December 2015 and Mr Green had that opportunity from mid-January 2016. Mr Green suggested that the Company was in a precarious financial position as a consequence of a relocation of premises in 2013. The financial position of the Company may have diverted the attention of Mr Anderson and Mr Green. However, the situation of Mr Spaull must have been equally diverting to each of them when faced with his personal plea as to his situation. Those pleas were ignored.

The Nature and Extent of Any Loss or Damage Sustained as a Result of the Breaches

27 In the context of his remuneration (base wage of $80,000 per annum) the contraventions concerned not insignificant amounts with respect to annual leave ($14,156.92) and commission payments (non-payment of $13,913 and the late September payment of $8,307). A letter from the Company's liquidators dated 6 October 2016 introduced into evidence reveals a significant deficiency in the assets available to satisfy the creditors of the Company including employees in the position of Mr Spaull. It would be wrong to fix a penalty for the purpose of compensating Mr Spaull for the loss of his entitlements. However, the extent of the loss by Mr Spaull is relevant in setting a penalty for the purpose of punishment and deterrence.

Whether There Had Been Similar Previous Conduct by the Respondent

28 There is no evidence of similar previous conduct of Mr Anderson or Mr Green.

Whether the Breaches Were Properly Distinct or Arose Out of the One Course of Conduct

29 The effect of s 557 of the FWA is that the Mr Anderson's conduct concerning the contraventions of the Annual Leave obligation constitutes a single contravention of that obligation and his course of conduct with respect to the contraventions of the Incentive Based Payment obligation constitute a second (single) contravention of that obligation. Similarly, Mr Green's conduct concerning the contraventions of the Annual Leave obligation constitutes a single contravention of that obligation and his course of conduct with respect to the contraventions of the Incentive Based Payment obligation constitute a second (single) contravention of that obligation.

The Size of the Business Enterprise Involved

30 There was evidence that the Company had operated for a number of years and, at least during 2015, employed 15-16 persons. There was evidence by Mr Green of a loss of $200,000 in the year ended June 2015. However, Mr Green also gave evidence of monthly meetings between all three directors and the accountants of the Company and there was no suggestion that the capacity of the Company to pay its debts as they fell due was ever raised as an issue for discussion. In short, I am satisfied that at all relevant times, to the knowledge of Mr Anderson and Mr Green, the Company had the financial capacity to meet its obligations to Mr Spaull.

Whether or Not the Breaches Were Deliberate

31 Given my findings on the state of mind of each director, it is apparent that each breach done by Mr Anderson and Mr Green was deliberate.

Whether Senior Management Was Involved in the Breaches

32 Mr Anderson was, in effect, an active and very senior manager of the Company. Mr Green was less active than Mr Anderson. However, he was equally senior in the administration of the Company until he resigned as director in February 2016.

Whether the Party Committing the Breach Had Exhibited Contrition

33 Neither Mr Anderson nor Mr Green has exhibited contrition.

Whether the Party Committing the Breach Had Taken Corrective Action

34 Neither Mr Anderson nor Mr Green has taken corrective action.

Whether the Party Committing the Breach Had Cooperated with the Enforcement Authorities

35 The occasion for co-operation does not appear to have arisen in this case.

The Need to Ensure Compliance with Minimum Standards by Provision of an Effective Means Enforcement of Employee Entitlements

36 This case illustrates the difficulties faced by an employee of a corporate entity seeking to enforce minimum standards with respect to entitlements. It is over one year since non-payment of the October 2015 commission payment and approaching one year since non-payment of the accrued annual leave. The Company went into liquidation on the eve of a hearing date. Mr Spaull has assumed the burden of proving accessorial liability of Mr Anderson and Mr Green. He has discharged that burden.

The Need for Specific and General Deterrence

37 Specific deterrence looms large as a relevant factor with respect to Mr Anderson. The liquidator refers to assets of the Company being transferred via a business sale agreement in September 2016 to a company operating in the same industry. Mr Spaull adduced evidence that satisfies me that:

a. Mr Anderson is intimately involved in the operation of that new business which is trading under the name 'Totality Business Solutions' which is deceptively similar to the Company's trading name of 'Total Business Technology'.

b. the 'new' business is attempting to leverage off the goodwill of the business formerly operated by the Company;

c. some of the promotional material of the 'new' business is misleading insofar as it suggests no connection with the failed business of the Company.

38 Specific deterrence does not loom as a relevant factor with respect to Mr Green; there is no evidence of any relevant ongoing activities as an employer or a director of the Company.

39 General deterrence is relevant in this case insofar as directors in a similar position of Mr Anderson and Mr Green must appreciate their obligations (and the consequences of a failure) with respect to matters within their authority.

40 Weighing the above factors and the submissions of the parties, I consider:

a. there should be an order that Mr Anderson pay a penalty of $8,640 with respect to the contravention of the Accrued Annual Leave obligation (that is, 80% of the maximum) and a penalty of $8,640 with respect to the contravention of the Incentive Based Payment obligation (that is, 80% of the maximum). The total penalty is $17,280. The penalty reflects my view of the aggravating features of the contravention identified above as well as the need to emphasise specific deterrence in the circumstances of this case.

b. there should be an order that Mr Green pay a penalty of $6,480 with respect to the contravention of the Accrued Annual Leave obligation (that is, 60% of the maximum) and a penalty of $6,480 with respect to the contravention of the Incentive Based Payment obligation (that is, 60% of the maximum). The total penalty is $12,960. The penalty reflects my view of the aggravating features of the contravention identified above as well as the disparate levels of involvement of Mr Anderson and Mr Green in each contravention.

Costs

41 In Schedule IV I have set out the law relevant to s 570 of the FWA. Unless I am satisfied, in accordance with s 570(2)(b) of the FWA, that the unreasonable act or omission of Mr Anderson or Mr Green caused Mr Spaull to incur costs, there will be no order as to costs.

42 The response filed by Mr Anderson and Mr Green on 8 April 2016:

a. admitted that the number of hours of accrued annual leave of Mr Spaull at the end of his employment was as alleged by him (that is, 315 hours). The only issues to be resolved in the Directors Claim with respect to annual leave was whether or not Mr Anderson and Mr Green were *involved* in a civil penalty contravention and, if so, the quantum, if any, of any penalty. Mr Anderson and Mr Green failed on each issue. I am satisfied that Mr Anderson did not have an arguable factual case with respect to each of these issues and nor did he have an arguable legal case with respect the issues. The evidence of his deep involvement in the management of the Company was overwhelming. He did not attend and participate in the hearing. Mr Anderson should pay Mr Spaull's costs of this aspect of the claim. The position is different in relation to Mr Green. The evidence of his factual involvement in the management of the Company was not overwhelming and there was scope for legal argument about whether that level of involvement resulted in accessorial liability under s 550 of the FWA. It was not unreasonable for Mr Green to put the arguments that he put on this issue; and

b. did not admit the quantum of the commission payments claimed by Mr Spaull and raised a jurisdictional issue that was incomprehensible. The issue to be resolved in the Directors Claim was: whether the Company had an obligation to make commission payments; the quantum of the obligation; whether or not Mr Anderson and Mr Green were involved in a civil penalty contravention and, if so, the quantum, if any, of any penalty. Mr Anderson and Mr Green failed on each issue. I am satisfied that there was no arguable basis available to Mr Anderson or Mr Green for a factual response to the issues of whether the Company had an obligation to make commission payments and the quantum of the obligation. It is significant that, on 15 December 2015, Mr Spaull telephoned Mr Green to complain about the failure to pay commission payments. It is also significant that, on 29 December 2015, Mr Anderson signed a letter acknowledging that the Company owed commission payments for September, October and November 2015. Again, I am satisfied that Mr Anderson did not have an arguable legal case with respect his involvement in this contravention. Mr Anderson should pay Mr Spaull's costs of this

aspect of the claim. Again, I am satisfied that the position is different in relation to Mr Green. There was scope for legal argument about whether his level of involvement resulted in accessorial liability under s 550 of the FWA. It was not unreasonable for Mr Green to put the arguments that he put on this issue.

43 It follows that there should be an order that Mr Anderson pay the costs of Mr Spaull with respect to the whole claim. His agent calculates those costs to be $4,537.50 based on 25 hours at an hourly rate of $181.50 (including GST) plus disbursements of $232.40. The hourly rate is reasonable. The schedule of hours reveals that some of the time claimed is referable only to the Company Claim (for example, discussion with liquidator) and some of the time falls in the category of 'indemnity' costs (for example, discuss claim with client). I am satisfied as to 20 hours ($3,630) and the disbursements. The result will be an order that Mr Anderson pay the costs of Mr Spaull fixed in the sum of $3,862.40.

M. FLYNN

INDUSTRIAL MAGISTRATE

Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA) under the *Fair Work Act 2009* (Cth)

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA. The Industrial Magistrates Court (WA) (IMC), being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': FWA, s 12 (see definitions of 'eligible State or Territory court' and 'Magistrates Court'); Industrial Relations Act 1979 (WA), ss 81, 81B.

[2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.

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

- The National Employment Standards set out in Part 2-2 of the FWA: FWA, s 539; s 44(1). Those standards include obligations of employers to employees with respect to annual leave as set out ss 86 - 94 of the FWA.
- Other terms and conditions of employment as set out in Part 2 - 9 of the FWA, s 539; s 323, s 325, s 328. Those terms and conditions include obligations of employers to employees with respect to the method and frequency of amounts payable in relation to the performance of work including payments of incentive based payments and bonuses: FWA, s 323(1).
- An 'employer' has the statutory obligations noted above if the employer is a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': FWA, s 14, s 12. The obligation is to an 'employee' who is a 'national system employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed by a national system employer': FWA, s 13.

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

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

In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible state or territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: ***Mildren and Anor v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

[5] In an application under the FWA, the claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

> *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

[6] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336:

> *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences [362].*

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

Practice and Procedure of the Industrial Magistrates Court

[8] The *Industrial Relations Act 1979* (WA) (IRA) provides that, except as prescribed by or under the Act, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): IRA, s 81CA Relevantly, regulations prescribed under the IRA provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: Regulation 35(4).

[9] In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observations (omitting citations):

> *40 … The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure*

provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence.

42 *… After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'.*

43 *… The tribunal can obtain information in any way it thinks best, always giving a fair opportunity to any party interested to meet that information; it is not obliged to obtain such independent opinion, for instance, upon oath, and whether the cross-examination shall take place upon that opinion is entirely a question for the discretion of the Tribunal; it is not bound by any rules of evidence and is authorised to act according to substantial justice and the merits of the case.*

44 *… An essential ingredient of procedural fairness is the opportunity of presenting one's case.*

45 *… the right to cross-examination is viewed as an important feature of procedural fairness.*

47 *… Procedural fairness requires fairness in the particular circumstances of the case. While a right to cross-examination is not necessarily to be recognised in every case as an incident of the obligation to accord procedural fairness, the right to challenge by cross-examination a deponent whose evidence is adverse, in important respects, to the case a party wishes to present, is.*

Schedule II Accessorial liability under the Fair Work Act 2009 (Cth)

[1] Section 550 of the FWA provides:

Involvement in contravention treated in same way as actual contravention

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

[2] Decisions on this (or a comparable) provision have established the following principles:

A. Section 550 is in the same or similar form as the accessorial provision of other legislation, including s 75B of the *Trade Practices Act 1974* (Cth) (now see the definition of 'involved' in the *Australian Consumer Law* Decisions on those provisions provide guidance to interpreting s 550 of the FWA not least because Parliament is assumed to have appreciated the effect those decisions when enacting s550 of the FWA.
See ***Australian Building & Construction Commissioner v Abbott (No 4)*** [2011] FCA 950 at [188] (Gilmour J); ***Devonshire v Magellan Powertronics Pty Ltd*** (2013) 275 FLR 273; 231 IR 198; [2013] FMCA 207.

B. In order to establish whether any individual respondent was involved in a contravention, it is necessary to examine the state of mind of each respondent separately in relation to each alleged contravention.
See ***Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate (as successor to the Australian Building and Construction Commissioner)*** [2012] FCAFC 178 at [38].

C. The respondent must intentionally participate in the contravention and to form the requisite intent the respondent must have knowledge of the essential matters which go to make up the contravention, whether or not the respondent knows that those matters amount to a contravention.
See ***Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate (as successor to the Australian Building and Construction Commissioner)*** [2012] FCAFC 178 at [38].

D. What constitutes 'the essential matters of the contravention' will depend upon the facts and circumstances of each case.
See the cases reviewed by White J in ***Fair Work Ombudsman v Devine Marine Group Pty Ltd*** [2014] FCA 1365 at [182] ff including ***Potter v Fair Work Ombudsman*** [2014] FCA 187 and ***Fair Work Ombudsman v Al Hilfi*** [2012] FCA 1166.

E. Cameron FM in ***Guirguis v Ten Twelve Pty Ltd & Anor*** [2012] FMCA 307 at [150] - [151] (omitting citations):
Section 550(2)(a) of the FWA provides for accessorial liability on the basis that a person has "aided, abetted, counselled or procured" a contravention. That paragraph is identical to s.75B(1)(a) of the Competition and Consumer Act and it can be inferred that they have the same meaning… it was said that "aided, abetted, counselled or procured" … have the same meaning as in the common law where they designate participation in a crime as a principal in the second degree or as an accessory before the fact. "Aiding" and "abetting" refer to a person who is present at the time of the commission of an offence and "counselling" and "procuring" refer to a person who, although not present at the commission of the offence, is an accessory before the fact.
A person counsels a contravention by another if he or she urges its commission, advises its commission or asks that it be committed and procures a contravention if he or she causes it to be committed, persuades the principal to commit it or brings about its commission; there must also be a causal connection between that action and the conduct impugned:'

F. 'To be knowingly concerned in a contravention, the respondent must have engaged in some act or conduct which "implicates or involves him or her" in the contravention so that there be a "practical connection between" the person and the contravention': White J in ***Fair Work Ombudsman v Devine Marine Group Pty Ltd*** [2014] FCA 1365 at [178].

G. 'For a person to be liable as an accessory to a contravention on the basis that they are wilfully blind to a certain fact, it still must be shown, albeit by inference, that the person had actual knowledge of such fact. If the term "wilful blindness" is used merely as a shorthand expression to indicate circumstances which warrant the drawing of the necessary inference, then it is acceptable. But it is unacceptable if it is used as a basis for imputing knowledge where actual knowledge is not proved.'
Cowdroy J in *Potter v Fair Work Ombudsman* [2014] FCA 187 at [82].

Schedule III Pecuniary Penalty Orders under the *Fair Work Act 2009* (Cth)

[1] Section 546(1), (2) of the FWA relevantly provides:

2. *The pecuniary penalty must not be more than:*
   a. if the person is an individual--the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or
   b. if the person is a body corporate--5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).

[2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): FWA, s 12. The relevant rate is that applicable at the date of the contravening conduct:

Before 28 December 2012	$110
Commencing 28 December 2012	$170
Commencing 31 July 2015	$180

[3] The purpose served by penalties was examined by Barker J in ***Australian Building and Construction Commissioner v Construction, Forestry, Mining & Energy Union (No 2)*** (2010) 199 IR 373 at [6] (approved by the Full Court in ***McDonald v Australian Building and Construction Commissioner*** [2011] FCAFC 29):

> *The purpose to be served by the imposition of penalties is at least threefold: (1) punishment, which must be proportionate to the offence and in accordance with prevailing standards; (2) deterrence, both personal (assessing the risk of re-offending) and general (a deterrent to others who might be likely to offend); and (3) rehabilitation.*

[4] In ***Kelly v Fitzpatrick*** [2007] FCA 1080; 166 IR 14 at [14], Tracey J adopted the following 'non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty' which had been set out by Mowbray FM in ***Mason v Harrington Corporation Pty Ltd*** [2007] FMCA 7:

- The nature and extent of the conduct which led to the breaches.
- The circumstances in which that conduct took place.
- The nature and extent of any loss or damage sustained as a result of the breaches.
- Whether there had been similar previous conduct by the respondent.
- Whether the breaches were properly distinct or arose out of the one course of conduct.
- The size of the business enterprise involved.
- Whether or not the breaches were deliberate.
- Whether senior management was involved in the breaches.
- Whether the party committing the breach had exhibited contrition.
- Whether the party committing the breach had taken corrective action.
- Whether the party committing the breach had cooperated with the enforcement authorities.
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
- The need for specific and general deterrence.

[5] The list is not 'a rigid catalogue of matters for attention. At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.' (Buchanan J in ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; 165 FCR 560 at [91]).

[6] The fixing of a pecuniary penalty for multiple contraventions done by one person is subject to:

- Section 557 of the FWA which provides, in effect, that two or more contraventions of the same civil remedy provision by the same person are taken to constitute a single contravention if the contraventions arose out of a course of conduct by the person.
- The application of the totality principle. The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** (2008) 165 FCR 560; 246 ALR 35; [2008] FCAFC 8; [47] – [52].

[7] Section 546(3) of the FWA also provides:

Payment of penalty

(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:
(a) the Commonwealth; or
(b) a particular organisation; or
(c) a particular person.

[8] In ***Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)*** [2016] FCA 244 at [40] - [44], Mortimer J summarised the law (omitting citations and quotations) on this provision in light of ***Sayed v Construction, Forestry, Mining and Energy Union*** [2016] FCAFC 4:

> *The power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. The initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the "Gibbs exception" (Gibbs v The Mayor, Councillors and Citizens of City of Altona [1992] FCA 553) that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted."*

Schedule IV: Costs (of successful Claimant) under the *Fair Work Act 2009* (Cth)

[1] Section 570 of the FWA relevantly provides:

> ***Costs only if proceedings instituted vexatiously etc***.
>
> *(1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.*
>
> *Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.*
>
> *(2) The party may be ordered to pay the costs only if:*
>
> *(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or*
>
> *(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or*
>
> *(c) the court is satisfied of both of the following:*
>
> *i. the party unreasonably refused to participate in a matter before the FWC;*
>
> *ii. the matter arose from the same facts as the proceedings.*

[2] In ***Ryan v Primesafe*** [2015] FCA 8, Mortimer J states (omitting citations) at [64] - [65]:

> *"The discretion conferred by the confined terms of s 570(2) should be exercised cautiously, and the case for its exercise should be clear. The reason for caution is the potential for discouraging parties' pursuit in a complete and robust way of the claims for contravention which they seek to make under the Fair Work Act, or the defence of such claims. The policy behind s 570 is to ensure that the spectre of costs being awarded if a claim is unsuccessful does not loom so large in the mind of potential applicants (in particular, in my opinion) that those with genuine grievances and an arguable evidentiary and legal basis for them are put off commencing or continuing proceedings. It is an access to justice provision. Insofar as it operates to the benefit of respondents, it is designed to ensure respondents feel free to pursue arguable legal and factual responses to the claims made against them."*

(My emphasis)

[3] In ***Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd (No 2)*** [2015] FCA 1509, Gilmour J states (omitting citations):

> *[8] The purpose of s 570 is to ensure that litigants, including respondents, are not deterred from complete[ly] and robust[ly]" defending claims for contravention.*
>
> *[9] In light of this purpose, costs will rarely be awarded under [s 570] and exceptional circumstances are required to justify the making of such an order. Courts should be particularly cautious before finding that a party has engaged in an unreasonable act or omission, lest that discourages parties from pursuing litigation in the manner which they deem best.*
>
> *[10] That a party has a "self-evidently weak case" is not enough to warrant a costs order. There must be "a higher level of criticism or disapprobation" Indeed, costs were not awarded against the FWO in Fair Work Ombudsman v Valuair Limited (No 3) [2014] FCA 1182 even though elements of the FWO's case were "artificial and unsatisfactory" and "potentially bizarre".*
>
> *[11] Where a party relies on s 570(2)(b), the Court must be satisfied of two matters: there must be an unreasonable act or omission; and that act or omission must have "caused" costs to be incurred.*
>
> *[12] The pursuit of a case by a party in circumstances where, on the materials before the party at the time, there was no substantial prospect of success may constitute an unreasonable act or omission. However, that an argument is ultimately not accepted does not mean it is unreasonable to put it.*
>
> *[13] Even if the Court is satisfied of a s 570(2) precondition, it retains a discretion not to order costs.*

[4] In ***Rentuza v Westside Auto Wholesale*** [2009] FMCA 1022, Lucev FM states (omitting citations):

> *[27] Whether a party has engaged in an unreasonable act or omission depends upon an objective analysis of the particular circumstances of the case.*
>
> *[28] The exercise of the discretion in s.570(2)(b) is not necessarily engaged because:*
>
> *(a) a party does not conduct litigation efficiently;*
>
> *(b) a concession is made late;*
>
> *(c) a party may have acted in a different or timelier fashion;*
>
> *(d) a party has adopted a genuine but misguided approach.*

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2016 WAIRC 00918

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00918
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	**:**	BY WRITTEN SUBMISSIONS 2 NOVEMBER 2016 18 NOVEMBER 2016 23 NOVEMBER 2016
DELIVERED	**:**	WEDNESDAY, 7 DECEMBER 2016
FILE NO.	**:**	APPL 109 OF 2015
BETWEEN	**:**	SHANE MICHAEL FERGUSON Appellant AND THE COMMISSIONER OF POLICE Respondent

CatchWords	**:**	Application to tender new evidence - Removal of police officer - Loss of confidence by Commissioner of Police - Relevance of proposed new evidence on remedy
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 23A(6), s 26(1), s 26(1)(a), s 26(1)(b), s 26(3), s 27, s 27 (1)(*l*) *Police Act 1892* (WA) s 33P, s 33Q, s 33Q(4), s 33R, s 33R(1), s 33R(2), s 33R(2)(b), s 33R(3), s 33R(4), s 33R(5), s 33R(7), s 33R(8), s 33S, s 33U, s 33U(1), s 33U(2), s 33U(3)
Result	**:**	Application to tender new evidence dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr N T L John (of counsel)
Respondent	**:**	Ms K Vernon (of counsel)

Reasons for Decision

1 This is our unanimous decision.

2 The Commissioner of Police seeks leave to tender new evidence in accordance with s 33R of the *Police Act 1892* (WA) (the *Police Act*). He also says that he ought then be able to reformulate his reasons for the appellant's removal in accordance with s 33R(8) of the *Police Act*.

Background

3 The appellant was removed as a police officer on 27 February 2015. The Notice of Intention to Remove indicated that the grounds were that on 18 July 2014, the appellant had acted in a manner that was likely to bring discredit to the force or in a manner that is unbecoming of a member of the force in relation to alleged conduct towards four people. He was charged with assault and grievous bodily harm in relation to that alleged conduct. As at the time of his removal, the charges had not been dealt with by the court. He filed this appeal on 27 March 2015. In the circumstances, it was agreed twice that the hearing would be adjourned to enable those charges to be dealt with.

4 On 17 October 2016, the Commissioner filed this application for leave to tender new evidence. The evidence sought to be tendered is:

(1) Three emails from the appellant to the Commissioner, dated 6 April 2016; and

(2) A record or 'notations' of communication between police officers and the appellant and his partner, on 8 April 2016, in relation to those emails.

The Commissioner's submission

5 The Commissioner submits that the WAIRC ought to be satisfied that it is in the interests of justice to grant leave to tender the new evidence because:

(1) The new evidence constitutes, in its own right, a reason that the Commissioner does not have confidence in the appellant's suitability to be a member of WA Police;

(2) The new evidence reinforces the Commissioner's loss of confidence on the grounds he had previously expressed;

(3) Ultimately, the WAIRC should not be left to speculate as to whether the new evidence would have altered the Commissioner's loss of confidence; and

(4) The new evidence is highly relevant to the WAIRC's consideration of the application of s 33U of the *Police Act* in relation to remedy in the event that the appellant is successful in his appeal.

6 The Commissioner acknowledges that the proposed evidence is not directly related to the appellant's conduct on 18 July 2014 which the Commissioner considered, amongst other things, in deciding to take removal action. However, it not only colours the particular conduct that day, but it also speaks to his integrity, performance and conduct as a whole, his attitude to the disciplined hierarchy of WA Police, and the maintenance of the special relationship between the appellant and the Commissioner.

7 Therefore, it is said to be closely related to the appellant's suitability to be a member of WA Police.

8 The Commissioner also says that the proposed evidence will have significance in the determination of a remedy should the appeal be successful, as well as to whether the conduct is insubordinate and unbecoming of a police officer, and demonstrates a lack of integrity. The proposed evidence demonstrates that the special relationship of trust and confidence between the Commissioner and the appellant has been irreparably destroyed.

9 It is said to also demonstrate that the appellant has no intention to return to WA Police.

Whether the Commissioner should be able to reformulate his reasons

10 The Commissioner says that in the event that leave is granted to tender the new evidence, he should be able to reformulate his reasons for removal of the appellant to expressly address the new evidence.

11 The Commissioner says that the provisions of s 33R, taken in context, indicate that the Commissioner may revoke the removal action upon consideration of any new evidence whether tendered by the Commissioner under subsection (2) or by the appellant under subsections (3) and (4), or (5).

12 If the Commissioner does not give notice of revocation under subsection (7), his rights under subsection (8) to reformulate his reasons arise. Those reformulated reasons may be different from the original reasons or may be additional reasons.

13 Therefore, the Commissioner seeks to be able to tender the proposed evidence and should then be able to reformulate his reasons.

The appellant's submissions

14 The appellant agrees that the emails constitute new evidence but says that the notations do not. The notations do not have the necessary quality of evidence because they are by unknown authors; created on an unknown date; the location or source of the notations is unknown; the contents of the first notation purport to be the author's commentary on what was allegedly said by the wife of the appellant (including hearsay and her opinions on matters purportedly in the mind of the appellant), and the contents of the second notation are the author's commentary on what was allegedly said by the appellant.

15 On such appeals, the WAIRC has a duty to have regard to the interests of the appellant and the public interest in determining the appeal (s 33Q(4) of the *Police Act*).

16 The appellant says that the material facts which subsequently came to light regarding a removed person's conduct must have a direct bearing on the conduct complained of in the removal. The new evidence is not a material fact that has come to light regarding the appellant's conduct, performance, honesty or integrity as a police officer because he was not a police officer at the time of the new evidence. The new evidence does not have a direct or even indirect bearing on the appellant's conduct complained of on 18 July 2014 that led to his removal and is irrelevant to the issues surrounding the appellant's removal from office.

17 The appellant also says that if the proposed evidence is accepted as true and correct, then it demonstrates that the appellant was suffering from mental health issues brought about by the stress of being removed based on allegations not found proven in court.

18 The appellant says that the new evidence does not colour the appellant's conduct claimed to have occurred on 18 July 2014 because there was no connection between the two. It is not relevant in assessing whether the appellant's removal on 27 February 2015 was harsh, oppressive or unfair because it occurred after the removal, and would not have occurred but for the removal.

19 Also, the conduct occurred at the time the Commissioner had no jurisdiction over the appellant and there was no special relationship between the two, so the alleged conduct cannot bring discredit on the WA Police Force.

Whether the Commissioner should be able to reformulate his reasons

20 Even if leave were granted, the appellant says this does not entitle the respondent to reformulate his reasons for removal pursuant to s 33R(8) of the *Police Act*.

21 The appellant also says that the proposed evidence cannot give rise to an additional reason for the appellant's removal because such conduct had not occurred at the time of removal.

The Commissioner's submission in reply

22 The Commissioner sought to overcome the question of the genesis or provenance of the first and second notations by appending a statement of Detective Sergeant Alan Bavich as to his attendance at the appellant's address on 8 April 2016 in relation to the emails, of speaking 'with [the appellant's] wife', and of a telephone conversation with the appellant later that day.

Consideration and conclusions

The statutory scheme

23 The *Police Act* sets out in **s 33P – Appeal right** that a member who has been removed from office may appeal that removal action on the grounds that it was harsh, oppressive or unfair, and is to state the nature of relief sought.

24 **Section 33Q – Proceedings on appeal**, at subsection (4) provides, amongst other things, that the WAIRC is to have regard to the interests of the appellant and the public interest which is to include:

(i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and

(ii) the special nature of the relationship between the Commissioner of Police and members of the Force.

25 **Section 33R – New evidence on appeal** provides that either party may seek leave to tender new evidence. In the case of an application by the Commissioner, the WAIRC may grant the application if the appellant consents or it is satisfied that it is in the interests of justice to do so. The appellant has not consented. Therefore, the WAIRC needs to consider whether it is in the interests of justice to do so. That phrase must be given a wide meaning (*Allan Raymond Carlyon v Commissioner of Police* [2004] WAIRC 11428; (2004) 84 WAIG 1395 [18] – [21]).

26 Subsection (5) provides that if the Commissioner of Police is given leave to tender new evidence, then the appellant is to have a reasonable opportunity to consider that new evidence and may tender new evidence without leave in response to the new evidence tendered by the Commissioner.

27 The Commissioner may then either give notice of the revocation of the removal action (subsection (7)) or reformulate his or her reasons for not having confidence in the appellant's suitability to continue as a member, having regard to the appellant's integrity, honesty, competence, performance or conduct (subsection (8)).

28 According to s 33S of the *Police Act*, certain provisions of the *Industrial Relations Act 1979* (WA) (the *IR Act*), subject to necessary modifications, apply to and in relation to an appeal and a determination in this case. They include s 26(1)(a) and (b) and s 26(3). Section 26(1)(a) and (b) provide that in the exercise of its jurisdiction, the WAIRC:

(a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and

(b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; …

(*IR Act* s 26(1)(a) and (b))

29 Subsection (3) is not relevant to this matter.

30 Section 33R of the *Police Act* provides two significant aspects regarding new evidence. The first is that, generally, new evidence shall not be tendered. In those circumstances, the appeal is to be determined on the evidence that was before the Commissioner in making the decision to take removal action (s 33R(1)), subject to it being in the interests of justice to receive new evidence.

31 Secondly, in the case of the Commissioner's application for leave to tender new evidence, the test is whether it is in the interests of justice to do so (s 33R(2)(b)).

32 We also note that where it is the appellant who seeks leave to tender new evidence, s 33R(4) provides that the WAIRC shall have regard to two specific matters:

(a) whether or not the appellant was aware of the substance of the new evidence; and

(b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access,

before his or her removal from office.

(*Police Act* s 33R(4))

33 Those tests do not apply to an application by the Commissioner. Previous cases about new evidence relate to a matter occurring before the removal action was taken, not after it.

34 In *Carlyon v Commissioner of Police*, the new evidence the Commissioner sought leave to tender was the transcript of the criminal trial of the appellant and the Magistrate's reasons relating to the incidents which formed the Commissioner's grounds for removal. That is not the case here. The proposed evidence relates to conduct after the removal. It is not evidence which came to light subsequent to the removal, but which relates to the conduct that formed the grounds for the removal. It relates to an entirely different circumstance. It was conduct at a time when the appellant was not a police officer.

35 The decision in *Minister for Police and Commissioner of Police v Smith* (1993) 73 WAIG 2311, 2326 is also distinguishable. In that case, the evidence which later came to light related to the incident the subject of the Commissioner's grounds for dismissing Smith, not to a different and subsequent incident.

36 The Commissioner also refers to Kenner C's comments in *Gordon v Commissioner of Police* [2010] WAIRC 00334 at [34] to [35]; (2010) 90 WAIG 645 at 650, that the provisions of s 26(1) and 27 (1)(*l*) of the *IR Act* are directed to enabling the WAIRC to 'do what is necessary to enable the expeditious hearing and determination of all [the] relevant issues' (Commissioner's submissions, 2 November 2016 [59]). However, Kenner C's comments were made in respect of an application by the appellant to amend his grounds of appeal. Such an application is to be dealt with by reference to the general powers of and directions to the WAIRC in ss 26 and 27 of the *IR Act*. On the other hand, the issue of new evidence is specifically set out and circumscribed by the provisions of s 33R of the *Police Act*. Those specific provisions must override any consideration of the WAIRC's general powers under ss 26 and 27 of the *IR Act*.

37 In determining the appeal, the WAIRC is not limited to what it may consider, however, it is to consider two particular matters:

(1) the interests of the appellant; and
(2) the public interest, which is taken to include:
    (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
    (ii) the special nature of the relationship between the Commissioner of Police and members of the Force.

(*Police Act* s 33Q)

38 The conduct complained of by reference to the proposed evidence is not related either to the particular conduct alleged in the Notice of Intention to Remove, nor is it of a similar type. It is communications with the Commissioner by email relating to an entirely different matter.

39 While the conduct the subject of the proposed evidence may relate to the appellant's conduct and integrity as a person, it does not relate to his conduct and integrity as a member of the force because he was not a member at the time.

40 However, it does relate to a former police officer seeking to return to the WA Police and conduct during that period when he is seeking to be returned. It may reflect on his integrity as a person and consequently may reflect on the WA Police Force should he be returned to that situation, if he is successful in his appeal.

Relevance of the proposed evidence on remedy

41 Section 33U(1), (2) and (3) provide that:

(1) This section applies if the WAIRC decides on an appeal that the decision to take removal action relating to the appellant was harsh, oppressive or unfair.

(2) If this section applies and unless an order is made under subsection (3) the WAIRC may order that the appellant's removal from office is and is to be taken to have always been of no effect.

(3) If, and only if, the WAIRC considers that it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect, the Commission may instead of making an order under subsection (2), subject to subsections (5) and (6), order the Commissioner of Police to pay the appellant an amount of compensation for loss or injury caused by the removal.

42 Subsection (3) suggests that, rather than nullifying the removal, the WAIRC may make an order for compensation for loss or injury, similar to the question of impracticability of reinstatement in s 23A(6) of the *IR Act* that:

> If, and only if, the Commission considers reinstatement or re-employment would be impracticable, the Commission may, subject to subsections (7) and (8), order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.

43 In our view, it is only in this regard, that is, whether nullifying the removal is practicable, that the proposed evidence may be relevant. This is because it may be relevant to whether the appellant and the Commissioner could re-establish the necessary special relationship which is recognised in the *Police Act*, and whether the Commissioner would have the trust and confidence in the appellant as a police officer.

44 Section 33U(4) sets out two particular matters which are relevant to consider in considering 'whether or not it is impracticable for it to be taken that the appellant's removal from office is and always has been of no effect'. The use of the phrase 'it is relevant to consider' is not language of limitation. The considerations are not expressed as exhaustive. Rather, the subsection provides that while the WAIRC is to consider those matters set out in s 33U(4)(a) and (b) as relevant, it is not restricted to those matters only (*AM v Commissioner of Police* [2010] WAIRC 00061; (2010) 90 WAIG 283 [18] – [23]).

45 Therefore, we are of the view that the Commissioner ought not to be granted leave to tender the new evidence for the purpose of determining the appeal. Should the WAIRC uphold the appeal and need to determine whether, under s 33U(3), it is impracticable for the removal to be taken as having no effect, it may be raised at that point.

46 The application is dismissed.

PRISONS ACT 1981—APPEAL—Matters pertaining to—

2016 WAIRC 00927

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 30 JUNE 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MYRON SAMS
	APPELLANT
	-v-
	DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 13 DECEMBER 2016
FILE NO/S	APPL 45 OF 2016
CITATION NO.	2016 WAIRC 00927

Result Appeal dismissed

Order

WHEREAS this is an appeal pursuant to s 106(2) of the *Prisons Act 1981* filed on 25 July 2016; and

WHEREAS on 29 August 2016, the parties agreed to adjourn this appeal while they pursue conciliation in the Commission's general jurisdiction; and

WHEREAS on 11 December 2016, the appellant advised the WAIRC that he agrees to the appeal being dismissed as he will seek to have the dispute resolved in the Commission's general jurisdiction.

NOW THEREFORE, the WAIRC, pursuant to the powers conferred on it under the *Prisons Act 1981* and the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00934

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES NATHAN BRADLEY

APPLICANT

-v-

BINDER GROUP PTY LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE MONDAY, 12 OCTOBER 2015
FILE NO. B 93 OF 2015
CITATION NO. 2015 WAIRC 00934

Result Direction issued
Representation
Applicant Mr P Mullally as agent
Respondent Mr M Cox of counsel

Direction

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr M Cox 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 upon the respondent any signed witness statements upon which he intends to rely by no later than 30 October 2015.

(2) THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely by no later than 13 November 2015.

(3) THAT the parties file an agreed statement of facts by no later than 27 November 2015.

(4) THAT the applicant file and serve an outline of submissions by no later than one week prior to the date of the hearing.

(5) THAT the respondent file and serve an outline of submissions by no later than three working days prior to the date of the hearing.

(6) THAT the application be listed for hearing for one day.

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

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

2016 WAIRC 00048

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATHAN BRADLEY
	APPLICANT
	-v-
	BINDER GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 3 FEBRUARY 2016
FILE NO/S	B 93 OF 2015
CITATION NO.	2016 WAIRC 00048

Result	Order issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr M Cox of counsel

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr M Cox of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

1. The respondent's witness, Mr Paul Bennett, be and is hereby granted leave to appear at the hearing by video link from Switzerland.

2. The applicant's witnesses, Mr Steve Palmer, Mr Bruce Bell and Ms Marianne Paterson be and are hereby granted leave to appear at the hearing by telephone from interstate.

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

2016 WAIRC 00731

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00731
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 5 FEBRUARY 2016, THURSDAY, 3 MARCH 2016, FRIDAY, 1 APRIL 2016
DELIVERED	**:**	TUESDAY, 30 AUGUST 2016
FILE NO.	**:**	B 93 OF 2015
BETWEEN	**:**	NATHAN BRADLEY
		Applicant
		AND
		BINDER GROUP PTY LTD
		Respondent
Catchwords	**:**	*Industrial Law (WA) - Contractual benefits claim - Whether contractual entitlement to payment of costs associated with obtaining permanent residency - Whether contractual entitlement to a bonus or commission payment - Whether payments were discretionary - Principles applied - Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr P Mullally as agent
Respondent	**:**	Mr M Cox of counsel
Solicitors:		
Respondent	**:**	MDC Legal

Case(s) referred to in reasons:

Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130

B.P. Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings (1977) 180 CLR 266

Codelfa Construction Pty Ltd v State Rail Authority (1982) 149 CLR 337

Fernandes v Bollinger & Co Pty Ltd (2016) 96 WAIG 485

Hawkins v Clayton (1988) 164 CLR 539

McDermott v Black (1940) 63 CLR 161

Mineralogy Pty Ltd v State of Western Australia [2005] WASCA 69

Pepe v Platypus Asset Management Pty Ltd [2013] VSCA 38

Russo v Westpac Banking Corp [2015] FCCA 1086

Rymark Australia Development Consultants Pty Ltd v Draper [1977] QdR 336

Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Woolworths Ltd v Kelly (1991) 22 NSWLR 189

Case(s) also cited:

Australian & New Zealand Banking Group Ltd v Frost Holdings Pty Ltd [1989] VR 695

Australian Medic-Care Ltd v Hamilton Pharmaceutical Pty Ltd (2009) 261 ALR 501

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600

Commonwealth Bank of Australia v Barker [2014] HCA 32

Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd (1993) 113 ALR 225

Dovura Pty Ltd v Wilkins (2000) 105 FCR 476

Hugh Sutherland Rogers v J-Corp Pty Ltd [2015] WAIRC 00862

Lau v Bob Jane T-Marts Pty Ltd [2004] VSC 69

Major v Bretheton (1928) 41 CLR 62

Masters v Cameron (1954) 91 CLR 353

Masterton Homes Pty Ltd v Palm Assets Pty Ltd [2009] NSWCA 234

Matthews v Cool or Cosy Pty Ltd IAC 1 2004

Media Entertainment & Arts Alliance, Re; Ex parte Hoyts Corp Pty Ltd (1993) 178 CLR 379

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234

Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596

Stilk v Myrick (1809) 2 Camp 317

Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326

Reasons for Decision

1 The applicant, Mr Bradley, was employed by the respondent, Binder Group Pty Ltd, as the Western Australian Industrial Sales Manager, and later the National Sales Manager, from 25 July 2011 to 17 April 2015. The company is engaged in the business of designing, manufacturing and supplying pipe support systems and associated equipment to the mining and gas industry. Mr Bradley was based in the Western Australian office of Binder. The company also has offices in Queensland and Victoria.

2 Mr Bradley was employed under two written agreements. The first employment contract for the position of WA Industrial Sales Manager was dated 14 March 2011. The second and final employment contract for the position of National Sales Manager was dated 17 May 2012. As a result of events prior to and during Mr Bradley's employment, he claimed that Binder has denied to him contractual entitlements in the total sum of $221,081.44. A summary of them now follows.

Relevant principles

3 The relevant principles applicable to contractual benefits cases are not controversial. In the recent case of *Fernandes v Bollinger & Co Pty Ltd* (2016) 96 WAIG 485 I said at par 5:

> The principles applicable to this aspect of the Commission's jurisdiction are well settled. The onus is on Mr Fernandes to establish that at the material time he had a contractual entitlement to the benefit claimed and that it has been denied. Specifically, the claim must relate to an industrial matter; Mr Fernandes must be an employee; the benefit claimed by him must be a contractual benefit, that being one due under the contract; the relevant contract must be a contract of service; the benefit claimed must not arise under an award or order and finally, it must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704.

Permanent residency costs

4 Mr Bradley maintained it was an oral term of his employment contract with Binder that the company would sponsor him to work in Australia under a Temporary Business Visa (Long Stay) (subclass 457), and pay the costs associated with obtaining

permanent residency. He said the agreement was reached during a meeting with the directors of the company in early May 2011. Mr Bradley maintained he would not have accepted a position with Binder otherwise, as he had already completed 16 months employment with his previous employer, and was only a few months away from being able to apply for permanent residency through them. His previous employer had agreed to meet all of the costs associated with obtaining a Permanent Work Visa (subclass 186). Mr Bradley claims he is owed $8,043 being the costs associated with obtaining permanent residency for himself and his family. Mr Bradley conceded in evidence that Binder did not agree to pay all the costs of his permanent residency. He accepted that Binder indicated it would "sponsor" him to permanent residency.

5 Binder submitted that in order to lawfully employ Mr Bradley, it understood it would have to take over sponsorship of his Temporary Business Visa (Long Stay) (subclass 457). It was a precondition of Mr Bradley's employment with the company. Binder maintained that during a meeting with Mr Bradley in early May 2011, Mr Paul Bennett, the Group Managing Director, agreed to arrange to transfer the sponsorship of Mr Bradley's 457 Visa to the company, and pay the costs associated with the transfer. He never agreed to pay for Mr Bradley's permanent residency costs. Binder did not nominate Mr Bradley for his permanent residency. Mr Bennett further said that when Mr Bradley raised the issue of costs for his permanent residency with him in January 2013, the company refused to pay for this because Mr Bennett considered that it had been raised well after the event. Binder submitted the employment contract was otherwise complete, and contained all of the express contractual terms and conditions that were to bind the parties. Specifically, Binder denied the contract contained an oral term that it was to pay the costs associated with Mr Bradley obtaining permanent residency status in Australia.

6 Mr Bradley gave evidence that in order to apply for a Permanent Work Visa (subclass 186) he needed to work for one employer for a minimum of two years. Mr Bradley also said that it was a condition of the oral agreement, that if he left employment with Binder within two years, he would be required to repay the visa costs expended by the company. Binder submitted that objectively, the condition could only refer to recovering costs associated with the 457 Visa, as Mr Bradley could only apply for a Permanent Work Visa (subclass 186) after the two year period had expired.

7 As a person from the United Kingdom, the only basis on which Mr Bradley was able to work in Australia at the material time was through sponsorship for a subclass 457 Visa. A requirement of the migration legislation is for an employer to "sponsor" a prospective employee. It is unlawful for an employer to employ any such person unless a subclass 457 Visa sponsorship is in place.

8 It was common ground in this matter that Mr Bradley, in his prior employment, was so sponsored. Therefore, self-evidently, for Mr Bradley to accept an offer of employment with a new employer, such as Binder, Binder had to become Mr Bradley's sponsor. It was not necessary for an express agreement in these terms. As a requirement of the migration legislation, and thus an obligation of law on Binder, I agree with Binder's submissions that if no express reference was made to such matters, then the circumstances would satisfy the tests for the implication of a term to this effect, into Mr Bradley's contract of employment, applying the principles established in *B.P. Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266.

9 No reference was made to the issue of visa or permanent residency sponsorship in Mr Bradley's letter of appointment as the WA Industrial Sales Manager for Binder, the copy of which in evidence was dated 14 March 2011. Reliance was placed by Mr Bradley on the discussions between himself and Mr Bennett and Mr Davey. Neither Mr Bennett nor Mr Davey confirmed Mr Bradley's version of events as to this issue. They both maintained that Binder only agreed to take over the costs of the subclass 457 Visa as Mr Bradley's sponsor. Reference was also made by Mr Bradley to the involvement of Mr Bell, the prior State Manager of Binder. The evidence was, however, as confirmed by Mr Bell himself, that he played no direct role in the appointment of Mr Bradley or the terms and conditions of employment finally agreed between the parties. The only role seemingly played by Mr Bell, was that he introduced Mr Bradley to Mr Bennett as a possible candidate for the State Manager position, prior to Mr Bell's departure from the company. Nor did Mr Bell it seems, have any authority to enter into contracts on behalf of Binder, even if it could be said that he did take part in some way, in the terms and conditions finally agreed between the parties.

10 Further reference was made by Mr Bradley to the role played by Ms Patterson. Ms Patterson was a recruitment consultant involved in the recruitment process for Mr Bradley's appointment at the early stages. In her witness statement, Ms Patterson asserted that she was involved in the "negotiation process" for Mr Bradley's appointment. Precisely what level of involvement Ms Patterson had in that regard was not clear on the evidence. It was common ground however, that she was not present at the meetings between Mr Bradley and Messrs Bennett and Davey when discussing the possibility of him joining the business. Ms Patterson could not have been privy to those discussions and what was agreed. Therefore, any assertions by Ms Patterson, and for that matter Mr Bell, as to what may have been agreed between the parties in relation to visa issues generally in relation to Mr Bradley, was necessarily hearsay. Additionally, such evidence could also be categorised as evidence of pre-contractual statements which are generally not of assistance as to the interpretation of terms of a contract as finally agreed.

11 Furthermore, if, as Mr Bradley maintained, the payment of costs for his permanent residency was so important to him, and was agreed to by Mr Bennett prior to his appointment, it is surprising to say the least, that he did not seek written confirmation of this either in the letter of offer made by Binder, or by a separate document. Whilst Mr Bradley made reference to his intentions on taking up the new appointment, and the period of time remaining to qualify for permanent residency under his previous employment, these are considerations which I cannot have regard to for the purposes of construing the terms of any contractual arrangement. Additionally, Mr Bradley appeared to base his claim at least to an extent, on what he perceived to be the position in his discussions with Mr Bennett. In his mind, as revealed in his evidence, any "sponsorship" of him by Binder in relation to his permanent residency, necessarily meant Binder paying all of the costs associated with it. However, there was no direct evidence of an agreement to this effect, or that was what Binder had in mind too.

12 Having regard to all of the evidence in relation to this issue, I am not persuaded that Mr Bradley has established, given the persuasive burden falls on him, that it was a term of his contract of employment that Binder was responsible for all of Mr Bradley's permanent residency costs.

Bonus payment for years ending 30 June 2012 – 30 June 2014

13 As part of his employment, Mr Bradley maintained he was also entitled to a bonus payment for each of the above financial years. He claimed a total of $213,038.44 was due to him under his contract of employment with the respondent.

Bonus payment for the year ending 30 June 2012

14 On 6 December 2011, Mr Ian Davey, the respondent's Sales and Marketing Director, sent an email to Mr Bradley and the other State Sales Managers, outlining the terms of a bonus scheme arrangement for the financial year ending 30 June 2012. The email confirmed what was discussed in a sales meeting in November 2011. A copy of the email was annexure IBD-3 to Mr Davey's witness statement. Given the importance of its terms, I reproduce the email as follows:

> I Want[sic] to confirm the bonus scheme arrangements and get you[sic] final feedback before we announce to all of the sales team. The details are as follows:
>
> - The bonus will be worked on the annual results for the Group and will be paid annually.
> - It is based on the full financial year accepted Budgets and ends at the completion of the financial year
> - All bonus calculations are based on the achievement or over achievement of Gross Profit dollars ($)
> - Anyone leaving or resigning for any reason before the end of the financial year will not be entitled to or considered for any bonus
> - Anyone who joins the company and has not completed a full year will be entitled to a pro rata bonus providing their tenure is greater than their probationary period. I.E if the financial year completes and the incumbent has not completed their probationary period then no bonus is payable
>
> The payment structure for the bonus is:
>
> Internal Sales Person - $5,000 on achievement of gross profit dollar ($) budget (for the branch)
>
> External Sales - $10,000 on achievement of gross profit dollar ($) budget – (Individual Budget)
>
> Branch/Sales Manage[sic] - $15,000 on achievement of gross profit dollar ($) budget (for the branch)
>
> East Coast Manager - $10,000 on achievement of gross profit dollar ($) budget (for each branch)
>
> In addition 20% of any gross profit $ above budget for the branch will be paid to the branch for distribution to everyone at the branch. Distribution to be agreed between the Sales Director and/or managing director and the relevant sales/branch manager and the east coast manager if applicable.
>
> Please provide your feedback o[sic] the above.

15 Mr Bradley maintained that in accordance with the bonus scheme, he was entitled to a payment of $15,000 for achieving sales over and above the gross profit target set for WA, and $106,604.44, being his share of a payment representing 20% of any gross profit above budget for the branch.

16 Binder submitted that under the first employment contract, Mr Bradley had no contractual entitlement to participate in a bonus scheme. It was not included as a term of the contract, and the scheme was not accompanied by any change in Mr Bradley's employment duties or status, or any other form of consideration. Further, Binder argued the second limb of the bonus scheme, which provided that *"…20% of any gross profit $ above budget for the branch will be paid to the branch for distribution to everyone at the branch"* meant "everyone" and not simply the five members of the sales team as alleged by Mr Bradley. In any event, the company claimed the distribution of the bonus was subject to agreement between the Sales Director and/or Managing Director. As there was no such agreement, it was incomplete, to the extent that it would require a future agreement to be enforceable. Binder submitted that it reserved to itself a discretion in respect of the second limb of the bonus scheme, and exercised its discretion having regard to its commercial circumstances, and other factors.

17 Although it denied that it was liable to pay Mr Bradley any amount by way of a bonus payment, Binder contended that Mr Bennett agreed to pay $40,000 to Mr Bradley, in full and final satisfaction of his claim to a bonus for the financial year ending 30 June 2012. As to this contention, Mr Bradley gave evidence that he felt vulnerable, and accepted this payment as he was afraid he could lose his job and visa if he pushed Binder too hard. He said he did not consider the payment discharged Binder's liability to pay the full bonus.

18 The bonus payment for the June 2012 financial year was based on the email from Mr Davey set out above. The scheme was introduced some six months after Mr Bradley became employed. There was no reference to the bonus scheme in Mr Bradley's original letter of appointment. Therefore for Mr Bradley to succeed in relation to this claim, he must establish that the contract was varied in or about December 2011 to incorporate the terms of Mr Davey's email of 6 December 2011 in relation to bonuses.

19 As noted, Binder maintained as a threshold position that Mr Bradley could not establish that the 2012 bonus scheme was a contractual benefit because Mr Bradley offered no fresh consideration for its terms. Binder contended that Mr Bradley worked in accordance with his established duties and responsibilities as from the commencement of his employment. In accordance with relevant contractual principles, the submission was made by Binder that Mr Bradley had therefore failed to establish that this bonus was enforceable: Carter JW, *Contract Law in Australia* (6th ed, 2012) pars 6.02, 6.04, 6.07 and 6.11; *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189.

20 For the following reasons I am not persuaded to this view. In the absence of any specified performance benchmarks in Mr Bradley's contract of employment, or reference to the scheme providing for the same, Mr Bradley's contribution to the two levels of performance specified in the 2012 bonus scheme constituted consideration necessary to support the terms of the

scheme having contractual effect. The obligations imposed on Mr Bradley to perform to achieve bonus targets, were sufficient consideration to give contractual effect to the promises made by Binder to him.

21 In large part the determination of Mr Bradley's claim in relation to the June 2012 bonus scheme is a matter of construction of the terms of the scheme itself. There were two elements to it. The first element required the meeting or exceeding of Binder's overall gross profit on a group basis. This included all of the branches they being Western Australia, Victoria and Queensland. If, as a part of this overall group result, a branch achieved its gross budget, payments were payable to the staff as set out. This occurred for the WA Branch. In Mr Bradley's case, as the Sales Manager, $15,000 was payable. He was plainly entitled to that amount. If the Commission concludes this was the only entitlement due to Mr Bradley under the June 2012 scheme, the payment made by Binder to Mr Bradley in the sum of $40,000, following his disputing his entitlement under the scheme with Mr Bennett and Mr Davey fully discharged its liability to Mr Bradley.

22 The contentious aspect of the June 2012 scheme was the second part. This dealt with the 20% gross profit above budget for a branch. Again, there was no dispute that the WA Branch well exceeded its gross profit target. On the evidence, the target gross profit for the WA Branch was $1,642,500 and the actual gross profit was $4,307,611.

23 In accordance with the ordinary and natural meaning of the words used in Mr Davey's email of 6 December 2011, there are two limbs to the second part of the 2012 bonus scheme. The first is a reference in the first sentence, to the payment of 20% of gross profit in excess of a branch budget to be paid to "everyone at the branch". The second limb is the reference in the second sentence to the words "Distribution to be agreed …".

24 It is trite to observe that in the interpretation of provisions of a contract, the modern approach requires not only reference to the text of the contract, but also to the "purpose and object of the transaction" and "what a reasonable person" would understand the terms to mean: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at par 40 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. It is also not appropriate to fasten on one part only of a contract. The text needs to be considered as a whole. One part of a contract taken in isolation may have quite a different meaning when considered in the context of all of the contract's component parts. At the end of the day, interpretation is a text based activity.

25 As noted, Mr Bradley submitted that the first limb of the 20% bonus provision should be construed to mean only those in Binder's sales team of five employees, including Mr Bradley, were recipients. On this basis, each member of the sales team was eligible to receive $106,604.44. Adding to this Mr Bradley's $15,000 payment for the "achievement bonus", would lead to a total of $121,604.44 owing to him, from which the amount paid of $40,000 should be deducted. In particular, Mr Bradley referred to Mr Davey's email of 6 December 2011 being addressed to the Sales Team Managers. The submission was that because it was sent to these staff of Binder in sales, this supported the contention that the bonus scheme recipients should be limited only to this group.

26 For the following reasons, I prefer the interpretation of the 2012 bonus scheme as contended by Binder in relation to the first limb of the second part of the scheme. The words used by Mr Davey in his email "everyone at the branch" are clear and unambiguous. The language used in the second last par, is quite different to and stands in contrast to the language used in the par above, dealing with the "achievement bonus" part of the scheme. In this part the relevant staff members were clearly identified. Reference was made to the specific sales personnel to receive the bonus, and, in addition, the "East Coast Manager". However, in the next par, the language is expressed in general terms. Reference to the word "distribution" is also an indicator of the wider scope intended by this part of the scheme. To "distribute" means to "deal out, give a share of to each of a number; spread about, scatter, put at different points …" (the Shorter Oxford English Dictionary).

27 If, as contended by Mr Bradley, the first limb meant only the five sales staff were to receive a bonus distribution, then it is difficult to immediately see what the necessity of the next sentence would be to the operation of the scheme. That is, if the distribution was as contended by Mr Bradley, then the remaining words in the paragraph in relation to "distribution to be agreed" would appear to be somewhat redundant and have no work to do: *Mineralogy Pty Ltd v State of Western Australia* [2005] WASCA 69 at par 52.

28 As a consequence of my conclusion as to the meaning of the words used in the second limb of the 2012 scheme, is the question of the lack of agreement as to the distribution. The last sentence of the par refers to the need for an agreed distribution between the Managing Director or Sales Director and the relevant Branch Manager. Mr Bennett testified that this part of the scheme was inserted to enable a distribution to be made only if it was considered appropriate, having regard to the overall health and profitability of the business.

29 In the case where the operative part of an agreement leaves some aspect to be decided, or the subject matter to be further agreed, the terms of the bargain, to that extent at least, would be incomplete: Seddon NC, Bigwood RA and Ellinghaus MP, *Cheshire and Fifoot: Law of Contract* (10th ed, 2012) par 6.8. In this case there was no evidence that the steps outlined in the second limb of the 2012 scheme took place. This part of the contract remained unfulfilled. It is not for the Commission to rewrite the terms of the agreement reached between the parties to provide what it may consider to be a fair outcome. I am not therefore persuaded that Mr Bradley has established his entitlement under the 2012 scheme as claimed.

"Settlement" of dispute

30 Given my conclusions about the 2012 bonus, whilst it is strictly unnecessary to determine the issue, in the event I am incorrect, a question as to whether a payment made by Binder to Mr Bradley in settlement of a dispute about his bonus for 2012 arises.

31 It was common ground that Mr Bradley and Binder had a dispute as to Mr Bradley's entitlement under the 2012 bonus scheme. Mr Bradley spoke to Mr Davey about the matter and it was proposed by Mr Davey that Mr Bradley be paid a total of $20,000, including the $15,000 from the first limb of the scheme. Mr Bradley was not happy with this. He raised the matter further with Mr Bennett. Given the results for the WA Branch, Mr Bradley felt that a $20,000 bonus was completely inadequate. Both Mr Bradley and Mr Bennett met to discuss the matter on 2 or 3 October 2012.

32 The upshot of this meeting was an offer by Mr Bennett to pay Mr Bradley $40,000 for the 2012 financial year bonus. Mr Bennett testified that the performance of the WA Branch was not just the result of the sales team efforts alone. Also, the WA Branch sales figures contained sales made prior to Mr Bradley joining Binder and sales made by others, including Mr Davey. Mr Davey testified that some $900,000 of the sales were made by him and contributed to the WA Branch results over the relevant period. Mr Bennett also referred to the fact that although the WA Branch sales performance was good, this was not the case for both Queensland and Victoria.

33 Mr Bradley testified that he felt pressured to accept the $40,000 from Mr Bennett because, given his visa status, he considered himself to be vulnerable. In the course of this case, Mr Bradley maintained that he did not agree to accept the $40,000 from Mr Bennett to finally resolve his claim. As such, Mr Bradley denied that there was any "accord and satisfaction" in relation to this leg of his contractual benefits claim: *McDermott v Black* (1940) 63 CLR 161 per Dixon J.

34 Importantly for present purposes, on 3 October 2012, shortly after the meeting with Mr Bradley, Mr Bennett sent an email to the company's Commercial Manager, Mr Marshall, in relation to the payment to be made to Mr Bradley. The email was copied to both Mr Bradley and Mr Davey. It said as follows:

> Graeme
>
> I've agreed a final bonus with Nathan of $ 40,000 for financial year 2011-12. Can you please arrange to pay at your earliest convenience,
>
> At this stage there is no bonus for 2012-13 for anybody, Nathan is going to work up a proposal for Ian and I to review.
>
> Regards
>
> Paul

35 Mr Bradley did not object to the content of Mr Bennett's email or respond to it at all. It was Mr Bennett's uncontradicted evidence that the issue of the $40,000 payment to Mr Bradley or the "final bonus" for 2012 was not raised by Mr Bradley with Mr Bennett at any time over the remainder of Mr Bradley's employment. I consider this to be significant, in particular the email. Had Mr Bradley not accepted the $40,000 payment as a compromise of his dispute with Binder at the time, he had an obligation to at least communicate this to Binder. A reply by Mr Bradley to Mr Bennett's email to Mr Marshall of 3 October 2012 was the perfect opportunity to do so. Mr Bradley's failure to respond at all to this was telling. All Mr Bradley had to say was that he was reserving his position in relation to the second limb of the 2012 scheme. Whether, in light of such a reservation, Mr Bennett would have still agreed to pay the $40,000 to Mr Bradley is merely conjecture. However, Mr Bradley could not have it both ways. He could not take the substantial sum of $40,000 without there being some communication to Binder of any reservations he may have then had: *Rymark Australia Development Consultants Pty Ltd v Draper* [1977] Qd R 336 at 344.

Bonus payment for the year ending 30 June 2013

36 Mr Bradley was promoted to the position of National Sales Manager in May 2012. He gave evidence that he specifically requested the inclusion of a bonus scheme in his contract dated 17 May 2012. The contract, in part set out below, provided as follows: *"a performance bonus scheme will be paid in addition to the agreed salary. Details are provided separately and subject to changes at the Managing Director's discretion"*. Mr Bradley maintained that he approached Mr Davey about the bonus scheme in August 2012, and was instructed to propose a new scheme for the 2013 financial year. Mr Bradley submitted a proposal for a revised bonus scheme on 1 November 2012, however received no response to it despite contacting Mr Davey on a number of occasions. Mr Bradley maintained that in the absence of a new structure being agreed for the 2013 financial year, the parties were bound by the first bonus scheme as provided in the email dated 6 December 2011. It was contended that the terms of the 2012 scheme should be implied into the contract applying the principles in *BP Refinery* or, the less stringent approach as set out in *Hawkins v Clayton* (1988) 164 CLR 539. Accordingly, Mr Bradley claims $98,934.44 under his contract of employment for the financial year ending 30 June 2013.

37 Binder submitted that in exercising his discretion, Mr Bennett decided not to make any bonus payments in the 2013 financial year, and therefore, decided not to implement a bonus scheme for that financial year at all. The company maintained that the bonus clause of the contract (set out above) is so uncertain and so dependent on the initiatives and discretion of one party, that it did not create an enforceable contractual obligation.

38 Binder argued there was no basis for Mr Bradley to assume the first bonus scheme would continue to operate in the 2013 financial year, as Mr Davey had rejected his proposal to work to the terms of the 2012 financial year bonus scheme. If the first bonus scheme was found to apply, Binder submitted that Mr Bradley would not be entitled to a bonus payment as the respondent did not meet its budget overall in the 2013 financial year.

39 As noted above in May 2012, Mr Bradley was promoted to the newly created position of National Sales Manager. As part of the discussions about the new appointment, Mr Bradley requested and Mr Bennett agreed to include reference to a bonus scheme in Mr Bradley's letter of appointment to the new position. A copy of the letter dated 17 May 2012 was attachment 3 to Mr Bradley's witness statement. The relevant part, dealing with the bonus, appeared under the heading "Remuneration Basis" in the following terms:

> Remuneration Basis:
>
> - Your salary will be $140,000 per annum.
> - Superannuation of 9% is also applicable.
> - A vehicle allowance of $18,000 PA will be paid as part of this role.
> - A performance bonus scheme will be paid in addition to the agreed salary. Details are provided separately and subject to changes at the Managing Directors discretion.

> Salary reviews take place yearly in the month of October. As discussed we are very focussed on the performance in this role and will review performance after 6 months with you. Performance will be based on the achievement of agreed goals.
>
> Performance Reviews are conducted annually in September.

40 To the extent that Mr Bradley relies on the 2012 bonus scheme as an implied term to support his 2013 claim, is, at least in part, recognition that the terms of the letter of appointment of itself, did not provide the basis for Mr Bradley's claim. On the evidence in this matter, there was no scheme finally agreed and introduced for 2013. Mr Bennett's testimony was that as he said in his 3 October 2012 email, there would be "no bonus for anyone" in the 2012/13 financial year. According to Mr Bennett, this was because of the problems resulting from the first bonus scheme, and the fact that several months of the 2013 financial year had then already passed and he felt it was too late to develop a second scheme.

41 Mr Davey testified that he understood the email of 3 October 2012 from Mr Bennett to be a directive that there would be no bonus scheme for anyone in 2012/13. Mr Davey denied the contentions made by Mr Bradley, that he spoke to Mr Davey in August 2012 and requested consideration be given to a scheme and that he, Mr Bradley, would otherwise be happy to work under the 2012 bonus scheme. Mr Davey said that he did not ask Mr Bradley to come up with a new one. While Mr Davey did accept he received some emails from Mr Bradley in relation to the issue of a bonus scheme for 2013, he considered any such proposals would have been for the following year in 2014. This was because according to Mr Davey, Mr Bennett had made it clear that there would be no bonus scheme for the 2013 financial year.

42 It is of importance to note that Mr Bradley and Binder entered into a new contract in May 2012 for the new position of National Sales Manager. There is no basis in my view, in Mr Bradley's letter of offer, to conclude that the terms of the 2012 financial year bonus scheme would simply carry over. The 2012 bonus scheme set out in Mr Davey's email of 6 December 2011, contained no reference, of course, to Mr Bradley's new position of National Sales Manager. It did not then exist. The positions to which the scheme expressly applied were State based positions and they were set out in Mr Davey's email. Regardless of there being no scheme details being "provided separately", as referred to in the 17 May 2012 letter, and therefore no scheme having express application for that year, the 2012 scheme itself, could not apply to a position not then in contemplation.

43 As to the contention advanced by Mr Bradley that the 2012 scheme should apply as an implied term, I am not persuaded to this view. I am not persuaded that the implication of the 2012 scheme would be necessary or reasonable for the effective operation of the contract for the new position of National Sales Manager: *Hawkins*. The contract could operate quite effectively without it. A further problem arises with the implication argument. That is to imply the 2012 bonus scheme into the new contract for the 2012/13 financial year, would be inconsistent with the express terms of the May 2012 contract letter on two bases. The first I have already touched on. That is, in my view, the 2012 scheme, properly construed, did not extend to the new position created by Mr Bradley's promotion and preceded the restructuring to bring the position about. The second difficulty for Mr Bradley is the express terms of the 17 May 2012 letter set out above. It refers to "Details are provided separately …" They were not provided in this case. It would be inconsistent with this express term to imply the terms of the 2011/12 scheme, having application to the prior financial year, and set some months prior by Mr Davey.

44 If it was intended to simply roll over the 2011/12 bonus scheme into Mr Bradley's new contract for the National Sales Manager position, it would have been a simple thing to just say that in the letter of 17 May 2012.

45 It is also strongly arguable that the terms of the contract for the National Sales Manager position in relation to a bonus, irrespective of the implication argument, were uncertain, illusory and unenforceable: *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130.

46 The next issue arising in connection with this claim and indeed for the next one too is whether the exercise of the discretion by Mr Bennett, was in all the circumstances reasonable. This is so because it is to be accepted that in cases where the terms of a contract confer discretion to do something, such as in this case, to have, change or pay a bonus, the discretion is to be exercised reasonably. In *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357, the Court of Appeal of New South Wales considered the terms of a contract dealing with a discretionary bonus scheme for a senior employee of the appellant company. In considering the terms of the contract there under consideration, Allsop P (Beazley JA agreeing), made some general observations as follows at pars 5 and 6:

> **[5]** The task then is to value that loss of opportunity or chance. This process begins with a proper understanding of the contractual content of the obligations and entitlements arising out of cl 4 and in particular cll 4.2 and 4.3. That the decision as to whether the respondent should receive the bonus was "entirely within the discretion of" the appellant should not be construed so as to permit the appellant to withhold the bonus capriciously or arbitrarily or unreasonably; it should not be construed so as to give the appellant a free choice as to whether to perform or not a contractual obligation. The relevant discretion should be understood against the proper scope and content of the contract. This was a bargained for bonus to be assessed against set objectives. Such a clause should receive a reasonable construction and not permit the appellant to choose arbitrarily or capriciously or unreasonably that it need not pay money the set objectives having been satisfied: *Greaves v Wilson* (1858) 25 Beav 290 at 293 ; 53 ER 647 at 650; *Stadhard v Lee* (1863) 3 B & S 364 at 371-372 ; 122 ER 138 at 141; *Gardiner v Orchard* [1910] HCA 18 ; 10 CLR 722; *Carr v J A Berriman Pty Ltd* [1953] HCA 31 ; 89 CLR 327; *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 at 1422-1423; *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd* [1972] HCA 36 ; 128 CLR 529 at 538, 543, 547 and 549-555; *Pierce Bell Sales Pty Ltd v Frazer* [1973] HCA 13 ; 130 CLR 575.
>
> **[6]** The discretion is to be exercised honestly and conformably with the purposes of the contract. There may be many circumstances in which it would be legitimate, and conformable with the purposes of the contract, not to pay the bonus. There may be financial stringency or misbehaviour by the respondent or some other consideration. It is unnecessary to explore the possibilities in detail. What, however, would not be permitted is an unreasoned, unreasonable, arbitrary refusal to pay anything, come what may. This would be a denial of the very clause that had been agreed. If these parties

wished to make payment under the clause entirely gratuitous and voluntary such that payment could be withheld capriciously, notwithstanding the compliance with solemnly set objectives they needed to say so clearly.

47 I note that in *Silverbrook*, the performance objectives set out in the bonus scheme had been met. In the further case of *Russo v Westpac Banking Corp* [2015] FCCA 1086 reference was made to the principles discussed in *Silverbrook*. However, in this particular case, the court referred to admissions made by the employer as to various breaches of its own policies, that it acted irrationally and unreasonably and relied upon impermissible matters in refusing to pay the bonus in that case: per Lloyd-Jones J at par 200.

48 Additionally too, in both *Silverbrook* and *Russo*, the courts were considering claims for damages for breach of contract. Damages were assessed by reference to the loss of an opportunity to obtain a bonus payment, as a consequence of the employer's breach of the contract. By way of contrast, in these proceedings, for a denied contractual benefit, it is for Mr Bradley to establish the entitlement to the bonus existed, as a benefit under the contract, before it can be established that the employer failed to provide it to him: *Hotcopper*.

49 In this case, there was no evidence on which the Commission can make any findings that Mr Bennett acted in bad faith or acted arbitrarily, capriciously or with any lack of honesty. On the contrary, on the evidence, Mr Bennett flagged in his email of 3 October 2012, a copy of which Mr Bradley received, that there would be no bonus for the financial year 2012/13.

50 Even if the 2012 scheme could be said to have applied in the 2013 financial year, it would suffer the same problems, at least in relation to the second limb, as I have set out earlier in these reasons when dealing with Mr Bradley's 2012 bonus claim. As to the first limb, if, contrary to my conclusions, the 2012 bonus scheme did "carry over" to the 2013 financial year, then the first "trigger" for the payment of a bonus would have to be met. This was that the Binder group as a whole achieved its gross profit target for the 2012/13 financial year.

51 Binder contended that the group gross profit result for the 2012/13 financial year fell short of the budgeted figure. Evidence in relation to Binder's financial performance for the years 2012, 2013 and 2014 was given by Mr Marshall. Additionally, Mr Marshall gave evidence in relation to a disputed transaction involving a company, "Karara Mining", which I will comment on further below.

52 According to Mr Marshall, who annexed the profit and loss statements and the audited financial results for the Binder group for the 2014 financial year to his witness statement, the "standard" (as opposed to "actual") cost sales measure, which Mr Bradley contended was the correct measure, fell short for the 2013 financial year by $375,701. However in relation to the disputed transaction involving Karara, for $642,268.60 plus GST, which resulted from a pricing error made by Mr Bradley in the 2012 financial year, Mr Bradley contended that it should have been in the company's 2013 results. If it was, he maintained that the overall group result would have achieved its gross budget figure.

53 Mr Marshall dealt with this issue in some detail in his testimony. Mr Marshall said that Mr Bradley under-priced this particular job by the amount in question in the 2012 financial year. Mr Bradley subsequently invoiced Karara Mining for the correct figure in the 2012 financial year. The payment was then due in the following year 2013. Karara Mining did not pay the correct amount but only the incorrectly quoted figure provided by Mr Bradley. Karara refused to pay the disputed figure.

54 The dispute was dealt with by Mr Davey and was resolved in the 2014 financial year. Mr Marshall referred to the payment being finally made by Karara in August 2013. This payment was received in Binder's bank account, which showed three payments received in August 2013, set out as annexure GM4 to Mr Marshall's witness statement.

55 According to Mr Marshall, there are a number of reasons why it would be wrong to include the disputed payment made by Karara in the 2012/13 financial year. Firstly, this was not the year in which the payment was made. Secondly, in accordance with proper accounting practice, Mr Marshall said he issued a credit note for the 2012 financial year reflecting the disputed amount, to indicate the error made by Mr Bradley and that the pricing for the job for Karara had to be revised downwards. Thirdly, when the payment was actually made by Karara, it was properly credited to the 2014 financial year, being the year in which the money was received by Binder. Finally, Mr Marshall said it would be contrary to accepted and proper accounting practice to retrospectively credit the amount to an earlier year and effectively "reopen" the books of account for Binder. He said this accounting record would be artificial.

56 Mr Marshall also referred to the audited financial statements of Binder for the 2014 financial year, annexed as GM5 to his witness statement. He said the revenue figure for 31 March 2014 included the disputed amount paid by Karara to Binder in that financial year.

57 I have carefully considered the evidence as to the disputed transaction. I accept Mr Marshall's evidence. It would not be appropriate, either from an accounting point of view or from a practical one, to regard the payment made by Karara in August 2013, as being credited to the 2012/13 financial year gross profit result. To do so would have constituted in my view an inaccurate record, not truly reflecting the financial position of the Binder group as at the end of that financial year and not reflecting, in accounting parlance, its "true state of affairs" as at that time.

58 Accordingly, it follows, even if the terms of the 2012 bonus scheme could be said to have applied to the 2013 financial year in Mr Bradley's case, as he maintained, then its terms were not met, in order to trigger any bonus payment entitlement.

Bonus payment for the year ending 30 June 2014

59 Mr Bradley maintained that a new bonus scheme was introduced for the financial year ending 30 June 2014. The new scheme, set out in an email from Mr Davey dated 31 July 2013, provided for a bonus payment if (1) Binder achieved its overall budget; and (2) each branch achieved its individual budget. The email from Mr Davey setting out the scheme, as annexure IBD-7 to his witness statement, was in the following terms:

Nathan/Steve,

Please find attached a proposed bonus scheme that has been run by the directors and we have preliminary approval for. Although somewhat difficult to achieve I have tried to keep it as simple as possible, self-funded and worthwhile if achieved.

Given the current structure of the business I felt that keeping the payment specific to each sector was more relevant and could drive individual performance more successfully that[sic] paying out on combined results.

It is formulated on Individual GP$ results but there is the caveat that the overall business GP$ must be achieved to trigger any bonus payment. This protects the business from being in the situation where we achieve GP$ budget in say 1 or two states in 1 product area but have a poor result in the other areas placing the company in the situation where we are paying a bonus but the business has made a loss for the year.

Page 1 of the spread sheet shows the overall bonus scheme and details the trigger points for payment and the associated payment for each step of achievement. This is done by National Sales Manager and both Industrial and Building Services BDM level.

Page 2 summarises the cost of the scheme so is largely irrelevant to our discussions on the bonus structure etc.

Some of the rules:

1) All payment decision [sic] determined by P Bennett, I Davey and G Marshall- Management decision is final.

2) Trigger for bonus is (1) Overall Group Budget Achievement and (2) Branch GP$ Budget achieved

   1. Therefore: For the Financial Year 2013/2014 the first trigger is a gross profit dollar result of $5,539,109.
   2. The second trigger is at branch level where overall GP$ must be achieved - Vic = $822,273, QLD = $1,849,000, WA = $3,363,000

3) It is an annual bonus calculated and paid annually

4) Bonus recipients must have been in the sales position for a minimum of 6 months and then the payment is pro rata for the appropriate time they have been participating

5) If people quit through the course of the year they lose any right to a bonus.

6) Freight will be calculated as a cost of the sale. Therefore freight recovery will impact. For example if Freight is under recovered for the year(a loss) this loss is deducted from the gross profit $ in the calculation of any bonus.

7) The National Sales Manager bonus for budget GP$ result is discretionary and will be decided by the Management panel- considering how the budget was achieved and other factors.

8) Close is NOT achievement· The trigger points are 5%, 10% and 15% - no pro rata or portion will be paid for say 14% over (this will only attract the 5% and 10% bonus payment)

The bonus payment to BDM's is triggered by achievement of an above GP$ budget result with the first trigger being Budget GP$ plus 5%. If the overall GP$ result is achieved and the sector (industrial or Building Services) then the bonus payment is triggered. The level of bonus payment is straight forward @ budget GP$ plus 5%, plus 10%, plus 15% and greater than 15%.

Have a look through this and we can discuss at Fridays telecon.

Regards

Ian Davey

60 Attached to Mr Davey's email were two pages in tabular format, setting out the performance objectives for each branch by division, they being Industrial and Building Services. The third area, "Kwicksmart" was also specified. The key terms of the scheme are repeated in "Notes" at the bottom of the second page. At point (1), the "trigger" points are noted again, in that the first trigger was the achievement of overall group budget and the second being the achievement of individual branch budgets.

61 Mr Bradley gave evidence that he was concerned about the Victorian budget as this branch did not have a full-time Business Development Manager and that this would impact on the branch's performance. He said that when he communicated his concern to Mr Davey during a meeting in his office, Mr Davey told him "not to worry about the individual branches". Mr Bradley said that Mr Davey reassured him that the bonus for National Managers would be paid, as long as the overall gross profit target for the Group and for the Industrial division were achieved.

62 Mr Bradley said he accepted this as a variation to the bonus scheme, such that the failure by the Victorian branch to reach its gross profit target would not be fatal to an entitlement to be paid a bonus. Mr Bradley claimed the Industrial team achieved a gross profit of $6.5 million, well above the overall Industrial target of $3,598,200 and the overall combined (Industrial and Building Services) gross profit target of $5,539,109. As the total Industrial target was exceeded by more than 15%, Mr Bradley claimed $32,500 under his contract of employment for the 2014 financial year.

63 As to the alleged change to the 2014 scheme, Mr Davey strongly denied any such conversation as contended by Mr Bradley took place. Furthermore and in any event, it was Mr Davey's evidence that no such change would have been agreed by him for a number of reasons. Firstly, in his view, the 2014 scheme was at the time of his email only a "proposal", and had not been finally approved for implementation. Secondly, Mr Davey did not have any authority to make such a change to the bonus scheme, without the approval of Mr Bennett, which did not occur. Thirdly, the operation in Victoria for the Industrial division was Mr Bradley's responsibility, as National Sales Manager. Any problems in underperformance were his to resolve, even if the 2014 scheme was effective and in force. Finally, the budget figure for Victoria was set at a low level and should have been achievable. In Mr Davey's view too, it would not have been fair to reward Mr Bradley by waiving the scheme conditions, but not do the same for the other Sales Manager, Mr Palmer.

64 As a result of this, Mr Bradley lodged a formal grievance under the company grievance process. Following an investigation instigated by Mr Bennett, it was found that contrary to Mr Bennett's view, the 2014 bonus scheme was "valid". Mr Bennett said that Mr Bradley, and other staff for that matter, were not entitled to a bonus as the triggers under the scheme were not met. In addition to Mr Bradley, two other managers lodged grievances, they being the Business Development Manager for Western Australia, Mr Williams and the Business Development Manager for Queensland, Mr Gett. Mr Bennett said that he met with each of them to discuss their grievances. Resulting from these discussions, both Messrs Williams and Gett were offered and they accepted, on an ex gratia basis, an amount that reflected what they both thought they were entitled to under the 2014 scheme.

65 In the case of Mr Bradley, Mr Bennett said he also met with him and offered $10,000 on an ex-gratia basis to resolve his claim. Mr Bradley declined to accept it. Mr Bradley testified that not much more was said apart from him explaining to Mr Bennett that the WA team had worked hard for the results they achieved. Mr Bennett testified that he told Mr Bradley that he would withdraw the offer and Mr Bradley would have to go and see Mr Davey and attempt to persuade him to take it up again and put another proposal to Mr Bennett. Mr Bennett said he tried to get the issue "off the table" and resolved, despite the overall group result not having been met under the 2014 scheme. Mr Bennett also made the point that although the WA result had been very strong, a focus of the business had been to reduce reliance on this State and develop the other States, such as Victoria, as it was recognised that the "mining boom" in this State would not continue indefinitely. The need for Mr Bradley to focus on all States, and not just WA, was the subject of commentary by Mr Davey in Mr Bradley's performance appraisal discussion on 8 July 2014, which was the subject of some evidence. (Tab 7 exhibit R1).

66 It was Binder's position that under the new scheme, the entitlement to a bonus payment would not be triggered unless all of the respondent's areas of operation and branches in Victoria, Queensland and WA achieved their gross profit budget both individually and collectively. It added that the payment was at all times, subject to the discretion of senior management. Binder further argued that although the Western Australian branch met its gross profit budget for the 2014 financial year, the respondent as a whole did not. The Victorian branch did not make its Industrial gross profit target. Accordingly, no bonus payment was payable for the 2014 financial year. Binder strongly denied it varied the bonus scheme so that a bonus would be payable if the Industrial stream met its budget overall, as opposed to each branch being required to meet its Industrial budget individually.

67 Further, irrespective of this, as to Mr Bradley's contention that the discussion said to have taken place between Mr Bradley and Mr Davey meant the 2014 scheme was varied, Binder submitted that no fresh consideration was provided by Mr Bradley for any such variation. Nor was there any objective intention to do so, on the evidence: *Codelfa Construction Pty Ltd v State Rail Authority* (1982) 149 CLR 337*; Pepe v Platypus Asset Management Pty Ltd* [2013] VSCA 38 at 27. Although it is unnecessary to finally decide the point, there is some merit in this submission in my view.

68 In relation to this aspect of Mr Bradley's claim, firstly, I am not persuaded that the scheme was varied as contended by Mr Bradley. I accept Mr Davey's evidence on this issue. In particular, I find it difficult to accept that such a major change would have been made without Mr Davey at least discussing the issue with Mr Bennett, to secure his agreement. This is also to be seen against the backdrop of the disputes about the earlier bonus schemes. The terms of the 2014 bonus scheme were clear and unambiguous. Decisions about it were to be made by the three senior managers and not any of them unilaterally. From the terms of the scheme set out above, it would be inconceivable in my view that Mr Davey would agree to such a major change on the strength of a discussion with Mr Bradley alone. Arguably in any event, given that Mr Bennett was the Managing Director of Binder Mr Davey's contention that he had no authority to make such a change has considerable strength.

69 From the terms of the 2014 scheme, it was made plain in the covering email from Mr Davey of 31 July 2013 and in the notes to the attachments, that both overall group profit and achievement of branch profit targets for Binder were conditions needing to be met, to trigger an entitlement to a bonus. It was not in dispute that this did not occur. Whilst one can understand Mr Bradley's sense of disappointment, given the very strong WA sales result for the 2014 year, this was not the only factor to consider under the scheme. The managers must have known this from Mr Davey's email of 31 July 2013. The requirements were, in my view, crystal clear.

70 While Mr Bradley contended, in effect, that Mr Bennett had been unfair in not exercising his discretion to award Mr Bradley his full bonus for 2014 this puts the issue of discretion somewhat the wrong way around. There was, at the time of the meeting, no triggered bonus benefit arising to Mr Bradley on the plain terms of the 2014 scheme. Mr Bennett did make Mr Bradley an ex-gratia offer which he rejected. While it was not all of what he wanted, it was not an insubstantial proposal to settle Mr Bradley's grievance. Had it been the case that the scheme triggers for 2014 were fully met, and despite this Mr Bennett declined to exercise his discretion in favour of Mr Bradley, as in cases such as *Russo* for example, Mr Bradley may have been on stronger ground.

Conclusion

71 For the foregoing reasons I am not persuaded that Mr Bradley has established his claims for denied contractual benefits. The application must be dismissed.

2016 WAIRC 00732

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATHAN BRADLEY
	APPLICANT
	-v-
	BINDER GROUP PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 30 AUGUST 2016
FILE NO/S	B 93 OF 2015
CITATION NO.	2016 WAIRC 00732

Result	Application dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr M Cox of counsel

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr M Cox of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2016 WAIRC 00930

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00930
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 17 NOVEMBER 2016
DELIVERED	**:**	TUESDAY, 13 DECEMBER 2016
FILE NO.	**:**	B 160 OF 2016
BETWEEN	**:**	CAMERON DREW Claimant AND BENJAMIN DREW Respondent

CatchWords	**:**	Unpaid wages - order made
Legislation	**:**	*Industrial Relation Act 1979* (WA) s 27(1)(d)
Result	**:**	Claim allowed; payment ordered
Representation:		
Claimant	**:**	Mr C Drew
Respondent	**:**	No appearance

Reasons for Decision

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

1 By Notice of Claim filed 12 September 2016 the claimant seeks payment of 137 hours of work at $30 an hour which he says he has not been paid.

2 There was no conciliation conference in this matter as a result of communications from the respondent that he did not wish to participate in such a process. The matter was listed for hearing today. The claimant has attended. The respondent has not appeared and I have decided, pursuant to section 27(1)(d) *Industrial Relations Act 1979* (WA), the respondent having been duly served with notice of the proceedings, to hear and determine the matter in the absence of the respondent.

3 The claimant has given evidence that he commenced work with the respondent, who is his cousin, on or around 11 April 2016 and worked through to 24 August 2016 when he was informed by text message that there was no more work for him.

4 The claimant has given evidence that he worked each week, five days a week, generally seven to eight hours a day, and that he was required to and did keep records of the hours that he worked on a timesheet, which he was required to text to his employer once it was filled in.

5 Having consulted those records, the claimant gives evidence that he received no payment at all for the last 22 days of his employment with the respondent, which ended, as I say, on 24 August 2016.

6 The claimant, through checking his records, gives evidence, which, of course, is unchallenged in these proceedings, that he worked over those 22 days for 137 hours. He gives evidence that he received no payment for those hours worked. The claimant also gives evidence that he was paid, pursuant to the agreement with his cousin, the sum of $30 per hour.

7 The claimant, having given evidence that he was paid $30 an hour and that he worked for 137 hours without payment, and that evidence having not been challenged, I have no reason to dispute the claimant's version of events. I will hereby order that the respondent pay to the applicant the sum of $4,132, less tax. The order will be that payment be made forthwith.

2016 WAIRC 00895

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAMERON DREW
	APPLICANT
	-v-
	BENJAMIN DREW
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 28 NOVEMBER 2016
FILE NO/S	B 160 OF 2016
CITATION NO.	2016 WAIRC 00895

Result	Claim allowed; payment ordered
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard the claimant on his own behalf and, there being no appearance for the respondent, having decided to hear and determine the matter in the absence of the respondent; and

HAVING given oral reasons for decision at the conclusion of the proceedings and having determined pursuant to section 35(1) *Industrial Relations Act 1979* to publish my reasons at a later time; and

HAVING decided that the respondent did not allow contractual benefits to the claimant relating to wages for the period 11 April 2016 to 24 August 2016;

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

THAT the respondent forthwith pays to the claimant the sum of $4,132.00 (less tax).

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

2016 WAIRC 00906

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SEAN JAMES FLANIGAN
	APPLICANT
	-v-
	BROADSPECTRUM SERVICES
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 1 DECEMBER 2016
FILE NO/S	U 115 OF 2016
CITATION NO.	2016 WAIRC 00906

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Ms A Blount (by telephone)
Respondent	Mr Z Costi (by telephone)

Order

HAVING heard Ms A Blount on behalf of the applicant and Mr Z Costi on behalf of the respondent,

AND HAVING given reasons for decision orally, and having indicated that I would publish my reasons for decision upon request by a party but not otherwise, I, the undersigned, pursuant to the powers conferred under section 27(1)(a) of the *Industrial Relations Act 1979* (WA), hereby order:

THAT this application be dismissed for want of jurisdiction.

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

2016 WAIRC 00888

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00888
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	TUESDAY, 8 NOVEMBER 2016
DELIVERED	**:**	FRIDAY, 18 NOVEMBER 2016
FILE NO.	**:**	U 145 OF 2016
BETWEEN	**:**	ALAN CLARENCE JACOBS
		Applicant
		AND
		COMMISSIONER OF POLICE
		Respondent

CatchWords	**:**	Unfair dismissal claim - Applicant dismissed because new attitude taken to stale report about him - Decision not reasonable - No good evidence of breakdown in working relationship - Compensation and reinstatement ordered
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application allowed; compensation and reinstatement ordered
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr A Mason and with him Ms D Southcott

Case(s) referred to in reasons:

Swan Yacht Club (Inc) v Leanne Bramwell (1998) 78 WAIG 579

Case(s) also cited:

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

Reasons for Decision

1 The applicant commenced employment as a casual traffic warden with the respondent, whose name was amended to "Commissioner of Police" at the start of the hearing, on 28 October 2009.

2 The first contract was for the period 28 October 2009 to the end of the 2009 school year.

3 The applicant was subsequently employed under written contracts of employment for the 2010 and 2011 school years.

4 Toward the end of 2011, and following registration of the Western Australia Police School Traffic Wardens Agreement 2011, the respondent changed its approach to the employment of casual traffic wardens and instead of offering contracts from year to year employed them on a contract providing for employment on an ongoing basis. The applicant signed such a contract on 4 October 2011.

5 The applicant continued in his employment as a casual traffic warden until 22 July 2016 when he was given a letter by the respondent which included the paragraph "I am providing you with notice of termination of your casual employment. I will inform Personnel Services Division to pay you one hour's pay in lieu of notice as required under the contract".

6 By application filed on 19 August 2016 the applicant claimed that he had been harshly, oppressively or unfairly dismissed and sought reinstatement. The applicant provided particulars to the effect that his dismissal came as a complete surprise to him, that nothing, including his annual performance review, had indicated any problem with his work performance and that the respondent had refused to tell him why he had been dismissed.

7 The respondent filed a Notice of Answer on 6 September 2016 which appeared to set out material relevant to arguments that the applicant had not been dismissed because he was a casual employee or that, if he had been dismissed, it was in accordance with the applicant's contract and the industrial agreement which regulated his employment and was therefore fair. The Notice gave no detail on why the applicant had been dismissed.

8 Attempts at conciliation failed and so the matter proceeded to hearing.

9 At the hearing the key questions were:

(1) was the applicant dismissed;

(2) if so, was that dismissal fair; and

(3) if the applicant was dismissed, and that dismissal was unfair, was there any reason why the remedy of reinstatement was impracticable.

10 In relation to (1) I find that the applicant was dismissed from his employment. The uncontroverted evidence was that the applicant worked each school day from 8.00am until 9.00am and then from 2.50pm until 3.50pm over the six or so years of his employment. The applicant was part of an ongoing relationship with the respondent whereby he turned up to work at set hours on set days without contact or direction from the respondent being required or occurring.

11 If such an employee is given notice that they are no longer required to come to work they are dismissed in the sense discussed in *Swan Yacht Club (Inc) v Leanne Bramwell* (1998) 78 WAIG 579.

12 The evidence in this case establishes that even though the applicant was a casual employee he was dismissed by the letter dated 22 July 2016. The claim is accordingly within the jurisdiction of the Western Australian Industrial Relations Commission.

13 In relation to (2) the dismissal was lawful as it was in compliance with both the contract of employment and the industrial agreement.

14 However, the dismissal was clearly both procedurally and substantively unfair.

15 At the hearing we learned why the applicant had been dismissed. It may be stated shortly as follows:

(1) In 2016 a traffic warden was convicted of sex offences;

(2) This caused the respondent to review the suitability of all traffic wardens to work with children;

(3) All "holdings" (to adopt the term used in the evidence of Acting Commander Michael Frank Peters) on the respondent's files relating to traffic wardens were looked at as part of the review;

(4) There were "holdings" relating to an incident involving the applicant in 2011; and

(5) As a result of the review of those "holdings" a decision was made to terminate the applicant's employment.

16 The "holdings" went into evidence and comprise a briefing note of Carole Ruth Taylor, Manager, Traffic Warden State Management Unit, dated 2 December 2010, which attached an email from Veronica Kelly, Detective Senior Constable, Child Assessment and Interview Team, dated 24 November 2010, and a Traffic Warden State Management Unit Investigation Running Sheet, compiled contemporaneously by Ms Taylor over the period 19 November 2010 to 20 December 2010.

17 The briefing note records that Ms Taylor had become aware that a parent had spoken to a police officer about a conversation the applicant had with the parent's daughter.

18 The briefing note goes on to record the actions taken by Ms Taylor and the actions of others taken into relation to the complaint.

19 The email of Detective Senior Constable Kelly summarises the actions taken by the Western Australia Police Service in relation to the complaint. In short those actions were that a statement was taken from the child concerned, Detective Senior Constable Kelly rang the applicant, who admitted some of the things he had said were unacceptable, (although Detective Senior Constable Kelly notes in the email that "I think he quickly admitted the inappropriateness over the phone as his wife was in the room and he did not wish to elaborate") and that Detective Senior Constable Kelly warned him to stay away from the child and not repeat the conduct.

20 Detective Senior Constable Kelly's email makes it clear that no criminal investigation was commenced and that, from a criminal point of view, the matter was considered closed by the Western Australia Police Service.

21 To complete the background, I should interpose here that, from an employment point of view, Ms Taylor did not consider the matter closed and on 20 December 2010 she wrote to the applicant informing him that he would not be offered employment in 2011. Ms Taylor gave evidence that she later received advice from the Human Resources branch of the Western Australia Police Service and following that she did, in fact, offer the applicant employment for 2011, which offer he accepted.

22 Returning to the matter of the fairness of the applicant's dismissal, it is clear that in 2016 the Western Australia Police Service took a different view of the 2011 "incident" than it had in 2011.

23 In light of the conviction of a traffic warden for sex offences in 2016, the Western Australia Police Service evidently decided to err on the side of caution and the 2011 "incident" was, on that approach, enough for the respondent to bring the applicant's employment to an end.

24 I find that it was unfair for the respondent to dismiss the applicant on this basis for the following reasons:

(a) The Western Australian Police Service had considered all the information it considered in 2016 back in 2011 and had, ultimately, decided to take no action on the basis of that information in relation to the applicant's employment; and

(b) The applicant had worked for six years after that decision had been made without incident.

25 In relation to (a) above, the applicant was entitled to consider that the matter was closed. If new information had come to light or if it emerged that information previously available had been overlooked in 2011, different considerations may have applied. However, an employer simply changing its mind about the seriousness of a matter several years later is not fair.

26 In relation to (b) above, even if the information available in 2011 had been sufficient, at that time, to fairly dismiss the applicant, and I make no finding on that, the fact that the applicant had gone five years since that time without any incident at all, let alone a similar incident, coming to the attention of his employer would, in my view, make it unfair to invoke the old, and now stale, matter to dismiss him.

27 I find also, although it is not strictly necessary to do so, that the dismissal was procedurally unfair. The applicant was not given an opportunity in 2016 to comment on the matter relied upon by the respondent to dismiss him.

28 I note here that the applicant denied in his evidence before me that he had said the things to the child in 2011 that Detective Senior Constable Kelly noted were in the child's statement. He also denied that he ever admitted to Detective Senior Constable Kelly that he said them.

29 I do not need to decide what the applicant said to the child in 2011 nor what he admitted saying when he spoke to Detective Senior Constable Kelly. What I have decided is that it is substantively unfair for the respondent to rely upon what it had on its records about the 2011 incident, without more, in 2016 having taken no action in 2011 and having had no further complaint about the applicant and procedurally unfair to do so without giving the applicant a chance to comment.

30 I turn then to the matter of remedy. The applicant seeks reinstatement. Reinstatement is to be ordered unless the respondent establishes a credible reason why reinstatement would be impracticable.

31 The respondent argues that the applicant should not be reinstated because, as a result of the 2011 incident, the respondent has a reasonable concern about whether the applicant should be trusted to be around children in his employment. Essentially I think what the respondent is saying is that it does not wish to hold out the applicant, by his employment, as someone who enjoys its trust and confidence to work with children when the applicant does not, in fact, enjoy that trust and confidence.

32 In relation to that I say the following:

(1) Although the respondent dismissed the applicant for the reasons we now know about it is not clear that the respondent does not have trust and confidence in the applicant. The closest the hearing came to hearing evidence from someone who could represent the mind of the employer was the evidence of Acting Commander Peters, who is the Acting Commander of the State Traffic Office. Acting Commander Peters did not really know very much about the 2011 incident and wrongly described it as the applicant being involved in an inappropriate relationship with a 15-year-old girl. This was so far removed from what, at its highest, had been alleged in 2011 that it is difficult to conclude that the respondent had any credible view in relation to whether the applicant was worthy of enjoying the respondent's trust and confidence or not; and

(2) Even if the applicant does, in fact, not enjoy the respondent's trust and confidence this is not reasonable. In 2011 there had been a complaint but no process, whether criminal or disciplinary, had gotten to the bottom of the incident and established in any safe form what had happened. Subsequent to this the applicant had, by 2016, gone five years without a similar, or any, complaint being made in relation to him. There is no rational basis put forward for the respondent suddenly losing confidence in the applicant in 2016.

33 No other issue was put up by the respondent as making the reinstatement of the applicant impracticable. I will order the reinstatement of the applicant.

34 I will also make orders under s 23A(5) of the *Industrial Relations Act 1979* that continuity of the applicant's employment be maintained and that the respondent pay to the applicant the remuneration lost by him because of the dismissal. No argument that the applicant had failed to mitigate his loss was made, unsurprisingly, given that the applicant is 74 years old.

35 In relation to the order for remuneration lost, I intend to set the date for the applicant's reinstatement as 1 December 2016 in a minute of proposed order and ask that, taking that date, the respondent informs me and the applicant of the remuneration the applicant will have lost from the date of his dismissal until that date. I make this request because I do not have good evidence before me of the days the applicant would have worked if had not been dismissed. Hopefully provision of a figure by the respondent can allow my chambers to facilitate the entry of an agreed amount in the final order.

2016 WAIRC 00903

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN CLARENCE JACOBS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 30 NOVEMBER 2016
FILE NO/S	U 145 OF 2016
CITATION NO.	2016 WAIRC 00903

Result	Application allowed; orders for reinstatement and payment of compensation
Representation	
Applicant	In person
Respondent	Mr A Mason and with him Ms D Southcott

Order

HAVING heard the parties on 8 November 2016 and having delivered reasons for decision on 18 November 2016, pursuant to my powers under the Industrial Relations Act 1979, I hereby :

1. Declare that the applicant was unfairly dismissed;
2. Order that the applicant be reinstated to his former position on conditions at least as favourable as the conditions on which the applicant was employed immediately before dismissal;
3. Order that the applicant's employment be considered continuous for all relevant purposes; and
4. Order that the respondent pay to the applicant the sum of $4,259.00 less applicable tax.

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

2016 WAIRC 00908

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN CLARENCE JACOBS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 1 DECEMBER 2016
FILE NO/S	U 145 OF 2016
CITATION NO.	2016 WAIRC 00908

Result	Name of respondent amended
Representation	
Applicant	In person
Respondent	Mr A Mason and with him Ms D Southcott

Order

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

WHEREAS at the hearing on 8 November 2016 the name of the respondent was amended;

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

THAT the name "Police Inspector Sean Togher (Western Australia Police State Traffic)" be deleted and "Commissioner of Police" be inserted in lieu thereof.

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

2016 WAIRC 00876

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00876
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	TUESDAY, 11 OCTOBER 2016
DELIVERED	**:**	MONDAY, 14 NOVEMBER 2016
FILE NO.	**:**	B 104 OF 2016
BETWEEN	**:**	ROBERT KINNEEN Claimant AND WHELANS Respondent

CatchWords	**:**	Industrial law (WA) - Contractual benefits claim - Claimant alleged respondent had to train him to become a licensed surveyor - Principles applied - No contractual term express or implied for employer to ensure necessary training - Claim dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Licensed Surveyors Act 1909* (WA) *Licensed Surveyors (Licensing and Registration) Regulations 1990* (WA)
Result	**:**	Claim dismissed
Representation:		
Claimant	**:**	In person
Respondent	**:**	Mr J Lilleyman as agent

Reasons for Decision

1 The claimant alleges that it was a term of his contract of employment with the respondent that it would provide him with all the necessary training to become a licensed surveyor under the *Licensed Surveyors Act 1909*.

2 By way of uncontroversial background, the claimant was employed by the respondent in March 2007 as a "Survey Party Leader". Around that date, the claimant entered into an Employer-Employee Agreement with the respondent, an example of which, the signed copy having been lost over the years, became Exhibit 4 in these proceedings.

3 It was the intention of the claimant, understood by the respondent, to become a licensed surveyor. To achieve this, a person such as the claimant enters into a "professional training agreement", as described in regulation 4 *Licensed Surveyors (Licensing and Registration) Regulations 1990*.

4 Professional training agreements are regulated by the *Licensed Surveyors (Licensing and Registration) Regulations 1990*, which make provision for their registration by the Land Surveyors' Licensing Board.

5 The claimant entered into a professional training agreement with Mr Philip Jonath, a licensed surveyor employed by the respondent, on 12 November 2007, and it was registered by the Land Surveyors' Licensing Board on 12 December 2007.

6 Mr Jonath resigned from his employment with the respondent in January 2011. The professional training agreement, however, continued with Mr Jonath as the supervising surveyor.

7 To become a licensed surveyor, a person must pass the examinations prescribed by regulation 10 *Licensed Surveyors (Licensing and Registration) Regulations 1990*.

8 The claimant undertook one such examination in March 2011. This was a field test referred to in the proceedings as the "Boya examination" because it took place in Boya.

9 The claimant failed the examination and when informed of this he resigned from his employment with the respondent.

10 As I have stated, the claimant claims that it was a term of his contract that the respondent would provide him with the training necessary to become a licensed surveyor and that it breached the term by not providing him with that training.

11 The particulars of the claim were various and appear in the Notice of Claim and were clarified and explained, and some emphasised, in the hearing. They can now be summarised as follows:

(1) The claimant had a weakness in relation to rural survey work which was known to the respondent but not addressed by them;

(2) Mr Jonath did not go "into the field" to supervise and train the claimant, especially in relation to rural survey work, and the respondent did not address this;

(3) The respondent did not find a new supervising surveyor within its employ to replace Mr Jonath as a party to the professional training agreement when Mr Jonath resigned; and

(4) The respondent was not proactive enough, once Mr Jonath had resigned in January 2011, in ensuring that the claimant was ready for the Boya examination in March 2011 and effectively left it to the claimant to "train himself."

12 The claimant gave evidence in the proceedings. He also called Gregory John Ireland, a licensed surveyor employed at all material times by the respondent. The respondent called Philip George Jonath.

13 As will be plain from my reasons no controversy requiring determination by me was raised by the evidence.

14 The relevant documents before me relating to the contract of employment between the claimant and respondent were:

(1) Exhibit 1, a letter from Brian Hill, Managing Director of the respondent, to the claimant, dated 21 March 2007 which "attached … various documents for you to consider, complete and endorse with respect to our offer of employment with Whelans." The attached documents were not produced by the claimant but it appears clear that one of the documents attached was an Employer-Employee Agreement; and

(2) Exhibit 4, a clean copy of an Employer-Employee Agreement which the claimant agreed was in the same terms as that he signed.

15 Neither of these documents contain a term whereby the respondent agreed to provide to the claimant the training necessary for the claimant to become a licensed surveyor.

16 I accept that it was within the contemplation of the parties that the claimant wished to become a licensed surveyor and that the respondent would assist with this.

17 In Exhibit 1, Mr Hill referred to the contract of employment as a "Survey Party Leader" and wrote that the contract of employment was subject to satisfactory completion of a three month probationary period in that role, following which, if successfully completed, "it would be reasonable to expect that … an Articled Position offer [could be] made so that you can ultimately become a Licensed Surveyor."

18 No documentation was provided or evidence given specifically about the "Articled Position" offer and I find that the reference to "an Articled Position offer" was a reference to entry into a professional training agreement.

19 However, that it was within the contemplation of the parties that the claimant would progress in his employment to becoming a licensed surveyor did not mean that the respondent agreed, as a contractual term of his employment, that it would provide the necessary training for this to occur.

20 The claimant was employed as a Survey Party Leader. That employment operated, as a matter of contract, quite separately from the claimant's progress toward becoming a licensed surveyor. It was common on the evidence that the claimant did not need to become a licensed surveyor for his employment as a Survey Party Leader to continue or, put another way, that his employment would continue, all things being equal, whether or not the claimant became a licensed surveyor.

21 Crucially, there is no mention of the claimant being trained by the respondent to become a licensed surveyor in Exhibit 4. I accept that the reference to training in clause 15.1 of Exhibit 4 is a reference to training for the role in which an employee is employed and not some other role.

22 As a matter of law, the claimant was employed as a Survey Party Leader. There is in this industry a scheme whereby a person employed within it may seek further qualifications and is assisted in this by their employment and by their employer. The respondent gave this assistance by employing the claimant in a role that would allow him to build up good relevant experience and by facilitating his entry into a professional training agreement. That assistance was given from day to day in the completion of the claimant's ordinary duties and by having Mr Jonath agree to being the claimant's supervising surveyor in a professional training agreement.

23 None of that assistance and training was given pursuant to the terms of the claimant's contract of employment and any failure to provide it, if there was such failure, could not amount to a breach of the contract of employment.

24 In conclusion on this point, and determinative of the claim, I find:

(1) There was no express term of the sort contended for by the claimant; and

(2) In all of the circumstances, there is no warrant to imply such a term into the contract of employment. The contract of employment as a Survey Party Leader was fully effective without it being necessary to imply into it any term relating to training to become a licensed surveyor.

25 As I say, those findings are determinative of the claim but I add that even if there was a term, express or implied, that the respondent would provide the claimant with training to become a licensed surveyor, for the claimant to succeed he would have to establish that the term was that he would be provided with training prior to March 2011. This is because the claimant resigned from his employment with the respondent in March 2011. It was only if the term was that the training had to be completed by this time that the respondent could be in breach of it.

26 On this point, the claimant put nothing before me, even after the point was raised by me, either by evidence or submissions, to the effect that the respondent had promised to complete his training by March 2011.

27 The uncontroverted evidence was that, even though the claimant failed the Boya examination in March 2011, if he had not chosen to resign, his employment would have continued and the respondent would have continued to assist him to become a licensed surveyor. Failure of the Boya examination by prospective licensed surveyors was relatively common and was not considered in any way to be a "black mark" against an employee who was trying to become a licensed surveyor.

28 If there was a term of the contract of employment such as that the claimant contends for, it remained operative in March 2011 and had not been breached as at that time, it not being time limited, and the claimant's resignation ended its operation.

29 I make no comment at all on the nature or adequacy of the training given to the claimant during his employment or under the professional training agreement. It is not necessary for me to do so in light of my above findings. I note however that the claimant failing the Boya examination proves nothing in relation to the adequacy or otherwise of that training. No argument is properly available that because the claimant failed the Boya examination his training must have been inadequate. Exhibit 6 in these proceedings in fact suggests other reasons for the claimant's failure but, as I say, I need make no findings in relation to this matter.

30 After the completion of the oral hearing the claimant, by email to my Associate dated 18 October 2016, wrote that he had some concerns about whether I could give full consideration to the matter because his "presentation [in the hearing] lacked direction and evidence".

31 The claimant attached to the email a two-page document headed "Post Hearing Concerns" which listed four concerns as follows:

(1) The claimant's failure to rebut arguments and factual assertions made by the respondent in his closing submissions;

(2) The claimant's failure to tender various documents as evidence, with a description of each being given;

(3) A concern about whether I would refer to evidence relating to the reasons the claimant failed the Boya examination, with a fuller explanation about that matter being given; and

(4) The claimant's failure to lead full evidence about the effect of the alleged breach of the contract upon him.

32 In relation to (1) above I can assure the claimant, with respect to the respondent's representative, that no submission made by the respondent's representative in his closing submissions was determinative or even highly persuasive in relation to the outcome of this matter.

33 In relation to (2) above I have considered the descriptions of the documents given by the claimant in the two-page document headed "Post Hearing Concerns", and the indication given of what these documents would be relied upon to prove if admitted into evidence, and find that none of the documents in any way bear upon matters relevant to the determination of this matter. That is, none of the documents would have any bearing upon the matter of the terms of the employment contract between the claimant and the respondent and, in particular, whether it contained a term upon which the claimant relies.

34 It would be pointless to allow the claimant to reopen this matter so that he could attempt to have these documents admitted into evidence.

35 In relation to (3) above I have not referred to the matter about which the claimant is concerned in my reasons for decision. It was unnecessary to do so.

36 In relation to (4) above, in light of my decision that there was no breach of contract by the respondent, I do not need to consider evidence about what effect, if there had been a breach, that breach had upon the claimant.

37 In summary, to use the language from the cases relating to reopening, there is no risk, if the claimant is not allowed to reopen, that there will be a less than complete review of the issues opened up by his case.

38 The claim is dismissed.

2016 WAIRC 00874

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT KINNEEN
	CLAIMANT
	-v-
	WHELANS
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 14 NOVEMBER 2016
FILE NO/S	B 104 OF 2016
CITATION NO.	2016 WAIRC 00874

Result	Claim dismissed
Representation	
Claimant	In person
Respondent	Mr J Lilleyman as agent

Order

HAVING heard the claimant on his own behalf and Mr J Lilleyman, as agent, for the respondent, on 11 October 2016; and

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

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 00933

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEDY KRISTAL
	APPLICANT
	-v-
	MS KATI KRASZLAN
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 14 DECEMBER 2016
FILE NO/S	U 171 OF 2016
CITATION NO.	2016 WAIRC 00933

Result Application dismissed

Order

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

WHEREAS on 21 November 2016, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference, the parties reached agreement to settle the dispute; and

WHEREAS on 13 December 2016, the applicant filed a *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 this application be, and is hereby dismissed.

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

2016 WAIRC 00886

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMANDAH-KAYTE LEAD
	APPLICANT
	-v-
	LEDGE POINT COUNTRY CLUB
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 18 NOVEMBER 2016
FILE NO/S	U 81 OF 2016
CITATION NO.	2016 WAIRC 00886

Result Application dismissed

Order

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

WHEREAS on 3 November 2016, the applicant wrote to the Commission, advising that her claim for unfair dismissal should be dealt with by the Fair Work Commission; and

WHEREAS on 9 November 2016, the applicant wrote to the Commission requesting that the matter be closed.

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 00922

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT BENTLEY LYONS
	APPLICANT
	-v-
	PREMIER COMMERCIAL AND INDUSTRIAL BUILDERS PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 DECEMBER 2016
FILE NO/S	B 164 OF 2016
CITATION NO.	2016 WAIRC 00922

Result Application dismissed

Order

WHEREAS this is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* filed on 3 October 2016; and

WHEREAS on 10 November 2016, by telephone, the applicant advised the Commission that the dispute had been resolved and he would discontinue the application; and

WHEREAS on 1 December 2016, the applicant filed a *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 this application be, and is hereby dismissed.

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

2016 WAIRC 00896

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY MOORE
	APPLICANT
	-v-
	BGC RESIDENTIAL
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 28 NOVEMBER 2016
FILE NO/S	B 183 OF 2016
CITATION NO.	2016 WAIRC 00896

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 24 November 2016, the applicant informed the Commission that the parties have reached an agreement to settle the dispute; and

WHEREAS on 26 November 2016, the applicant advised the Commission that he wished to withdraw his claim.

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 00889

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00889
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 26 OCTOBER 2016
DELIVERED	**:**	FRIDAY, 18 NOVEMBER 2016
FILE NO.	**:**	U 146 OF 2016
BETWEEN	**:**	KYM SHELDON
		Applicant
		AND
		HR DEPARTMENT: CENTRECARE ABN 98 651 609 161
		Respondent

CatchWords	**:**	Unfair dismissal application - Respondent a trading corporation - Western Australian Industrial Relations Commission does not have jurisdiction - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979*
		Fair Work Act 2009
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person (via telephone)
Respondent	**:**	Ms C Broers and with her Ms L Broadley

Case(s) referred to in reasons:

Aboriginal Legal Service Western Australia Inc v Lawrence [No 2] [2008] WASCA 254; (2009) 89 WAIG 241

Reasons for Decision

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

1 By notice of claim filed 10 August 2016, the applicant Kymbol Stuart Sheldon made an unfair dismissal claim against Centrecare Inc alleging that he had been unfairly dismissed on 8 August 2016.

2 On 14 September 2016 the respondent filed a Notice of Answer. The particulars of its Notice of Answer were as follows:

> "We believe Centrecare is a constitutional corporation as we have a generated income of $1,399,883 for financial year 2015-2016. Additionally we are listed and bound by the Fair Work Act 2009 and are raising a jurisdictional objection to this claim. Once this matter has been heard we will respond in writing under the federal legislation. Please see the attached Certificate of Incorporation."

3 The Certificate of Incorporation became Exhibit 1 in these proceedings.

4 The matter was listed for a hearing in relation to the question of jurisdiction and that hearing occurred today, 26 October 2016. At the hearing the respondent maintained that it was a trading corporation and that, accordingly, the Western Australian Industrial Relations Commission had no jurisdiction to hear Mr Sheldon's unfair dismissal claim.

5 At the hearing, Ms Broers, the Executive Manager, Organisational Services for the respondent, gave evidence and provided documents or a document which became Exhibit 2 in these proceedings, being the Centrecare audited financial report for the financial year 2015/2016.

6 So the question for me to decide is whether the respondent is a trading corporation. I need to decide that question because if the respondent is a trading corporation then pursuant to the *Fair Work Act 2009*, it is the Fair Work Commission that has jurisdiction to hear unfair dismissal claims against trading corporations, and the jurisdiction of the Western Australian Industrial Relations Commission to hear such applications has been ousted by the *Fair Work Act 2009*.

7 This matter turns then on whether the respondent is a trading corporation. In relation to that question, the law has been relevantly set out by the Western Australian Industrial Appeal Court in the case of *Aboriginal Legal Service Western Australia Inc v Lawrence* [No 2] [2008] WASCA 254; (2009) 89 WAIG 241 and in particular by his Honour President Steytler, with whose decision Pullin J agreed.

8 If I go to (68) of that decision, having set out most of the relevant cases on the point, his Honour has this to say - and I quote, citations omitted:

> "The more relevant (for present purposes) principles that might be drawn from these and other cases are as follows:
>
> 1) A corporation may be a trading corporation even though trading is not its predominant activity.
> 2) However, trading must be a substantial and not merely a peripheral activity.
> 3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services.
> 4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant.
> 5) The ends which a corporation seeks to serve by trading are irrelevant to its description. Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade'.
> 6) Whether the trading activities of an incorporated body are sufficient to justify its categorisation as a 'trading corporation' is a question of fact and degree.
> 7) The current activities of the corporation, while important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade.
> 8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading."

9 Those statements were made by his Honour in a matter having particular relevance here because the Aboriginal Legal Service of Western Australia Inc was a not-for-profit organisation which raised its funds, essentially, through Government grants. By that I mean insofar as his Honour has decided that those were relevant principles to refer to in that case, those principles would also have obvious relevance to this case.

10 This case is not a marginal case in any way. Centrecare Inc competes in the market for funding from the State and Federal Government. We heard evidence that it regularly tenders for contracts in a competitive process in which it has competitors for funding from competitors such as Anglicare, Uniting Care West, Relationships Australia and various other entities. Often it wins those contracts which may be as a result of its record and performance over the years.

11 As I say, it has a good success rate in winning those contracts, but in each case it wins the contracts following a competitive tender process and on some occasions it does not win the contracts and that has on occasion had repercussions for employment of its employees. Evidence was given of one case where a contract was lost, six persons who were dedicated to providing the services under that contract had to be found new work and it was not possible to find one of those persons new work and that person was made redundant.

12 The respondent raises a substantial amount of money from year to year through its winning of contracts with the Government. In 2016 that totalled $23,580,602 which, broken down into State and Government contracts, was $16,192,011 from State Government contracts and $7,388,591 from Commonwealth Government contracts. There is no guarantee from contract to contract that Centrecare is going to win those contracts. It does so, where it does, because it competes successfully in the market for that money.

13 The respondent also raises funds through contracts with private organisations, that is non-Government organisations. It does that largely through the provision of employee assistance programme and in the financial year 2015/2016 it raised $1,308,884 from those contracts. It also earns a small amount of money from rental income, and evidence was given about the properties from which rent revenue is raised.

14 Although Centrecare conducts its activities in the public interest, as President Steytler made clear, simply because activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as trade. I note also that whilst the respondent does not make a profit, that that is not an essential pre-requisite to trade.

15 In my view this respondent is clearly a trading corporation insofar as it competes in the market for revenue and its provision of services relies entirely upon it being successful in winning those contracts on the open market.

16 I find also, although not as determinative, that it competes for private sector work competitively and wins that work in the area of the provision of employee assistance programme.

17 So as I say, this is not a marginal case. In my view the respondent is clearly a trading corporation and that being my finding this Commission does not have jurisdiction to determine the claim.

18 Mr Sheldon, you will need to bring your claim, in my view, to the Fair Work Commission.

19 An order dismissing the claim will issue soon and it will be pursuant to my powers under section 27(1) of the *Industrial Relations Act 1979* to dismiss a matter where the Commission considers that is warranted. This is a case where I consider it is warranted.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Christopher Dean Schilling	Sadliers Transport Co (NSW) Pty Ltd	B 157/2016	Senior Commissioner S J Kenner	Discontinued

CONFERENCES—Matters arising out of—

2016 WAIRC 00871

DISPUTE RE POSSIBLE TERMINATION OF EMPLOYMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

APPLICANT

-v-

WA COUNTRY HEALTH SERVICE

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT

DATE MONDAY, 14 NOVEMBER 2016

FILE NO/S C 14 OF 2016

CITATION NO. 2016 WAIRC 00871

Result Application dismissed

Order

WHEREAS this is an application made pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS at a conference convened by the Commission on Tuesday, 11 October 2016, the parties advised the Commission they had reached in-principle agreement to settle the dispute; and

WHEREAS on Wednesday, 28 October 2016, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*.

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

THAT the application be, and is hereby dismissed.

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

2015 WAIRC 00899

DISPUTE RE TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00899

CORAM : COMMISSIONER S J KENNER

HEARD : TUESDAY, 22 SEPTEMBER 2015

DELIVERED : THURSDAY, 24 SEPTEMBER 2015

FILE NO. : C 31 OF 2015

BETWEEN : THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

Applicant

AND

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

Respondent

Catchwords : *Industrial law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Conference pursuant to s 44 of the Industrial Relations Act 1979 (WA) - Application for interim order that salary payments continue pending resolution of the claim - Discretionary power - Whether there is a particular circumstance in existence which would give rise to the*

		exercise by the Commission of the power to grant interim relief - Financial difficulty not a sufficient reason to warrant the grant of interim relief - Application refused
Legislation	:	*Industrial Relations Act 1979* (WA) s 44(6)(bb)(ii)
		Public Sector Management Act 1994 (WA) s 80(b)
		School Education Act 1999 (WA) s 240
Result	:	Decision issued
Representation:		
Applicant	:	Mr M Amati
Respondent	:	Mr D Matthews of counsel

Case(s) referred to in reasons:

The Director General Department of Education and Training v The State School Teachers' Union of WA (Incorporated) (2009) 89 WAIG 622

Case(s) also cited:

The Director General, Department of Education v The State School Teachers' Union of WA (Inc) (2011) 91 WAIG 166

Reasons for Decision

1 The substantive application in this matter is one brought by the Union on behalf of its member Mr Bellantone, a teacher employed by the Department of Education, most recently at Clarkson Primary School. The Union alleged that on 15 September 2015 Mr Bellantone was harshly, oppressively and unfairly dismissed. The background to the matter is quite extensive but in summary, on 25 July 2014, the Department wrote to Mr Bellantone setting out a number of allegations of breaches of discipline under s 80(b) of the Public Sector Management Act 1994. In addition to the allegations, Mr Bellantone was ordered to leave the school premises under s 240 of the School Education Act 1999. Mr Bellantone has not returned to the school since that time. Mr Bellantone has been suspended on pay up to the time of the termination of his employment.

2 By letter dated 25 June 2015, the Director-General of the Department informed Mr Bellantone that of the five allegations of breaches of discipline, three had been found to be proven. In separate disciplinary proceedings commenced by letter of 17 November 2014 from the Department to Mr Bellantone, a further allegation of a breach of discipline under s 80(b) of the PSM Act was made against him. That allegation concerned a falsification by Mr Bellantone of email correspondence to the Standards and Integrity Directorate of the Department, in relation to a locally managed discipline process in which Mr Bellantone was involved at Clarkson Primary School. The specific allegation was that in altering an email to the Standards and Integrity Directorate dated 21 August 2013, Mr Bellantone falsely implicated the Principal of the school, Ms Bromley. It was asserted by the Department that the email from Mr Bellantone created the impression that Ms Bromley had deliberately omitted information from material provided by her to the Directorate in respect of the disciplinary process.

3 The response from the Union on behalf of Mr Bellantone to the November 2014 allegation, dated 31 July 2015, advanced, as a major defence, Mr Bellantone's then and current medical condition. Having considered the Union's response, the Department determined that the appropriate sanction was, in all of the circumstances, termination of employment which took effect on 15 September 2015.

4 The Department has not taken any further steps at this stage in relation to the July 2014 disciplinary matters, in view of its decision concerning the November 2014 allegation.

5 As a part of the present proceedings, the Union seeks interim relief by way of an order of the Commission under s 44(6)(bb)(ii), that Mr Bellantone's salary payments continue pending the hearing and determination of his claim for substantive relief. In support of the interim order sought, the Union contended that the circumstance of Mr Bellantone being on 14 months paid suspension, without the provision of work, a long standing action, is relevant and it would be unfair to discontinue Mr Bellantone's salary payments, in light of that history. Furthermore, there were issues raised by the Union in relation to Mr Bellantone's fitness for work. Another, although not developed argument, was that a number of subsidiary allegations raised in the Department's letter of 25 June 2015 involved some 'targeting" of Mr Bellantone unfairly.

6 For the Department, it was contended that there was no basis for interim relief in the present circumstances. No particular factors, beyond those which would arise in the ordinary course of a claim of unfair dismissal, are present. There are no identifiable disadvantages or factors specific to Mr Bellantone that would give rise to circumstances in which the Commission would exercise the discretion to make interim orders in his favour. Furthermore, the Department contended that the balance of convenience, in terms of the recovery of any monies paid to Mr Bellantone weighed against the grant of interim orders in this case.

7 The Commission's powers under s 44(6)(bb)(ii) of the Act to grant interim relief in terms the Commission thinks appropriate, pending the resolution of the substantive claim, is plainly a discretionary power. As I indicated to the parties during the course of the compulsory conference, in my view, there must be some particular circumstance(s) in existence which would give rise to the exercise by the Commission of the power to grant interim relief. What those particular factors are will very much depend on the facts and circumstances of the case before the Commission. Each case will vary: *The Director General Department of Education and Training v The State School Teachers' Union of WA (Incorporated)* (2009) 89 WAIG 622.

8 In this case, the allegation of deliberate falsification of a document provided to the Standards and Integrity Directorate in the course of a disciplinary investigation was a serious one. The conduct of Mr Bellantone had the effect of, by inference, falsely implicating the then Principal of Mr Bellantone's School, in an act of misconduct also. Mr Bellantone did not dispute the fact of the allegation, but sought to explain it and apologise.

9 Whilst the Union placed considerable weight on the financial impact on Mr Bellantone, of the Department's decision to terminate his employment on 15 September 2015, that is a consequence which flows from most dismissals. In and of itself, it is not in my opinion, sufficient reason to warrant the grant of interim relief. As the Department pointed out, correctly in my

view, if this factor was to be weighed heavily in favour of the making of an interim order in claims such as the present matter, then very many, if not most such claims, could attract interim orders. I do not consider that was the intention of Parliament. Of course, in this connection, in the event that a final determination by the Commission of the Union's substantive claim is in Mr Bellantone's favour, then orders for compensation for loss, including lost salary and wages, can be made. The fact that Mr Bellantone has had a lengthy period of suspension on pay does not alter my views in relation to this matter in his favour. If anything, Mr Bellantone has had a considerable period of time to pursue other employment options, which according to the Union he has done over this period.

10 In my opinion, there has been nothing further raised by the Union to cause me to exercise my discretion under s 44(6)(bb)(ii) of the Act to grant interim orders. Therefore, the application for interim orders is refused. The substantive claim will now be listed for hearing and determination on dates to be fixed by the Commission.

2015 WAIRC 01015

DISPUTE RE TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 16 NOVEMBER 2015
FILE NO/S	C 31 OF 2015
CITATION NO.	2015 WAIRC 01015

Result	Application for interim orders dismissed
Representation	
Applicant	Mr M Amati
Respondent	Mr D Matthews of counsel

Order

WHEREAS the Commission published reasons for decision on 24 September 2015 dismissing an application by the applicant for interim relief under s 44(6) (bb)(ii) of the Industrial Relations Act 1979;

AND WHEREAS no orders were published by the Commission at that time;

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

THAT the application for interim orders be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2016 WAIRC 00360

DISPUTE RE TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 13 JUNE 2016
FILE NO/S	C 31 OF 2015
CITATION NO.	2016 WAIRC 00360

Result	Order issued
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr D Anderson of counsel

Order

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

THAT the notice of application be and is hereby amended in the terms of the amended application filed on 3 June 2016.

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

CONFERENCES—Matters referred—

2016 WAIRC 00902

DISPUTE RE FIXED TERM CONTRACTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00902
CORAM	**:**	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
HEARD	**:**	THURSDAY, 13 OCTOBER 2016; THURSDAY, 27 OCTOBER 2016; FRIDAY, 11 NOVEMBER 2016; WEDNESDAY, 16 NOVEMBER 2016
DELIVERED	**:**	WEDNESDAY, 30 NOVEMBER 2016
FILE NO.	**:**	PSACR 25 OF 2015
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Applicant AND DIRECTOR GENERAL, HOUSING AUTHORITY Respondent

CatchWords	**:**	Industrial Law (WA) - Jurisdiction of the Public Service Arbitrator - Whether an 'industrial matter' exists - Whether Arbitrator has power to make deeming orders - Whether orders sought vary an agreement - Whether jurisdiction is excluded - Whether orders sought are in the public interest - Whether the application is premature
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7, s 44, s 80E(5), s 80E(7) *Public Sector Management Act 1994* (WA) s 64, s 64(4) *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA)
Result	**:**	*Matter to be listed for hearing*
Representation:		
Applicant	**:**	Mr M Shipman (of counsel) and Mr W Claydon (of counsel)
Respondent	**:**	Mr R Andretich (of counsel)

Cases referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd [2002] WAIRC 05952; (2002) 82 WAIG 2112

Australian Railways Union of Workers, West Australian Branch v Western Australian Government Railways Commission (1996) 76 WAIG 2880

Civil Service Association of Western Australia Incorporated v Director General, Department of Agriculture [2004] WAIRC 11714; (2004) 84 WAIG 2251

Civil Service Association of Western Australia Incorporated v Director General, Department of Justice [2004] WAIRC 12338; (2004) 84 WAIG 2877

The Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia – Western Australian Branch v Homeswest (1995) 75 WAIG 2872

Director General Department of Justice v Civil Service Association of Western Australia Incorporated [2005] WASCA 244; (2005) 86 WAIG 231

The Director General of the Department of Justice v The Civil Service Association of Western Australia (Inc) [2004] WAIRC 13765; (2005) 85 WAIG 629

Electrolux Home Products Pty Ltd v The Australian Workers' Union [2004] HCA 40; 221 CLR 309

The Minister for Education v The Civil Service Association of Western Australia (Inc) (1997) 77 WAIG 2185

Moreno v Serco (Australia) Pty Ltd (1995) 75 WAIG 3068

Re Cram; Ex parte NSW Colliery Proprietors Association Ltd (1987) 163 CLR 117

RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch [2000] WASCA 162; (2000) 80 WAIG 2437

Waring v Workcover WA [2010] WAIRC 00914; (2010) 90 WAIG 1664

Reasons for Decision

Background

1 On 23 October 2015 the Civil Service Association of Western Australia Incorporated (**CSA**) filed an application for a conference under s 44 of the *Industrial Relations Act 1979* (WA) (**IR Act**), relating to a dispute about the Housing Authority's practice of employing public service officers on fixed term contracts.

2 The parties did not settle the matter at conferences held before Public Service Arbitrator (**Arbitrator**) Acting Senior Commissioner Scott. The matter was referred for hearing and determination on 21 June 2016. It was reallocated to my chambers on 21 June 2016 and the Memorandum of Matters Referred for Hearing and Determination (**Memorandum**) was amended on 14 July 2016.

3 The Housing Authority objects to me hearing and determining these matters.

4 The parties agreed to deal with the Housing Authority's objections before any substantive hearing. A hearing was held on 13 October 2016 and the parties filed further written submissions after the hearing.

The Memorandum

5 The Memorandum states:

> The applicant is in dispute with the respondent over the respondent's practices in its employment of officers under fixed term contracts. It says those practices are arbitrary and unfair. It says that:
>
> 1. (i) the respondent employs public service officers (the officers) on fixed term contracts for reasons not contemplated by clause 8(5) *Public Service Award 1992* (Award) and clause 15 *Public Service and Government Officers General Agreement 2014* (Agreement); and
>
> (ii) in its application of cl 7.1 of the Commissioner's Instruction No. 2 Filling a Public Sector Vacancy (CI2), the respondent has created a mischief which denies the officers the opportunity to seek permanent appointment.
>
> **Particulars**
>
> 2. The practices, amongst other things, result in the officers being engaged on rolling contracts of a short duration, which accumulate to exceed the 12 month threshold in CI2, cl 7.1(c), yet the officers are denied the opportunity of having their request for consideration to a permanent appointment assessed.
>
> 3. The practices include but are not limited to:
>
> (a) Not referring to the possibility of permanency in either an Expression of Interest or an external advertisement, yet continuing to award contracts to the same officer for extended periods which can result in the contractor exceeding the two year threshold in CI2, cl 7.1(c);
>
> (b) Employing the officers beyond the two year threshold at CI2;
>
> (c) Not conducting a competitive merit selection process for the initial appointment;
>
> (d) Not engaging in a performance management process with the officers;
>
> (e) Not undertaking an individual assessment of merit;
>
> (f) Not filling a vacancy with a permanent appointment of an incumbent officer or another suitable officer when the substantive occupant has permanently vacated the position and funding remains in place for the appointment, but rather making an appointment by offering a further fixed term contract.
>
> **Contentions**
>
> 4. The respondent's practices have denied the applicant's members a workplace right.
>
> 5. The respondent justified the practices on the basis that:
>
> (a) It was undergoing a review. This was not a valid justification given the 'review' was ill defined and did not have any end date. Also, many of the officers have been employed for years at a time well beyond any short or medium term of a 'review'. The respondent subsequently resiled from this explanation.
>
> (b) The Government of Western Australia's recruitment freeze until 30 June 2016, which prohibited any appointment to a permanent position in the public sector. This justification is not valid because the respondent is not bound by the recruitment freeze, but has chosen to voluntarily abide by the policy. The recruitment freeze is immaterial to the relief it seeks in the application.
>
> 6. The applicant seeks orders to create a new workplace right for officers employed pursuant to cl 8(5) of the Award and cl 15 of the Agreement and CI2, cl 7.1 that:
>
> (a) the officers listed below be deemed to have satisfied the relevant considerations in cl 7.1; and
>
> (b) if a vacancy or similar vacancy is identified in the respondent, the respondent may exercise the CEO's discretion and will, if it decides a permanent position is required, assess the employees described at 6(c) when contemplating making a permanent appointment; and

(c) those officers are:
Ms Emily Dickinson
Ms Pau Lin Liew
Ms Natasha Buck
Mr Cliff Goncalves
Mr Michael Rye
Mr William Peng
Mr Christopher Lees
Ms Dianne McCambridge
Ms Andra Biondi
Ms Julie Rodriguez (Tremain).

7. That for all future fixed term contracts, the respondent comply with the following:

(a) For any fixed term contract

(i) under six months' duration must include a statement in the original advertisement for the contract, as to whether or not there is the prospect of appointment to a permanent position;

(ii) which has the possibility of appointment to a permanent position must be advertised in accordance with s 64(4) of the *Public Sector Management Act 1994* (WA) (the PSM Act);

(iii) must include a competitive merit selection process.

(b) Any notice of appointment to a fixed term contract must include in the terms and conditions of the contract a statement as to whether or not there is the possibility of appointment to a permanent position.

(c) For any fixed term contract, in the event that an appointment to a permanent position does not occur within two years of the date of the original advertisement and the position is still required, the position must be re-advertised in compliance with s 64(4) of the *Public Sector Management Act 1994* (WA) at the cessation of the current contract.

(d) Any officer on a fixed term contract, where there is the possibility of appointment to a permanent position and the contract has or contracts have exceeded 12 months in aggregate, must be subject to a performance management process before the cessation of the current contract or before two years from the date of the original advertisement, whichever is the sooner.

(e) The respondent must conduct an individual assessment of merit of a the [sic] officer prior to a permanent appointment being made; and

(f) Such other orders as the Public Service Arbitrator thinks fit.

The respondent says that:

1. Its practices in the use of fixed term contracts of employment comply with its obligations.

2. Its use of fixed term contracts is legitimate and consistent with the provisions of clause 8(5) of the Award and clause 15 of the Agreement. Any inconsistencies that were highlighted have now been resolved.

3. Allegations of non-compliance with the provisions of the Award or Agreement are exclusively within the jurisdiction of the Industrial Magistrate.

4. A full review of fixed term contracts has been undertaken.

5. An extensive review of employment practices associated with the application of CI2 has been undertaken and as a result, its employment practices are consistent with the provisions of the PSM Act, the Commissioner's Instructions and the Award and the Agreement.

6. The applicant's claim of the denial of an existing workplace right and seeking a new workplace right are inconsistent. The applicant fails to provide clarity or offer a basis for either claim.

7. The creation of a new workplace right would involve a variation to the Award and/or the Agreement which settled the industrial matters dealt with. Clause 7.2 of the Agreement provides there would be no further claims concerning conditions of employment except as provided. Therefore:

(a) The application is contrary to clause 7.2 of the Agreement and the respondent does not consent to a variation of the Award or Agreement to include a new workplace right.

(b) The applicant seeks to amend or vary an industrial instrument and/or Commissioner's Instruction, which are outside of the respondent's scope of authority and sphere of influence.

(c) The respondent is not the appropriate respondent to a claim for the amendment or variation of CI2. The making of the Commissioner's Instruction involves the exercise of a statutory function by the Public Sector Commissioner.

8. Where the applicant seeks orders that the employees named be automatically deemed to have met the relevant criteria for permanent appointment as set out in part 7.1 of CI2, the employees named and likely to be affected by the orders sought either do not satisfy the provisions of s 64(4) of the PSM Act or meet the criteria of part 7.1 of CI2, or have either;

- gained permanent appointment by way of part 3.1 and 3.2 of CI2;
- have [sic] been offered permanent employment and have declined the offer; or
- meet [sic] the criteria for consideration for permanent appointment but there are no suitable available vacancies.

9. It opposes the orders sought to the extent that any such orders would by effect, place the respondent in a position of non-compliance with the PSM Act and the Commissioner's Instructions.

10. Appointment under section s 64 of the PSM Act is subject to compliance with relevant Commissioner's Instructions and cannot be deemed collectively. An appointment based upon deemed compliance when in fact there is noncompliance would be invalid.

11. Where the orders sought would affect terminology contained in its position advertisements and extend to the contractual terms contained in its fixed term contracts of employment:

    (a) The orders sought do not constitute an industrial matter as defined by s 7 of the *Industrial Relations Act 1979*;

    (b) In any event, the respondent objects to being constrained by way of the wording that is included in position advertisements. The wording of position advertisements should be determined on a case by case in accordance with the circumstance and nature of the vacancy;

    (c) Pursuant to s 64 of the PSM Act and CI2, employing authorities have the right to determine when a vacancy is to be filled and by what mode of employment. The decision on how to advertise a vacancy rests with the employing authority and should not be interfered with; and

    (d) A fixed term appointment does not carry with it any presumption of or right to a permanent appointment and as such, no reference to the possibility or not of permanency should be required to be included in a fixed term contract of employment. An employee accepting an offer of fixed term employment is taken to have agreed that the arrangement will naturally expire according to its terms.

12. The application proceeds upon the misconception that part 7 of the Commissioner's Instruction provides an employee right. Rather, it is intended to simply inform the content of the requirement of s 64(4) of the PSM Act in that, a fixed term officer cannot apply for a permanent appointment 'unless the vacancy has first been advertised in accordance with the Commissioner's Instructions'.

13. The respondent seeks that the matter be dismissed.

The Housing Authority's submissions

6 The Housing Authority filed three sets of written submissions and made oral submissions at the hearing. It objects to me hearing and determining these matters for the following reasons.

Deeming

7 The Housing Authority argues that the Arbitrator has no power to make orders deeming certain employees have satisfied the requirements in clause 7 of the Commissioner's Instruction No. 2 (**CI2**).

8 The Housing Authority says the CSA seeks findings of facts contrary to what they are or may be, rather than a review of any decision by the Housing Authority within the jurisdiction of the Arbitrator.

9 Courts and tribunals must make findings of facts based on the evidence before them, subject to strict exceptions.

10 The Housing Authority says the power to determine a matter other than on the facts as found on the evidence is limited and requires a statutory power. This most often is provided by a specific provision which deems certain facts to exist and entitles the adjudicator to proceed accordingly, for example s 3(4) of the IR Act.

11 I understand the Housing Authority's submission to be that, absent any express power to deem, the Arbitrator has no capacity to change the facts to be other than what they are, or to order that something is lawful which is otherwise unlawful.

12 It says there is no specific or general power in the IR Act or the *Public Sector Management Act 1994* (WA) (**PSM Act**) that gives the Arbitrator the power to make deeming orders, so the application should be dismissed.

13 The Housing Authority says an appointment which does not comply with CI2 does not comply with s 64 of the PSM Act and therefore cannot be lawfully made. The Arbitrator cannot make something lawful which is unlawful. Further, the Arbitrator cannot constrain the discretion conferred on the Housing Authority under s 64 of the PSM Act. To constrain the discretion would be to deny the discretion.

14 The Housing Authority submits that any appointment made under s 64 of the PSM Act must comply with the conditions of s 64 of the PSM Act, which include Commissioner's Instructions *and* orders.

15 An order by the Arbitrator must be consonant with the other conditions and instruments that apply to appointment. Any order cannot detract from or be contrary to the requirements of s 64 of the PSM Act.

16 The Housing Authority notes Sharkey P's observation in ***The Minister for Education v The Civil Service Association of Western Australia (Inc)*** (1997) 77 WAIG 2185 (***Education v CSA***) that '[t]here was no power in the Commission to make an order directing the appellants to act contrary to their obligations under s.64 of the PSM Act, and it was not therefore in accordance with equity, good conscience and the substantial merits of the case to do so' (2187).

17 The Housing Authority says ***Education v CSA*** cannot be distinguished on the basis that, in that case, the Director General gave undertakings to appoint employees. The case provides a general construction of the effect of s 64 of the PSM Act and the other instruments that condition the power of appointment.

18 The Housing Authority also cites ***Waring v Workcover WA*** [2010] WAIRC 00914; (2010) 90 WAIG 1664 (***Waring***) as authority for the invalidity of appointments which do not comply with the terms of an award, agreement or Commissioner's Instruction.

19 The CSA is asking the Arbitrator to authorise the Housing Authority to act unlawfully and contrary to Parliament's intent.

Review or variation of CI2

20 The Housing Authority says the Arbitrator has no power to condition, vary or fetter the discretion conferred on the Housing Authority by s 64 of the PSM Act because the making of CI2 is a statutory function and it cannot be reviewed or varied by the Arbitrator.

Variation of agreement

21 The Housing Authority says the CSA seeks orders which would vary the *Public Service and Government Officers General Agreement 2014* (**General Agreement**).

22 The orders would vary the General Agreement because they would give fixed-term employees a right to be considered for appointment to a permanent position when they would not otherwise have that right.

23 The Arbitrator has very limited powers to vary the General Agreement and those powers are not relevant to these circumstances.

24 The Housing Authority says its capacity to appoint and the conditions relating to appointment of fixed-term employees are comprehensively dealt with in the *Public Service Award 1992* (**Award**) and the General Agreement. Those conditions remain fixed for the life of the General Agreement: ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd*** [2002] WAIRC 05952; (2002) 82 WAIG 2112 (***Burswood Resort***).

25 The Award and General Agreement deal with the mode of appointment and conditions of appointment, which includes conversion from fixed-term to permanent employment.

26 The CSA seeks to create a new workplace right for fixed-term employees by providing them with the ability to apply for permanency when they would not otherwise be able to do that.

27 Subclause 7.2 of the General Agreement provides that '[t]he parties to this General Agreement undertake that for the term of this General Agreement there will be no further claims on matters contained in this General Agreement except where specifically provided for'. The matters in the Memorandum are further claims because they seek a right where otherwise there would not be one: ***Burswood Resort***. This application is a claim about a matter in the General Agreement.

No industrial matter

28 The Housing Authority says the second part of the orders sought by the CSA do not relate to an industrial matter and therefore the Arbitrator has no jurisdiction.

29 The orders seek to regulate the Housing Authority's practice of calling for expressions of interest or advertising vacancies. They require the inclusion of an express term in a fixed-term contract of employment about the possibility of future permanent employment.

30 The Housing Authority concedes that the definition of an 'industrial matter' is very broad.

31 Initially the Housing Authority submitted that an industrial matter required the existence of an employment relationship. Given that an employment relationship does not exist when expressions of interest are called for, there cannot be an industrial matter and therefore no jurisdiction of the Arbitrator to inquire into and deal with the matter: ***The Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia – Western Australian Branch v Homeswest*** (1995) 75 WAIG 2872.

32 In its third written submissions, the Housing Authority conceded that ***RGC Mineral Sands Ltd v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch*** [2000] WASCA 162; (2000) 80 WAIG 2437 [79] (***RGC Mineral Sands Ltd***) is authority for the proposition that there may be circumstances where an industrial matter can arise where there is no immediate or directly contemplated employment relationship. However, the Housing Authority maintains that there is no industrial matter in this case.

33 The Housing Authority says that until an employment relationship is established, the Arbitrator has no power under the IR Act to dictate the terms under which public sector agencies advertise and offer employment to applicants for public sector agencies: ***Electrolux Home Products Pty Ltd v The Australian Workers' Union*** [2004] HCA 40; 221 CLR 309 (***Electrolux***). The way in which the employment relationship is formed is a matter for the employer.

Jurisdiction is excluded under s 80E(7)

34 In its first written submissions the Housing Authority submitted that Commissioner's Instruction No. 1 and the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (**WA**) (**PSM Regulations**) exclude these matters from the Arbitrator's jurisdiction under s 80E(7) of the IR Act: ***Director General Department of Justice v Civil Service Association of Western Australia Incorporated*** [2005] WASCA 244; (2005) 86 WAIG 231 (***Jones***).

35 At the hearing, the Housing Authority conceded that the PSM Regulations do not provide a procedure for the employees specified in the Memorandum (**specified employees**), and therefore do not exclude the Arbitrator's jurisdiction, because there has not been any decision that could be reviewed.

36 The Housing Authority agreed that s 80E(7) of the IR Act does not apply to these matters.

Public interest

37 The Housing Authority says it is not in the public interest for the Arbitrator to make the orders sought because the Arbitrator should not facilitate the making of an unlawful appointment or the avoidance of the requirements under s 64 of the PSM Act.

38 The requirements of s 64 of the PSM Act limit and condition the power to appoint, they do not create a workplace right.

Application is premature

39 The Housing Authority says the CSA seeks the Arbitrator's intervention prematurely. It could only be after the Housing Authority has posted advertisements with a view to making an appointment, if at all, that it would be open to the Arbitrator to intervene.

Orders seek to condition the exercise of legitimate managerial prerogative

40 The Housing Authority says that the manner in which the Housing Authority calls for expressions of interest and makes an offer of employment are an exercise of legitimate management prerogative. It should not be conditioned and these matters should not be considered industrial matters.

The CSA's submissions

41 The CSA filed two sets of written submissions and made oral submissions at the hearing.

42 It says an industrial matter exists and the Arbitrator has the power to make the orders the CSA seeks.

Orders are within power

43 The CSA says the Arbitrator has broad powers under s 80E(5) of the IR Act to review, nullify, modify or vary the Housing Authority's exercise of power. These powers are broader than the Commission's general jurisdiction under Part II of the IR Act.

44 The CSA argues that the orders it seeks do not remove the Housing Authority's discretion under s 64 of the PSM Act.

45 The CSA says it does not seek the outcomes sought in ***Education v CSA*** and ***Waring*** and those decisions are distinguishable.

46 Further, it says s 64 of the PSM Act can be conditioned by an order of the Arbitrator.

47 The CSA agrees that a fixed-term employee must fulfil the requirements in clause 7.1 of CI2 to be contemplated for permanent employment. It says if the Arbitrator deems it to be so, then the fixed-term officer will have fulfilled those requirements.

48 The CSA says the orders would merely lead to the specified employees being eligible for appointment, should the CEO choose to exercise his discretion.

49 The CSA does not seek orders that require the CEO to appoint the specified employees as permanent employees or orders that convert the specified employees from fixed-term employees to permanent employees.

50 It argues that under s 80E(5) of the IR Act, the Arbitrator can vary the Housing Authority's decision, for example a decision to act in a way that has meant that the requirements under clause 7.1 of CI2 have not been met.

51 The CSA asks that I vary the outcome of the Housing Authority's actions and decisions. I understand the CSA's submission to be that this could be achieved in a number of ways. Deeming is one way.

52 The CSA submits that no decisions of the Industrial Appeal Court or Full Bench of this Commission prohibit the Arbitrator from making deeming orders. The Housing Authority has not produced any authority to contradict this argument.

53 The CSA refers to several decisions where Commissioners and Arbitrators have made orders deeming certain things to have occurred.

54 In ***Moreno v Serco (Australia) Pty Ltd*** (1995) 75 WAIG 3068, 3070, which involved an application brought under s 29(1)(b) of the IR Act, Gifford C ordered that an employee be re-employed as an ongoing casual, rather than on an 'as required' basis. In doing so, Gifford C considered whether a deeming clause in an award was a prerequisite to Mr Moreno being able to be classified as a permanent full-time employee.

55 In ***Australian Railways Union of Workers, West Australian Branch v Western Australian Government Railways Commission*** (1996) 76 WAIG 2880 Scott C made orders deeming that industrial action did not constitute a break in the continuity of higher duties payments.

56 In ***Civil Service Association of Western Australia Incorporated v Director General, Department of Agriculture*** [2004] WAIRC 11714; (2004) 84 WAIG 2251 Arbitrator Beech SC made orders deeming that an employee was on annual leave for the period it took to address a particular issue and agree the solution to it. The balance of the period during which the employee was in fact on annual leave was deemed to be leave with pay because Beech SC considered that there was no reason why the employee should have been absent from the workplace for the length of time that he was in fact absent.

57 In ***Civil Service Association of Western Australia Incorporated v Director General, Department of Justice*** [2004] WAIRC 12338; (2004) 84 WAIG 2877 Beech C made an order deeming that an employee was on paid sick leave for a period during which he had exhausted his entitlement to paid sick leave. The Full Bench upheld an appeal against this decision in ***The Director General of the Department of Justice v The Civil Service Association of Western Australia (Inc)*** [2004] WAIRC 13765; (2005) 85 WAIG 629 (***DoJ v CSA***) because the exercise of an equitable power could not override an agency's obligation to recover money paid out of the Consolidated Fund without parliamentary authority and therefore the payment made was unlawful and ultra vires. The CSA says the Full Bench did not impugn the Commission's power to make deeming orders generally.

58 The CSA refers to a range of clauses in 13 agreements that relate to deeming.

59 The CSA says that the Arbitrator could also order certain things to done, for example that a performance appraisal be done or that a notice be issued. The CSA submits that the Arbitrator has the power to make these orders.

60 If I consider that I do not have the power to deem that the requirements of clause 7.1 of CI2 are met, the CSA asks that it be permitted to amend its application to seek orders that ensure that the requirements of clause 7.1 of CI2 are met retrospectively.

No variation

61 The CSA says it does not seek to vary the Award or General Agreement. This application is contained to clause 7.1 of CI2.

62 These matters are not further claims and the no further claims clause of the General Agreement does not apply.

63 The no further claims clause is limited to matters that were the subject of negotiations during the bargaining period and were settled by the making of the General Agreement. It is simply a prohibition on claims about wages and hours.

64 The CSA argues that the no further claims clause must be construed narrowly, otherwise any employment conditions imposed by an employer during the term of an agreement would fall foul of the clause and such a result would be absurd.

Industrial matter

65 The CSA says the definition of 'industrial matter' in s 7 of the IR Act is very broad.

66 The matters set out in the Memorandum are industrial matters.

67 The CSA argues that it is not necessary that there be any employment relationship for an industrial matter to exist: ***DoJ v CSA*** [32] (Full Bench). The Industrial Appeal Court in ***RGC Mineral Sands Ltd*** held at [80] that the existence of an employment relationship was not necessary to give the Commission jurisdiction.

68 Parker J concluded that the Commission had jurisdiction to deal with a claim about prospective employees if there was no obvious statutory impediment to hearing the matter. What is relevant is that there is an industrial matter. There is no need for a dispute concerning an industrial matter: ***RGC Mineral Sands Ltd*** [58] (Parker J).

69 The CSA says ***Electrolux*** is not persuasive because it is not relevant to the definition of industrial matter under the IR Act. ***Electrolux*** considered the *Workplace Relations Act 1996* (Cth) and whether there was an industrial dispute, being a dispute about matters pertaining to the employment relationship.

Jurisdiction is not excluded under s 80E(7)

70 The CSA says there is no relevant procedure available to the specified employees under the PSM Regulations.

71 The Arbitrator's jurisdiction is only excluded under s 80E(7) of the IR Act where a standard actually exists: ***Jones*** [45]-[46].

72 The PSM Regulations do not apply to the specified employees because the PSM Regulations are only relevant where a person has made an unsuccessful application. This group of employees is excluded from making an application at all.

Consideration

Industrial matter

73 I must decide whether an industrial matter within the definition of s 7 of the IR Act exists.

74 Given its federal context, ***Electrolux*** is not relevant to these matters.

75 It is open to me to find, and I do, that the application discloses an industrial matter, even if much of what is proposed by way of orders may prove to be beyond the scope of that industrial matter and the jurisdiction and power of the Arbitrator: ***RGC Mineral Sands Ltd*** [92].

76 The matters set out in the Memorandum fall within the broad definition of industrial matter in s 7 of the IR Act:

> ***industrial matter*** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;
>
> (c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
>
> (ca) the relationship between employers and employees;
>
> …

77 To the extent that the Housing Authority says that the manner in which it calls for expressions of interest and makes an offer of employment are an exercise of legitimate management prerogative which should not be conditioned and is not an industrial matter, I think the Housing Authority conflates issues.

78 That is part of the substance of the matter. It may go to whether or not I should deal with a matter, not whether an industrial matter exists or whether I have the power to make orders: ***RGC Mineral Sands Ltd*** [65] (Parker J, with whom Kennedy J agreed), citing ***Re Cram; Ex parte NSW Colliery Proprietors Association Ltd*** (1987) 163 CLR 117, 133 – 137.

Power to make orders

79 I agree that I do not have the power to order that the Housing Authority appoint the fixed-term employees as permanent employees. However, the CSA is not asking me to do that.

80 I am not persuaded by the Housing Authority that I should dismiss these matters because I cannot review or vary the making of CI2. In hearing these matters, I do not consider I would review or vary the making of CI2. Rather, I would inquire into and deal with an industrial matter.

81 Deeming orders need not involve making findings of facts contrary to what they are.

82 Clearly I have the power to order that certain things be done if I decide to adjust the Housing Authority's decision.

83 The Housing Authority has not persuaded me that I do not have the power to make the deeming orders sought by the CSA. Of course, whether I would decide to make deeming orders would depend on hearing the substantive matter.

84 Whether the deeming orders sought by the CSA would mean that a permanent appointment of one of the specified employees under s 64 of the PSM Act would be lawful is another matter. I accept that an appointment under s 64 of the PSM Act must comply with s 64 of the PSM Act, the Commissioner's Instructions *and* any order of the Arbitrator.

85 As I have found at [76], an industrial matter exists. It does not depend on there being an employment relationship.

86 I would need to hear the substantive matter before I could decide whether or not to order the second part of the orders sought by the CSA.

87 I am not persuaded that I do not have the power to make an order that could deal with the industrial matter. Of course I would need to consider the making of any specific order once I have heard the substantive matter.

Variation

88 I agree that I do not have the power to vary the General Agreement in the circumstances. However, I do not consider that the orders sought would vary the General Agreement.

89 In my view, the orders would not necessarily give fixed-term employees a right to be considered for appointment to a permanent position when they would not otherwise have that right.

90 The Housing Authority and CSA agreed at the hearing that fixed-term employees can apply for permanent positions at any time.

91 The effect of the orders may be that the criteria of clause 7.1 of CI2 is met in relation to the specified employees. A consequence of this may be that the specified employees would then not be excluded from being considered for permanent appointment. On its face, that does not necessarily amount to having a right to be considered for appointment. It also does not vary the General Agreement.

92 I do not agree with the CSA that the no further claims clause only excludes claims in relation to wages and hours, or that it only relates to claims made in the bargaining process.

93 The no further claims clause excludes 'claims on matters contained in [the] General Agreement except where specifically provided for'.

94 The question is whether the matters in the Memorandum are matters contained in the General Agreement. Conversion is not mentioned in the General Agreement but modes of appointment and the conditions of employment for fixed-term employees are in the General Agreement.

95 I agree with the CSA that the no further claims clause should not be construed broadly. If it were, many ancillary matters, including those introduced by an employer during the life of the General Agreement, would fall foul of the clause.

96 On its face, the application seeks to correct what the CSA says is an unfair practice.

97 These matters are about the Housing Authority's practice of appointing and treating fixed-term employees. Disputes about the exercise of discretion about matters the subject of an agreement are not necessarily further claims. I am not inclined to think this is a further claim.

Jurisdiction is not excluded under s 80E(7)

98 Jurisdiction is not excluded under s 80E(7) of the IR Act because the PSM Regulations do not provide a procedure for the specified employees. The Housing Authority rightly conceded as much.

Public interest

99 I am not persuaded that the orders sought are contrary to the public interest.

100 The orders sought would not require the Housing Authority to appoint employees.

101 The Housing Authority exercises discretion under s 64 of the PSM Act in relation to making appointments.

Application is not premature

102 This application is not premature. An industrial matter exists and the CSA is entitled to seek the Arbitrator's assistance in relation to the matter.

103 Whether the orders the CSA seeks are orders I would make will no doubt be the focus of the substantive hearing.

Conclusion

104 The objections are not upheld. I will hear and determine the matters in the Memorandum.

2016 WAIRC 00910

DISPUTE RE FIXED TERM CONTRACTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, HOUSING AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	MONDAY, 5 DECEMBER 2016
FILE NO	PSACR 25 OF 2015
CITATION NO.	2016 WAIRC 00910

Result	Matter to be listed for hearing
Representation	
Applicant	Mr M Shipman (of counsel) and Mr W Claydon (of counsel)
Respondent	Mr R Andretich (of counsel)

Order

WHEREAS on 23 October 2015 the applicant filed an application for a conference under s 44 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the matter was referred for hearing and determination on 21 June 2016;

NOW THEREFORE I, the undersigned, having given reasons for my decision and pursuant to the powers conferred on me under the *Industrial Relations Act 1979* (WA) hereby order –

THAT the matter be listed for hearing.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation, Industrial Union of Workers Perth	The Minister for Health in his incorporated capacity under s. 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board	Scott CC	C 10/2016	24/06/2016 1/07/2016 9/08/2016	Dispute re transfer	Concluded
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	The Public Transport Authority of Western Australia	Kenner SC	C 4/2016	29/04/2016	Dispute re alleged unfair dismissal of union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2016 WAIRC 00924

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 7 NOVEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SPARKS 'N' SECURITY PTY LTD AND RITZLINE PTY LTD T/A IC COOL REFRIGERATION, MECHANICAL AND ELECTRICAL SERVICES
	APPLICANT
	-v-
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 DECEMBER 2016
FILE NO.	APPL 67 OF 2016
CITATION NO.	2016 WAIRC 00924
Result	Directions issued
Representation	
Applicant	Mr I Curlewis (of counsel)
Respondent	Ms R Harding (of counsel) and with her Ms B Ridout (of counsel)

Directions

HAVING HEARD from Mr I Curlewis of counsel on behalf of the applicant and Ms R Harding of counsel and with her Ms B Ridout of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT the applicant file and serve particulars of the application by 16 January 2017;
2. THAT the parties file an agreed statement of facts by 16 January 2017.
3. THAT the matter be listed for one day of hearing in March, on a date to be fixed.
4. THAT the parties have liberty to apply.

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

2016 WAIRC 00925

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 1 NOVEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAULL & WARNER RESOURCES PTY LTD
	APPLICANT
	-v-
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 DECEMBER 2016
FILE NO.	APPL 68 OF 2016
CITATION NO.	2016 WAIRC 00925
Result	Directions issued
Representation	
Applicant	Ms S Maddern (of counsel) and with her Mr P Williams (of counsel)
Respondent	Ms R Harding (of counsel) and with her Ms B Ridout (of counsel)

Directions

HAVING HEARD from Ms S Maddern of counsel and with her Mr P Williams of counsel on behalf of the applicant and Ms R Harding of counsel and with her Ms B Ridout of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT by 27 January 2017, the applicant file and serve:

(a) any witness statements and documents upon which it intends to rely; and
(b) a brief outline of submissions and a list of authorities.

2. THAT by 11 February 2017, the respondent file and serve:
   (a) any witness statements and documents upon which it intends to rely; and
   (b) a brief outline of submissions and a list of authorities.
3. THAT by 11 February 2017, the parties are to file an agreed statement of facts.
4. THAT witnesses' statements will constitute their evidence in chief.
5. THAT the parties are to advise each other and the Commission of which witnesses they will require for cross examination.
6. THAT the matter be listed for two days' on 13 and 14 March 2017.
7. THAT the parties have liberty to apply.

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

2016 WAIRC 00926

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 27 JULY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THOMAS ALFRED SMITH

APPLICANT

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

RESPONDENT

CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 DECEMBER 2016
FILE NO.	APPL 70 OF 2016
CITATION NO.	2016 WAIRC 00926

Result	Order and Directions issued
Representation	
Applicant	Mr T A Smith and with him Mr J Ramsay
Respondent	Ms R Harding (of counsel) and with her Mr B Ridout (of counsel)

Order and Directions

HAVING HEARD from Mr T A Smith on his own behalf and with him Mr J Ramsay, and Ms R Harding of counsel and with her Ms B Ridout of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

1. ORDERS THAT the application be received out of time.
2. DIRECTS THAT the application be adjourned sine die for the parties to consider or pursue mediation.
3. DIRECTS THAT the applicant update the Commission on the status of the matter by close of business 13 January 2017.

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

2016 WAIRC 00873

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	MONDAY, 14 NOVEMBER 2016
FILE NO.	APA 3 OF 2016
CITATION NO.	2016 WAIRC 00873

Result	Direction issued

Direction

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 under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the respondent file and serve its further submissions by 28 November 2016.
2. THAT the appellant file and serve its further submissions within 14 days of the respondent filing its further submissions.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

2016 WAIRC 00884

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARCO CELENZA
	APPLICANT
	-v-
	SONIA & TIM FAIRHEAD DIRECTORS AND LICENSEE, NORFOLK COMMERCIAL
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 16 NOVEMBER 2016
FILE NO/S	B 40 OF 2016
CITATION NO.	2016 WAIRC 00884

Result	Order issued
Representation	
Applicant	Mr M Celenza
Respondent	Mr T O'Leary (of counsel)

Order

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

AND WHEREAS at a conference on 4 October 2016 the applicant's representative agreed to provide to the respondent and the Commission particulars of claim, including information in relation to the applicant's taxation and superannuation arrangements;

AND WHEREAS on 18 October 2016 the applicant's representative provided to the respondent a number of documents;

AND WHEREAS on 2 November 2016 the respondent requested from the applicant's representative particulars of claim;

AND WHEREAS on 3 November 2016 the applicant's representative ceased acting for the applicant;

AND WHEREAS at a conference on 16 November 2016 the applicant gave an undertaking that he would provide to the respondent and the Commission answers to the questions, and the documents requested, in paragraph 23 of the respondent's letter to the applicant's representative dated 2 November 2016, as set out in the following schedule;

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

THAT by 30 November 2016, the applicant file at the Commission and serve on the respondent answers to the questions, and the documents requested, in paragraph 23 of the respondent's letter to the applicant's representative dated 2 November 2016, as set out in the following schedule.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

SCHEDULE

23 If your client maintains his claim, please provide responses to the following request for particulars of your client's "*taxation and superannuation arrangements*" at your earliest convenience:

(a) Please describe the content of your statutory declaration made as part of "*Application for Renewal of a Real estate and Business Sales Representative Registration*" renewal certificate for each of 2012, 2013, 2014, 2015 and 2016.

(b) Please provide a copy of your client's declaration for each of the years 2012 – 2016 (excluding 2015).

(c) What income did your client declare for the 2012/13 financial year?

(d) Please provide a copy of your client's tax return for the 2012/13 financial year.

(e) Please provide a copy of your client's notice of assessment issued by the Australian Taxation Office for the 2012/13 financial year.

(f) What superannuation payments did your client receive for the 2012/13 financial year?

(g) Please provide a copy of your client's superannuation fund's tax return for the 2012/13 financial year.

(h) Please provide a copy of your client's notice of assessment issued by the Australian Taxation Office for your client's superannuation fund for the 2012/13 financial year.

(i) What income did your client declare for the 2014/15 financial year?

(j) Please provide a copy of your client's tax return for the 2014/15 financial year.

(k) Please provide a copy of your client's notice of assessment issued by the Australian Taxation Office for the 2014/15 financial year.

(l) What superannuation payments did your client receive for the 2014/15 financial year?

(m) Please provide a copy of your client's superannuation fund's tax return for the 2014/15 financial year.

(n) Please provide a copy of your client's notice of assessment issued by the Australian Taxation Office for your client's superannuation fund for the 2014/15 financial year.

(o) What income did your client declare for the 2015/16 financial year?

(p) Please provide a copy of your client's tax return for the 2015/16 financial year.

(q) Please provide a copy of your client's notice of assessment issued by the Australian Taxation Office for the 2015/16 financial year.

(r) What superannuation payments did your client receive for the 2015/16 financial year?

(s) Please provide a copy of your client's superannuation fund's tax return for the 2015/16 financial year.

(t) Please provide a copy of your client's notice of assessment issued by the Australian Taxation Office for your client's superannuation fund for the 2015/16 financial year.

(u) On what date did your client become an undischarged bankrupt?

2016 WAIRC 00885

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARCO CELENZA
	APPLICANT
	-v-
	SONIA & TIM FAIRHEAD DIRECTORS AND LICENSEE, NORFOLK COMMERCIAL
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 16 NOVEMBER 2016
FILE NO/S	B 40 OF 2016
CITATION NO.	2016 WAIRC 00885

Result Order issued

Order

HAVING heard Mr C Celenza on his own behalf and Mr T O'Leary (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 21 December 2016.
2. THAT the applicant file and serve outlines of evidence by 31 January 2016.
3. THAT the respondent file and serve outlines of evidence by 28 February 2017.
4. THAT the applicant file and serve an outline of written submissions by 14 March 2017.
5. THAT the respondent file and serve an outline of written submissions by 28 March 2017.
6. THAT this matter be listed for a two-day hearing not before 18 April 2017.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

2016 WAIRC 00872

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 29 AUGUST 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN ROSS MACK
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF PARKS AND WILDLIFE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR G LEE - BOARD MEMBER
	MR N PURDY - BOARD MEMBER
DATE	MONDAY, 14 NOVEMBER 2016
FILE NO.	PSAB 18 OF 2016
CITATION NO.	2016 WAIRC 00872

Result Direction issued

Direction

HAVING heard Mr D Stojanoski on behalf of the appellant and Ms M Marsh on behalf of the respondent, the Public Service Appeal Board, 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 and a bundle of agreed documents by 2 December 2016.
2. THAT the appellant file and serve outlines of evidence by 13 January 2017.
3. THAT the respondent file and serve outlines of evidence by 3 February 2017.
4. THAT the appellant file and serve an outline of written submissions by 24 February 2017.
5. THAT the respondent file and serve an outline of written submissions by 17 March 2017.
6. THAT this matter be listed for hearing not before 3 April 2017.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

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

2016 WAIRC 00928

APPEAL AGAINST DISCIPLINARY PENALTY AND DECISION ON 9 SEPTEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JONATHAN SHIELDS
	APPELLANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR D SHAW - BOARD MEMBER
	MR S GREGORY - BOARD MEMBER
DATE	TUESDAY, 13 DECEMBER 2016
FILE NO.	PSAB 19 OF 2016
CITATION NO.	2016 WAIRC 00928

Result Direction issued

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the appellant and Mr M Golesworthy (as agent) on behalf of the respondent, the Public Service Appeal Board, 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 and a bundle of agreed documents by 10 February 2017.
2. THAT the appellant file and serve outlines of evidence by 3 March 2017.
3. THAT the respondent file and serve outlines of evidence by 24 March 2017.
4. THAT the appellant file and serve an outline of written submissions by 13 April 2017.
5. THAT the respondent file and serve an outline of written submissions by 5 May 2017.
6. THAT this matter be listed for hearing not before 22 May 2017.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

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

2016 WAIRC 00934

DISPUTE RE INTERPRETATION OF CLAUSE 24(14) OF THE DEPARTMENT OF HEALTH MEDICAL PRACTITIONERS (METROPOLITAN HEALTH SERVICES) AMA INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 14 DECEMBER 2016
FILE NO	PSACR 5 OF 2016
CITATION NO.	2016 WAIRC 00934

Result	Name of respondent amended
Representation	
Applicant	Mr S Bibby
Respondent	Ms R Sinton (as agent)

Order

WHEREAS on 15 March 2016 the applicant filed an application for a conference under s 44 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the matter was referred for hearing and determination on 21 June 2016;

AND WHEREAS at the hearing on 8 December 2016 the parties agreed to the name of the respondent being amended;

AND WHEREAS the Public Service Arbitrator is of the opinion that it is appropriate to amend the name of the respondent in this application;

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

THAT the name of the respondent be amended to 'South Metropolitan Health Service, established pursuant to s 32(1)(b) of the *Health Services Act 2016*'.

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

2016 WAIRC 00880

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALD F GOJANOVICH
	APPLICANT
	-v-
	WESTERN AUSTRALIA POLICE TRAFFIC WARDEN STATE MANAGEMENT UNIT
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 15 NOVEMBER 2016
FILE NO/S	U 126 OF 2016
CITATION NO.	2016 WAIRC 00880

Result	Name of respondent amended
Representation	
Applicant	Mr S Harben (of counsel)
Respondent	Mr A Mason (of counsel)

Order

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

AND WHEREAS at a conciliation conference on 15 November 2016 the parties agreed to the name of the respondent being amended;

AND WHEREAS the Commission considers that it is appropriate to amend the name of the respondent;

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

THAT the name of the respondent be amended to 'Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police'.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Registered Nurses - Australian Nursing Federation - Disability Services Commission Industrial Agreement 2016 AG 50/2016	5/12/2016	The Australian Nursing Federation, Industrial Union of Workers Perth	Disability Services Commission	Commissioner T Emmanuel	Agreement registered
WA Health System - United Voice - Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2016 AG 47/2016	15/11/2016	The Health Service Providers established pursuant to section 32(1)(b) of the Health Services Act 2016 Mental Health Commission	United Voice WA	Commissioner T Emmanuel	Agreement registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2016 WAIRC 00904

DECLARATION PURSUANT TO SECTION 42H

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS, CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 1 DECEMBER 2016
FILE NO.	APPL 72 OF 2016
CITATION NO.	2016 WAIRC 00904

Result	Declaration made
Representation	On the papers

Declaration

HAVING made an order on 12 October 2016 in Application 53 of 2016 involving the same parties as those to this application declaring bargaining to be at an end pursuant to section 42H *Industrial Relations Act 1979* (WA); and

HAVING been informed by the parties that they have formed the view that Application 53 of 2016 should have been made to a Public Service Arbitrator rather than the Western Australian Industrial Relations Commission; and

WHEREAS the current application is in identical terms to the application in Application 53 of 2016; and

WHEREAS I have been provided with a Minute of Consent Order signed on behalf of the Western Australian Police Union of Workers, the Civil Service Association of Western Australia Incorporated and the Commissioner of Police;

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,
[L.S.] Commissioner.

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2016 WAIRC 00905

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the *Industrial Relations Act 1979*, intends, by order, to cancel the following Agreements, namely the -

1. A. Goninan & Co. Limited Bassendean Enterprise Agreement 2003
2. A.B.B. James Watt Pty Ltd Nelson Point Development Project (Enterprise Bargaining Agreement) AG 21 of 1993
3. ABB Power Transmission Distribution Transformers Division, Osborne Park Location (Enterprise Bargaining Agreement)1993
4. ABB-EPT Construction Pty Ltd Western Region (Paraburdoo Fines Further Processing Project) Enterprise Bargaining Agreement No. 19 of 1995
5. ABB – EPT Construction Pty Ltd (Alcoa Kwinana B – 30 Project) Enterprise Bargaining Agreement
6. ABB Power Transmission, Distribution Transformer Division, Osborne Park Enterprise Agreement 1994
7. ABB-EPT Construction Pty Ltd Western Region (Kwinana) Enterprise Bargaining Agreement 1994
8. ABB Engineering Construction Pty Ltd Western Australia (Alcoa Wagerup Refinery Maintenance) Enterprise Bargaining Agreement No. AG 189 of 1996
9. ABB Engineering Construction Pty Ltd Western Australia (Alcoa Kwinana Refinery Maintenance) Enterprise Bargaining Agreement No. AG 190 of 1996

10. ABB Engineering Construction Pty Ltd Western Australia (Alcoa Pinjarra Refinery Maintenance) Enterprise Bargaining Agreement No. AG 191 of 1996
11. ABB Engineering Construction Pty Ltd, Western Australia (Kwinana Factory) Enterprise Bargaining Agreement
12. ABB ALSTOM POWER LTD - Power Plant Maintenance (W.A.) Agreement
13. ABB Australia Pty Limited, (ATCS) Component Service, Automation Technology Division, WA Enterprise Agreement, 2003-2006
14. ACI Plastics Packaging Bentley Enterprise Agreement 2004
15. Air Drill Enterprise Agreement 2000
16. All Ports Terminal and Zone Maintenance Enterprise Agreement 2004
17. Aluminium Fabrication Industry Traineeship Agreement
18. Aluminium Finishing Traineeship Agreement No. AG 13 of 1988
19. AMCOR Beverage Cans, Canningvale Operation, Enterprise Bargaining Agreement 2003 to 2006
20. Amec Services Pty Ltd Alcoa Projects Enterprise Bargaining Agreement 2001 – 2003
21. Apprentices Fitting and Turning – The Minister for Agriculture Industrial Agreement
22. Atlas Copco Australia Pty Limited Perth WA Enterprise Agreement 1999
23. Australian Poultry Limited (Osborne Park) Enterprise Bargaining Agreement 1994
24. Australian Glass Manufacturers Co. Perth, Maintenance Trades (Enterprise Bargaining) Agreement 1993
25. Australian Glass Manufacturers Co. Perth, Maintenance Trades (Enterprise Bargaining) Agreement 1994
26. ACI Glass Packaging - Perth, Maintenance Trades (Enterprise Bargaining) Agreement 2003
27. ANI Products (WA) Division Enterprise Bargaining Consent Agreement 1993
28. ANI Bradken Perth, Western Australian Enterprise Bargaining Agreement 1996
29. ANI Bradken - Western Australia Enterprise Bargaining Agreement 1998
30. Automotive Dismantler Youth Traineeship Agreement
31. Bains Harding Industries (South West Division) Enterprise Bargaining Agreement
32. Bains Harding Industries (Western Power - Kwinana) Enterprise Bargaining Agreement 1998
33. Bains Harding Industries (Worsley Alumina) Enterprise Bargaining Agreement 1998
34. Bains Harding Industries (Alcoa Wagerup) Enterprise Bargaining Agreement 1998
35. Bains Harding Industries (Wesfarmers CSBP) Enterprise Bargaining Agreement 1998
36. Bains Harding Industries (Alcoa Kwinana) Enterprise Bargaining Agreement 1998
37. Bains Harding Industries (Manufacturing Division) Enterprise Bargaining Agreement
38. Bartter Enterprises Pty Ltd (Maintenance Division) Certified Agreement 2004
39. Benchmark Recruitment (WA) Pty Ltd (CBH Kwinana) Maintenance Agreement 2002
40. Beltreco Limited (North West) Enterprise Bargaining Agreement 1997
41. Beltreco Ltd (WA) Malaga Operations Enterprise Agreement 1999
42. Beltreco North West Operations Enterprise Bargaining Agreement 2000
43. BHP Building Products Osborne Park Enterprise Agreement 2000/2001
44. BHP Steel - Rod & Bar Products - Kwinana Works - Steel Industry Enterprise Bargaining Agreement 1993
45. BHP Iron Ore Enterprise Bargaining Agreement 1997
46. B.H.P. Transport - Kwinana Enterprise Bargaining Agreement, 1993
47. BHP Transport Kwinana Enterprise Bargaining Agreement, 1995
48. BHP Transport Pty Ltd Kwinana Bulk Materials Handling Enterprise Agreement 1998
49. Binder (WA) Enterprise Bargaining Agreement 1999
50. Bibra Lake Fabrication Workshop Enterprise Agreement 2003
51. Email Major Appliances - Belmont Service Technicians Enterprise Agreement 2000

on the grounds that there is no employee to whom the Agreements apply.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote File No. Admin 130/2016 on all correspondence.

Dated at Perth this 30th day of November 2016

(Sgd.) S BASTIAN

[L.S.] Registrar

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008.

Application Number	Award, order or industrial agreement varied	Parties		Commissioner	Matter	Dates	Result
APPL 69/2016	N/A	N/A	N/A	Scott CC	Request for mediation	28/11/2016 5/12/2016	Concluded

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2016 WAIRC 00882

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00882
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 31 OCTOBER 2016
DELIVERED	**:**	WEDNESDAY, 16 NOVEMBER 2016
FILE NO.	**:**	APPL 33 OF 2016
BETWEEN	**:**	MATTHEW CROWLEY Applicant AND DEPARTMENT OF COMMERCE Respondent

Catchwords	**:**	*Industrial Law (WA) - Referral to Commission under Public Sector Management Act 1994 - Voluntary redundancy - Dispute over attraction and retention incentive payment - Whether Regulations fairly and properly applied - Whether Commission has jurisdiction - Principles applied - For a referral to the Commission under s 95(2)(b) to be valid, the person aggrieved by the decision must be in an extant employment relationship with their employer as at the time of the referral - Contractual benefits claim - All industrial matters in connection with a "government officer" fall exclusively within the jurisdiction of the Arbitrator - Application dismissed for want of jurisdiction*
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 23, 80C(1), 80E(1), 80E(7) *Public Sector Management Act 1994* (WA) ss 3, 94(1A), 95A, 95, 95(2)(b), 96A(2)(b) *Public Sector (Redeployment and Redundancy) Regulations 2014* (WA)
Result	**:**	Application dismissed for want of prosecution
Representation:		
Counsel:		
Applicant	**:**	In person of counsel
Respondent	**:**	Mr R Bathurst of counsel

Case(s) referred to in reasons:

Chief Executive Officer, Department of Agriculture and Food v Trevor James Ward (2008) 88 WAIG 156

Reasons for Decision

Brief factual background

1 The applicant Mr Crowley was employed by the respondent, the Department of Commerce, as its General Counsel in the Office of the Director General. Mr Crowley took up that position in about mid-June 2011. Not long after that on 5 July 2011, Mr Crowley started acting in the position of General Counsel, Consumer Protection Division within the Department. Both positions were specified callings Level 7.

2 The situation developed in about early February 2016 when Mr Crowley expressed an interest in taking a voluntary redundancy. It had been determined that his substantive position of General Counsel in the Office of the Director General was to be made redundant. It seems that in about March 2016 some discussions took place between the parties in relation to the content of his severance package. Mr Crowley expressed the view that it should include an attraction and retention incentive payment that he had been receiving in his acting position. Representatives of the Department considered this request and took the view that the incentive payment was not to be included in Mr Crowley's severance package. In view of this Mr Crowley was asked whether he wished to proceed with a voluntary severance to which he responded that he did.

3 Events proceeded and in April 2016 correspondence was prepared reflecting Mr Crowley's voluntary severance offer which was accepted by him in writing on 11 May 2016. It was a condition of Mr Crowley's acceptance of the voluntary severance that he resign from his employment with the Department which he did, effective on 17 May 2016.

4 An issue has arisen now between the parties in relation to the attraction and retention payment. Mr Crowley claims that this payment, and the manner in which he was informed as to his severance package, was not in accordance with the *Public Sector (Redeployment and Redundancy) Regulations 2014* (WA) and the Regulations have not been fairly or properly applied. Mr Crowley maintains that the failure to include the attraction and retention incentive payment in his severance package is a matter that may be referred to the Commission under s 95(2)(b) of the *Public Sector Management Act 1994* (WA). Additionally, by his amended application, Mr Crowley also maintains that he has been denied a contractual benefit under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) in the form of his incentive payment in the sum of $22,330.64 and he has claimed accordingly.

5 The Department objected to and opposed Mr Crowley's claim on a number of bases. First and foremost, it maintained that the Commission has no jurisdiction to entertain Mr Crowley's claim referred to the Commission under s 95(2)(b) because at the time of the referral, Mr Crowley was not an employee, he having resigned effective 17 May 2016. The referral to the Commission was filed with the Registry on 23 June 2016. Secondly, the Department maintained that Mr Crowley's contractual benefits claim, if that is what it is, must fail too. This was because, as a government officer at the material time, as defined in s 80C(1) of the Act, any such claim, if maintainable, can only proceed before the Public Service Arbitrator constituted under Part IIA of the Act. As the Arbitrator's jurisdiction in relation to industrial matters relating to a government officer is exclusive of the jurisdiction of the Commission, then this claim was unable to be dealt with by the Commission.

6 The factual background to the present dispute is not contested and was set out in the affidavit of Ms Bendotti, the Acting Manager Human Resources Service Delivery of the Department. Ms Bendotti confirmed in her evidence that the issue of the inclusion of the attraction and incentive payment was a matter of difference between Mr Crowley and the Department. However, she also confirmed that in an email to Mr Crowley, he was informed that the Department would be calculating his voluntary severance payment to him, excluding the attraction and retention incentive payment. Notwithstanding this, Ms Bendotti said that Mr Crowley wished to proceed with the voluntary severance process.

7 A number of documents were annexed to Ms Bendotti's affidavit. The most significant of which was annexure MB4, that being a letter of 1 April 2016 to Mr Crowley from the Acting Director General of the Department. In this letter a formal offer of voluntary severance was made to Mr Crowley. In accordance with the terms of the Regulations, a calculation of the severance payout due to him was made. The final figure to be paid out was stated in the letter to be dependent on Mr Crowley's date of acceptance of the voluntary severance and the effective date of his resignation. Mr Crowley signed the letter of offer on 11 May 2016 and elected his resignation date as being 17 May 2016. Mr Crowley's employment came to an end on that date.

8 I find accordingly.

Jurisdiction – PSM Act claim

9 Sections 95(2)(b) and 96A(2)(b) of the PSM Act provide a right of referral to the Commission on limited grounds, to employees and former employees aggrieved by decisions taken by their employer in relation to redeployment and redundancy matters dealt with under the Regulations. In the case of a referral under s 96A(2)(b) this jurisdiction only extends to employees who have been "registered" under the Regulations, as that is defined in s 94(1A) of the PSM Act. It was common ground that Mr Crowley was not a registered employee and therefore, s 96A has no application to the circumstances of the present case.

10 Section 95 of the PSM Act relevantly provides as follows:

> **95. Jurisdiction of Industrial Commission in relation to section 94 decision**
>
> (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.

11 Additionally, the relevant provisions of the Regulations in relation to voluntary severance are set out in Part 3. For reasons which will become apparent shortly, it is not necessary for me to set them out or to deal with them in any detail.

12 As to its jurisdictional challenge, the Department submitted that a "section 94 decision" is one made or purported to be made under the Regulations. For the purposes of a referral to the Commission, such a decision may be referred under s 95(2) by an employee who is aggrieved by the relevant decision. However, the Department contended that the terms of s 95(6) make it clear that for the Commission to have jurisdiction to deal with a referral to it of a section 94 decision, the employee's employment must not have terminated. In this case, Mr Crowley's employment terminated on 17 May 2016, as a result of his resignation effective from that date. In this connection, the Department contended that for the purposes of s 95(2)(b) of the PSM Act, the reference to "employee" being aggrieved by a decision at the time of the referral to the Commission, means one in the present tense, as a person who is employed as at the time of the referral.

13 Furthermore, and in any event, the Department further submitted that as reg 44 of the Regulations prescribes a period of 21 days as the period within which a referral to the Commission must be made after the making of a decision, as set out in s 95(3) of the PSM Act, Mr Crowley's application was out of time. The Department contended that the relevant date of the section 94 decision for the purposes of the referral to the Commission, was 1 April 2016, being the date on which Mr Crowley was made an offer of voluntary severance. Accordingly, the Department contended that the referral to the Commission should have been made by no later than 22 April 2016.

14 In reply Mr Crowley made a number of submissions. First and foremost, he contended that having regard to Parts 3 and 6 of the Regulations, a resignation as a part of a voluntary severance process, is not a termination of employment as provided in Part 6. The upshot of Mr Crowley's lengthy and careful written submission in relation to this issue, was that for the purposes of s 95(6) of the PSM Act, reference to "terminated" does not include a circumstance where an employee accepts a voluntary severance arrangement under Part 3 of the Regulations and resigns. Given the structure and operation of the voluntary severance process set out in the Regulations, Mr Crowley contended that if the Department's submissions are correct, in his circumstances, he effectively has no remedy to challenge whether or not the relevant regulations have been fairly and properly applied, at least within the 21-day time limit prescribed by s 95(3) of the PSM Act and reg 44 of the Regulations.

15 Mr Crowley further set out in his written submissions, an analysis of the respective parts of the Regulations, in support of his primary contention that the concepts of "resign" or "resignation" are different to the concept of "termination". Thus Mr Crowley contended that the fact that he tendered a resignation as a part of the voluntary severance process, was, when read with the relevant parts of the Regulations, no barrier to him referring the present matter to the Commission for hearing and determination.

16 It was uncontroversial that Mr Crowley was no longer an employee of the Department at the time of the referral of his claim to the Commission. No claim was made by Mr Crowley under s 96A(2) of the PSM Act. The claim turns solely on the application of s 95 in respect of a "section 94 decision". The terms of s 95 have been set out above. The key provisions for present purposes are ss 95(2) and (6). In s 95(2)(b), the referral of a section 94 decision may be made by "an employee aggrieved by the decision". For the purposes of the PSM Act, "employee" in s 3 is defined as "**employee** means a person employed in the Public Sector by or under an employing authority;".

17 In contrast, in s 96A(2)(b), dealing with a referral to the Commission, in relation to a decision made or purported to be made under regulations referred to in s 95A, the relevant reference is made to "an employee or former employee" aggrieved by the decision. There is nothing to suggest that the reference to "employee" in both s 95(2)(b) and 96A(2)(b) means other than a person who is employed under an extant contract of employment, as the definition of "employee" in s 3 of the PSM Act appears to make plain. This interpretation of the meaning of "employee" seems to be confirmed by the terms of s 95(6), which provides that the Commission does not have jurisdiction in relation to a section 94 decision, "if the employment of the employee is terminated".

18 In my view this provision applies equally irrespective of whether an employee's employment is terminated at the initiative of the employer or the employee. I do not accept the arguments made by Mr Crowley that the application of the provisions of the Regulations, in the case of a voluntary severance, and a resignation, should be construed as something other than the termination of an employee's employment for these purposes. There is nothing to suggest in the drafting of s 95(6) that it is predicated on a "dismissal", in the sense of a termination at the initiative of an employer.

19 For example, the Regulations themselves in Part 6, contemplate termination of employment on different bases. In the ordinary course, in the case of a "registered employee" who is subject to a "redeployment period" as defined in reg 28, their employment is terminated by operation of law as prescribed by reg 30. On the other hand, as a part of this process, an employee may request, and the employer may agree, to terminate the employee's employment earlier than the end of the "redeployment period", which under reg 32(2), would plainly be a termination of employment by the employer. In either case, for the avoidance of doubt, s 95A(3) of the PSM Act provides that the contract of employment also comes to an end at the same time. The use of the same words "is terminated" in both ss 95A(2) and (3), is a further indication that these words are not to be read down or given a narrow construction in s 95(6).

20 Furthermore, the draftsperson of ss 95(2)(b) and 96A(2)(b) has clearly sought to draw a distinction between a person engaged under an extant contract of employment and a person whose contract of employment has been terminated. The reference to "former employee" in s 96A(2)(b) is a clear indication that the draftsperson of both ss 95(2)(b) and s 96A(2)(b) intended the reference to "employee" to mean a person then employed under a contract of employment as at the time of the referral to the Commission. If this were not so, then the additional reference to "former employee" in s 96A(2)(b), would be superfluous and have no work to do. It is a rebuttable principle of statutory interpretation, that where a draftsperson uses words consistently in legislation, the same meaning should generally be attached to those words. Furthermore, where the legislature has chosen to use different language, the intention must be to change the meaning (see generally Pearce DC and Geddes RS, *Statutory Interpretation in Australia*, 7th Ed at par 4.6). There is nothing in the terms of the relevant provisions of the PSM Act to lead me to the view that this presumption should not be applied in this case.

21 From their terms, ss 95 and 96A, when read with ss 94 and 95A of the PSM Act, reveal a legislative scheme that has two separate strands. The first, dealt with by ss 94 and 95, provides for a process and a limited appeal from the process, concerning redeployment and proposed redundancy of public sector employees employed by an employing authority. This strand deals with a range of steps up to but falling short of termination of employment. The second strand, dealt with by ss 95A and 96A, deals with the process, and a limited right of appeal from it, leading to the termination of the employment of an employee. Both processes, and the right of referral to the Commission leading from them, are clearly separate and distinct.

22 Therefore, in my view, it is a jurisdictional fact that needs to be established, that for a referral of a matter to the Commission under s 95(2)(b) of the PSM Act to be valid, the person aggrieved by the decision must be in an extant employment relationship with their employer, as at the time of the referral. As this jurisdictional fact is not satisfied in this case then in my view, Mr Crowley's claim under s 95 must fall at the first hurdle, as he has no standing to refer the matter to the Commission. Furthermore, not only is there no standing to refer the matter, by the plain terms of s 95(6), as I consider it should be construed,

the Commission does not have jurisdiction in respect of the purported referral of the section 94 decision, in circumstances where the employment of the employee concerned has already come to an end.

23 For these reasons, it is unnecessary for me to consider the further question of whether the relevant decision was made more than 21 days prior to the referral to the Commission. In the absence of standing or jurisdiction, there could never be grounds to extend time in any event.

Jurisdiction – contractual benefits claim

24 Based on his amended application at par 1C as noted above, Mr Crowley seeks the recovery of a denied contractual benefit in relation to the attraction and retention incentive he claims should have been incorporated into his voluntary severance payment. Additionally, as referred to at par 37 of his amended grounds of claim, Mr Crowley also maintained that despite the irrevocable resignation he tendered as a part of his acceptance of the voluntary severance offer, that he remained employed and was entitled to his salary from 17 May 2016 up to the present time. This was submitted as being on the basis the non-compliance with the Regulations by the Department, rendered the termination of his employment a nullity.

25 In opposition to both claims, on jurisdictional grounds, the Department submitted that neither claim had any reasonable prospect of success. Primarily, the Department contended that as a "government officer", as defined in s 80C(1) of the Act, any industrial matter affecting a government officer, except for those of the present kind, fall within the exclusive jurisdiction of the Arbitrator under s 80E(1) of the Act. Accordingly, as the submission went, there can be no basis upon which Mr Crowley can proceed with his contractual benefits claim before the Commission, despite the more general submission by the Department that neither claim has any reasonable prospect of success on the merits, in any event.

26 In reply, Mr Crowley contended that his claim for the attraction and retention incentive payment, along with salary after 17 May 2016, is within the Commission's general jurisdiction under s 23 of the Act. Furthermore, Mr Crowley submitted that the employer's actions in relation to the abolition of his substantive position was not made in good faith and the Department could not have been satisfied in accordance with the Regulations, that he could not be transferred within his Department or another organisation. Accordingly, having acted the way that it did, Mr Crowley contended that the Department's decision making was affected by jurisdictional error and is a nullity. Thus his entitlement to ongoing salary payments remains.

27 As a "government officer" at the time of his employment, all industrial matters in connection with such officers fall exclusively within the jurisdiction of the Arbitrator, as is provided by s 80E(1) of the Act. The only exception to this general exclusive jurisdiction, is claims of the current kind made under ss 95 and 96A of the PSM Act. This is made clear by the terms of s 80E(7), to the effect that despite section 80E(1) dealing with the exclusive jurisdiction of the Arbitrator in respect of industrial matters relating to a government officer, an Arbitrator does not have jurisdiction to deal with matters of the present kind. That is the only exception to the exclusive nature of the Arbitrator's jurisdiction under the Act.

28 The exclusivity of the Arbitrator's jurisdiction in respect of government officers under s 80E(1) of the Act has been referred to in many decisions of the Commission. That is, the Commission's general jurisdiction under s 23 of the Act is not able to be availed of by a government officer. For example, this was referred to in a decision of the Full Bench of the Commission in *Chief Executive Officer, Department of Agriculture and Food v Trevor James Ward* (2008) [WAIRC 00079]; (2008) 88 WAIG 156 per Ritter AP at pars 92-94. Therefore, in relation to Mr Crowley's claims for payment in respect of the attraction and retention incentive and ongoing salary, as alleged contractual benefits, they are beyond the Commission's jurisdiction under s 23 of the Act.

Conclusion

29 Accordingly, for the foregoing reasons, the application must be dismissed for want of jurisdiction.

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW CROWLEY
	APPLICANT
	-v-
	DEPARTMENT OF COMMERCE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 16 NOVEMBER 2016
FILE NO/S	APPL 33 OF 2016
CITATION NO.	2016 WAIRC 00883
Result	Application dismissed for want of jurisdiction
Representation	
Applicant	In person of counsel
Respondent	Mr R Bathurst of counsel

Order

HAVING heard the applicant of counsel 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 –

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

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2016 WAIRC 00718

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2016 WAIRC 00718
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	THURSDAY, 5 MAY 2016
DELIVERED	**:**	FRIDAY, 19 AUGUST 2016
FILE NO.	**:**	RFT 29 OF 2015
BETWEEN	**:**	STEVE BURKE TRANSPORT PTY LTD Applicant AND TOLL TRANSPORT PTY LTD T/AS TOLL IPEC Respondent

CatchWords	**:**	Owner-driver contract - Referral of dispute - Whether party to an expired owner-driver contract able to refer dispute to Tribunal - Interpretation of purpose and object of *Owner-Driver (Contracts and Disputes) Act 2007* - Tribunal has jurisdiction to hear the matter referred - Jurisdiction found - Privity doctrine
Legislation	**:**	*Industrial Relations Act 1979* *Interpretation Act 1984* (WA) s 18 *Owner-Driver (Contracts and Disputes) Act 2007* s 4, s 5, s 6, s 7, s 37, s 38, s 39, s 40, s 44, s 45, s 46, s 47, s 48
Result	**:**	Jurisdiction found
Representation:		
Counsel:		
Applicant	**:**	Mr W Spyker of counsel
Respondent	**:**	Ms C McCutcheon of counsel
Intervenor	**:**	Mr A Dzieciol of counsel for the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

Reasons for Decision

1 The question for determination is whether the Road Freight Transport Industry Tribunal has jurisdiction to deal with a referral of a dispute under s 40(a)(i) of the *Owner-Drivers (Contracts and Disputes) Act 2007* (the OD Act) in respect of an owner-driver contract where the owner-driver contract has come to an end. For the following reasons, I have decided that it does have jurisdiction in those circumstances.

2 Given the significance of the issue, the Minister for Transport, the Minister responsible for the OD Act, and the Transport Workers' Union of Australia Industrial Union of Workers, which often has involvement in these matters, were notified of the hearing. The Transport Workers' Union sought and was granted leave to intervene and make submissions.

The Parties' Contentions

3 Toll Transport Pty Ltd says that for a party to an owner-driver contract to have standing to refer a dispute to the Tribunal, that contract must be extant, or on foot. This is said to be because s 40(a)(i) of the OD Act gives standing to 'a person who *is* a party to the owner-driver contract'.

4 Steve Burke Transport Pty Ltd says that firstly, it is a party to an owner-driver contract even though the contract has ended.

5 The issue was identified by the applicant, but was not argued by either party. In the circumstances, it is a matter for another day. In any event, as I have decided that the contract does not have to be on foot for a party to make the referral to the Tribunal, it does not need to be determined.

6 Secondly, and it being the matter that was argued, it says that the OD Act is to be interpreted to mean that the contract does not have to be extant at the time of the referral of the dispute to the Tribunal.

Background

7 For the purposes of the determination of the jurisdictional issue, the parties agree that:

1. Steve Burke Transport Pty Ltd was an owner-driver within the meaning of s 4 of the OD Act;
2. There had been a contract between the parties which was an owner-driver contract within the meaning of s 5 of the OD Act;

3. The parties entered that contract for the provision of transport services around June 2011;

4. Steve Burke Transport Pty Ltd referred a dispute to the Tribunal on 7 December 2015. At that time, the contract was no longer on foot.

The Approach to Interpretation

8 The question for determination involves the construction of the OD Act.

9 The approach to be taken to statutory construction is set out in a number of authorities, in particular in the judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc and Others v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, as follows:

> 69 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> 70 A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> …
>
> 78 However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis Bennion points out:
>
> > 'The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.' (footnotes omitted)

10 In *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681 at [15], Spigelman CJ said:

> If a court can construe the words actually used by the parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text – using consequences to determine which meaning should be selected – then the process remains one of construction.

11 Section **18 – Purpose or object of written law, use of in interpretation**, of the *Interpretation Act 1984* (WA), recognises the requirement to interpret written laws in a manner that promotes the purpose or object underlying the law. It provides:

> In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

12 In dealing with that section, the High Court in *AB v State of Western Australia and Another* [2011] HCA 42; (2011) 244 CLR 390 at [24] said:

> The injunction contained in s 18 of the *Interpretation Act 1984* (WA) is relevant to the task of construing the provisions of the Act. Moreover, the principle that particular statutory provisions must be read in light of their purpose was said in *Waters v Public Transport Corporation* to be of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation 'the courts have a special responsibility to take account of and give effect to the statutory purpose'. It is generally accepted that there is a rule of construction that beneficial and remedial legislation is to be given a 'fair, large and liberal' interpretation.

13 In *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 at [103], McHugh J noted:

> [T]he function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment.

The *OD Act*

14 In considering the meaning of s 40(a)(i) of the OD Act, it is necessary then to look at the whole of the OD Act, to place the provision in context, and to ascertain the general purpose and policy of the OD Act.

15 The long title of the OD Act sets out some of its purpose and policy. It provides that it is:

> [A]n Act —
>
> - to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so; and
> - to establish the Road Freight Transport Industry Tribunal and the Road Freight Transport Industry Council,
>
> and for related purposes.

16 Therefore, one of its primary objectives is the regulation of the relationship between contracting parties. It sets up a tribunal to aid in that objective.

17 The scope of the OD Act is set out in s **6 – Application of Act**, which provides:

> (1) This Act applies to and in relation to owner-drivers who are engaged —
>
> (a) under an owner-driver contract that is entered into in Western Australia or that is subject to the law of Western Australia ; or
>
> (b) to transport goods wholly within Western Australia; or
>
> (c) to transport goods from Western Australia to another place, or from another place to Western Australia, if a substantial part of the services under the owner-driver contract are performed in Western Australia.
>
> (2) However, this Act does not apply in relation to an owner-driver contract if the owner-driver who is a party to the contract has the benefit of, or is otherwise covered by —
>
> (a) a contract determination made under Chapter 6 of the *Industrial Relations Act 1996* of New South Wales; or
>
> (b) an order made under the *Owner Drivers and Forestry Contractors Act 2005* of Victoria,
>
> in relation to the contract.

18 The relevant part of the definition of an 'owner-driver contract' is that it 'is a contract (whether written or oral or partly written and partly oral) entered into in the course of business by an owner-driver with another person for the transport of goods in a heavy vehicle by the owner-driver' (OD Act s 5(1) – Meaning of 'owner-driver contract').

19 Section **7 – Act prevails over owner-driver contracts** provides, as the heading suggests, that the Act prevails over any provision in an agreement, arrangement or owner-driver contract, and that any provision of such an agreement, arrangement or owner-driver contract that:

> (a) purports to exclude, modify or restrict the operation of this Act or the code of conduct; or
>
> (b) is contrary to or inconsistent with anything in this Act, the code of conduct or an order of the Tribunal,
>
> has no effect.

20 **Part 9 – Road Freight Transport Industry Tribunal**, commencing with s 37, provides for the Commission as referred to in the *Industrial Relations Act 1979* to be the Tribunal, and ss 38 and 39 set out in the jurisdiction of the Commission sitting as the Tribunal. Section **38 – Industrial Relations Commission sitting as the Road Freight Transport Industry Tribunal** provides:

> (1) By this section the Commission has jurisdiction to —
>
> (a) hear and determine disputes that may be referred to the Commission under this Part; and
>
> (b) enquire into and deal with any other matter in relation to the negotiation of owner-driver contracts that may be referred to the Commission under this Part.

21 A ***dispute*** is defined as:

> [A] dispute between one or more owner-drivers and one or more hirers arising under or in relation to this Act, the code of conduct or an owner-driver contract (including a payment dispute) and includes an allegation that a person has contravened this Act, the code of conduct or an owner-driver contract[.]
>
> (OD Act s 37 – Terms used in this Part)

22 A ***payment dispute*** is also defined as:

> For the purposes of this Act, a ***payment dispute*** arises if, by the time the amount claimed in a payment claim is due to be paid under an owner-driver contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed.
>
> (OD Act s 37(2))

23 Section 40 sets out who may refer particular types of disputes to the Tribunal. In doing so, it also sets out three types of disputes or matters that may be referred to the Tribunal, each of which would fall within the jurisdiction generally defined in s 38.

24 The first type of matter or area of jurisdiction under s 40(a) is '[a] dispute arising under or in relation to an owner-driver contract'. Therefore, that is the jurisdiction of the Tribunal – the dispute arising under or in relation to the owner-driver contract.

25 The persons who may refer that dispute to the Tribunal are:

(i) a person who is a party to the owner-driver contract; or

(ii) a transport association in which a party to the owner-driver contract is eligible to be enrolled as a member; or

(iii) an inspector; or

(iv) the Minister;

(OD Act s 40(a))

26 The second area of jurisdiction under s 40(b) is 'a dispute arising under or in relation to this Act or the code of conduct, or involving an allegation that a person has contravened this Act or the code of conduct'.

27 Such a dispute is able to be referred by:

(i) an owner-driver or hirer with a sufficient interest in the dispute; or

(ii) a transport association; or

(iii) except in a case involving an allegation that a person has contravened Part 6 — an inspector; or

(iv) the Minister;

(OD Act s 40(b))

28 The third area of jurisdiction, under s 40(c), is 'a matter arising in relation to the conduct of joint negotiations for an owner-driver contract'. This matter may be referred by:

(i) an owner-driver or hirer with a sufficient interest in the matter; or

(ii) a transport association; or

(iii) the Minister.

(OD Act s 40(c))

29 There is provision for the Tribunal to endeavour to resolve a dispute or matter referred to it by conciliation (s 44).

30 Section **47 – Determination of dispute where no resolution by conciliation**, provides that if the dispute is not resolved through conciliation or the processes under s 45, 'the Tribunal may hear and determine the dispute for the purposes of section 38(1)(a).'

31 Section 47(4) and (5) deal with the determinations the Tribunal may make, in the following terms:

(4) In making a determination mentioned in subsection (1), the Tribunal may do one or more of the following —

(a) order the payment of a sum of money —

(i) found by the Tribunal to be owing by one party to another party; or

(ii) by way of damages (including exemplary damages and damages in the nature of interest); or

(iii) by way of restitution;

(b) order the refund of any money paid under an owner-driver contract;

(c) make an order in the nature of an order for specific performance of an owner-driver contract;

(d) declare that a debt is, or is not, owing;

(e) order a party to do, or to refrain from doing, something;

(f) make any other order it considers fair, including declaring void any unjust term of an owner-driver contract.

(5) In making an order under subsection (4), the Tribunal cannot —

(a) insert a term into; or

(b) subject to subsection (4)(f), otherwise vary,

an owner-driver contract.

32 Section **48(1) – Order to prevent entering into of owner-driver contracts**, provides that the Tribunal may make an order for the purpose of prohibiting relevant persons from:

(a) entering into any specified kind of owner-driver contract; or

(b) doing any act (whether by advertising or otherwise) that may reasonably be construed as being intended to induce other persons to enter into any such contract.

CONSIDERATION

33 Is the OD Act beneficial and remedial legislation?

Scheme and Context of the Act

34 The scheme of the OD Act is that it sets out provisions to regulate the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so, and establishes a Tribunal for related purposes.

35 The OD Act sets out that it applies to owner-drivers and those who hire them. It prevails over any contracts that the parties might have entered into. It provides for a broad range of disputes to be referred to the Tribunal. These include the

enforcement of contracts. The powers of the Tribunal in dealing with those matters include ordering the payment of a sum of money found to be owing by one party to another, damages, restitution, refund of any monies paid under an owner-driver contract or specific performance of an owner-driver contract. It may declare that a debt is or is not owing, order a party to do or refrain from doing something, and make any other orders that the Tribunal considers fair, including declaring void any unjust term of an owner-driver contract (see s 47(4)).

36 I find that the legislation is beneficial or remedial legislation in that it gives some benefit to a person and thereby remedies some injustice (*Re McComb* [1999] 3 VR 485, 490).

37 Parliament's intention in enacting the OD Act is expressed in the Second Reading Speech to the Legislative Assembly on Tuesday, 31 October 2006 (Western Australia, *Parliamentary Debates*, Legislative Assembly, 31 October 2006, 7884 (Ms A.J.G. MacTiernan, Minister for Planning and Infrastructure)) and confirms that it is beneficial legislation. The Explanatory Notes to the Owner-Drivers (Contracts and Disputes) Bill 2006, which reflects the Second Reading Speech, includes the following:

> This Bill addresses inequity in the bargaining positions of owner-drivers and hirers and provides for sustainable rates of engagement that will provide adequate incomes for owner-drivers.

38 The Explanatory Notes comment on a number of important aspects of the OD Act, in the following terms:

> **Part 9 – Road Freight Transport Industry Tribunal**
>
> Part 9 establishes a Road Freight Transport Industry Tribunal (the RFTI Tribunal), which would conduct conciliation and arbitration proceedings in the event of disputes between parties regarding breaches of contract, the security of payment provisions, the code of conduct, or unconscionable conduct.
>
> …
>
> **Clause 40 – Persons who may refer disputes and matters to the Tribunal**
>
> This clause lists the persons who may refer a dispute or matter to the Tribunal. The list is limited to persons with a direct interest in the outcome of disputes and excludes other persons. Acceptable persons include the Minister, a party to an owner-driver contract, a transport association or an inspector. The dispute or matter may arise out of an owner-driver contract, the Act or code of conduct, or in relation to the conduct of joint negotiations for an owner-driver contract.
>
> …

39 In respect of **Clause 47 – Determination of dispute where no resolution by conciliation**, it says, amongst other things:

> In making a determination the RFTI Tribunal may do things such as order the payment or refund of money, and make orders in relation to an owner-driver contract.

40 The learned authors D C Pearce and R S Geddes, in *Statutory Interpretation in Australia*, 8th ed, at [9.2] say of the approach to be adopted in relation to interpretation of beneficial legislation:

> The orthodox view of the approach to be adopted in relation to the interpretation of this type of legislation is provided by Isaacs J (dissenting) in *Bull v Attorney-General* (NSW) (1913) 17 CLR 370. The case concerned the interpretation of a section of the Crown Lands Act of 1895 (NSW) validating certain transactions. It was held by the majority of the court not to validate all transactions under Crown lands legislation but only those that independently of the operation of the legislation were defective. Isaacs J took the view that the section was intended to validate all transactions concerning Crown lands. He said (at 384):
>
> > In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially … This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.
>
> It should not be thought from the reference to ambiguity in this extract that Isaacs J was suggesting that the beneficial interpretation approach only applies where there is an ambiguity in the legislation. It is apparent from his endorsement of the view of Lord Shaw in *Butler (or Black) v Fife Coal Co* [1912] AC 149 (see **9.6**) that the reference to ambiguity is intended as an example of the general approach to remedial provisions – ambiguous provisions are to be interpreted in a manner favourable to those who are to benefit from the legislation: see *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433; 52 ALR 24 at 28; *Zangzinchai v Milanta* (1994) 53 FCR 35 at 42-3; 125 ALR 265 at 272.

41 Therefore, this approach is not, according to the authors, to be limited to resolving ambiguity, and as the legislation is beneficial and remedial, it is to be given a 'fair, large and liberal' interpretation (*AB v State of Western Australia and Another* [2011] HCA 42; (2011) 244 CLR 390).

The meaning of 'is a party to an owner-driver contract'

(a) The grammatical meaning

42 In the phrase 'is a party' as set out in s 40(a)(i) of the OD Act, the important word is 'is'. ''Is' is the third person singular *present* indicative of **be**' (*Macquarie Concise Dictionary* (6th ed, 2013) 624).

43 'Present' as an adjective, is '1. Being, existing or occurring at this time or now' (*Macquarie Concise Dictionary* (6th ed, 2013) 934).

44 Section 6, which sets out the application of the OD Act, appears to suggest that it applies only where there is an extant contract because subsection (1)(a) says it 'applies to and in relation to owner-drivers who *are* engaged under an owner-driver contract' (emphasis added).

45 Therefore, taken in isolation, not in the context in which it falls within the legislation, or with the purpose of the legislation in mind, the grammatical or literal meaning of the phrase 'is a party to an owner-driver contract' is able to be read as being that the person is *presently* a party to an owner-driver contract.

46 I note in passing that s 7 provides for the OD Act to prevail over owner-driver contracts, there is reference to 'an agreement or arrangement in force on, or entered into after, the coming into operation of this section'. This provides for the OD Act to prevail over certain agreements, arrangements or contracts which are or were in force when the OD Act came into operation, and afterwards. It is quite specific to that point alone and of no assistance in this matter.

(b) The meaning in context and in light of the purpose or object

47 Read in context and with the purpose of the legislation in mind, I conclude that a different meaning to the grammatical meaning is discernable.

48 Two aspects are clear from the provisions of ss 38 and 40. Referral of disputes or matters to the Tribunal may be made by specified persons according to the nature of the dispute or matter.

49 As I noted above, s 40(a), (b) and (c) sets out firstly, three disputes and matters or areas of jurisdiction. The first area of jurisdiction is 'a dispute arising under or in relation to an owner-driver contract'. It is not limited to an existing or present contract. The existing or present contract relates only to the question of who may refer the dispute, and only one of the four persons, organisations or parties who may refer that dispute *is* to be a person who is party to the contract. No such requirement applies to the transport association representing a party to the contract, an inspector or the Minister. Further, the provision in s 40(a)(ii) regarding the transport association simply requires that it is an association in which a party to the owner-driver contract is eligible to be enrolled as a member. It does not use the phrase 'is a party' but says 'in which a party to the owner-driver contract' is eligible to be a member. This, I conclude, refers back to the owner-driver contract referred to in the description of the area of jurisdiction in that subsection.

50 Given that the purpose and object of the OD Act is to regulate the relationship between the contracting parties; to address inequity in bargaining positions of owner-drivers and hirers, to provide for sustainable rates of engagement; and to provide for a Tribunal to deal with disputes between owner-drivers and hirers, it would defeat the purpose of the OD Act for a party to a contract which has expired to not be able to refer a dispute regarding such matters as repudiation, essential terms or payments outstanding, because the contract has ceased to operate. As Mr Spyker for the applicant points out, the Tribunal's jurisdiction could be easily defeated by the hirer terminating the contract without notice and thereby denying the owner-driver the opportunity to refer the matter in dispute to the Tribunal.

51 The grammatical meaning would result in any of the last three organisations or persons listed in s 40(a) being able to refer the dispute, even though the contract is no longer on foot, but a person who was a party to the contract, which has expired, or terminated or for some other reason has ceased to operate, could not do so.

52 Where the dispute relates to the OD Act or the code of conduct, or involves an allegation that a person has contravened the OD Act or the code of conduct (s 40(b)), that is, the second area of jurisdiction, it may be referred by an owner-driver or hirer with a sufficient interest in the dispute; or a transport association; or, with a particular exception, an inspector, or the Minister.

53 In a matter arising in relation to the conduct of joint negotiations for an owner-driver contract (s 40(c)), that is, the third area of jurisdiction, it may be referred by an owner-driver or hirer with a sufficient interest in the matter, or a transport association, or the Minister.

54 Therefore, neither of the second and third areas of jurisdiction identified in s 40 of a dispute arising under or in relation to the OD Act or the code of conduct, or in relation to the joint negotiations for an owner-driver contract, contain a requirement for standing of being a party to the matter or dispute. They require that the owner-driver or hirer in particular have a sufficient interest in the matter or dispute.

55 Therefore, a requirement for standing in the referral of a dispute arising under or in relation to an owner-driver contract of having a current contract is inconsistent with the remainder of the standing requirements, and I believe inconsistent with the language of the OD Act as a whole, and with Parliament's intentions.

56 I also note that s **37 – Terms used in this Part** sets out a definition of dispute which includes a payment dispute. The latter refers to a claim for payment when the payment is due to be paid and has not been paid in full, or has been rejected or wholly or partly disputed. This is the nature of at least a significant type of dispute that would fall under s 40(a).

57 In this context, to read 'is a party to an owner-driver contract' to mean a party to an extant contract at the time of the making of the referral to the Tribunal would be 'incongruous' per Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 305; 35 ALR 115 at 157. It is 'capricious and irrational' per Mason and Wilson JJ in *Cooper Brookes* at 321; 170. It would not remedy the mischief that Parliament intended to deal with.

58 A reading of s 40 as a whole does not reflect the intention of the Parliament to regulate the relationship between owner-drivers and hirers, nor for there to be a Tribunal to deal with their contractual disputes, if it excludes the capacity of an owner-driver to refer a dispute to the Tribunal because the contract, the terms of which are in dispute or payment under which is claimed, has now come to an end.

59 Also, the nature of the determinations the Tribunal may make under s 47(3) and (4), in particular s 47(4)(a)(i), (ii), (iii) and (d), would seem far more limited than the purpose of the legislation, read in context, suggests if the contract could not be enforced by a party to it merely because it was no longer on foot.

60 Therefore, I conclude that s 40(a)(i) is to be read as providing standing to refer a dispute to the Tribunal to a person who is a party to the owner-driver contract, whether that contract is still on foot or not. It is a dispute arising under or in relation to that contract which is to be referred, and it is a matter of who can refer that. It seems contrary to the intention of Parliament and the

object of the legislation to deny such a person the capacity to refer such a dispute to the Tribunal merely on the basis that the contract has now come to an end. The rights and obligations under the contract may still remain, even though the contract has expired or been terminated.

The privity doctrine

61 Although it is not necessary to decide this matter, I note that the applicant also says that the doctrine of privity of contract prescribes that only parties to a contract have standing to commence an action under that contract. To limit the Tribunal's jurisdiction to parties to an extant contract would have the effect of excluding actions being commenced for wrongful termination of contract.

62 The applicant is correct that under the common law doctrine, and subject to some exceptions, only parties to a contract have standing to commence an action under that contract (*Coulls v Bagot's Executor & Trustee Co Ltd* [1967] HCA 3; (1967) 119 CLR 460, per Windeyer J).

63 However, the common law has been modified by the OD Act, which provides for a range of persons and bodies to refer disputes, including enforcement of the contract. This question for determination is not about the common law but about the provision of the legislation, which has the effect of overriding the common law where they conflict (LexisNexis Australia, *Halsbury's Laws of Australia* (at 16 August 2016) [385-60]).

64 In any event, if the OD Act is to be interpreted in such a way as to prevent a dispute being referred to the Tribunal by a party to a contract which is no longer on foot, this may not prevent that party suing on the contract under common law. It is a question of the effect of this particular legislation and the limits it imposes on disputes that can be referred to the Tribunal.