Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 9 WEDNESDAY 27 DECEMBER, 2017 Vol. 97—Part 2

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

97 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

PRESIDENT—Unions—Matters dealt with under Section 66—

2017 WAIRC 00739

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK BEBICH
	APPLICANT
	-and-
	TRANSPORT WORKERS UNION
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	FRIDAY, 18 AUGUST 2017
FILE NO.	PRES 4 OF 2017
CITATION NO.	2017 WAIRC 00739

Result	Order made
Appearances	
Applicant	Mr C Bayens
Respondent	Mr A Dzieciol (of counsel)

Order

This matter having come on for a directions hearing before me on 18 August 2017, and having heard Mr C Bayens on behalf of the applicant and Mr A Dzieciol (of counsel) on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

> The name of the Respondent be deleted and that be substituted therefor the name, Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

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

2017 WAIRC 00748

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK BEBICH
	APPLICANT
	-and-
	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	TUESDAY, 22 AUGUST 2017
FILE NO.	PRES 4 OF 2017
CITATION NO.	2017 WAIRC 00748

Result	Order made
Appearances	
Applicant	Mr C Bayens, as agent
Respondent	Mr A Dzieciol (of counsel)

Order

This matter having come on for a directions hearing before me on 18 August 2017, and having heard Mr C Bayens, as agent, on behalf of the applicant and Mr A Dzieciol (of counsel) on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. The applicant is to file and serve a response to the respondent's Notice of answer within seven (7) days.
2. The application be listed for hearing as to whether:
   (a) jurisdiction arises under s 66 of the *Industrial Relations Act 1979* to make an order in the terms sought in Order 1 of the application;
   (b) the application should otherwise be dismissed.
3. The parties file a Statement of Agreed Facts seven (7) working days prior to the date of hearing.
4. Both parties file and serve written submissions five (5) days prior to the date of hearing.

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

2017 WAIRC 00970

Application pursuant to s.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2017 WAIRC 00970
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	TUESDAY, 3 OCTOBER 2017 AND BY FURTHER WRITTEN SUBMISSIONS FILED ON 17 OCTOBER 2017 AND 26 OCTOBER 2017
DELIVERED	**:**	WEDNESDAY, 29 NOVEMBER 2017
FILE NO.	**:**	PRES 4 OF 2017
BETWEEN	**:**	MARK BEBICH
		Applicant
		AND
		TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
		Respondent

CatchWords	:	Industrial Law (WA) - Application pursuant to s 66 of the *Industrial Relations Act 1979* (WA) - Alleged breaches of union rules - Disciplinary action taken against applicant by the National body registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) - Structure of National and State organisations considered - Effect of dual registration - Separate corporate organisations - Applicant held office in National body by election and in State organisation pursuant to s 71(5) of the *Industrial Relations Act 1979* (WA) - Power to enforce petition pursuant to s 66 of the IR Act where officers hold office pursuant to s 71(5) considered - Requirement of particulars of alleged breaches of union rules considered
Legislation	:	*Industrial Relations Act 1979* (WA) s 60, s 65, s 66, s 66(2), s 71, s 71(5), s 71(5)(b), s 71(5)(c), s 71(5)(d), s 71(6), s 71A
		Fair Work (Registered Organisations) Act 2009 (Cth) s 9A, s 268
		Industrial Relations Amendment Act 1990 (WA) s 9
Result	:	Application dismissed
Representation:		
Applicant	:	Mr C Bayens, as agent
Respondent	:	Mr A Dzieciol (of counsel)

Case(s) referred to in reasons:

Cain v Shuttleton (1996) 76 WAIG 4458

Etherton v Public Service Board of New South Wales (1983) 3 NSWLR 297

Luby v The Secretary, The Australian Nursing Federation, Industrial Union of Workers, Perth [2002] WAIRC 06067; (2002) 82 WAIG 2124

McJannett v Construction Forestry Mining and Energy Union of Workers [2012] WAIRC 00935; (2012) 92 WAIG 1889

Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations for the State of Queensland [1995] HCA 31; (1995) 184 CLR 620

Stacey v Civil Service Association of Western Australia (Inc) [2007] WAIRC 00568; (2007) 87 WAIG 1229

The West Australian Locomotive Engine Drivers' Firemen's and Cleaners' Union of Workers v Schmid (No 1) (1996) 76 WAIG 639

Reasons for Decision

Background

1 An application was made by Mark Bebich (the applicant) on 2 August 2017, pursuant to s 66 of the *Industrial Relations Act 1979* (WA) (the IR Act) seeking:

> l. An Order that expulsion of Mr Mark Bebich be declared null and void and he be reinstated as Vice President of the TWU (WA Branch).
>
> 2. An Order that the TWU (WA Branch) abide by Rule 16 of the 'Rules of the Transport Workers Union of Australia (WA Branch) and be required to call a "Special Meeting" of members in relation to the Petition served on the Secretary - Mr Tim Dawson on the 27th of March 2017.

2 The grounds upon which the application is made are:

> 1. Mr BEBICH was initially suspended and then expelled as the Vice President from the Transport Worker [sic] Union (WA Branch) without justifiable grounds and contrary to the Union Rules as registered in the Industrial Relations Commission.
>
> 2. As a consequence of Mr BEBICH's expulsion, a petition drafted in accordance with the Rules of the Transport Workers Union (WA Branch) and signed by more than 100 financial members of the said Union calling for a 'Special Meeting' was presented and served on the Transport Workers Union (WA Branch) which has been ignored and not acted upon as required.

3 The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (the State organisation) has a counterpart Federal body as defined in s 71 of the IR Act. Section 71(1) defines a 'Branch', a 'counterpart Federal body' and a 'State organisation' as follows:

> ***Branch*** means the Western Australian Branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Commonwealth);
>
> ***counterpart Federal body***, in relation to a State organisation, means a Branch the rules of which —
>
> (a) relating to the qualifications of persons for membership; and
>
> (b) prescribing the offices which shall exist within the Branch,
>
> are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter; and

State organisation means an organisation that is registered under Division 4 of Part II.

4 The counterpart Federal body is the Western Australian Branch of the Transport Workers' Union of Australia. The Transport Workers' Union of Australia is an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) (the National body). The counterpart Federal body bears a similar name to the State organisation. Its name is the Transport Workers' Union of Australia Western Australian Branch. The counterpart Federal body is not separately registered as an organisation. It is a Branch that is part of the National body.

5 On 22 August 2017, an order was made that the application be listed for hearing as to whether:

(a) jurisdiction arises under s 66 of the IR Act to make an order in the terms sought in order 1 of the application; and

(b) the application should otherwise be dismissed.

The circumstances alleged by the applicant which led to his expulsion.

6 Mr Bebich claims that he was wrongly expelled by the Branch committee of management on 13 March 2017 in accordance with r 91(2) of the rules of the National body (the National rules).

7 In a statutory declaration made by the applicant on 1 August 2017, the applicant states that he has held the position of Vice President since 1990.

8 The applicant became aware of allegations that expensive vehicles and other payments had been made to former State Secretaries. These matters were the subject of evidence at the Heydon Royal Commission into union corruption in 2014. The applicant was embarrassed and upset to hear testimony by witnesses that two F350 vehicles had been purchased for former Secretary Jim McIveron and former Secretary Rick Burton. The applicant claims he made it very clear to the current Secretary, Timothy Dawson, that they had to make a swift and strong approach to deal with the matters and bring those responsible to account. Two months later, the applicant contracted an ailment which kept him bedridden for almost 12 months. When he recovered, he returned to his duties as Vice President. He obtained copies of minutes of Branch committee of management meetings that he had missed and was surprised that it appeared little had been done. He also became dissatisfied about other payments that had been made.

9 At about that time, a new transport organisation had been formed called TransportEdge Inc. In late January or early February 2017, the applicant attended a Branch committee of management meeting whereat Mr Dawson commented that he (the applicant) was saying 'bad things' about the 'TWU' and was publicly supporting TransportEdge. Mr Dawson put a motion to the meeting that the applicant be suspended from the 'Union'. The motion was passed and the applicant was required to leave the building.

10 On 10 February 2017, the applicant received a letter from Mr Dawson (annexure B, applicant's statutory declaration). In the letter, Mr Dawson, as Branch Secretary, stated that:

(a) the applicant was formally charged under r 91 of the National rules and the applicant was summonsed to attend a special meeting of the Branch committee of management to be held on 13 February 2017; and

(b) the purpose of the meeting was to hear the applicant's explanation in relation to the following charges:

1) That you have induced or assisted a member or members who are Eligible to be members of the Transport Workers Union (TWU) to resign as members of the TWU in breach of rule 91(1)(c);

2) That you have committed a substantial breach of the Rules in your capacity as an office holder; and

3) That you have engaged in gross misbehaviour in your capacity as an officer [sic] holder.

In particular, it is alleged that you have:

1) Made disparaging remarks about the TWU and its management to TWU members and prospective members in discussions with them;

2) Encouraged TWU members to resign their membership both in the course of discussions with them and by virtue of your association with TransportEdge Inc;

3) Endorsed promotional material (*flyer attached*) for *TransportEdge Inc.* in which you make critical statements about the TWU and its management;

4) Promoted membership of *TransportEdge Inc.* as a substitute for TWU membership by endorsing TransportEdge Inc's promotional material and your association with TransportEdge Inc;

If proven, these allegations amount to a breach of rule 91(1)(c), rule 1(c) and rule 43 and of the Rules which provide:

Rule 1(c): the objects of the TWU include

to promote, foster and maintain the best industrial interests of all Members.

Rule 43:

Offences against the Union

A person holding any position whatsoever within the Union commits an Offence against the Union if that person is guilty of:

…

(b) a substantial breach of the Rules;

(c) gross misbehaviour; or

(d) gross neglect of duty.

Pursuant to Rule 91(2), if you fail to attend the meeting without reasonable excuse or if the allegations above are made out, you may be:

(c) Fined not more than $100;

(d) suspended from any position held within the Union, subject to rules 44 and 45; or

(e) expelled from the Union.

11 By letter dated 13 February 2017, the applicant responded to the charges (annexure D, applicant's statutory declaration).

12 On 8 March 2017, further particulars of the charges to be made against the applicant were set out in a letter from Mr Dawson (annexure E, applicant's statutory declaration).

13 On 10 March 2017, the applicant wrote to Mr Dawson stating in his opinion his suspension invokes r 45 of the National rules which requires that a special general meeting of members enrolled in the Branch must be called (annexure F, applicant's statutory declaration).

14 It appears from the documents attached to the applicant's application that:

(a) no special general meeting was called;

(b) on 13 March 2017, a special meeting of the Branch committee of management was convened at which the applicant did not attend.

15 On 13 March 2017, it was resolved at the Branch committee of management meeting, by two-thirds majority, that the applicant be expelled from the union pursuant to r 91(2)(b) and r 91(2)(e) of the National rules (annexure G, applicant's statutory declaration).

16 On 27 March 2017, the applicant sent a letter to Mr Dawson seeking that a special general meeting be called pursuant to r 16 of the rules of the State organisation (annexure H, applicant's statutory declaration). Attached to the letter is a copy of a petition signed by over 100 members of the State organisation (annexure I, applicant's statutory declaration). The petition states as follows:

Preface: In accordance with rule 41(b)(iii) of the RULES OF THE TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH, should any member who signs a petition in accordance with Rule 16 fail to attend the meeting called as a result of such petition he or she shall be fined a sum not exceeding ten dollars by the Committee of Management, unless he or she provides a satisfactory reason to the Committee of Management for nonattendance at the said meeting.

We, the undersigned being full and financial members of the Transport Workers Union call for an immediate Special Meeting of the Union

Specifically, we charge the Committee of Management with:

1. Suspended the current Vice President - Mr Mark Bebich without just cause

2. Being neglect in their duties before, during and after in relation to the purchase of F350 vehicles by the Union and the payment of car allowances to the previous State Secretary of the TWU, namely Mr Jim McIveron.

17 Rule 16 of the rules of the State organisation provides:

The Committee of Management shall have power to suspend any Committeeman, Officer, Federal Council representative or Organiser elected in accordance with rules 9, 10 and 42 for dishonesty, disobedience, incompetence, neglect of duty, acting contrary to the best interest of the Branch, or any other valid reason. Should action be taken in accordance with the foregoing, a special meeting shall be called of members.

The President or Secretary of the Branch, upon receipt of a petition signed by 100 or more financial members, shall call a special meeting of the Branch to hear specific charges, which shall be clearly set out in the petition against the Committee of Management as a whole or any one or more members thereof.

At any meeting held in accordance with this rule the actions of those charged shall be considered and he or they shall be heard in defence. It shall be competent for such meeting to carry a motion of no confidence in any member or members so charged.

Whenever a motion of non-confidence has been carried in accordance with this rule, and endorsed by the Branch, the Chairman of the meeting at which such motion was passed shall declare vacant the position or positions held by the member or members affected by the motion, and nominations to fill such position or positions shall be called for by advertisement in the daily press, and the provisions of rules 9, 10 and 42 insofar as applicable shall apply in the election to fill the position or positions affected.

The Returning Officer shall fix the dates when nominations shall close, and also the dates when the ballot shall open and close. Provided that the closing date of the ballot shall not be later than eight weeks from the date when the motions of no confidence were carried.

Only members who were financial at the date when the motion of no confidence was passed shall be eligible to vote in connection with any election held under this rule.

No petition presented in accordance with the rules shall be acted upon unless, at the time of being signed, it was prefaced with the provisions of Rule 41 (b) (iii).

No motion under this rule shall be deemed to be carried or acted upon unless two-thirds of the members voting thereon have voted in favour of the motion.

Notice of answer - State organisation

18 The State organisation objects to the application being dealt with by the President pursuant to s 66 of the IR Act.

19 The State organisation says that the first order and the grounds of the application do not relate to the rules of the State organisation. It says that the position of Branch Vice President is an office of the National body, being an office which is elected under the National body's rules. In these circumstances, it says it has made no decision that can be described as a decision to expel the applicant as a member or as Vice President of the State organisation. Thus, it says the decision is not a decision made under the rules of an organisation for the purposes of s 66 of the IR Act.

20 In respect of the second order sought by the applicant, the State organisation concedes that 103 of the signatories to the petition were, at the time the petition was signed, financial members of the State organisation and that the petition called for an immediate special meeting of the members of the State organisation to be convened.

21 The State organisation says that the petition does not otherwise comply with r 16 of the rules of the State organisation in that r 16 requires a petition to specify the charges against the committee of management and for those charges to be clearly set out. It says the charges lack specificity and are not clearly set out. Accordingly, it says the State organisation was not obliged to and did not convene a special meeting.

Applicant's response to State organisation's notice of answer

22 In response, the applicant refers to r 16 of the National rules which is said to indicate that the Western Australian Branch is a current Branch of the National body. The applicant also refers to:

(a) rule 31 of the National rules which confers and directs the power of a Branch committee of management to have control of all business of the union within a State of the Branch; and

(b) rule 60 of the National rules which directs the timing and way Branch elections are to be conducted.

23 The applicant argues that he was elected to the position of Vice President pursuant to r 8, r 9, r 10 and r 42 of the rules of the State organisation.

24 Rule 7 of the rules of the State organisation provides that the 'control of the Branch shall be vested in the Committee of Management'. The applicant contends that r 7 of the rules of the State organisation, when read with the National rules, has the effect that the running and business conducted by a State Branch remains always the responsibility of the State Branch.

25 The applicant also makes a submission that a certificate issued by the Registrar of the Commission pursuant to s 71 of the IR Act is for the purposes of ensuring that the State Branch has authority to be part of, contribute and represent at a national level in negotiations, bargaining and in regard to agreements that are forged in relation to national matters such as minimum pay rates, awards and conditions of employment.

26 The applicant also claims that:

(a) the charges preferred against the applicant have no national implication and it is only fair and just that any charges should be judged by those members who elected the applicant to ensure impartiality; and

(b) the actions taken against the applicant are in direct conflict of the National rules, in particular r 91 of the National rules as it only applies to gas industry sub-branches.

27 Charge 1 referred to in the petition is said to be properly particularised as the applicant was expelled without due process, the process was procedurally unfair and contrary to Branch rules.

28 In relation to charge 2, the applicant says that the charge was drafted by financial members who had 'common knowledge' of the events referred to. In particular, the 'common knowledge' arises from the allegations being examined by the Heydon Royal Commission and the point of the petition is so that the members can find out what has occurred.

Applicant's submissions

29 In written submissions filed on 29 September 2017, the applicant seeks to develop a submission that the counterpart Federal body (namely the Western Australian Branch of the National body) is registered as a State organisation. In support of this argument the applicant refers to s 9A of the *Fair Work (Registered Organisations) Act* which provides that a federal counterpart for a particular association of employers or employees registered under a State or Territory industrial law is an organisation prescribed by the regulations to be a federal counterpart of that association. The applicant says, therefore, to be considered as a federal counterpart an organisation must first be registered as an organisation within the State and be required to maintain that registration under a State or Territory industrial law.

30 In relation to order 1, the applicant says he will provide evidence that in retrospect he regrets that he entertained the 'respondents' [sic] actions in respect to his alleged breach of r 91 of the National rules, and that in his defence he will say that he only did so as it achieved an end result that was conducive to the matter, namely that the actions invoked r 45 of the National rules requiring a special general meeting of members of the Branch be convened, to consider the matter of his suspension by the Branch committee of management.

31 It is the applicant's submission that the allegations made against him did not have national implications and that action should have been taken against him in accordance with r 16 of the rules of the State organisation.

32 In respect of the second order, the applicant's submissions largely repeat the matters set out in his response. The applicant also says that the petition sets out the only known details and contains sufficient detail to require the calling of a special meeting of members pursuant to r 16 of the rules of the State organisation.

33 In subsequent written submissions filed on 17 October 2017, the applicant concedes the National body is a separate organisation to the State organisation. The applicant, however, contends that the State organisation is a Branch of the National body and this is so, when read with r 5, r 7, r 8, r 11, r 16 and r 41, and is stipulated as such in r 48 and r 49 of the rules of the State organisation.

34 Rule 48 and r 49 of the rules of the State organisation provide:

> 48 - DEFINITIONS
>
> Wherever the words 'branch secretary' or 'secretary of the branch' or 'secretary of a branch' appear in these rules the word 'secretary' shall be read and construed as 'secretary-treasurer'.
>
> 'Branch' means the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch, the organisation registered pursuant to the Industrial Relations Act 1979, (as amended).
>
> 'Union' means Transport Workers' Union of Australia, the organisation registered pursuant to the Conciliation and Arbitration Act 1904 (as amended).
>
> 49 - INCORPORATION WITH UNION
>
> (i) The branch shall be incorporated with and be a branch of the union.
>
> (ii) Membership of the union shall be synonymous with membership of the branch and admission to, or cessation of membership of the union shall, ipso facto, constitute admission to or cessation of membership of the branch.
>
> (iii) Such of the rules of the union as were registered under the provisions of the Conciliation and Arbitration Act 1904 (as amended) on the first day of May 1961 (a copy of which rules is attached hereto and filed with the registrar of the Industrial Unions of Western Australia) shall be incorporated in these rules and shall be applicable to the branch and its members except to the extent that any such rules are inconsistent with these rules in which case these rules shall prevail.

35 The effect of these rules it is said is:

(a) The State organisation is a Branch, registered under the IR Act (r 48).

(b) That a person desirous of being a member of the Branch must agree to comply with the rules (r 5).

(c) The Branch committee of management has vested control of the running of the Branch (r 7)

(d) The Branch committee of management positions are elected positions and the Branch committee of management have control of all business within the area which it is constituted to operate and subject to the rules of the State organisation (r 8).

(e) The Branch committee of management has ultimate power as to the running of the Branch and can interpret the rules if they are silent (which in the case of the applicant, they are not) (r 11).

(f) The Branch committee of management has ample and appropriate powers to suspend any member of the Branch committee of management (r 16 and r 41).

(g) The rules of the State organisation acknowledge they are a counterpart Federal body of the National body but can only 'use' the National rules if there is an inconsistency. No such inconsistency has been raised by the parties in these proceedings and as such rules of the State organisation, by decree will prevail (r 49).

36 It is also argued that the s 71 certificate has no bearing on the issues raised in these proceedings as the State organisation has not made any agreement as contemplated in s 71(6) of the IR Act with the counterpart Federal body relating to the management and control of the funds or property, or both, of the State organisation.

State organisation's submissions

37 The State organisation points out in written submissions filed on 29 September 2017 that in exercising the powers under s 66 of the IR Act, the President is not able to make any orders relating to an organisation registered under the *Fair Work (Registered Organisations) Act*. It says that order 1 seeks an order in relation to the observance, or otherwise, by a counterpart Federal body of the State organisation of the rules of the National body. As such, the order sought is beyond power and the application insofar as it relates to order 1 should be dismissed.

38 The State organisation, however, concedes that the applicant may have a right to pursue an application in relation to these matters in the Federal Court, pursuant to the *Fair Work (Registered Organisations) Act*. However, that is not a matter relevant to these proceedings.

39 The State organisation concedes that, on the face of it, proposed order 2 is within the power conferred on the President of the Commission under s 66 of the IR Act. However, this part of the application should be dismissed as the petition the applicant presented to the State organisation does not comply with the rules of the State organisation.

40 It points out the State organisation is not able to direct the counterpart Federal body of the National body to do a particular act, or to refrain from doing a particular act. Further, that any meeting of members of the State organisation can only pass a resolution relating to the actions of the committee of management and/or the actions of any officers of the State organisation.

41 In relation to the charges set out in the petition, the State organisation says that:

(a) the committee of management of the State organisation did not 'suspend' the applicant as Vice President. The decision to expel the applicant as a member of the National body was made by the Branch committee of management of the counterpart Federal body of the National body; and

(b) the committee of management of the State organisation was not involved in the decision to purchase any vehicles, or to pay allowances to officials of the State organisation. All decisions concerning finances were made by the Branch committee of management of the counterpart Federal body.

42 In any event, the State organisation argues that the petition does not meet the requirements of r 16, and, therefore, the State organisation is not required to respond by holding a special meeting of members.

43 The State organisation contends that the words in r 16 that a meeting be called to hear 'specific charges' must be interpreted to mean a petition must set out particulars of the charges or the allegations that are the subject of the charge. The petition does not do this. The petition only sets out charges against the committee, in general terms.

44 Dealing with the charges in the petition, the State organisation says:

(a) the first charge alleges that the committee 'suspended the current Vice President – Mr Mark Bebich without just cause'. There is no information included in the petition about why the petitioners consider that there was no 'just cause' for the committee's actions in that regard; and

(b) the second charge is that the committee was, allegedly, in neglect of its duties in relation to the purchase of F350 vehicles and in relation to the payment of car allowances to the previous State Secretary. However, there is no information provided in the petition about how the committee was, supposedly, in neglect of its duties in relation to any of these matters.

45 The State organisation says that the requirement in r 16 of its rules for particulars to be provided enshrines the basic rule of natural justice that a person who is accused of wrongdoing must be given sufficient particulars of the allegations made against them so that they are able to respond to those allegations. The State organisation points out the concept that a person who is the subject of disciplinary action is entitled to particulars of allegations is well known and understood in criminal and industrial proceedings: ***Etherton v Public Service Board of New South Wales*** (1983) 3 NSWLR 297.

Conclusion - Structure of the Federal and State organisations - dual registration - separate organisations

46 Pursuant to s 66(2) of the IR Act, the President may make such order or give such directions relating to the rules of the organisation, their observance or non-observance or the manner of their observance, either generally or in the particular case, as the President considers appropriate.

47 The President under s 66 of the IR Act only has power to make orders or give directions relating to the rules of an organisation registered under the IR Act. The President has no power to give orders or directions to a counterpart Federal body.

48 Section 9A of the *Fair Work (Registered Organisations) Act* does not have the effect of deeming a State organisation to be a part of a federally registered organisation.

49 The State organisation and the counterpart Federal body are separate legal entities. The National body, of which the counterpart Federal body is a part of, is a separate corporate entity to the State organisation. The State organisation as a registered organisation is a corporation pursuant to s 60 of the IR Act.

50 In ***Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations for the State of Queensland*** [1995] HCA 31; (1995) 184 CLR 620, Brennan CJ, Deane and Dawson JJ explained that a branch of a federal organisation is not a separate person (corporate body) from its national organisation. Their Honours said (640 - 641):

> A branch of a federal industrial organisation is not a person; it has no existence apart from that of the members of the branch. The word 'branch' in that context is no more than a collective noun which, although singular in form, is used with a plural implication. That was made clear in *Williams* v *Hursey* ((1959) 103 CLR 30 at 54-55) by Fullagar J, with whom Dixon CJ and Kitto J agreed, when he pointed out that a branch of a federally registered organisation has no corporate character and no separate existence as a juristic person (See also *Allen* v *Sideris* (1984) 3 FCR 548 at 560; 9 IR 68 at 78). He said of the Hobart branch of the Waterside Workers' Federation of Australia that it (*Williams* v *Hursey* (1959) 103 CLR 30 at 54-55):
>
> > 'is not an "unincorporated society, fellowship, club or association". It has no separate identity — no existence apart from the registered organisation, of which it is an integral and inseverable part. Its members are merely a section of the total membership of the federation — locally organised for the sake of convenience, but in no respect independent of the federation, and in all respects subject to the control of the federation.'
>
> There was an obvious convenience in the members of a federal organisation in a State — a State branch — becoming registered under the industrial laws of the State in order to derive the advantages which flowed from State registration. The State registered organisation was better placed to participate in the State system of industrial regulation and to pursue improved terms and conditions for its members without any requirement that they be involved in an interstate industrial dispute. But considerable confusion arose from speaking of the registration as the registration of the State branch of a federal organisation (See *Moore* v *Doyle* (1969) 15 FLR 59 at 120-121). The confusion arose because, in so speaking, the misconception which was laid to rest in *Williams* v *Hursey* was resurrected, namely, the misconception that the use of the term 'branch' in relation to a federal organisation signifies an entity with an existence apart from its members rather than merely identifying those members collectively.
>
> On the other hand, when under State legislation the State branch of a federal organisation — that is, the branch members — became registered and, by reason of the registration became incorporated, what emerged was a new corporate body

with a legal personality which *was* separate and distinct from its own members. That corporate body was not a State branch of the federal organisation, notwithstanding that, initially at least, its own members were also members of the State branch of the federal organisation. In the absence of some fiduciary obligation, the assets which it acquired in its name were its own and not the assets of the federal organisation.

The difficulties arising from the failure to appreciate the effect of the incorporation under State legislation of a State branch of a federal organisation were adverted to in *Moore* v *Doyle* ((1969) 15 FLR 59 at 120-124). As a result, a report was obtained by the Commonwealth (The Sweeney Report, *Report of the Committee of Inquiry on Co-ordinated Industrial Organisations* (1974)) which recommended that State branches of federal organisations be able to obtain registration under State legislation but without acquiring corporate personality. This recommendation led to the insertion in 1974 of s 136A in the *Conciliation and Arbitration Act* 1904 (Cth). Sub-section (1) of that section provided:

> 'Where it is not contrary to the rules of an organisation to do so, it may participate in the systems of conciliation and arbitration or of wages boards or like systems established under the law of a State, and for that purpose a branch of an organisation may become registered under a law of a State so long as that registration does not involve the branch in becoming incorporated, or otherwise becoming a legal entity, under the law of a State.'

Corresponding provisions are now to be found in s 293 of and Sch 4 to the *Industrial Relations Act* 1988 (Cth). However, the operation of s 136A and of the corresponding provisions in the *Industrial Relations Act* 1988 (Cth) has been dependent upon the existence of State legislation providing for the registration of an organisation which does not carry corporate personality with it. Since the enactment of the Commonwealth provision, South Australia is the only State to have passed the required complementary legislation (See *Industrial and Employee Relations Act* 1994 (SA), Ch 4, Pt 3 and Industrial Relations Regulations (Cth), reg 119A and reg 119B).

51 Western Australia has not enacted legislation to affect the recommendation made in the Sweeney Report of 1974 that a branch of a federally registered organisation may be registered as an organisation without becoming a separate corporate body. Pursuant to s 60 of the IR Act, upon registration, an organisation, such as the State organisation in this matter, becomes a corporate body.

52 As Beech C observed in ***Cain v Shuttleton*** (1996) 76 WAIG 4458, 4464, the State organisation in this matter, namely the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch, and the National body:

> [A]re separate legal identities notwithstanding the provisions in their respective rules which confer rights on the members of the one due to membership of the other (*Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations for Queensland and others* (1995) 132 ALR 198). To put it another way, if an official of the Federal union performs an act in the name of that organisation and for the purposes of that organisation then the State union is not merely for that reason implicated in the official's action.

53 Whilst a s 71 certificate enables the State organisation to be managed by officers who form its committee of management by officers of the counterpart Federal body, such an arrangement does not affect the requirement of each separate organisation to comply with its own set of rules and the provisions of the Acts of Parliament that regulate the administration of each organisation. Namely, the State organisation is required to comply with the provisions of the IR Act and the counterpart Federal body is required to comply with the provisions of the *Fair Work (Registered Organisations) Act*.

54 Where a s 71 certificate is operative, the provisions of the IR Act that regulate the election of the holders of office of the State organisation have no effect.

55 On 22 September 1981, it was declared that the rules of the counterpart Federal body, being the Western Australian Branch of the Transport Workers' Union of Australia, relating to the qualifications of persons for membership of the Branch and prescribing the offices which shall exist within the Branch were deemed, for the purposes of s 71 of the IR Act, to be the same as the rules of the said union relating to the corresponding subject matter.

56 Following the making of the declaration on 11 November 1981, the Registrar of the Commission registered an alteration to the rules of the State organisation to provide in r 8(c) of the rules of the State organisation that 'each office in the Union may, from such time as the Committee of Management of the Union may determine, be held by the person who, in accordance with the rules of the Union's Counterpart Federal Body, holds the corresponding office in that Body'.

57 On 21 January 1982, the then Secretary of the State organisation, Mr J J O'Connor, by letter, informed the Commission that pursuant to s 71(5)(b) of the IR Act it had been determined on and from 11 December 1981, each office of the State organisation will be held by the person who in accordance with the rules of the 'Western Australian Branch of the TWU' (the counterpart Federal body) holds the corresponding office in that body.

58 The effect of r 8(c) of the rules of the State organisation, which authorised the decision of the State organisation in 1981 to determine that the persons holding office in the counterpart Federal body are to henceforth hold office in the State organisation, was to trigger the operation of s 71(5) of the IR Act. Section 71(5) provides:

> Where, after the coming into operation of this section —
>
> (a) the rules of a State organisation are altered pursuant to section 62 to provide that each office in the State organisation may, from such time as the committee of management of the State organisation may determine, be held by the person who, in accordance with the rules of the State organisation's counterpart Federal body, holds the corresponding office in that body; and
>
> (b) the committee of management of the State organisation decides and, in the prescribed manner notifies the Registrar accordingly, that from a date specified in the notification all offices in the State organisation will be filled in accordance with the rule referred to in paragraph (a),
>
> the Registrar shall issue the State organisation with a certificate which declares —

(c) that the provisions of this Act relating to elections for office within a State organisation do not, from the date referred to in paragraph (b), apply in relation to offices in that State organisation; and

(d) that, from that date, the persons holding office in the State organisation in accordance with the rule referred to in paragraph (a) shall, for all purposes, be the officers of the State organisation,

and the certificate has effect according to its tenor.

59 Pursuant to s 71(5) of the IR Act, on 22 January 1982, the Registrar of the Commission, whose title was at that time the Industrial Registrar, issued the following certificate:

(1) that the provisions of the Industrial Arbitration Act, 1979 relating to elections for office within a union do not, from December 11, 1981 apply in relation to offices in the 'Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch'; and

(2) that, from December 11, 1981, the persons holding office in the 'Transport Workers' Union of Australia, Western Australian Branch', an organisation registered under the provisions of the 'Conciliation and Arbitration Act, 1904', shall, for all purposes, be the officers of the 'Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch'.

60 As a result of the issue of the certificate on that date, from that time onwards the provisions of the IR Act relating to elections for office within the State organisation have had no application as the persons who hold office in the counterpart Federal body are deemed to be the officers of the State organisation.

61 As counsel for the State organisation points out, elections for holders of office of the counterpart Federal body are held by the Australian Electoral Commission under the rules of the National body.

62 Consequently, the rules of the State organisation to elect officers of the committee of management pursuant to r 9, r 10 and r 42 have no operative effect. This is because, at all material times, the holders of the corresponding office of the counterpart Federal body hold office in the State organisation.

63 Despite r 49(i) and the incorporation of the National rules pursuant to r 49(iii) of the rules of the State organisation, r 49(i) cannot have the effect of incorporating the State organisation as part of the National body or incorporating the National body as a part of the State organisation. To this extent, this provision has no operative effect.

64 The effect of s 60 of the IR Act is that upon registration the State organisation is a corporate entity in its own right and the *Fair Work (Registered Organisations) Act* does not extend to organisations of employees registered under the IR Act.

65 However, by operation of s 71A of the IR Act, a registered organisation may adopt the rules of its counterpart Federal body. Section 71A came into effect in 1990 by s 9 of the *Industrial Relations Amendment Act 1990* (WA) (Act No 99 of 1990). I note that s 71A came into operation on 19 January 1991. However, r 48 and r 49 came into effect at an earlier date. These rules became operative by being registered as alterations to the rules of the State organisation by the Acting Registrar of the Commission on 8 February 1988. Although s 71A authorises the incorporation of the rules of the counterpart Federal body pursuant to r 49(iii) of the rules of the State organisation, the effect is that the rules of the National body that are applicable to the counterpart Federal body only apply to the extent of no inconsistency with the rules of the State organisation. Consequently, the operation of the registered rules of the State organisation prevail over the incorporated rules of the National body that apply to the counterpart Federal body. Thus, the incorporation of the rules of the National body cannot have the effect of overriding r 8(c) of the rules of the State organisation.

66 It is clear that the purpose of r 16 is:

(a) to call a special meeting of members to consider specific charges against officers;

(b) for the members to hear any defence to the charges; and

(c) for a motion of no-confidence in any officer to be put.

67 If a special meeting of the State organisation is convened under r 16 of the rules of the State organisation, the only motion that could be carried is a motion of no confidence in the members of the committee of management (of the State organisation) or any members of the committee. If a motion is carried, it could have no effect as an office of the committee of management cannot be declared vacant or an election held because of the operative effect of r 8(c) and s 71(5)(c) of the IR Act.

68 In the event that a no-confidence motion is carried and endorsed by the State organisation at a special meeting convened pursuant to r 16, the chairman of the meeting is to declare vacant the positions of the officers in relation to which a no-confidence motion is passed. The difficulty with this procedure is that the effect of s 71(5)(c) and r 8(c) is that officers of the State organisation cannot be removed pursuant to r 16.

69 The procedure set out in r 16 of the rules of the State organisation to remove officers of the committee of management upon a motion of no-confidence at a special meeting of members can have no effect as the officers of the State organisation are not elected 'in accordance with rules 9, 10 and 42' of the rules of the State organisation as referred to in r 16.

70 In these circumstances, a motion carried at a special meeting convened under r 16 cannot have any practical effect.

71 In any event, as counsel for the State organisation points out, the applicant was expelled from office as Vice President by the counterpart Federal body acting pursuant to r 91 of the National rules.

72 For these reasons, I am of the opinion that no jurisdiction arises under s 66 of the IR Act to make proposed order 1 or proposed order 2 insofar as charge 1 in the petition relates to the suspension of the applicant, as I have no jurisdiction to enquire into the expulsion of the applicant from the counterpart Federal body pursuant to the rules of the National body.

73 Insofar as proposed order 2 relates to allegations of purchases of vehicles and payment of car allowances in charge 2 of the petition, this is a matter that prima facie is capable of invoking the jurisdiction of the President conferred by s 66 of the IR Act, if the matters referred to in the petition constituted a neglect of duties by officers of the committee of management of the State organisation.

74 Mr Dawson gave oral evidence about the financial records of the counterpart Federal body and an audited general purpose financial report for the year ended 31 December 2016 (exhibit B). At page 4 of the report, a certificate signed by Mr Dawson as Branch Secretary certifies that the documents lodged are copies referred to in s 268 of the *Fair Work (Registered Organisations) Act*. The report contains financial information about expenditure made in 2016. Yet, the report makes no reference to expenditure prior to 2016 or to any period relating to when the alleged purchases and car allowances are said by the applicant to have occurred. For these reasons, I find the matters contained in exhibit B to be unhelpful.

75 Mr Dawson also gave evidence that, in his opinion, the State organisation has no officers, funds or property. I did not find his opinion about these issues helpful. Pursuant to r 8(c) of the rules of the State organisation, Mr Dawson is the Secretary of the State organisation. Pursuant to s 65 of the IR Act, as the Secretary of the State organisation he is required to deliver to the Registrar a balance sheet of the assets and liabilities, a statement of the receipts and expenditure and a cash flow statement for the State organisation each financial year. Yet, no such records were produced by him in support of his contention about the financial affairs of the State organisation. It is plain that Mr Dawson has a poor comprehension of the effect of a s 71 certificate and the obligations of officers who hold a corresponding office in the counterpart Federal body who by operation of the s 71 certificate and r 8(c) hold office in the State organisation.

76 I do, however, agree that the allegations in charge 2 of the petition do not contain sufficient particulars. Charge 2 does not state the dates upon which the conduct is alleged to have occurred. This goes not only to particularisation of the allegations, but also to the jurisdiction of the President to make orders pursuant to s 66 of the IR Act. For the President to make an order under s 66, there must be temporal connection between the conduct arising in the s 66 application and any orders and directions to be made.

77 In ***Stacey v Civil Service Association of Western Australia (Inc)*** [2007] WAIRC 00568; (2007) 87 WAIG 1229, Ritter AP comprehensively reviewed the leading authorities which have determined the nature of the President's jurisdiction and the type of orders that can be made pursuant to s 66 of the IR Act. His Honour had regard to two decisions, one of which is the decision of the Industrial Appeal Court in ***The West Australian Locomotive Engine Drivers' Firemen's and Cleaners' Union of Workers v Schmid (No 1)*** (1996) 76 WAIG 639, the other a decision of Sharkey P in ***Luby v The Secretary, The Australian Nursing Federation, Industrial Union of Workers, Perth*** [2002] WAIRC 06067; (2002) 82 WAIG 2124. At [291] - [303], Ritter AP explained the power to make orders relating to a past non-observance of a rule is restricted to where the purpose is to secure the performance of an existing obligation:

> (l) *WALEDFCU v Schmid (No 1)* (1996) 76 WAIG 639
>
> There are two cases I am aware of which specifically consider whether the s66 jurisdiction can be used only to secure the performance of existing obligations under the rules or extends to making orders for the purpose of remedying past breaches of the rules. In *WALEDFCU v Schmid (No 1)*, the IAC partially allowed an appeal to the extent of '*striking out*' two of the three orders made by Sharkey P in a s66 application. The three orders made were that:-
>
> *'(1) THAT the respondent through its general committee forthwith order the trustees of the respondent organisation to institute legal proceedings in a competent court within 14 days of 21st day of September 1995 to recover the sums paid by the respondent to Mr K Campbell, General President and Mr M Ryan and Mr K Jarrett, General Vice-Presidents, to which they were not entitled by way of honorarium in the years 1991, 1992, 1993 and 1994 should any such amount not be paid to the respondent within seven days of 21st day of September 1995.*
>
> *(2) THAT in the event that such monies are not repaid or such proceedings are not so instituted by the said trustees then the respondent organisation shall itself institute such proceedings in a competent court within 21 days of 21st day of September 1995.*
>
> *(3) THAT the said respondents shall, at all times, in any event, take all steps and do all things necessary to recover such monies from the said General President and General Vice-Presidents as expeditiously as is possible.*'
>
> There were joint reasons for decision of the Court (Kennedy, Franklyn and Anderson JJ).
>
> The rules of the union provided that each of the general president and general vice president were to be paid an annual honorarium. The amount of the honorarium was increased in 1991 at a triannual delegates' conference. It was common ground that this resolution was not effective to amend the rules because the act governing amendments to union rules was not complied with. The increased honorariums were paid from 1991 to 1994. These payments were not authorised. Mr Schmid and 18 other members of the union applied to the President for, in effect, enforcement of the rules on the ground that the rules were not being observed. The specific rule said to not be observed was rule 22. This rule as relevantly quoted by the IAC at page 640 was:-
>
> *'22. POWERS OF GENERAL COMMITTEE*
>
> *The members of the General Committee shall in the interim between Delegate meetings:*
>
> *(a) Manage and superintend all affairs of the Union, perform all duties allotted to them by these Rules, so as to further the objects of the Union.*
>
> *(b) Protect the funds from misappropriation.*

(c) Direct the actions of the General Trustees.

(d) Be held responsible for the right administration of the funds of the Union.

(e) Control all property of the Union.

-

(i) Institute legal proceedings (except as provided in Rule 40) on behalf of the Union.

(j) Direct the General Trustees to take legal proceedings against any officer or member of the Union guilty of misappropriating any of its funds.'

Sharkey P found the general president and two general vice presidents of the union had been paid money which they were not entitled to and that there had been '*a misappropriation of funds in that funds were put to use in a way which the rules did not and do not authorise them to be put*' (page 640). As stated by the IAC at page 640, Sharkey P held the general committee had a duty under rule 22 to recover the amounts paid by directing the general trustees to take legal proceedings against the officers or members guilty of the misappropriation. Accordingly and purporting to exercise the power conferred by s66(2) of *the Act* Sharkey P made the orders appealed from.

As explained by the IAC the primary attack made against the first order was that there was no power for the President to make the order under s66(2) of *the Act*. It was submitted the power to compel observance of rules could only be exercised to secure performance of existing obligations under the rules and did not extend to the making of orders for the purpose of remedying past breaches of the rules. Reliance was placed upon *Darroch v Tanner* (1987) 16 FCR 368; 21 IR 284. As explained by the IAC at page 640, in that case a union had used funds and resources to produce election material to advance the interests of particular candidates. The resolution to expend the funds in this way was held to be beyond power and it was held the expenditure was unauthorised. An application was made under s141(1G) of the *C and A Act* for an order requiring the members of the state executive responsible for authorising the payment to perform and observe the rules of the union by repaying the amount. As set out by the IAC, s141(1G) of the *C and A Act* was that: '*An order under this section may give directions for the performance or observance of any of the rules of an organisation by any person who is under an obligation to perform or observe those rules*'. In *Darroch v Tanner* the Full Court of the Federal Court decided, applying *R v Commonwealth Court of Conciliation and Arbitration; Ex Parte Barrett* (1945) 70 CLR 141 per Latham CJ at 156-157, and Dixon J at 163, that the section did not empower the Court to do other than secure the performance of an existing obligation.

Relevantly, the IAC did not decide this aspect of the appeal on the basis that *Darroch v Tanner* involved the application of the differently worded s141(1G) of the *C and A Act*. Instead, it applied another aspect of *Darroch v Tanner* which was as stated by the IAC that '*the court made it clear the result would have been different had the court concluded that, on a proper construction of the rules, there was a continuing obligation on the persons to whom the directions had been given, and the direction was given to secure the performance of that continuing obligation*' (page 640).

The IAC then said that in their opinion, rule 22 did impose a continuing obligation upon the general committee of the union generally to protect its property and funds from misappropriation and specifically by rule 22(j) to direct the general trustees to take legal proceedings against any officer or member of the union guilty of misappropriating any of its funds. Accordingly, the Court decided order (1) was within the power conferred on the President by s66(2) of *the Act*.

The Court then rejected a contention that rule 22(j) did not come into operation unless the particular officers had been found guilty of misappropriating union funds by a court exercising criminal jurisdiction.

The IAC upheld however the attacks on both the second and third orders made by the President. This was because '*the rules cast no obligation on anyone but the general trustees to institute recovery proceedings in a case of misappropriation*'. As opposed to this, the second order made would have compelled the union itself to institute the proceedings if the general trustees refused to do so.

The IAC decision suggests the powers of the President under s66 were limited to, relevantly, the making of orders about complying with an express rule of an organisation. As there was no rule creating the obligation with respect to orders 2 and 3, they were set aside.

(m) *Luby v Secretary, The Australian Nursing Federation, Industrial Union of Workers, Perth* (2002) 82 WAIG 2124

In *Luby* Sharkey P said:-

'*164 The power conferred on the Commission, constituted by the President, is not restricted as it was, in relation to the Court, under s.141G of the Conciliation and Arbitration Act 1904 (Cth). That provision was considered in Darroch v Tanner [1987] 21 IR 284 at 289 (FC FC), because s.66(2) of the Act is much broader and provides that the President may make such order or give such directions relating to the rules of the organisation, their observance or non observance or the manner of their observance either generally or in the particular case. The words "relating to" are particularly broad. Thus, directions may be given or orders made relating to the past non-observance of a rule. Generally, however, and practically, that will not often occur. If at the time the directions are given or the orders made impose an obligation on the persons to whom they were given and the orders and directions are for the purpose of securing the performance of an existing obligation, then such an order will be made relating to past non observance of a rule.*

> *165 The Council's responsibility is similar to that of a Board of Directors (see Schmidt and Others v WALEDFCU (Pres) (op cit) (see also Allen v Townsend and Others (FC FC) (op cit) at page 349 per Evatt and Northrop JJ, and see also per Nicholson J in Carter and Others v Drake and Others 73 WAIG 3308 at 3311 (IAC)).*'

Although not all of what Sharkey P there said may withstand scrutiny in the light of subsequent authorities, there is like *Schmid* the opinion expressed that orders will be made relating to a past non-observance of a rule where the purpose is to secure the performance of an existing obligation.

(n) Conclusion on Orders Sought for Alleged Breach of Rule 12(l)(vi)

These authorities confirm in my opinion that the orders sought by the applicant for the alleged breach of rule 12(l)(vi) are beyond the jurisdiction and power of the President under s66 of *the Act*. This is because the breach of the rule was alleged to have first taken place in September 1999, continuing until March 2006. The present application was not commenced until June 2006 and first heard in February 2007. The relevant paragraph of the rule was deleted from the rules of *the CSA* in November 2006. In this combination of circumstances I do not think the s66(2) jurisdiction extends to the making of an order akin to that of the payment of compensation for loss caused by the breach of a rule which if complied with could or would have lead [sic] to payments being made to the applicant. Such an order has no contemporary relevance to the activities of *the CSA* or the observance of its rules and does not in purpose or effect secure the performance of an existing obligation.

78 In this matter, it could be said that there is an existing temporal obligation created by the petition itself, that is, on tendering the petition to the President or Secretary of the State organisation r 16 at that point in time requires the President or Secretary of the State organisation to call a special meeting to hear specific charges set out in the petition. However, as set out above, the invoking of the process under r 16 would be futile as there is no power to remove an officer of the committee of management because of the operative effect of r 8(c) and s 71(5)(d).

79 In any event, as counsel for the State organisation points out, it is well established charges sought to be brought against an officer of a union which could result in expulsion must be clearly particularised. Particulars are important to be provided. Without adequate particulars unfairness to a person 'charged' arises. Charges should not be laid as a means to 'find out what occurred about a matter'. The material facts relied upon are required to be stated. Charges should only be laid where prima facie there is credible evidence (if accepted at its highest) of the matters prohibited by r 16, that is dishonesty, disobedience, incompetence, neglect of duty, acting contrary to the best interest of the State organisation, or any other valid reason.

80 In ***McJannett v Construction Forestry Mining and Energy Union of Workers*** [2012] WAIRC 00935; (2012) 92 WAIG 1889 I observed [248]:

> The fundamental principle of how far further and better particulars should go to elucidate the nature of a claim for an opposing party was stated by Isaacs J in ***R v The Associated Northern Collieries*** (1910) 11 CLR 738, 740 – 741 as follows:
>
> > [T]he opposite party shall always be fairly apprised of the nature of the case he is called upon to meet, shall be placed in possession of its broad outlines and the constitutive facts which are said to raise his legal liability. He is to receive sufficient information to ensure a fair trial and to guard against what the law terms 'surprise,' but he is not entitled to be told the mode by which the case is to be proved against him …
> >
> > [W]here I am in any doubt as to the sufficiency of the particulars I resolve it in favour of the defendants, so as to ensure their being in a position to fully understand and prepare for the case alleged against them. As *Buckley* L.J. said in *G. W. Young & Co. Ltd. v. Scottish Union and National Insurance Co.* (24 T.L.R., 73, at p. 74), 'the principle underlying particulars was that they were given in order to make the plaintiff's case plain';

81 In the absence of particulars of the material facts alleged in relation to charge 2, it is not clear whether there is a temporal connection between the alleged conduct and the existing obligations of the committee of management of the State organisation.

82 When regard is had to the applicant's submissions, it appears the purpose of the petition is to elicit information from the officers as to what occurred when the purchase of the vehicles and payment of the car allowances were made. This purpose is inconsistent with the objects and purpose of r 16. The purpose of a special meeting convened pursuant to r 16 is not for members to hold a general inquisitorial enquiry. The purpose of a special meeting convened by a petition under r 16 is to hear and determine specific charges against holders of office in the State organisation. Leaving aside the effect of r 8(c) and s 71 of the IR Act, where charges are made out, the officers are required to be removed and the positions they hold are declared vacant and elections are to follow. However, as set out above, the consequences provided for in r 16 cannot ensue because of s 71(5)(c) and r 8(c) of the rules of the State organisation.

83 For these reasons, I am of the opinion that an order should be made to dismiss the application.

2017 WAIRC 00967

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK BEBICH
	APPLICANT
	-and-
	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	WEDNESDAY, 29 NOVEMBER 2017
FILE NO/S	PRES 4 OF 2017
CITATION NO.	2017 WAIRC 00967

Result	Application dismissed
Appearances	
Applicant	Mr C Bayens, as agent
Respondent	Mr A Dzieciol (of counsel)

Order

This matter having come on for hearing before me on 3 October 2017, and having heard Mr C Bayens, as agent, on behalf of the applicant and Mr A Dzieciol (of counsel) on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

The application be and is hereby dismissed

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

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2017 WAIRC 00793

INTERPRETATION OF VARIOUS INDUSTRIAL AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00793
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	TUESDAY, 6 JUNE 2017, TUESDAY, 22 AUGUST 2017
DELIVERED	**:**	FRIDAY, 8 SEPTEMBER 2017
FILE NO.	**:**	APPL 17 OF 2017
BETWEEN	**:**	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Applicant AND AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIAN BRANCH Respondent

CatchWords	**:**	Application for true interpretation of clause of industrial agreements - Respondent applied for dismissal pursuant to section 27 (1)(a) *Industrial Relations Act 1979* - Respondent's application dismissed - Dispute relates to meaning of word "required" - Principles of interpretation of industrial instruments discussed and applied - "Required" interpreted
Legislation	**:**	*Financial Management Act 2006* *Industrial Relations Act 1979* *Minimum Conditions of Employment Act 1993*
Result	**:**	Agreements interpreted

Representation:

Counsel:		
Applicant	:	Mr D Anderson
Respondent	:	Mr A Stewart
Solicitors:		
Applicant	:	State Solicitor's Office
Respondent	:	Chapmans Barristers & Solicitors

Cases referred to in reasons:

Attorney General v Gray [1977] 1 NSWLR 406

Board of Trustees of the State Public Sector Superannuation Scheme v Welsh [2000] QSC 335

Commonwealth of Australia v Hamilton [1992] 2 Qd R. 257

Director General, Department of Education v United Voice WA [2013] WASCA 287

NSW Nurses and Midwives Association v Western Sydney Local Health District (2016) 257 IR 82

Re Harrison; Ex parte Hames [2015] WASC 247

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1987) 67 WAIG 1097

Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd [2014] WASCA 164

Case(s) also cited:

Australian Liquor, Hospitality and Miscellaneous Union, Miscellaneous Workers Divisions, Western Australian Branch v Board of Management, Fremantle Hospital and Hospital Service (Unreported, Complaint No 87 of 1997, delivered 17 November 1997)

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337

David Securities Pty Limited v Commonwealth Bank of Australia (1992) 175 CLR 353

Director General of Department of Justice v Civil Service Association (2004) 85 WAIG 629

Henry v Henry (1996) 185 CLR 571

Ian MacFarlane v Halperin Fleming & Meertens (2001) 82 WAIG 150

Kucks v CSR Ltd (1996) 66 IR 182

O'Sullivan v Farrer (1989) 168 CLR 210

Rogers v The Queen (1994) 181 CLR 256

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

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

Reasons for Decision

1 The applicant applies to have me declare the true interpretation of the word "required" in the following clauses (all of which are in relevantly similar terms):

- Clause 4.2.6 of the Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2015;
- Clause 4.3.6 of the Public Transport Authority/ARTBIU (Transwa) Industrial Agreement 2016;
- Clause 4.4.3 of the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014; and
- Clause 4.3.6 of the Public Transport Authority Railway Employees (Network and Infrastructure) Industrial Agreement 2014.

2 The respondent argues that I should not act under section 46 *Industrial Relations Act 1979*, and should dismiss the application pursuant to section 27(1)(a) *Industrial Relations Act 1979*, because there are proceedings before the industrial magistrate's court which will require that court to interpret one of the clauses set out above, namely clause 4.4.3 Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014, and therefore the current proceedings are:

(1) not necessary or desirable in the public interest (with reference being made to section 27(1)(a)(ii) *Industrial Relations Act 1979*);

(2) an abuse of process or vexatious (with reference being made to section 27(1)(a)(iv) *Industrial Relations Act 1979*).

3 I have been provided with a copy of the initiating document in the industrial magistrate's court proceedings, being the Originating Claim in M 202/2016 filed 4 December 2016.

4 The claim pleads that the Public Transport Authority "formed the view" that the claimant's member had been overpaid and refers to "the alleged overpayment."

5 The claim pleads that the Public Transport Authority recovered the "overpaid [amount] by deducting [the claimant's member's] pay on various occasions."

6 The claim pleads that the deductions were "not authorised."

7 The claim pleads that the Public Transport Authority is in breach of section 17C(1) *Minimum Conditions of Employment Act 1993* because the claimant's member was not, when the deductions were made, paid his wages in full.

8 There is a "defence" to a claim of such a breach being that the deductions were authorised in one of the ways set out in section 17D(1) *Minimum Conditions of Employment Act 1993*.

9 The claim pleads that "the deductions were not authorised under section 17D(1) *Minimum Conditions of Employment Act 1993*."

10 It is not entirely clear from the claim whether the claimant disputes the overpayment or whether it confines itself to a complaint about the method of recovery it alleges the Public Transport Authority used. Submissions made before me did not clarify this.

11 On balance, the pleading that the Public Transport Authority "formed the view" that the claimant's member had been overpaid, and the claim's reference to "the alleged overpayment", inclines me to the view that the claimant has raised by its pleadings the matter of whether or not there was an overpayment. Certainly there is no positive pleading admitting there was an overpayment.

12 I consider it possible that the industrial magistrate's court in M 202/2016 may turn its mind to whether the claimant's member was "required to repay" an amount to the Public Transport Authority.

13 I will decide the section 27(1)(a) *Industrial Relations Act 1979* application against that background.

14 The respondent says, firstly, that it is not necessary or desirable for the Western Australian Industrial Relations Commission to hear and determine the application because the industrial magistrate's court will interpret the word "required" in its determination of the claim before it and, if the current application proceeds to determination:

(1) this may undermine public confidence in the administration of justice because there is the potential for the Western Australian Industrial Relations Commission and industrial magistrate's court to "deliver conflicting constructions" of the word; and

(2) resources, both public and private, will be wasted if there are two proceedings to determine the same thing.

15 The respondent also says in relation to 27(1)(a)(ii) *Industrial Relations Act 1979* that:

(3) if the current proceedings are not determined there will be no prejudice to the applicant because it will still have the word "required" interpreted by the industrial magistrate's court.

16 In relation to these arguments I find:

(1) There is no possibility of "conflicting constructions." The industrial magistrate's court will, pursuant to section 46(3) *Industrial Relations Act 1979*, be bound by any declaration I make under section 46 *Industrial Relations Act 1979* as to the true interpretation of the word "required";

(2) There will be no waste of resources if a binding declaration of the true interpretation of the word "required" is made by me. That matter will not have to be litigated before the industrial magistrate's court, my declaration being binding upon it; and

(3) It would only be if I was upholding the application on one of the first two arguments above that I might need to comfort myself that there is no prejudice to the applicant resulting from such an outcome.

17 Secondly, the respondent says that the current application is an "abuse of process or vexatious" because:

(1) it is oppressive to the respondent, the claimant before the industrial magistrate's court, to have it expend its resources on the present application when the matter is before, and will be determined by, the industrial magistrate's court proceedings; and

(2) the application creates the potential for conflicting constructions which would bring the administration of justice into disrepute.

18 I find that the current proceedings were not in prospect, nor have they ended up being in the result, oppressive in the sense the respondent argues.

19 I note the respondent did not apply to have the application under section 27 *Industrial Relations Act 1979* heard and determined as a preliminary matter because the substantial proceedings were going to be lengthy and expensive.

20 As it turned out the proceedings were neither lengthy nor complex. No evidence was brought and short argument only, both written and oral, was required.

21 I have dealt above with the argument that the administration of justice might be brought into disrepute if the current proceedings continue to determination on the basis of there being the potential for conflicting constructions. There is no such potential.

22 I should add for the sake of completeness that whether I am right or wrong about the effect of section 46 *Industrial Relations Act 1979*, and its impact on the section 27 *Industrial Relations Act 1979* application, the presence of section 46(3) *Industrial Relations Act 1979* would, at face value at least, generally rule out any suggestion that a party has an "illegitimate purpose" in seeking an interpretation, even if there are proceedings on foot which might deal with a provision intended to be interpreted.

23 I turn then to interpret the word "required" in the relevant clauses.

24 I set out in full, by way of example, clause 4.4.3 of the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014* which provides as follows:

> "Overpayments: If an employee is required to repay an amount to the Employer, the amount to be repaid from any fortnightly pay will not exceed 10% of the employee's gross rostered pay unless another arrangement has been agreed to between the Employer and the employee. The repayment may be for, but not limited to, overpayment of Base Wage Rate, additional shifts, or allowances."

25 The principles to be applied in interpreting industrial agreements are well known and uncontroversial. They may be found in cases such as *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 67 WAIG 1097, *Director General, Department of Education v United Voice WA* [2013] WASCA 287, *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* [2014] WASCA 164 and *Re Harrison; Ex parte Hames* [2015] WASC 247.

26 Neither party asked me to have regard to evidence of the circumstances surrounding the making of the relevant industrial agreements or to the background knowledge of the parties at the time the industrial agreements were made.

27 I was asked to interpret the word "required" on the basis that its intended meaning emerges from consideration of the word in the context of a reading of the entire industrial agreement and having regard to "the law".

28 My reference to "the law" here is a reference to what the parties say are matters of legal precedent and legislation which operate to inform or limit the meaning of the word "require".

29 Essentially it is said, by both parties, that the parties could not have intended for the word "require" to have a meaning which would offend established legal precedent or legislation or, put another way, I should interpret the word "require" so that, whatever the parties intended by it, it is given a meaning, if possible, that does not offend established legal precedent or legislation.

30 I consider that an approach to interpretation that has me ensuring that the industrial agreement does not offend "the law" in this sense is consistent with the general principle for construction that words in an industrial agreement should be given the most appropriate meaning they can legitimately bear.

31 A meaning that offends legislation or established binding precedent would, prima facie, not be legitimate. I suppose that an industrial agreement could legitimately ameliorate or change the effect of the application of a legal precedent to a given situation but I add that such an intention and effect would need to be clearly stated and understood.

32 So then, what is the most appropriate meaning the word "require" can bear in the current context?

33 The first thing that may be said is that the relevant clauses do not provide any insight into the meaning of the word "required" contained within them. The relevant clauses relate to a method of repayment, or condition a method of repayment, "if an employee is required to repay an amount."

34 It is clear that the "requirement" arises elsewhere.

35 The second thing that may be said is that a reading of the entire industrial agreements reveals they do not contain definitions of "required to repay" or express explanations of how the "requirement" might or does arise.

36 The applicant suggested that the meaning may be implied by a reading of the entire industrial agreements and, in particular, the "dispute settlement" and "wage shortfall" clauses which are in relevantly identical terms in each industrial agreement.

37 I do not find those clauses helpful in interpreting the term "required".

38 The dispute settlement clauses provide for a process for dealing with "questions, disputes or difficulties arising under the agreement or in the course of the employment of employees covered by the agreement."

39 Such provisions are required to be included in industrial agreements by section 48A *Industrial Relations Act 1979.*

40 Section 48A (1a) *Industrial Relations Act 1979* provides as follows:

> "The procedures referred to in subsection (1) shall provide for the persons involved in the question, dispute or difficulty to confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission."

41 The relevant clauses provide for the parties to "confer among themselves and make reasonable attempts to resolve" the matter and further provide that "if no agreement is reached either party may refer the dispute to the Western Australian Industrial Relations Commission for conciliation and/or determination."

42 Even if an employee may attempt to deal with an allegation that they have been overpaid through the relevant dispute settlement clauses I find that this is neutral in relation to the interpretation of the meaning of the word "required" in the relevant clauses. I see no inevitable intersection between the two clauses.

43 Resort to the dispute settlement clauses may change nothing. The dispute may not be resolved by the parties and remain on foot. The Western Australian Industrial Relations Commission may or may not have jurisdiction to resolve the dispute (and it is questionable whether it could make orders in relation to a matter of overpayment) and even if it does any "requirement" would arise out of the application of the *Industrial Relations Act 1979* and not out of the industrial agreements.

44 The "wage shortfall" clauses also do not assist.

45 I set out in full, by way of example, clause 4.4.4 of the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014 which provides as follows:

> "4.4.4 Underpayments: Where the Employer is informed by an employee that the employee has not been paid the full amount of remuneration due to the employee in a fortnightly pay the Employer shall quickly investigate the matter. Where an underpayment is confirmed and determined to be the fault of the Employer, the Employer shall pay the shortfall to the employee in the next fortnightly pay."

46 That the industrial agreements oblige the Public Transport Authority to investigate allegations of underpayments and the Public Transport Authority must, if it determines there is an underpayment and that it is at fault, pay the employee the shortfall in their next pay tells me nothing about the relevant clauses.

47 If the argument is that because the employer can unilaterally determine whether an employee has been underpaid or not this implies the employer can unilaterally determine whether an employee has been overpaid or not this must be rejected as a matter of logic.

48 If the argument, which I think was that put, is that the employer can unilaterally decide whether or not there has been an underpayment or an overpayment, subject to exhaustion of the dispute settlement clauses in both instances, and thus it can be said the "requirement" in the relevant clauses may arise out of the dispute settlement clauses, I am returned to the consideration of the dispute settlement clauses that I have already undertaken and which did not assist me.

49 Unassisted in my task by a reading of the entire industrial agreements I return to try and work out from where the "requirement" referred to in the relevant clauses might, in the reasonable contemplation of the parties when the industrial agreements were made, arise.

50 The applicant suggested that the requirement to repay an overpayment may come from established and binding legal authorities, properly understood.

51 It is obvious that such an argument does not go to what the parties actually intended. It is an argument which is underpinned by the assertion that I should assume the parties intended to make the industrial agreements consonantly with established binding authorities or, put another way, did not intend, without making this clear, to make industrial agreements which conflict with such authorities.

52 So, the applicant says, if there is authority which is clear and incontestable to the effect that overpayments to employees by an employer such as the applicant must be repaid it is safe and appropriate to find that this is the "requirement" referred to in the relevant clauses, even if there is no evidence that the drafters of the industrial agreements, who would of course not necessarily be lawyers, knew of the authority or had it in mind when they drafted the clause.

53 I think it is tolerably clear from the wording of the relevant clause that, if there is such authority, the drafters were not aware of it and did not have it in mind when they drafted the clauses.

54 I say this because if there was such an authority, accepted by the parties to be binding in the way it would need to be for this construction to work, there would be no need to include the words "if there is a requirement."

55 If the effect of the authority was that wage overpayments must be repaid there would be no need to include words to the effect "in the case that an overpayment must be repaid." A case where an overpayment would not have to be repaid would never arise.

56 In any event, I am far from convinced that the parties agreed on the relevant clauses intending to act consonantly with a binding authority or should be assumed to have made the relevant clauses intending to act consonantly with a binding authority.

57 The legal authority the applicant refers to is *Attorney General v Gray* [1977] 1 NSWLR 406.

58 In that case it was held that any payment out of the consolidated fund without parliamentary authority is illegal and ultra vires and, if traceable, must be recovered by the government and a court is obliged to make an order for that recovery.

59 It was not put to me that, as a matter of course, it should be accepted that in every case where the Public Transport Authority overpays an employee, or says that it has overpaid an employee, without more, the overpayment is illegal in the sense the overpayment in *Attorney General v Gray* [1977] 1 NSWLR 406 was illegal.

60 The applicant concedes, I think, and if so appropriately, that firstly it cannot be assumed that every allegation of an overpayment establishes an overpayment as a fact and that the facts that might trigger the relevant clauses will not be so clear in every case of overpayment that the overpayment is illegal and is "required" to be repaid because of the applicability of *Attorney General v Gray* [1977] 1 NSWLR 406.

61 Determination of whether an overpayment occurred as a fact may be difficult if, as the relevant clauses say, the payment of shift and other allowances may be involved.

62 I note, without dealing with the cases in detail, that it is plain the application and effect of *Attorney General v Gray* [1977] 1 NSWLR 406 are on occasions contentious matters and sometimes decisions in these contested matters seem to detract from or limit the principle that comes from *Attorney General v Gray* [1977] 1 NSWLR 406.

63 For instance, in *Commonwealth of Australia v Hamilton* [1992] 2 Qd R 257 the Full Court of the Queensland Supreme Court found that the principle did not apply if someone had fraudulently induced a government authority to make a payment. The Court said that by the person's fraud they had brought themself within the necessary Parliamentary authorisation.

64 In relation to an overpayment to an employee based on fraud the Public Transport Authority may not be able to rely on the principle in *Attorney General v Gray* [1977] 1 NSWLR 406. The relevant clauses are not confined to mistaken overpayments and the potential for overpayments to occur in circumstances other than mistake is not great but is certainly enhanced when shift and other allowances are included.

65 Another example is *NSW Nurses and Midwives Association v Western Sydney Local Health District* (2016) 257 IR 82 where the New South Wales Industrial Relations Commission distinguished *Attorney General v Gray* [1977] 1 NSWLR 406 because, on that Commission's interpretation, the principle required identification of a specific statutory provision breached and that payments above those provided for in minimum rate awards were not caught by the principle because it was not "illegal" to pay a greater sum than such an award prescribed.

66 I say nothing about the correctness or otherwise of those cases but they support me in my view that the parties cannot have intended, or be assumed on public policy grounds to have intended, to make a clause that accepts that *Attorney General v Gray* [1977] 1 NSWLR 406 has a certain application and effect in every case of alleged overpayment.

67 I was not addressed on the implications, if any, of the *Financial Management Act 2006*.

68 So against the background of my above findings I need to now answer the question of what "required" in the phrase "required to repay" in the relevant clauses means.

69 Unassisted in the ways offered I have dealt with above I must return to the start point being the ordinary meaning of the word.

70 The Macquarie Dictionary (3rd ed) has several possible definitions as follows:

- "to call on authoritatively, order or enjoin (a person etc) to do something"
- "to ask for authoritatively or imperatively; demand"
- "to call for or exact as obligatory"
- "to place under an obligation or necessity"
- "to make demand; impose obligation or need"

71 The respondent says that whatever "required to repay" means it cannot mean that the employer can unilaterally, and without more than its own determination, order or demand an employee to pay it money.

72 That can be accepted at face value as correct and I do not think the applicant would say otherwise.

73 The applicant suggests the empowerment to do so may come from other sources, either from the outcome of the dispute resolution procedure, or an assumed outcome from an employee's failure to invoke the procedure, or from case law, but not that the employer may unilaterally and without more order payment. I have rejected those other sources as being sound foundations for a requirement.

74 The respondent also refers to section 17C *Minimum Conditions of Employment Act 1993*, which provides that an employee is entitled to be paid his or her pay in full, as informing the relevant meaning to be applied. The respondent says a construction that means the employer can, without more, call on or order or ask for or demand an employee to pay it money offends section 17C *Minimum Conditions of Employment Act 1993*.

75 I think section 17C *Minimum Conditions of Employment Act 1993* is a neutral consideration in determining the true interpretation of the phrase "required to repay."

76 An employer could, if empowered to do so, require an employee to repay an amount to the employer and still pay the employee his or her pay in full.

77 The common themes of the dictionary definitions of "require" are that of "obligation" and "authority." For a requirement to arise there must be an "obligation" on the person to do the thing such that there is an "authoritative" call for the thing to be done.

78 If that obligation does not arise under the industrial agreement, and I have found it does not, and does not arise as a matter of course from the common law, and I have found it does not, then from where can the obligation arise.

79 Who or what can place an employee under an obligation to pay money to an employer?

80 The obvious and most appropriate answers are that a court can impose such an obligation or an employee himself or herself can place themselves under such an obligation. Legislation may also place an employee under such an obligation, although I am not aware of any examples of this and none were brought to my attention.

81 In my view the meaning of the term "if an employee is required to repay" is "if an employee is under an obligation to repay" and that such an obligation may arise as a result of, at least, a court order, legislation or an agreement.

82 The relevant clauses are nothing like, say, clause 13 of the Public Sector and Government Officers General Agreement 2014. Many of the Public Transport Authority's arguments, with respect, seem to relate to a clause such as that.

83 I will make an order under section 46(2) *Industrial Relations Act 1979* if requested to do so.

INDUSTRIAL MAGISTRATE—Claims before—

2017 WAIRC 00972

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2017 WAIRC 00972
CORAM	:	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	:	ON THE PAPERS (LODGED 6 OCTOBER 2017)
DELIVERED	:	1 DECEMBER 2017
FILE NO.	:	M 95 OF 2016
BETWEEN	:	JODIE CHERYL PANNELL
		CLAIMANT
		AND
		DR WILLIAM DAVID PANNELL
		RESPONDENT

CatchWords	:	Costs - Whether proceedings initiated frivolously or vexatiously
Legislation	:	*Industrial Relations Act 1979* (WA) *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) *Minimum Conditions of Employment Act 1993* (WA) *Long Service Leave Act 1958* (WA)
Case(s) referred to in reasons	:	***Commissioner of Police of Western Australia v AM*** [2010] WASCA 163 ***Tkacz v Watson HJ & Associates*** (2008) 173 IR 113 ***Walsgott v Maroochy Shire Council*** [2005] QPEC 12 ***Jodie Cheryl Pannell v Dr William David Pannell*** [2017] WAIRC 834
Result	:	Application for costs dismissed.
Representation:		
Claimant	:	Mr D. Howlett (counsel) instructed by Croftbridge
Respondent	:	Mr T. Carmady (counsel) instructed by William + Hughes

REASONS FOR DECISION

Introduction

1 On 22 September 2017, this claim by Ms Jodie Pannell (Jodie) was dismissed upon an application for summary judgment by the Respondent, Dr William Parnell (Bill). Bill has made an application for costs consequent upon his successful application. The court may order that Bill's costs be paid by Jodie 'if and only if, in the opinion of the court, the case has been frivolously or vexatiously instituted' by Jodie: *Industrial Relations Act 1979* (WA) (IR Act), s 83C(2) and *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (Regulations), reg 11.

Reasons for dismissing the claim.

2 My written reasons for granting Bill's application have been published, ***Jodie Cheryl Pannell v Dr William David Pannell*** [2017] WAIRC 834 (the Summary Judgment Reasons). It is convenient to set out an edited version of some passages of the Summary Judgment Reasons:

a. Jodie married Mr Daniel Pannell ('Daniel') on 8 January 1994. They worked in a winery business operated from a property in Pemberton. The owner of the Pemberton Property was Daniel's father, Bill. Jodie and Daniel lived together at the Pemberton Property from the mid 1990's until, on 24 November 2012, Jodie moved out of that property. There is a dispute about the identity of Jodie's employer while she worked in the winery business. Jodie alleges that her employer was Bill. He says that, commencing in 2000, Jodie was employed by a partnership of two partners: himself and Picardy Pty Ltd ('the Company').

b. Jodie's claim is for unpaid annual leave of $62,602.84 as provided under the *Minimum Conditions of Employment Act 1993* (WA) ('MCE Act') and for unpaid long service leave of $13,567.21 as provided for under the *Long Service Leave Act 1958* (WA) ('LSL Act'). Bill defends the claim on several alternative grounds. One of those grounds, that Jodie signed a settlement deed in September 2013 releasing Bill from employment related claims, is the basis for Bill's application for summary judgment.

c. The origin of the settlement deed is proceedings commenced by Jodie in the Family Court of WA against Daniel, Bill and Sandra ('the Family Law Proceedings'). Jodie applied for orders that she be granted certain property interests including a partial joint interest with Daniel in the Pemberton Property. The particulars of claim filed by Jodie in the Family Law Proceedings alleged that she had engaged in work at the Pemberton Property without being paid 'commercial wages' or 'long service leave, holiday pay or superannuation entitlements commensurate with the work performed' on the strength of a promise by Bill and Sandra that, if she did that work, she would be granted the property interests she claimed. The Family Law Proceedings ended when consent orders were made in September 2013 reflecting a 'deed of settlement and release' ('the Settlement Deed') executed by Bill, Sandra, Daniel, Jodie and the Company. The Settlement Deed includes the following clause ('Jodie's Release Clause'):

> ***6.1 Release by Jodie*** *Jodie releases and Discharges William, Sandra, Daniel, the Company and the Partnership from any claim, action, demand, suit or proceeding for damages, debt, restitution, equitable compensation, account, injunction, specific performance or other remedy that Jodie has, or might have but for this Deed, in respect of the claims made by Jodie in the Proceedings, arising out of her employment by the Partnership and her appointment as a director of the Company, whether arising at common law, in equity or under statute or otherwise.*

d. Jodie's claims against Bill, unarguably, arise under statute (i.e. the MCE Act and the LSL Act) and, unarguably, are claims that fall within the description of claims for an 'other remedy' being claims for payments and penalties as provided in those statutes. Bill's application for summary dismissal of Jodie's claim will not be granted unless I have a high degree of certainty that Jodie's claim against Bill is a claim that falls within either of the following descriptions (adopting the language of Jodie's Release Clause):
    (i) in respect of claims made by Jodie in the Family Law Proceedings ('the Family Law Claim Issue');
    (ii) or arising out of her employment by a partnership comprised of Bill and the Company ('the Partnership Issue').
e. **The Family Law Claim Issue.** A reasonable bystander would understand the reference to 'the claims made by Jodie in the Family Law Proceedings' in Jodie's Release Clause to include allegations by Jodie in the Family Law Proceedings of financial entitlements which are relevant to the orders sought by her in those proceedings. Jodie's allegations in the Family Law Proceedings of a forgone entitlement to 'paid long service leave, holiday pay or superannuation entitlements, commensurate with the work performed' was relevant to her claim for orders based upon estoppel or a constructive trust or restitution in those proceedings. The effect of Jodie's Release Clause is to release and discharge Bill from the claims made in this case. There are no factual disputes or substantial questions of law involved in this conclusion. Her claim will be summarily dismissed.
f. **The Partnership Issue.** Whether the claims made by Jodie in this case were arising out of her employment of a partnership of Bill and the Company, would require a finding that Jodie was an employee of the partnership. It is impossible for this court on a summary judgment application to make a finding on the identity of Jodie's employer without the benefit of evidence to fill the 'evidential vacuum' on significant events in March 2000.

The meaning of the phrase 'frivolously or vexatiously instituted'?

3 In ***Commissioner of Police of Western Australia v AM*** [2010] WASCA 163 (S) (Pullin J, Buss J, Le Miere J), the WA Industrial Appeals Court were required to construe s 86(2) of the IR Act which provides that 'costs shall not be given unless, in the opinion of the court, the proceedings have been frivolously or vexatiously instituted or defended'. The following principles emerge from the judgment of Buss J (with whom Pullin J and Le Miere J agreed) at [25] - [36]:

a. The issue is not whether the case is, *in fact*, frivolous or vexatious; the court's power to award costs is enlivened if the case has been frivolously or vexatiously *instituted*.
b. A claim is 'frivolous' if there are no reasonable grounds for the claim.
c. A claim is 'vexatious' if it is instituted with the intention of annoying or embarrassing the respondent or for an impermissible collateral purpose.
d. A claim may be characterised as 'frivolous or vexatious' if, irrespective of the motive of the claimant, the claim is so obviously untenable or manifestly groundless as to be utterly hopeless.
e. A party seeking costs must establish 'something substantially more than either a lack of success, or the prospect of a lack of success', before an unsuccessful party can be held to have frivolously or vexatiously instituted a case.
f. Where the test is satisfied and the power to award costs is enlivened, the court may, nevertheless, having regard to the general policy of [the law] and all the circumstances of the case, decide, in the exercise of its discretion, to make no order as to costs.
g. In forum where there is a general policy of not awarding costs, it will only be 'very rare occasions' that costs will be awarded.

Bill's submissions on costs.

4 On 6 October 2017, Bill's counsel lodged a written submission in support of an order for costs against Jodie ('Bill's Costs Submission'). In summary, the submission:

a. Sets out relevant legal criteria by reference to passages from: ***Commissioner of Police of Western Australia v AM*** [2010] WASCA 163 (S) and ***Tkacz v Watson HJ & Associates*** (2008) 173 IR 113 (Calder IM):

> *there is an obligation on any person who initiates proceedings to take reasonable steps to ascertain whether the proposed … basis of the claim … is actually one which justifies taking the step of initiating proceedings.*

b. States that the institution of the claim was 'frivolous' in that there were no reasonable grounds for the claim or the claim was so obviously untenable that it could not possibly succeed.
c. Under the heading, 'What Jodie knew about the operation of the Jodie Release Clause', sets out certain passages of the Summary Judgment Reasons relevant to the Family Law Claim Issue.
d. Concludes as follows:

> *All of the findings of the Court in relation to the operation of the Jodie Release Clause were ascertainable prior to the institution of the proceedings. … Jodie must have been aware or should have been aware at the time these proceedings were instituted, that the allegations of foregone entitlements which formed the basis of [her claim] were released by operation of the Jodie Release*

> *Clause. … It was clear at the time they were instituted that these proceedings had no reasonable basis and/or were so obviously untenable that they could not possibly succeed.*

Jodie's case was not frivolously instituted.

5 The case turned on the construction of Jodie's Release Clause. Although, there were no factual disputes or substantial questions of law involved, the task of construing the meaning of the clause with respect to the Family Law Claim Issue was not without difficulty. Such difficulty arose primarily from the complexity of the factual *allegations* made in the Family Law Proceedings and the language of the Settlement Deed. The heading 'What Jodie *knew* about the operation of the Jodie Release Clause.' in Bill's Costs Submission is inaccurate. A correct heading would be, 'What a reasonable bystander *knew* about the operation of the Jodie Release Clause.' Indisputably, Jodie's lack of proper remuneration for her work on the Pemberton Property was an aspect of her claim in the Family Law Proceedings and were central to her claim in the proceedings in this court. However, it remained necessary to determine whether her claim in this court had been compromised by the Settlement Deed in the Family Law Proceedings. Bill has been successful on this issue. However, something substantially more than 'success' is required to enliven the discretion to order costs. Jodie argued that the word 'claims' in the phrase 'claims made by Jodie in the Family Law Proceedings' (found in Jodie's Release Clause) was a reference to causes of action alleged in those proceedings (i.e. estoppel, constructive trust and restitution) or to a remedy identified in the Family Law Proceedings. The argument warranted detailed consideration in the Summary Judgment Reasons. It was plausible, 'even if not overburdened with merit' (***Walsgott v Maroochy Shire Council*** [2005] QPEC 12 (Wilson SC DCJ) at [15]). I am not persuaded that the claim was frivolously instituted.

Conclusion

6 I am not of the opinion that the claim was frivolously or vexatiously instituted. It follows that the application for costs will be dismissed.

7 I have been advised that an appeal against the summary dismissal of Jodie's claim is pending. In a communication with the Registry, Jodie's counsel expressed the view that the effect of reg 42 of the Regulations was that Bill's application for costs was to be taken be suspended pending the resolution of the appeal. Regulation 42 states:

> *Judgments suspended A judgment is suspended — (a) until 21 days after the making of the judgment; or (b) if an appeal is lodged with the Full Bench and the Full Bench has not ordered otherwise, until that appeal is heard and determined.*

8 My view is that the lodging of an appeal does not suspend an application for costs consequential upon the judgment. The relevant word in reg 42 is 'judgment'. The suspension of a judgment under appeal is necessary to prevent enforcement proceedings being taken on the judgment and frustrating the appeal process. However, there is a distinction between, on the one hand, 'an application' and, on the other hand, 'a judgment'. The definition of 'judgment' in reg 4, reinforces this distinction. The continuation of an *application* consequent upon a judgment (under appeal) does not trigger any enforcement proceedings and does not risk frustrating an appeal against the judgment. Questions may arise about the effect of reg 42 upon any *order* granting costs where the order follows a judgment under appeal. However, those questions do not arise in this case and, in any event, are unlikely to be questions for this court.

M. FLYNN
INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 01014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MADDISON BUNCE
	APPLICANT
	-v-
	OPTIMAL PHARMACY PLUS BEECHBORO
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 15 DECEMBER 2017
FILE NO/S	U 96 OF 2017
CITATION NO.	2017 WAIRC 01014

Result Application discontinued

Order

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

AND WHEREAS on 9 November 2017, 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* (WA), orders –

THAT this application be, and by this order is, discontinued.

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

2017 WAIRC 00948

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASON BUCHANAN
	APPLICANT
	-v-
	CASH CONVERTERS CANNINGTON
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 20 NOVEMBER 2017
FILE NO/S	U 95 OF 2017
CITATION NO.	2017 WAIRC 00948

Result	Application dismissed
Representation	
Applicant	Mr J Buchanan
Respondent	Mr D Farnsworth

Order

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

AND WHEREAS on 7 September 2017, 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* (WA), orders –

THAT this application be, and by this order is, dismissed.

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

2017 WAIRC 00971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STRAUSS DE VILLIERS
	APPLICANT
	-v-
	EASTERN GOLDFIELDS
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 29 NOVEMBER 2017
FILE NO/S	B 118 OF 2017
CITATION NO.	2017 WAIRC 00971

Result	Application dismissed

Order

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

WHEREAS the Commission convened a conference on 27 October 2017 for the purpose of conciliation and scheduling; and

WHEREAS at the conference, the parties reached agreement to settle the applicant's claim; and

WHEREAS on 27 November 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*; and

WHEREAS the Commission is satisfied that further proceedings are not necessary.

NOW THEREFORE, the Commission, pursuant to the powers conferred by 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 00877

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYUBA DOKTOROVICH
	CLAIMANT
	-v-
	YESOD PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 15 NOVEMBER 2016
FILE NO/S	B 92 OF 2016
CITATION NO.	2016 WAIRC 00877

Result	Claims allowed in part; payments ordered
Representation	
Claimant	In person
Respondent	No appearance

Order

HAVING heard the claimant on her 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 salary and the payment of accrued but unused annual leave upon cessation of employment to which the claimant was entitled under her contract of employment but that any entitlement to superannuation contributions did not arise under the contract of employment;

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

1. In relation to the claim for salary that the respondent forthwith pay to the claimant the sum of $82,432.88 (less tax); and
2. In relation to the claim for accrued annual leave that the respondent forthwith pay to the claimant the sum of $2,978.77 (less tax).

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

2017 WAIRC 00994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEAN EKEROTH
	APPLICANT
	-v-
	CANCER COUNCIL WA
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 11 DECEMBER 2017
FILE NO/S	U 107 OF 2017
CITATION NO.	2017 WAIRC 00994

Result	Application dismissed

Order

This matter is a claim for unfair dismissal referred to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* on 24 August 2017.

The Commission convened conciliation conferences on 2 October 2017 and 29 November 2017. At the conference on 29 November 2017, the parties reached agreement to resolve the matter. In accordance with that agreement, on 7 December 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance.*

The Commission is satisfied that further proceedings are not necessary or desirable in the public interest and orders –

THAT this matter be, and is hereby dismissed.

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

2017 WAIRC 00995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN FRANCIS HAILES
	APPLICANT
	-v-
	CHRISTIAN BROTHERS TRINITY COLLEGE [ABN 49717506377]
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 11 DECEMBER 2017
FILE NO/S	U 146 OF 2017
CITATION NO.	2017 WAIRC 00995

Result Application dismissed

Order

This matter is a claim for unfair dismissal referred to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* on 16 November 2017.

On 5 December 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance* in relation to his claim before this Commission.

The Commission is satisfied that further proceedings are not necessary or desirable in the public interest and orders –

THAT this matter be, and is hereby dismissed.

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

2017 WAIRC 01013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KATHRYN ELIZABETH WEBSTER
	APPLICANT
	-v-
	3B COLLECTIVE PTY LTD T/A ANYTIME FITNESS FREMANTLE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 15 DECEMBER 2017
FILE NO/S	B 122 OF 2017
CITATION NO.	2017 WAIRC 01013

Result Application discontinued

Order

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

AND WHEREAS on 22 November 2017, 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* (WA), orders –

THAT this application be, and by this order is, discontinued.

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

2017 WAIRC 00963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS FONG YEE PANG
	APPLICANT
	-v-
	MR THOMAS RODERICK LANE TRADING AS CHARTWELLS CHARTERED ACCOUNTANTS
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 23 NOVEMBER 2017
FILE NO/S	U 193 OF 2016
CITATION NO.	2017 WAIRC 00963

Result	Application dismissed
Representation	
Applicant	Ms F Y Pang on her own behalf
Respondent	Ms C de Saint Jorre of counsel

Order

WHEREAS this is a claim referred to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* on 25 November 2016; and

WHEREAS at a conference convened on 4 May 2017, the parties reached in principle agreement to settle the matter; and

WHEREAS on 13 November 2017, the respondent informed the Commission that the agreement reached was reflected in a deed executed by both parties, and that all terms of the deed had been met except for the requirement for the applicant to file a *Form 14 – Notice of Discontinuance*; and

WHEREAS on 13 November 2017, the Commission asked the applicant to advise whether there were any matters outstanding in relation to her claim, and that if nothing further was heard from her by close of business Tuesday, 21 November 2017 the Commission would assume that the matter is resolved and dismiss the application; and

WHEREAS no further correspondence has been received from or on behalf of the applicant.

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

THAT this application be, and is hereby dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Alexander Kovalenko	WA Sports Centre Trust	U 113/2017	Commissioner T Emmanuel	Discontinued
Constance Barboutis	Master Plumbers & Gasfitters Association of W.A	U 90/2017	Commissioner D J Matthews	Discontinued
Daniel Martin	A & HK Knights trading as Spot on Print (ABN: 66 593 874 610)	U 143/2016	Commissioner T Emmanuel	Discontinued
Demelza Armstrong	Colin G Waideman Heavy Vehicle Training	B 60/2016	Commissioner D J Matthews	Discontinued
Elizabeth Skevington	Mental Health Commission	U 83/2017	Commissioner T Emmanuel	Discontinued
Elliot Ryan	Shannon Bodeker and Associates Pty Ltd	B 68/2017	Commissioner T Emmanuel	Discontinued
Jane Shin Jeng Khooi	Hands on Computer Training International Pty Ltd ATF The Computer Training Trust T/AS Australian Institute of Commerce & Technology	U 125/2016	Commissioner T Emmanuel	Discontinued
Katherine Gabriel	identitywa	U 55/2017	Commissioner D J Matthews	Discontinued
Kim Vitek	SGS Australia Pty Ltd	B 101/2017	Commissioner D J Matthews	Discontinued
Leanne Dorothy Patricia Boland	Franc Henze	U 85/2017	Commissioner D J Matthews	Discontinued
Mark Darren Richards	Commitie Karlgarin Country Club	U 5/2017	Commissioner D J Matthews	Discontinued
Mr Charles Evans	Mr Rob Branson, Busselton Rewinds	B 177/2016	Commissioner D J Matthews	Discontinued
Mr Mihalj Olman	Department of Corrective Services	U 44/2017	Commissioner D J Matthews	Discontinued
Ms Karen Vivien Malloch	Mr Silvio Brenzi, CEO Shire of Yalgoo	U 105/2017	Commissioner D J Matthews	Discontinued
Rochelle Marea Horvath	Cape Australia Onshore Pty Ltd	B 87/2017	Senior Commissioner S J Kenner	Discontinued
Stanley Graham Wallis	Barry Panizza Barry Panizza Family Trust	U 27/2017	Commissioner T Emmanuel	Discontinued

CONFERENCES—Matters referred—

2017 WAIRC 00864

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00864
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 23 SEPTEMBER 2016, WEDNESDAY, 16 NOVEMBER 2016, FRIDAY, 18 NOVEMBER 2016, FRIDAY, 25 AUGUST 2017, MONDAY, 11 SEPTEMBER 2017
DELIVERED	**:**	THURSDAY, 12 OCTOBER 2017
FILE NO.	**:**	CR 9 OF 2016
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Applicant AND THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

Catchwords	**:**	*Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether dismissal was a proportionate and appropriate penalty for the transit officer's conduct - Whether there has been a loss of trust and confidence - Principles applied - Dismissal of transit officer could never be an appropriate penalty where the factual foundations for the dismissal were overturned and determined against the respondent - Not persuaded that reinstatement to demoted position would be impracticable - Declaration and orders issued*
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Industrial Relations Commission Regulations 2005* (WA)
Result	**:**	Declaration and orders issued
Representation:		
Counsel:		
Applicant	**:**	Mr C Fogliani of counsel
Respondent	**:**	Mr J Carroll of counsel
Solicitors:		
Applicant	**:**	W.G. McNally Jones Staff Lawyers
Respondent	**:**	State Solicitors Office

Case(s) referred to in reasons:

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

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

Case(s) also cited:

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2009] WAIRC 525

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WAIRC 66

Reasons for Decision

Background

1 The issue of "trust and confidence", in cases of unfair dismissal and claims for reinstatement, is an easy one to state, but presents difficulties in practice. The *Industrial Relations Act 1979* (WA) in s 23A(3), (4) and (6), makes it clear that the primary remedy in the event of a finding of unfairness, is reinstatement or re-employment. If an order of reinstatement can be made, it generally should be made. The relevant principles applicable to the power and discretion given to the Commission to make such orders are well settled and were recently summarised by the Full Bench in *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 at par 106. It is unnecessary to repeat those well settled principles. "Impracticable" does not mean impossible but means "not reasonably feasible or reasonably capable of being accomplished on the facts and in the circumstances of the particular case": *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian*

Branch v Public Transport Authority of Western Australia [2017] WASCA 86; (2017) 97 WAIG 431 per Buss and Murphy JJ at par 30.

2 The notion of trust and confidence cannot be used by an employer, unsuccessful in an unfair dismissal case, as a shield, to resist the re-establishment of an employment relationship, without a sound and rational basis. An entrenched attitude of resistance to an employee, based on factual allegations found against an employer, or feelings of discomfort or unease, fall far short of what is required to be established. Such views must be based on rationally probative evidence, be credible, and not be attended by error, supposition, or mistaken opinion.

3 This matter has been remitted to the Commission by the Full Bench to further consider one matter only: whether the dismissal of Mr Merlo as a transit officer was "a proportionate and appropriate penalty for Mr Merlo's conduct": *Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2017] WAIRC 00452; (2017) 97 WAIG 1329. This was said by the respondent to involve a loss of trust and confidence in Mr Merlo, based on the evidence of Mr Italiano. It is important to appreciate from the outset, that contrary to the respondent's further written submissions at par 3, the Commission's reasons for the order that Mr Merlo be reinstated to the demoted position of transit officer level 3 was not because of Mr Merlo's contrition and the fact that demotion had been imposed on another transit officer for deploying OC spray in an unrelated incident. With respect, that submission fails to appreciate the basis for the Commission's decision. Rather, it was for the main reason, as I set out at pars 43 to 46 in my original reasons, that the matters referred for hearing and determination, set out at pars (a) to (j), being the mainstay of the respondent's decision to dismiss Mr Merlo, were determined against the respondent. That is, the respondent was unsuccessful on the merits. These findings and conclusions were not to any extent, disturbed on the appeal. The matters referred to by the respondent at par 3 of its supplementary written submissions, were additional considerations to the Commission's principal findings, which overturned the factual mainstay for its decision to dismiss Mr Merlo.

4 For the following reasons, I am not persuaded by the further written submissions of the respondent as to this matter.

5 The evidence of Mr Italiano at first instance, was based on his views of the primary facts which the Commission found against the respondent; was reliant on a disciplinary history record that contained factual errors; that failed to have regard or proper regard to the uncontested evidence that Mr Merlo was a competent transit officer with integrity; which seemed to rely upon an assertion that Mr Merlo "would work his way through the Transit Officer's Manual", based on some prior incidents that failed to have regard to their specific circumstances and contexts; and, that he had some reservations as to Mr Merlo's temperament (pp 85-91t). I affirm my decision at first instance that Mr Merlo be reinstated to a transit officer level 3 position without loss. This is a result on the evidence which, in my view, is just and equitable. In my opinion, the dismissal of Mr Merlo could never be an appropriate penalty for Mr Merlo's conduct in this case, where the factual foundation for Mr Merlo's dismissal, at least in the most part, being the events of November 2015, were overturned and determined against the respondent.

Preliminary issue

6 At a mention on 11 September 2017, the parties provided to me a letter of 7 September 2017 referring to an alleged incident regarding Mr Merlo, involving the changing of a video hard drive in the cab of a train. The respondent maintained that because of this matter, the Commission should defer further consideration of its final decision in relation to Mr Merlo, pending the process under the relevant industrial agreement. It was common ground that this process could take months to be completed.

7 The Commission was not persuaded there should be any further delay of this matter. An unresolved and untested allegation, in my view, unrelated to the issue before the Commission as to whether the dismissal of Mr Merlo was an appropriate or proportionate response to his conduct nearly two years ago, should not, given the Commission's obligation to deal with matters of the present kind with all due speed under s 22B of the Act, cause any further delay. To do so would be quite contrary to equity and good conscience. Furthermore, given that the process set out in the industrial agreement has not run its course, and as at the time of the further written submissions, Mr Merlo had not even had an opportunity to respond to the matters raised in the respondent's letter of 7 September 2017, it would be inappropriate to defer the final consideration of the matters before the Commission at first instance. Ultimately, whatever arises from the most recent events, will take their course and the parties will be able to exercise their respective rights under the industrial agreement.

Dismissal letter

8 Whilst I did not set it out in my initial reasons for decision, given the issues now arising on these remitted proceedings are narrowly focussed, it may assist to set it out. The letter, from Mr Italiano dated 8 June 2016, which is quite lengthy, was in the following terms:

> **Final Determination on Discipline Finding and Penalty: Clause 2.11 of the *Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2015***
>
> I refer to the Investigation Report No. I0039/15 into the allegation that you used excessive force in regards to the manner in which you deployed Oleoresin Capsicum (OC) spray on a 12 year old juvenile.
>
> **Final Determination on Alleged Breaches of Discipline**
>
> Having reviewed the evidence and having regard to:
>
> - your memorandum responding to the first notification dated 3 December 2015;
> - the Investigation Report;
> - correspondence to you from the Principal Consultant Labour Relations, Ms Anita Ryan dated 10 May 2016 advising of potential adverse findings and proposed penalty;
> - your letter dated 21 May 2016 responding to that advice;
> - your past employment history which includes:
>   - disciplinary matters of

- 18 November 2011 - Warning - Failure to follow direction - Parking on PTA property whilst not rostered on shift
- 2 December 2011 - Reprimand - Breach of Transit Officers Operations Manual (the Operations Manual) - Failure to submit an action report, request CCTV footage and use of force
- 23 January 2013 - Counselled - Breach of Operations Manual - Off PTA Property
- 15 October 2014-Warning - Breach of Operations Manual - Punctuality
- 28 October 2014 - Counselled - Breach of Operations Manual - Security Officers Purpose
- 17 February 2016-Warning - Breach of Operations Manual - Station Duties

o performance development - My Action Plans dated

- 5 March 2013
- 17 February 2014
- 28 July 2014
- 8 July 2015

- your length of service (since commencing on 3 September 2010) and progression through the Transit Officer salary increments;
- when you last undertook Defensive Tactics Refresher Training;
- our evening meeting of 26 May 2016 where you nominated Transit Line Supervisors Mr Lee Crane and Mr Steve Svirac as character references; and
- Mr Crane and Svirac's written references:

it is my task as the nominee of the Chief Executive Officer to make a final determination on the allegation that you committed breaches of discipline.

I find, and you later admitted, that you have engaged in breaches of discipline on 7 November 2015 on the Eastern Concourse at Perth Railway Station when you used excessive force by deploying OC spray at (name omitted) off PTA property, therefore breaching *Sections 3.17- Carriage and Use of OC Spray, 3.18- Off PTA Property* and *7.10 - Use of Force* of the *Transit Officer Operations Manual.*

Considerations Relevant to Imposition of Revised Penalty

Having determined that you have committed breaches of discipline, I must now decide which if any penalty should be applied.

The penalties available to be imposed as disciplinary action in response to a breach of discipline include those available at *Clause 2. 11.21* of the *Public Transport Authority/ ARTBIU (Transit Officers) Industrial Agreement 2015* (the Industrial Agreement). These include:

a) No penalty;

b) A reprimand (which may include a final reprimand);

c) Deferring the payment and anniversary date for annual increments by a period not exceeding six months;

d) A permanent or temporary transfer to another location within the PTA or to another employment position within the PTA, including to a position to which this agreement does not apply;

e) A permanent or temporary demotion or reduction to a lower increment or to a lower grade or position to which this agreement applies;

f) A permanent or temporary demotion to another position to which this agreement does not apply; and/or

g) Dismissal.

In Ms Ryan's correspondence of 10 May 2016, the Labour Relation Division recommended I consider dismissal due to the severity of this incident and two previous disciplinary matters for breaches of the Operation Manual relating to:

1) a reprimand for failure to submit an action report, failure to request CCTV footage and excessive use of force on 2 December 2011 and

2) counselling for chasing an offender off PTA property in 23 January 2013.

My decision is again based on the documents and meeting referred to above.

Your service since September 2010 with the PTA is acknowledged.

In considering the appropriate penalty, I note that:

- in your memorandum responding to the first notification you:
  - o deny breaching Section 3.17.3 of the Operations Manual citing that you deployed the OC spray in *"self-defence"* as the POI was actioning to spit at you; and
  - o apologise for any inconvenience or embarrassment this matter may have caused.
- the Investigator, in the Investigation Report, found that:
  - o (name omitted) continually behaved in a disorderly and threatening manner but during the course of his actions did not come onto PTA property.
  - o you were standing behind the barrier fence away from (name omitted) and had sufficient room to extend that gap between him and yourself if you believed he was going to spit at you or may have jumped the barrier fence.
  - o the footage shows (name omitted) remained behind the barrier fence and whilst he was behind the barrier fence, feigned a movement towards you and you reacted to that movement.

- as a result of his action, you deployed your OC spray, striking him in the facial area whilst he remained off PTA property. Furthermore, you stepped towards him thus closing the distance between you and him.
- You cannot use force to stop somebody coming onto PTA property if they are off property.
- given the instruction in the Operations Manual, you deployed OC spray when (name omitted) was off PTA property and the use of the OC spray was not in accordance with the Operations Manual and as such the force used by you could be considered excessive.

• in your letter responding to the potential adverse findings and proposed penalty correspondence dated 21 May 2016, you state that:

- with the benefit of hindsight, you would not have deployed your OC spray at him.
- you have gained a greater appreciation of how critical it is to be aware of PTA boundaries.
- you could have handled the incidence better, given his threats, increased the distance between yourself and (name omitted).
- you recognise *"that self-improvement is essential to being a good employee and will continue to try to improve my own practices and understanding"* as well your willingness to undergo retraining and participate in performance management if a lesser penalty than dismissal is considered.

At our meeting of 26 May 2016, we discussed that the four additional disciplinary matters and four My Action Plans listed above would be used to form part of my understanding of your past pattern of behaviour, conduct and service to assess the appropriate penalty.

When discussing what type of worker you have been and why you should keep your job, you invited me to seek character references from your Midland Transit Line Supervisors, Mr Lee Crane and Mr Steve Svirac. I have received written advice from them on your ability to perform as a Transit Officer and they have not provided me with any additional information to dissuade me from the recommended penalty.

I have considered the matters you raised in your letter of 21 May 2016 and during our meeting, including the impact a decision to dismiss would have on you and your family, noting what you have told me about your two dependant children and mortgage.

In the end, however, when considering whether dismissal is a proportionate and reasonable response after taking into account and weighing up all of these circumstances, I consider this latest lapse in judgement justifies your dismissal, noting that your actions during the incident exacerbated this situation, leading to your subsequent deployment of OC spray.

When viewing this incident in the context of you past employment record, I have concluded that you have demonstrated that you are not suitable for continued employment as a Transit Officer. Regrettably, I am not persuaded that allowing you another reprieve is likely to prevent a recurrence of such conduct.

Having taken all these matters into account, I have therefore decided that dismissal is the appropriate penalty in all the circumstances. This penalty is being imposed in accordance with Clause *2.11.21 g)* of the Industrial Agreement.

Our established procedures are designed for the safety of our employee and patrons. Compliance with them is not optional.

It is an outcome that I regret and sincerely wish you will (sic) in your endeavors to find suitable employment elsewhere.

Conclusion

Your employment is terminated effective from 5:00pm on 8 June 2016.

You are not required to return to duty on 10 June but are required to return all PTA property including your equipment and uniform, your SmartRider card and your building access cards to the Transit Manager Security.

You will be paid a further 5 weeks' wages in lieu of notice and your outstanding leave entitlements.

Following the return of your PTA property, the payment will be made to your nominated bank account.

The PTA's Employee Assistance Program will remain available to you for counselling and support for a further 5 weeks from your termination. The provider is contactable on 1300 687 327.

In addition, the PTA will arrange and pay for a career transition session with our nominated provider to be accessed prior to 8 September 2016. Ms Ryan will be in contact with you to supply further information on this option.

If you have any questions arising from this letter, please contact Ms Ryan in the PTA's People and Organisation Development Division, on 9326 3992.

(name omitted)

9 The factual allegations against Mr Merlo, as referred to in the letter as being contained in the Investigation Report, to the extent that they were overturned by the findings and conclusions of the Commission in respect of the matters referred for hearing and as set out at par 4(a) to (j) of my initial reasons, subject to one qualification, must be disregarded. The qualification I make is that it was clear to me, from observing Mr Italiano when giving his evidence, that those matters in respect of which Mr Italiano had difficulty accepting Mr Merlo's version of events or where Mr Italiano had a different view to Mr Merlo, despite the subsequent findings by the Commission, coloured Mr Italiano's impression of Mr Merlo in terms of whether he could have trust and confidence in Mr Merlo occupying the position of a transit officer in future. I will return to this later in these reasons.

Performance development matters

10 I consider first, what are described in the letter as matters of "performance development" (see 87t and applicant's further written submissions at p 6). Some four of the "My Action Plans" were in evidence and referred to in Mr Italiano's letter of 8 June 2016. He said they were considered by him in his decision to dismiss Mr Merlo. Mr Italiano was taken through each of

them in his evidence. I considered them briefly in my initial reasons at par 20. I did so briefly because no issues of substance arose from them on Mr Italiano's evidence. These documents seemed to be performance review type procedures.

11 As to the 2013 MAP (exhibit 1 tab 19), it recorded that Mr Merlo was a competent transit officer. Mr Merlo was spoken to by his supervisor over the 12-month period about some improvements and Mr Merlo's response to do so. Mr Italiano had no issues with this. The next MAP was in February 2014 (exhibit A1 tab 20). In this, all boxes were ticked "yes", in terms of Mr Merlo meeting all expectations. The only notation was to the effect that Mr Merlo was late to work on three occasions in 12 months. Mr Italiano had no issue arising from this and agreed that the conclusion was that Mr Merlo was a competent transit officer.

12 In 2014 two MAPS took place, one in February and the other in July (exhibit A1 tab 21). There was reference again to Mr Merlo as being a competent transit officer. The same reference to lateness was in relation to the prior MAP in 2013 and not any new incident. Mr Italiano did not cavil with the description of Mr Merlo's performance when it was put to him in his evidence as having "done well". A further MAP was completed in July 2015 (exhibit A1 tab 22). Mr Merlo met all expectations and the overall comment from his manager was that Mr Merlo was "competent and a capable Transit Officer and can be relied upon to complete assigned tasks and is respected by both his Colleagues and his Supervisors". A note was made that Mr Merlo was spoken to about the way he spoke to other staff members and the outcome was described as "issue resolved". Mr Italiano did not take any issue with these conclusions and described the manner of speaking to other staff as a "local matter". I observe in passing that this MAP assessment, and the comments I have just referred to, were made only a few months prior to the incident in November 2015, which lead to Mr Merlo's dismissal.

13 Overall, as noted above, Mr Italiano had no concerns with trust in Mr Merlo from the MAPS and the only issue of three instances of a lack of punctuality, had been addressed.

Disciplinary matters

14 Mr Italiano was then taken through the references to "disciplinary matters" in the letter of 8 June 2016. The first refers to August 2011 when Mr Merlo and two other off duty transit officers parked their private vehicle in a secure compound at the respondent's Guildford Training Facility. Mr Merlo admitted this conduct and received a written warning on 18 November 2011. Mr Merlo provided an explanation for his conduct. Mr Italiano had no recollection of this incident. However, he said that it was part of his decision making as Mr Merlo should have known not to park at that location. Mr Merlo explained that he had not been on the job for long (a little over 12 months) and was not aware of the rule in this respect. There was no repeat of this behaviour. The respondent submitted that this showed Mr Merlo was "unable to follow simple directions".

15 The next matter referred to in the letter was a reprimand in December 2011 for failing to submit a form as required by the Manual to report the use of force on a person at Bassendean Railway Station on 31 August 2011 and to request CCTV footage. Mr Italiano said this was a breach of the Manual. In this same matter, Mr Merlo was also accused of using unnecessary and excessive force on a patron by "checking" him backwards. This was found to be unsubstantiated. The failure to accurately record this in the dismissal letter is a matter I will comment on below. As to the failure to lodge the forms, Mr Merlo accepted an action report was not completed and the request for CCTV footage was not made. Whilst submissions were made by the respondent in the further written submissions about the importance of recording such events, this was not the evidence from Mr Italiano. Whilst I do not suggest these matters are trifling by any means, his concern appeared to be the breach of the Manual per se, albeit it was not the same kind of incident that occurred in November 2015. Again however, there was no repeat of such an event.

16 In January 2013 Mr Merlo received a caution in relation to an incident where Mr Merlo and his partner left the respondent's property at the Bassendean Railway Station to restrain a person acting in a disorderly fashion. Mr Merlo's evidence was the person was acting in a disorderly fashion towards himself and his partner. He was also concerned about the risk to the person from passing traffic. The respondent in the correspondence acknowledged that this was the first occasion that Mr Merlo was involved in this sort of incident and he had the best of intentions in acting as he did. Whilst Mr Italiano said in his evidence that he regarded this as "another breach" (of the Manual), context is very important. This was recognised by the respondent itself in its letter to Mr Merlo of 23 January 2013, advising of the outcome of the matter. Whilst Mr Italiano seemed in his evidence, to aggregate all such occurrences together as examples of "breaches of the Manual", I do not consider this view to be soundly based. It is more nuanced than that. Each incident needs to be considered on its own merits.

17 The respondent in its further written submissions, described this matter as a "serious incident". However, after the matter was investigated at the time and the circumstances considered, the Manager of Investigations determined the appropriate response was simply a caution, which does not rank on the disciplinary scale of penalties in the Agreement. If it was really seen as such a serious matter at the time, one would expect to have seen a substantial penalty imposed.

18 Some 19 months later, in October 2014, Mr Merlo was late to work because he misread his roster. Mr Merlo acknowledged the error, apologised and said that it would not reoccur. This was recognised by the respondent in its warning letter issued to Mr Merlo. Mr Italiano said he took this into account. Mr Italiano also seemed to acknowledge that this was a case of inadvertence rather than anything more serious. Mr Italiano also acknowledged that there have been no other punctuality issues with Mr Merlo since this time.

19 In the same month in late October 2014 (exhibit A1 tab 17), an incident occurred where a patron was riding on the coupling between two trains. When the train was arriving at the Maylands Railway Station, Mr Merlo was working with his transit officer partner. The patron jumped off the coupling and entered the train. Mr Merlo endeavoured to deal with the offender however, his partner on that occasion, when Mr Merlo pointed out the offending conduct, declined to assist him by having the train stopped. Again, no disciplinary action was recorded, although a record of the matter was placed on Mr Merlo's personal file. Despite it appearing under the heading of "disciplinary matters", in Mr Italiano's letter of 8 June 2016, as with the "off property" incident on 28 October 2014, no formal discipline was taken against Mr Merlo. Mr Italiano also conceded in his evidence, given that Mr Merlo's partner on that occasion failed to assist him, there was very little that Mr Merlo could have done about the situation. Despite this, in his response, Mr Merlo apologised for his actions. In my view, this incident could not be reasonably regarded as failure by Mr Merlo to perform his duty.

20 Again, as with some of the other matters referred to above, the context of this incident is important.

21 Finally, some 16 months later, in February 2016, Mr Merlo received a warning for staying in the Transit Office because of a health problem. The warning acknowledged that this was the first occasion of an event of this type involving Mr Merlo. Mr Italiano acknowledged that Mr Merlo should have informed his supervisor of what had occurred. Mr Merlo freely accepted his error and as Mr Italiano put it in his evidence, Mr Merlo "took the rap". There was no suggestion that Mr Merlo's health problem was not genuine. His error was simply failing to inform his supervisor at the time.

22 In addition to the matters I have referred to above, the letter of dismissal, on which the respondent relied, contained some errors. Firstly, as I have already mentioned, some of the events referred to under the heading "disciplinary matters", did not involve disciplinary action. Secondly, the reference on p 2 in the second paragraph to the use of excessive force, although not upheld by the Commission on the evidence, erroneously referred to a breach of s 3.18 of the Manual, as the offender "A" did not commit any alleged offence on the respondent's property. This was acknowledged by Mr Italiano in the proceedings. Thirdly, the reference, also on p 2 of the letter, to Ms Ryan's earlier letter of 10 May 2016, recommending to Mr Italiano that he consider the dismissal of Mr Merlo, including because of his "excessive use of force on 2 December 2011", was erroneous. Mr Merlo was not disciplined for this and no such finding was made.

23 The respondent made a further submission that Mr Italiano was aware of this when, in his cross-examination, the original disciplinary letter of 2 December 2011 was put to him. Several things must be said about this. Firstly, Mr Italiano was only asked about the original disciplinary letter of 2 December 2011 and not his letter of dismissal of 8 June 2016 at the time it was written or signed, which referred to Ms Ryan's letter containing the error and the Labour Relations Division recommendation that Mr Merlo be dismissed for reasons including the previous (erroneous) finding of the use of excessive force. Secondly, the dismissal letter plainly said that Mr Italiano based his decision on "the documents", which must have included Ms Ryan's letter recommending dismissal, provided to him at the time, and his meeting with Mr Merlo. Thirdly, there was no evidence from Mr Italiano that at the time of his actual decision to dismiss Mr Merlo, based on the matters set out in his letter of 8 June 2016 and Ms Ryan's earlier letter, he was aware of and took account of the error in Mr Ryan's recommendation letter to him. Fourthly, there was no reference to this error being raised in Mr Italiano's meeting with Mr Merlo, or any subsequent correction of the letter of dismissal or retraction of what, at the end of the day, was quite a serious (but erroneous) allegation against Mr Merlo.

24 Indeed, the letter of dismissal is quite to the contrary. On p 3, in the fourth last paragraph, it refers to Mr Italiano's meeting with Mr Merlo and that the "four additional disciplinary matters…listed above would be used to form part of my understanding of your past pattern of behaviour, conduct and service to assess the appropriate penalty". Finally, too, this erroneous prior allegation of the excessive use of force was also in the same vein as the allegation of the excessive use of force in the incident on 7 November 2015, leading to Mr Merlo's dismissal, that was not established on the evidence, and decided against the respondent. These issues all taken together were plainly relied on by the Labour Relations Division in its recommendation to Mr Italiano that Mr Merlo be dismissed.

25 I do not therefore think it is open for the respondent to sweep this issue aside as simply a typographical error in the letter of dismissal of 8 June 2016, that did not have any effect on the respondent's decision to dismiss Mr Merlo. The objectively verifiable evidence of events at the time the decision to dismiss was made, is to the contrary.

26 In my opinion, taking these matters together, coupled with the need to consider the context of the prior incidents, and the time periods between them, did not provide a rational and sound basis to support Mr Italiano's decision to dismiss Mr Merlo. This is, obviously, despite the most fundamental aspect of this case, that being that the main allegations against Mr Merlo at pars (a) to (j) of the matters referred for hearing, being determined against the respondent in any event.

27 As to the trust and confidence issue also, as I have already mentioned, apart from the issues I have already dealt with above, and additionally, as a matter of impression and judgement, Mr Italiano seemed to have formed a negative assessment of Mr Merlo, because he did not accept some explanations given by Mr Merlo as to some of the central factual contentions in this case, or alternatively, Mr Italiano preferred an alternative explanation. These were set out in the applicant's further written submissions at pp 10-15. I do not propose to set them out in detail. Suffice to say in relation to these issues, as the Commission determined on the evidence against the respondent's position on these contentions, and none of them having been disturbed on appeal, they cannot be relied upon now.

28 Overall, as I found in my earlier reasons and as expressed in summary form, the MAPS supported Mr Merlo as a competent transit officer and Mr Italiano accepted that Mr Merlo was a person of integrity. This also seemed to be the view of his managers and supervisors, at least as set out in the MAPS. Despite the errors in the letter of dismissal of 8 June 2016, the matters of a truly disciplinary nature, were largely "one off incidents", for which reasonable explanations were advanced by Mr Merlo. There was no suggestion of any repeat of such behaviours by Mr Merlo. In addition, some of the incidents were well in the past by the time the incident of 7 November 2015 occurred. In these circumstances, I consider that the reinstatement of Mr Merlo to the demoted position of a Transit Officer Level 3, is reasonably feasible or reasonably capable of being accomplished.

Conclusion

29 Having regard to the foregoing, I do not consider that Mr Italiano's express loss of confidence in his letter of 8 June 2016 was rationally and soundly based. Having said that, I accept that the level of trust and confidence necessary for the position of a transit officer with the respondent needs to be high. I am not persuaded that the respondent has discharged the burden on it to establish that it would be impracticable to reinstate Mr Merlo to a transit officer position. There was no suggestion on the evidence or in the further written submissions, that the attitude of Mr Merlo towards the respondent was such that a transit officer position should or could not be occupied by him. The evidence was quite to the contrary.

30 There is one final matter on which I wish to comment. The Commission's original declaration and order of 13 February 2017 ordered the respondent to reinstate Mr Merlo as a transit officer level 3 in accordance with the *Public Transport Authority / ARTBIU (Transit Officers) Industrial Agreement 2015*. The orders also required Mr Merlo to be paid his remuneration and

benefits lost from the date of his dismissal to the time of his reinstatement and all service to be deemed continuous for benefit purposes. At the directions hearing initially held on 25 August 2017, the Commission was informed that the parties had "agreed", despite the terms of the Commission's order, that Mr Merlo be placed in a position in the Video Monitoring Room of the respondent. Mr Merlo was not reinstated to a transit officer level 3 position nor was he compensated for his loss, as required by the Commission's order. This was not a proper course for the parties to adopt.

31 There was no application brought by the respondent to stay the Commission's order of 13 February 2017. The institution of an appeal to the Full Bench does not constitute a stay of an order of the Commission and such is made clear by the terms of the Act and the Regulations: s 49(11) and reg 102(6) and (7) *Industrial Relations Commission Regulations 2005* (WA). It is not for the parties to "agree" to not comply with an order of the Commission. Only the Commission may relieve a party of an obligation to comply. The effect of this course is that the respondent, from 13 February 2017 to 21 July 2017, the date of the order of the Full Bench, was in breach of the Commission's order.

32 Irrespective of my conclusions set out above, there is no basis now for the respondent to submit to the Commission in the alternative, that Mr Merlo should be permanently transferred to the position that the Commission understands Mr Merlo has been in since February 2017. I reject this contention. Not only should a party not be able to gain an advantage from its non-compliance with an order of the Commission, in contested proceedings, but in any event, the respondent has not persuaded me that reinstatement to a demoted transit officer level 3 position would, in all the circumstances, be impracticable.

33 A declaration and orders now issue.

2017 WAIRC 00867

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 16 OCTOBER 2017
FILE NO/S	CR 9 OF 2016
CITATION NO.	2017 WAIRC 00867

Result	Declaration and orders issued
Representation	
Applicant	Mr C Fogliani of counsel
Respondent	Mr J Carroll of counsel

Declaration and Orders

HAVING heard Mr C Fogliani of counsel on behalf of the applicant and Mr J Carroll of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby –

(1) DECLARES that the dismissal of Mr Stefano Merlo by the respondent on 8 June 2016 was harsh, oppressive and unfair.

(2) ORDERS that the respondent forthwith reinstate Mr Merlo as a Transit Officer Level 3 in accordance with the Public Transport Authority / ARTBIU (Transit Officers) Industrial Agreement 2015.

(3) ORDERS that Mr Merlo be paid an amount in respect of remuneration lost from the date of his dismissal to the date of his reinstatement in accordance with the rate of pay, entitlements and benefits applicable to the position of a Transit Officer Level 3.

(4) ORDERS that Mr Merlo's service with the respondent otherwise be deemed continuous for all benefit purposes.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation Industrial Union of Workers Perth	WA Country Health Service	Emmanuel C	C 29/2017	20/09/2017	Dispute re disciplinary action of union member	Discontinued
The Australian Rail, Tram and Bus Industry Union of Employees West Australian Branch	Public Transport Authority of Western Australia	Matthews C	C 17/2017	01/06/2017	Dispute re alleged findings	Discontinued
WA Prison Officers Union of Workers	Minister for Corrective Services Department of Justice	Matthews C	C 24/2017	N/A	Dispute re work conditions	Dispute re work conditions

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00996

THE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

APPLICANT

-v-

SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE TUESDAY, 12 DECEMBER 2017
FILE NO/S APPL 86 OF 2017
CITATION NO. 2017 WAIRC 00996

Result Order issued
Representation (by correspondence)
Applicant Mr D Rafferty
Respondent Mr N Tindley (of counsel)
The Pharmacy Guild of Western Australia Organisation of Employers Mr A Drake-Brockman (as agent)

Order

WHEREAS the Shop, Distributive and Allied Employees' Association of Western Australia (**SDA**) filed a notice of application on 3 November 2017 for a declaration that the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (**the award**) applies to all workers employed in the pharmacy and chemist shop industry;

AND WHEREAS Mr Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth filed a notice of answer saying the award does not apply to the pharmacy assistant employees at Chemist Warehouse Perth;

AND WHEREAS on 30 November 2017 the Pharmacy Guild of Western Australia Organisation of Employers (**PGWA**) sought leave to intervene in application APPL 86 of 2017 because its members are affected by, and have sufficient interest in, these proceedings. The PGWA says it represents the industrial interests of retail pharmacy operators who are non-constitutional corporations and it has extensive knowledge of the retail pharmacy industry in Western Australia;

AND WHEREAS the parties do not oppose the PGWA's notice of intervention;

AND WHEREAS a person whose rights will be directly affected by an order made by a court must be given a full and fair opportunity to be heard: ***Re Ludeke; Ex parte the Customs Officers' Association of Australia, Fourth Division*** [1985] HCA 31; (1985) 155 CLR 513 (520) (Gibbs CJ);

AND WHEREAS the Commission considers that the declaration sought by the SDA in application APPL 86 of 2017 would directly affect the PGWA's members' legal rights and obligations;

AND WHEREAS the Commission is satisfied the PGWA has sufficient interest in the matter and allowing the PGWA to intervene is unlikely to result in unfairness to any party;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders -

THAT the Pharmacy Guild of Western Australia Organisation of Employers be granted leave to intervene in application APPL 86 of 2017.

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

2017 WAIRC 01008

WESTERN AUSTRALIAN PHARMACY ASSISTANTS AWARD 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PHARMACY GUILD OF WESTERN AUSTRALIA (ORGANISATION OF EMPLOYERS), ROYAL STREET CHEMMART PHARMACY GREG'S DISCOUNT CHEMIST CANNING BRIDGE, KOJONUP PHARMACY
	APPLICANTS
	-v-
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 13 DECEMBER 2017
FILE NO/S	A 1 OF 2014
CITATION NO.	2017 WAIRC 01008

Result	Name of applicant amended
Representation (by correspondence)	
Applicants	Mr A Drake-Brockman (as agent)
Respondent	Mr D Rafferty

Order

WHEREAS this is an application for a new award under the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 12 December 2017 the applicants requested that Greg's Discount Chemist Canning Bridge be removed as an applicant in this matter;

AND WHEREAS the respondent does not oppose the removal of Greg's Discount Chemist Canning Bridge as an applicant in this matter;

AND HAVING heard from the parties, the Commission is satisfied that it is appropriate to remove Greg's Discount Chemist Canning Bridge as an applicant in this matter;

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

THAT Greg's Discount Chemist Canning Bridge be removed as an applicant in this matter.

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

2017 WAIRC 01018

WESTERN AUSTRALIAN PHARMACY ASSISTANTS AWARD 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PHARMACY GUILD OF WESTERN AUSTRALIA (ORGANISATION OF EMPLOYERS), ROYAL STREET CHEMMART PHARMACY, KOJONUP PHARMACY
	APPLICANTS
	-v-
	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 15 DECEMBER 2017
FILE NO/S	A 1 OF 2014
CITATION NO.	2017 WAIRC 01018

Result	Name of applicant amended
Representation (by correspondence)	
Applicants	Mr A Drake-Brockman (as agent)
Respondent	Mr D Rafferty

Order

WHEREAS this is an application for a new award under the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 13 December 2017 the applicants requested that the name of the applicant 'Royal Street Chemmart Pharmacy' be amended to 'Royal Street Community Pharmacy';

AND WHEREAS the respondent does not oppose this amendment;

AND HAVING heard from the parties, the Commission is satisfied that it is appropriate to amend the name of the applicant 'Royal Street Chemmart Pharmacy' to 'Royal Street Community Pharmacy';

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

THAT the name of the applicant 'Royal Street Chemmart Pharmacy' be amended to 'Royal Street Community Pharmacy'.

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

2017 WAIRC 00942

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS KATHLEEN POSKITT
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 15 NOVEMBER 2017
FILE NO.	PSA 94 OF 2013
CITATION NO.	2017 WAIRC 00942

Result	Direction issued
Representation	
Applicant	Ms P Marcano (as agent)
Respondent	Mr J Ross (as agent)

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the applicant and Mr J Ross (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 6 December 2017.
2. THAT the applicant file and serve a written statement of facts on which the applicant relies and witness statements by 17 January 2018.
3. THAT the respondent file and serve a written statement of facts on which the respondent relies and witness statements by 8 February 2018.
4. THAT this matter be listed for hearing after 19 February 2018.

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

2017 WAIRC 00943

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS ANDREA BLAZEVICH
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 15 NOVEMBER 2017
FILE NO.	PSA 95 OF 2013
CITATION NO.	2017 WAIRC 00943

Result	Direction issued
Representation	
Applicant	Ms P Marcano (as agent)
Respondent	Mr J Ross (as agent)

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the applicant and Mr J Ross (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 6 December 2017.
2. THAT the applicant file and serve a written statement of facts on which the applicant relies and witness statements by 17 January 2018.
3. THAT the respondent file and serve a written statement of facts on which the respondent relies and witness statements by 8 February 2018.
4. THAT this matter be listed for hearing after 19 February 2018.

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

2017 WAIRC 00944

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS MARIA CALMA
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 15 NOVEMBER 2017
FILE NO.	PSA 96 OF 2013
CITATION NO.	2017 WAIRC 00944

Result	Direction issued
Representation	
Applicant	Ms P Marcano (as agent)
Respondent	Mr J Ross (as agent)

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the applicant and Mr J Ross (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 6 December 2017.
2. THAT the applicant file and serve a written statement of facts on which the applicant relies and witness statements by 17 January 2018.
3. THAT the respondent file and serve a written statement of facts on which the respondent relies and witness statements by 8 February 2018.
4. THAT this matter be listed for hearing after 19 February 2018.

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

2017 WAIRC 00945

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS DONHA EDWARDS
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 15 NOVEMBER 2017
FILE NO.	PSA 97 OF 2013
CITATION NO.	2017 WAIRC 00945

Result	Direction issued
Representation	
Applicant	Ms P Marcano (as agent)
Respondent	Mr J Ross (as agent)

Direction

HAVING heard Ms P Marcano (as agent) on behalf of the applicant and Mr J Ross (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 6 December 2017.
2. THAT the applicant file and serve a written statement of facts on which the applicant relies and witness statements by 17 January 2018.
3. THAT the respondent file and serve a written statement of facts on which the respondent relies and witness statements by 8 February 2018.
4. THAT this matter be listed for hearing after 19 February 2018.

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

2015 WAIRC 01026

DISPUTE RE TERMS AND CONDITIONS OF EMPLOYMENT

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	COMMISSIONER S J KENNER
DATE	TUESDAY, 17 NOVEMBER 2015
FILE NO.	PSAC 13 OF 2015
CITATION NO.	2015 WAIRC 01026

Result	Recommendation issued
Representation	
Applicant	Mr S Bibby
Respondent	Ms T Sweeney of counsel

Recommendation

WHEREAS on 3 July 2015 the Association made an application to the Arbitrator for a compulsory conference in relation to a dispute between it and the Department of Health concerning part time anaesthetists employed at Fiona Stanley Hospital;

AND WHEREAS issues then in dispute concerned the terms of the part time contracts of employment for the affected employees under cl 25 of the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013 and an alleged failure by the Department to provide clinical time to practitioners under cl 20(3) of the Agreement;

AND WHEREAS an initial conference was convened on 9 July 2015. A further compulsory conference was convened on 9 October 2015. At that conference the Arbitrator was informed that a number of anaesthetists had accepted employment at Fiona Stanley Hospital working on a part time basis under part time contracts of employment under the Agreement. The Department proposed that anaesthetists employed at Fiona Stanley Hospital engaged to work on a 0.8 FTE basis would be required to work at the hospital, and be paid for, 64 hours per fortnight, despite any previous arrangements with the practitioner. Previous arrangements included practitioners working 60 hours per fortnight in the hospital and undertaking non-clinical duties off site.

AND WHEREAS the Arbitrator was further informed that practitioners have not been provided with the correct amount of non-clinical time, representing 20% of their duties, as required by cl 23 of the Agreement. Additionally, the Association maintained that if the practitioners are to now work 64 rostered hours per fortnight in accordance with their contracts of employment, then they should receive flexibility from the Department in order to be able to undertake some or all of their non-clinical duties away from the hospital site. This was opposed by the Department;

AND WHEREAS at the compulsory conference on 9 October 2015, the Arbitrator requested the parties to undertake an assessment of non-clinical duties performed by practitioners, and the rostered time allocated for these purposes. Furthermore, the Department was requested to respond to the issues raised by the Association on 6 August 2015, in relation to continuing professional development activities and the Association's proposal regarding the performance of non-clinical duties off-site;

AND WHEREAS a further compulsory conference was convened on 16 November 2015. At the conference the parties referred to their contentions in relation to the current allocation of non-clinical duties as set out by the Association on 19 October 2015 and in reply by the Department on 23 October 2015. Further discussion took place between the parties and the Arbitrator in relation to the issues in dispute, including the proposal that the issue of the performance of non-clinical duties be administered and managed by the responsible Head of Department in conjunction with practitioners. Following further conciliation, the Arbitrator indicated to the parties that he would make a recommendation in an endeavour to resolve the existing dispute;

NOW THEREFORE the Arbitrator, pursuant to the powers conferred on him under s 44 of the Industrial Relations Act, 1979, hereby recommends –

(1) THAT the primary responsibility for the administration of non-clinical time for anaesthetists employed at Fiona Stanley Hospital be the responsible Head of Department in consultation with the practitioners concerned. Further, that such administration is to be carried out with appropriate oversight as may be required by the Hospital Senior Executive.

(2) THAT the parties confer on the specific arrangements to apply under par (1) including, but not limited to, matters such as the recording of non-clinical duties and time allocated etc. in order to maintain transparency and accountability.

(3) THAT the administration of non-clinical time for anaesthetists in accordance with par (1) be initially implemented on a trial basis for a period of four months, following which the trial will be evaluated by the parties.

(4) THAT the compulsory conference otherwise be adjourned to a date to be fixed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2017 WAIRC 00965

DISPUTE RE POSSIBLE BREAKDOWN IN INDUSTRIAL RELATIONS BETWEEN PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	A/DIRECTOR GENERAL DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 24 NOVEMBER 2017
FILE NO.	PSAC 21 OF 2017
CITATION NO.	2017 WAIRC 00965

Result	Recommendation made
Representation	
Applicant	Ms J Moore of counsel and with her Mr B Cusack
Respondent	Mr J Carroll of counsel and with him Ms A Gillespie

Recommendation

HAVING heard Ms J Moore of counsel and with her Mr B Cusack for the applicant and Mr J Carroll of counsel and with him Ms A Gillespie for the respondent on Friday, 17 November 2017 the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby recommends that-

> In relation to any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute, and subject to section 49D *Industrial Relations Act 1979*, the failure of an employee of the respondent to confirm that the applicant represents them not alone be the basis for the respondent not providing documents requested by the applicant where the applicant informs the respondent that it represents the employee in relation to the matter.

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

2017 WAIRC 00934

DISPUTE RE UNION MEMBER'S EMPLOYMENT STATUS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	THE EAST METROPOLITAN HEALTH SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
DATE	FRIDAY, 10 NOVEMBER 2017
FILE NO.	PSACR 16 OF 2017
CITATION NO.	2017 WAIRC 00934

Result	Direction issued
Representation	
Applicant	Ms J Auerbach
Respondent	Mr D Anderson (of counsel)

Direction

HAVING heard Ms J Auerbach on behalf of the applicant and Mr D Anderson (of counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 24 November 2017.
2. THAT the applicant file and serve outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 22 December 2017.
3. THAT the respondent file and serve outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 5 February 2018.
4. THAT the applicant file and serve written submissions by 19 February 2018.
5. THAT the respondent file and serve written submissions by 6 March 2018.
6. THAT this matter be listed for a two-day hearing after 20 March 2018.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

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

2017 WAIRC 01003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL MIROSEVICH
	APPLICANT
	-v-
	EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 12 DECEMBER 2017
FILE NO.	U 111 OF 2017
CITATION NO.	2017 WAIRC 01003

Result	Direction issued
Representation	
Applicant	Ms K Jones (of counsel)
Respondent	Mr P Heslewood (as agent) and Ms S Smith (as agent)

Direction

HAVING heard Ms K Jones (of counsel) on behalf of the applicant and Mr P Heslewood (as agent) and Ms S Smith (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 17 January 2018.
2. THAT the respondent file and serve written submissions about jurisdiction by 7 February 2018.
3. THAT the applicant file and serve written submissions about jurisdiction by 28 February 2018.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Education (School Support Officers) CSA General Agreement 2017 PSAAG 5/2017	N/A	Department of Education	(Not applicable)	Commissioner D J Matthews	Agreement registered
Waikiki Private Hospital Health Services Union (HSUWA) Enterprise Agreement 2017 AG 10/2017	N/A	The Health Services Union of Western Australia (Union of Workers)	Mr Anthony James Robinson Trading as Waikiki Private Hospital	Commissioner T Emmanuel	Agreement registered
Department of Education (Residential College Supervisors) CSA General Agreement 2017 PSAAG 4/2017	12/13/2017	Department of Education	(Not applicable)	Commissioner D J Matthews	Agreement registered
Public Service and Government Officers CSA General Agreement 2017 PSAAG 2/2017	12/08/2017	Chemistry Centre (WA), The Civil Service Association of WA Incorporated, Department of Mines, Industry Regulation and Safety	(Not applicable)	Senior Commissioner S J Kenner	Agreement registered

JOINDER/CONCURRENCE OF PARTIES—Application for—

2017 WAIRC 00950

TEACHERS (PUBLIC SECTOR PRIMARY AND SECONDARY EDUCATION) AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PRINCIPALS' FEDERATION OF WESTERN AUSTRALIA

APPLICANT

-v-

THE DEPARTMENT OF EDUCATION

FIRST RESPONDENT

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

SECOND RESPONDENT

CORAM COMMISSIONER D J MATTHEWS

DATE MONDAY, 20 NOVEMBER 2017

FILE NO/S APPL 80 OF 2017

CITATION NO. 2017 WAIRC 00950

Result Application for Joinder to Award granted

Representation

Applicant Mr S Kemp of counsel

First Respondent Ms E McAdam and with her Ms R Owen

Second Respondent Mr J Theodorsen as agent

Order

HAVING heard Mr S Kemp of counsel for the applicant and Ms E McAdam and with her Ms R Owen for the first respondent and Mr J Theodorsen, as agent, for the second respondent on the papers and being satisfied that the order would not offend section 38(4) *Industrial Relations Act* 1979 and by consent;

NOW THEREFORE I, the undersigned, pursuant to section 38(2) *Industrial Relations Act 1979* hereby order:

THAT the Principals' Federation of Western Australia be joined as a named party to the Teachers (Public Sector Primary and Secondary Education) Award 1993.

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

NOTICES—Appointments—

2017 WAIRC 01002

DESIGNATION

SECTION 16(2A) *INDUSTRIAL RELATIONS ACT 1979*

SECTION 51G *OCCUPATIONAL SAFETY AND HEALTH ACT 1984*

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to s 16(2A) of the *Industrial Relations Act 1979* (the Act), hereby designate A/Senior Commissioner S J Kenner, being a Commissioner who holds office under s 8(2)(d) of the Act and who satisfies the additional requirements referred to in s 8(3A) of the Act, to continue to exercise the jurisdiction conferred by s 51G of the *Occupational Safety and Health Act 1984* from 1 January 2018. This designation ceases to have effect on 31 December 2018.

Dated the 11th day of December 2017.

L.S. (Sgd.) P.E. SCOTT

CHIEF COMMISSIONER P E SCOTT

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2017 WAIRC 00981

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. *Bakewell Morley Casual Employees Agreement 1997 No. AG 184 of 1997*
2. *Capel Dairy Co. Enterprise Agreement 1994 No. AG 177 of 1994*
3. *Certificate II Composites (Traineeship) Agreement 1997 No. AG 211 of 1997*
4. *Certificate II Composites (Traineeships) Agreement No. AG 86a of 1998*
5. *Certificate II Composites (Traineeship) Agreement No. AG 86b of 1998*
6. *Certificate II Composites (Traineeship) Agreement No. AG 86c of 1998*
7. *Certificate II Composites (Traineeship) Agreement No. AG 86d of 19988*
8. *Certificate II Composites (Traineeship) Agreement No. AG 86e of 1998*
9. *Certificate II Composites (Traineeship) Agreement No. AG 86f of 1998*
10. *CSR Ltd Gyprock Bradford Welshpool Enterprise Bargaining Agreement 1993 No. AG 77 of 1993*
11. *CSR Gyprock Bradford Ltd (WA) Enterprise Agreement,1995 No. AG 92 of 1995*
12. *Hardie Iplex Pipeline Systems - Osborne Park (Enterprise Bargaining) Agreement 1993 No. AG 84 of 1993*
13. *James Hardie Pipelines Osborne Park Site Redundancy Agreement No. AG 278 of 1996*
14. *Jobskills Trainee (School Employees - Groundsperson's) Agreement, 1994, No. AG 27a of 1994*
15. *Jobskills Trainee (School Employees - Groundsperson's) Agreement, 1994, No. AG 27b of 1994*
16. *Jobskills Trainee (School Employees - Groundsperson's) Agreement, 1994, No. AG 27c of 1994*
17. *Jobskills Trainee (Hospitality Group Training (WA) Inc) Agreement, 1994 No. AG 36 of 1994*
18. *Jobskills Trainee (School Employees - Teachers Aide) Anglican Schools Commission Agreement, 1994 No. AG 190 of 1994*
19. *Jobskills Trainee (School Employees - Teacher Aide) Association of Independent Schools Agreement, 1994 No. AG 192 of 1994*
20. *Jobskills Trainee (Child Care) Agreement 1994 No. AG 63 of 19941*

21. *JOBSKILLS Trainee School Employees (Canteen Assistant) Agreement, 1995 No. AG 294 of 1995*
22. *Jobskills Trainee (Children's Services Private) Agreement 1996, No. AG 116 of 1996*
23. *JobSkills Trainee Katanning Kids Child Care Centre Agreement 1996 No. AG 133 of 1996*
24. *JobSkills Trainee Ragamuffins Child Care Centre Agreement 1996 No. AG 134 of 1996*
25. *JobSkills Trainee Little Whalers Child Care Centre Agreement 1996 No. AG 135 of 1996*
26. *Jobskills Trainee Plastic Injection Co. (Employer Name) Agreement 1996 No. AG 233 of 1996*
27. *Jobskills Trainee Nally (WA) Pty Ltd (Employer Name) Agreement, 1996 No. AG 234 of 1996*
28. *Jobskills Trainee Monopak Pty Ltd (Employer Name) Agreement, 1996 No. AG 235 of 1996*
29. *Jobskills Trainee Plas-Pak (WA) Pty Limited Agreement 1996, AG 236 of 1996*
30. *Jobskills Trainee Plas-Pak (WA) Pty Limited Agreement 1996, AG 237 of 1996*
31. *Peters (WA) Limited (Balcatta Security Officers) Enterprise Bargaining Agreement 1995 No. AG 50 of 1995*
32. *St John Ambulance Australia Enterprise Agreement 1995 No. AG 2 of 1996*
33. *Thermofabrication Traineeship Agreement No. AG 68 of 1998*
34. *West Australian Newspapers Limited (Enterprise Bargaining) Security Officers and Cleaners Agreement 1994 No. AG 106 of 1994*
35. *West Australian Newspapers Limited (Enterprise Bargaining) Security Officers and Cleaners Agreement 1995, No. AG 6 of 1996*

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 Vol 7* on all correspondence.

Dated at Perth this 28th day of November 2017

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

2017 WAIRC 01019

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. *Amaroo Cottages for Senior Citizens (Inc), Hospital Salaried Officers Association (Union of Workers) Enterprise Agreement 2003*
2. *Association for the Blind of Western Australia Salaried Officers' Enterprise Agreement 2003*
3. *Bethesda Hospital (HSU) Administrative Staff Enterprise Agreement 2005*
4. *Churches of Christ Homes and Community Services Incorporated (HSU) Agreement 2004*
5. *Hospital Salaried Officers Boddington District Hospital Board Agreement 1999*
6. *Hospital Salaried Officers Brookton Health Service Enterprise Agreement 1999*
7. *Hospital Salaried Officers Coolgardie Health Centre Enterprise Bargaining Agreement 1996*
8. *Hospital Salaried Officers Gnowangerup District Hospital Enterprise Agreement 1999*
9. *Hospital Salaried Officers Hawthorn Hospital Enterprise Bargaining Agreement 1996*
10. *Hospital Salaried Officers HealthCare Linen Enterprise Bargaining Agreement 1996*
11. *Hospital Salaried Officers Menzies Nursing Post Enterprise Bargaining Agreement 1996*
12. *Hospital Salaried Officers Mt Henry Hospital Enterprise Bargaining Agreement 1997*
13. *Hospital Salaried Officers Perth Dental Hospital Enterprise Bargaining Agreement 1996*
14. *Hospital Salaried Officers Royal Perth Hospital Enterprise Bargaining Agreement 1996*
15. *Hospital Salaried Officers Telfer Nursing Post Enterprise Bargaining Agreement 1996*
16. *Hospital Salaried Officers Wanneroo Hospital Enterprise Bargaining Agreement 1996*
17. *Hospital Salaried Officers Warburton Range Hospital Enterprise Bargaining Agreement 1996*
18. *Hospital Salaried Officers West Kambalda Nursing Post Enterprise Bargaining Agreement 1996*
19. *Hospital Salaried Officers Wooroloo District Hospital Enterprise Bargaining Agreement 1996*
20. *HSU Peel Health Campus Administrative, Clerical and Allied Health Staff Agreement 2004*
21. *Imaging the South Enterprise Agreement 2005*
22. *Independent Living Centre of WA Incorporated Salaried Officers' Industrial Agreement 2005*
23. *Mercy Hospital Mount Lawley Health Services Union Enterprise Bargaining Agreement 2004*
24. *Ramsay Healthcare WA Hospitals Health Services Union Enterprise Agreement 2005*
25. *St John of God Hospital Geraldton (HSU) Caregiver Agreement 2006*

26. *St John of God Hospital Murdoch (HSU) Caregiver Agreement 2006*
27. *St John of God Hospital Subiaco (HSU) Caregiver Agreement 2006*
28. *Therapy Focus Enterprise Bargaining Agreement 2004*
29. *Uniting Church Homes, Health Services Union Enterprise Agreement 2004*
30. *WA Baptist Hospital and Homes Trust Incorporated, Health Services Union (Union of Workers) Enterprise Agreement 2004*

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 12th day of December 2017

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

PUBLIC SERVICE APPEAL BOARD—

2017 WAIRC 00991

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 3 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00991
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MR S BIBBY - BOARD MEMBER MR M WARNER - BOARD MEMBER
HEARD	**:**	WEDNESDAY, 25 OCTOBER 2017 WRITTEN SUBMISSIONS: WEDNESDAY, 15 NOVEMBER 2017, WEDNESDAY, 22 NOVEMBER 2017
DELIVERED	**:**	FRIDAY, 8 DECEMBER 2017
FILE NO.	**:**	PSAB 5 OF 2017
BETWEEN	**:**	DR POH KOOI LOH Appellant AND MS ELIZABETH MACLEOD CHIEF EXECUTIVE EAST METROPOLITAN HEALTH SERVICE Respondent

CatchWords	**:**	Industrial Law (WA) - Appeal against decision to terminate appointment as Head of Department - Jurisdiction of the Public Service Appeal Board - Whether a disciplinary decision or finding was made - Whether disciplinary action was taken in relation to a breach of discipline - Lack of trust and deterioration of relationship - Construction of s 80I(1)(c) of the *Industrial Relations Act 1979*
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 80C(2), s 80I, s 80I(1)(c) *Health Services Act 2016* (WA) s 6(e), s 6(g), s 161(c), s 161(d), s 163(3)(b)(i), s 172(1), s 172(1)(b), s 172(1)(d), s 172(2), s 172(3), s 172(6) *Public Sector Management Act 1994* (WA) s 78(1)
Result	**:**	Appeal dismissed for want of jurisdiction
Representation:		
Appellant	**:**	Mr T Smetana (of counsel)
Respondent	**:**	Ms J van den Herik (as agent)

Cases referred to in reasons:

Civil Service Association of Western Australia Inc v Director General of Department for Community Development [2002] WASCA 241; (2002) 82 WAIG 2845

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

SGS Australia Pty Ltd v Taylor (1993) 73 WAIG 1760

State Government Insurance Commission v Johnson (1997) 77 WAIG 2169

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board (**Board**).

2 Dr Loh has appealed to the Board. In his amended notice of appeal, he appeals the East Metropolitan Health Service's decision to terminate his appointment as Head of the Department of Geriatric Medicine (**DGM**) at Royal Perth Hospital (**Removal**).

3 Dr Loh is still employed by the Health Service as a Consultant Physician Geriatrics but he is no longer Head of Department.

4 Dr Loh has brought his appeal under s 172(2) of the *Health Services Act 2016* (WA) (**HS Act**), which allows a government officer to appeal a disciplinary decision or finding made about him. Dr Loh says the Removal was a disciplinary decision or finding by the Health Service pursuant to s 172(1)(d) of the HS Act because it was:

a. disciplinary action pursuant to s 163(3)(b)(i) of the HS Act because the Removal was the result of the Health Service finding that Dr Loh had committed a breach of discipline; and

b. disciplinary action as defined by s 6(e) and s 6(g) of the HS Act because of the Removal's effect.

5 The Health Service objects to the Board hearing and determining Dr Loh's appeal because it says the Board lacks jurisdiction. In summary, the Health Service says the Removal was not a disciplinary decision or finding and it was not disciplinary action. The Health Service says it merely exercised its discretion under cl 20(13)(e) of the *WA Health System – Medical Practitioners – AMA Industrial Agreement 2016* (**Agreement**), which states:

(e) An appointment as Head of Department may, at the discretion of either party, be terminated by either the Employer or the Head of Department giving to the other 1 months' [sic] notice or in lieu of the giving of the notice, the payment or the forfeiture of payment, as the case may be, of the Head of Department Allowance for that period.

6 It is common ground that Dr Loh is a government officer. The Board must decide whether the Health Service made a disciplinary decision or finding about Dr Loh.

7 For the reasons set out below, the Board finds the Health Service did not make a disciplinary decision or finding about Dr Loh and did not take disciplinary action against him.

Circumstances leading to Dr Loh's appeal

8 Dr Loh was appointed Head of Department in November 2014 for five years, subject to satisfactory performance and annual performance reviews. His performance was reviewed in 2013, 2014, 2015 and 2016 and was assessed as 'exceeds expectations' or 'meets expectations'.

9 Dr Loh's relationship with the Health Service's management deteriorated as a result of the following events.

10 In 2015, Dr Anwar, who was then Acting Executive Director of Royal Perth Bentley Group at the Health Service, stood down a doctor in the DGM. In response to that incident, in early 2017 Dr Anwar organised team-building exercises for the DGM physicians which involved one-on-one sessions with a psychologist. Initially Dr Loh supported the team-building exercises but then asked Dr Anwar to cancel them.

11 In December 2016, Dr Wright started work for the Health Service as Acting Co-Director (Medical) Service One at Royal Perth Bentley Group. In early January 2017 Dr Wright did a walk-through at Bentley Hospital with Ms Brearley, who is Service Co-Director (non-clinical). Junior doctors told Dr Loh that they were asked questions about consultants and workload during the walk-through. Dr Wright met with Dr Loh in late January 2017 to understand how the DGM operates. They discussed the staffing profile. Dr Loh thought Dr Wright had an agenda to cut the DGM's full-time equivalents (**FTE**) and sent an email to staff saying as much.

12 In around April 2017, another consultant in the DGM, Dr Donaldson, retired after many years' service. Though engaged on a full-time basis, in the lead up to his retirement Dr Donaldson had been working 0.8 FTE and taking 0.2 FTE long service leave for some months.

13 Dr Loh thought that Dr Donaldson's replacement should be employed on a full-time basis. Dr Loh organised the paperwork for Dr Donaldson's replacement and the advertisement called for a 1.0 FTE role. After the Health Service changed the advertisement to call for a 0.8 FTE role, the following emails were exchanged:

From: Loh, Pk

Sent: Thursday, 23 March 2017 5:29 PM

To: Bennett, Lesley

Cc: Anwar, Aresh; McCoubrie, David

Subject: FW: FTE TO BE AMENDED - 00102414_CONSULTANT_PHYSICIAN_GERIATRICS ADVERT_Year 1-9_BHS/RPH ADVERT

Importance: High

Hi Lesley

We would really appreciate the courtesy of being informed that you wish to withdraw clinical resources from the department after the advertisement has gone live & disseminated to all our colleagues.

Leon works in SJOGML as a clinical academic it is a different site with different roles.

Many thanks. Best wishes. PKL

From: Anwar, Aresh

Sent: Friday, 24 March 2017 1:26 PM

To: Loh, Pk

Cc: Wright, Steve

Subject: RE: Attending 75 bed TCP briefing Frid 16 Dec 9am

Dear PK,

I am going to intervene – a number of emails are bubbling through which on the face of them suggest significant levels of antipathy expressed towards Lesley.

This is obviously not right or indeed acceptable. The FTE decisions are made with the service co-directors taking into account demand articulated through job plans.

My reading of the email from Liz is not one that is making demands that you provide but rather offers the opportunity for you to articulate the need for more if there is need that cannot be met.

Happy to chat through but I would advice [sic] caution re the language we use for it very much sets the tone within the organisation[.]

Aresh

From: Loh, Pk

Sent: Friday, March 24, 2017 4:52 PM

To: Anwar, Aresh

Cc: Wright, Steve

Subject: RE: Attending 75 bed TCP briefing Frid 16 Dec 9am

Hi Aresh

Many thanks for your phone call. As discussed I think the decision to reduce the DGM FTE was made without knowledge of the tranche of TCP beds coming to EMHS & aged care service requirements that come with it from 1st of May.

I look forward to discussing this with Steve next week. Unfortunately, the new advertisement has come out with the reduced FTE as of 10 mins ago.

Best wishes. PKL

From: Bennett, Lesley

Sent: Monday, 27 March 2017 8:00 AM

To: Loh, Pk

Cc: Anwar, Aresh

Subject: RE: FTE TO BE AMENDED - 00102414_CONSULTANT_PHYSICIAN_GERIATRICS ADVERT_Year 1-9_BHS/RPH ADVERT

Dear PK

As you should be aware, this is not my budget and it is clear from the email trail below that I was simply double checking with Linda and Steve what FTE they had signed off and for which they had CE approval. Steve and I have undergone a period of handover and I wanted to be sure we all had the same information. Steve replied to the email below to state it should be 0.8, for some reason, his response seems to have not been included in the attachment below.

I also need to express the disappointment and concern I feel having read the correspondence and the omission of important and very significant information therein in the process of escalation. In ideal circumstances I would have liked to have been given the opportunity to, at the very least talk, through the concerns with you so as to ensure any misunderstandings were addressed before the issue was escalated. As you will no doubt realise there is significant potential for recipients to misconstrue the message and as a consequence doubt my integrity.

As a consequence of your actions, the appropriate next step is a meeting with the ED and I will request a formal meeting this week.

Lesley

From: Loh, Pk

Sent: Monday, March 27, 2017 8:14 AM

To: Bennett, Lesley

Cc: Anwar, Aresh

Subject: RE: FTE TO BE AMENDED - 00102414_CONSULTANT_PHYSICIAN_GERIATRICS ADVERT_Year 1-9_BHS/RPH ADVERT

Thnks [sic] Lesley. That may be helpful. Apologies may be in order from my side. Best wishes. PKL

[Outline of evidence of Dr Loh - Annexures]

14 Dr Anwar asked Dr Loh to attend a meeting on 30 March 2017 with him, Dr Wright and Ms Brearley. Dr Loh understood the meeting's purpose was to discuss a clinical issue and he invited Associate Professor Etherton-Beer and Professor Flicker to attend the meeting as well.

15 The evidence about exactly what was said at the meeting is not agreed, but broadly the parties agree that Dr Anwar told Dr Loh that things were not working out with him as Head of Department and there was an erosion of trust between Dr Loh and management. Dr Anwar asked Dr Loh to step down as Head of Department and indicated that the Health Service would terminate Dr Loh's appointment as Head of Department because of Dr Loh's emails.

16 All witnesses gave evidence truthfully and to the best of their ability. Their evidence about the events in question was broadly consistent and it is accepted by the Board. As set out below, central to the matter to be determined is that the parties characterise the evidence differently. Dr Loh says the Board should find that what occurred was a disciplinary matter, whereas the Health Service says the Board should find that what occurred was solely an exercise of its discretion to terminate a Head of Department appointment in accordance with the Agreement.

Law

17 Section 80I(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**) provides:

> (1) Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
>
> (b) an appeal by a government officer under the *Public Sector Management Act 1994* section 78 against a decision or finding referred to in subsection (1)(b) of that section;
>
> (c) an appeal by a government officer under the *Health Services Act 2016* section 172 against a decision or finding referred to in subsection (1)(b) of that section;
>
> (d) an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).

18 Section 172 of the HS Act relevantly states:

> **172. Certain decisions and findings may be appealed or referred**
>
> (1) In this section —
>
> ***disciplinary decision or finding*** means —
>
> (a) a decision made under section 159(1)(b) or (c); or
>
> (b) a finding made in the exercise of a power under section 165(5)(a)(ii); or
>
> (c) a decision made under section 147, 148 or 164 to suspend a government officer or other employee on partial pay or without pay; or
>
> (d) a decision to take disciplinary action made under section 150(1), 163(3)(b) or 166(b); or
>
> (e) a decision to terminate the employment of a government officer or other employee under section 168(1).
>
> (2) Subject to sections 118 and 173, an employee or former employee who —
>
> (a) is, or was, a government officer; and
>
> (b) is aggrieved by a disciplinary decision or finding made in respect of the government officer,
>
> may appeal against that decision or finding to the Industrial Commission constituted by a Public Service Appeal Board appointed under the *Industrial Relations Act 1979* Part IIA Division 2.
>
> (3) A Public Service Appeal Board has jurisdiction to hear and determine an appeal under subsection (2) in accordance with the *Industrial Relations Act 1979* Part IIA Division 2.
>
> …
>
> (6) If it appears to the Industrial Commission or the Public Service Appeal Board that the employing authority failed to comply with the relevant policy framework or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the Industrial Commission or Public Service Appeal Board —
>
> (a) is not required to determine the reference or allow the appeal solely on that basis and may proceed to decide the reference or appeal on its merits; or
>
> (b) may quash the decision or finding and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommenced by the employing authority if the employing authority continues the disciplinary process.

19 Section 163 of the HS Act relevantly states:

> **163. Dealing with disciplinary matter**
>
> (1) In dealing with a disciplinary matter under this Division an employing authority —
>
> (a) must proceed with as little formality and technicality as this Division, the relevant regulations and the circumstances of the matter permit; and
>
> (b) is not bound by the rules of evidence; and
>
> (c) may, subject to this Division and the relevant regulations, determine the procedure to be followed.
>
> (2) Even though an employing authority decides to act under section 162(a), the employing authority may, at any stage of the process, decide instead that it is appropriate —
>
> (a) to take improvement action with respect to the employee; or
>
> (b) that no further action be taken.

(3) *After dealing with a matter as a disciplinary matter under this Division —*

…

(b) if the employing authority finds that the employee has committed a breach of discipline that is not a section 173(2) breach of discipline, the employing authority must decide —

(i) to take disciplinary action, or both disciplinary action and improvement action, with respect to the employee; or

(ii) to take improvement action with respect to the employee; or

(iii) that no further action is to be taken. (emphasis added)

20 Section 6 of the HS Act defines disciplinary action as follows:

disciplinary action, in relation to a breach of discipline by an employee, means any one or more of the following —

(a) a reprimand;

(b) the imposition of a fine not exceeding an amount equal to the amount of remuneration received by the employee in respect of the last 5 days during which the employee was at work as an employee before the day on which the finding of the breach of discipline was made;

(c) transferring the employee to another health service provider with the consent of the employing authority of that health service provider;

(d) if the employee is not a chief executive, transferring the employee to another office in the health service provider in which the employee is employed;

(e) reduction in the monetary remuneration of the employee;

(f) reduction in the level of classification of the employee;

(g) alteration of the employee's scope of practice or duties, or both;

(h) dismissal. (emphasis added)

21 A breach of discipline is defined in s 161 of the HS Act:

161. What is a breach of discipline

An employee commits a breach of discipline if the employee —

(a) disobeys or disregards a lawful order; or

(b) contravenes —

(i) any provision of this Act applicable to that employee; or

(ii) any public sector standard or code of ethics; or

(iii) a policy framework;

or

(c) commits an act of misconduct; or

(d) is negligent or careless in the performance of the employee's functions; or

(e) commits an act of victimisation within the meaning of the *Public Interest Disclosure Act 2003* section 15. (emphasis added)

Dr Loh's case

22 Dr Loh says the Health Service made a decision to take disciplinary action against him under s 163(3)(b) of the HS Act when it gave him notice of the Removal on 3 April 2017.

23 He says the Health Service found that he committed a breach of discipline because:

a. there is no set form or procedure set out in the HS Act about how and when the Health Service must deal with a disciplinary matter;

b. the Health Service could not have removed him as Head of Department for no reason. It must have been for a reason or reasons; and

c. he was not given detailed reasons for the Removal.

24 Dr Loh argues that the Board should find the Removal was a disciplinary decision or finding because the Health Service, through Dr Anwar, formed the opinion that Dr Loh had committed misconduct or was negligent or careless in the performance of his functions, in accordance with s 161 of the HS Act, based on the following:

a. the Health Service believed Dr Loh was not supportive of the team-building exercises that Dr Anwar organised for February 2017;

b. the Health Service was unhappy that Dr Loh advocated for Dr Donaldson's replacement in the DGM to be employed on a full-time, rather than part-time, basis in March 2017; and

c. the Health Service believed Dr Loh did not support management doing a walk-through at Bentley Hospital when Dr Loh advocated for that hospital's junior doctors on 30 March 2017.

25 Dr Loh argues that the decision to remove a Head of Department should be subject to review by the Board to afford natural justice and because Heads of Department perform an advocacy role within the health system.

Dr Loh's evidence

26 Dr Loh gave evidence that he understood it is part of the Head of Department role to represent the views of the DGM physicians to the Royal Perth Hospital management.

27 From Dr Anwar's comments in 2015 and 2016, Dr Loh thought Dr Anwar felt he did not support Dr Anwar's decision to stand down the DGM doctor. Dr Loh concedes he did not support Dr Anwar's decision, because of the significant implications for service delivery and lack of proper investigation. However, Dr Loh says he did everything Dr Anwar asked him to do, despite being uncomfortable about it.

28 Dr Loh gave evidence that he asked Dr Anwar to cancel the team-building exercises that Dr Anwar had organised because the majority of the DGM's physicians did not want to have a one-on-one session with a psychologist. Dr Loh says he did everything Dr Anwar asked him to do in relation to the doctor who had been stood down and the team-building exercises. Dr Anwar told Dr Loh that Dr Anwar felt it was Dr Loh's duty as Head of Department to convince physicians to meet the psychologist in one-on-one sessions.

29 Dr Loh gave evidence that he believed that on 6 January 2017, Dr Wright, Ms Brearley and Dr Bennett made a surprise visit to Bentley Hospital. They asked junior doctors about consultants' workloads and routines. Dr Loh says when he met with Dr Wright in late January 2017, he told Dr Wright that the DGM's physicians felt that more physicians were needed. In cross-examination Dr Loh said although Dr Wright never said to him that Dr Wright intended to cut FTE, Dr Loh formed that belief based on their meeting and the questions asked during the walk-through at Bentley Hospital.

30 Dr Loh gave evidence that Dr Anwar was unhappy about Dr Loh's email on 23 March 2017 (set out at [13]). Dr Loh believes Dr Anwar, Dr Bennett and Dr Wright thought that Dr Loh committed misconduct when he sent the email and they did not trust him to carry out his role as Head of Department.

Meeting on 30 March 2017

31 On 30 March 2017 Dr Loh attended a meeting with Dr Anwar, Ms Brearley, Dr Wright, Associate Professor Etherton-Beer and Professor Flicker. Dr Loh says he understood the meeting's purpose was to discuss extra beds. After that matter had been discussed, Dr Anwar asked Associate Professor Etherton-Beer and Professor Flicker to leave. Dr Anwar asked Dr Loh if he wanted a support person. When Dr Loh said he did, Dr Anwar replied that they should press on.

32 Dr Loh says Dr Anwar said things were not working out, there was a lack of trust and he asked Dr Loh to leave as Head of Department. When Dr Loh asked why, Dr Anwar said there was no reason, but that things were not working out. Then Dr Anwar said that it was due to Dr Loh's emails from the previous week, when Dr Loh accused Dr Bennett of withdrawing resources from the DGM.

33 Dr Loh gave evidence that he did not feel that he had an opportunity to present his case at the meeting. He asked for another meeting with a legal support person to discuss his dismissal as Head of Department. Dr Anwar agreed and his assistant tried to set a meeting at a time when Dr Loh had clinic. Dr Anwar's assistant told Dr Loh that a meeting may be held on 6 or 7 April 2017.

34 On 3 April 2017, the Health Service sent Dr Loh a letter confirming the Removal.

35 Dr Loh gave evidence that the reason for the Removal was because Dr Anwar and Dr Bennett considered that Dr Loh committed misconduct or was negligent in the performance of his duties.

36 Dr Loh agreed in cross-examination that he did not commit an act of misconduct and was not negligent in the performance of his duties. He did not think any aspect of his behaviour would give rise to the Health Service suspecting he committed a breach of discipline. He agreed the Health Service did not allege that he had done any of those things. Dr Loh agreed that no allegations of a breach of discipline were put to him and no disciplinary process was followed.

37 Dr Loh gave evidence that he lost duties and an annual allowance as a result of the Removal.

The Health Service's case

38 The Health Service says it made no disciplinary decision or finding and took no disciplinary action in relation to Dr Loh.

39 Rather, it says it exercised its discretion under cl 20(13)(e) of the Agreement. The Health Service says at best this is a dispute about the application of that clause.

40 The Health Service says it must comply with its Discipline Policy in circumstances where a breach of discipline is alleged. This was not a disciplinary matter and it did not comply with that policy because it is not relevant to the Health Service giving notice to a Head of Department under cl 20(13)(e) of the Agreement.

41 The Health Service does not dispute Dr Loh's contention that it gave him notice of the Removal because there was an erosion of trust between Dr Loh and management and there was 'no longer any trust with [Dr Loh] by management'. But it says that does not mean it must suspect or find a breach of discipline because of a lack of trust.

42 Dr Anwar and Dr Wright gave evidence for the Health Service. Dr Anwar is Executive Director, Royal Perth Bentley Group at the Health Service. Dr Wright is Medical Director, Service Four at Fiona Stanley Hospital.

Dr Anwar's evidence

43 At the time of relevant events, Dr Loh as Head of Department reported to Dr Wright and Ms Brearley.

44 Dr Anwar gave evidence that he was concerned about the tone of Dr Loh's emails and that Dr Loh was undermining Dr Wright and Dr Bennett, who was Acting Director Clinical Services.

45 Dr Anwar said 'the spirit of communication of the information at its core promoted conflict rather than being constructive'. The Board understands that Dr Anwar felt Dr Loh interpreted management's actions in a negative way.

46 Dr Anwar's view was in part due to Dr Loh's 'resistance to embracing the staff welfare [initiative Dr Anwar] had put in place with the engagement of [the psychologist]'. The Board understands this to mean the team-building exercises.

47 Dr Anwar gave evidence that he concluded he should remove Dr Loh as Head of Department based on a number of email exchanges and informal conversations with Dr Loh. His personal observations were supported by conversations with other people about Dr Loh's interactions with Dr Wright and Dr Bennett.

48 Dr Anwar was told by medical administration staff that he needed to give Dr Loh one month's notice to end his Head of Department appointment. He wanted to communicate the decision to end Dr Loh's appointment as Head of Department in a

dignified way, so he invited Dr Loh to meet him on 30 March 2017. Dr Anwar considered it appropriate for Dr Wright and Ms Brearley to attend the meeting because Dr Loh reported directly to them.

49 Dr Anwar said he was surprised Dr Loh invited Associate Professor Etherton-Beer and Professor Flicker to the meeting to discuss strategic direction. Once that part of the meeting was over, they left.

50 Dr Anwar's evidence is that he told Dr Loh that the spirit of the relationship between the Head of Department and management was not constructive. He did not say there was no longer any trust with the Head of the Department by management. Dr Anwar said it would be better for Dr Loh to leave the role and step down, because 'this was not working'.

51 Dr Anwar says Dr Loh asked on what grounds he should step down. Dr Anwar replied that no reasons needed to be provided but he was prepared to elaborate that the reason for the role ending was because of the previous week's emails.

52 Dr Anwar then said he had 'no faith in the spirit in which [Dr Loh presented the facts]', for example in relation to the 0.8 FTE vacancy. Dr Anwar agreed they could meet again and that Dr Loh could bring a support person.

53 Dr Loh acknowledged at the meeting the verbal notice of termination. Dr Loh said he was advocating for resources, had the support of departmental colleagues and was not aware of the other issues Dr Anwar referred to.

54 Dr Anwar gave evidence that Dr Loh's emails were underpinned by reasonable advocacy but the behaviour and tone in his emails went beyond normal advocacy. A Head of Department must work in 'an open and transparent and safe environment'. It is critical to the role to challenge and highlight risks. A Head of Department does not always have to agree with management. Dr Anwar says he regularly has and relies on robust discussions with staff. Views are appropriately expressed and debated in various forums, including the Heads of Department meeting.

55 Dr Anwar gave evidence that he did not think Dr Loh's performance was unsatisfactory, nor that Dr Loh had committed an act of misconduct or been negligent in the performance of his duties. Dr Anwar said he did not discuss an unsatisfactory work performance process or disciplinary process for Dr Loh with Dr Bennett, Dr Wright or anyone else.

56 The gist of Dr Anwar's evidence was that the Health Service did not consider or take disciplinary action against Dr Loh. This was not a disciplinary matter. The Removal was because of a lack of trust between Dr Loh and management, which on Dr Anwar's part was due to Dr Loh's emails and attitude to the team-building exercises.

Dr Wright's evidence

57 Dr Wright gave evidence that, as part of his orientation, on about 6 January 2017 he visited Bentley Hospital with Ms Brearley. They could not locate a consultant to talk to, so they asked a registrar 'How do the teams work here? When do the consultants do their rounds?'. Dr Wright was introduced to staff during the walk-through.

58 At the time of the visit, Dr Wright was not given any indication of anything untoward about the manner of the walk-through or the walk-through itself. It was not until the meeting on 30 March 2017 that Dr Wright realised Dr Loh had concerns about the walk-through.

59 Dr Wright met with Dr Loh and Ms Brearley on 24 January 2017 to understand how the DGM operated. Dr Wright did not say that the DGM had been allocated too many FTE and they did not discuss cutting FTE.

60 Dr Wright felt Dr Loh misrepresented him to the DGM's staff when Dr Loh sent them an email saying Dr Wright's agenda was to cut FTE. Dr Wright gave evidence that he did not have an agenda to cut FTE.

61 Dr Wright gave evidence that the decision to replace Dr Donaldson at 0.8 FTE had been made before Dr Wright started in his role. It was based on reduced geriatric clinics and the fact that Dr Donaldson's 0.8 FTE arrangement had been in place for about a year.

62 Dr Wright said he and Ms Brearley attended the meeting with Dr Anwar and Dr Loh on 30 March 2017. Dr Wright understood that the meeting's purpose was to discuss ending Dr Loh's Head of Department appointment. Dr Wright's evidence about the meeting was broadly consistent with Dr Anwar's evidence.

63 Dr Wright gave evidence that he had been a Head of Department for three years at Fiona Stanley Hospital. He understands that either party can give one month's notice to end the Head of Department arrangement. When that happens only the payment of the allowance changes. The hours are absorbed into clinical duties.

64 Dr Wright gave evidence that a Head of Department finds the right balance between representing staff views and supporting managerial views and decisions. While one does not always have to accept management's view, there is an appropriate forum to put forward a different view, such as directly or in a Heads of Department meeting with Service Co-Directors.

65 Dr Wright gave evidence that he did not discuss with Dr Anwar or Dr Bennett an unsatisfactory work performance process or disciplinary process for Dr Loh.

Consideration

66 The Board does not have jurisdiction to enquire into and deal with all industrial matters that relate to government officers. The Board's jurisdiction is not unlimited.

67 The Board's jurisdiction is set out in Part IIA Div 2 of the IR Act, in particular in s 80I, and referred to in relevant sections of the HS Act.

68 The Board can hear and determine appeals against specific decisions of employing authorities.

69 Given Dr Loh's appeal, where the Health Service objects to the Board's jurisdiction, Dr Loh must establish as a jurisdictional fact that the Health Service took disciplinary action against him when it removed him as Head of Department.

Preliminary issue – reference to s 172(1)(b) only

70 The Board considers it necessary to deal with a preliminary issue relevant to the question of jurisdiction. Namely, whether the Board's jurisdiction to hear and determine Dr Loh's appeal, which relates to s 172(1)(d) of the HS Act, is enlivened in circumstances where s 80I(1)(c) of the IR Act only refers to s 172(1)(b) of the HS Act and not any of the other subsections in s 172(1) of the HS Act.

71 Because neither party dealt with this preliminary issue at the hearing, the Board invited Dr Loh and the Health Service to make written submissions about it.

72 The Health Service says the answer to the Board's question is no. It does not appear to distinguish between Dr Loh's standing to make an appeal and the Board's jurisdiction to hear and determine his appeal. The Health Service's submission seems to be that the Board only has jurisdiction to hear and determine Dr Loh's appeal under s 172(1)(d) of the HS Act because Dr Loh's amended notice of appeal referred to that subsection and not to s 80I(1)(c) of the IR Act. Further, the Health Service seems to conclude that because Dr Loh referred his appeal under s 172(1)(d) of the HS Act, the Board's jurisdiction is not enlivened. The Health Service says to the extent of any inconsistency, the HS Act prevails over the IR Act. It submits this is Parliament's clear intention, particularly given s 172(6) of the HS Act.

73 The Health Service accepts that under s 172(3) of the HS Act the Board's jurisdiction is in accordance with Part IIA Div 2 of the IR Act. It is not clear from the Health Service's submission where in Part IIA Div 2 of the IR Act the Board's jurisdiction is dealt with, if not in s 80I.

74 The Health Service says the Board's question is irrelevant, Dr Loh's amended notice of appeal relates to s 172(1)(d) of the HS Act and to answer the Board's question 'as to whether other powers are enlivened is arguably extending the powers of the [Board] to "enquire into" and "deal with" as opposed to "hear" and "determine" an appeal.'

75 The Health Service argues '[t]he responsibility of the Board is to hear and determine not to enquire into or deal with an appeal by posing a question as to whether the Appellant should have made his appeal on different jurisdictional grounds.'

76 With respect, the Health Service appears to misunderstand the Board's question. The question is not whether Dr Loh should have made his appeal 'on different jurisdictional grounds', as the Health Service puts it. The question is whether, even if Dr Loh could establish that the Health Service made a disciplinary decision or finding about him, the Board has jurisdiction to hear and determine Dr Loh's appeal.

77 The Board asked the question because of its view that the Board's jurisdiction is conferred by s 80I of the IR Act. Dr Loh's appeal relates to a decision referred to in s 172(1)(d) of the HS Act. On its face, it may be argued that s 80I of the IR Act does not appear to expressly confer jurisdiction to hear and determine an appeal brought under s 172 of the HS Act against a decision referred to in s 172(1)(d) of the HS Act.

78 Contrary to the Health Service's submission, it is entirely proper for the Board to raise an issue relating to jurisdiction in circumstances where the parties have not. The issue of jurisdiction is always at large: ***SGS Australia Pty Ltd v Taylor*** (1993) 73 WAIG 1760 (Sharkey P, Gregor C & Kennedy C).

79 The question is relevant because the Board's jurisdiction is conferred by s 80I(1)(c) of the IR Act. Section 172(2) of the HS Act enables an employee, like Dr Loh, who is aggrieved by a disciplinary decision or finding to appeal to the Commission constituted by a Board. Section 172(3) of the HS Act makes it clear that a Board has jurisdiction to hear and determine an appeal under s 172(2) of the HS Act in accordance with Part IIA Div 2 of the IR Act.

80 Part IIA Div 2 of the IR Act is about constituent authorities. The Board's jurisdiction is set out in s 80I of the IR Act. The Board has power under s 80I(1) to adjust the matters referred to in s 80I. Relevant to the circumstances of this matter is the Board's jurisdiction under s 80I(1)(c) of the IR Act to hear and determine an appeal by a government officer under s 172 of the HS Act. Section 80I(1)(c) of the IR Act seems to be the only provision that expressly deals with the Board's jurisdiction to hear and determine such an appeal and its powers in the exercise of its jurisdiction. Section 172(6) of the HS Act does not confer jurisdiction or condition the exercise of the Board's jurisdiction. Rather, it confirms some of the options that are open to the Board where it appears to the Board that an employing authority failed to comply with the relevant policy framework or the rules of procedural fairness in making the decision or finding the subject of an appeal.

81 The Board considers that the reasoning in the unanimous decision of the Industrial Appeal Court in ***State Government Insurance Commission v Johnson*** (1997) 77 WAIG 2169 is relevant. Although that case related to equivalent provisions as they were in 1994, the same reasoning applies to this matter. That case involved an appeal made by a government officer from his employer's decision that he be dismissed. Section 80I of the IR Act relevantly provided:

> (1) Subject to section 52 of the *Public Sector Management Act* 1994 and subsection (3) of this section, a Board has jurisdiction to hear and determine –
>
> ...
>
> (e) an appeal…by any Government officer…from a decision, determination or recommendation of the employer of that Government officer that the Government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d), and (e).

82 Like the current s 78(1) of the *Public Sector Management Act 1994* (**PSM Act**) and s 172(2) of the HS Act, at the time of that decision s 78(1) of the PSM Act gave a government officer standing to appeal to the Board, relevantly, a finding that the government officer committed a breach of discipline and the action taken as a result of that finding.

83 Franklyn J held:

> The jurisdiction of the Public Service Board is that and only that conferred on it by the *Industrial Relations Act* 1979 (WA) (the Act). Anderson J has set out the relevant provisions of s 80I(1) which confers on the Board the 'jurisdiction to hear and determine' the appeals identified in pars (a) to (e) thereof and 'to adjust all such matters *as are referred to* in paragraphs (a), (b), (c), (d) and (e)' (emphasis added). No other section confers jurisdiction (2170). (original emphasis)

84 Anderson J held:

> The Board is established and its functions and jurisdiction are set out in Part IIA of the *Industrial Relations Act 1979*. Section 80H provides, relevantly –

> '80H (1) For the purpose of an appeal under s 80I there shall be established, within and as part of the Commission [the Industrial Relations Commission], a Board to be known as the Public Service Appeal Board…'
>
> As to jurisdiction, s 80I provides –
>
> '80I. (1) Subject to section 52 of the *Public Sector Management Act 1994* and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> ...
>
> (e) an appeal…by any Government officer…from a decision, determination or recommendation of the employer of that Government officer that the Government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d), and (e).'
>
> Neither s 52 of the *Public Sector Management Act 1994*, which refers to chief executive officers, nor sub-s(3) of s 80I, which refers to appeals from decisions to do with redeployment and redundancy, has any application. None of the paras (a), (b), (c) or (d) has any relevance. Thus if the Board has the jurisdiction or power to hear and determine a claim for compensation by a dismissed government employee that jurisdiction or power must be found within s 80I(1)(e) and specifically within the power 'to adjust all such matters as are referred to in' para (e) (2170).

85 The Board's view that its jurisdiction is set out in s 80I of the IR Act is consistent with the Industrial Appeal Court's approach in ***State Government Insurance Commission v Johnson*** (1997) 77 WAIG 2169.

86 One way of construing s 80I(1)(c) of the IR Act is that it refers only to a decision or finding referred to in s 172(1)(b) of the HS Act and not a decision referred to in s 172(1)(d) of the HS Act, which is the subsection Dr Loh relies on, nor to a decision referred to in any of the other subsections of s 172(1) of the HS Act. If s 80I(1)(c) of the IR Act is construed in that way, the Board would not have jurisdiction to hear and determine Dr Loh's appeal even if he were able to establish that the Health Service made a disciplinary decision or finding about him.

87 However, the Board finds that s 80I(1)(c) of the IR Act should not be construed in that way.

88 First, the Board accepts Dr Loh's submission that 'a court construing a statutory provision must strive to give meaning to every word of the provision': ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [71]. Meaning must be given to the words of the provision. Unlike s 172(1)(a), s 172(1)(c), s 172(1)(d) and s 172(1)(e) of the HS Act, s 172(1)(b) relates to a finding and not a decision. The word 'decision' in s 80I(1)(c) of the IR Act would be meaningless if a Board could only hear and determine appeals about findings referred to in s 172(1)(b) of the HS Act. Similarly, s 172(1)(a), s 172(1)(c), s 172(1)(d), s 172(1)(e) and s 172(2) of the HS Act would be meaningless if the Board lacked jurisdiction under s 80I of the IR Act to hear and determine and adjust such decisions.

89 Second, it is possible that Parliament intended s 80I(1)(c) of the IR Act to be read as relating to an appeal against a decision under s 172 of the HS Act, which would include a decision referred to in s 172(1)(a), s 172(1)(c), s 172(1)(d) and s 172(1)(e), and also relating to an appeal against a finding referred to in s 172(1)(b). It is also possible that the reference to '(1)(b)' in s 80I(1)(c) of the IR Act is simply a typographical error and the reference should be to '(1)' instead.

90 It is clear that Part IIA Div 2 of the IR Act must be read in conjunction with the HS Act: s 80C(2) of the IR Act. It is clear from s 172(2) of the HS Act that Parliament intended that an employee who is a government officer and is aggrieved by a disciplinary decision or finding may appeal against that decision or finding to the Board.

91 The Board therefore considers that s 80I(1)(c) of the IR Act should be construed to give the Board jurisdiction to hear and determine appeals against decisions or findings referred to in s 172(1)(a), s 172(1)(b), s 172(1)(c), s 172(1)(d) and s 172(1)(e) of the HS Act. The Board finds that if Dr Loh establishes that the Health Service made a disciplinary decision or finding about him, then the Board will have jurisdiction to hear and determine Dr Loh's appeal.

Did the Health Service make a disciplinary decision or finding about Dr Loh?

92 It is clear, and the Health Service does not dispute, that the effect of the Removal was to reduce Dr Loh's remuneration and alter the scope of his practice or duties.

93 However, for the Removal to fall within the definition of disciplinary action under s 6(e) and s 6(g) of the HS Act, it must be *in relation to a breach of discipline*.

94 The evidence does not show that the Health Service dealt with this matter as a disciplinary matter. The evidence does not show that any allegation of a breach of discipline was put to Dr Loh, that there was an investigation or that a finding was made. The evidence does not show anything to suggest that the Health Service found that Dr Loh committed a breach of discipline, or that the Health Service took disciplinary action, other than Dr Loh's assertion that disciplinary action was taken when his remuneration was reduced and his scope of practice or duties was altered. Those were the effect of the Removal.

95 That the effect of the Removal happens to fit part of the definition of disciplinary action does not mean that disciplinary action has been taken. Remuneration could be reduced and the scope of practice or duties altered for any number of reasons, including by agreement or at an employee's initiative.

96 The Board accepts that the relationship between Dr Loh and management had deteriorated. Indeed, Dr Anwar and Dr Loh both gave evidence that there was a lack of trust between Dr Loh and management. But a lack of trust or deterioration in the relationship does not equate to a finding of a breach of discipline.

97 Clearly Dr Anwar did not care for Dr Loh's approach or communication style. The Board accepts that there was a lack of trust on the Health Service's part because of Dr Loh's email exchanges with Dr Bennett and Dr Loh's resistance to the DGM's physicians attending one-on-one sessions with a clinical psychologist. That lack of trust was the reason for the Removal.

98 Dr Anwar agreed in cross-examination that he found Dr Loh's behaviour in relation to these issues to be disappointing, inappropriate, unacceptable and not proper. Dr Loh says misconduct is 'improper or immoral by the standards of ordinary people': ***Civil Service Association of Western Australia Inc v Director General of Department for Community Development*** [2002] WASCA 241; (2002) 82 WAIG 2845 [32] (Anderson J).

99 Although Dr Anwar agreed that he thought Dr Loh's email was unacceptable and not proper, that does not amount to a finding that Dr Loh committed misconduct or was negligent in the performance of his duties. It was clear from Dr Anwar's evidence that he did not consider Dr Loh committed misconduct:

CROSS-EXAMINATION BY MR SMETANA

…

And you thought Dr Loh's email to Dr Bennett of 23 March was unacceptable, didn't you?---Um, I did.

And you said that in your email to Dr Loh dated 24 March, haven't you?---I did, yes, absolutely.

And you thought Dr Loh's conduct in sending an email to Dr Bennett accusing her of withdrawing clinical resources was unacceptable conduct by him, didn't you?---I thought the manner in which the, ah, concerns were raised, um, they were - were hostile and unnecessary.

Would you say that you thought Dr Loh's email to Dr Bennett, dated 23 March, was unacceptable conduct by him?---I think it's disappointing. I mean, it - it - it's disappointing. It's not the what, it's the how. Um, we'd discussed spirit, we discussed engagement, we'd talked about, um, standards of behaviour, we've talked about values, and those are all embodied in the way we communicate with our colleagues. The - the message maybe warned us, that was legitimate for challenge, it's all in the how.

Yes.

So would you agree that the content of Dr Loh's email to Dr Bennett, dated 23 March, was unacceptable conduct by Dr Loh?---It was disappointing. It was - did not - - -

EMMANUEL C: So that's number 3, I think you just need - - -?---Okay.

- - - to do a yes or no?---What - was it unacceptable? Yes, it was unacceptable.

SMETANA, MR: Unacceptable conduct by him?---It was not disciplinary, but it was - it was disappointing, yes. It was unacceptable.

Unacceptable conduct by him?---Well, ah, ah - - -

EMMANUEL C: You're going to get an opportunity, I think, to expand on this - - -?---Yes.

- - - with - - -?---It was - - -

- - - Ms van den Herik?--- - - - unacceptable conduct by him.

SMETANA, MR: Thank you.

…

Certainly. And you thought the tone of Dr Loh's email to Dr Bennett of 23 March was inappropriate, is that correct?---I absolutely did.

Yes. Is it fair to say that you thought the tone of Dr Loh's email to Dr Bennett of 23 March was an act of misconduct?---No, never.

But you would agree that the tone of the email was inappropriate?---It is inappropriate.

Would you agree that the tone of Dr Loh's email to Dr Bennett, dated 23 March, in your opinion, was not proper?---There are lots of things that happen proper but don't cross the line in terms of becoming disciplinaries. So yes, I would suggest it was not proper. Um, but I didn't believe that it crossed the line to such an extent that it would invoke a disciplinary process.

…

Isn't it correct that you decided that Dr Loh had misconducted himself, if I could put it that way, by agreeing to the Critical Components program and then seeking it to be cancelled?---No, no misconduct.

And isn't it correct that you decided that Dr Loh had misconducted himself by sending his email dated 23 March to Dr Bennett, accusing her of withdrawing clinical resources?---Not misconduct, no. Um, disappointingly demonstrating antipathy but not misconduct.

…

RE-EXAMINATION BY MS VAN DEN HERIK:

VAN DEN HERIK, MS: Dr Anwar, in cross-examination, it was put to you that you made a finding about Dr Loh's withdrawal of support, or perceived withdrawal of support - - -?---Sure.

- - - for the team building initiatives?---Sure.

Do you say you made a finding?---No, we formed an opinion. I apologise - I mean, I - I apologise, it would been that we formed an opinion. There is - ah, we weren't part of any structured process to have any findings, so, um, that would've been a - the wrong adjective to use or verb.

It was also put to you in cross-examination that you'd formed a view that Dr Loh did not meet the standard of performance required of a Head of Department. In other words, his standard of performance was unsatisfactory. What's your response to that?---It was, um, I mean, ah - sorry, maybe it - it does require an expanded explanation. It - we were disappointed in the spirit of collaboration that was being demonstrated as part of our working relationship and that spirit of trust and collaboration is a central tenant to how we work together. Um, how that forms into a standard, um, I think is pretty difficult to articulate. It's a spirit, not the transactional elements of working as a Head of Department, that we found disappointing.

Also in cross-examination, it was put to you that the conduct of the emails - the exchange of emails on 23 March were in fact unacceptable conduct?---I - I did try and articulate several times, I hope the records would show, that I found them disappointing. I, eh, I was drawn to the evidence where I talk about behaviour and values and that I felt that they didn't adhere to the behaviours and values set that the organisation is hoping to achieve - aspiring to

achieve. And as a consequence, yes, they fell short. But I didn't feel they crossed a line to such an extent as to warrant a formal disciplinary process. In fact, as I previously articulated, that did not cross our mind and was not part of the framework we were thinking about when we met him that evening.

100 Dr Loh's remuneration was reduced and the scope of his practice or duties was altered because the Health Service chose to terminate his appointment as Head of Department in accordance with cl 20(13)(e) of the Agreement. The effect would have been the same had Dr Loh chosen to exercise his right under that clause to terminate his appointment as Head of Department.

101 The parties to the Agreement decided the circumstances in which a Health Service and an employee may terminate a Head of Department appointment. All the Agreement requires is that either party give the other party one month's notice or, in lieu of giving notice, paying (or forfeiting, as the case may be) the Head of Department allowance for that period. That the effect of terminating a Head of Department appointment may have the same effect as disciplinary action does not give this Board jurisdiction to hear and determine Dr Loh's appeal.

102 The Board finds that the Health Service did not find that Dr Loh committed misconduct or was negligent or careless in the performance of his functions.

103 The Board is not persuaded that the Health Service found that Dr Loh committed a breach of discipline. Therefore the Removal was not 'disciplinary action *in relation to* a breach of discipline' (emphasis added). There is no disciplinary decision or finding to appeal to the Board.

104 For these reasons the Board must dismiss Dr Loh's appeal.

2017 WAIRC 00992

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 3 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR POH KOOI LOH
	APPELLANT
	-v-
	MS ELIZABETH MACLEOD CHIEF EXECUTIVE
	EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR S BIBBY - BOARD MEMBER
	MR M WARNER - BOARD MEMBER
DATE	FRIDAY, 8 DECEMBER 2017
FILE NO	PSAB 5 OF 2017
CITATION NO.	2017 WAIRC 00992

Result	Appeal dismissed for want of jurisdiction
Representation	
Appellant	Mr T Smetana (of counsel)
Respondent	Ms J van den Herik (as agent)

Order

HAVING heard Mr T Smetana (of counsel) on behalf of the appellant and Ms J van den Herik (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT this appeal be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

PUBLIC SERVICE APPEAL BOARD—Notation of—

The following were matters before the Commission under the Public Service Appeal Board.

Application Number	Parties		Commissioner	Matter	Dates	Result
PSAB 20/2017	Roy Wyatt	Chief Executive, East Metropolitan Health Service	Emmanuel C	Appeal against the decision to take disciplinary action on 26 September 2017	N/A	Discontinued

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 49/2016	N/A	N/A	Emmanuel C	Request for mediation	N/A	Concluded

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 3/2016	Patricia Skipworth	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the employer	Emmanuel C	Discontinued	11/11/2016

RECLASSIFICATION APPEALS—

2017 WAIRC 00938

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00938
CORAM : PUBLIC SERVICE ARBITRATOR
COMMISSIONER T EMMANUEL
HEARD : THURSDAY, 12 OCTOBER 2017
DELIVERED : MONDAY, 13 NOVEMBER 2017
FILE NO. : PSA 2 OF 2016
BETWEEN : CATHERINE SHAW
Applicant
AND
SOUTH METROPOLITAN HEALTH SERVICE
Respondent

CatchWords : Public Service Arbitrator - Industrial Law (WA) - Claim for reclassification - Manager Medico-legal/FOI Service - New clinical services - New duties - More responsibility - Education - Flow on effect - Whether there has been a significant increase in work value
Legislation : *Industrial Relations Act 1979* (WA) s 80E(2)(a)
Result : Application dismissed
Representation:
Applicant : Ms P Marcano (as agent)
Respondent : Ms R Sinton (as agent)

Cases referred to in reasons:

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 v The Health Services Union of Western Australia (Union of Workers) [2013] WAIRC 00836; (2013) 93 WAIG 1565

Ong v Director General of Health as delegate of the Minister for Health in his incorporated capacity under s 7 of the Hospital and Health Services Act 1927 as the WA Country Health Service [2014] WAIRC 00827; (2014) 94 WAIG 1505

Shehade v Director General of Health as delegate of the Minister for Health in his incorporated capacity under s 7 of the Hospital and Health Services Act 1927 as the employer [2015] WAIRC 00973; (2015) 95 WAIG 1786

Western v Director General of Health as delegate of the Minister for Health in his incorporated capacity under s 7 of the Hospital and Health Services Act 1927 as the WA Country Health Service [2014] WAIRC 01223; (2014) 94 WAIG 1789

Willers v WorkCover, Western Australian Authority [2010] WAIRC 00183; (2010) 90 WAIG 333

Reasons for Decision

1 Ms Shaw has been the Manager Medico-legal/FOI Service (**review position**) for the Fiona Stanley Fremantle Hospital Group (**Hospital Group**), which is part of South Metropolitan Health Service (**Health Service**), since October 2014. Before that, Ms Shaw was the Manager Legal Services at Fremantle Hospital and Health Service (**Fremantle**).

2 Ms Shaw applied for the review position to be reclassified from level G8 to level G10. The Classification Review Committee denied Ms Shaw's claim for reclassification.

3 Ms Shaw asked the Health Service to review her claim for reclassification, providing further information in support. The Health Service reviewed Ms Shaw's claim. It concluded that although there was some evidence of increased work value, it was not enough to justify reclassification to level G10.

4 Ms Shaw appeals the Health Service's decision not to reclassify the review position. She claims there has been a significant increase in work value since the review position transitioned from Fremantle to the Hospital Group. She says the work has become more complex, more skills and knowledge are required and the level of responsibility has increased.

5 The Health Service says there is an insufficient increase in work value and significant potential for flow on to similar WA health system positions.

6 I must decide whether there has been a significant net increase in the review position's work value, arising from changes to the work, skill, responsibility or conditions.

Principles

7 To succeed in her claim for reclassification, Ms Shaw must establish that there has been a significant net increase in the review position's work value which arises from changes to the position's work, skill, responsibility or conditions under which the work is performed.

8 The test the Public Service Arbitrator applies when considering work value changes is set out in the Statement of Principles of the State Wage Order [2017] WAIRC 00355:

> **7. Work Value Changes**
>
> 7.1 Applications may be made for a wage increase under this Principle based on changes in work value.
>
> 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
>
> 7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position.
>
> 7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.
>
> 7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.
>
> 7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
>
> 7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.
>
> 7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.

7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.

7.10 The expression "the conditions under which the work is performed" relates to the environment in which the work is done.

7.11 The Commission should guard against contrived classifications and over-classification of jobs.

7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

9 The Public Service Arbitrator applies the test strictly.

Ms Shaw's case

10 Ms Shaw gave evidence and called Ms Zagari and Dr Mark as witnesses. Ms Zagari is the Acting Executive Director for the Hospital Group. Dr Mark is the Director of Clinical Services for the Hospital Group and the Area Director of Clinical Services for the Health Service. The review position reports to Dr Mark in his role as the Director of Clinical Services.

11 In summary, Ms Shaw says there has been a significant increase in the review position's work value because, since the transition from Fremantle to the Hospital Group:

a. the nature of the work has become more complex because Fiona Stanley Hospital (**Fiona Stanley**) is larger and provides more clinical service areas than Fremantle did and the Facilities Manager at Fiona Stanley is a private contractor;

b. more skills and knowledge are required because of the new and more complex clinical service areas at Fiona Stanley; and

c. the level of responsibility has increased because the review position is contacted directly for advice and works independently and autonomously.

12 She says the review position should be reclassified because of these new duties and the higher level of education and interpersonal skills now required.

New clinical services

13 Ms Shaw says the review position requires broader and more complex knowledge of different areas of health because the Hospital Group provides clinical services that were not provided at Fremantle. They include:

a. Renal Transplant Services;

b. State Burns Unit;

c. Paediatric Surgery;

d. Tertiary Neonatal Service;

e. State Haemophilia Centre;

f. High-risk obstetric services, including Diabetes in Pregnancy Service;

g. State Rehabilitation Service;

h. Mother and Baby Mental Health;

i. Youth Mental Health;

j. Lung Transplant Unit;

k. Advanced Lung Disease Department;

l. Advanced Heart Failure and Cardiac Transplant Service; and

m. Elective Neurosurgery.

14 Ms Shaw says the review position has an increased workload because Fiona Stanley is a busy hospital. Before the Hospital Group was formed, Fremantle had a total of 587 beds. The total bed capacity of the Hospital Group has increased by 562 beds to 1,149 beds. She now supervises more full time equivalent employees than she did previously.

15 Ms Zagari gave evidence that the services at Fiona Stanley are significantly more complex, the Hospital Group is a larger service that crosses two campuses and the patients are very different to those at Fremantle.

16 Dr Mark gave evidence that the review position's role has become more complex because of increased patient expectations, political imperatives and the fact that many public sector staff work part-time in private practice. He said Fremantle was not under such a level of scrutiny and the real-time nature of the review position's role is probably the most changed aspect.

New duties

17 Ms Shaw argues that the review position has the following new duties:

a. dealing with personal injury and public liability claims;

b. advising and assisting medical, nursing and allied health staff;

c. liaising with State Solicitor's Office to get legal opinions;

d. managing internal freedom of information (**FOI**) applications; and

e. instructing and assisting internal Medical Report writers with medico-legal reports.

18 She says it has been necessary to develop new policies as a result of working in a new hospital. Ms Shaw acknowledges that she received a temporary special allowance from 6 October 2014 to 31 December 2015 for that. However, Ms Shaw says the

business case made for her temporary special allowance, including managing policies and procedures and working with the Department heads, involves ongoing responsibilities.

19 Ms Shaw gave evidence that because the Facilities Manager at Fiona Stanley is a private contractor, this adds to the complexity of the hospital and the claims considered by the review position. Ms Shaw notes that she must determine liability in circumstances where there is third party involvement, due to Facilities Manager's role at Fiona Stanley.

20 Ms Shaw says the additional duties add responsibility and increase the level of knowledge required because of high-risk litigation areas, including mental health, youth mental health services, paediatric surgery and high-risk obstetric services. These have increased the skills and complexity required to perform the review position. She says the Health Service has acknowledged that legal issues involving children are significantly different and involve more risk than issues involving adults.

21 Ms Zagari gave evidence that the review position now requires increased skills and knowledge because of the complexity of the patients and the changing legal landscape and therefore the advice she seeks from the review position is more complex and frequent.

22 Ms Shaw says the Health Service's submission that the review position's duties have only broadened and that work value assessments must be based on the essential requirements of the role undervalues the duties required of the review position and the added complexity.

Responsibility

23 Ms Shaw gave evidence that the review position is expected to provide advice directly to co-directors, directors and consultants without the Director of Clinical Services being involved. The Director of Clinical Services role is less hands-on than it used to be. She said that people who receive medico-legal advice from the review position are expected to follow the advice and the review position has authority to make decisions in complex situations.

24 Ms Zagari gave evidence that she 'absolutely depend[s]' on the advice or interpretation of advice that the review position provides. She supported Ms Shaw's evidence that clinicians seek advice directly from the review position and rely heavily on it and compared that to the situation at Fremantle, where the Director of Clinical Services provided advice as an intermediary.

25 Dr Mark gave evidence that the review position is often the first point of contact for medical staff when faced with difficult medico-legal situations, which are often time-sensitive and not situations where the review position can 'phone a friend'. The review position must be able to work autonomously and give practical and sensible advice promptly. Dr Mark does not micromanage the review position and he expects that staff follow the advice provided without consulting him. The review position is empowered to manage the Medico-legal Service and the FOI Service.

BIPERS

26 Ms Shaw says that the Health Service gave the review position too low a BIPERS score and put too much weight on that score.

27 In particular, Ms Shaw says the review position should have received a higher score for education level, interpersonal skills, scope of activities, instructions received and influence on results.

28 The review position now requires a certain level of decision-making, analysis and understanding of complex issues and legal opinions. An employee who has completed the equivalent of Year 10, even if she had seven to 10 years' experience, would not necessarily be able to undertake the review position's duties. Education to a Year 10 level is not an acceptable minimum requirement and what is actually required is significantly more.

29 I understand Ms Shaw's evidence to be that she could not work in the review position, as it is now, without a tertiary qualification. She does not believe a Year 10 level of education is enough. Ms Zagari's evidence was that she did not expect that somebody educated to a Year 10 level could necessarily perform at the minimum standard expected of the review position. Dr Mark's evidence was consistent with Ms Shaw's and Ms Zagari's evidence. He said it would be unrealistic to believe a person educated to a Year 10 level could perform in the review position at the required level.

30 Ms Shaw says review position is required to have continuous contact with internal and external stakeholders, requiring a high level of skill in negotiating and gaining cooperation from these stakeholders.

31 Ms Zagari gave evidence that she believed interpersonal skills were 'the thing that [the review] position requires more than anything' and must be of 'an extremely advanced' nature.

Flow on

32 Ms Shaw says flow on effects would be very limited and would likely only affect one role at Royal Perth Hospital.

The Health Service's case

33 The Health Service called Mr Howell and Mr Anderson as witnesses. Mr Howell is the Principal Consultant at Howell and Associates. He did the reclassification assessment for the review position. Mr Anderson is a Senior Classification Review Officer with Health Support Services.

34 The Health Service says that although the review position now spans the Hospital Group, its duties are still of a similar nature.

35 It argues that a change in position does not automatically lead to an increase in work value. The changes made to the review position's job description form (**JDF**) are minor. They broaden the duties and do not add significantly to the review position's work value.

36 The JDF sets out the essential minimum skills required. A significant increase in work value must be based on the essential requirements of the position. The Health Service says that there have been no changes to the essential minimum requirements and skills needed to do the review position.

New clinical services

37 The Health Service does not dispute that Fiona Stanley provides more clinical services than Fremantle did.

38 The Health Service says that the work performed in relation to the wider variety of clinical services provided at Fiona Stanley has not significantly changed the nature of the work performed by the review position. It recognises that there has been an

increase to the review position's work volume, but says that this does not equate to an increase in work value. It cites ***Ong v Director General of Health as delegate of the Minister for Health in his incorporated capacity under s 7 of the Hospital and Health Services Act 1927 as the WA Country Health Service*** [2014] WAIRC 00827; (2014) 94 WAIG 1505 in support of its argument that broadening of a role does not equate to a significant increase in work value.

39 Change of itself is not sufficient. Rather, the change must bring a higher level of work, skill or responsibility or changes to the work environment that make the work of a higher level: ***Shehade v Director General of Health as delegate of the Minister for Health in his incorporated capacity under s 7 of the Hospital and Health Services Act 1927 as the employer*** [2015] WAIRC 00973; (2015) 95 WAIG 1786.

40 The Health Service says that while additional clinical services may add to workload and work pressure, there is no significant increase in work value without a requirement for increased skills and responsibility: ***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 v The Health Services Union of Western Australia (Union of Workers)*** [2013] WAIRC 00836; (2013) 93 WAIG 1565.

41 Mr Howell gave evidence that the increased complexity in the review position's role because of the increased number of clinical services does not reflect a significant change in work value. This is because the key responsibilities of the review position are strongly similar. The review position is required to manage the provision of a medico-legal and FOI service, which has protocols, processes, procedures and 'a body of knowledge around it'. The application of that in one environment compared to another is similar.

New duties

42 The Health Service says the review position is engaged to provide medico-legal advice on all streams of medical practice and, whether the advice is more or less complex, the skills and knowledge required to perform the role are the same.

43 I understand the Health Service's argument to be that the review position has always advised on complex matters. That it may now advise on different complex matters does not increase work value.

44 Mr Howell gave evidence that apart from FOI activities, the existing and proposed JDFs describe similar duties at a similar level of responsibility and complexity. The FOI activities increase the quantity of matters in the proposed JDF but do not add significant complexity or authority to the role. Increased knowledge and skills are not required for the review position to provide advice in relation to the broader range of clinical services offered.

45 Ms Shaw received a temporary special allowance during the commissioning of Fiona Stanley when she worked in a commissioning project officer position at a higher level. The Health Service says that this was because of an increase in work value for a temporary period in setting up the new service. Those additional project and policy duties were not ongoing.

46 In Mr Howell's view, the additional full time equivalent employees the review position now supervises are minimal and do not increase work value.

Responsibility

47 The Health Service says that the autonomy and expectation of the review position has not changed. Fremantle was a tertiary hospital before it became part of the Hospital Group. The level of skill, knowledge and competencies required is the same across a tertiary hospital environment.

48 Mr Howell gave evidence that he understands the review position is currently required to make decisions autonomously and independently, which it did before the transition from Fremantle to the Hospital Group. Although the review position now works across more client areas, it has the same responsibility to provide advice in medico-legal matters.

49 The proposed JDF shows that the review position provides expert advice. Mr Howell's evidence is that, despite this, alternative or second options are available, the review position works from an established body of knowledge and follows clearly documented processes and directives. He says that to show an increase in work value, the review position must be the principal and authoritative counsel in relation to medico-legal matters.

BIPERS

50 The Health Service says it made an informed assessment when working out the BIPERS score. Mr Howell's evidence was that BIPERS is one of the instruments used in a reclassification assessment, but is not a significant one. He noted that the BIPERS score for the review position was around the midpoint of the level G8 band. Mr Anderson gave evidence that BIPERS is a tool in the assessment but does not come into play until a significant increase in work value has been established.

51 The Health Service argues that a post-secondary qualification is not essential for the review position. There is no statutory or other identified or accepted qualification for the position. It says essential educational requirements must be distinguished from beneficial or desirable ones: ***Western v Director General of Health as delegate of the Minister for Health in his incorporated capacity under s 7 of the Hospital and Health Services Act 1927 as the WA Country Health Service*** [2014] WAIRC 01223; (2014) 94 WAIG 1789.

52 The review position works from an established body of knowledge.

53 Mr Howell gave evidence that he found that the review position mostly dealt with internal contacts rather than external contacts.

54 The Health Service says that the review position's scope of activities is narrow because many activities are supported by clear guidelines and procedures.

55 The review position does not demonstrate conflict resolution and negotiation skills necessary to achieve a higher score.

56 In summary, the Health Service argues that its BIPERS assessment is accurate.

Flow on

57 The Health Service says there is a strong likelihood for flow on to other positions in the WA health system, particularly the level G8 comparator positions at Royal Perth Hospital and King Edward Memorial Hospital because they have very similar duties. Mr Anderson gave evidence that the level G8 medico-legal position at Royal Perth Hospital has applied for reclassification.

Consideration

58 It is clear from the evidence that Ms Shaw is a dedicated and capable employee. I accept, as does the Health Service, that Ms Shaw performs the review position at a high level.

59 However, the question to be answered is whether there is a significant increase in work value to warrant the review position being reclassified.

Work, skills and conditions

60 I accept that there has been some change in the duties and therefore the work performed. In part, this is due to the additional clinical services offered at Fiona Stanley.

61 I accept that the review position's duties have broadened. As the Health Service points out, broadening of duties does not necessarily mean work value has increased. Where the broadened duties are of the same level or a lower level, work value will not increase. Of course, where the broadened duties are of a higher level or involve a sufficient increase in skill and responsibility, work value may increase.

62 The duties set out in the review position's JDF have not materially changed, even taking into account the revisions made by Ms Shaw on the proposed JDF.

63 The evidence leads me to conclude that the broadened duties have increased the review position's workload and work pressure. But I am not persuaded that the additional clinical services require the review position to have higher level skills or responsibilities.

64 A key responsibility of the review position is to manage medico-legal issues in the hospital environment. That necessarily involves dealing with all medico-legal matters as they arise. Some issues will be relatively simple and others complex.

65 I accept that the review position must now advise in relation to medico-legal issues that arise in the context of different areas of service provision, as set out in [13]. For example, youth mental health and high-risk obstetrics were not services provided at Fremantle. They are services provided at Fiona Stanley.

66 No doubt becoming familiar with legislation and medico-legal issues arising in these different contexts involves additional work. I am not persuaded it involves higher level skills or responsibilities. The same can be said for personal injury, public liability and FOI matters.

67 Ms Shaw's evidence about the justification for the business case for the temporary special allowance paid from 1 July to 31 December 2015, set out in [18], was not supported by the documentary evidence. The documentary evidence suggests that the temporary special allowance was paid because of a lack of staff and limited administrative support, rather than managing policies and procedures and working with Department heads. But even if I accept Ms Shaw's evidence about this matter, and that the business case conditions are ongoing, I do not consider that they involve higher level duties, skill or responsibility.

68 I accept that the review position's workload has increased. But an increase in workload is not the same as an increase in work value. The same applies to work pressure.

69 I am not persuaded that the conditions under which the work is performed have significantly changed or that any such changes in conditions increase work value.

Responsibility

70 Although not apparent from the JDFs, the evidence shows that the Director of Clinical Services is less involved now and the review position works more autonomously than before. I accept that the review position is now expected to make decisions autonomously. This increase in responsibility increases work value.

BIPERS

71 Ms Shaw disputes the BIPERS score.

72 The evidence about BIPERS focussed on the education level required for the review position. While I accept that a higher education level would benefit this type of position, I do not consider that there have been changes to the review position that require a higher education level. I accept that a post-secondary qualification is not a minimum requirement. The minimum education requirement for the review position is a certificate of secondary education when paired with seven to 10 years' experience.

73 The Health Service appears to have scored the review position 85 for education graded at 2 and experience graded at 4. However, the BIPERS key provided in Ms Shaw's documents indicates that when education is graded at 2 and experience is graded at 4 the score should be 90. A score of 85 occurs when education is graded at 4 and experience is graded at 2. Other than this, which does not make a meaningful difference to the outcome, I am not persuaded that the Health Service gave the review position too low a BIPERS score. Further, as has been noted in many reclassification decisions, an assessment tool is a guide and not an absolute determinative tool: ***Willers v WorkCover, Western Australian Authority*** [2010] WAIRC 00183; (2010) 90 WAIG 333 [151].

Comparisons

74 While it is understandable that employees may focus on similarities to other positions, comparative wage justice is not part of the reclassification process. Comparisons only become relevant after a significant increase in work value is established.

Conclusion

75 Ms Shaw is a capable, dedicated and high performing employee. The review position's workload and work pressure have increased. There has been some increase in work value, mostly due to increased responsibility. But overall the work, skill, responsibility and conditions under which the work is performed have not significantly changed. There has not been a significant increase in work value to warrant reclassification.

76 The application is dismissed.

2017 WAIRC 00939

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE SHAW
	APPLICANT
	-v-
	SOUTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	MONDAY, 13 NOVEMBER 2017
FILE NO	PSA 2 OF 2016
CITATION NO.	2017 WAIRC 00939

Result	Application dismissed
Representation	
Applicant	Ms P Marcano (as agent)
Respondent	Ms R Sinton (as agent)

Order

HAVING heard Ms P Marcano (as agent) on behalf of the applicant and Ms R Sinton (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT this application be, and by this order is, dismissed.

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

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2017 WAIRC 00823

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	**:**	2017 WAIRC 00823
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 29 MAY 2017, MONDAY 17 JULY 2017
DELIVERED	**:**	MONDAY, 18 SEPTEMBER 2017
FILE NO.	**:**	OSHT 2 OF 2017
BETWEEN	**:**	GERRY HANSSEN, HANSSEN PTY LTD DIRECTOR
		Applicant
		AND
		LEX MCCULLOCH, WORKSAFE WESTERN AUSTRALIA COMMISSIONER
		Respondent

Catchwords	:	*Industrial Law (WA) - Occupational Safety and Health Tribunal - Application to review decision of WorkSafe Commissioner to not grant an exemption from compliance with regulation 3.54(1)(b) - Whether there has been substantial compliance - Whether compliance is unnecessary or impracticable - Principles applied - Applicant has not substantially complied with the Regulations - Applicant has not established compliance is unnecessary or impracticable - Tribunal is not satisfied an exemption should be granted - Decision of WorkSafe Commissioner is affirmed*
Legislation	:	*Occupational Safety and Health Act 1984* (WA)
		Occupational Safety and Health Regulations 1996 (WA)
Result	:	Decision affirmed
Representation:		
Counsel:		
Applicant	:	Mr G Hanssen
Respondent	:	Ms H Richardson of counsel and with her Mr M Workman of counsel
Solicitors:		
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18; (2014) 254 CLR 1

Collector of Customs v AGFA-Gevaert Ltd (1996) 186 CLR 389

Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd (1982) 44 ALR 173

Eclipse Resources Pty Ltd v The State of Western Australia [No. 4] (2016) 307 FLR 221; [2016] WASC 62

Exhaust Control Industries Pty Ltd v Lex McCulloch WorkSafe Western Australia Commissioner [2017] WAIRC 00375

Kirwan v Pilbara Infrastructure Pty Ltd [2012] WASC 99

Nitro Circus Touring Australia Pty Ltd v Lenzoni [2016] NSWSC 178

Re Asset Risk Management Ltd and others (1995) 130 ALR 605

Reilly v Tobiassen [2008] WASC 6

Tobiassen v Reilly [2009] WASCA 26

Case(s) also cited:

Allesch v Maunz [2000] HCA 40; (2000) 203 CLR 172

Fox v Percy [2003] HCA 22; (2003) 214 CLR 118

The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd [2007] WAIRC 01273; (2007) 88 WAIG 22

Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1994) 74 WAIG 2

Reasons for Decision

Background

1 The applicant Hanssen Pty Ltd is a project manager and building contractor responsible for projects presently under construction in the Perth CBD. The circumstances giving rise to the present matter before the Tribunal are that Hanssen was responsible for the Concerto Apartments development in Adelaide Terrace, East Perth. A fatality occurred on the site in October 2016. The respondent, WorkSafe, undertook investigations, leading to the issuance of several Improvement Notices for the project. One of the Improvement Notices issued by Inspector Poulton, related to non-compliance with reg 3.54(1)(b) of the *Occupational Safety and Health Regulations 1996* (WA). This regulation requires openings in concrete floors to have wire mesh installed and a covering strong enough to prevent persons and materials falling through.

2 A request by Hanssen to WorkSafe for a review of the Improvement Notice was granted in mid-December 2016. WorkSafe accepted that it was not practicable for Hanssen to retrospectively fit mesh into concrete, after it had been poured on site. The Improvement Notice was cancelled. It was made clear however by WorkSafe, that this did not impact on or relate to an earlier application by Hanssen for an exemption from compliance with reg 3.54(1)(b). The exemption request by Hanssen was based on its development of the "Hanssen Penetration System". This was said by Hanssen to be a safer method of working and moving around covered penetrations on construction projects, in conjunction with the use of "BubbleDeck" precast concrete slabs.

3 WorkSafe refused Hanssen's exemption request in early January 2017. It took the view that the system in use by Hanssen did not constitute "substantial compliance" with reg 3.54(1)(b) for the purposes of reg 2.12. Furthermore, WorkSafe decided that it was not impracticable or unnecessary in accordance with reg 2.13, for there to be compliance with the regulation. A

subsequent review request by Hanssen in late January 2017 to the WorkSafe Commissioner was refused and the original decision was confirmed on 12 April 2017.

Application for review to the Tribunal

4 Hanssen now applies to the Tribunal under s 61A of the *Occupational Safety and Health Act 1984* (WA), to review the decision of WorkSafe to not grant it an exemption from compliance with reg 3.54(1)(b). The grounds for the application to review to the Tribunal are that Hanssen has a "proven safer method to move and work around penetrations" and "workers are never exposed to big penetrations they could accidentally fall through". In a letter of 27 April 2017 accompanying the application for review, Hanssen explains that:

> 1. When the precast bubbledeck is installed workers can walk and work on top of the penetration whilst preparing for all other services prior to the concrete pour, no falling hazards.
> 2. During this period of installing electrical, hydraulic, mechanical services and additional reinforcing no small tools or small items can fall through this penetration to hurt someone below even though they wear safety helmets.
> 3. Whilst pouring concrete no spillage occurs because of this solid cover.
> 4. Procedural steps are performed on and around covered penetration and safe environment, therefore no hazards are derived from these steps.
> 5. Procedural steps must be followed regardless of the covering system.
> 6. In our system workers are never exposed to open penetrations or works around open penetrations.
> 7. A substantial part of the penetration system has been deemed no (sic) practicable for the use of a mesh by the WorkSafe Commissioner. Our penetration system shows clearly how workers work around penetrations without the risk of falling through, therefore it is reasonable to accept the application of the system for the remaining holes.
>
> It is the only system which makes it possible to prepare penetrations in this safest possible method to our knowledge. As a design and construct company it is our duty to continually develop safer ways of constructing buildings.
>
> We would also appreciate the opportunity to meet in person to explain in more detail our Hanssen Penetration System. We will be available at any time that suits OSH Tribunal.

5 Accordingly, Hanssen now seeks an order under s 61A(3)(c) of the *OSH Act* to substitute for the decision of WorkSafe, a decision of the Tribunal to grant the exemptions sought from the requirements of reg 3.54(1)(b).

Contentions of the parties

6 Attached to Hanssen's review application was a portfolio of documents setting out the Hanssen Penetration System. This is proposed by Hanssen as an alternative system to the use of mesh and a protective cover in relation to all holes on the Concerto Apartments development in East Perth, and for all future Hanssen projects. In short, the Hanssen Penetration System comprises 50 x 50 x 5 x 100mm metal angle pieces welded to the metal edge, forming the penetration of a "BubbleDeck" slab. BubbleDeck is a precast concrete floor system which incorporates large hollow plastic balls enmeshed in a steel lattice. As this precast system uses less concrete than traditional concrete slabs, it is lighter and may be completely fabricated off site. This is the precast method used by Hanssen.

7 Once the angles are welded to the BubbleDeck slab edge, 25mm structural plywood is then fitted over the penetration. It is said that all work is then able to be performed in and around the penetration. Once the work is completed, the structural plywood is removed and the opening/shaft is permanently closed. Included in the Hanssen Penetration System attachment, were detailed procedural steps, with photographs and diagrams, for each of the typical floor penetrations in a multistorey construction, including bathrooms; bathroom-kitchen; cable trays; bus ducts; bin chutes and pressurisation penetrations.

8 It was Hanssen's general submission to the Tribunal that because of the accident on the Concerto Apartments project, the company looked to a better method of dealing with penetrations from a safety point of view. It was submitted that once the structural plywood is in place, there is no possibility of anything or anyone falling through to the level below. Hanssen submitted also that the system was better because there was no necessity to have to cut through mesh to put pipes in, therefore avoiding injury to employees by stepping into areas of mesh cut open for this purpose. Hanssen also contended that the plywood formed a secure platform on and around which employees may work. With the installation of services, Hanssen also submitted that the plywood only needed to be removed at the last minute, to put pipes through. There is no need for bolt cutters and grinders, as is the case when cutting through steel mesh.

9 On behalf of WorkSafe, several submissions were made. As to the legal framework, it was contended that regard needed to be had to the objects of the *OSH Act*, Schedule 1 to the legislation enabling regulations to be made and the terms of reg 3.54 itself. Having done so, the clear purpose of the regulation is to ensure that employees working in or about holes or openings in floors on construction sites are protected from the threat of injury because of falls through such holes or openings.

10 Given the exemption request made, and the review application to the Tribunal, WorkSafe contended that either substantial compliance, impracticability or lack of necessity for compliance must be established by Hanssen. As to substantial compliance for the purposes of reg 2.12, WorkSafe's submission was that whilst not defined in the Regulations, the meaning to be given to this phrase must be considered in the context of the purposes and objects of the legislation, placing paramountcy on the safety of employees in the workplace: *Eclipse Resources Pty Ltd v The State of Western Australia [No. 4]* (2016) 307 FLR 221; [2016] WASC 62 per Beech J at par 541. As to the meaning of the phrase "substantial compliance" itself, whether this requirement is met involves a matter of degree. It concerns the practical effect of what has been done, compared with the practical effect the relevant provision which has not been complied with seeks to achieve: *Re Asset Risk Management Ltd* (1995) 130 ALR 605 per Burchett J at 607 and cited in *Nitro Circus Touring Australia Pty Ltd v Lenzoni* [2016] NSWSC 178 per Hammerschlag J at par 30. An extension of this submission was that as to the meaning of the word "substantial", this

involves a level of uncertainty. It will ultimately be a question of judgement and is not amenable to precise measurement: *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 44 ALR 173 per Smithers J at pp 191-192.

11 Having regard to the purposes and objects of the *OSH Act*, in the context of the authorities referred to, it was the submission of WorkSafe that in effect, "substantial compliance" for the purposes of the Regulations, should be construed as requiring "very nearly close to full compliance in most, if not all circumstances". In referring to the requirements of reg 3.54(1)(b) in this case, WorkSafe identified three elements constituting full compliance. They are the use of wire mesh of the prescribed gauge and dimensions; the wire mesh being covered with material of the required strength; and the cover material being securely fixed to the floor. Having regard to the description and operation of the Hanssen Penetration System, as outlined in these proceedings, it was Worksafe's initial submission that only one element of the three elements required by reg 3.54(1)(b), had been met. That element is the provision of a cover strong enough to prevent persons falling through. It was later accepted that Hanssen's agreement to secure the cover with screws meant that two elements were met. However, despite this, the submission was that given only two of the three required elements of reg 3.54(1)(b) had been met in this case, substantial compliance could not be established.

12 Furthermore, WorkSafe submitted that there is an additional difficulty with Hanssen's application. That is because it seeks to be exempted from compliance with the Regulations in respect of all future construction projects. Given that there can be no possible comparison with an existing actual construction for the purposes of establishing whether there has been substantial compliance, WorkSafe submitted that in effect, what Hanssen is seeking by its application on this ground, is not a substantial compliance exemption, but rather, the avoidance of compliance with reg 3.54(1)(b) at all.

13 As to the issue of impracticability for the purposes of reg 2.13, WorkSafe submitted that the terms of reg 3.54(1)(b)(i) only require mesh to be used where it is practicable. In cases where it is not, an exemption is not necessary. In any event, it was contended that WorkSafe has already recognised, in the cancellation of the Improvement Notice issued to Hanssen, that it would not be practicable to retrospectively embed mesh into concrete slabs. Additionally, in refusing Hanssen's exemption request, WorkSafe also accepted that in some circumstances, such as for example, a stair pressurisation shaft, with a speed wall installed in the centre, it would not be practicable to use mesh. On evidence to be led by it, WorkSafe also maintained that where a BubbleDeck precast concrete slab system has been and is used, it is practicable to use wire mesh.

14 Finally, in relation to whether compliance with reg 3.54(1)(b) is necessary or not, WorkSafe contended that it is. Its position was that the Hanssen Penetration System is not safer and does not meet the three elements required in reg 3.54(1)(b), which would be supported on the evidence. Irrespective of this, WorkSafe made the general submission that the request of Hanssen for the Tribunal to conclude that its system is safer than the requirements to use mesh as specified by reg 3.54(1)(b), is a subjective assessment of the merits or otherwise of the regulation itself, which is a matter beyond the Tribunal's jurisdiction.

15 For all the foregoing reasons, WorkSafe contended that Hanssen's application to the Tribunal for a review of the refusal to grant the exemption should be dismissed.

Statutory provisions and legal principles

16 For the purposes of the Tribunal's jurisdiction, a review of the WorkSafe Commissioner's decision under the Regulations is prescribed by s 61A of the *OSH Act* in the following terms:

> **61A. Review of Commissioner's decisions under regulations**
>
> (1) In this section —
>
> ***reviewable decision*** means —
>
> (a) a decision made under the regulations by the Commissioner himself or herself; and
>
> (b) a determination of the Commissioner on the review, under the regulations, of a decision made under the regulations by a person other than the Commissioner, whether or not the decision was made by that person as a delegate of the Commissioner,
>
> but does not include a decision made by a person acting as a delegate of the Commissioner.
>
> (2) A person who is not satisfied with a reviewable decision may, within 14 days of receiving notice of the decision, refer the decision to the Tribunal for review.
>
> (3) On reference of a decision under subsection (2), the Tribunal is to inquire into the circumstances relevant to the decision and may —
>
> (a) affirm the decision; or
>
> (b) set aside the decision; or
>
> (c) substitute for the decision any decision that the Tribunal considers the Commissioner should have made in the first instance.
>
> (4) Pending the decision on a reference under this section, the operation of the reviewable decision is to continue, subject to any decision to the contrary made by the Tribunal.

17 There is no question in this case that the subject matter of the proceedings before the Tribunal is a "reviewable decision" for the purposes of s 61A(1). It is convenient at this point to also set out the relevant provisions of the Regulations. Part 3 of Division 5 deals with the prevention of falls. This Division involves the identification of fall hazards and risk assessment in relation to a workplace; fall injury prevention systems and holes, edges and roof protection amongst other things. Holes or openings are relevant in this case. They are dealt with in reg 3.54 as follows:

3.54. Holes etc. in floors, duties of employer etc. as to

(1) A person who, at a workplace, is an employer, the main contractor, a self-employed person or a person having control of the workplace must ensure that any hole or opening (other than a lift well, stairwell or vehicle inspection pit) with dimensions of more than 200 mm x 200 mm but less than 2 metres x 2 metres or with a diameter greater than 200 mm but less than 2 metres —

(a) in a floor, other than a concrete floor, of a building or structure at the workplace is covered with a material that is —

(i) strong enough to prevent persons or things entering or falling through or into the hole or opening; and

(ii) securely fixed to the floor;

or

(b) in a concrete floor of a building or structure at the workplace —

(i) has, if practicable, wire mesh that meets the requirements of subregulation (2); and

(ii) is covered with a material that is —

(I) strong enough to prevent persons or things entering or falling through or into the hole or opening; and

(II) securely fixed to the floor.

(2) The wire in the wire mesh referred to in subregulation (1)(b)(i) is required to —

(a) be at least 4 mm in diameter; and

(b) have maximum apertures of 75 mm x 75 mm; and

(c) be embedded, at least 200 mm in the edges of the surrounding concrete; and

(d) be embedded either —

(i) in the upper half of the slab with a minimum concrete cover of 20 mm; or

(ii) in the lower half of the slab with a minimum cover of 30 mm.

(3) A person to whom subregulation (1) applies must ensure that —

(a) wire mesh referred to in subregulation (1)(b)(i) —

(i) is not used as a working platform; and

(ii) is only removed for the purposes of installing services in circumstances where the removal takes place immediately before the installation of a service and the only portion removed is the minimum portion required to be removed for the installation;

and

(b) any cover referred to in subregulation (1)(a) or (b)(ii) —

(i) is marked in clearly legible lettering with the words "DANGER — HOLE BENEATH"; and

(ii) is only removed for the purposes of installing services in circumstances where the removal takes place immediately before the installation of a service.

Penalty applicable to subregulations (1) and (3): the regulation 1.16 penalty.

18 It is in respect of concrete floors of buildings under construction or management by Hanssen, that reg 3.54 arises in this case.

19 There is an ability for a person to seek an exemption from the WorkSafe Commissioner on two grounds. Those grounds are that a person has substantially complied with a requirement, or that compliance with a requirement would be unnecessary or impracticable. Both arise in this case. Relevantly, regs 2.12 and 2.13 are in the following terms:

2.12. Exemption from regulation where substantial compliance

(1) A person may apply to the Commissioner for a person who, or a workplace which, does not fully comply with a requirement of these regulations to be exempted from the requirement and the application is to be in an approved form.

(2) If, on an application under subregulation (1), the Commissioner is satisfied that there is substantial compliance with the relevant requirement of these regulations then the Commissioner may exempt the person or workplace from the requirement and the exemption is to be in writing and may be made subject to such conditions as are specified by the Commissioner.

…

2.13. Exemption from regulation where compliance unnecessary or impracticable

(1) A person may apply to the Commissioner for a person or a workplace to be exempted from complying with a requirement of these regulations and the application is to be in an approved form.

(2) If, on an application under subregulation (1), the Commissioner is satisfied that compliance with any requirement of these regulations would be unnecessary or impracticable then the Commissioner may exempt the person or workplace from the requirement and the exemption is to be in writing and may be made subject to such conditions as are specified by the Commissioner.

20 As well as granting the exemptions, the WorkSafe Commissioner may impose conditions. Any exemption granted may later be revoked.

21 The approach of the Tribunal to matters before it of the present kind was considered in a recent decision in *Exhaust Control Industries Pty Ltd v Lex McCulloch WorkSafe Western Australia Commissioner* [2017] WAIRC 00375; (2017) 97 WAIG 1373 where, at pars 49 and 50, I observed:

> 49 In accordance with s 61A(3) of the OSH Act, the Tribunal is required to "inquire into the circumstances relevant to the decision" of WorkSafe. This involves, analogously with reviews of improvement and prohibition notices, the Tribunal assessing whether, in view of the material before it, WorkSafe was justified in making the decision it did. This requires the Tribunal to investigate for itself the circumstances giving rise to the decision and the validity of the conclusions reached: *Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* (1992) 74 WAIG 2; *The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd* [2007] WAIRC 01273; (2007) 88 WAIG 22.
>
> **Principles of interpretation**
>
> 50 The general approach to the construction of statutes, legislative instruments and other documents that may have legislative or regulatory effect, and contracts, is to construe the instrument as a whole. In Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355, in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ at par 69-70 and 78, it was said 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[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In *Commissioner for Railways (NSW) v Agalianos*[47], 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[48].
> >
> > 70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[49]. 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[50]. 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"[51]. 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[56] 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[57]:
> >
> > > "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)

22 The Regulations are made under ss 61(1) and (5) of the *OSH Act*. By Schedule 1 to the *OSH Act*, a list of items in respect of which regulations may be made is set out. Under s 61 regulations may be made in respect of "all matters necessary or convenient to be prescribed for giving effect to the purposes of" the *OSH Act.* The objects of the *OSH Act* are set out in s 5 and they are:

5. Objects

The objects of this Act are —

(a) to promote and secure the safety and health of persons at work;

(b) to protect persons at work against hazards;

(c) to assist in securing safe and hygienic work environments;

(d) to reduce, eliminate and control the hazards to which persons are exposed at work;

(e) to foster cooperation and consultation between and to provide for the participation of employers and employees and associations representing employers and employees in the formulation and implementation of safety and health standards to current levels of technical knowledge and development;

(f) to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health;

(g) to promote education and community awareness on matters relating to occupational safety and health.

23 It is well settled that principles of interpretation applicable to statutes have equal application to regulations and other subsidiary legislation: *Collector of Customs v AGFA-Gevaert Ltd* (1996) 186 CLR 389 at 398 cited in *Eclipse Resources Pty Ltd v The State of Western Australia [No. 4]* (2016) 307 FLR 221; [2016] WASC 62 per Beech J at par 550. As to delegated legislation specifically, recently in *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; (2014) 254 CLR 1 the High Court said:

> The appropriate enquiry in the construction of delegated legislation is directed to the text, context and purpose of the regulation, the discernment of relevant constructional choices, if they exist, and the determination of the construction that, according to established rules of interpretation, best serves the statutory purpose.

24 The Regulations, consistent with s 60(1) of the *OSH Act*, are to be regarded as giving effect to the objects of the *OSH Act*. Those objects, as set out above, include the promotion of health and safety of persons at work; to protect those persons and to reduce, eliminate and control hazards. Falls, especially in multi-storey buildings, are obviously a significant workplace hazard. Regulation 3.49 requires an employer, main contractor, self-employed person or person having control of a workplace, to undertake a process of hazard identification regarding falls, to assess the risk of injury and harm and to take any necessary steps to reduce those risks. This is in addition to and without limiting the general obligation on such persons to engage in such a process for the workplace generally, as required by reg 3.1.

25 The terms of reg 3.54(1)(b), are expressed in mandatory terms. Thus, an employer, main contractor, self-employed person, or a person having the control of a workplace, "must" ensure … This is subject to the qualification in reg 3.54(1)(b)(i) that wire mesh meeting the requirements of reg 3.54(2) be used, "if practicable". Of course, the obligations imposed by the Regulations are not in the nature of absolute requirements. This is because WorkSafe is empowered, in an appropriate case, to grant an exemption from compliance. However, consistent with the principles of statutory interpretation that I have set out above, reg 3.54 must be construed in accordance with the objects and purposes of the *OSH Act* in s 5.

26 "Practicable" as used in reg 3.54(1)(b)(i), is not otherwise defined in Part 1 of the Regulations. Thus, it has the meaning as set out in s 3 of the *OSH Act*: s 44 *Interpretation Act 1984* (WA); DC Pearce and RS Geddes *Statutory Interpretation in Australia 4th Ed* pars [6.23]-[6.24]. For these purposes, "practicable" in s 3 of the *OSH Act* is defined to mean:

> ***practicable*** means reasonably practicable having regard, where the context permits, to —
>
> (a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring; and
>
> (b) the state of knowledge about —
>
> (i) the injury or harm to health referred to in paragraph (a); and
>
> (ii) the risk of that injury or harm to health occurring; and
>
> (iii) means of removing or mitigating the risk or mitigating the potential injury or harm to health;
>
> and
>
> (c) the availability, suitability, and cost of the means referred to in paragraph (b)(iii);

27 What is "reasonably practicable" in terms of the elements of the definition, involves an objective assessment: *Reilly v Tobiassen* [2008] WASC 6; *Tobiassen v Reilly* [2009] WASCA 26 (see too the discussion of "practicable", albeit in the context of s 19 of the *OSH Act* in *Kirwan v Pilbara Infrastructure Pty Ltd* [2012] WASC 99 per Hall J at pars 94-104). Having regard to the obvious and well known high risk of severe injury or worse, from a fall from height through a hole in a concrete floor of a multi-storey building, in my view, reg 3.54(1)(b)(i) should be construed as requiring wire mesh to be used, meeting the requirements of reg 3.54(2), if it can be so used.

28 I turn now to consider how the exemption provisions of the Regulations in regs 2.12 and 2.13 should be applied.

29 WorkSafe correctly submitted that there is no reference in the Regulations to the meaning of "substantial compliance" for the purposes of reg 2.12. Therefore, one needs to construe this provision in accordance with its ordinary and natural meaning. Importantly, as noted earlier in these reasons, the words used in the Regulations are to be construed in the context of the statutory purposes and objects of the legislation. In this sense, in *Re Asset Risk Management*, a case referred to by WorkSafe, the issue arose as to the meaning of "substantial compliance" for the purposes of s 205(11) of the *Corporations Law* (Cth).

This provision refers to an exemption from the prohibition on a company giving financial assistance to acquire its own shares. In considering the meaning of the phrase "substantial compliance", Burchett J said at 607:

> There is little authority on the operation of s 205(11). I was referred to *Re U Drive Pty Ltd* (1986) 5 ACLC 117, a decision of Young J, and to *Re News Corporation Ltd* (1993) 11 ACLC 733, a decision of Hill J. In neither case was the non-compliance in question comparable. In each, the Court looked to see whether the practical effect of compliance with subs (10) had been achieved, and in the latter, Hill J said (at 734):
>
> > "Ultimately, it seems to me the matter is one of degree in a case such as the present, namely whether the compliance is such that it can fairly be said to be a *substantial* compliance." [Emphasis original.]
>
> I agree that substantial compliance is a matter of degree. What the Court is concerned with is the practical effect of what has been done, which should be compared with the practical effect the legislature appears to have sought to achieve. But each case is likely to raise its own problems, and it will always be necessary to apply afresh the statutory language.

30 As also submitted by WorkSafe, the concept of "substantial" and "substantially" is not amenable to a precise measurement. I accept that in the context of an important area such as occupational health and safety and in this case, dealing with the risk of serious injury or worse resulting from a fall from height, "substantial compliance" must meet a high threshold, not far short of full compliance.

31 I adopt and apply these principles for the purposes of determining the present matter.

The evidence

32 The Hanssen Penetration System was outlined in the evidence of Mr Bermudez, an architect and project manager for Hanssen. Mr Bermudez provided a PowerPoint presentation to the Tribunal. This included many of the photographs contained in the materials annexed to Hanssen's application to the Tribunal. The process commences in the factory offsite, where the metal angles are welded to the metal edges of the BubbleDeck. The next step described by Mr Bermudez was the fixing of the plywood timber. A silicone seal is then applied and additionally, following a request by WorkSafe, the plywood is secured in place by screws. Danger signs are then placed on the plywood.

33 Mr Bermudez informed the Tribunal that the structural plywood on the penetrations is very strong and Hanssen has tested it up to a weight of 1000kg. Mr Bermudez's presentation included the installation of BubbleDeck being craned onto site, with a handrail fitted. Penetrations are also covered from underneath with more plywood. Again, the plywood is silicone sealed and screwed into place. A danger sign is then also applied. The slide presentation included the various penetrations, as set out in the materials attached to the application. Mr Bermudez confirmed in his evidence that the Hanssen Penetration System does not use mesh at any stage of the process.

34 Evidence was given on behalf of WorkSafe through Inspector Poulton and Inspector White. Inspector Poulton has been a WorkSafe Inspector for about 20 years. He is presently a Team Manager responsible for inspectors working in the construction sector and has been in this position for about 11 years.

35 Inspector Poulton gave evidence that on 10 October 2016, he was informed that there had been a fatality at the Concerto Apartments construction site in East Perth. An employee had fallen down a lift shaft. Investigations into the accident then commenced. Following discussions with various inspectors, Inspector Poulton attended the Concerto Apartments site and met with Mr Hanssen and other representatives of Hanssen, along with another inspector, Mr Clune. Inspector Poulton said that following the start of the meeting, Mr Bermudez also joined the meeting. Discussion took place in the meeting about various safety issues. One of them was the practice on the Concerto Apartments site for hole covering in concrete floors. Inspector Poulton said that Mr Hanssen advised that the ventilation shaft where the deceased employee fell, was split with a speed wall, creating in effect two ventilation shafts. Mr Hanssen explained to Inspector Poulton that it was not practicable to mesh the ventilation shaft holes because of the presence of the speed wall in the middle.

36 Inspector Poulton testified that he then asked Mr Hanssen about other holes in concrete floors on the site. Inspector Poulton was informed that there were many holes with dimensions between 200mm x 200mm and 2m x 2m in size which were covered in plywood. No meshing was embedded into the concrete slab. Mr Hanssen informed Inspector Poulton that whilst he could have used mesh for these holes, he did not want to as further hazards were created by having to cut the mesh when putting in services. Inspector Poulton said that he told Mr Hanssen that if it was practicable to do so, then under reg 3.54 of the Regulations, mesh was required to be installed to be compliant. Mr Hanssen advised him that none of the holes in the concrete floors on the Concerto Apartments site had mesh in them and he did not want to use wire mesh.

37 Due to this conversation, Inspector Poulton said that he informed Mr Hanssen that he would issue an Improvement Notice in relation to Hanssen's failure to install wire mesh as required by the Regulations. Accordingly, on 14 October 2016, Improvement Notice 319829 was issued to Hanssen. This resulted from the conversation with Mr Hanssen, the admissions made by Hanssen in it and information received from other inspectors, following their inspections of the site.

38 Inspector Poulton also said he informed Mr Hanssen that in relation to floors yet to be constructed, they would need to be meshed in accordance with reg 3.54 and if he did not wish to do so, then Hanssen would need to seek an exemption from compliance with the Regulations. Inspector Poulton said he made notes of the meeting, a copy of which were annexure B to his witness statement. Following the meeting, on 16 November 2016 Inspector Poulton also met separately with Mr Bermudez. Inspector Poulton said in that meeting, Mr Bermudez informed him that except in relation to holes close to the building core, it was possible to install mesh in holes on the Concerto Apartment site. Inspector Poulton also made notes of this meeting, which were annexure C to his witness statement.

39 In response to questions from the Tribunal, Inspector Poulton testified that in his 20 years as an inspector he had seen many construction sites where BubbleDeck panel systems were used, in which mesh covering holes, had been inserted in accordance with the Regulations. He was not aware of any issues in relation to this process. Inspector Poulton also referred to the need to cut mesh to put services through such as piping etc. Tools required would include wire cutters, snippers or grinders and

sometimes an oxyacetylene torch. In circumstances where large amounts of mesh need to be removed for the insertion of services, Inspector Poulton referred to the need for employees to wear fall protection equipment when working in or around an opening. Sometimes scaffolding might be erected underneath the opening to minimise any fall distance, or hand rails could be used, such as those installed by Hanssen on its sites.

40 There was no cross-examination of Inspector Poulton by Hanssen. In the absence of any reason not to accept Inspector Poulton's evidence, the Tribunal accepts it.

41 Inspector White is a qualified carpenter and joiner and has about 25 years' experience in the construction industry. He has worked for private sector construction contractors on major civil projects, including multi-storey apartments and office buildings. Inspector White also has experience as a supervisor and site manager. He has also had extensive experience in relation to dealing with health and safety legislation and compliance including as he said, on "hundreds, possibly thousands, of occasions, penetrations with mesh and covers". Inspector White could not recollect an occasion when mesh was not used in penetrations as required by health and safety regulations.

42 Inspector White gave evidence about visits to Hanssen construction sites. One of them, in Murray Street Perth, he visited in March and May 2017. Following this visit, Inspector White said he had cause to issue an Improvement Notice because he noted that the penetrations in concrete floors did not comply with reg 3.54(1)(b). Whilst the penetrations were covered, they did not have mesh embedded in the concrete as required and lacked the required signage. It was Inspector White's view that it was practicable for the penetrations to be made compliant with the Regulations, which was the reason for the issuance of the Improvement Notice.

43 In relation to these proceedings, Inspector White said that he was aware of Hanssen's request for an exemption from compliance with reg 3.54(1)(b) and the reasons for it. In his evidence, Inspector White set out his opinion, based on his extensive experience, as to why he did not think that the exemption request made by Hanssen should be granted, either in respect of any present or future projects.

44 In relation to stair pressurisation shafts, Inspector White said he understood that Hanssen's objection to using mesh is because it may disturb the airflow of an air pressurisation shaft. Inspector White noted that the size of pressurisation shafts is prescribed by building codes or relevant standards. It was Inspector White's view that any difficulties with airflow because of mesh, could be accommodated by a larger penetration in the concrete floor in the design, to overcome them. Furthermore, Inspector White said that he was not aware in his experience, of any difficulties in using mesh embedded in a penetration, due to its size and required airflow.

45 The second point on which Inspector White gave evidence was Hanssen's claim that the Hanssen Penetration System is a safer method of covering penetrations without the use of wire mesh. Inspector White outlined his understanding of the Hanssen Penetration System, which was consistent with the evidence of Mr Bermudez and the other material before the Tribunal. Whilst Inspector White observed that he understood that the structural plywood used by Hanssen was not securely fixed to the floor, this point would appear to have been overcome by Mr Hanssen's earlier submission that Hanssen now fixes the structural plywood cover in place with screws.

46 In terms of his view of the Hanssen Penetration System, Inspector White said that in his opinion, based on his experience, he did not think it was a safer method of working. He noted that mainly because the absence of mesh in the penetration cover meant that someone or something, may not be prevented from falling through the hole. Additionally, while Inspector White has not personally worked with the BubbleDeck precast concrete system, he testified that he has worked over the years with similar types of precast concrete floor systems that use polystyrene or protruded air voids. Topping concrete is required to be used. Accordingly, Inspector White said he saw no reason at all why mesh cannot be used and installed prior to pouring the topping concrete, which he has seen performed on "hundreds of occasions".

47 Inspector White suggested also, that as an alternative to inserting the wire mesh prior to pouring the topping concrete, there was no reason in his view why mesh could not be installed when fabricating the precast concrete floor, although he had no personal experience of this approach. Finally, as to cut mesh becoming a hazard, Inspector White said that based upon his many years of experience, he has observed a range of trades cutting through mesh to install various services. These trades included plumbing, electrical, air-conditioning and others. The process usually involves cutting only the section of the mesh required for the installation of the required service, which may be a small area. Generally, this can be done by using tools such as bolt cutters and small angle grinders. Personal protective clothing is to be used when this takes place.

48 In addition to visiting Hanssen sites, Inspector White said that he had occasion to also observe the use of BubbleDeck precast concrete at a construction site in Emerald Terrace, West Perth. He visited this site in late July 2017. Inspector White said the main reason for the visit was to observe the use of BubbleDeck precast concrete and whether wire mesh was used in accordance with the Regulations. Whilst on the site, he observed BubbleDeck precast concrete being used, along with mesh being embedded in it in compliance with the Regulations. Inspector White took photos of the work being undertaking at the site, copies of which were annexed to his witness statement as annexure C. The photographs clearly show wire mesh being used in conjunction with the BubbleDeck precast concrete system.

49 In response to questions from the Tribunal, Inspector White said that he was aware that the use of the BubbleDeck type of precast concrete systems is becoming more prevalent in the construction industry. He was not aware of any difficulties in relation to the use of wire mesh for penetration covering, used in conjunction with such systems.

50 As with Inspector Poulton, Inspector White was not cross-examined and in the absence of any reason not to do so, I accept his evidence.

Consideration

51 I will deal first with Hanssen's request for an exemption from reg 3.54(1)(b) on the ground of substantial compliance. The original exemption request made to WorkSafe on 25 October 2016, sought an exemption for not only the 189 Adelaide Terrace site (the Concerto Apartments site) but also, in respect of "all future projects by Hanssen Pty Ltd". The Concerto Apartments development has now been completed. Thus, only consideration of the request for all future projects is required.

52 There is an immediate problem with an exemption based on this ground. As identified by WorkSafe, that is in this circumstance, in respect of projects yet to be commenced, there can be no comparison made between the level of compliance and the requirements of reg 3.54(1)(b). When regard is had to the cases discussed earlier in these reasons, such as *Re Asset Risk Management*, there has not been anything done by Hanssen, in relation to which, a practical assessment and comparison may be performed. However, despite this difficulty, for the purposes of the argument, I will assume that a hypothetical project of Hanssen uses the Hanssen Penetration System as described in the evidence and based on the materials before the Tribunal.

53 The elements of the Hanssen Penetration System involve the welding of metal angle brackets onto the metal edge of a BubbleDeck slab and the fitting of structural plywood, sealed with silicone and now, as accepted by Hanssen, to be secured by screws. This may be done conveniently offsite in the prefabrication stage or onsite on the evidence and the presentation of Mr Bermudez. A handrail was fitted around the perimeter of the concrete slab in one of the photos shown in Mr Bermudez's presentation.

54 The terms of reg 3.54(1)(b) have been set out above. The three key requirements are mesh of the prescribed size and placement; a strong covering to prevent persons or things falling through; and the secure fixing of the covering to the floor. Further requirements are set out in reg 3.54(2) which specify the size and aperture of the wire mesh and how it is to be embedded in a concrete slab. This also includes when the wire mesh may be removed for the installation of services and that it may not be used as a working platform.

55 I have set out earlier in these reasons how I consider reg 2.12, read with reg 3.54(1)(b) taken in context, should be construed. As originally proposed and used, the Hanssen Penetration System only satisfied one element of the required three key elements, that being the use of the structural plywood cover. Given Hanssen's agreement with WorkSafe's request to fix the plywood with screws, two elements would now be met. However, even so, in my view, this does not constitute substantial compliance.

56 Given the nature of the hazard to which reg 3.54 is directed, and the approach to "substantial compliance" set out above, the use of wire mesh is integral to the safety system prescribed in the Regulations. Both the wire mesh and the cover to go on it, are part of the fall protection scheme contemplated by this safety measure. That is, there are two barriers to persons and things falling through, depending on the size of an item. Construed in context, I do not consider that the use of only one element, a plywood cover, even fixed to the floor, notwithstanding its obvious load bearing capacity as demonstrated on Hanssen's evidence, is sufficient to constitute substantial compliance in this case.

57 The above conclusion is, of course, subject to the issue of practicability, which I have also discussed earlier in these reasons. WorkSafe has already accepted in its earlier determination, that there may be some circumstances where it is not practicable to use wire mesh in a penetration. In that circumstance, no exemption is required. As to what may constitute substantial compliance with reg 3.54(1)(b), while it will depend on the circumstances of each case, there is much to be said in my opinion for the suggestion from WorkSafe in its submissions, that this may involve, for example, some departure from the requirements of reg 3.54(2). However, the determination of that issue can await another day when it specifically arises for consideration.

58 The second basis for the exemption request is that compliance is unnecessary or impracticable under reg 2.13. I comment first on the impracticable ground. As with the requirements of reg 3.54(1)(b)(i) itself, there is an aspect of circularity concerning this issue. This is because compliance with reg 3.54(1)(b)(i) is mandatory only if it is not impracticable to use wire mesh. No exemption is necessary if impracticability is established. As also mentioned above, there may be some cases already noted by WorkSafe, such as in air pressurisation shafts, where it is not practicable to use wire mesh. Each situation will depend on its own circumstances.

59 However, in general, the evidence of Inspector White, not controverted by Hanssen, established that in his experience, there have been no impediments to using wire mesh as required by reg 3.54(1)(b), even where systems like the BubbleDeck method are used. Inspector White could not recall an occasion where wire mesh had not been applied. To a similar effect, was the evidence of Inspector Poulton. In his 20 years as an inspector, he had observed many construction sites where BubbleDeck precast concrete was used, with wire mesh embedded as required by reg 3.54(1)(b). He was not aware of any problems with compliance. Having regard to all that is before the Tribunal in this respect, I would anticipate that situations where it would be impracticable to use wire mesh would be relatively few.

60 Finally, is the ground of exemption based on necessity. The situations where there may be an exemption granted because compliance with a regulation would be unnecessary could be variable. It may be conceivable that a person with an obligation to otherwise comply, adopts an accepted, more efficient and modern system, to achieve compliance with a standard or a requirement of the Regulations, making strict compliance unnecessary, to address the specific hazard. I do not accept the WorkSafe submission that this is a matter beyond the Tribunal's jurisdiction: *ECI*.

61 To be unnecessary, it must be established by a person seeking an exemption that the object or purpose of the regulation can be met for example, by other means which adequately take account of the relevant hazard and the risk of harm or injury. Given the requirements of reg 3.54(1)(b), the fact that the Tribunal is not satisfied that Hanssen has substantially complied with the Regulations and the continued presence on future projects of the major hazard of falls from height and the risk of serious injury, in my view, Hanssen has not been able to establish that compliance with reg 3.54(1)(b) is unnecessary.

Conclusion

62 Whilst Hanssen is to be commended for endeavouring to develop an alternative system for dealing with penetrations on multi-storey buildings, the Tribunal is not satisfied that an exemption from compliance with reg 3.54(1)(b) should be granted. Accordingly, the decision of the WorkSafe Commissioner to refuse the exemption request is affirmed.

2017 WAIRC 00824

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	GERRY HANSSEN, HANSSEN PTY LTD DIRECTOR
	APPLICANT
	-v-
	LEX MCCULLOCH, WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 18 SEPTEMBER 2017
FILE NO/S	OSHT 2 OF 2017
CITATION NO.	2017 WAIRC 00824

Result	Decision affirmed
Representation	
Applicant	Mr G Hanssen
Respondent	Ms H Richardson of counsel and with her Mr M Workman of counsel

Order

HAVING heard Mr G Hanssen on behalf of the applicant and Ms H Richardson of counsel and with her Mr M Workman of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984, hereby orders –

THAT the decision of the respondent dated 12 April 2017 be and is hereby affirmed.

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

2017 WAIRC 00877

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	GERRY HANSSEN, HANSSEN PTY LTD DIRECTOR
	APPLICANT
	-v-
	LEX MCCULLOCH, WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 17 OCTOBER 2017
FILE NO/S	OSHT 5 OF 2017
CITATION NO.	2017 WAIRC 00877

Result	Application dismissed
Representation	
Applicant	Mr G Hanssen
Respondent	Mr D McDonnell of counsel

Order

HAVING heard Mr G Hanssen on behalf of the applicant and Mr D McDonnell of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984, hereby orders –

THAT the application be and is hereby dismissed.

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

2017 WAIRC 00878

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	GERRY HANSSEN, HANSSEN PTY LTD DIRECTOR
	APPLICANT
	-v-
	LEX MCCULLOCH, WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 17 OCTOBER 2017
FILE NO/S	OSHT 6 OF 2017
CITATION NO.	2017 WAIRC 00878

Result	Application dismissed
Representation	
Applicant	Mr G Hanssen
Respondent	Mr D McDonnell of counsel

Order

HAVING heard Mr G Hanssen on behalf of the applicant and Mr D McDonnell of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984, hereby orders –

THAT the application be and is hereby dismissed.

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