Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 6 WEDNESDAY 26 SEPTEMBER, 2018 Vol. 98—Part 2

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—
98 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2018 WAIRC 00734

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. RFT 4/2017 GIVEN ON 5 APRIL 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2018 WAIRC 00734
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	:	FRIDAY, 10 AUGUST 2018
DELIVERED	:	MONDAY, 10 SEPTEMBER 2018
FILE NO.	:	FBA 3 OF 2018
BETWEEN	:	DELIVER2U (WA) PTY LTD Appellant AND GD MITCHELL ENTERPRISES PTY LTD T/AS LITE N' EASY PERTH Respondent

ON APPEAL FROM:

Jurisdiction	:	**Road Freight Transport Industry Tribunal**
Coram	:	**Senior Commissioner S J Kenner**
Citation	:	**[2018] WAIRC 00218; (2018) 98 WAIG 251**
File No	:	**RFT 4 of 2017**

CatchWords	:	Industrial Law (WA) - Appeal from Road Freight Transport Industry Tribunal dismissing claim on grounds of jurisdiction to determine a dispute - Construction of meaning of 'owner-driver contract' in s 5(1) Owner-Drivers (Contracts and Disputes) Act 2007 (WA) - Jurisdiction turns on whether an implied or express term should be imported into the contract that the effective performance of the contract can only be achieved if the goods are transported in a 'heavy vehicle' (as defined) - Whether respondent required the appellant to transport goods in a 'heavy vehicle' could not be made on the papers where affidavit evidence competing and in contest
Legislation	:	*Owner-Drivers (Contracts and Disputes) Act 2007* (WA), s 3, s 4, s 5, s 5(1), s 5(2), s 7, s 7(1), s 37, s38, s 43(1), s 47 *Road Traffic (Vehicles) Act 2012* (WA), s 3(1)
Result	:	Appeal upheld, decision of Tribunal suspended and matter remitted

Representation:

Counsel:		
Appellant	:	Mr W G Spyker, of counsel
Respondent	:	Mr M D Howard SC and with him Ms P A Honey, of counsel
Intervener	:	Mr C Fordham, of counsel, and with him Mr J Collier
Solicitors:		
Appellant	:	Spyker Legal
Respondent	:	Thynne Macartney
Intervener	:	Slater and Gordon Lawyers

Case(s) referred to in reasons:

Brambles Holdings Ltd v Bathurst City Council [2001] NSWCA 61; (2001) 53 NSWLR 153

Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410

Carlton & United Breweries Ltd v Tooth & Co Ltd (SCNSW, unreported, 11 June 1985)

Commonwealth Bank of Australia v Barker [2014] HCA 32; (2014) 253 CLR 169

Director General of Department of Transport v McKenzie [2016] WASCA 147

Hamlyn & Co v Wood & Co (1891) 2 QB 488

Marcus Clark (Vic) Ltd v Brown (1928) 40 CLR 540

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

Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) (1986) 67 WAIG 325

Reasons for Decision

SMITH AP:

Introduction

1 This is an appeal instituted under s 43(1) of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) (the Owner-Drivers Act), against an order made by the Road Freight Transport Industry Tribunal (the Tribunal), constituted by Senior Commissioner Kenner, dismissing an application for want of jurisdiction.

2 The matter came before the Tribunal as a dispute referred by Deliver2U (WA) Pty Ltd (the appellant) alleging breaches of a delivery agreement and conduct which is said to be unconscionable by GD Mitchell Enterprises Pty Ltd t/as Lite n' Easy Perth (the respondent).

3 The respondent in its notice of answer filed on 9 October 2017 raised an issue going to the jurisdiction of the Tribunal to hear and determine the dispute. The issue was whether delivery agreements entered into between the parties constituted an 'owner-driver contract' within the meaning of the Owner-Drivers Act.

4 It is common ground in the appeal whether the appellant and respondent had entered into an 'owner-driver contract' is a jurisdictional fact which is a pre-condition to the valid exercise of the Tribunal's power to deal with the dispute.

Application to intervene in the appeal

5 The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (the TWU) made an application to intervene in the appeal to make submissions about the proper construction of 'owner-driver contract' in s 5(1) of the Owner-Drivers Act. The application was not opposed by the parties to the appeal.

Background

6 Pursuant to s 47 of the Owner-Drivers Act (when read with s 37), the Tribunal has jurisdiction to hear and determine a dispute (among other matters) between one or more owner-drivers and one or more hirers arising under an 'owner-driver contract'. For the purposes of the Owner-Drivers Act, an 'owner-driver' is defined in s 4 to mean an owner-driver (if it is a body corporate other than a listed public company) that carries on the business of transporting goods in one or more heavy vehicles that are supplied by the body corporate or an officer of the body corporate, and operated by an officer of the body corporate (whether solely or with the use of other operators) whose principal occupation is the operation of those vehicles.

7 An 'owner-driver contract' is defined in s 5 as:

> (1) For the purposes of this Act, an ***owner-driver contract*** is a contract (whether written or oral or partly written and partly oral) entered into in the course of business by an owner-driver with another person for the transport of goods in a heavy vehicle by the owner-driver.
>
> (2) It does not matter that an owner-driver contract provides for an owner-driver to perform services other than transporting goods, as long as the services to be performed under the contract predominantly relate to the transport of goods.
>
> (3) To avoid doubt, an owner-driver contract does not include a contract that is a contract of employment.

8 A 'heavy vehicle' is defined in s 3 of the Owner-Drivers Act to mean unless the contrary intention appears has the meaning given in the *Road Traffic (Vehicles) Act 2012* (WA) (s 3(1)).

9 Section 3(1) of the *Road Traffic (Vehicles) Act* defines a 'heavy vehicle' to mean a vehicle with a GVM of more than 4.5 tonne. GVM is defined in s 3(1) of the *Road Traffic (Vehicles) Act* to stand for 'gross vehicle mass', and in relation to a vehicle, means the maximum loaded mass of the vehicle:

(a) as specified by the manufacturer; or

(b) as specified by the relevant authority if —

(i) the manufacturer has not specified a maximum loaded mass; or

(ii) the manufacturer cannot be identified; or

(iii) the vehicle has been modified to the extent that the manufacturer's specification is no longer appropriate;

10 At first instance, the respondent contended that the Tribunal did not have jurisdiction to determine the appellant's claim, as there was no requirement placed on the appellant, either orally or in writing, by the respondent to use a vehicle with a GVM of more than 4.5 tonne, or any tonnage limit (that is, a heavy vehicle as defined in the Owner-Drivers Act).

11 Consequently, an issue was squarely raised before the Tribunal whether the parties had entered into an agreement that constituted an 'owner-driver contract' within the meaning of the Owner-Drivers Act.

12 The appellant with some reluctance agreed to determine the issue of jurisdiction as a preliminary matter on the papers.

13 After the parties had filed written submissions, the Associate to Senior Commissioner Kenner sent a letter dated 25 January 2018 to the parties requesting each of them to file, and serve, an affidavit or affidavits setting out their contentions on an evidentiary issue which the Tribunal had identified may be an evidentiary issue in relation to paragraph 9 of the appellant's particulars of claim (when read with cl 8.1(a) of the 'delivery agreement').

14 In paragraph 9 of the appellant's particulars, it was stated that the appellant provided the services to the respondent with an approved GVM 5.5 tonne truck. The issue identified in the Associate's letter related to whether or not the respondent had 'approved' the use by the appellant of the heavy vehicle the appellant had purchased to perform its obligations under the delivery agreement. The letter also noted that:

(a) an issue may be the extent of the respondent's knowledge of the type and capacity of the vehicle used by the appellant for the performance of the services;

(b) this matter was not dealt with in the written submissions that had been filed by the parties; and

(c) the respondent had denied the allegation made by the appellant in paragraph 26 of its notice of answer.

15 The Associate's letter also requested the parties to file and serve any further written submissions and were informed that if a short oral hearing was required for the disposition of the issue, arrangements would be made by the Tribunal.

16 In light of the matters raised in the letter sent on behalf of the Tribunal, the appellant filed an affidavit of Anthony Baggs sworn on 9 February 2018 and the respondent filed affidavits of Cassandra Jane Brokaw sworn on 6 February 2018 and on 22 February 2018. The parties also filed supplementary submissions dealing with the matters raised in the Associate's letter.

The appeal – The issues raised

17 The grounds of appeal are as follows:

1. The Learned Commissioner erred in concluding that there is a requirement for a contract to expressly provide for the use of a 'heavy vehicle' by a driver in order to constitute an 'owner-driver contract' for the purposes of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) ('Act'), when the Learned Commissioner should have concluded that all that is required is that, as a matter of fact, a driver transports goods for a hirer using a 'heavy vehicle'.

2. The Learned Commissioner erred in concluding that the Appellant and Respondent were not parties to an 'owner driver contract' for the purposes of the Act.

3. The Learned Commissioner erred in concluding that the relevant contract was the unsigned 2016 Agreement, when the learned Commissioner should have concluded that the parties were subject to an oral contract that constituted an 'owner-driver contract' for the purposes of the Act.

4. The Learned Commissioner erred in concluding that the Respondent did not require the Appellant to transport goods using a 'heavy vehicle', when the Commissioner should have concluded as a matter of fact that the Respondent was unable to transport a sufficient number of eskies on its delivery runs except by using a 'heavy vehicle', alternatively, the Learned Commissioner erred in making findings of fact upon contested and competing affidavit evidence.

5. The Learned Commissioner erred in concluding that the Respondent did not know of and had not approved the Appellant's use of a 'heavy vehicle' when the Commissioner should have concluded the Respondent did know of, and had approved, its use. Alternatively, the Learned Commissioner erred in making findings of fact upon matters not subject to oral evidence and cross-examination.

18 There are two main issues in this appeal.

19 The first issue raises a matter of law and solely goes to the construction of the meaning of 'owner-driver contract' within the meaning of the Owner-Drivers Act.

20 The proper interpretation of the meaning of 'owner-driver contract' in s 5 of the Owner-Drivers Act is a question that was properly before the Tribunal as a preliminary issue. The first issue was a question of law going to the jurisdiction of the Tribunal to deal with the dispute which did not turn on the facts of the particular matter before the Tribunal.

21 The procedural step to determine the first issue as a jurisdictional question and as a preliminary matter was entirely proper. Once a question of jurisdiction is raised, the Tribunal must determine that question before exercising power to resolve the dispute before it: ***Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)*** (1986) 67 WAIG 325.

22 The second issue is whether the contract entered into between the parties was an 'owner-driver contract'. This issue raises questions of fact and law. For reasons that follow, I am of the opinion this issue should not have been dealt with as a preliminary issue.

Relevant circumstances stated in the affidavit of the appellant's director, Mr Baggs

23 In his affidavit sworn on 9 February 2018, Mr Baggs stated:

(a) Prior to April 2016, he had contracted with the respondent in his individual capacity to deliver 'Lite n' Easy' pre-packaged meals stored in small eskies to customers around the State. This arrangement commenced in April 2014 and continued to April 2016. Over this period, Mr Baggs performed deliveries of the respondent's pre-packaged meals in a van hired from a rental company. The vehicle had a GVM of 4.5 tonne. Mr Baggs made observations over time that the capacity of the vehicle he hired provided him with very little extra space when it was filled with eskies of meals to be delivered and empty eskies from returns.

(b) In or around late March 2016, Mr Baggs met with Ms Brokaw, who was the respondent's Western Australian service and administration manager. At the meeting, Ms Brokaw told Mr Baggs that the respondent was changing its delivery driver arrangements, and that he needed to establish his own company and for the new corporate body to purchase a truck to continue performing deliveries.

(c) Mr Baggs asked Ms Brokaw what type of truck the new company needed to purchase and she told him that the truck needed to be fitted out with refrigerated-style insulation and to be white in colour.

(d) Because the van that he was renting was not insulated, Mr Baggs formed the opinion that he needed to purchase a larger truck that would accommodate the refrigerated-style insulation.

(e) Prior to the purchase of a truck, Mr Baggs observed that the number of deliveries he performed on his runs were steadily increasing. He calculated that his truck needed to fit at least 280 eskies to keep performing deliveries and together with the refrigerated insulation, he formed the opinion that to carry all the eskies he needed a truck that was larger than the van he had been hiring. After conducting research of the cost of a suitable truck, Mr Baggs formed the opinion that a truck large enough to accommodate at least 280 eskies and have refrigerated-style insulation all approximately had a GVM of 5 tonne and cost $70,000.

(f) Because an amount of $70,000 was a significant amount of money, Mr Baggs sent Ms Brokaw an SMS text message on 2 May 2016 asking whether his delivery runs would be maintained at their current levels. In the SMS, he stated:

> Bit concerned that I'll be [sic] a truck for 70K without any garuntee [sic] that the current income will be maintained. A van is 45K and is a lot easier to financially maintain. If I buy a truck can you garuntee [sic] will my numbers and runs will be viable … I'm happy to make that commitment if your [sic] happy to commit to ensuring it's viability … I need to make $500 more a week than the van drivers do to make the same money. I hope you understand my concern. In order to make the commitment I need to know if there will be any major changes to my runs in foreseeable future?

(g) In response, Ms Brokaw sent a text message in which she stated:

> Whilst I can't guarantee numbers to an absolute degree, I don't see that we would look to reduce your numbers, and are looking to better match capacity of drivers. So yes if you had higher capacity you would get higher numbers.

(h) On 1 July 2016, the appellant purchased a Hino 300 Series GVM 4.5 tonne truck and Mr Baggs had it fitted with refrigerated-style insulation which consequently resulted in the manufacturer registering the truck with a weight of GVM 5.5 tonne. After 1 July 2016, Mr Baggs used the Hino truck to perform deliveries.

(i) In or around August 2016, Mr Baggs approached Ms Brokaw on the respondent's delivery dock and asked if she could inspect his truck to make sure it complied with all of the requirements she had set out at their meeting. Ms Brokaw inspected the truck and asked Mr Baggs what the insulation was made from. Mr Baggs told her it was made from 50 mm sandwich panel and she replied that since it was fridge-style insulation that was fine. Ms Brokaw completed the inspection and did not raise any issues with Mr Baggs regarding the type or size of the truck. In these circumstances, the appellant claims that the respondent approved the use of the appellant's truck.

Relevant circumstances stated in Ms Brokaw's affidavits

24 Ms Brokaw, in her affidavit sworn on 22 February 2018, took issue with the number of matters stated in Mr Baggs' affidavit. In particular, she stated:

(a) The number of deliveries were not increasing over time. In or about May 2016, numbers of deliveries were decreasing due to the seasonal reduction in customer numbers between May and August in each year.

(b) The respondent's regional delivery runs require a vehicle with the capacity to transport approximately 160 to 190 eskies on a regular basis and up to approximately 200 eskies at peak times. This equates to a vehicle with a carrying capacity of approximately two tonnes.

(c) The maximum number of eskies Mr Baggs transported was 210 eskies on two days only, on 7 September 2016 and 14 September 2016. This number of eskies would fit into a van or truck that is not a heavy vehicle.

(d) If the number of eskies allocated to any driver exceeded a driver's vehicle capacity, the respondent would review this and where required alter the delivery run or reallocate the suburbs and towns between drivers.

The Tribunal's reasons for decision

25 The Senior Commissioner, after properly having regard to the relevant principles in relation to the construction of legislation, including the decision in ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355, had regard to the long title of the Owner-Drivers Act which provides that it is an Act:

- to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so; and
- to establish the Road Freight Transport Industry Tribunal and the Road Freight Transport Industry Council,

and for related purposes.

26 After having regard to the definition of 'heavy vehicle' in s 3 of the Owner-Drivers Act, the meaning of 'owner-driver' in s 4, the definition of 'owner-driver contract' in s 5 and the extent of the Tribunal's jurisdiction in s 38, the Senior Commissioner made the following findings:

(a) Based on the affidavit evidence filed by both the appellant and the respondent, it does not appear to be in dispute that for the purposes of s 4, the appellant was an owner-driver as defined, being a body corporate that carries on the business of transporting goods in one or more heavy vehicles supplied by that body corporate. Mr Baggs, as the officer of the company, operated the vehicle and that was his principal occupation.

(b) Breaking down the component parts of the meaning of 'owner-driver contract' in s 5 of the Owner-Drivers Act, the following requirements are met:

(i) there is a contract, although there have been several contracts entered into, the latter being unsigned, no issue appears to have been taken by the parties that the terms of the third and final agreement dated 2016, govern the relationship between them;

(ii) the agreement was entered into by the appellant 'in the course of business';

(iii) the contract was entered into by an 'owner-driver', as the appellant was, at the material times, so described;

(iv) the agreement was entered into 'with another person', that person being the respondent;

(v) the subject matter of the contract was for the 'transport of goods'; and

(vi) the products manufactured by the respondent and delivered to its customers, as far as the appellant was concerned, were goods transported in a 'heavy vehicle' as defined and were transported by the appellant as the relevant 'owner-driver'.

27 The question then considered by the Senior Commissioner was what was the meaning of the words 'for the transport of goods in a heavy vehicle' by an owner-driver in s 5(1) of the Owner-Drivers Act. This issue was found to turn on a constructional choice between construing the words:

(a) not to mean just the transport of goods by an owner-driver as defined in s 4, but rather a contract that must specify in its terms that a heavy vehicle be used, which is one with a GVM of more than 4.5 tonne; or

(b) to mean it is sufficient that there simply be a contract between an owner-driver (as defined) and a hirer for goods to be transported.

28 The latter construction was rejected by the Senior Commissioner and the former construction applied. The Senior Commissioner found that unless the express terms of the contract itself, whether oral or written, or partly so, provides for the use of a heavy vehicle (as defined in s 3 of the Owner-Drivers Act) by the owner-driver to transport the relevant goods, the resulting contract is not one amenable to the Tribunal's jurisdiction.

29 Having reached the view that it is to be specified (by an express term) that a heavy vehicle be used to transport goods, for a contract to constitute an owner-driver contract as defined in s 3 of the Owner-Drivers Act, the Senior Commissioner then turned to consider whether the terms of the contract entered into between the parties in this matter constituted such an agreement. In determining this issue, the Senior Commissioner had regard to cl 8.1(a) of an unexecuted agreement dated 2016.

30 Pursuant to cl 8.1(a) of the unexecuted agreement, it was provided that the appellant's vehicle must be of a type and capacity approved by the company from time to time.

31 Clause 8.1 of the unexecuted agreement dated 2016 was in the following terms:

8.1 The Contractor must provide, at the Contractor's expense, the Vehicle suitable for the delivery of the Products which complies with the following conditions:

(a) the Vehicle must be of a type and capacity approved by the Company from time to time;

(b) the Vehicle must be fully sealed, insulated and capable of being operated at a temperature advised by the Company from time to time;

(c) the Vehicle must be kept in a suitable condition for carrying food products and must comply with all relevant legislation relating to the carrying of food products;

(d) the Vehicle must be painted white and will bear no logos, brands, markings, or product descriptions, other than the Company's logo or brand if required by the Company, in which case they will be provided, at no cost to the Contractor, by the Company; and

(e) the Vehicle must be kept in a good and proper state of repair and condition to maintain the highest standards of hygiene and cleanliness as may be reasonably practical.

32 The Senior Commissioner found the issue arising from cl 8.1(a) was whether, on the facts, the respondent approved the type and capacity of the vehicle purchased by the appellant to continue performing the services and thus, whether it could be contended that the use by the appellant of its heavy vehicle to perform the services was in accordance with the terms of the agreement.

33 In the Tribunal's reasons for decision, the Senior Commissioner set out the affidavit evidence not only of Mr Baggs but also Ms Brokaw and properly observed that there is some dispute on the affidavit evidence as to what may have been said in relation the appellant's vehicle. The Senior Commissioner found that Ms Brokaw was aware that the vehicle make was a 'Hino' but nothing further was disclosed about the vehicle by Mr Baggs to Ms Brokaw. In particular, he found that:

(a) no mention had been made by Mr Baggs to Ms Brokaw about the vehicle's weight or GVM, or that it was a 'heavy vehicle'; and

(b) the registration papers for the vehicle, that would be expected to reveal these matters, were not provided to the respondent.

34 After making these observations, the Senior Commissioner found [54]:

> Clause 8.1(a) of the Agreement requires the company to 'approve' the type and capacity of a contractor's vehicle. It is not a matter only for a contractor to obtain approval. Approval may arise in various ways. It may be inferred from conduct as well as resulting from express concurrence. However, as to the former, there would need to be informed assent by the respondent. Guesswork would not be sufficient. After commencing in July 2016, Mr Baggs specifically spoke to Ms Brokaw and asked her to inspect the vehicle acquired by the applicant to ensure that it met the respondent's requirements. She did so. Ms Brokaw was satisfied with the vehicle that the applicant had provided. However, her satisfaction was as to the express requirements of cl 8.1 (b) to (d) of the Agreement set out above. Whilst it is the case that the respondent would have been aware, from the text messages from Mr Baggs, that he was considering obtaining a larger vehicle to perform the services, this is not the same as constituting an agreement that the applicant's vehicle was a heavy vehicle for the purposes of the OD Act.

The parties' submissions going to proper construction of the meaning of an 'owner-driver contract'

35 The parties to the appeal and the intervener differ in their approaches to the proper construction of the meaning of 'owner-driver contract' in s 5.

36 The appellant submits that when the principles of statutory construction are properly applied, there are four elements required to establish the existence of an 'owner-driver contract'. These are:

(a) there is a contract;

(b) that is entered into in the course business;

(c) by an owner-driver with another person;

(d) for the transport of goods.

37 The appellant also submits that the use of the words 'in a heavy vehicle by the owner-driver', in s 5(1), should be construed as disjunctive as those words inform the reader that, in carrying out the transport of goods, the owner-driver must utilise a heavy vehicle. It is said to follow therefore:

(a) that it is not necessary for a contract to specify the precise size and tonnage requirements of a vehicle to be utilised by the owner-driver to transport the goods. Rather, it is simply a fact whether or not the owner-driver actually uses a heavy vehicle to transport goods; and

(b) the factual question for determination is two-fold. Firstly, if it is found to be established that the person who claims to be an owner-driver is in fact someone who carries on the business of transporting goods in one or more heavy vehicles, the second factual issue is whether that owner-driver is engaged by another person to conduct the business of transporting goods in that way. Thus, it is only necessary for a finding to be made that the owner-driver utilises a heavy vehicle.

38 The TWU puts a submission that the Senior Commissioner:

(a) properly identified the elements of an owner-driver contract that are required to be found as a matter of fact pursuant to s 5; and

(b) was correct to find that the use of the word 'for' in s 5(1) must be understood to denote the purpose or subject matter of the contract.

39 However, the TWU contend that the construction preferred by the Senior Commissioner contemplates that an owner-driver contract could be drafted in terms that seek to avoid the obligations to owner-drivers that arise under the Owner-Drivers Act and such construction is contrary to s 7 of the Owner-Drivers Act.

40 Section 7 of the Owner-Drivers Act provides as follows:

(1) A provision in an agreement or arrangement in force on, or entered into after, the coming into operation of this section, whether an owner-driver contract or not and whether in writing or not, that –

(a) purports to exclude, modify or restrict the operation of this Act or the code of conduct; or

(b) is contrary to or inconsistent with anything in this Act, the code of conduct or an order of the Tribunal,

has no effect.

(2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.

(3) Any purported waiver, whether in an owner-driver contract and whether in writing or not, of an entitlement under this Act has no effect.

(4) Despite subsection (1), during the 6 months beginning on and including the day on which this section comes into operation, a provision of an owner-driver contract that is contrary to or inconsistent with a provision of this Act or the code of conduct prevails to the extent of the inconsistency.

41 The TWU also contend the Senior Commissioner erred in drawing an inference in s 5(1) that the purpose of an owner-driver contract must be an express term of the contract. This inference is said to be contrary to the words used in s 5 which contemplates that an owner-driver contract may not be drafted in formal terms, or may not be recorded in writing at all. Further, that s 5(2) contemplates that a contract might cover a wide range of services so consequently s 5(2) provides that 'services to be performed under the contract predominantly relate to the transport of goods'. In these circumstances, it is pointed out that s 5(2) contemplates that an owner-driver may transport goods in a heavy vehicle or a light vehicle and there might be multiple purposes to a contract. Consequently, regard must be had to the fact that a contract may be for all types of transport services whereby the Owner-Drivers Act will only apply in circumstances where the purpose of the terms of the contract for the goods in question include a heavy vehicle.

42 The respondent in its written submissions did not take issue with the construction applied by the Senior Commissioner for a contract to be an 'owner-driver contract' for the purposes of s 5(1). However, in oral submissions senior counsel for the respondent departed from this submission. Following questions put to counsel for the parties by the Full Bench, senior counsel conceded that a contract for the transport of goods would also constitute an owner-driver contract within the meaning of s 5(1) if a term could be implied into the contract that the transport of goods must objectively, by necessary implication, be required to be transported in a heavy vehicle.

Construction of owner-driver contract in s 5 of the Owner-Drivers Act

43 The modern approach to statutory construction requires the meaning of a provision to be construed within a statute as a whole and in context. Thus, it is artificial to focus on words in a statute in isolation.

44 In ***Director General of Department of Transport v McKenzie*** [2016] WASCA 147, Buss P observed [46] - [48]:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of the provision, in particular the mischief it is seeking to remedy. See ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby & Hayne JJ); ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*** [2009] HCA 41; (2009) 239 CLR 27 [47] (Hayne, Heydon, Crennan & Kiefel JJ).
>
> The context includes the existing state of law, the history of the legislative scheme and the mischief to which the statute is directed. See ***CIC Insurance Ltd v Bankstown Football Club Ltd*** [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ).
>
> The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See ***Certain Lloyd's Underwriters v Cross*** [2012] HCA 56; (2012) 248 CLR 378 [26] (French CJ & Hayne J). The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. See ***Minister for Employment and Workplace Relations (Cth) v Gribbles Radiology Pty Ltd*** [2005] HCA 9; (2005) 222 CLR 194 [21] (Gleeson CJ, Hayne, Callinan & Heydon JJ).

45 In determining the proper construction of owner-driver contract, the Senior Commissioner properly considered the meaning of 'owner-driver' in s 5(1) in context and with regard to the purpose of the legislation in the following passages of his reasons for decision [23] - [27]:

> As set out above, in s 5(1), which defines what an owner-driver contract is, specifies that the relevant contract is to be entered into … '*for*' the transport of goods '*in a heavy vehicle*' by the owner-driver. The language of s 5(1) read in its ordinary and natural sense, does not say that the contract between an owner-driver and the other person is for the transport of goods simpliciter. The final words in the subsection qualify the words 'transport of goods', by the inclusion of the further words 'in a heavy vehicle by the owner-driver'. Such an owner-driver is a person, who, by s 4, is engaged in the business of the transport of goods in heavy vehicles. The word 'for' in the context of s 5, in its ordinary and natural sense, must be understood as denoting the relevant purpose or subject matter of the contract. The Shorter Oxford English Dictionary relevantly defines 'for' as '1. with the object or purpose of OE. b. for the purpose of being or becoming …'. In my view, the word 'for' is directly referable to the preceding words in the sub-section and refers to the subject matter of the contract between the parties.
>
> The terms of s 5(2) tend to confirm this construction as it further deals with the purpose and subject matter of the contract by providing that it may also enable the owner-driver to perform other services, so long as the contract predominantly relates to the transport of goods. When read with the long title, by s 5, the OD Act concerns itself with contracts of the specified kind. That is, in part at least, the subject matter of the legislation. This is supported by reference to other parts of the legislation. By Part 2, is prescribed matters in relation to the content of owner-driver contracts. These include prohibited provisions and implied provisions. By Part 4, are prescribed terms dealing with the making of a Code of Conduct concerning various matters in relation to owner-driver contracts and the conduct of the parties to such contracts.

> Parts 5 and 6 cover negotiations for owner-driver contracts and unconscionable conduct in relation to their negotiation, terms and performance.
>
> Additionally, s 5(1) is not to be read in isolation. The long title to the OD Act, set out earlier in these reasons, in part provides that in pursuing a safe and sustainable road freight transport industry, this is to be achieved 'by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so …'.
>
> The terms of the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* are also relevant. Whilst it is the general rule that regulations may not be referred to in the interpretation of the statute under which regulations are made, an exception applies where regulations are, in conjunction with the statute, part of a legislative scheme: *Statutory Interpretation in Australia* (7th ed 2011) 3.41. In this case, the Code of Conduct is part of such a scheme. In the negotiation for owner-driver contracts in Division 1 of the Code, certain obligations are imposed on parties. Section 7 deals with entering into contracts. By s 7(2), a prospective hirer is obliged to provide certain information to an owner-driver. This includes a copy of Guideline Rates published by the Road Freight Transport Industry Council, comprising industry representatives and established under Part 3 of the OD Act. Such Guideline Rates are given statutory effect and have the status of subsidiary legislation for the purposes of s 43(7) to (9) of the *Interpretation Act*. They are to be published under s 27 of the OD Act and s 8 of the Code. Guideline Rates consider fixed and variable costs of operating heavy vehicles of specified classes. Under s 7(2) of the Code, they are to be given to an owner-driver, irrespective of whether such rates are applicable to the proposed contract. This would cover the circumstance where, for example, a payment system by piecework is being contemplated. An owner-driver can then, by way of comparison, make some assessment of what might be earned under an hourly or per kilometre rate basis, to help assess whether rates to be paid are safe and sustainable: *Ram Holdings, Michael Italiano v Kelair Holdings Pty Ltd* [2018] WAIRC 00156 at pars 129-130.
>
> Guideline Rates are applicable to heavy vehicle types starting from 5 tonnes GVM up to prime movers of 122.5 tonnes GVM. They specify rates, according to size of vehicle, on both an hourly rate and per kilometre rate basis, for metropolitan and regional work. Whilst not minimum or maximum rates, they are published to guide parties in their negotiations for owner-driver contracts. Rates of pay are a fundamental term of any owner-driver contract and the Guideline Rates are fixed by reference to classes of heavy vehicles. The Tribunal may have regard to the Guideline Rates under the OD Act in determining whether rates paid under an owner-driver contract are safe and sustainable. All the above is a strong indication of legislative intention that the use of a heavy vehicle must be part of the bargain between the parties for a contract to be an owner-driver contract as defined in s 5 of the OD Act.

46 The analysis in these paragraphs of the Senior Commissioner's reasons displays no misinterpretation.

47 However, I do agree that the Senior Commissioner erred in drawing from the point in [27], that there is a strong legislative intention that the use of a heavy vehicle must be part of the bargain between the parties for a contract to be an owner-driver contract, results in a necessary finding that the use of a heavy vehicle must be specified in an express term of a contract.

48 In my respectful opinion, such a construction is to give s 5(1) a narrow meaning that is inconsistent with the purpose of the Owner-Drivers Act that the provisions of the Owner-Drivers Act are to apply irrespective of the express intention of the parties (especially s 7(1)).

49 I do not accept the appellant's construction should be applied to s 5(1). The difficulty with the appellant's construction of 'owner-driver contract' is that the words 'in a heavy vehicle' in s 5(1) of the Owner-Drivers Act have no work to do. In particular, it would only be necessary to find that a contract had been entered into in the course of business by an owner-driver as defined in s 5 of the Owner-Drivers Act by a person who carries on the business of transporting goods in one or more heavy vehicles by an owner-driver with another person for the transport of goods.

50 The Owner-Drivers Act is to provide for regulation of the (contractual) relationship between persons who enter into contracts to transport goods in heavy vehicles and the persons who hire them to do so. Some of those contractual relationships to which the Owner-Drivers Act applies will be established by oral agreements, some in writing, and some partly orally and partly in writing (s 5(1)).

51 It is an established principle in the common law of contract that terms can be implied in fact, in law (as legal incidents) or by custom.

52 Whilst whether a contract entered into by an owner-driver (as defined in s 4) will be for the transport of goods in a heavy vehicle by an owner-driver within the meaning of s 5(1) is necessarily a question of fact of the terms of a contract, it does not follow that the determination of that question turns only on the express terms of a contract.

53 In ***Carlton & United Breweries Ltd v Tooth & Co Ltd*** (SCNSW, unreported, 11 June 1985), Hodgson J spoke of four categories of implied terms; approved by Heydon JA in ***Brambles Holdings Ltd v Bathurst City Council*** [2001] NSWCA 61; (2001) 53 NSWLR 153 [28]; see also ***Commonwealth Bank of Australia v Barker*** [2014] HCA 32; (2014) 253 CLR 169 [21] (French CJ, Bell and Keane JJ). In ***Carlton & United Breweries Ltd v Tooth & Co Ltd***, Hodgson J said:

> There is a spectrum of different types of implied terms covering, inter alia, the following:
>
> (i) Implications contained in the express words of the contract: see *Marcus Clark (Vic) Ltd v Brown* (1928) 40 CLR 540 at 553-4.
>
> (ii) Implications from the 'nature of the contract itself' as expressed in the words of the contract: see *Liverpool City Council v Irwin* [1977] AC 239.
>
> (iii) Implications from usage (for example, mercantile contracts).

(iv) Implications from considerations of business efficacy: see *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

54 The first category referred to by Hodgson J relies upon the principle that to imply a term from express terms of a contract there must be something from the language of the contract itself, and the circumstances under which it was entered into that such an inference both parties intended to stipulate in question, for the conclusion to be drawn that the stipulation is intended: ***Marcus Clark (Vic) Ltd v Brown*** (1928) 40 CLR 540, 553-554; applying ***Hamlyn & Co v Wood & Co*** (1891) 2 QB 488.

55 Application of the principle in the first category of implied terms to s 5(1) could, in some circumstances, result in the parties attempting to contract out of the Owner-Drivers Act contrary to s 7. For the same reason, the fourth category of implied terms is not capable of application as the business efficacy test is subject to the exception that a term to be implied on grounds of business efficacy is excluded if inconsistent with an express term of a contract.

56 It is difficult to contemplate that the third category of implication of terms by custom could have application to s 5.

57 The second category of implied terms referred to by Hodgson J are terms implied by law as a legal incident of the nature of a particular contract. Such terms are usually implied by law as legal incidents of a particular class of contract or they can be applied in law in all classes of contract: ***Commonwealth Bank of Australia v Barker*** [21].

58 In ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410, McHugh and Gummow JJ pointed out that the question whether the law would imply into the contract of employment a term turns on whether the term is a necessary incident of a definable category of contractual relationship (452). Their Honours also said (450):

> Many of the terms now said to be implied by law in various categories of case reflect the concern of the courts that, unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined (163). Hence, the reference in the decisions to 'necessity'.
>
> For example, it is established that the mere relationship of landlord and tenant implies a covenant for quiet enjoyment. The reason for this appears to be that, originally, the common law courts would not recognise the tenant as having any estate in the demised land and would not reinstate the tenant if ejected by the landlord; the remedy in covenant remedied the position of the tenant who otherwise, if ejected, would have been without recourse (164).
>
> This notion of 'necessity' has been crucial in the modern cases in which the courts have implied for the first time a new term as a matter of law.

59 In ***Commonwealth Bank of Australia v Barker***, French CJ, Bell and Keane JJ said in respect of these observations by McHugh and Gummow JJ that [29]:

> In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the 'necessity' which will support an implied term in law is demonstrated where, absent the implication, 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined' (112) or the contract would be 'deprived of its substance, seriously undermined or drastically devalued (113). The criterion of 'necessity' in this context has been described as 'elusive' (114) and the suggestion made that 'there is much to be said for abandoning (115) the concept. Necessity does, however, remind courts that implications in law must be kept within the limits of the judicial function. They are a species of judicial law-making and are not to be made lightly. It is a necessary condition that they are justified functionally by reference to the effective performance of the class of contract to which they apply, or of contracts generally in cases of universal implications, such as the duty to co-operate. Implications which might be thought reasonable are not, on that account only, necessary (116). The same constraints apply whether or not such implications are characterised as rules of construction.

60 In my respectful opinion, whether an owner-driver has entered into a contract with another person for the transport of goods in a heavy vehicle will turn on whether it is an express term or an implied term that the goods the subject of the contract are to be transported in a heavy vehicle.

61 Whether such a term is to be implied should turn upon whether it is a necessary incident for the effective performance of the contract. That is, the effective performance of the contract can only be achieved if the goods in question are transported in a heavy vehicle as defined. To determine whether such a term should be implied would depend upon the evidence in each matter as to whether a heavy vehicle was objectively required to transport goods, the subject of the contract in question.

62 The practical effect of this construction can be illustrated in the following exchanges between the Full Bench and senior counsel for the respondent when counsel was invited to consider a contract to transport an Army tank by an owner-driver where the terms of the contract were otherwise unspecified. In response, Mr Howard SC said (ts 24 – 25):

> **HOWARD, MR:** - - - then the only way - and again, I don't know what tanks weigh, but I'm perfectly happy to accept that the only way you can transport a tank is with a heavy vehicle. And if that is the case, then that contract will be for the transport of goods in a heavy vehicle. But if we take a pizza, then if a truck is used to deliver a pizza, on the appellant's construction it falls within the Act because as a matter of fact a truck is used to transport a pizza. Now, we say what is being done in 5(1) is something different. So sometimes, it will be the nature of the goods that make it plain - - -
>
> **SMITH AP:** So that would arise as a matter of implication of the terms of the contract. An implied term that because of the nature of the - what is contracted - - -
>
> **HOWARD, MR**: Yes.

63 For these reasons, it is clear that error is established in the finding made by the Tribunal that s 5(1) requires that a contract between an owner-driver and a hirer must expressly provide for the use of a heavy vehicle for the contract to constitute an owner-driver contract. I am of the opinion that in part ground 1 of the appeal is made out.

Could the question whether the parties entered into an owner-driver contract be determined on the papers?

64 Turning to the remaining grounds of appeal, the question is whether objectively it could be found that the contract entered into by the appellant and the respondent required for its effective performance the use of a heavy vehicle. The answer to this question necessarily must turn upon findings made in a factual inquiry.

65 Although the Senior Commissioner examined the factual circumstances before him, by embarking on an inquiry whether approval was given by the respondent of the type and capacity of the vehicle used by the appellant pursuant to cl 8.1 of the unexecuted agreement, in the absence of any findings about whether the appellant was able to deliver the required quantities of packaged meals for the respondent, the Senior Commissioner was, in my respectful opinion, led into error.

66 The difficulty that faced the Tribunal on a hearing on the papers was that there was competing affidavit material before the Senior Commissioner which raised factual circumstances squarely relevant to this issue and in dispute.

67 The effect of Mr Baggs' evidence was that over time, the total number of his esky meal deliveries and collection had increased from approximately 180 in total to approximately 280 in total by April 2016. Consequently, Mr Baggs claimed on behalf of the appellant that the appellant was unable to transport a sufficient number of eskies on its delivery runs except by using a 'heavy vehicle'.

68 Ms Brokaw took issue with Mr Baggs' assertion that deliveries performed by him were increasing and that he would need a vehicle with a capacity of 280 eskies to perform the services. She deposed in her affidavit that from the respondent's records, the maximum number of eskies at any one time Mr Baggs had transported was 210 on two occasions in September 2016. She also deposed that 210 eskies would fit into a van or a truck that is not a heavy vehicle. Thus, the effect of Ms Brokaw's evidence was that Mr Baggs' estimate of 280 eskies, including deliveries and returns, was an assumption made by him that was incorrect.

69 In the reasons of the Senior Commissioner, he set out the evidence of Mr Baggs and Ms Brokaw on this issue and observed that there was some dispute on the affidavit evidence. He properly did not, however, make any finding of facts on this issue. The Senior Commissioner did not make any findings about whether it was possible to do so. It is also clear from his reasons that he did not attempt to resolve this issue. This was not an issue that he turned his mind to because the issue that occupied his mind in determining whether there was an owner-driver contract between the parties was whether the respondent had approved the appellant's use of a heavy vehicle for the purposes of the Owner-Drivers Act.

70 In light of the competing and disputed factual evidence, the question whether in fact the appellant and respondent had entered into an owner-driver contract could not conclusively be determined.

71 In these circumstances, I am satisfied that ground 2 of the appeal has been made out.

72 I do not find it necessary to determine ground 3 of the appeal. In any event, this was not an issue that was agitated in the proceedings before the Tribunal and was contrary to the submissions put to the Tribunal at first instance that the terms of the unexecuted delivery agreement were a relevant term of the contract between the parties.

73 Ground 4 of the appeal must fail in the face of contested and competing affidavit evidence. A finding of fact could not be made on the papers that the appellant was required to transport the goods using a 'heavy vehicle' on grounds that he was unable to transport a sufficient number of eskies on delivery runs except by using such a vehicle.

74 Ground 5 must also fail because the proper question for the Tribunal to answer in determining whether the appellant was a party to an owner-driver contract with the respondent does not turn on a question of whether the respondent did know of and had approved the use of a heavy vehicle.

Conclusion

75 For these reasons, I am of the opinion that an order should be made that the appeal be upheld, the decision of the Tribunal be suspended and the matter be remitted for further hearing and determination according to law. Whether the matter should be re-allocated to another member of the Commission to constitute the Tribunal is a matter for the Chief Commissioner to consider.

EMMANUEL C:

76 I have had the benefit of reading the draft reasons of her Honour, the Acting President. I agree with those reasons and have nothing to add.

MATTHEWS C:

77 I have had the benefit of reading the draft reasons of her Honour, the Acting President. I agree with those reasons and have nothing to add.

2018 WAIRC 00738

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DELIVER2U (WA) PTY LTD
	APPELLANT
	-and-
	GD MITCHELL ENTERPRISES PTY LTD T/AS LITE N' EASY PERTH
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 12 SEPTEMBER 2018
FILE NO/S	FBA 3 OF 2018
CITATION NO.	2018 WAIRC 00738

Result	Appeal upheld; decision of Tribunal suspended and matter remitted
Appearances	
Appellant	Mr W G Spyker, of counsel
Respondent	Mr M D Howard SC and with him Ms P A Honey, of counsel
Intervener	Mr C Fordham, of counsel, and with him Mr J Collier

Order

This appeal having come on for hearing before the Full Bench on 10 August 2018, and having heard Mr W G Spyker, of counsel, on behalf of the appellant, Mr M D Howard SC and with him Ms P A Honey, of counsel, on behalf of the respondent, and Mr C Fordham, of counsel, and with him Mr J Collier on behalf of the intervener, and reasons for decision having been delivered on 10 September 2018, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is upheld.
2. The operation of the decision made by the Road Freight Transport Industry Tribunal (Tribunal) in matter RFT 4 of 2017 on 5 April 2018 ([2018] WAIRC 00218; (2018) 98 WAIG 251) is suspended and the case remitted to the Tribunal for further hearing and determination.

By the Full Bench

[L.S.]

(Sgd.) J H SMITH,
Acting President.

FULL BENCH—Unions—Declarations made under Section 71—

2018 WAIRC 00725

APPLICATION FOR DECLARATION PURSUANT S 71(2)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2018 WAIRC 00725
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 30 MAY 2018, FRIDAY, 17 AUGUST 2018
DELIVERED	**:**	MONDAY, 3 SEPTEMBER 2018
FILE NO.	**:**	FBM 4 OF 2018
BETWEEN	**:**	WESTERN AUSTRALIAN POLICE UNION OF WORKERS Applicant AND (NOT APPLICABLE) Respondent

CatchWords	:	Industrial Law (WA) - Application pursuant to s 71 for a declaration relating to qualifications of persons for membership of a State Branch of a Federal organisation and offices that exist within the Branch - Qualifications for membership rules substantially the same - Satisfied offices are the same or can be deemed to be the same
Legislation	:	*Industrial Relations Act 1979* (WA), s 71, s 71(1), s 71(2), s 71(3), s 71(4), s 71(7), s 71(8), s 71(9)
		Fair Work (Registered Organisations) Act 2009 (Cth)
		Police Act 1892 (WA)
Result	:	Application granted
Representation:		
Counsel:		
Applicant	:	Mr R French, of counsel, and with him Mr A Clare, of counsel
Solicitors:		
Applicant	:	Tindall Gask Bentley Lawyers

Case(s) referred to in reasons:

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

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

Re Bonny [1986] 2 Qld R 80

Reasons for Decision

FULL BENCH:

Introduction

1 The Full Bench had before it an application made under s 71 of the *Industrial Relations Act 1979* (WA) (the Act) in which the applicant, the State union, seeks a declaration that:

(a) pursuant to s 71(2) of the Act, the Police Federation of Australia Western Australia Police Branch is the counterpart Federal body (the counterpart Federal body) of the applicant and the rules of the applicant and the counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same; and

(b) pursuant to s 71(4) of the Act, the rules of the counterpart Federal body prescribing the offices which exist in the Branch are deemed to be the same as the rules of the applicant prescribing the offices which exist in the applicant.

2 After hearing the applicant on Friday, 17 August 2018, the Full Bench granted the application and made a declaration in the terms sought by the applicant ([2018] WAIRC 00691).

3 These reasons set out the reasons why the Full Bench granted the application.

4 Pursuant to s 71(1) of the Act, the counterpart Federal body of a State organisation is the Western Australian Branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), the rules of which:

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

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

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

5 This is not the first application the State union has made for a s 71 declaration. On 31 January 2006, the Full Bench of the Commission made declarations in accordance with s 71(2) and s 71(4) in respect of the counterpart Federal body ([2006] WAIRC 03610; (2006) 86 WAIG 402).

6 On 6 November 2007, pursuant to s 71(7) of the Act, the Full Bench approved a deed between the State union and the Federal body, the Police Federation of Australia (the Federal union), being a memorandum of an agreement relating to the management and control of funds and property of the State union. Pursuant to s 71(8) of the Act, the Registrar registered the memorandum as an alteration to the rules of the State union.

7 Since January 2006, there have been numerous changes to the rules of the State union and the counterpart Federal body which led to an issue being raised as to whether the 2006 declaration made by the Full Bench is still effective and whether a subsequent certificate issued by the Registrar, pursuant to s 71(9) of the Act, in 2006 is operative and effective.

8 In a statutory declaration made on 1 May 2018 by the secretary of the State union, Paul Craig Hunt, he states that between August 2011 and March 2016 the provisions within the rules of the State union and the rules of the counterpart Federal body were independently amended and for that period were temporarily disconnected. Mr Hunt also states that the relevant respective rules of the State union and the counterpart Federal body have subsequently been realigned through variations made to the rules with effect from 29 March 2016.

9 In these circumstances, the State union makes application for the Full Bench to make a fresh s 71 declaration in respect of its rules and the rules of the counterpart Federal body.

Are the qualifications of persons for membership of the State organisation and the counterpart Federal Body substantially the same?

10 Section 71(2) of the Act provides that the rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same. 'Substantial' means what is 'real or of substance as distinct from ephemeral or nominal' or 'considerable' or 'in the main or essentially': ***Re an application by the Civil Service Association*** (1993) 73 WAIG 2931, 2932; ***Re Bonny*** [1986] 2 Qld R 80, 82.

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

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

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

12 The qualifications of persons for membership are set out in r 5.1 of the rules of the State union and r 3 of the rules of the counterpart Federal body.

13 Under r 5 of the rules of the State union, a person is eligible to be an ordinary member of the union if they are appointed under the *Police Act 1892* (WA) and employed by the Commissioner of Police or a police recruit. Rule 3 of the rules of the Federal union cover much wider categories of persons who are eligible for membership. In respect of the counterpart Federal body, the eligibility for membership rule, r 3 of the rules of the Federal union, covers all persons who are eligible to be members of the State union and under r 3(v) also includes elected or appointed offices or employees of the association or any branch thereof, whether or not employees in the industry. Rule 3 also covers an unlimited number of persons in certain other categories which are intended to cover persons eligible for membership Australia-wide.

14 Having read the eligibility rules of the State union and the counterpart Federal body, it is clear that all persons who are eligible to be members of the State union are eligible to be members of the counterpart Federal body. Further, it is clear from s 71(3) of the Act that it is immaterial that some persons who are eligible to be members of the counterpart Federal body are ineligible to be members of the State union.

15 For these reasons, it is clear that the finding can be made that the categories of eligibility for membership of the State union and the counterpart Federal body are substantially the same.

Are the offices that exist in the counterpart Federal body the same as the offices of the State organisation?

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

17 When determining whether the offices that exist in the counterpart Federal body are the same as the offices of the State organisation, it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules: ***Jones v Civil Service Association Inc*** [2003] WASCA 321; (2003) 84 WAIG 4 [35] (Pullin J).

18 Pursuant to r 6.1(b) of the rules of the State union, there is constituted a Board of Directors which consists of 15 directors, of which 11 who hold office shall be from the metropolitan region and one each from the northern (Kimberley/Pilbara) region, central (Mid West-Gascoyne/Wheatbelt) region, eastern (Goldfields/Esperance) region, and southern (Southwest/Great Southern) region. The rules of the Federal union create a Branch Executive of the Federal body and the same number of office holders from the same regions. Pursuant to r 6.1(i) of the State union and r 52AA(1) of the Federal union, the Board of Directors of the State union and the Branch Office Bearers are to consist of a president, a senior vice president, a vice president, and a treasurer.

19 The rules of the State union and the Federal union provide for the duties of the office holders of the applicant and the counterpart Federal body as follows:

WA Police Union Rules	**PFA WA Police Branch Rules - Part CA**
Office Holder Duties	
President	
Rule 7.3 *The President shall:* *(a) be chairperson at all meetings of the Board and the Union to maintain order and administer these Rules impartially;* *(b) oversee the control and supervision of the employees and agents of the Union;* *(c) manage the business and affairs of the Union in accordance with these Rules including, but not limited to, policy matters, liaison between the Board and employees, and media liaison;* *(d) sign all Industrial Agreements, deeds or other*	52AG *The President shall:* *(1) be the Chief Executive Officer of the Branch and ex officio member of all Committees;* *(2) preside at all meetings of the Executive or of the Branch to maintain order and administer the Rules impartially, and upon the minutes being confirmed to sign the Minute Book in the presence of the meeting;* *(3) manage the business and affairs of the Branch in accordance with these Rules including, but not limited to, policy matters, liaison between the Executive and employees, and media liaison;*

instruments made on behalf of the Union by the Board; *(e) arrange the preparation of an annual budget for approval by the Board and monitor and control the budget so approved;* *(f) as required authorise any extraordinary expenditure up to a level as predetermined by the Board each year;* *(g) present a report to each Annual Conference; and* *(h) delegate to a Director, employee, member or agent all such tasks and duties as may be necessary to properly conduct the affairs, financial and otherwise, of the Union and to pursue its Objects.* Rule 8.2 – Special Conferences *(a) If the President or a majority of Branches consider that the Board is acting contrary to the best interests of the Union then they shall be empowered to instruct the Secretary to summon a Special conference, and the Secretary shall within 30 days convene such a Conference.* Rule 8.4 – Meetings of the Board of Directors *(e) Special meetings of the Board may be convened by the:* *(1) President whenever considered necessary by the President;* *(2) Secretary within seven days of a requisition signed by at least five (5) Directors setting out the object of the meeting. No other business shall be transacted at the special meeting of the Board than that set out in the request for the meeting.*	*(4) sign all Industrial Agreements, deeds or other instruments made on behalf of the Branch by the Executive;* *(5) arrange the preparation of an annual budget for approval by the Executive and monitor and control the budget so approved;* *(6) ensure that all expenditure is authorised by the Executive;* *(7) as required authorise any extraordinary expenditure up to a level as predetermined by the Executive each year;* *(8) present a report to each Annual Conference;* *(9) be the appropriate officer to notify the Commission (in writing) of any industrial disputes involving the Branch or its members only of which he or she becomes aware, consistent with rule 28(d);* *(10) have the power to summon either a Special Executive or a Special Conference Meeting by reason of extraordinary circumstances existing, and shall state the special business requiring attention. Where such meetings have been called the business upon which such meetings were called must be dealt with; and* *(11) delegate to the Senior Vice President, Vice President, Treasurer or an Executive Member all such tasks and duties as may be necessary to properly conduct the affairs, financial and otherwise, of the branch and to pursue its Objects.*
Senior Vice President and Vice President	
Rule 7.4 *(a) During any absence or incapacity of the President, the Senior Vice President has the authority to act for and on behalf of the President, and when so acting, shall have all the rights, powers, duties and responsibilities of the President whether implied or expressed under these Rules.* *(b) In the absence or incapacity of both the President and the Senior Vice President from any meeting the Vice President shall take the chair and shall have all the rights, powers, duties and responsibilities of the President, whether implied or expressed under these Rules.* *(c) The Senior Vice President and the Vice President shall be members, ex officio, of each Committee established by the Board.*	52AH *(1) During any absence or incapacity of the President the Senior Vice President has the authority to act for, and on behalf of the President when so acting, and shall have all the rights, powers, duties and responsibilities of the President, whether implied or expressed under the Rules.* *(2) In the absence or incapacity of both the President and the Senior Vice President from any meeting the Vice President shall take the chair and shall have all the rights and responsibilities specified in sub rule (1) of this rule.* *(3) The Senior Vice President and the Vice President shall be members, ex officio, of each Committee established by the Executive.*
Treasurer	
Rule 7.5 *The Treasurer shall:* *(a) keep a general oversight of the financial position of the Union;* *(b) exercise proper control over the management of Union funds;* *(c) ensure accounting records are kept in accordance with proper accounting principles*	52AI *The Treasurer shall:* *(1) keep a general oversight of the financial position of the Branch and exercise proper control over the management of its funds and ensure accounting records are kept in accordance with proper accounting principles and truly record and explain the financial transactions and financial position of the Branch;*

and truly record and explain the financial transactions and financial position of the Union;	*(2) present to each meeting of the Executive appropriate accounting reports indicating the status of the funds and financial position of the Branch, or other relevant reports as required by the Executive for the preceding period;*
(d) present to each meeting of the Board appropriate accounting reports indicating the status of the funds and financial position of the Union, or other relevant reports as required by the Board;	*(3) present to each Annual Conference an audited balance sheet of the assets and liabilities, a statement of the receipts and expenditure and a statement of the sources and application of funds of the Branch;*
(e) present to each Annual Conference an audited balance sheet of the assets and liabilities, a statement of the receipts and expenditure and a statement of the sources and application of funds of the Union;	*(4) be entitled to inspect the books of the Branch at any time and in the event of any irregularity shall immediately make a report to the President;*
(f) be entitled to inspect the books of the Union at any time and in the event of any irregularity shall immediately make a report to the President;	*(5) be an ex officio member of each Committee established by the Executive;*
(g) be an ex officio member of each committee established by the Board;	*(6) in conjunction with the President prepare an annual report;*
(h) chair the Union's Risk and Audit Committee;	*(7) assist the President in the preparation of an annual budget as well as the monitoring and control of the approved budget; and*
(i) assist the President prepare a report for the Annual Conference;	*(8) be entitled to call for a full audit at any given time.*
(j) assist the President in the preparation of an annual budget as well as the monitoring and control of the approved budget; and	
(k) be entitled to call for a full audit at any given time.	

20 It can be seen from this table that the duties of the president of the State union and the counterpart Federal body are substantially the same.

21 There is no corresponding provision to r 52AG(9) of the rules of the Federal union. The State union points out that this is because r 28(d) of the rules of the Federal union authorises State branches to lodge industrial disputes only affecting their Branch, in the context of a federation of multiple branches. Rule 52AG(10) of the rules of the Federal union confers upon the president the power to summon either a special executive or a special conference meeting whenever necessary. The corresponding provision in the State union rules is r 8.2 and r 8.4.

22 In the counterpart Federal body, the elected positions are 'executive members', therefore their monthly meetings are 'executive meetings'.

23 A State annual conference involves the whole membership through their nominated Branch, delegates and the directors. The counterpart Federal body annual conference only involves the elected 'executive members'.

24 The duties of the senior vice president of the counterpart Federal body and the State union are essentially the same.

25 The duties of the treasurer of the State union and the counterpart Federal body are effectively identical except that the treasurer of the State union is required to chair the State union's risk and audit committee (r 7.5(h)). However, there is no corresponding provision to r 7.5(h) in the rules of the Federal body because there is no risk and audit committee in the counterpart Federal body.

26 Having examined these provisions of the rules of the State union and the Federal body, the Full Bench formed the opinion that for each office in the State union, there is a corresponding office in the counterpart Federal body and a declaration in these terms should be made by the Full Bench.

2018 WAIRC 00691

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN POLICE UNION OF WORKERS

APPLICANT

-and-

(NOT APPLICABLE)

RESPONDENT

CORAM FULL BENCH
THE HONOURABLE J H SMITH, ACTING PRESIDENT
CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER

DATE FRIDAY, 17 AUGUST 2018

FILE NO/S FBM 4 OF 2018

CITATION NO. 2018 WAIRC 00691

Result	Declaration issued
Appearances	
Applicant	Mr R French, of counsel, and with him Mr A Clare, of counsel

Declaration

This matter having come on for hearing before the Full Bench on 17 August 2018, and having heard Mr R French, of counsel, and with him Mr A Clare, of counsel, on behalf of the applicant, the Full Bench being of the opinion upon the evidence that the rules of the applicant and its counterpart Federal body, relating to the qualifications of persons for membership of each such body are substantially the same, and the Full Bench also being of the opinion that the rules of the counterpart Federal body prescribing the offices which exist in the branch are the same in this respect as the rules of the applicant, it is this day, 17 August 2018, declared as follows:

(1) The rules of the applicant and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same, in accordance with s 71(2) of the *Industrial Relations Act 1979* (the Act).

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

By the Full Bench

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

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2018 WAIRC 00731

INTERPRETATION OF THE TEACHERS (PUBLIC SECTOR PRIMARY AND SECONDARY EDUCATION) AWARD 1993

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00731
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 3 AUGUST 2017, TUESDAY, 27 FEBRUARY 2018, WEDNESDAY, 1 AUGUST 2018, TUESDAY, 3 OCTOBER 2017
DELIVERED	**:**	THURSDAY, 6 SEPTEMBER 2018
FILE NO.	**:**	APPL 7 OF 2017
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	*:*	Application for interpretation of the *Teachers (Public Sector Primary and Secondary Education) Award 1993* and *School Education Act Employees' (Teachers and Administrators) General Agreement 2014* - Casual employee entitlement to various allowances - Principles of interpreting industrial instruments considered - Plain reading of text provides answers to questions posed
Legislation	*:*	
Result	*:*	*Questions answered*
Representation:		
Counsel:		
Applicant	**:**	Mr M Ritter SC of counsel
Respondent	**:**	Mr J Bennett of counsel
Solicitors:		
Respondent	**:**	State Solicitor’s Office

Case(s) referred to in reasons:

Construction, Mining and Energy Workers' Union of Australia - Western Australian Branch v Robe River Iron Associates (1988) 68 WAIG 1570

Case(s) also cited:

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

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

City of Wanneroo v Holmes (1989) 30 IR 362

Kucks v CSR Ltd (1996) 66 IR 182

BP Australia Pty Ltd v Nyran Pty Ltd (2003) 198 ALR 442

BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (WA) Branch (2006) 153 IR 397

Sunset Vineyard Management Pty Ltd v Southcorp Wines Pty Ltd [2008] VSCA 96

Queensland Power Co Ltd v Downer EDI Mining Pty Ltd [2010] 1 Qd R 180

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

Canberra Hire Pty Ltd v Koppers Wood Products Pty Ltd [2013] ACTSC 162

Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd [2014] WASCA 164; (2014) 48 WAR 261

Essential Energy v Australian Municipal, Administrative, Clerical and Services Union [2015] FWCFB 1981

Re Harrison; ex parte Hames (Minister for Health) (2015) WASC 247

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

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited [2017] FWCFB 3005

Reasons for Decision

1 The terms and conditions of many employees of the respondent who are, or who are eligible to be, members of the applicant are provided by the *Teachers (Public Sector Primary and Secondary Education) Award 1993* and whatever industrial agreement is operative at any material time.

2 Casual employees employed under these have for some time received certain allowances. For instance, employees received the Remote Teaching Service allowance and Band and Special Responsibility allowances when the 2011 agreement was in operation.

3 In 2014 the industrial agreement which had been registered in 2011 was, by agreement, "rolled over".

4 "Rolled over" is a well known term in the area of industrial agreement negotiations and has the meaning that the substance of the new agreement will be the same as the old, although there may be some tinkering at the edges.

5 The applicant, and the casual employees it represents, were accordingly surprised to learn that the respondent was of the view that changes of substance had occurred to the terms and conditions of their employment under the new agreement. That is, they were surprised that the respondent represented to them that changes in the 2014 agreement, as compared to the 2011 agreement, meant that casual employees were no longer entitled to the Remote Teaching Service allowance or the Band and Special Responsibility allowances.

6 In the 2011 agreement the definition of "casual employee" said that for casual employees their hourly rate was "inclusive of 20% loading paid in lieu of leave."

7 In the 2014 agreement the definition of "casual employee" said the hourly rate was "inclusive of 20% loading paid in lieu of leave **and allowances** (my emphasis)"

8 By letter dated 29 June 2016 the respondent's delegate wrote this to the applicant:

> "… the entitlement of casual employees to access [the locality, Remote Teaching Service and Band and Special Responsibility] allowances is precluded by clause 10(1)(a) of the Award as well as the definition of "casual employee" in clause 7 of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2014*, which states [and the definition is then reproduced]"

9 The issue of the "locality allowance" may be set aside. This allowance is provided for in the Award and it is the Award the respondent's delegate is relying upon to inform the applicant that it is not payable to casual employees (although this is not made clear by the author). The definition of "casual employee" in the Award has long provided that allowances are not payable and the applicant accepts, for that reason, that the locality allowance is not payable to casual employees.

10 However, the Remote Teaching Service and Band and Special Responsibility allowances are provided for in the 2014 industrial agreement and accordingly, although again not made clear, it must be the definition of casual employee in the 2014 agreement that the respondent's delegate is relying upon to inform the applicant that those allowances are not payable to casual employees.

11 So, to make it clear, the respondent informed the applicant, through her delegate, that some allowances that had been paid to casual employees under the 2011 agreement were not payable under the 2014 agreement and cited the definition of casual employee in the 2014 agreement to establish her position. The respondent did not say that those allowances had been mistakenly paid for some time and that the 2014 agreement merely regularised the proper state of affairs. The respondent said the 2014 agreement had effected a material change resulting in reduced remuneration for some casual employees.

12 The respondent says that in declaring the true interpretation of the 2014 agreement I need not go beyond its text. The definition of casual employee makes it plain that allowances are not payable to casual employees and that being the case there is no warrant for any wider enquiry.

13 The applicant says this is too simplistic an approach. It says that the two allowances were paid to casual employees under the 2011 agreement and that, given the 2014 agreement was understood by all to be a "rollover" agreement, I should have regard to what was, on the face of it, an agreed interpretation of the 2011 agreement, being that these allowances were payable under it, in interpreting the 2014 agreement.

14 It is said that if everyone thought the 2011 agreement meant X, and it was simply rolled over in 2014, that the 2014 agreement should be interpreted to mean X. The applicant says that where the 2011 agreement was merely "rolled over" in 2014, the terms of the 2014 agreement cannot possibly be understood to have effected a material change resulting in reduced remuneration for some casual employees.

15 I have had close regard to the submissions of the parties, both written and oral, on the principles for guiding the interpretation of agreements.

16 The theme that interpretation is primarily a text based enquiry is clear, as is the theme that if the ordinary meaning of words used in an agreement are unambiguous then the enquiry into the meaning of those words need go no further.

17 I find, despite exhaustive search, no support for a proposition that if a word has a single and "ordinary" meaning, that is that it is not a word susceptible of more than one meaning and that ordinary meaning if applied does not create or suggest an ambiguity in understanding the text nor lead to an absurd result on the face of the text, that I must launch a wider enquiry.

18 In particular, although themes of fairness and industrial reality do loom large in the guiding principles for interpretation of agreements, there is no authority for the proposition that I must interpret an agreement having regard to those matters if the agreement has a plain meaning.

19 I am content to accept that evidence may be led to demonstrate that an ambiguity in meaning exists as representing the preponderant view of decision makers on the interpretation of agreements, but I equally accept that such evidence is not useful, even if admitted, if the text of the agreement has a simple, single and ordinary meaning.

20 I have to keep sight of the fact that I am interpreting the definition of "casual employee" in the 2014 agreement and the meaning of the material words within it. I am not "constructing" an agreement that best accords with concepts of fairness and equity.

21 When I look at the material words in the definition of "casual employee", those being "and allowances", their meaning could not be plainer. They mean that "allowances" under the agreement are not payable to casual employees because the hourly rate paid to casual employees is inclusive of 20% paid in lieu of payment of any such allowances.

22 I am cognizant that the preamble to the definition clause states that the definitions therein apply "unless otherwise specified."

23 Clause 35 of the agreement deals with the Remote Teaching Service allowance. Nothing is "specified" in the clause which would cause me to interpret the clause as being read without regard to the definition of "casual employee" in the definition clause.

24 Casual employees are, pursuant to the definition of that term, not entitled to the allowance under clause 35.

25 Clause 23 of the agreement deals with Band and Special Responsibility allowances. Again, nothing is "specified" in the clause which would cause me to interpret the clause as being read without regard to the definition of "casual employee" in the definition clause.

26 Casual employees are, pursuant to the definition of that term, not entitled to the allowances under clause 23.

27 The definition of casual employee makes it as plain as can be that "allowances" are not payable to such employees. Clause 23 and 35 of the agreement refer to "allowances." It is as plain as can be that these are not payable to casual employees.

28 Turning then to the 13 questions asked of me they are as follows:

"Question 1.	Is the Remote Teaching Service Allowance provided for in clause 35.2(a)(i) of the General Agreement payable to casual employees.
Question 2.	Is the Teacher in Education Support Units, Centres and Schools' Band 2 allowance contained in Schedule B and referred to in clause 23 concerning 'Band and Responsibility Allowances' of the General Agreement, payable to casual employees.
Question 3.	Is the 'Locality Allowance' allowance provided for in clause 53 of the Award payable to casual employees.
Question A1.	For the class of casual employee covered by clause 19.3 of the GA, are the hourly rates in table 19 of Schedule A, the applicable hourly rate.
Question A2.	Pursuant to clause 20.4 of the GA, are 'Category 1' teacher flying squad members who undertake teacher relief duties, to be paid an additional dislocation allowance fortnightly to the

value of $16,500 per annum on a pro rata basis, in lieu of any other allowances provided to teachers on the basis of the location of the school?

Question A3. Pursuant to clause 20.5 of the GA, are 'Category 2' teacher flying squad members who undertake teacher relief duties, entitled to the payment of all locality and/or school specific allowances (such as the RTS, CTP and locality allowances) applicable to teaching staff at the school where they are relieving, on a pro rata basis?

Question A4. Are SOC teachers entitled to be paid any allowances contained in the GA, in addition to payments in accordance with the formula prescribed in clause 23.5 of the Award.

Question A5. Do any allowances contained in the GA apply to teachers performing internal relief work, for doing that work, in addition to the rates prescribed in clause 24.3 of the GA?

Question A6. For example, if an employee is in the CTP or the MTP and they are entitled to the internal relief rate, are they also entitled to the corresponding CTP or MTP allowance?

Question A7. If an employee is part of the Remote Teaching Service and they undertake internal relief teaching, are they entitled to be paid a pro rata Remote Teaching Service allowance in addition to payment at the internal relief rate?

Question A8. If a casual employee is employed in the Remote Teaching Service, are they entitled to the Remote Teaching Service allowance and locality allowances (as prescribed in clause 53 of the Award) on a pro rata basis, in addition to the payment they are entitled to in accordance with the formula prescribed in clause 23.5 of the Award.

Question A9. Given the contents of clause 35.2(b), is it correct that a Remote Teaching Service employee engaged under Part 9 of the GA is not entitled to payments in accordance with clause 23 of the Award, band and special responsibility allowances, and clause 49 of the Award, country incentives allowance, even if they would otherwise be entitled to them.

Question A10. Is it correct that, pursuant to clause 39.3(a) of the GA, the casual loading of 20% for swimming instructors (inclusive of the rates provided for in table 17 of the GA) 1s paid in lieu of leave an all GA and Award based allowances."

29 My answers are as follows:

30 Question 1 – No.

31 I note that the applicant also asks me to answer the question of whether casual employees are, under the agreement, eligible to be engaged in the Remote Teaching Service.

32 Clause 33.2 of the agreement makes it tolerably clear that they may be, given that this subclause contemplates it occurring. However, I consider that the clauses dealing with the Remote Teaching Service are ambiguous in that it is not clear whether or not a casual employee engaged in the Remote Teaching Service must be appointed on a permanent or a fixed term contract basis and not otherwise. That is, it is not entirely clear whether a casual employee may work within the Remote Teaching Service as a casual employee.

33 I would need to have more evidence of "surrounding circumstances" to answer this question which was, in my view, ancillary to the main dispute between the parties.

34 Question 2 – No.

35 Questions 3, A1, A2, A3, A4, A8, A9, A10 – The parties are not in dispute about how these questions should be answered. I am invited to consider whether the answers the parties agree are, in my view, correct. I see no profit in such an endeavour. Parties may agree in an agreement that up means down and I see no profit in pointing out that up is not down. In other words, I have not considered whether I think the parties are right; it is enough for me, given the objects of the *Industrial Relations Act 1979*, that they agree.

36 Questions A5, A6, A7 – The applicant says that Question A5 is a "general question which perhaps is one that doesn't need to be or can't really be answered in the terms that it is," and says it would be better to "focus upon A6 and A7 which ask more specific questions."

37 The respondent says that "A5 and A6 can and should be answered together, to some extent, and have been in [her] written submissions, along with A7 as well."

38 Without resolving the dispute about which questions it would be best to answer to resolve the dispute, it may be stated that the issue in dispute is whether, or to what extent, employees in the Remote Teaching Service and the Country and Metropolitan Teaching Programs are entitled to be paid "internal relief rate" payments pursuant to clause 24 of the agreement.

39 In relation to the Remote Teaching Service the answer is provided by clause 33 of the agreement. It is clear from reading that clause that Remote Teaching Service teachers are eligible for payment of internal relief rates because the clause conditions their entitlement to such payments.

40 I do not pretend I can improve upon or better express the clear provisions of clause 33 of the agreement. I agree with Senior Counsel for the applicant that clause 33 "puts the issue to bed."

41 I should note that clause 35.2 of the agreement, which rules in and out the payment of various "allowances" to employees within the Remote Teaching Service, is not relevant. Internal relief rate payments are not "allowances" and one would not expect them to be referred to in a subclause dealing expressly with allowances.

42 In relation to whether employees in the Metropolitan Teaching Program and Country Teaching Program are eligible to receive internal relief rate payments the applicant says in its written submissions that "there is nothing in the [agreement] which has the effect that Metropolitan Teaching Program or Country Teaching Program teachers who provide "internal relief" are not entitled to payment of the latter … [and that] this is consistent with the purpose of the "internal relief" payment described in clause 24.2 of the [agreement]."

43 The respondent says in her written submissions the following:

> "… a full time employee working in a Country Teaching Program school would already receive their full annual Country Teaching Program allowance in their fortnightly pay. There is no "corresponding" increase to the allowance if a full time employee performs internal relief work, as this would lead to the employee receiving an entitlement greater than their annual Country Teaching Program allowance as provided for at clause 30 and Schedule C of the General 2014 Agreement.
>
> This rationale also extends to part time employees, who would receive a Country Teaching Program allowance greater than they should receive according to their FTE (full time equivalent). Pursuant to clause 9(2) of the Award, part time employees are entitled to the same entitlements as full time employees, on a pro rata basis."

44 The question then is whether the Metropolitan Teaching Program allowance and the Country Teaching Program allowance contemplate and cover payments for internal relief rate payments. That is, are the Metropolitan Teaching Program allowance and Country Teaching Program allowance "code" allowances which cover other payments in the agreement and, in particular, internal relief rate payments.

45 If the Metropolitan Teaching Program allowance and Country Teaching Program allowance "cover the field", as it were, then the preamble to Part 8 to the effect that where a provision of Part 8 is inconsistent with any other provision of the agreement the provisions of Part 8 prevail may have work to do.

46 The respondent, as I understand it, argues that insofar as clause 30 of the agreement provides that the financial incentives for employees will be paid pursuant to Schedule C of the agreement, that this is the entire financial incentive to be paid to employees in the Metropolitan Teaching Program and Country Teaching Program and nothing else, including internal relief rate payments, are to be paid.

47 The respondent's argument fails. The Metropolitan Teaching Program and Country Teaching Program allowances and internal relief rate payments cross like ships in the night. They are paid for different things and there is nothing at all in the text of the agreement that provides, or even suggests, that the Metropolitan Teaching Program allowance or Country Teaching Program allowance are intended to "swallow up" the provisions of clause 24 of the agreement.

48 I have noted that for the Remote Teaching Service specific provision is made for which allowances are payable to those in the Remote Teaching Service and which are not.

49 There is no corresponding provision in the equivalent clause providing for financial incentives for employees in the Metropolitan Teaching Program and Country Teaching Program. That is entirely neutral in relation to the internal relief rate, which as I have said, is not an allowance.

50 I agree with the applicant that there is no reason, on a text based analysis of the agreement, why employees in the Metropolitan Teaching Program or Country Teaching Program would not be eligible for internal relief rate payments and entitled to them in appropriate circumstances.

51 Questions A5, A6 and A7 may be answered in the following way. Employees in the Remote Teaching Service and Metropolitan and Country Teaching Programs are eligible to receive internal relief rate payments under clause 24 of the agreement. For those in the Remote Teaching Service, their entitlement is conditioned by clause 33 of the agreement.

52 In closing, I should note that much was made in the proceedings about the circumstances in which the words "and allowances" came to appear in the definition of casual employees in the agreement. I set out the way in which the applicant sought to rely upon the matter in terms of constructing the agreement at [3] to [14] herein. I rejected an argument those circumstances were relevant given the plain text of the agreement.

53 In the result then nothing turns on those circumstances and the evidence relating to it because I find that, on an application for the true interpretation of the agreement to be declared, the text provides the answers.

54 Accordingly, it is not necessary for me to assess and determine matters of fairness or equity in the way Commissioner Salmon did in ***Construction, Mining and Energy Workers' Union of Australia - Western Australian Branch v Robe River Iron Associates*** (1988) 68 WAIG 1570. An application similar to that made in that case, with the matters raised determinatively on the appeal in that matter (found at (1988) 68 WAIG 2667) being addressed, would have been an interesting one to consider. But this is not such an application.

55 Alternatively, an argument relying upon the comments of David Foskett QC in *The Law and Practice of Compromise* (5th ed 2002) at paras 4-24 that:

> "Where one party to a compromise is labouring under some misapprehension about its terms and this is known to, or in some way encouraged by, the other party there cannot really be said to be any genuine agreement between them even though, viewed objectively, it would appear that there had been (*Chitty on Contracts* (28th ed 1999) Vol 1, paras 5-034 and 5-073)"

may have been an interesting one, but no such argument was made.

56 In relation to fairness it is also noteworthy that the 'status quo' seems to have been maintained throughout the life of the agreement and that there is now a replacement agreement, about which I know nothing.

CANCELLATION OF—Awards/Agreements/Respondents—Under Section 47—

2018 WAIRC 00702

CANCELLATION OF VARIOUS AGREEMENTS

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 AUGUST 2018
FILE NO/S	APPL 60 OF 2018
CITATION NO.	2018 WAIRC 00702

Result Agreements cancelled

Order

The Commission gave notice of an intention to make an order cancelling the agreements listed in the Schedule:

(a) in the Western Australian Industrial Gazette on 27 June 2018;

(b) on the Commission's website from 21 June 2018 until 30 July 2018;

(c) in *The West Australian* newspaper on 15 June 2018; and

(d) by post to the parties to industrial agreements no later than 21 June 2018,

inviting any person with a sufficient interest to object to the cancellation of the agreements in the Schedule.

Sixty-eight parties to various industrial agreements, including some agreements listed in the Schedule, were not served by post because the Commission does not hold a current address for service on those entities.

A number of the organisations advised that they had no objection to the cancellation of the industrial agreements that related to them.

As of 24 August 2018, the Commission has received no objections to the cancellation of the industrial agreements.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

THAT the industrial agreements set out in the attached Schedule be cancelled.

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

SCHEDULE

1. A S Built Constructions Industrial Agreement
2. A.B. Tilbury Pty Ltd Enterprise Bargaining Agreement 2004 – 5
3. ABB Installation and Service Pty Limited Railway Pedestrian Crossings Installation Project Agreement 1995
4. ABB Installation and Service Pty Ltd (Western Region) Enterprise Bargaining Agreement
5. ABB Transmission and Distribution Limited, Distribution Transformer Division, WA Operations (Enterprise Bargaining Agreement 1996)
6. ACI Plastics Packaging Welshpool Enterprise Agreement 2002
7. Action Ceilings Industrial Agreement
8. Activ Foundation Inc (Enterprise Agreement) 1994
9. Activ Foundation Supported Employees Wages Agreement 2004
10. Advance Ceilings Industrial Agreement
11. Advantage Glass Industrial Agreement
12. Alan Croll Roofing Industrial Agreement
13. All Personnel - TWU Enterprise Bargaining Agreement 2001
14. Amatek Ltd Enterprise Agreement 1996
15. AMEC Australia Pty Ltd Enterprise Agreement 1996
16. Arnott's Biscuits S.D.A. – TWU Agreement 2003

17. Association for Christian Education Inc. (Enterprise Bargaining) Agreement 1998
18. Association of Independent Schools of Western Australia Clerical Officers (Enterprise Bargaining) Agreement 1998
19. Australasian Foundries Pty Ltd Enterprise Bargaining Agreement No. 125 of 1994
20. Australian Municipal, Administrative, Clerical and Services Union of Employees – Western Australian Clerical and Administrative Branch and Bakewell Foods Pty Ltd Supported Wages System Agreement 2002
21. Australian Red Cross (Western Australian Division) Headquarters Enterprise Agreement 1996
22. AWU - Fremantle Bowling Club Enterprise Bargaining Agreement 1995
23. AWU Jobskills "K" newgrowth Agreement 1995, No. AG 2 of 1995
24. AWU Jobskills Trainee Agreement 1995
25. B & L Formwork Industrial Agreement
26. B. Kernaghan & Co Industrial Agreement
27. Bains Harding Industries (Western Power - Muja) Enterprise Bargaining Agreement 1998
28. Bakewell Foods Pty Ltd-ALHMWU Supported Wages System Agreement 2003
29. Beaufort College Enterprise Bargaining Agreement 1998
30. Beenyup WWTP, (O'Donnell Griffin) Certified Agreement 2003
31. Bells Thermalag & Industrial Services Asbestos Eradication Industrial Agreement
32. Benem Cabinet Industrial Agreement
33. Bentley Crane Hire / BLPPU & CMETU Collective Agreement 2001
34. Berri Limited (Balcatta Plant) Enterprise Agreement 2004
35. Beton Contractors Industrial Agreement
36. BHP Building Products Myaree Enterprise Agreement 2000/2001
37. BHP Cadjebut Enterprise Bargaining Agreement 1993
38. BHP Steel Transport & Logistics, Kwinana Logistics Terminal Enterprise Agreement 2003
39. Bindoon Tiling Industrial Agreement
40. Blowflex Moulding PTY LTD, Western Australian Enterprise Bargaining Agreement 2001
41. Blue Steel / BLPPU and the CMETU Collective Agreement 2001
42. Bluescope Steel Myaree Service Centre Closure Agreement 2004-7
43. BMB Scaffold Industrial Agreement
44. BOC Limited Perth Operations Centre (Canning Vale) Agreement (2004)
45. Boodarie Iron - Port Hedland Operations Industrial Agreement 2003
46. Boral Building Services Industrial Agreement
47. Boral Quarries (Enterprise Bargaining) Consent Agreement,1994
48. Boral Resources (WA) Ltd (Trading as Boral Quarries) Enterprise Bargaining Agreement 1999
49. Boral Transport Mechanics Enterprise Bargaining Agreement 2003
50. BP Refinery Kwinana Pty Ltd Site Agreement 1994
51. Brad Brick Bricklaying Industrial Agreement
52. Bradken Perth, Western Australian Enterprise Bargaining Agreement 1995
53. Bradken Perth, Western Australian Machineshop (Enterprise Bargaining) Agreement No AG 69 of 1993
54. Bradken Resources Pty Ltd - Western Australia-Welshpool Enterprise Bargaining Agreement 2006
55. Brady's Building Products (Enterprise Bargaining) Agreement 1999
56. Brambles Western Australia - Placer (Granny Smith) Operation Gold Mining and Processing Agreement 1996
57. Bridge House - Salvation Army Agreement 2002
58. Brightwater Care Group Incorporated Hospital Salaried Officers Enterprise Agreement 2004
59. Bristile Clay Tiles Enterprise Agreement 1995
60. Bristile Clay Tiles Maintenance Enterprise Agreement 1994
61. Bristile Clay Tiles Production Enterprise Agreement 1994
62. Brownbuilt Metalux Industries Redundancy Agreement 1998-1999
63. Brownbuilt Pty Ltd, Welshpool, WA Agreement 2006
64. Brownes Dairy North Perth (Enterprise Bargaining) Agreement 1996

65. Brownes Dairy North Perth Clerical (Enterprise Bargaining) Agreement No. AG 193 of 1994
66. BT Tritech Electrical Enterprise Bargaining Agreement 2005
67. Building Security Management Services Enterprise Bargain Agreement 2005
68. Bulong Nickel Project Construction Agreement 1997-1998 (AFMEPKIU/CEPU)
69. Bunbury Cathedral Grammar School (Non-Teaching Staff Enterprise Bargaining) Agreement 2004
70. Bunnings Forest Products Pty Ltd (Enterprise Bargaining) Agreement 1998
71. Burswood Resort Casino (Electronic Servicepersons) Enterprise Agreement No. AG 1 of 1993
72. Burswood Resort Casino (Maintenance Employees) Enterprise Agreement No. AG 2 of 1993
73. Buttercup Bakeries (WA) Enterprise Agreement 1997
74. Buttercup Bakeries Malaga (WA) Breadroom, Distribution and Maintenance Enterprise Agreement 2005
75. C & S Perrot Industrial Agreement
76. C S Perrott Industrial Agreement
77. Cambridge Private Hospital HSOA Enterprise Agreement 2003
78. Capel Dairy Co. Enterprise Agreement 1994
79. Cargill Australia Limited Enterprise Bargaining Agreement 1993
80. Cargill Salt (A Department of Cargill Australia Limited) Enterprise Bargaining Agreement 1999
81. Carrier-apac Manufacturing (WA) Enterprise Bargaining Agreement 2003
82. Cascade Services Pty Ltd Industrial Agreement
83. Cavlec Electrical Engineering Services Pty Ltd Enterprise Bargaining Agreement
84. Cawse Nickel Project Construction Agreement 1997-1998
85. CBH North Fremantle Maintenance Employees Partnership (Enterprise Bargaining) Agreement 1996
86. CBI Constructors Pty Ltd - Kwinana (Enterprise) Industrial Agreement 1996
87. CC Cabling Pty Ltd Enterprise Bargaining Agreement 2004
88. CCA (WA) Operations (Kewdale) Enterprise Agreement
89. Celtic Scaffolding/BLPPU Collective Agreement 2000
90. Centre Ceilings Wall and Ceiling Industrial Agreement
91. Cerebral Palsy Association of Western Australia Ltd. Salaried Staff Enterprise Agreement 2004
92. Cerebral Palsy Association of Western Australia Ltd. Supported Employees Industrial Agreement 2004
93. Cervantes Electrics Pty Ltd (Maintenance Operations) Enterprise Bargaining Agreement 1997
94. Cervantes Electrics Pty Ltd Enterprise Bargaining Agreement
95. Challenge Cabinets/BLPPU and the CMETU Collective Agreement 2001
96. Chiquita Mushrooms Pty Ltd Western Australian Mushroom Production Agreement 2004
97. City of Cockburn (Building & Engineering) Enterprise Agreement 1997
98. City of Perth (Outside Workforce) Agreement 2005
99. City of Perth Combined Trades Area Enterprise Agreement
100. City of Stirling Transport Sections Consent Agreement 1994

2018 WAIRC 00703

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 AUGUST 2018
FILE NO/S	APPL 61 OF 2018
CITATION NO.	2018 WAIRC 00703

Result Agreements cancelled

Order

The Commission gave notice of an intention to make an order cancelling the agreements listed in the Schedule:

(a) in the Western Australian Industrial Gazette on 27 June 2018;

(b) on the Commission's website from 22 June 2018 until 24 August 2018;

(c) in *The West Australian* newspaper on 18 June 2018; and

(d) by post to the parties to industrial agreements no later than 21 June 2018,

inviting any person with a sufficient interest to object to the cancellation of the agreements in the Schedule.

Sixty-eight parties to various industrial agreements, including some agreements listed in the Schedule, were not served by post because the Commission does not hold a current address for service on those entities.

A number of the organisations advised that they had no objection to the cancellation of the industrial agreements that related to them.

As of 24 August 2018, the Commission has received no objections to the cancellation of the industrial agreements.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

THAT the industrial agreements set out in the attached Schedule be cancelled.

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

SCHEDULE

1. City of Swan (Trades) Enterprise Bargaining Agreement
2. City of Wanneroo Fleet Maintenance Unit Consent Agreement 1996
3. City of Wanneroo, Fleet Maintenance Services Bargaining Agreement 2001-2004
4. Cityfleet Employees Industrial Agreement Number (3)
5. Cleanaway Technical Services Forrestdale Enterprise Bargaining Agreement 1994 – The
6. Clear Cut Chasing Pty Ltd/CFMEUW Industrial Agreement 2002-2005
7. Clerks' (Commercial, Retail, Wholesale, Hotels and Motels Clerical Industrial Traineeships) Agreement, AG 7 of 1988
8. Clerks' (Commercial, Retail, Wholesale, Hotels and Motels Clerical Industrial Traineeships) Agreement, AG 8 of 1988
9. Clerks' (Commercial, Social and Professional Services) Award Industrial Agreement
10. Clerks' (Wholesale & Retail Establishments) Award Industrial Agreement
11. Clerks' Grain Handling Enterprise Agreement 1996
12. Clough WA (Kewdale) Enterprise Bargaining Agreement No. AG 282 of 1998
13. Coates Hire Enterprise Bargaining Agreement 2000
14. Coca-Cola Bottlers, Perth (Performance Improvement) Enterprise Bargaining Agreement 1992 No. AG 3 of 1993
15. Cockburn Cement Limited (Enterprise Bargaining) Agreement 1998
16. Cockburn Cement Limited (Enterprise Bargaining) Agreement (November) 2004
17. Cockburn Hire Transport Enterprise Agreement
18. Coflexip Stena Offshore Asia Pacific Pty Ltd Industrial Agreement 1997
19. Co-Generation Power Station Project Agreement 1995
20. Co-Generation Power Station Project Agreement 1995, AG 86 of 1996
21. Collect Electrical Construction Division Enterprise Bargaining Agreement 2004
22. ColourPress Electrical and Engineering Employees (Enterprise Bargaining) Agreement 2003
23. Com A1 Windows Pty Ltd Agreement 1999
24. Commercial Tile Contractors/CFMEUW Industrial Agreement 2002-2005
25. Community Newspaper Group Ltd Editorial Enterprise Agreement 1999
26. Conduct Electrical Pty Ltd Enterprise Bargaining Agreement 2004
27. Construction Worker Level 1 (Structures) Swan Valley Nyungah Community Traineeship Agreement 1997

28. Cooktown Constructions Industrial Agreement
29. Co-operative Bulk Handling Limited District Maintenance Employees Enterprise Partnership Agreement 2003
30. Co-Operative Bulk Handling Limited Roving Crew Maintenance Enterprise Partnership Agreement 2003
31. Cornerstone Cartage Pty Ltd and Transport Workers Union Enterprise Agreement 2004
32. Coventry Group Ltd trading as Hot Mix or Bitumen Emulsions Cannington (Enterprise Bargaining) Agreement 2002
33. Coventrys - Transport Division Enterprise Bargaining Agreement 2002
34. Creative and Therapy Activities Disabled Group Inc Enterprise Bargaining Agreement 2002
35. Creative and Therapy Activities Disabled Group Inc. Enterprise Bargaining Agreement 2000
36. CSR Building Products (WA) Enterprise Agreement 2003
37. CSR Gyprock Bradford Ltd (WA) Enterprise Agreement,1995
38. CSR Humes Welshpool Enterprise Agreement November 1994/1995
39. CTC Electrical & Security Enterprise Bargaining Agreement 2004
40. CTS Mechanical and Electrical Enterprise Bargaining Agreement 2002
41. Culunga Aboriginal Community School (Enterprise Bargaining) Agreement 2004
42. CVP Electrical Co Ltd Enterprise Bargaining Agreement 2004
43. D & G Projects Asbestos Eradication Industrial Agreement
44. D.P. Mckenna Pty Ltd Construction Division Enterprise Bargaining Agreement 2004-2005
45. Dairy Industry Authority of Western Australia Enterprise Agreement 1997
46. Data Cabling Systems WA Pty Ltd Construction Division Enterprise Bargaining Agreement 2004-2005
47. Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Agreement 1996 Amendment Agreement 2001
48. Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 1996 Amendment Agreement 2001(A)
49. Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 1996 Amendment Agreement, 1999
50. Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 1996 Amendment Agreement, 1998
51. Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement, 1996
52. Deep Green/CFMEUW Industrial Agreement 2005 – 2008
53. Delta Corporation Ltd, Enterprise Bargaining Agreement 1996
54. DESAIR & AMWU, Malaga, Sheet Metal Enterprise Bargaining Agreement 2006
55. Direct Engineering Services, Malaga, Sheet Metal Enterprise Bargaining Agreement 2003
56. Distribution Technology Systems Pty Ltd Enterprise Bargaining Agreement 2004-2005
57. Djooraminda Cottage Carers' Industrial Agreement 2004
58. DMR Plastering Contractors Industrial Agreement
59. Dongara Cockburn Cement Enterprise Bargaining Agreement 2004
60. Dongara Demolition Industrial Agreement
61. Dorma Auto Door Systems Enterprise Bargaining Agreement 2005
62. DR & J Building Industrial Agreement
63. Du Feu Metal Enterprise Bargaining Agreement 1995
64. Dudley Agreement (Industrial Agreement) 1995
65. Dyno Industries (WA) Pty Ltd (DIWA) Enterprise Bargaining Agreement 1999
66. Dyno Industries (WA) Pty Ltd (DIWA) Enterprise Bargaining Agreement 2001
67. E. D. Oates Pty Ltd Brushware Manufacturing Enterprise Bargaining Agreement 2005
68. E.P.T. Pty Ltd Nelson Point Development Project (Enterprise Bargaining) Agreement AG 18 of 1993
69. East Spar Project (Varanus Island) Agreement 1996
70. Eastport / BLPPU and the CMETU Collective Agreement 2001
71. Easypave Pty Ltd Industrial Agreement
72. Edge Maintenance Services Pty. Ltd. Industrial Agreement
73. Edgell-Birds Eye Manjimup Production Centre (Enterprise Bargaining) Agreement 1992

74. Electrical Construction and Maintenance Australia Pty Ltd Enterprise Bargaining Agreement
75. Electro Acoustic Construction Division Enterprise Bargaining Agreement 2004
76. Electrolux Home Products - Spare Parts and Service Belmont W.A. Enterprise Agreement 2001
77. Elevator Technologies Australia Pty Ltd Enterprise Agreement 2001
78. Eltech Services Pty Ltd Enterprise Bargain Agreement 2005-2006
79. Eltin Boddington Gold Mine Agreement 1999
80. Eltin Hedges Gold Mine Agreement 1997
81. Eltin Limited Hedges Gold Mine Maintenance Agreement
82. Email Limited (Major Appliance Consumer Service Division WA) Enterprise Agreement 1992
83. Email Limited Major Appliance Division Consumer Service Division (WA) Redundancy Agreement 1998
84. Email Major Appliances- Belmont Service Clerical and Shop Assistants Enterprise Agreement 2000
85. Enrolled Nurses and Nursing Assistants (Next Step Specialist Drug and Alcohol Services) Enterprise Agreement 1999
86. Ensign Customer Service Representative 2004-2006
87. Ethnic Child Care Resource Unit (ECCRU) Enterprise Bargaining Agreement 2004
88. Everett-Smith & Co Enterprise Bargaining Agreement
89. Executive Paving Industrial Agreement
90. Faulding Healthcare (Western Australia) Clerical & Administrative Agreement 1999
91. Festive Poultry Limited Enterprise Bargaining Agreement 1996
92. Fill-Crete WA/BLPPU and the CMETU Collective Agreement 2000
93. Firemain Co Contracting Commercial Building Sector Enterprise Agreement 2004
94. Firemain Electrical Service Enterprise Agreement – Perth
95. Fleet Maintenance Services Certified Agreement 2004
96. Floripa Technologies Construction Division Enterprise Bargaining Agreement 2004
97. Foodland Associated Limited Cold Store Maintenance Employees Enterprise Bargaining Agreement 1995, No. AG 138 of 1995
98. Forrestfield CBH Grain Silo Construction Project Agreement 1996
99. Foster's Australia North Fremantle Agreement 2006
100. FPU and Peters (WA) Ltd Balcatta Production Employees' Traineeship Agreement, No 262 of 1996
101. Frank Peter Longshaw Industrial Agreement

2018 WAIRC 00704

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 AUGUST 2018
FILE NO/S	APPL 62 OF 2018
CITATION NO.	2018 WAIRC 00704

Result Agreements cancelled

Order

The Commission gave notice of an intention to make an order cancelling the agreements listed in the Schedule:

(a) in the Western Australian Industrial Gazette on 27 June 2018;

(b) on the Commission’s website from 25 June 2018 until 30 July 2018;

(c) in *The West Australian* newspaper on 19 June 2018; and

(d) by post to the parties to industrial agreements no later than 21 June 2018,

inviting any person with a sufficient interest to object to the cancellation of the agreements in the Schedule.

Sixty-eight parties to various industrial agreements, including some agreements listed in the Schedule, were not served by post because the Commission does not hold a current address for service on those entities.

A number of the organisations advised that they had no objection to the cancellation of the industrial agreements that related to them.

As of 24 August 2018, the Commission has received no objections to the cancellation of the industrial agreements.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

THAT the industrial agreements set out in the attached Schedule be cancelled.

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

SCHEDULE

1. Fred Mason Contract Bricklayers Industrial Agreement
2. Fusion Recruitment Group - TWU Enterprise Bargaining Agreement 2006
3. G Construction Engineering Industrial Agreement
4. G.N. Conform Industrial Agreement
5. Gadsden Rheem (W.A.) Enterprise Agreement
6. Garland Ellas Taylor Pty Ltd Enterprise Bargaining Agreement.
7. Gascoyne Trading Workshop Enterprise Bargaining Agreement 1994
8. GEC Avery Australia Limited Enterprise Bargaining Agreement 1995
9. Geraldton Brickworks Pty Ltd Enterprise Agreement 2000
10. Geraldton Harbour Master-Marine Pilots Salary Agreement 1996 – The
11. Gilbarco Aust. Ltd (Perth) Agreement 1994
12. Gilbarco Aust. Ltd. (Western Australian Branch) Registered Agreement 1998
13. Global Electrontech Constructions Pty Ltd Commercial Enterprise Bargaining Agreement 2003
14. Golden Egg Farms' (Food Preservers) Agreement 2005
15. Goninan WA Division Bassendean Enterprise Bargaining Agreement No. AG 48 of 1993
16. Good Samaritan Industries (State) Industrial Agreement 2003
17. Good Samaritan Industries Supported Employees Industrial Agreement of 2004
18. Goodman Fielder Consumer Foods Ltd (Western Australia) Enterprise Agreement 2004
19. Graceville Women's Centre - Salvation Army Industrial Agreement 2002
20. Grain Handling (Maintenance Workers) Enterprise Agreement 1994
21. Grant Electrical Industries Pty Ltd Enterprise Bargaining Agreement No. AG 60 of 1993
22. Greenbushes Mine Maintenance (Enterprise Bargaining) Industrial Agreement 1993
23. Gromark Packaging Pty Ltd Kewdale Plant Enterprise Agreement 1995
24. Group Training-Perth (Inc) Agreement 1998
25. Guildford Grammar School Enterprise Bargaining Agreement 1996
26. Gunns Limited Enterprise Agreement 2004
27. Hairdressing SDA - Carl Ridolfo Pty Ltd T/A Carl Ridolfo Hair Design Enterprise Agreement 2000
28. Hairdressing SDA - Cheveux by Anthony Pty Ltd T/A Cheveux by Anthony Enterprise Agreement 2000
29. Hairdressing SDA - Coffiano Holdings Pty Ltd T/A Studio Picasso Enterprise Agreement 2000
30. Hairdressing SDA - Grand Court Corp Pty Ltd Enterprise Agreement 2000
31. Hairdressing SDA - Joanne Steel T/A Jo's for Hair Enterprise Agreement 2000
32. Hairdressing SDA - Judith Clarke t/a Distinctions Hair Design Enterprise Agreement 2000
33. Hairdressing SDA - Luciano's Hair Fashion for Men Enterprise Agreement 2000
34. Hairdressing SDA - Starra Pty Ltd T/A Diva Hair Studio & Sinatra's for Hair
35. Halliburton KBR Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 2002
36. Hammer Outdoor Design Industrial Agreement

37. Hardie Iplex Pipeline Systems - Osborne Park (Enterprise Bargaining) Agreement 1993
38. Healthcare Linen Pty Ltd Engineering Enterprise Agreement 1996
39. Heat Containment Industries Enterprise Agreement 1993
40. Hedland Bus Lines Enterprise Agreement 1994
41. Hi Tec Demolition Industrial Agreement
42. Hollywood Private Hospital (HSOA) Enterprise Agreement 2000
43. Horticultural Career Start Traineeship Industrial Agreement 1995
44. Hospital Salaried Officers (Attadale Hospital) Enterprise Bargaining Agreement 1997
45. Hospital Salaried Officers (Mayne WA Hospitals) Enterprise Bargaining Agreement 2003
46. Hospital Salaried Officers Joondalup Health Campus Enterprise Bargaining Agreement 1996
47. Hospitality Industry - Australian Hotels Association (WA Branch - Accommodation Division) Industrial Agreement 2000
48. Hot Briquetted Iron Project Agreement
49. Howard Porter Pty Ltd Enterprise Bargaining Agreement 2001
50. Huhtmaki Australia Limited - Western Australian Site Enterprise Agreement 2005
51. Iluka Resources Limited Industrial Agreement 2004
52. Improved Concrete Pumping Services (WA) Pty Ltd/CFMEUW Industrial Agreement 2005 – 2008
53. Improved Concrete Pumping Services/CFMEUW Industrial Agreement 2002-2005
54. Independent Pump Hire Industrial Agreement
55. Independent Wool Dumpers Pty Ltd Agreement 1999
56. Industrial Personnel - TWU Enterprise Bargaining Agreement 2001
57. Inform Construction Industrial Agreement
58. Inform Construction Industrial Agreement
59. Ingal EPS Enterprise Bargaining Agreement 2003
60. Inghams Enterprises Pty Limited (Maintenance Department) Enterprise Bargaining Agreement 1997
61. Inghams Thornlie (WA) Agreement 1999
62. Innes Transport Pty Ltd and The Transport Workers Union Enterprise Bargaining Agreement 1998
63. Integrated Power Services Industrial Agreement 2003 AG 88 of 2003
64. Integrated Power Services Pty Ltd Collie Basin Coal Infrastructure Operations and Maintenance Enterprise Agreement 1999
65. Integrated Workforce - TWU Enterprise Bargaining Agreement 2005
66. Interlec (WA) Pty Ltd Enterprise Bargaining Agreement 2004-2005
67. Intework Supported Employees Wages Agreement 2004
68. J & K Hopkins Enterprise Agreement 2005
69. Jadsco Pty Ltd Maintenance Contracts Enterprise Bargaining Agreement 1996, No. AG 145 of 1996
70. James Hardie Australia Pty Ltd. Rutland Avenue, Welshpool, Agreement, 1999
71. James Hardie Pipelines - Osborne Park (Enterprise Bargaining) Agreement 1995
72. Jandakot Wool Washing Pty Ltd Agreement 2003
73. JFM Electrical Pty Ltd Enterprise Bargain Agreement 2004
74. Jobskills Trainee (Hospitality Industry) Agreement 1995
75. Jobskills Trainee (School Employees - Teachers Aide) Catholic Education Commission Agreement, 1994
76. John Holland Construction and Engineering Pty Ltd (Nelson Point Development Project) Enterprise Bargaining Agreement No. AG 49 of 1993
77. Jones & Rickard Service (W.A.) Enterprise Bargaining Agreement 1995
78. Jones & Rickard Service (WA) Enterprise Bargaining Agreement 1997
79. K Mart Armadale Rostering Agreement 1994
80. Kalamunda District Community Hospital (Hospital Assistants) Agreement
81. KBR Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 2006
82. Kiam KNR Plant Enhancement Kwinana Works Agreement 2001
83. Kilpatrick Green Pty Ltd Nelson Point Development Project (Enterprise Bargaining Agreement) AG 22 of 1993

84. Kilpatrick Green Pty Ltd (WA) Agreement
85. Kirin Australia (Fitters') Enterprise Agreement 2002
86. Kirin Australia (MP) Enterprise Agreement 2006-8
87. Kirin Australia (MPO) Enterprise Agreement 2003-5
88. KLM Electrical Contracting (WA) Pty Ltd Enterprise Agreement 1996
89. KLM Group Construction Division Enterprise Bargaining Agreement 2004
90. K-Mart Food Services (Wages) Agreement 1994
91. Komatsu Australia Perth (Service Department) Enterprise Agreement 2001
92. Komatsu Australia Perth (Service Department) Enterprise Agreement 2005
93. KRM Pty Ltd t/a Kitec Electrical Services Enterprise Bargaining Agreement 2004
94. KSE Steel Team Enterprise Bargaining Agreement
95. Kwinana Industries Council Engineering Traineeship Agreement 1997
96. Kwinana Oil Refinery Site Maintenance And Modification Contractors Agreement 1997
97. Kwinana Water Reclamation Project, Electrical Agreement 2003
98. Leader Construction Cabling Commercial Enterprise Bargaining Agreement 2003
99. Ledger Engineering Pty Ltd (Receiver and Manager Appointed) Enterprise Bargaining Agreement 1996
100. Ledger Engineering Pty Ltd Enterprise Bargaining Agreement

---

2018 WAIRC 00705

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 AUGUST 2018
FILE NO/S	APPL 63 OF 2018
CITATION NO.	2018 WAIRC 00705

Result Agreements cancelled

Order

The Commission gave notice of an intention to make an order cancelling the agreements listed in the Schedule:

(a) in the Western Australian Industrial Gazette on 27 June 2018;

(b) on the Commission's website from 27 June 2018 until 30 July 2018;

(c) in *The West Australian* newspaper on 20 June 2018; and

(d) by post to the parties to industrial agreements no later than 21 June 2018,

inviting any person with a sufficient interest to object to the cancellation of the agreements in the Schedule.

Sixty-eight parties to various industrial agreements, including some agreements listed in the Schedule, were not served by post because the Commission does not hold a current address for service on those entities.

A number of the organisations advised that they had no objection to the cancellation of the industrial agreements that related to them.

As of 24 August 2018, the Commission has received no objections to the cancellation of the industrial agreements.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

THAT the industrial agreements set out in the attached Schedule be cancelled.

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

SCHEDULE

1. Leighton Contractors Pty Limited Agreement 1994 For Construction Of The Wandoo Concrete Gravity Structure.
2. Leisk, Jenkins Eltech Pty Ltd (LJE) Enterprise Bargaining Agreement 2002
3. Les Wainwright and Transport Workers Union Enterprise Agreement 2004
4. LG International Security Services Enterprise Bargaining Agreement 2005
5. LHMU - Buttercup Bakery Malaga (WA) Bakehouse Enterprise Agreement 2005
6. LHMU - Challenge Australian Dairy Pty Ltd - Job Security & Union Recognition Agreement 2005
7. LHMU - Iplex Pipelines (Manufacturing) Union Recognition Agreement 2005
8. LHMU - PB Foods Limited Beverage Production (Balcatta) Enterprise Agreement 2005-2008
9. LHMU iPlex Pipeline (Warehouse) Union Recognition Agreement 2005
10. Lidco Aluminium Windows Pty Ltd Agreement 1995
11. Lomondside Enterprises/CFMEUW Industrial Agreement 2002-2005
12. Lutheran Schools WA (Enterprise Bargaining) Agreement 2005
13. Lysaght Building Industries Myaree Performance Related Payments Scheme (Enterprise Bargaining) Agreement AG 29 of 1993
14. M & D Vujacic Industrial Agreement
15. M&J Mitchell Enterprise Agreement 1997
16. Maico Electrical Enterprise Bargain Agreement 2004-2005
17. Maico Pty Ltd Enterprise Bargaining Agreement 2005-2008
18. Masters Dairy Enterprise Bargaining Agreement 1995, No. AG 125 of 1995
19. McDonald & Mavric Bricklaying Services Industrial Agreement
20. MDR Construction Hire Industrial Agreement
21. Meadow Lea Foods Ltd (Palmyra and Canningvale Sites) Enterprise Agreement 1998
22. Mercy Hospital Mt Lawley, Maintenance Staff Enterprise Bargaining Agreement 2004
23. Methodist Ladies' College (Enterprise Bargaining) Agreement 2005
24. Methodist Ladies' College (Non-Teaching Staff - Building Trades) Enterprise Bargaining Agreement 1998
25. Methodist Ladies' College Non-Teaching Staff (Enterprise Bargaining) Agreement 2005
26. Metro Brick (Cardup) (Enterprise Bargaining) Agreement 1994
27. Metro Brick Armadale (Enterprise Bargaining) Agreement 1994
28. Metro Meat International Limited, Katanning Division Maintenance Employees Enterprise Agreement
29. Metro Meat International Limited, Linley Valley Division Maintenance Employees Enterprise Agreement
30. Metrobus Engineering and Maintenance Engineering Agreement 1995
31. MetroBus Engineering Employees Closedown Enterprise Bargaining Agreement 1997
32. Metso Minerals (Wear Protection) Maintenance Agreement 2005
33. Midland Brick Enterprise Agreement (WA) 2004
34. Minesite Personnel Pty Ltd Certified Agreement 1999
35. Mizco Construction Electrical Certified Agreement 2003
36. Mofflyn - LHMU, (State) Industrial Agreement 2004
37. Mr Formwork / BLPPU and the CMETU Collective Agreement 2000
38. MRC Contracting Pty Ltd/CFMEUW Industrial Agreement 2005-2008
39. Myer Stores Limited Distribution Centre Carousel Road Cannington Site Clerical Agreement 1994
40. Nannup Timber Processing Pty Ltd Enterprise Agreement 2001
41. Nannup Timber Processing Pty Ltd Enterprise Agreement 2003
42. National Foods Milk Limited and Liquor, Hospitality and Miscellaneous Union Western Australia State Industrial Agreement 2004
43. National Training Wage Traineeship (Hospitality Industry) Agreement 1995, No. AG 211 of 1995.
44. Nazareth House Salaried Officers Enterprise Agreement 2005
45. Nelson Point and Finucane Island Capacity Expansion Project - Port Hedland Agreement 1997 – 1998, No. AG 113 of 1997

46. Nelson Point and Finucane Island Capacity Expansion Project - Port Hedland Agreement 1997 – 1998, No. AG 166 of 1997
47. Nelson Point and Finucane Island Capacity Expansion Project - Port Hedland Agreement 1997-1998, No. AG 321 of 1997
48. Nilsen Electric (WA) Pty Ltd Enterprise Agreement 1996
49. NS Komatsu Perth (Service Department) Enterprise Agreement 1999
50. Nyindamurra Family School (Enterprise Bargaining) Agreement 1997
51. Ocean Legend Agreement 2003
52. Ocean Legend Agreement 2003 Amendment Agreement 2005
53. O'Donnell Griffin (Maintenance Operations) Port Hedland Enterprise Bargaining Agreement 1997
54. O'Donnell Griffin Nelson Point Development Project (Enterprise Bargaining) Agreement AG 20 of 1993
55. O'Donnell Griffin Nelson Point Development Project (Enterprise Bargaining) Agreement Phase II, No. AG 28 of 1993
56. Oil Bunkering (Fremantle) Limited Enterprise Bargaining Agreement 2005
57. Olympic Fine Foods Enterprise Agreement 1995
58. Otis Australia - Western Australian Construction & Service Employees Certified Agreement 1997
59. Otis Building Technologies - Western Australia Elevator Division Certified Agreement 1996.
60. OTRACO Earthmover Tyre Fitter's Enterprise Agreement 1998
61. P & C Industrial Installations and Maintenance Industrial Agreement
62. P & O Towage Services Small Craft Crews Enterprise Agreement 1993
63. P&O Towage Services Small Craft Crews Enterprise Agreement 1996
64. Pacific Industrial Company (WA) Pty Ltd Transport Drivers' Certified Agreement
65. Pacific Industrial Company Enterprise Bargaining Agreement 2000
66. Pacific World Packaging (WA) Enterprise Agreement 1995
67. Paraplegic-Quadriplegic Association of Western Australia (Inc) Supported Employees' Wages Agreement 2005
68. PB Foods Limited Operations Enterprise Agreement 2005
69. PB Foods Ltd Balcatta Security Officers Enterprise Agreement 2005
70. PB Foods Ltd Brunswick (Enterprise Bargaining) Agreement 2005
71. PB Foods Ltd Country Distribution Depots (Enterprise Bargaining) Agreement 2000
72. Peel Community Living (Inc) ALHMUW State Industrial Agreement 2002
73. Peel Laundry (Transport Workers) Enterprise Agreement, 1996
74. Penrhos College Non-Teaching Staff (Enterprise Bargaining) Agreement 2002
75. Pepsi Cola Bottlers Western Australian Enterprise Agreement 1996
76. Perth Montessori School (Enterprise Bargaining) Agreement 2004
77. Peters (W.A.) Limited (Balcatta Operations) Enterprise Bargaining Agreement 1994 No.2
78. Peters (WA) Ltd Country Distribution Depots (Enterprise Bargaining) Agreement 1996, No. AG 170 of 1996
79. Peters Creameries (WA) Pty Ltd (Enterprise Bargaining) Agreement 1994, No. AG 112 of 1995
80. Peters Poultry Suppliers Agreement 1994
81. Peters Poultry Suppliers Enterprise Agreement 1996
82. Pilbara 4-Wheel Drive and Mine Services Agreement 1997
83. Pilkington (Australia) Operations Limited, Myaree Wholesale (Stage IV, 20000 Enterprise Agreement
84. Pilkington (Australia) Operations Limited, Myaree Wholesale (Stage II 1995) Enterprise Agreement
85. Pilkington (Australia) Operations Limited, Myaree Wholesale (Stage III 1998) Enterprise Agreement
86. Pilkington (Australia) Operations Ltd, Myaree Enterprise Agreement 1993
87. Pioneer Concrete (WA) Pty Ltd Bunbury Quarry (Enterprise Bargaining) Agreement 1996.
88. Pioneer Concrete (WA) Pty Ltd Herne Hill Quarry (Enterprise Bargaining) Agreement 1996
89. Pioneer Construction Materials Agitator Truck Drivers' Agreement 2004
90. Pioneer Construction Materials Pty Ltd Byford Quarry (Enterprise Bargaining) Agreement 2004
91. Pioneer Construction Materials Pty Ltd Red Hill Quarry (Enterprise Bargaining) Agreement 2004
92. Pioneer Construction Materials Tip Truck and Tanker Drivers Agreement 2004

93. Polarcup Australia - Perth Enterprise Agreement 1999
94. Port Hedland Visitors Centre (Inc) Agreement 2002
95. Precise Drilling & Sawing Industrial Agreement
96. Premier Coal Development Project Agreement 1997
97. Printing (Community Newspaper Group) Production Employees (Enterprise Bargaining) Agreement 2006
98. Prok Group Enterprise Bargaining Industrial Agreement 1999
99. Prospector and Avon Link on Train Customer Service Officers Enterprise Agreement 2006

2018 WAIRC 00706

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 AUGUST 2018
FILE NO/S	APPL 64 OF 2018
CITATION NO.	2018 WAIRC 00706

Result Agreements cancelled

Order

The Commission gave notice of an intention to make an order cancelling the agreements listed in the Schedule:

(a) in the Western Australian Industrial Gazette on 27 June 2018;

(b) on the Commission's website from 29 June 2018 until 30 June 2018;

(c) in *The West Australian* newspaper on 21 June 2018; and

(d) by post to the parties to industrial agreements no later than 21 June 2018,

inviting any person with a sufficient interest to object to the cancellation of the agreements in the Schedule.

Sixty-eight parties to various industrial agreements, including some agreements listed in the Schedule, were not served by post because the Commission does not hold a current address for service on those entities.

A number of the organisations advised that they had no objection to the cancellation of the industrial agreements that related to them.

As of 24 August 2018, the Commission has received no objections to the cancellation of the industrial agreements.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

THAT the industrial agreements set out in the attached Schedule be cancelled.

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

SCHEDULE

1. Protech International Group Enterprise Bargaining Agreement 2004
2. PVS / Auto Services / Jobskills Agreement, No. AG 283 of 1995
3. PVS / Auto Services / Jobskills Agreement, No. AG 336 of 1995
4. PVS / Auto Services / Jobskills Agreement, No. AG 4 of 1996
5. PVS / Auto Services / Jobskills Agreement, No. AG 111 of 1996
6. PVS / Auto Services / Jobskills Agreement, No. AG 156 of 1996
7. PVS / Auto Services / Jobskills Agreement, No. AG 158 of 1996
8. PWD Construction Pty Ltd Industrial Agreement
9. Pyrotronics Fire Protection Pty Ltd ABN 73 102 333 899 Enterprise Bargaining Agreement 2003

10. R & C Rossi Industrial Agreement
11. R.A.C. (WA) Redundancy Agreement
12. R.A.C. of W.A. (Inc.) Fleet Maintenance Workshop Enterprise Bargaining Agreement 1997 – The
13. RAC - Assistance Centre, Enterprise Agreement 2002
14. RAC Motoring Services Enterprise Bargaining Agreement 2004
15. Ralph M Lee (WA) Pty Ltd Enterprise Bargaining Agreement 1994
16. Ralph M Lee (WA) Pty Ltd Enterprise Bargaining Agreement 1996
17. Ralph M Lee Pty Ltd (Maintenance Operations) Port Hedland Enterprise Bargaining Agreement 1997
18. Ranwell Pty Ltd / CFMEUW Collective Agreement 2002
19. Rapid Metal Developments Enterprise Bargaining Agreement 1999
20. RCR Engineering Enterprise Agreement
21. RCR Engineering Ltd (Bunbury Operations) Enterprise Agreement 1996.
22. RCR Tomlinson Ltd (Bayswater and Welshpool) Enterprise Agreement 2002
23. RCR Tomlinson Ltd (Bayswater and Welshpool) Enterprise Agreement 2004
24. RCR Tomlinson Ltd (Bunbury Operations) Enterprise Agreement 2001 – 2003
25. RCR Tomlinson Ltd (Perth Engineering) Enterprise Agreement 1998
26. Readymix - Port Headland Concrete Plant (Enterprise Bargaining) Agreement 1996 – The
27. Readymix (Mandurah and Gosnells) Transport, (Enterprise Bargaining) Agreement 1995 – The
28. Readymix Albany Quarry (Enterprise Bargaining) Consent Agreement 1994
29. Readymix Gosnells Quarry (Enterprise Bargaining) Consent Agreement 1993 – The
30. Readymix Gosnells Quarry and Central Workshops (Enterprise Bargaining) Consent Agreement 1995 – The
31. Readymix Metropolitan Concrete (Enterprise Bargaining) Consent Agreement 1993 – The
32. Readymix Quarries Gosnells Operations 1995 Redundancy Agreement
33. Real Estate WA (REWA) Agreement 2004
34. Red Australia Equipment Pty Ltd
35. Redundancy Due to ANI Bradken South Fremantle Plant Closure
36. River Rooster Australia, SDA Enterprise Agreement 2001
37. River Rooster Boulder, SDA Enterprise Agreement 2001
38. River Rooster Bridgetown, SDA Enterprise Agreement 2001
39. River Rooster Harvey, SDA Enterprise Agreement 2001
40. River Rooster Maddington, SDA Enterprise Agreement 2001
41. River Rooster Mandurah, SDA Enterprise Agreement 2001
42. River Rooster Margaret River, SDA Enterprise Agreement 2001
43. River Rooster Pinjarra, SDA Enterprise Agreement 2001
44. River Rooster Warnbro, SDA Enterprise Agreement 2001
45. Riverton Engineering Enterprise Bargaining Agreement 2000
46. Rocket Couriers and the Transport Workers Union Enterprise Agreement 1998
47. Rokla Pty Ltd Industrial Agreement
48. Roofmart Certified Agreement 2005
49. Roving Crew Partnership Agreement 1997
50. Royal Automobile Club of W.A. (Incorporated) Enterprise Bargaining Agreement 1993, No. AG 21 of 1992 – The
51. Salaried Officers Mayne Diagnostic Imaging (Joondalup) Western Australian Enterprise Agreement 2003
52. Salvation Army Property Trust (Western Australia) Hospital Salaried Officers Association Enterprise Agreement 2003
53. Samcon WA Industrial Agreement
54. Sandvik Materials Handling Enterprise Bargaining Agreement 2003
55. Sandvik Materials Handling Pty Ltd Bayswater Components Agreement 2004-2007
56. Scaffidi Developments Pty Ltd Industrial Agreement
57. Schindler Lifts Australia Pty Ltd (Western Australia) Enterprise Agreement 2003

58. Schweppes Cottee's (Osborne Park) Enterprise Bargaining Agreement No. AG 198 of 1994
59. SDA and DWA Jobskills Number 1 Warehouse Employees' Agreement, No. AG 213 of 1996
60. Security Monitoring Centres (Control Room Operators) Agreement 1998
61. Serco Australia Pty Belmont Enterprise Bargaining Agreement 1998
62. Serco Australia Pty Limited Enterprise Bargaining Agreement 1997, No. AG 104 of 1997
63. Shire of Albany Certified Enterprise Bargaining Agreement Depot Staff 1997
64. Shire Of Bridgetown-Greenbushes Enterprise Agreement 1996
65. Shire of Busselton Certified Enterprise Bargaining Agreement
66. Shire of Collie Enterprise Bargaining Agreement (Metal Trades General Employees) 1997
67. Shire of Greenough Maintenance Agreement 1996
68. Shire of Swan (Building Operations) Enterprise Bargaining Agreement
69. Shop Distributive and Allied Employees' Association of Western Australia Pizza Hut Agreement 1998
70. Shop, Distributive and Allied Employees Association of Western Australia and PVS Jobskills No. 1 Retail Employees Agreement, No. AG 208 of 1995 – The
71. Shop, Distributive and Allied Employees Association of Western Australia and PVS Jobskills No. 3 Retail Employees Agreement – The
72. Shop, Distributive and Allied Employees Association of Western Australia and PVS Jobskills No.2 Retail Employees Agreement – The
73. Shop, Distributive and Allied Employees' Association of Western Australia and Perth ITEC Pty Ltd JobSkills No. 214 of 1996 – The
74. Shop, Distributive and Allied Employees' Association of Western Australia and PVS Jobskills No.4 Retail Employees' Agreement, No. AG 212 of 1996 – The
75. Showbits Perth and SDA Agreement 2003
76. Simon Carves Electrical Services (Maintenance Operations) Enterprise Bargaining Agreement 1997
77. Simon-Carves Electrical Services Enterprise Agreement 1996.
78. Simsmetal Limited (Production and Maintenance) Enterprise Bargaining Agreement
79. Simsmetal Limited (Production and Maintenance) Enterprise Bargaining Agreement No. AG 134 of 2003
80. Simsmetals Limited (Production and Maintenance) Enterprise Bargaining Agreement No. AG 45 of 2005
81. SJM Electrical Enterprise Bargaining Agreement 1998
82. SJM Electrical Enterprise Bargaining Agreement 2000
83. Skilled Engineering Ltd (CBH Kwinana) Maintenance Agreement 2000
84. Skilled Group Ltd (CBH) Maintenance Agreement 2005
85. Smith's Snackfood Company Limited (Western Australia) Enterprise Agreement 2004
86. Smorgon ARC Welshpool Enterprise Bargaining Agreement 1993 No. Ag 26 of 1992
87. Solahart, Welshpool, Manufacturing Enterprise Bargaining Agreement 2004
88. Sotico Pty Ltd Bunbury Port (Enterprise Bargaining) Agreement 2000
89. Southcorp Packaging I.P.D. Fremantle Enterprise Agreement 2000
90. Southcorp Packaging, Gadsden Carton System In-Plant Team Bentley-WA Enterprise Agreement 2000
91. Southern Cross Electrical Engineering Pty Ltd Enterprise Bargaining Agreement
92. Southern Cross Electrical Engineering Pty Ltd Western Australian Industrial Operations Certified Agreement 2003
93. Southern Processors Ltd (Albany) Enterprise Agreement 1992
94. Spearwood Workshop and Commercial Services Employees Enterprise Partnership Agreement 1996
95. SR2 Construction Project Agreement 1996
96. St John Ambulance Communication Centre Enterprise Agreement 1994
97. St John Ambulance Deputy Superintendents' Enterprise Agreement 1994
98. St John of God Health Care Murdoch AMA Medical Practitioners Industrial Agreement 2005
99. St John of God Health Care Subiaco (HSOA) Caregiver Agreement 2001
100. St John of God Health Care Subiaco (HSUA - Pharmacy) Agreement 2004

2018 WAIRC 00707

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 AUGUST 2018
FILE NO/S	APPL 65 OF 2018
CITATION NO.	2018 WAIRC 00707

Result Agreements cancelled

Order

The Commission gave notice of an intention to make an order cancelling the agreements listed in the Schedule:

(a) in the Western Australian Industrial Gazette on 27 June 2018;

(b) on the Commission's website from 29 June 2018 until 30 July 2018;

(c) in *The West Australian* newspaper on 22 June 2018; and

(d) by post to the parties to industrial agreements no later than 21 June 2018,

inviting any person with a sufficient interest to object to the cancellation of the agreements in the Schedule.

Sixty-eight parties to various industrial agreements, including some agreements listed in the Schedule, were not served by post because the Commission does not hold a current address for service on those entities.

A number of the organisations advised that they had no objection to the cancellation of the industrial agreements that related to them.

As of 24 August 2018, the Commission has received no objections to the cancellation of the industrial agreements.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

THAT the industrial agreements set out in the attached Schedule be cancelled.

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

SCHEDULE

1. Royal WA Institute for the Blind Employees Wage Agreement – The
2. St John of God Health Care Subiaco Maintenance Agreement 2004
3. St John of God Hospital Subiaco (Enrolled Nurses) Agreement 1994
4. St John of God Hospital Subiaco (Maintenance) Agreement 1995
5. St John of God Hospital Murdoch Caregiver Agreement 1994
6. St John of God Pathology Enterprise Agreement 2004
7. Standre Industrial Agreement
8. State School Teachers' Union of WA Clerical Staff Agreement of 2001
9. Statewide Demolition Industrial Agreement
10. Stegbar Pty Ltd (Wangara WA) Enterprise Agreement 2006
11. Steggles Engineering Site Agreement 1996, No. AG162 of 1996
12. Steggles Enterprise Bargaining Agreement 1995, No. AG 59 of 1996
13. Steggles Limited (Maintenance Division) Enterprise Agreement 1998
14. Stirling Stainless Steel Enterprise Agreement 2004
15. Stork Electrical (WA) Enterprise Agreement
16. Stork Electrical Pty Ltd Enterprise Agreement 1996

17. Stork ICM Australia Pty Ltd (Rockingham Workshop and Operations) Agreement No 157 of 1999
18. Stork ICM Australia Pty Ltd (Rockingham Workshop and Operations) Agreement No AG 5 of 1999
19. Stramit Building Products (Maddington) Western Australia Enterprise Bargaining Agreement 2005/2008
20. Stramit Building Products Western Australia Enterprise Bargaining Agreement 2003
21. Stramit Industries, Maddington, Western Australia Enterprise Bargaining Agreement 1996
22. Stramit Industries, Maddington, Western Australia Enterprise Bargaining Agreement 1998
23. Stream Tiling Industrial Agreement
24. Structural Marine Enterprise Bargaining Agreement 2002
25. Stylewoods/BLPPU and the CMETU Collective Agreement 1999
26. Summit Ceilings Wall and Ceiling Industrial Agreement
27. Sunlite Australia / CFMEUW Industrial Agreement 2005 – 2008
28. Support Services & Enrolled Nurses (Mercy Hospital & LHMU) Union Recognition & Job Security Agreement 2005
29. Swan Brewery and Combined Unions (Enterprise Agreement) 1992
30. Swan Brewery Enterprise Agreement 2003
31. Swan Christian Education Association Inc. (Enterprise Bargaining) Agreement 2002
32. Swan Christian Education Association Inc. (School's Non-Teaching Employee Enterprise Bargaining) Agreement 2001
33. Swan Lagging Industrial Agreement
34. Swan Portland Cement Ltd, Burswood Site, Enterprise Bargaining Agreement 1994
35. Swan Portland Cement Ltd, Burswood Site, Enterprise Bargaining Agreement 1995
36. Swan Portland Cement Ltd Clinker Grinding Plant - Kwinana Project Agreement 1996
37. Swan Portland Cement Ltd Redundancy Agreement 1995
38. Swire Cold Storage Pty Ltd Employer, Employee Agreement 2004
39. Swire Cold Storage Pty Ltd Transport Workers Enterprise Agreement 2004
40. Swispec Pty Ltd Enterprise Agreement 1996
41. TAB Racing Radio Employees General Agreement 2003
42. Telfer Gold Mine Enterprise Agreement 1993
43. Thomson Cleaning Company Industrial Agreement
44. Thorn Mechanical Pty Ltd Enterprise Bargaining Agreement 2004
45. Tip Top Bakeries (Canning Vale) and Transport Workers' Union Industrial Agreement 2005
46. Tip Top Bakeries (Canning Vale) Industrial Agreement No. AG 82 of 1997
47. TMS Electrical Pty Ltd Enterprise Bargaining Agreement 2004-2006
48. Total Corrosion Control (Metal Workers) Enterprise Bargaining Agreement 1997
49. Total Marine Service Geraldton Dredging Workshop Agreement 2002
50. Total Tilt-Up Industrial Agreement
51. Town of Albany Outside Workers (Carpenters & Metal Trades) Certified Agreement 1996
52. Town of Kwinana (WA) Enterprise Agreement, 1996
53. Town of Port Hedland Enterprise Agreement (Trades Employees) 2002
54. Transfield - A.S.I. (Enterprise Bargaining) Consent Agreement 1993
55. Transfield Construction Pty Ltd W.A. Division Alcoa Kwinana B-30 Project Enterprise Bargaining Agreement
56. Transfield Construction Pty Ltd WA Division Workshops (Kwinana) Enterprise Bargaining Agreement No. AG 11 of 1993
57. Transfield Maintenance HBI Agreement 2000
58. Transfield Pty Ltd, Transfield Coatings (WA) Industrial Agreement 1998
59. Transport Workers' (Eastern Goldfields Transport Board) Agreement 2005
60. Transport Workers South West Express Enterprise Agreement 2004
61. Trendwest Painting Industrial Agreement
62. Trinity Building Group/BLPPU Collective Agreement 1999
63. Trinity Demolition Industrial Agreement
64. Troy Development Corporation Pty Ltd trading as Masterfloors/BLPPU and the CMETU Collective Agreement 1999

65. Tubemakers Kwinana Pipe Plant Joint Enterprise Development Agreement
66. Tubemakers Kwinana Pipe Plant Joint Enterprise Development Agreement, No. AG 139 of 1995
67. Tubemakers of Australia Limited, Steel Pipelines, Kwinana (Enterprise Bargaining) Agreement No. AG 2 of 1992
68. Turbine Components Australia Pty Ltd Redundancy Agreement
69. Tyco Services Industrial Agreement
70. Tyco Water Pty Ltd, ACN 087 415 745 Steel Pipeline Systems, Kwinana Manufacturing Joint Enterprise Development Agreement - July 1999 to June 2001
71. Tyco Water Pty Ltd, Kwinana Pipe Plant, Enterprise Bargaining Agreement 2006
72. Ulta Speed Rigging & Construction Industrial Agreement
73. United Construction Alcoa (Kwinana and Pinjarra Refineries) Local Service Contracts Enterprise Bargaining Agreement 1995
74. United Construction Alcoa Kwinana Core Crew Enterprise Agreement 1993
75. United Construction Alcoa Operations Local Services Contracts and Associated Projects Enterprise Bargaining Agreement 1996
76. United Construction Alcoa Pinjarra Core Crew Enterprise Agreement 1993
77. United Construction Argyle Area Maintenance Agreement 1995
78. United Construction Argyle Maintenance Core Crew Enterprise Agreement 1993
79. United Construction BHP Petroleum Griffin Venture Remediation Project Agreement 1997
80. United Construction BHP Titanium Minerals Project Enterprise Based Agreement 1996
81. United Construction CBH Project (Geraldton) Enterprise Agreement 1994
82. United Construction Coogee Chemicals Sulphuric Acid Handling Facility, Enterprise Based Agreement 1996
83. United Construction HIsmelt Maintenance Core Crew Enterprise Agreement 1994, No. AG 23 of 1994
84. United Construction HIsmelt Maintenance Core Crew Enterprise Agreement 1994, No. AG 282 of 1995
85. United Construction Kwinana Fabrication Facilities Ltd Enterprise Bargaining Agreement 1996
86. United Construction Kwinana Nickel Refinery Maintenance Enterprise Based Agreement 1996
87. United Construction Kwinana Supply Services Enterprise Bargaining Agreement 1996
88. United Construction Ord Sugar Mill Maintenance Agreement 1996, No. AG 176 of 1996
89. United Construction Pty Ltd (Alcoa Kwinana B-30 Project) Enterprise Bargaining Agreement
90. United Construction Pty Ltd Enterprise Agreement for HIsmelt Services 1996
91. United Construction Pty Ltd Nelson Point Development Project (Enterprise Bargaining) Agreement AG 19 of 1993
92. United Construction Pty Ltd Nelson Point Development Project (Enterprise Bargaining) Agreement Phase II AG 37 of 1993
93. United Construction Supplementary Workforce BP Oil Kwinana Refinery Enterprise Bargaining Agreement 1996, No. AG 153 of 1996
94. United Group Rail Services Limited Bassendean Enterprise Agreement 2006
95. United Maintenance Pty Ltd HBI Agreement 2000
96. Universal Fasteners Enterprise Bargaining Agreement 1996, No. AG 178 of 1996
97. Untex Textured Coating Industrial Agreement
98. V & L Carlino Industrial Agreement
99. Van Leer Australia Pty Limited - Perth Enterprise Bargaining Agreement 2000
100. Van Leer Australia Pty Limited - Perth Enterprise Bargaining Agreement 2001

2018 WAIRC 00708

CANCELLATION OF VARIOUS AGREEMENTS

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 AUGUST 2018
FILE NO/S	APPL 66 OF 2018
CITATION NO.	2018 WAIRC 00708

Result Agreements cancelled

Order

The Commission gave notice of an intention to make an order cancelling the agreements listed in the Schedule:

(a) in the Western Australian Industrial Gazette on 27 June 2018;

(b) on the Commission's website from 29 June 2018 until 30 July 2018;

(c) in *The West Australian* newspaper on 25 June 2018; and

(d) by post to the parties to industrial agreements no later than 21 June 2018,

inviting any person with a sufficient interest to object to the cancellation of the agreements in the Schedule.

Sixty-eight parties to various industrial agreements, including some agreements listed in the Schedule, were not served by post because the Commission does not hold a current address for service on those entities.

A number of the organisations advised that they had no objection to the cancellation of the industrial agreements that related to them.

As of 24 August 2018, the Commission has received no objections to the cancellation of the industrial agreements.

The Commission is satisfied that the requirements of s 47(3) of the *Industrial Relations Act 1979* have been met and that there is no employee to whom these industrial agreements apply. Pursuant to the powers conferred on me by s 47 of the *Industrial Relations Act 1979*, I hereby order:

THAT the industrial agreements set out in the attached Schedule be cancelled.

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

SCHEDULE

1. Vandertang Concrete Industrial Agreement
2. Vaughan Castings Enterprise Agreement 2000
3. Vax Appliances Enterprise Bargaining Agreement 1999
4. Vinidex Pty Ltd (Maintenance Section - Perth Site) Enterprise Bargaining Agreement 2003
5. Vinidex Pty Ltd (Maintenance Section Perth Site Enterprise Bargaining Agreement 2005
6. Vinidex Tubemakers Pty Ltd (Maintenance Section) Enterprise Bargaining Agreement 1994
7. Vinidex Tubemakers Pty Ltd (Maintenance Section) Enterprise Bargaining Agreement 1996
8. Vinidex Tubemakers Pty Ltd (Maintenance Section - Perth Site) Enterprise Bargaining Agreement 1998
9. Viscount Plastics (WA) Pty Limited Enterprise Bargaining Agreement 2001
10. Viscount Plastics (WA) Pty Limited Enterprise Bargaining Agreement 2003
11. Visy Industrial Fremantle Enterprise Agreement 2003
12. Visy Industrial Plastics Welshpool Enterprise Bargaining Agreement 2005
13. Visypak Carton Systems In-Plant Team Bentley - WA Enterprise Agreement 2004
14. Volgren Australia Pty Ltd Enterprise Agreement 2004
15. WA Ceiling Industries Subiaco Grandstand Construction Project Agreement 1994
16. W.A. Rewind Company (Western Australia) Training and Skills Program (TASK) Agreement 1994
17. WA Shell Sands Pty Ltd (Enterprise Bargaining) Agreement, November 2004
18. Walsh's Glass Industrial Agreement
19. Waratah Wire Products - Kwinana Wiremill Performance Improvement Recognition Payment System Agreement No. Ag 46 of 1993
20. Watsons Foods, Metal Trades Enterprise Agreement 1996
21. Webforge (WA) Enterprisse Bargaining Agreement 2003
22. Weir Engineering Pty Ltd Enterprise Bargaining Agreement
23. Wembley Cement Industries (Enterprise Bargaining) Consent Agreement No. AG 56 of 1993
24. Wembley Cement Industries, Gnangara, Agreement 1995 – The
25. Wes Trac (Service Operations) Enterprise Agreement 2005
26. Wescan Enterprise Bargaining Agreement 1997/98
27. Wesco Electrics Pty Ltd Construction Division Enterprise Bargaining Agreement 2004-2005
28. Wesfarmers Kleenheat Gas (Metal Trades) Enterprise Agreement 1995

29. Wesfarmers Transport Limited 1999 Workshop Enterprise Agreement
30. Wesfarmers Wool Store Operation Employees Enterprise Agreement 1994
31. Wesfarmers Wool Store Operation Employees Enterprise Agreement 1996
32. Wesfi Manufacturing Pty Ltd (Cullity Timbers Country Stores) Enterprise Bargaining Agreement 2001 – 2003
33. Wesfi Manufacturing Pty Ltd, Dardanup, (Wesboard Particleboard and LPM Division - Enterprise Bargaining) Agreement 1996
34. Wesfi Manufacturing Pty Ltd Dardanup, (Wesboard) Particleboard and LPM Division) Enterprise Bargaining Agreement 1998 – The
35. Wesfi Manufacturing Pty Ltd Dardanup, (Wesboard Particleboard and LPM Division) Enterprise Bargaining Agreement 2000 – The
36. Wesfi Manufacturing Pty Ltd, MDF Division Enterprise Bargaining Agreement (CEPU version) 1998-2000
37. Wesfi Manufacturing Pty Ltd, MDF Division Enterprise Bargaining Agreement (CEPU version) 2000 – 2002
38. Wesfi Manufacturing Pty Ltd Victoria Park Enterprise Bargaining Agreement 1998
39. Wesfi Manufacturing Pty Ltd, Welshpool (Weswood MDF Division - Enterprise Bargaining) Agreement 1996
40. Wesfi Pty Ltd Particleboard and Low Pressure Melamine Manufacturing Divisions-Dardanup (Enterprise Bargaining) Agreement 1993
41. Wesfi Pty Ltd Particleboard and Low Pressure Melamine Manufacturing Divisions - Dardanup (Enterprise Bargaining) Agreement 1995
42. Wesley College (Enterprise Bargaining) Agreement 2004
43. Wespine Industries Pty Ltd Classification Agreement 1998
44. Wespine Industries Pty Ltd (Dardanup Site) Enterprise Bargaining Agreement 1997
45. Wespine Industries Pty Ltd (Dardanup site) Enterprise Bargaining Agreement 1999
46. Wespine Industries Pty Ltd (Enterprise Bargaining) Agreement 1993
47. Wespine Industries Pty Ltd (Enterprise Bargaining) Agreement 1994
48. West Australian (Christmas Agreement) 2004
49. West Australian Newspaper Clerks (Enterprise Bargaining) Agreement 1994, No. AG 66 of 1994
50. West Australian Newspaper Production Employees (Enterprise Bargaining) Agreement 2000
51. West Australian Newspaper Production Employees (Enterprise Bargaining) Rollover Agreement 2005
52. West Australian Newspapers Christmas Agreement 1993
53. West Australian Newspapers (Christmas Agreement) 1999
54. West Australian Newspapers Clerks (Enterprise Bargaining) Agreement 1998
55. West Australian Newspapers Clerks (Enterprise Bargaining) Agreement 2001
56. West Australian Newspapers Clerks (Enterprise Bargaining) Agreement 2004
57. West Australian Newspapers (Composing Room - Redundancy and Training) Industrial Agreement 1996
58. West Australian Newspapers (Enterprise Bargaining) Agreement 1992
59. West Australian Newspapers (Enterprise Bargaining) Security Officers and Cleaners Agreement 1992
60. West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 1993
61. West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 1995
62. West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 1997
63. West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2003
64. West Australian Newspapers Security Officers (Enterprise Bargaining) (Interim) Agreement 1999
65. West Australian Newspapers Security Officers and Cleaners (Enterprise Bargaining) Agreement 2000
66. West Australian Newspapers Security Officers and Cleaners (Enterprise Bargaining) Agreement 1997
67. West Australian Water Proofing Industrial Agreement
68. West Coast Coreing & Sawing/BLPPU Collective Agreement 1999
69. Westcan (Enterprise Bargaining) Agreement 1993
70. Westcare Disabled Employees Wages Agreement No.2
71. Westerfeld Engineering (Nelson Point Development Project) Enterprise Bargaining Agreement No. AG 35 of 1993
72. Western Australia Armaguard Clerical Enterprise Agreement III. Stuart Street Perth
73. Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 4 of 1994
74. Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 6 of 1996

75. Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 14 of 2000
76. Western Australian Grain Handling Salaried Officers' Enterprise Agreement 1993
77. Western Australian Grain Handling Salaried Officers' (Union of Workers) Enterprise Agreement 1996
78. Western Australian Meat Marketing Co-Operative Limited Katanning Division Maintenance Employees Enterprise Agreement
79. Western Australian Mint Production Agreement 2002
80. Western Australian Mint Security Agreement 1996
81. Western Australian Mint Security Officers' Agreement 2002
82. Western Australian Specialty Alloys Pty Ltd Foundry Enterprise Bargaining Agreement 2004
83. Western Construction (Alcoa Minor Projects) Enterprise Bargaining Agreement No. AG 138 of 1996
84. Western Construction Co CSBP Sodium Cyanide Solids Project Enterprise Bargaining Agreement 2001
85. Western Construction Co Workshop Enterprise Bargaining Agreement 1999
86. Western Construction Co Workshop Enterprise Bargaining Agreement 2002
87. Western Construction Enterprise Bargaining Agreement 1998 No. AG 256 of 1998
88. Western Mechanical & Electrical Pty Ltd Enterprise Bargaining Agreement 2005
89. Western Quarries (Enterprise Bargaining) Consent Agreement 1995
90. Western Quarries Pty Ltd (Enterprise Bargaining) Consent Agreement, 1992
91. Westmix Pty Ltd Enterprise Bargaining Agreement 1994
92. Weston Milling (WA.) Transport Workers Productivity Improvement Agreement 1996
93. WesTrac Equipment (Service Department) Enterprise Bargaining Agreement 1994
94. WesTrac Equipment (Service Operations) Enterprise Agreement 1999
95. WesTrac Equipment (Service Operations) Enterprise Agreement 2001
96. Westrail Freight Terminal Services Agreement 2000
97. Whittakers Timber Products Enterprise Bargaining Agreement
98. Whittakers Timber Products Enterprise Bargaining Agreement 2003
99. Williams Electrical Service Pty Ltd Enterprise Bargaining Agreement 1995
100. Woodroffe Industries Limited (Osborne Park) Enterprise Bargaining Agreement 1996
101. Wooldumpers Australia (Fremantle) Pty Limited Enterprise Agreement 1995
102. Wooldumpers Australia (Fremantle) Pty Ltd Enterprise Agreement 1997
103. Woolworths Distribution Centre Agreement 1993
104. Woolworths (WA) Pty Ltd Clerical Enterprise Agreement 1996
105. Workpower Inc Supported Employees Wages Agreement 2004
106. Workpower Incorporated Salaried Officers' Industrial Agreement 2002
107. Wormald Service Enterprise Agreement, Perth 2003
108. Wormald Systems Contracting Commercial Building Sector Enterprise Agreement 2003
109. Worsley Expansion Project Partnership Agreement No. AG 16 of 1998
110. Worsley Expansion Project Partnership Agreement No. AG 264 of 1998
111. Wreckair Hire (WA) Enterprise Agreement
112. Wreckair Hire (WA) Enterprise Agreement- Branches Employees – The
113. roxton/BLPPU and the CMETU Collective Agreement 1999
114. Wundowie Foundry Pty Ltd Enterprise Agreement 1998
115. Wundowie Foundry Pty Ltd Enterprise Agreement 2001
116. Yiyili Community School (Enterprise Bargaining) Agreement 1997

INDUSTRIAL MAGISTRATE—Claims before—

2018 WAIRC 00700

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2018 WAIRC 00700
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 16 MAY 2018
DELIVERED	**:**	THURSDAY, 23 AUGUST 2018
FILE NO.	**:**	M 71 OF 2017
BETWEEN	**:**	JEREMY STANISLAUS

CLAIMANT

AND

CALIFORNIA PIZZA KITCHEN (PIZZA AUSTRALIA ABN 89 609 127 013)

RESPONDENT

CatchWords	***:***	*INDUSTRIAL LAW – Small Claims Procedure – Interpretation of contract of employment providing for arbitration by the Western Australia Industrial Relations Commission before bringing case in a 'superior court' – Whether the Industrial Magistrates Court is a 'superior court' - Alleged contravention of Fair Work Act 2009 (Cth) provisions concerning: accrued annual leave, safety net contractual entitlements, National Employment Standards (maximum weekly hours) – Contract of employment providing for employer's costs of training employee to be deducted from employee entitlements- Whether deduction 'unreasonable in the circumstances'*
Legislation	***:***	*Fair Work Act 2009 (Cth)* *Industrial Relations Act 1979 (WA)* *Employment Dispute Resolution Act 2008* (WA)
Case(s) referred to in reasons	**:**	***Fitzgerald v Emerald Grain Pty Ltd*** [2017] WASC 206 ***Colin Sharrock v Downer EDI Mining Pty Ltd*** [2018] WAIRC 377 ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27 ***Avenia v Railway & Transport Health Fund Ltd*** [2017] FCA 859 ***Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)*** [2015] FCA 1196 ***AIPA v Jetstar Pty Ltd*** [2014 FCA 14 ***Matus v Australia Wide Computer Resources Pty Ltd & Anor*** *(No.2)* [2015] FCCA 2055 ***Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited*** [2014] FCA 878 ***Jones v Dunkel*** (1959) 101 CLR 298 ***Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*** [2004] HCA 55 ***Masterton Homes Pty Ltd v Palm Assets Pty Ltd*** [2009] NSWCA 234
Result	***:***	*Claim proven in part*
Representation:		
Claimant	**:**	In person
Respondent	**:**	Ms H. Peard (director)

REASONS FOR DECISION

1 In February 2016, Jeremy Stanislaus (the claimant) was employed as a manager by Pizza Australia Pty Ltd (the Company) in connection with a new restaurant business that the Company planned to open later in the year. The Company had issued a letter of appointment to the claimant (the Appointment Letter) on 5 February 2016. On 19 February 2016, a 'manager employment agreement' (the Employment Agreement) and an acknowledgement regarding certain expenses while in the United States of America (the USA Expenses Acknowledgment) were each signed by the claimant and by a director of the Company. The claimant's employment involved an initial period of eight weeks training in the USA. He then returned to Perth and prepared for the opening of the business. 'California Pizza Kitchen' opened on 21 September 2016. On 25 October 2016, the Company wrote to the claimant, advising of a decision to terminate his employment and stating that he would be paid one week's salary in lieu of notice.

2 On 12 December 2016, the claimant sent an email to the Company alleging outstanding entitlements, in total $19,995, remained unpaid:

(1) annual leave that had accrued to the claimant as at the end of his employment (Annual Leave Claim).

(2) overtime of eight days during the period of training in the USA, as (allegedly) approved by a director of the Company, Mr Russell Hextall (USA Overtime Claim);

(3) underpayment of his salary as provided in the Employment Agreement for a 10 week period commencing 9 May 2016 and ending 10 July 2016 (Underpayment Claim);

(4) overtime of 13 days during the period before the restaurant opening as (allegedly) approved by Mr Hextall (Opening Overtime Claim); and

(5) $120 per month telephone allowance for the period from 10 May 2016 as (allegedly) approved by Mr Hextall (Telephone Allowance Claim).

3 The claimant subsequently filed a claim in this court for the amount of $19,995 and repeated the five claims made in his email of 12 December 2016. Those claims will be referred to, collectively, as 'the Five Claims'.

4 The Company's response to the Five Claims, evident from a combination of the response[1] and the case presented at the trial on 16 May 2018, is to:

(1) admit the Annual Leave Claim;

(2) dispute each of the other claims on the basis of an inconsistency between the claims and the contents of one or more of each of the Appointment Letter, the Employment Agreement and the USA Expenses Acknowledgement letter;

(3) allege that the Company is entitled, under cl 15.7 of the Employment Agreement, to set-off against the Annual Leave Claim (and any other successful claims made by the claimant) the sum of $20,000 expenses incurred by the Company in training the claimant in the USA (the Training Expenses Set-Off).

The 'conciliation, mediation and arbitration' clause: must the claim be stayed pending a referral to the Western Australian Industrial Relations Commission?

5 Clause 17 of the Employment Agreement provides for conciliation, mediation and arbitration by the Western Australian Industrial Relations Commission (WAIRC) of any dispute that arises in relation to the Employment Agreement as provided for by the *Employment Dispute Resolution Act 2008* (WA).[2] At the commencement of the trial, the Company stated that it also relied upon cl 17 in answer to the Five Claims.[3] The effect of cl 17 is that the claim in this court must be stayed pending the referral of the dispute at the initiative of the claimant or the Company to the WAIRC, if three criteria are all satisfied.

(1) Firstly, the claim must concern 'a dispute (that) has arisen in relation to' the Employment Agreement. The Five Claims answer this description. Four of the claims arise directly in relation to the Employment Agreement: Annual Leave Claim; Underpayment Claim; Opening Overtime Claim and Telephone Allowance Claim. The USA Overtime Claim arises directly from the USA Expenses Acknowledgment. It was signed by the parties at the same time as the Employment Agreement. The USA Overtime Claim is based on alleged conversations with Mr Hextall after the Employment Agreement was signed. These facts, and the reference to 'education and training expenses' in cl 15.7 of the Employment Agreement creates a nexus between the USA Overtime Claim and the Employment Agreement such that the USA Overtime Claim has also 'arisen in relation to the agreement': ***Fitzgerald v Emerald Grain Pty Ltd*** [2017] WASC 206[49] per Martin CJ.

(2) Secondly, the claimant must have given a written notice to the Company 'specifying the details of the dispute and the requested resolution'. The email by the claimant of 12 December 2016 satisfies this requirement.

(3) Thirdly, the claimant must have infringed the prohibition on 'bringing an unresolved dispute to the superior courts (unless) the WAIRC is incapable of making a remedial order as provided under the *Industrial Relations Act 1979* (WA) Part II Division 2.' If the Industrial Magistrates Court is a 'superior court', then the claimant will have infringed this prohibition and his claim must be stayed. My view is that the reference to a 'superior court' in the Employment Agreement is *not* a reference to a court of the nature of the Industrial Magistrates Court. The claimant is not prohibited from bringing a claim in this court. At law, there is a well known distinction between 'superior courts' and 'inferior courts'.[4] The former are courts of general jurisdiction constituted by a judge (e.g. a Supreme Court, the Federal Court). The latter are courts whose jurisdiction is determined by statute (e.g. a Magistrates Court). The terms 'superior court' and 'inferior court' have, at least to lawyers, an accepted technical meaning. The text of cl 17, with references to 'remedial orders' and statutes favour this technical meaning as having been intended by the parties. In any event, the plain meaning of superior court would *not* be taken to be a reference to a court constituted by a Magistrate. On either view, the Industrial Magistrates Court, having a jurisdiction determined by the *Industrial Relations Act 1979* (WA) and constituted by an Industrial Magistrate is *not* a superior court.

Jurisdiction of the Industrial Magistrates Court

6 The Company and the claimant are, respectively, a national system employer and a national system employee as defined in the *Fair Work Act 2009* (Cth) (FW Act).[5] The 'small claims procedure', set out in s 548 of the FW Act, applies to this claim.[6] The effect of that provision on claims in this court were considered in ***Colin Sharrock v Downer EDI Mining Pty Ltd*** [2018] WAIRC 377 (Magistrate Scaddan). The claim will only succeed in this court to the extent that the claimant proves an entitlement to an amount that the Company was required to pay him:

(1) under the FW Act (a FW Act Entitlement);

(2) under a fair work instrument such as a modern award (e.g. *Restaurant Industry Award 2010* [MA000119]); or

(3) because of a 'safety net contractual entitlement' i.e. an entitlement under a contract of employment that relates to any of the subject matters identified in the FW Act concerning either the National Employment Standards or the terms of a modern award (a Safety Net Contractual Entitlement).[7]

It is convenient to consider the source (if any) of the claimant's entitlement when considering, in turn, each of the Five Claims and, finally, the Training Expenses Set-Off.

7 Section 548(3) of the FW Act provides that in a small claims proceeding, 'the court is not bound by any rules of evidence and procedure and may act in an informal manner'. Further, the court 'may act without regard to legal forms and technicalities'. This provision must be read in light of the obligations upon a court called upon to exercise judicial power. A court can only make a finding on the basis of probative evidence and 'a decision must be supported by a reasoned judgment that addresses the issues in the case.'[8] In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27 [40] - [47], Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings of the State Administrative Tribunal in Western Australia and made the following observations (omitting citations) which I respectfully adopt:

(1) The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them to one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'.

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

(3) The tribunal can obtain information in any way it thinks best, always giving a fair opportunity to any party interested to meet that information; it is not obliged to obtain such independent opinion, for instance, upon oath, and whether the cross-examination shall take place upon that opinion is entirely a question for the discretion of the tribunal; it is not bound by any rules of evidence.

(4) An essential ingredient of procedural fairness is the opportunity of presenting one's case. The right to cross-examination is viewed as an important feature of procedural fairness. Procedural fairness requires fairness in the particular circumstances of the case. While a right to cross-examination is not necessarily to be recognised in every case as an incident of the obligation to accord procedural fairness, the right to challenge by cross-examination a deponent whose evidence is adverse, in important respects, to the case a party wishes to present, is.

Annual Leave Claim

8 At the trial the Company stated (and the claimant agreed) that when his employment ended, the claimant had accrued 86.5380 hours of untaken paid annual leave. Annual leave entitlements of national system employees in the position of the claimant are provided for in s 87 and s 90 of the FW Act. Section 87 provides that four weeks of paid annual leave accrues progressively during each year of service. Section 90(2) states that 'if, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave'. In the claim filed in this court, the claimant made a claim for 'annual leave as stated on my last pay sheet to be 2.8 weeks ($4,145.96)'. My view is that the claimant made an error when filing his claim. The reference to '2.8' in the claimant 's last pay slip is not a reference to the weeks of accrued annual leave to date; it is a reference to the hours of annual leave accrued in the past week. I agree with the calculations of the Company that, at an hourly rate of $39.4872 (based on an annual income of $77,000 and 37.5 ordinary hours per week) and 86.5380 hours of untaken paid annual leave, the accrued annual leave entitlement of the claimant at the end of his employment was $3,417.14.

9 The Annual Leave Claim is a FW Act Entitlement. Subject to what is stated below regarding the Training Expenses Set-Off (see paragraph 35 – 41), there will be an order that the Company pay this amount to the claimant.

The Underpayment Claim

10 The Employment Agreement provides that the Company will pay the claimant a salary of $1,480.77 per week ($77,000 per annum). The claimant was paid this salary from 11 July 2016. The claimant was employed by the Company at premises in Malaga for a nine week period *before* 11 July 2016, from 9 May 2016 to 10 July 2016. His primary duties during this period involved making preparations necessary for the opening of California Pizza Kitchen. This included: converting USA recipes for use in Australia; assisting in kitchen design and decisions concerning the fit-out of California Pizza Kitchen premises; and dealing with potential suppliers. The claimant also performed tasks, when directed by Mr Hextall, that were not related to California Pizza Kitchen. Mr Hextall had an interest in a business known as 'Little Cs'. In connection with Little Cs, the claimant performed the following tasks from time to time: preparing pizza dough, doing deliveries and ingredient shopping at markets. The claimant was paid a salary of $1,000 per week for his work during this nine week period. The claimant argues that he was entitled to be paid $1,480.77 per week salary as provided in the Employment Agreement for his work during this period. The Company disputes that the Employment Agreement applied to the claimant during this period.

11 In ***Avenia v Railway & Transport Health Fund Ltd*** [2017] FCA 859 [115] - [117], Lee J made the following apposite observations on 'ascertaining the rights and liabilities of the parties' to a contract of employment (omitting citations):

[T]he rights and liabilities under a contract are to be determined objectively, by reference to a textual as well as a contextual analysis (that is, by reference to the entire text of the contract as well as any contract or document referred to in the text) and purpose. Ordinarily, this process of construction is possible by reference to the contract alone but sometimes, where there is constructional choice, recourse to events, circumstances and things external to the contract is necessary (including the genesis of the transaction and the commercial background).

...

[T]he court is entitled to approach the task of construction on the basis that the parties intended to produce a contract that makes commercial sense, that is, a contract consistent with the commercial object of the agreement.

[W]here a transaction is implemented by two or more instruments or documents, they may be read together for the purpose of ascertaining their proper construction and legal effect, at least where the contracts or documents are executed contemporaneously or within a short period. ... [T]he rationale for this proposition is that [each document] 'is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole'.

12 The relevant text of the Employment Agreement provides:

This Agreement is made on the 19th day of February 2016.

...

The Company has offered to employ the Manager on the terms contained in this Agreement.

The Manager has accepted the terms offered by the Company.

1. Definitions

In this Agreement, unless the context otherwise requires:

...

(d) ***Base Salary*** *means the annual cash component of the Manager's remuneration as set out in Item 5 of Schedule 1;* (Schedule 1 contains an item: 'annual salary (gross) $77,000').

…

(f) ***Duties*** *means the duties described in Schedule 2;* (Schedule 2 lists 'General Duties' and 'Position Specific Duties').

(q) ***Start Date*** *means the date set out in Item 2 of Schedule 1 unless another date is agreed between the Company and the Manager*. (Item 2 of Schedule 1 states, 'TBC but at least one month prior to Restaurant Opening').

...

3.2 Term

(a) This Agreement commences on the Start Date and continues until it is terminated in accordance with clause 15.

...

4. Manager's Role

(a) The Company employs the Manager in the position specified Item 1 of Schedule 1. (Item 1 of Schedule 1 states, 'General Manager').

(b) The Manager must carry out the Duties as set out in Schedule 2.

(c) The Manager must perform any work that the Company instructs the Manager to perform that is lawful and within the skill and capacity of the Manager to perform. (Schedule 2 lists 'General Duties' and 'Position Specific Duties').

...

7 Place of Work

The Manager's place of work will be at the principle place of business, namely, California Pizza Kitchen, Hillary's Boat Harbour, WA and at such other locations as the performance of the Duties and the business of the Company may reasonably require.

...

10.2 Base Salary

(a) The Company will pay the Base Salary ... according to the pay cycle specified in Item 5 of Schedule 1. (Schedule 1 contains an item: 'electronic funds transfer weekly'.)

13 In my view, the ordinary meaning of the text of the Employment Agreement, when made on 19 February 2016, was reasonably clear. The rights and obligations of the parties to the Employment Agreement, including the obligation of the Company to commence paying the claimant a salary of $77,000 per annum, would commence on a date to be agreed between them but that date would be not later than one month prior to the date of the restaurant opening. This construction is consistent with the fact that, in February 2016, the date for the restaurant opening was unknown. The premises had been secured. However, a period of training in the USA was about to commence and further known and unknown contingencies would impact upon the likely opening date. The precise role of the claimant after the training period and before one month before opening, if any, was uncertain. The parties were free to negotiate on the role of the claimant and his pay during this period. In fact, the transaction unfolded in exactly this manner insofar as paying a salary of $77,000 was concerned. In response to a demand from the claimant, Mr Hextall agreed to commence paying a salary of $77,000 from 11 July 2016, a date earlier than one month prior to the restaurant opening date of 21 September 2016. Before 11 July 2016, the claimant performed tasks requested by the Company and accepted $1,000 per week in salary.

14 The claimant argues that, having assumed at least some of his duties set out in the Employment Agreement from 9 May 2016, the Company was required to pay the 'Base Salary' of $77,000 per annum from that date. I disagree. Assuming that some of the duties of the claimant after 9 May 2016 resembled some of the duties set out in the Employment Agreement, the 'Start Date' of the Employment Agreement was not determined by reference to the duties assumed by the claimant . The 'Start Date' was to be determined by agreement between the parties. Until there was an agreement, there was no obligation under the

Employment Agreement to pay the Base Salary. If the Company did not accede to the demand made by the claimant to commence the Base Salary, he was free to cease working for the Company and not to return until 21 August 2016.

15 Understandably, the claimant feels aggrieved at the Company decision to continue to pay him the same 'training' salary of $1,000 per week from 9 May 2016, notwithstanding the change to the nature of his duties. He was no longer in training. He was making preparations for the opening of California Pizza Kitchen. However, the Employment Agreement had not commenced and the duties performed by the claimant in this period were not covered by any modern award. The only relevant obligation on the Company was to comply with the terms of a national minimum wage order: FW Act, s 293. The salary of $1,000 per week paid by the Company to the claimant was in excess of the 'national minimum wage' of $656.90 a week that applied during this nine week period.

16 For completeness I will note that if the claimant had been successful with his interpretation argument (contrary to my conclusion), an order in his favour would follow because his claim is for a 'Safety Net Contractual Entitlement'. Section 12 of the FW Act contains a definition of 'safety net contractual entitlement' as meaning 'an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in, inter alia, s 139(1) of the FW Act (which deals with modern awards). The claim by the claimant is to an entitlement under a contract of employment, namely the Employment Agreement, and it relates to one of the subject matters described in s 139(1) of the FW Act. Specifically, s 139(1)(a) of the FW Act states that 'a modern award may include terms about minimum wages. It is not necessary to engage the terms of a *particular* modern award to create a safety net contractual obligation'.[9] Where the Employment Agreement provides, in effect, for a minimum wage of the claimant (i.e. $77,000 per annum) and this obligation is not inconsistent with any modern award that covers and applies to the claimant, the obligation becomes a Safety Net Contractual Entitlement.

The USA Overtime Claim

17 It is not in dispute that the USA Expenses Acknowledgement, signed by the claimant on 19 February 2016, accurately reflects an agreement between the claimant and the Company made on that day that the claimant would receive $1,000 per week for eight weeks of training in the USA. It is also not in dispute that the parties, by oral agreement, subsequently agreed that the Company would make a payment of $1,100 per week and that a weekly payment of this amount was made to the claimant over eight weeks, commencing 29 February 2016.

18 The claimant stated that the training occurred at a workplace between Monday and Sunday (seven days) in the first week and between Monday and Saturday (six days) in the following seven weeks. He said that he started at 7.00 am and that he finished between 3.30 pm and 5.00 pm. I note that the 'franchise training schedule overview' admitted into evidence shows a timetable of planned training for the claimant. It refers to: six days of training per week; shifts that were not to 'exceed 10 hours'; 'weekly hours cannot exceed 50 hours' and study time of 'approximately two hours per day'. It is not in dispute that, before travelling to the USA, the claimant understood that his training would be in accordance with this document. Also in attendance at the training were Mr Hextall and Ms Hannah Peard who were directors of the Company and named in the Employment Agreement as 'reporting officers'.

19 The claimant stated that after two weeks of training (i.e. around 12 – 13 March 2016) he had a conversation with Mr Hextall in which it was agreed that the combined hours of training and study were unreasonably long. The claimant stated that Mr Hextall promised that, in the future, the Company would compensate the claimant by way of either 'time in lieu' or a payment, for each 6th day worked. The claimant stated that, upon returning to Australia, he made a demand upon Mr Hextall in April or May of 2016 for the Company to honour this promise and was told that once the funds were available to the Company, the claimant would be paid.[10] The claim by the claimant for $1,600 is based on this promise and is calculated by reference to a daily rate of $200, being the 'ordinary' daily rate for five days at an agreed salary of $1,000, for each of the eight Saturdays that the claimant was required to attend for training.

20 Ms Peard agreed that the training involved attending a workplace for training on six days per week. However, she was not present during the conversation the claimant alleged that he had with Mr Hextall. The Company does not admit that Mr Hextall made the promise of an overtime payment as alleged by the claimant. The Company further asserts that the claimant cannot now be heard to deny either a written contract in the form of the USA Expenses Acknowledgement on the weekly salary or the contents of the franchise training schedule overview on the anticipated working hours.

21 The Company did not call Mr Hextall to give evidence of his version of the critical conversation alleged by the claimant. The omission was not explained by the Company. I am entitled to take that into account in deciding whether to accept the evidence of the claimant.[11] The evidence of the claimant, on the content of his conversation with Mr Hextall, was cogent, plausible and uncontradicted. He readily conceded that, before travelling to the USA, he understood that he would attend to training for six days per week. He was prompted to raise the issue with Mr Hextall on finding that, combined with time spent on private study, he was occupied for 8.5 – 10 hours per day over six days i.e. 50 – 60 hours per week. Any errors in his evidence on other matters did not cause me to doubt the reliability of his evidence on his conversation with Mr Hextall. I am satisfied that the conversation took place in terms as stated by the claimant (and summarised above at paragraph 18).

22 It is true, as the Company asserted, that evidence of a conversation will not usually be admitted to contradict the terms of a written contract.[12] However, there are exceptions to this rule of evidence. Evidence of oral conversations may be admitted on the question of whether a contract is wholly in writing, or partly written and partly oral.[13] The claimant was unhappy about the hours he was required to spend at training and in private study. The demands upon him exceeded the maximum weekly hours provided for in the National Employment Standards (i.e. 38 hours plus reasonable additional hours): FW Act, s 62. The franchise training schedule overview cannot displace the standards contained in the FW Act. The dispute between the claimant and the Company was compromised with the result that the agreement with the Company was partly written and partly oral. It was partly oral insofar as the claimant became entitled, upon demand, to either 'time in lieu' or an additional payment of $200 for each 6th day worked in a week. The entitlement commenced with work done on the next Saturday after the weekend of 12 – 13 March 2016 and finished on Saturday 23 April 2016, i.e. six weeks. The claimant made the demand for payment in late

April or early May of 2016. It was ignored. the claimant has proven a legal obligation upon the Company to make six payments of $200 to him, i.e. a total of $1,200.

23 For the same reasons set out above (at paragraph 16) and subject to what is stated below regarding the Training Expenses Set-Off there will be an order that the Company this amount to the claimant. The $1,200 is Safety Net Contractual Entitlement. Pursuant to s 12 of the FW Act, it is an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in, inter alia, s 139(1) of the FW Act (which deals with modern awards). The contract of employment is the partly written and partly oral contract described above. The contract relates to two the subject matters described in s 139(1) of the FW Act. Specifically, s 139(1) of the FW Act states that 'a modern award may include terms about minimum wages and overtime rates. It is not necessary to engage the terms of a *particular* modern award to create a safety net contractual obligation.[14] Where the contract provides, in effect, for overtime of $200 per day and this obligation is not inconsistent with any modern award that covers and applies to the claimant, the obligation becomes a Safety Net Contractual Entitlement.

The Opening Overtime Claim

24 The claimant alleges that he worked every day (seven days per week) for a two and half month period before the opening of California Pizza Kitchen on 21 September 2016 and that Mr Hextall and Ms Peard, 'both agreed that I would be paid out or [given] time off once things settled down'.[15] When giving evidence on this issue, the claimant stated that Mr Hextall instructed him to record the weekend time being worked during this period on a second timesheet that was to be submitted to Mr Hextall for him to 'sign and put in the file to reimburse' the claimant.[16] The claim by the claimant is based on this promise. It is for $3,849.75 and is based upon a daily rate of $296.15 for 13 days overtime worked in this period. The daily rate is calculated by reference to the Base Salary provided for in the Employment Agreement.

25 Ms Peard stated that she was unaware of the arrangement claimed by the claimant.[17] She did not recall the claimant working long hours and she noted timesheets of the Company referred to the claimant showing 'rostered day off' for a number of days during the relevant period. The Company does not admit that Mr Hextall made the promise of extra payment as alleged by the claimant. The Company further asserts that the Employment Agreement itself provides a mechanism for resolving overtime claims. Clause 8 of the Employment Agreement concerns 'hours of work'. It provides that the Company may require the claimant to work 'an average of up to 38 hours per week exclusive of an unpaid meal break' and reasonable additional hours as may from time to time be reasonably required' (cl 8(a)). It also provides that where the manager is required to perform 'unreasonable additional hours of work, the manager will be permitted to take time off in lieu' (cl 8(b)).

26 I am satisfied that the claimant worked every day for a period before the opening of the restaurant. He was able to give cogent, plausible and detailed evidence of his activities in the period immediately before the restaurant opening. His explanation for why the Company timesheets record a 'rostered day off' is also plausible; Mr Hextall asked him to record and supply a 'second' timesheet. No witness was called by the Company to rebut, by direct evidence, that the claimant was not working on a given day.

27 I am not satisfied that Mr Hextall made a promise to the claimant that went further than restating the effect of cl 8(b) of the Employment Agreement. The evidence of the claimant is consistent with Mr Hextall promising that, in due course, the claimant would be permitted to take time off in lieu of unreasonable additional hours worked. I am not satisfied that Mr Hextall made a promise to the claimant to make a payment as compensation for unreasonable additional hours worked. The evidence of the claimant on the language used by Mr Hextall was equivocal (e.g. a promise to 'reimburse'). In any event, such a promise would vary cl 8(b) and (c) and cl 20.2 of the Employment Agreement provides that any variation of the Employment Agreement is not effective unless in writing and signed by both parties. Clause 20.2 should be heeded in the absence of evidence of either a collateral contract an intention by the parties create a new agreement.

28 It may be accepted that, pursuant to cl 8(b) of the Employment Agreement, the claimant was entitled to take time off in lieu of the unreasonable additional hours worked by him in the period before the restaurant opening. The claimant did not have an opportunity to take any time off in lieu before his employment ended on 25 October 2016. It may be noted that the claimant was on leave for a period commencing 8 October 2018. The Employment Agreement does *not* expressly provide for any accrued right of the claimant to 'time in lieu' to be converted to overtime and paid upon termination of employment. I am not satisfied as to the criteria for implication of such a term. Such a term is not necessary to ensure the effectiveness of the Employment Agreement. In light of the contents of Clauses 8(b) and (c), I am not satisfied that such a term is 'so obvious' as to go 'without saying'. The Company does not have an obligation under the Employment Agreement to convert any accrued 'time in lieu' to a payment to the claimant.

29 It should be noted that cl 8 of the Employment Agreement is inconsistent with National Employment Standards concerning maximum weekly hours insofar as the clause:

(1) contrary to s 64(1) of the FW Act, would permit the '38 hour per week average' to be calculated over a period that exceeds 26 weeks;

(2) contrary to s 62(2) of the FW Act, would require the claimant to work additional hours in excess of 38 hours per week that are unreasonable.

30 Notwithstanding the inconsistency noted in the previous paragraph, this court cannot re-write the Employment Agreement to provide for an entitlement to paid overtime. However, the Company was required to observe the National Employment Standards concerning maximum weekly hours and comply with the terms of a national minimum wage order: FW Act, s 293 – 294. The result is that for each additional hour worked by the claimant in excess of hours that are reasonable, the claimant was entitled to be paid the minimum wage of $17.70 per hour. This equates to $134.52 per day. Having regard to the factors set out in s 62(3) of the FW Act, I am satisfied that it was unreasonable for the claimant to be required to work on each Sunday. The claimant gave evidence of working for seven days per week for two and half months. I infer that he worked on 10 Sundays with a resulting entitlement under the FW Act provisions concerning the national minimum wage order to $1,345.20. Subject

to what is stated below regarding the Training Expenses Set-Off there will be an order that the Company this amount to the claimant.

The Telephone Allowance Claim

31 The claimant gave evidence of an oral agreement with Mr Hextall to the effect that, commencing 10 May 2016, the Company would pay the claimant's mobile phone account in the amount of $120 per month.[18] The claimant said that Mr Hextall accepted that the only practicable method of communicating with numerous suppliers to the Company was via the claimant's personal mobile phone. The claim by the claimant is based on this promise.

32 Ms Peard stated that she was unaware of the promise by Mr Hextall as alleged by the claimant.[19] She disputed the need for the claimant to use his mobile phone when he had access to either a landline at Malaga, phones at the restaurant or a free 'app' on his phone.

33 I repeat observations I made concerning the USA Overtime Claim: the Company did not call Mr Hextall to give evidence of his version of the critical conversation alleged by the claimant; the omission was not explained; I am entitled to infer that the evidence of Mr Hextall would not have helped the case of the Company;[20] The evidence of the claimant was cogent and plausible. The claimant made arithmetic errors in the claim that he filed. He quickly resiled from his original claim for $2,880 and ultimately gave evidence suggesting a maximum entitlement of $120 per month from May 2016 - 26 October 2016, i.e. $660. The discrepancy between $2,880 and $660 is not insubstantial. Nevertheless, I am satisfied Mr Hextall made the promise to pay $120 per month as alleged by the claimant, at least a promise that continued from May 2016 until the restaurant opening on 21 September 2016. The claimant was resilient in cross-examination on the conditions in Malaga that prompted the conversation between him and Mr Hextall. The oral promise, made before the Employment Agreement commenced on 10 July 2016 (see paragraph 30 above), is not inconsistent with cl 10.3 of the same agreement which states that the Company will reimburse the claimant for sundry expenses incurred in the performance of his duties subject to expenditure in excess of $100 having prior approval of Mr Hextall *or* Ms Peard. The claim will succeed to the extent of four months, i.e. $480.

34 Subject to what is stated below regarding the Training Expenses Set-Off there will be an order that the Company this amount ($480) to the claimant. The $480 is a 'Safety Net Contractual Entitlement'. Pursuant to s 12 of the FW Act, it is an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in, inter alia, s 139(1) of the FW Act (which deals with modern awards). The relevant term of the contract of employment is wholly oral. The term relates to the subject matter described in s 139(1) of the FW Act. Specifically, s 139(1) of the FW Act states that 'a modern award may include terms about 'expenses incurred in the course of employment'.[21]

The Training Expenses Set-Off

35 I have concluded above that, subject to accepting the submissions of the Company on the Training Expenses Set-Off, the Company has an obligation to pay to the claimant (and the Court has the power to order payment of) the amount of $6,442.34, comprised of the following amounts:

- Annual Leave Claim: $3,417.14 as a FW Act Entitlement for accrued annual leave;
- USA Overtime Claim: $1,200 as a Safety Net Contractual Entitlement following a contractual promise regarding overtime;
- Opening Overtime Claim: $1,345.20 as a FW Act Entitlement for work on 10 Sundays;
- Telephone Allowance Claim: $480 as a Safety Net Contractual Entitlement following a contractual promise regarding mobile phone reimbursement.

36 The Company argues that if it has any liability to the claimant, it is entitled to rely upon cl 15.7 of the Employment Agreement to extinguish that liability. The clause states:

> ***15.7 Reimbursement of Company Expenses***
>
> *(a) The Company will incur expenses, (Company travel, education and training expenses) on the engagement of the Manager.*
>
> …
>
> *(d) If the Manager's employment is terminated by the Company for any reason within 12 months of the Company incurring such expense, the Manager will reimburse the Company 50% of those expenses.*
>
> *(e) The Manager authorizes the Company to deduct the amount of reimbursable expenses from any amount that would otherwise be payable to the Manager on termination of the Manager's employment. Where the Manager and the Company enter into a separate written agreement in relation to reimbursable expenses, then, to the extent of any inconsistency, that agreement takes priority over the provisions of this clause.*

37 Ms Peard stated, in effect, that the Company incurred expenses of $40,000 in training the claimant in the USA over an eight week period commencing on 29 February 2016. The Company relies upon cl 15.7(d) and (e) as authority to deduct up to 50% of that amount ($20,000) 'from any amount that would otherwise be payable to the claimant on termination of his employment'. The Company did not adduce any written evidence of having incurred any expense. It relied upon the oral evidence of Ms Peard as proof of that expenditure. Ms Peard did not detail the components of total amount of $20,000. It may be noted that the Appointment Letter makes reference to training and states that, 'while training the Company will provide flights, transport, accommodation and travel insurance'. Ms Peard did not give a breakdown of the expenses for each of those items.

38 In the course of the hearing I raised with representatives of the Company whether cl 15.7 permitted the recovery of training costs incurred *before* the 'Start Date' in the Employment Agreement. On reflection, I accept the submission of the Company

that the Employment Agreement contemplates such an outcome. Clause 15.7 contemplates the recovery of expenses incurred 'on the engagement' of the Manager. This occurred in February 2016 and may be distinguished from the 'Start Date' of 11 July 2016 (explained above).

39 The effect of s 326(1) of the FW Act is that cl 15.7 of the Employment Agreement has no effect to the extent that it permits the Company to make a deduction that is for the benefit of the Company and is unreasonable in the circumstances. Clause 15.7 is for the benefit of the Company. The issue is whether the clause is 'unreasonable in the circumstances'. The phrase was considered in ***Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)*** [2015] FCA 1196 [176]ff and it is convenient to assess the evidence in this case by reference to the relevant factors identified in that case:

- 'The ultimate purpose of the [provision] is to protect employees from practices that have the effect of denying them the benefit of the remuneration they have earned and are thus entitled to fully enjoy. A central consideration in assessing whether a deduction is unreasonable in the circumstances will be the extent to which the employee has gained the benefit of the deduction made from, or out of, his or her remuneration.' The claimant, an experienced manager in the hospitality industry, received training in a *particular* system used in the business of the Company. The benefit of the training to him was negligible insofar as he was not likely to use the knowledge and skills acquired other than while working for the Company. Indeed, the Employment Agreement contains confidentiality and restraint of trade clauses.
- 'The extent to which the employer has benefited will likely be relevant. It will be relevant to assess whether the employee has been taken advantage of in some way, with the result that part of the benefit of his or her remuneration has been lost to the employer.' There is no suggestion that any director or employee of the Company 'took advantage' of the claimant in supplying training to him. However, I accept the observation of the claimant that the benefit to him of the training was limited compared to the cost of delivery in the USA. The claimant noted that the same training could have been delivered in Australia to him at significantly less cost.
- 'The quality of the assent given by the employee will need to be considered.' The claimant signed the Employment Agreement. He is taken to be aware of the contents. It is not clear whether he read cl 15.7. He was not cross-examined on the issue. The Appointment Letter refers to the Company meeting the costs of flights, transport, accommodation and travel insurance. It says nothing about any obligation to repay those costs.
- 'Other circumstances which relate to the reasonableness of the transaction that authorised the deduction may also need to be examined. In that respect, the assessment will be forward looking. But, it should also examine the reasonableness of the deductions once made and, in that respect, the assessment can take the benefit of hindsight. The obligation to reimburse the Company arises under cl 15.7 if the Manager's employment is terminated within 12 months of the Company incurring the expense. Training in the USA for a period of eight weeks would inevitably involve substantial expense when compared to the usual accrued entitlements of an employee who ceased work within that 12 month period. Indeed, as was the case of the claimant, the period between the 'Start Date', from which the Manager was paid the Base Salary and commenced to accrue entitlements, and a termination date was subject to the provisions of the Employment Agreement on the probationary period. In short, cl 15.7 admits of the possibility of a deduction for training expenses well in excess of accrued entitlements.

40 I have reached the conclusion, having regard to the factors set out in the previous paragraph, that cl 15.7 is 'unreasonable in the circumstances'. This case may be distinguished from cases where employers have recovered the training costs associated with a portable qualification such as pilot training: ***AIPA v Jetstar Pty Ltd*** [2014 FCA 14. Any benefit that the claimant received from training was wholly disproportionate to the cost incurred by the Company.

41 For completeness, I note that the evidence adduced by the Company has failed to satisfy me as to the incurring of *any* expenses associated with training. No invoice or receipt was adduced in evidence. The contractual relationship, if any, between the Company and the training provider was not explained. It may be inferred that there were costs associated with the delivery of the training to the claimant. However, there is an evidential onus on the Company to explain the fact that it was *the Company* that incurred the expense in connection with a *particular employee*, namely, the claimant. The onus was not discharged.

42 In the result, there will be an order that Company pay to the claimant the amount of $6,442.34. I will hear from the parties on the issue of pre-judgement interest.

M FLYNN

INDUSTRIAL MAGISTRATE

[1.] Filed on 26 May 2017.

[2.] The *Employment Dispute Resolution Act 2008* (WA) provides:

> ***12. Referral agreements***
>
> *(1) Two or more parties may enter into an agreement in writing (a **referral agreement**) that a particular employment dispute, or employment disputes of a particular class, between the parties may be resolved by the IR Commission.*
>
> *(2) The parties to a referral agreement may be —*
>
> *(a) an employer or group of employers; or*
>
> *(b) an employee or group of employees; or*
>
> *(c) an organisation of employees; or*

(d) an organisation of employers.

(3) The referral agreement may specify circumstances in which an individual is entitled to act on behalf of a group of employees or group of employers.

(4) The referral agreement may specify the functions that may be performed by the IR Commission in relation to any employment dispute or class of employment dispute to which the referral agreement relates.

(5) Without limiting subsection (4), the functions of the IR Commission may include any of the following —

(a) mediating or conciliating the employment dispute;

(b) arbitrating the employment dispute;

(c) providing a remedy or other relief of the kind that may be provided under the IR Act Part II Division 2;

(d) deciding any other issue or question arising in the employment dispute.

(6) A referral agreement —

(a) comes into force —

(i) if a commencement date is specified in the agreement — on that date; or

(ii) otherwise — on the date on which it is made;

and

(b) remains in force until —

(i) if an expiry date is specified in the agreement but all the parties agree to withdraw from the agreement prior to that date — the date on which the parties agree to withdraw; or

(ii) if an expiry date is specified in the agreement and subparagraph (i) does not apply — that expiry date; or

(iii) otherwise — the third anniversary of the date on which the agreement came into force.

(7) The expiry of a referral agreement does not affect a referral proceeding commenced under that agreement before the expiry.

(8) A party cannot withdraw from a referral agreement without the agreement in writing of the other party or parties to the agreement.

13. Referral to IR Commission to perform certain functions in referral agreement

(1) A party to a referral agreement, or a member of a group of employers or employees that is a party to a referral agreement, may refer an employment dispute to the IR Commission for the performance by the IR Commission of such functions as are specified in the referral agreement.

(2) The referral must be in a form approved in writing by the Chief Commissioner.

(3) A party who makes a referral can withdraw the referral at any time.

3. **17 DISPUTE RESOLUTION**

17.1 Definitions

In this clause:

(a) Notice means written notice given by the aggrieved Party specifying the details of the dispute and the requested resolution.

17.2 Process

(a) If a dispute arises in relation to this Agreement, the aggrieved Party must provide written a Notice to the other Party.

(b) If the dispute is not resolved by the Parties within 14 days after the Notice is given, the dispute is to be referred to the Western Australian Industrial Relations Commission (Commission) for conciliation, mediation and or arbitration in accordance with the Employment Dispute Resolution Act 2008 (WA).

(c) The Parties consent to the dispute being dealt with in the manner referred to in this clause 17.

(d) The Parties may only bring an unresolved dispute to the superior courts if the Commission is incapable of making a remedial order as provided under the Industrial Relations Act 1979 (WA) Part II Division 2. In such circumstances only, a Party may commence proceedings in a superior court, but only to obtain a remedial order that is unavailable to the Commission.

(e) The Parties must each bear their own costs in any and all of the dispute resolution steps set out in this clause 17.

(f) This clause 17 does not prevent any Party from obtaining any injunctive, declaratory or other interlocutory relief from a superior court which may be urgently required.

(g) Despite any existence of a dispute, each Party must continue to perform their respective obligations under this Agreement.

4. See *Halsbury's Laws of Australia* accessed online at 10 July 2017:[125-35] Superior and inferior courts The paragraph below is current to 17 February 2017

> *Courts may be classified as either superior courts or inferior courts. Superior courts in Australia include the High Court, Federal Court and Family Court and the Supreme Court of every State and Territory.*
>
> *All courts which are not superior courts are inferior courts. An inferior court may be made a superior court for the purpose of exercising prescribed jurisdiction.*
>
> *Traditionally, superior courts are courts of unlimited jurisdiction. Under the federal judicial system in Australia, no court is strictly a court of general jurisdiction, which places some restriction upon superior courts in Australia.*

5. FW Act, section 14

6. The claimant indicated in the claim itself that he wanted the procedure to apply. Section 548 of the FW Act provides:

> ***548 Plaintiffs may choose small claims procedure***
>
> *(1) Proceedings are to be dealt with as small claims proceedings under this section if:*
>
> *(a) a person applies for an order (other than a pecuniary penalty order) under Division 2 from a magistrates court or the Federal Circuit Court; and*
>
> *(b) the order relates to an amount referred to in subsection (1A); and*
>
> *(c) the person indicates, in a manner prescribed by the regulations or by the rules of the court, that he or she wants the small claims procedure to apply to the proceedings.*
>
> *(1A) The amounts are as follows:*
>
> *(a) an amount that an employer was required to pay to, or on behalf of, an employee:*
>
> *(i) under this Act or a fair work instrument; or*
>
> *(ii) because of a safety net contractual entitlement; or*
>
> *(iii) because of an entitlement of the employee arising under subsection 542(1);*
>
> *(b) an amount that an outworker entity was required to pay to, or on behalf of, an outworker under a modern award.*
>
> *Limits on award*
>
> *(2) In small claims proceedings, the court may not award more than:*
>
> *(a) $20,000; or*
>
> *(b) if a higher amount is prescribed by the regulations—that higher amount.*
>
> *Procedure*
>
> *(3) In small claims proceedings, the court is not bound by any rules of evidence and procedure and may act:*
>
> *(a) in an informal manner; and*
>
> *(b) without regard to legal forms and technicalities.*
>
> *(4) At any stage of the small claims proceedings, the court may amend the papers commencing the proceedings if sufficient notice is given to any party adversely affected by the amendment.*
>
> *Legal representation*
>
> *(5) A party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court.*
>
> *(6) If the court grants leave for a party to the proceedings to be represented by a lawyer, the court may, if it considers appropriate, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.*
>
> *(7) For the purposes of this section, a person is taken not to be represented by a lawyer if the lawyer is an employee or officer of the person.*
>
> *Representation by an industrial association*
>
> *(8) The regulations may provide for a party to small claims proceedings to be represented in the proceedings, in specified circumstances, by an official of an industrial association.*
>
> *(9) However, if small claims proceedings are heard in a court of a State, the regulations may so provide only if the law of the State allows a party to be represented in that court in those circumstances by officials of bodies representing interests related to the matters in dispute.*
>
> *(a) in an informal manner; and*
>
> *(b) without regard to legal forms and technicalities.*

> *(4) At any stage of the small claims proceedings, the court may amend the papers commencing the proceedings if sufficient notice is given to any party adversely affected by the amendment.*
>
> *Legal representation*
>
> *(5) A party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court.*
>
> *(6) If the court grants leave for a party to the proceedings to be represented by a lawyer, the court may, if it considers appropriate, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.*
>
> *(7) For the purposes of this section, a person is taken not to be represented by a lawyer if the lawyer is an employee or officer of the person.*
>
> *Representation by an industrial association*
>
> *(8) The regulations may provide for a party to small claims proceedings to be represented in the proceedings, in specified circumstances, by an official of an industrial association.*
>
> *(9) However, if small claims proceedings are heard in a court of a State, the regulations may so provide only if the law of the State allows a party to be represented in that court in those circumstances by officials of bodies representing interests related to the matters in dispute.*

[7.] Section 548(1A) makes reference to an application for an amount that an employer was required to pay to an employee 'because of a safety net contractual entitlement' and 'because of an entitlement under subsection 542(1)'. Section 542(1) concerns 'entitlements under contracts' and provides that:

> *For the purposes of this Part, a safety net contractual entitlement of a national system employer or a national system employee, as in force from time to time, also has effect as an entitlement of the employer or employee under this Act.*

Section 12 of the FW Act contains a definition of 'safety net contractual entitlement' as meaning:

> ***safety net contractual entitlement*** *means an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in:*
>
> *(a) subsection 61(2) (which deals with the National Employment Standards); or*
>
> *(b) subsection 139(1) (which deals with modern awards).*

Section 61(2) of the FW Act identifies minimum standards relating to the following matters: (a) maximum weekly hours (Division 3); (b) requests for flexible working arrangements (Division 4); (c) parental leave and related entitlements (Division 5); (d) annual leave (Division 6); (e) personal/carer's leave and compassionate leave (Division 7); (f) community service leave (Division 8); (g) long service leave (Division 9); (h) public holidays (Division 10); (i) notice of termination and redundancy pay (Division 11); (j) Fair Work Information Statement (Division 12). Section 139(1) of the FW Act states that 'a modern award may include terms about any of the following matters': (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and: (i) skill-based classifications and career structures; and (ii) incentive-based payments, piece rates and bonuses; (b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities; (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours; (d) overtime rates; (e) penalty rates, including for any of the following: (i) employees working unsocial, irregular or unpredictable hours; (ii) employees working on weekends or public holidays; (iii) shift workers; (f) annualised wage arrangements that: (i) have regard to the patterns of work in an occupation, industry or enterprise; and (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged; (g) allowances, including for any of the following: (i) expenses incurred in the course of employment; (ii) responsibilities or skills that are not taken into account in rates of pay; (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations; (h) leave, leave loadings and arrangements for taking leave; (i) superannuation; (j) procedures for consultation, representation and dispute settlement.

[8.] ***Matus v Australia Wide Computer Resources Pty Ltd & Anor*** *(No.2)* [2015] FCCA 2055 [18] per Nicholls J.

[9.] ***Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited*** [2014] FCA 878 [16]ff per Buchanan J:

> *Safety net contractual entitlements' …[I]t is instructive to identify some respects in which federal industrial legislation (e.g. the FW Act) has moved into the area of contractual entitlements in a way unprecedented before the establishment of that legislation upon constitutional powers other than s 51(xxxv) (the conciliation and arbitration power) of the Constitution. The entitlements claimed in the present case are for incentive-based payments and bonuses. I use those particular terms for reasons which will appear shortly. Entitlements of that kind seem to be a 'safety net contractual entitlement' as defined by s 12 of the FW Act [safety net contractual entitlement means an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in: (a) subsection 61(2) (which deals with the National Employment Standards); or (b) subsection 139(1) (which deals with modern awards)].. … It is clear that the FW Act contemplates that there may be contractual entitlements not inconsistent with, but in addition to, the [s 61(2) NES] minimum standards about those matters. … Again, it is clear that the FW Act contemplates*

that there may be contractual entitlements not inconsistent with, but in addition to, the terms of any modern award about those [s 139(1) modern award] subject matters.

However, neither the particular terms of a minimum standard, nor the necessity to engage the terms of a particular modern award , are necessary to the existence of the statutory obligation which now exists to observe the terms of a safety net contractual obligation.

[10.] See the Transcript of the evidence of the claimant at page 26:

So when I asked Russell for payment for the extra work in the US, the sixth day - work and also some sort of back pay - - -

Yes?--- - - - ah, he said that, ah, he was in the process of getting, ah, extra - extra - extra finances, extra loans as such.

Yes?---And this - and he kept on delaying any sort of payment. And then he said that he was working on some fairly big loan that would help, ah, pay all of his bills.

[11.] In ***Jones v Dunkel*** (1959) 101 CLR 298 [321] – [322], Windeyer J observed that the failure of a party to call a relevant witness, if unexplained, may lead to an inference that evidence of the missing witness would not help the party's case. The dual effect of the principle stated in ***Jones v Dunkel*** is summarised in *Cross on Evidence* as follows: First, unexplained failure by a party to give evidence, to call witnesses, to tender documents or other evidence or to produce particular material to an expert witness may (not must) in appropriate circumstances lead to an inference that the uncalled evidence or missing material would not have assisted that party's case. The rule can operate against parties not bearing the burden of proof and parties which do bear it as well. The appropriate circumstances exist where it was within the power of the party to tender the evidence which was not tendered: the details of this condition, so far as elucidated by the cases, are considered below.…The significance to be attributed to the fact that a witness did not give evidence will in the end depend upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. … Secondly, the rule in Jones v Dunkel permits an inference that the untendered evidence would not have helped the party who failed to tender it. It entitles the trier of fact to take that into account in deciding whether to accept any particular evidence which relates to a matter on which the absent witness could have spoken... But the rule does not permit an inference that the untendered evidence would in fact have been damaging to the party not tendering it. The rule does not create any admission..

...And if the case of a party who fails to call a witness is otherwise proved, the inference that the absent witness would not assist the party's case does not detract from the proof.

[12.] ***Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*** [2004] HCA 55; (2004) 218 CLR 471 [36].

[13.] Campbell JA (with whom Allsop P and Basten JA relevantly agreed) in ***Masterton Homes Pty Ltd v Palm Assets Pty Ltd*** [2009] NSWCA 234; (2009) 261 ALR 382 at [90] (citations omitted):

The principles that are applicable in deciding whether an agreement that parties have entered is one that is wholly in writing, or partly written and partly oral, include the following: (1) When there is a document that on its face appears to be a complete contract, that provides an evidentiary basis for inferring that the document contains the whole of the express contractual terms that bind the parties... (2) It is open to a party to prove that, even though there is a document that on its face appears to be a complete contract, the parties have agreed orally on terms additional to those contained in the writing... Conversely, it is open to a party to prove that the parties have orally agreed that a document should contain the whole of the terms agreed between them.... (3) The parol evidence rule applies only to contracts that are wholly in writing, and thus has no scope to operate until it has first been ascertained that the contract is wholly in writing... (4) Where a contract is partly written and partly oral, the terms of the contract are to be ascertained from the whole of the circumstances as a matter of fact... (5) In determining what are the terms of a contract that is partly written and partly oral, surrounding circumstances may be used as an aid to finding what the terms of the contract are.

[14.] ***Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited*** [2014] FCA 878 [16] ff per Buchanan J.

[15.] Quote is from the claim form filed 28 March 2017.

[16.] See the Transcript at pages 31-32:

All right. So this - what you've just said might relate to - if you look at your claim, you've claimed for $3,849.75. You've said that you were working for seven days a week for a period two to two and a half months before the opening on 21 September. And you said that it was agreed that you would be paid out or you would be given time off in lieu?---Yeah, so we - we were so much in - basically catch up or to do - to hit the deadline - - -

Yes?--- - - - so, ah, I know the chef also worked extra hours.

Yes?---I was - I wasn't sure what his arrangement was with Russell. So with me he asked me to do a - a - a timesheet as per my roster.

Yes?---And also another sheet I did with the extra work I did, which he signed off on.

Okay. So there were two timesheets?---Yes.

Why was that?---One was for the rostered hours, ah, I was supposed to do and one was for any extra, which he signed off and he kept in a file and then that was - I was to be reimbursed for that.

Okay. Did you keep a copy of any of those documents?---Ah, no I wasn't given any.

So how do you - how - you say that you worked the equivalent of $3,849 during this period. How do you calculate that?---Ah, the two extra days per week for the last, ah, two and half months.

Do you have any evidence that you worked on those days? The - each Saturday and Sunday? Is there anything that you have that tends to - - -?---The only people that, ah, can back me up is some of the other workers that, um, on Sunday mornings they would come in to, ah - to do half-day shift. So they - they would see me there. Obviously Sundays they wouldn't but sometimes Russell would drop in on Sundays to - to do some office work. I lived, ah, very close. I was about 3 minutes' drive away from this place.

Okay. And how - what were your hours then on those week - on the Saturdays and the Sundays? What hours did you work?---I could come in almost anytime I wanted. I could come in early morning if I wanted to. But roughly it would be - or - or days' work as in, you know, seven, eight hours a day.

All right. Okay?---I mean don't get me wrong, Russell and the Directors looked after us when we were in the US and dinners and they took us out everywhere. And obviously when someone like Russell, we've gotten so close to him, you know, we were very close. And, ah, I believe him to be a man of his word.

All right?---Also, your Honour, the - the phone usage as well.

We'll come to that shortly?---Okay.

I'm just coming back to the - you - effectively you said that there were two timesheets?---Yeah, so I was asked to do one - - -

Okay?--- - - - as per my roster said. So the roster said come in on Monday - - -

Yes?--- - - - ah, start at seven, finish at four or five - - -

Yes?--- - - - right? One to - based on that and one was any extra work I did. With - which mainly - - -

Well, what - yes - - -?--- - - - went to the two extra days I was doing - weekend work.

Why did you agree to do that? Why did you agree to do two timesheets?---Cos one would go to, ah, the pay - the payroll officer - - -

Yes?--- - - - that he would process to, and the other one he would sign and put in the file to - for - to reimburse me.

See also the Transcript at pages 53-54:

Yes?---But my argument was I was doing a lot more - - -

Yes?--- - - - others. So when I brought it up with Russell - - -

Yes?--- - - - he said do one to reflect what the roster says - - -

Yes?--- - - - was given to me.

Yes?---And if I worked on the weekend or on my days off, or - - -

Yes?--- - - - extra hours to put it on another - on a sheet - - -

Okay?--- - - - where he would sign off on it.

Okay?---This is only for the last probably two and a half months did I do, ah, basically work almost every day.

[17.] See the Transcript at page 66:

Um, again it's the first I've heard of it and I don't believe that to be accurate.

When Mr Stanislaus filed his claim he made a claim on the basis of working seven days a week for the period from July to September '16. Did you - this is a matter for you to tell me what you did when you received that claim, but really for you to comment upon, is did - was that discussed with the Directors, whether or not that was authorised, that work?---The seven days a week?

Yes?---Um, there - I don't believe there was substantial seven days a week. As we can see from the timesheets there was often two rostered days off. Um, when the hours required did step up as the restaurant was opening - and that's when his pay was increased.

[18.] See the Transcript at page 43:

What did he agree to? Ah, the - the amount that I'm claiming, the 120 per month.

[19.] Transcript at page 66:

So, um, there was no agreement to pay for phone usage with any of the Directors. Um, the reason for this was that Jeremy was instructed to use the, um - the business - the landline phone at all times. Um, also as we've discussed there's a discrepancy between the amount calculated, um, where it should be $720, not 2,880, and Jeremy was also advised that when the restaurant phones were operational, um, he would be able to use those phones and the business phone app on his mobile, where all calls could be made.

Mr Stanislaus said he reached an agreement with Mr Hextall in relation to the phone?---Mm hmm.

What did you want to say about that?---Um, I - I'm not aware of that discussion. Um, ah, that's the first time hearing of it, to be honest.

[20.] In ***Jones v Dunkel*** (1959) 101 CLR 298 [321] – [322].

[21.] It is not necessary to engage the terms of a *particular* modern award to create a safety net contractual obligation*:* ***Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited*** [2014] FCA 878 [16]ff per Buchanan J.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00723

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL JURKUCH DENG AKUOCH
	APPLICANT
	-v-
	MENEGHELLO GALVANIZERS
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 29 AUGUST 2018
FILE NO/S	U 87 OF 2018
CITATION NO.	2018 WAIRC 00723

Result Application dismissed

Order

1. This matter is a claim of unfair dismissal referred to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* on 24 July 2018.
2. The Commission convened a scheduling conference on 14 August 2018. Following the conference, the applicant was to advise the Commission of his intentions in respect of this application by 29 August 2018.
3. On 27 August 2018, 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.

2018 WAIRC 00402

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GAIL BURGESS
	APPLICANT
	-v-
	VIRGILIO & DIANNE TRIMBOLI
	OCONNOR LUNCH BOX
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 9 JULY 2018
FILE NO/S	B 69 OF 2018
CITATION NO.	2018 WAIRC 00402

Result Order issued

Representation

Applicant No appearance required

Respondent Ms B Stanway as agent

Order

WHEREAS on 8 June 2018 the Commission received a notice of claim of entitlement to a benefit under a contract of employment;

AND WHEREAS on 14 June 2018 the Commission filed the notice of claim of entitlement to a benefit under a contract of employment;

AND WHEREAS on 5 July 2018 the respondent applied to the Commission for an order extending the time for the filing of a notice of answer in respect of the herein application pursuant to Regulation 36(1) of the Industrial Relations Commission Regulations, 2005;

AND WHEREAS the Commission has considered the application for an extension of time for filing a notice of answer in Chambers;

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

THAT the time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 16 July 2018.

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

2018 WAIRC 00714

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GAIL BURGESS
	APPLICANT
	-v-
	VIRGILIO & DIANNE TRIMBOLI
	OCONNOR LUNCH BOX
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 28 AUGUST 2018
FILE NO/S	B 69 OF 2018
CITATION NO.	2018 WAIRC 00714

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

THAT the application be and is hereby discontinued by leave.

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

2018 WAIRC 00711

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00711
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	FRIDAY, 27 JULY 2018
DELIVERED	**:**	MONDAY, 27 AUGUST 2018
FILE NO.	**:**	U 61 OF 2018
BETWEEN	**:**	ALISON MARTIN
		Applicant
		AND
		SOUTH REGIONAL TAFE
		Respondent

Catchwords	*:*	Unfair dismissal claim - Application filed out of time - Discretion to accept claim not exercised - Application dismissed
Legislation	*:*	*Industrial Relations Act 1979*
Result	*:*	*Application dismissed*
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr J Carroll (of counsel)

Reasons for Decision

1 The applicant lodged a notice of claim of unfair dismissal a year after the date of termination of her employment. Given this was outside the 28 day time limit provided by section 29(2) *Industrial Relations Act 1979* I may only accept the claim if I consider that it would be unfair not to do so.

2 At the conclusion of the hearing on that question on 27 July 2018 I told the applicant that I would not be accepting her claim and gave short reasons which I expand upon here.

3 In my view where a claim is lodged so long after the date of termination of the employment there must be a very good explanation for the delay and a strong case on the merits revealed. Where the period of delay is so long everyone involved, or potentially involved, and this includes the Western Australian Industrial Relations Commission, is entitled to assume that they will not be put to the trouble of ever having to deal with the matter, unless there are compelling reasons why that assumption should be overturned.

4 Here such reasons were not present**,** despite the applicant's earnest and valiant attempts to demonstrate them.

5 The applicant gave evidence that she was aggrieved by her employment ending at the time and was aware that she could challenge it in a quasi-judicial forum. She took several actions consistent with this knowledge, such as reading websites and attempting to contact the Employment Law Centre, but did not actually lodge a claim within time.

6 At some time the applicant became aware that the period within which to lodge a claim had expired and gave evidence that she was not aware she could seek to have a claim accepted out of time. She gave evidence that she only became aware of this in February 2018.

7 It is at this point that the problems facing the applicant's application to have the claim accepted out of time become insurmountable. Even if I accepted that her failure to do anything before this was covered in turn by, as she says, emotional distress, a belief that the appropriate way to deal with this matter was through entreaties to her former employer and hopelessness because she was not aware she could apply for an extension of time, a further delay from February to June 2018 is not excusable.

8 As at February 2018 the applicant was aware she could apply for an extension of time but did nothing until June 2018. One may be sympathetic about the applicant saying that she needed to "work up the courage" to lodge a claim, but taking into account the interests of the employer and those members of the public who have brought matters to the Western Australian Industrial Relations Commission in a timely fashion but whom will inevitably have the hearing of their matter delayed if this one proceeds, this cannot properly excuse further delay at that time and of that length.

9 This application is dismissed.

2018 WAIRC 00713

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALISON MARTIN
	APPLICANT
	-v-
	SOUTH REGIONAL TAFE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 27 AUGUST 2018
FILE NO/S	U 61 OF 2018
CITATION NO.	2018 WAIRC 00713

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr J Carroll of counsel

Order

HAVING HEARD the applicant in person and Mr J Carroll of counsel for the respondent the Western Australian Industrial Relations Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby orders that the application be and is hereby dismissed.

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

CONFERENCES—Matters referred—

2018 WAIRC 00716

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00716
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 25 JULY 2018
DELIVERED	**:**	TUESDAY, 28 AUGUST 2018
FILE NO.	**:**	CR 15 OF 2018
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
		Applicant
		AND
		DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION
		Respondent

Catchwords	*:*	Industrial law (WA) – Unfair dismissal claim – Dismissal on medical grounds unfair – Reinstatement impracticable – Reemployment impracticable – Compensation ordered
Legislation	*:*	*Industrial Relations Act 1979*
Result	*:*	*Application granted in part*
Representation:		
Counsel:		
Applicant	**:**	Mr D Scaife of counsel
Respondent	**:**	Mr W Fitt of counsel
Solicitors:		
Applicant	**:**	Eureka Lawyers
Respondent	**:**	State Solicitor's Office

Cases also cited:

Kyriakopoulos v James Hardie & Company Pty Ltd (1970) 37 SAIR 91

Finch v Sayers [1976] 2 NSWLR 540

Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

City of Wanneroo v Holmes (1989) 30 IR 362

Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Top Top Bakeries (1994) 58 IR 22

Australian Liquor Hospitality and Miscellaneous Workers Union WA Branch v Silver Chain Nursing Association [1995] WAIRC 11511

Durham v Western Australian Government Railways t/a Westrail (1995) 75 WAIG 1787

WA Access Pty Ltd v Vaughan (2000) 81 WAIG 373

Thomas William Wigham v SFM Engineering Pty Ltd [2001] WAIRC 02520

Civil Service Association of Western Australia Incorporated v Director General, Education Department of WA (2002) 82 WAIG 2982

Maria Letizia Jones v Commissioner of Police (2007) 87 WAIG 1101

Diana Mary Dorothea Ridge v Director General, Department of Culture and the Arts (2008) 88 WAIG 2184

Geoffrey S. Holt v Director General, Department of Education and Training [2009] WAIRC 00664

The State School Teachers' Union of WA (Incorporated) v The Director General, Department of Education and Training [2010] WAIRC 00904

Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch v Registry Officer, WA Health Industrial Relations Service, Department of Health (2011) 91 WAIG

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

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WAIRC 00830; (2017) 97 WAIG 1689

Reasons for Decision

1 By letter dated 22 February 2018 the respondent's delegate informed the applicant's member that his employment would be coming to an end because "your current medical condition [means] you are unable to fulfil the duties and responsibilities associated with your substantive position as a teacher" and "there is no prospect of you regaining fitness to work as a teacher for the foreseeable future".

2 The respondent's delegate was acting upon a recommendation contained in a briefing note produced within the respondent's department dated 14 February 2018.

3 The briefing note had a section headed "Background".

4 The briefing note under this heading set out that the applicant's member had been referred to "the Occupational Physician" (which is a reference to Dr Roger Lai) in June 2016 and that he had attended an "initial appointment" with Dr Lai on 5 September 2017.

5 The briefing note summarised the report prepared by Dr Lai after that consultation but did not attach it.

6 The briefing note went on to summarise a disciplinary process undertaken in relation to the applicant's member.

7 Reference was then made to a "further fitness for work assessment" conducted by Dr Lai with the applicant's member on 6 December 2017 and the brieing note summarised, without attaching it, the report Dr Lai produced.

8 The "Background" section concluded with reference to a supplementary report produced by Dr Lai, which was attached to it, and reference to a letter sent to the applicant's member in which the applicant's member had been informed that a recommendation was to be forwarded to the respondent's delegate that he be retired on the grounds of ill health and the applicant's member's response to that letter, both of which were attached to the briefing note.

9 The briefing note then had a heading "Employee Support Bureau Comment" and below that appeared the sentence "Mr Kilner has been deemed medically unfit for his substantive role at Busselton SHS and medical retirement is recommended."

10 The key document before the decision maker was the "supplementary" report of Dr Lai dated 20 December 2017 which I reproduce in full:

> I am writing following receipt of further information from Mr Kilner's treating health professionals.
>
> Dr Mowat psychologist 8/12/17 letter
>
> I do not think he is likely to regain medical capacity to return to Busselton Senior High School in the foreseeable future.
>
> Dr Buckeridge general practitioner 15/12/17 letter
>
> This is to certify that Bill Kilner will be unable to attend work from 15/12/2017 to 1/7/2018 inclusive due to a medical condition. At this stage I do not know whether Bill is likely to regain capacity. I will assess this midway though next year. [sic]
>
> **Medical opinion**
>
> In my opinion, it is unlikely that Mr Kilner will be able to return to work at Busselton SHS without significant risk of further stress leave for the foreseeable future. ie. permanent incapacity for his substantive position. This is based on the long history of his unresolved concerns with student behaviours, the lack of change following an extended period of time off work, the ongoing S&I process and the prognostic information from his treatment providers.

11 The key opinion expressed by Dr Lai in this report is that if the applicant's member returned to work at Busselton Senior High School there is a significant risk of further stress leave and that this was likely to be the situation for the foreseeable future.

12 Dr Lai seems to then say by the use of "ie" that this sentence may be accurately rephrased as "Mr Kilner has permanent incapacity for his substantive position."

13 In my view, a reasonable person reading the full key sentence in Dr Lai's report, and even having full regard for Dr Lai's medical expertise, would wonder how a "significant risk of further stress leave for the foreseeable future" if a person resumes working in a position may be accurately rephrased as a "permanent incapacity" to work in that position.

14 I consider the reasonable reader would want more information on what Dr Lai means when he says that one equals the other.

15 The desire of the reasonable reader for that explanation would, in my view, be added to considerably by consideration of what follows in Dr Lai's report.

16 Immediately following the key sentence, Dr Lai sets out the bases for the opinion expressed in it. As a reasonable reader, I would expect that this would squarely address the issue of "permanent incapacity" in a medical context.

17 Dr Lai writes that the bases for his belief are the following:

(1) the long history of the applicant's members unresolved concerns with student behaviour (presumably at Busselton Senior High School);

(2) the lack of change (it is not clear in or to what) following the applicant's member having had an extended period of time off work;

(3) the ongoing S&I process (which I think everyone would have understood to be a reference to the disciplinary process against the applicant's member); and

(4) The prognostic information from his treatment providers (which were set out in the letter).

18 I think the reasonable reader of these comments, and especially one having the onerous task of deciding whether to end someone's employment on the grounds of ill health, would have had the following thoughts in their mind when they read them:

(1) the long history of unresolved concerns with student behaviour – Has this led to a medical condition or is it a different issue, perhaps one relating to the applicant's member being upset or angry about something?;

(2) the lack of change following an extended period of time off work – Does this relate to a medical condition or something else?;

(3) the ongoing S&I process – Has this led to a medical condition or is something else being talked about?; and

(4) the prognostic information from his treatment providers – These are pretty short and lacking in essential detail if they are to be relied upon in the context of deciding a person's employment future. What "condition" is the applicant's member suffering from in the opinion of those doctors and exactly why does that condition mean he does not have "capacity" to return to Busselton Senior High School?

19 Going on to read the other material provided under cover of the briefing note, the reasonable reader would have noted that the applicant's member wrote in his email dated 31 January 2018 that he did not see himself returning to work until his challenge to the disciplinary process had been completed and that his "progress to recovery has been severely hampered by the Standards Integrity charge".

20 The reasonable reader would have wondered, especially given the way Dr Lai had cast his report, whether there were medical reasons for the applicant's member not having "capacity" to work or whether something else was going on.

21 The reasonable reader would have wondered whether the applicant's member's "permanent incapacity" to return to work was a medical incapacity or not.

22 In my view, in the mind of the reasonable reader, and in particular a reader who had the heavy responsibility of deciding a person's employment future on the basis of his health, the briefing note and attachments thereto would have raised more questions than given answers.

23 I consider that the reasonable reader would have rejected the briefing note and its attachments as a proper evidential basis upon which to decide such a weighty question as whether someone's long career with an organisation ought effectively be brought to an end on the grounds of ill health and would have sought more comprehensive information.

24 At the very least the reasonable decision maker would have insisted upon reading the other medical reports produced by Dr Lai.

25 If the decision maker had done this, which at a minimum I consider he should have, this is what he would have learned.

26 Dr Lai's report relating to his initial consultation with the applicant's member dated 5 September 2017 is reproduced here in full for ease of reference. It is as follows:

FITNESS FOR WORK ASSESSMENT

EMPLOYEE: WILLIAM KILNER - DOB: 05/09/53

MATHS TEACHER 0.8 FTE

I reviewed Mr William Kilner on 5/09/2017 for a fitness for work assessment. Mr Kilner attended with Jacqui MacLiver. Mr Kilner provided medical reports from 2007 and 2013 as well as a personal statement of events this year.

Reason for referral

Mental health concerns, off work since end of term 1, 2017

Summary

Mr Kilner felt overwhelmed and unable to cope towards the end of term 1, 2017 from a combination of non-work stressors and work stressors {difficult student behaviours). Since stopping work he has undertaken regular psychological therapy and has gradually improved. He still feels quite anxious in relation to work. If he sees the difficult students in the community he deliberately avoids them (left a function at a local cinema).

At this time, he cannot see himself ever returning to work at Busselton SHS, mainly in relation to difficult student behaviours and feeling unsupported in the management of such behaviour. He has 321 days of sick leave.

Findings

Mr Kilner presented as mildly anxious. He became very emotional when discussing his anxiety and difficulties faced. When discussing less sensitive topics he presented reasonably well.

Medical opinion

Questions

1) What condition does Mr Kilner have that may be affecting his ability to work?

Anxiety disorder.

2) The status and control of the current condition?

He is substantially improved from 3 months ago and continues to improve. He is receiving appropriate treatment and support.

3) Mr Kilner's ability to undertake the role at their substantive site safely and effectively including attending work regularly and working up to standard, without risk to self and others?

He is currently medically unfit for teaching due to anxiety. He is still triggered when seeing certain students. The anxiety would interfere with the effective performance of his teaching duties inclusive of behaviour management.

4) Prognosis?

Mr Kilner has previously recovered from similar episodes of anxiety in the past (2007, 2012) and successfully resumed normal duties at Busselton where he has worked for 29 years. He stated today that he does not want to ever return to work at Busselton SHS - this is obviously a negative prognostic indicator. Nevertheless, this view may change as the anxiety resolves as I expect it will over the next few months.

In relation to timeframes I consider it unlikely that he will regain fitness for substantive teaching before the end of this year.

I suggest a review in December 2017 in the forum of a case conference (you may be asked to join by teleconference) to explore options for 2018.

27 The first thing the reasonable reader may have noted, although the relevance of this may have been overtaken by the further enquiry reasonably embarked upon, is that the summary of the report in the briefing note is a poor one.

28 In particular, the summary's conclusion that the report was to the effect that the applicant's member "was medically unfit for teaching" ignores that was the "current" opinion of Dr Lai expressed some months before and that, by way of much better context, Dr Lai had said the applicant's member was "substantially improved from 3 months ago and continues to improve", that he was only "mildly anxious" and that his anxiety, which related only to "certain students", was expected to "resolve". It also omits the key note that "Mr Kilner has previously recovered from similar episodes of anxiety".

29 The reasonable reader would wonder whether the applicant's member had continued to improve as Dr Lai had predicted and would want to learn more about the current state of his "anxiety" and its impact on him being able to work.

30 This would have led a reasonable decision maker to read the report of Dr Lai dated 6 December 2017.

31 Rather than reproducing that entire report I attempt a summary which I believe captures the report's substance. The report said that the applicant's member had continued to improve since September but that the applicant's member, since that time, had learned he was the subject of a disciplinary process and that he did not want to return to work until that had been sorted out. The reasonable reader would have noted, cognizant of the importance of the decision he had to make, that Dr Lai expresses the opinion in the report that there was no medical reason why the applicant's member could not return to work.

32 I do emphasise by direct quotation that Dr Lai included the following opinion: "reviewing previous psychiatrist reports that Mr Kilner previously provided (2007, 2013) his current presentation is similar to that described in the reports when it was deemed he had no active medical condition. His concerns about student behaviour are very longstanding, going back over a decade."

33 I consider that the report of 6 December 2017, and the key finding of Dr Lai within it that the applicant's member did not have a medical condition that "may be" affecting his ability to work, much less one that actually was, would have loomed large in any subsequent decision making of a reasonable decision maker.

34 I consider, having regard to the most relevant material in the possession of the respondent, that her delegate, if he had read and properly understood those materials, would have realised very quickly that they fell well short of what is required to bring a person's employment to an end **on medical grounds.**

35 The materials clearly raise the possibility that non-medical issues were more significant in relation to the applicant's member not attending work than medical issues. In fact, they seem to say this.

36 In my view, the respondent's termination of the applicant's member's employment on the grounds of ill health was, in terms of process, a very poor effort in relation to any teacher, let alone one who had given decades of service to the respondent's department.

37 The respondent in my view had to do better and her employees may have reasonably expected her to have done better.

38 In my view, a reasonable decision maker would have insisted on a much better briefing note attaching all relevant material and, in particular, all the reports of Dr Lai.

39 In my view, had all the material been provided to a reasonable decision maker, that decision maker could not possibly have come to the conclusion that the applicant's member was unable to work due to ill health.

40 A reasonable decision maker would have caused further and better investigations to be made into why it was that the applicant's member was not attending for work.

41 For the sake of completeness on this issue I find that a reasonable decision maker, in the context of considering whether the applicant's member should be dismissed for ill health, would have placed no store in the applicant's member's email dated 31 January 2018. A self-assessment of one's health, to the extent that email contains one, is neither reliable nor relevant.

42 I also find that the comment made by a departmental employee, and provided to the decision maker in an attachment to the briefing note, that the applicant's member "has not provided any medical evidence" to support what he had written in his email of 31 January 2018 to be irrelevant and the statement in the briefing note that "Mr Kilner did not provide any further medical information" to be irrelevant.

43 A reasonable decision maker had to be satisfied on the materials before him that the applicant's member could not work in his job due to ill health. The evidence, such as it was, ought to have been before him and considered by him. An absence of information provided by the employee is a completely neutral consideration, and especially so where the applicant's member was submitting himself to review by Dr Lai as and when required.

44 I find it is unnecessary to make a finding about whether the applicant's member's fitness for work needed to be assessed as against his position at Busselton Senior High School or in a wider context. Accepting the respondent's case at its highest, that the assessment that ought properly to have occurred is one against the position at Busselton Senior High School, the material before the decision maker could not reliably support a finding that the applicant's member was medically unfit to fill that position. A consideration of all the relevant material certainly could not reliably support such a finding.

45 I have not found it necessary, for the reasons above, to consider the applicant's argument that the termination was unfair because it involved breaches of the *Teachers (Public Sector Primary and Secondary Education) Award 1993*. It may be that the relevant provisions are ambiguous, certainly a possible outcome on what I heard about them from the parties. However, I could not make a meaningful contribution to the resolution of any ambiguity given the lack of evidence presented in this matter on what are referred to in the authorities as "the surrounding circumstances".

46 That matter will have to wait for another day or, even better, attention at some time from the parties to formulate a set of provisions upon which both agree as to their expression, meaning and effect.

47 I find the dismissal of the applicant's member on the grounds of ill health was unfair for the reasons given above.

48 I turn then to the question of remedy.

49 The framework is the one legislated by section 23A *Industrial Relations Act 1979*.

50 Reinstatement should be ordered unless impracticable.

51 If reinstatement is impracticable, then re-employment in a suitable alternative position should be ordered unless that too would be impracticable.

52 If both reinstatement and re-employment are impracticable, and only then, compensation may be ordered, up to a maximum of six months of remuneration.

53 In relation to remedy I have had regard to all of the materials before me, including the medical reports and the applicant's member's statement adopted by him in the witness box.

54 The applicant does not wish its member to return to Busselton Senior High School. The respondent does not wish the applicant's member to return to Busselton Senior High School.

55 In light of this, I have no trouble in concluding that it would be impracticable to return the applicant's member to Busselton Senior High School (if this is what "reinstatement" would require of me, or otherwise). It would be a rare case where the Western Australian Industrial Relations Commission would disagree with both parties where they say it is impracticable for someone to be put into a particular position. This is not that rare case.

56 I turn then to consideration of an order that the applicant's member be employed in an available and suitable alternative position.

57 I find that such a placement would be impracticable.

58 A central tenet of the applicant's case was there was no proper basis for the respondent to come to the conclusion that its member could not return to work due to ill health when it did because there was no evidence at that time that he was suffering from ill health. The applicant's case was effective and has succeeded.

59 It must follow, however, that it is open to me to conclude that the applicant's member was not going to work for reasons unrelated to his health. I come to that conclusion.

60 Further, it must be open to me to join with the applicant in recognising the full force and effect of the medical reports that were referred to, and to find they have a clear theme that the applicant's member was not going to work because of a reaction to the disciplinary process that had been initiated against him. That reaction was not a medical one, according to the reports, but rather an emotional one, perhaps exacerbated by the long history of the applicant's member raising concerns about student behaviour at Busselton Senior High School.

61 It was clearly galling to the applicant's member that he was being disciplined for his conduct toward students when he had over a long period of time been raising concerns about their conduct.

62 In his statement, adopted in these proceedings, the applicant's member says he has "recovered" from whatever effect the disciplinary process had upon him but he then goes on to say he still cannot return to work. The attempts of the applicant to deal with the evidence in such a way that I could be comfortable in concluding that the history was not one where the applicant's member had a dramatic, exaggerated and long term, but non-medical, reaction to the disciplinary proceedings, and that this was not the most significant reason for the applicant's member not working for an extended period, and for not, even today, being ready to return to work, were valiant but failed.

63 Facing a disciplinary proceeding is an unfortunate event but it can happen. It has to be recognised by those who become subject to such a proceeding that the initiation of a process is the start and not the end and the process must be faced and dealt with.

64 Even when completed, review is usually possible and, at the end of the day, the ultimate outcome must be lived with.

65 I am left with the inescapable conclusion on the materials before me that the applicant's member reacted in an abnormal way to the start of a disciplinary process and that the abnormal reaction was dramatic and sustained. No employer ought be ordered to re-employ someone whose reaction to a disciplinary proceeding is so dramatic and sustained.

66 It is impracticable for any employment relationship to be re-established by the Western Australian Industrial Relations Commission against such a background.

67 The remedy in this case must be one of compensation.

68 Understandably, given the respondent's case, it was not argued before me that the applicant's member's employment could have been brought fairly to an end within six months of the time at which it was. There is no sound basis for me to assume anything other than that the applicant's member would have continued in his employment beyond six months from the date his employment did end.

69 My start point then is that the applicant's member ought be awarded six months of remuneration by way of compensation.

70 However, I must have regard to section 23A(7)(a) *Industrial Relations Act 1979*.

71 As I understand what I was told by the applicant, having consulted its member, the applicant's member has made no attempt at all to mitigate the loss suffered by him as a result of his dismissal. He has not sought work in the private sector, either in a school or by way of offering private tuition services, or at all. The respondent should not be made to fully fund that failure.

72 Although it involves some speculation on my part I consider that had an attempt been made by the applicant's member to find work, or to otherwise obtain money, for instance through Newstart, he would have earned or received money equivalent to one month of his remuneration from the respondent in the six months following his dismissal.

73 I will order that the respondent pay to the applicant's member a sum equating to 20 weeks of his salary as at the time of his dismissal.

74 It goes without saying that, for the reasons above, I have not had to turn my mind to all of the issues raised by the memorandum of matters. There was simply no need to deal with some of them.

2018 WAIRC 00724

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 30 AUGUST 2018
FILE NO/S	CR 15 OF 2018
CITATION NO.	2018 WAIRC 00724

Result	Application granted in part
Representation	
Applicant	Mr D Scaife of counsel
Respondent	Mr W Fitt of counsel

Order

HAVING heard Mr D Scaife of counsel for the applicant and Mr W Fitt of counsel for the respondent on Wednesday, 25 July 2018; and

HAVING given Reasons for Decision in which I determined to uphold the application in part and award the applicant's member compensation;

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

THAT the respondent pay to the applicant's member a sum equating to 20 weeks of his salary as at the time of his dismissal to be paid forthwith.

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

2018 WAIRC 00290

DISPUTE RE UNION MEMBERS OPERATIONAL STATUS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 7 MAY 2018
FILE NO.	PSACR 3 OF 2018
CITATION NO.	2018 WAIRC 00290

Result	Directions issued
Representation	
Applicant	Ms K Taylor
Respondent	Mr A Chapple

Direction

HAVING heard Ms K Taylor on behalf of the applicant and Mr A Chapple on behalf of the respondent the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979 hereby directs –

(1) THAT each party shall give informal discovery by serving their list of documents by 7 May 2018.

(2) THAT inspection of documents shall be completed by 14 May 2018.

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

(4) THAT the applicant file and serve any witness statements upon which it intends to rely by no later than 21 May 2018.

(5) THAT the respondent file and serve any witness statements upon which it intends to rely by no later than 4 June 2018.

(6) THAT the applicant file and serve any witness statements in reply upon which it intends to rely by no later than 18 June 2018.

(7) THAT the parties file an outline of submissions and a statement of agreed facts by no later than 2 July 2018.

(8) THAT the matter be listed for hearing for one day.

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

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

2018 WAIRC 00686

DISPUTE RE UNION MEMBERS OPERATIONAL STATUS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00686
CORAM	**:**	PUBLIC SERVICE ARBITRATOR SENIOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 7 MAY 2018, MONDAY, 9 JULY 2018
DELIVERED	**:**	FRIDAY, 10 AUGUST 2018
FILE NO.	**:**	PSACR 3 OF 2018
BETWEEN	**:**	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
		Applicant
		AND
		COMMISSIONER OF POLICE
		Respondent

Catchwords	:	*Industrial law (WA) – dispute regarding operational status of a police officer – Officer declared non-operational due to medical assessments – Assessments disputed – Officer subsequently successfully completed police force requalification tests – Arbitrator satisfied that officer should be returned to operational status.*
Legislation	:	*Industrial Relations Act 1979 (WA) ss 7, 23(1), 44(9)*
		Fair Work Act 2009 (Cth)
Result	:	*Application upheld*

Representation:

Applicant: Ms K Taylor and with her Mr P Hunt
Respondent : Mr A Chapple

Case(s) cited:

Ambulance Victoria v Ms V [2012] FWAFB 1616

Bindaree Beef Pty Ltd v The Australasian Meat Industry Employees' Union, Newcastle and Northern Branch on behalf of Riley [2012] NSWIRComm 74

Bindaree Beef Pty Ltd v Riley [2013] *NSWCA 305*

CSL Limited T/A CSL Behring v Papaioannou [2018] FWCFB 1005

Director General Department of Justice v Civil Service Association of Western Australia Inc [2005] WASCA 244

Electricity Retail Company T/A Synergy v Menegola [2014] FWC 2873

Grant v BHP Coal Pty Ltd [2014] FWC 1712

Hobbs v Capricorn Coal Management Pty Ltd PR903643 [2001] AIRC 408

Jetstar Airways Ltd v Neeteson-Lemkes [2013] FWCFB 9075

Lion Dairy and Drinks Milk Ltd v Norman [2016] FWCFB 4218

Martin v TNT Australia Pty Ltd T/A TNT [2017] FWC 440

Ms V v Ambulance Victoria [2011] FWA 8576

Riley v Bindaree Beef Pty Ltd [2011] NSWIRComm 1057

The Civil Service Association of Western Australia Incorporated v Director General

Housing Authority [2017] WAIRC 00846

T. Hodgson v Conrad International Treasury Casino [2001] AIRC 904

Reasons for Decision

Brief background

1 Senior Sergeant Demar is a currently serving police officer and she joined the Western Australian Police Force in February 1986. As part of the requirements imposed on police officers, to be regarded as fully operational and to conduct patrols, officers are required to successfully complete operational skills training every 12 months. These tests are the Critical Skills 1, the Critical Skills 2 and the Critical Skills 3. The tests cover a range of skills essential for operational duty for police officers to ensure their operational safety and to enable them to properly carry and use firearms and other use of force options. They include Active Shooter Response Training; Police Life Support Training and the Deployment Readiness Test. The latter test is a physical fitness test required as part of the CS3 assessment.

2 On 6 April 2016 Senior Sergeant Demar was undergoing her CS1 and CS2 requalification at the Maylands Police Complex. During this assessment she fell and suffered a right knee injury. This led to a brief absence from duty until 11 April 2016, when Senior Sergeant Demar returned to work on light duties. On advice from her treating doctor, Senior Sergeant Demar consulted Dr Annear, an orthopaedic surgeon. Dr Annear, who has substantial experience with sports injury treatment and management, performed a right knee high tibial osteotomy on Senior Sergeant Demar on 29 June 2016.

3 Following the surgery, Senior Sergeant Demar commenced post-operative rehabilitation and her treating physician, Dr Govindappa, provided her with a medical clearance for a return to work on restricted duties and working hours on 25 November 2016. Senior Sergeant Demar commenced a graduated return to work program on 1 December 2016. On 12 December 2016 Senior Sergeant Demar attended a review with the Commissioner of Police's consultant occupational physician, Dr Powers. From this review, which did not, as was common ground, involve a full functional assessment, Dr Powers, having regard to the recent surgery undergone by Senior Sergeant Demar in conjunction with her medical history, concluded that she should be placed on permanent light semi-sedentary work restrictions. The current dispute arises from that assessment. This remains Dr Powers' opinion, despite other medical assessments and events, which I will detail later in these reasons.

4 The Union on behalf of Senior Sergeant Demar disputes the Commissioner of Police's position, which is based on Dr Powers' assessment. Conciliation was not successful in resolving the present dispute. Accordingly, the matter was referred for hearing and determination under s 44(9) of the *Industrial Relations Act 1979* (WA).

The dispute

5 The s 44(9) referral of matters in dispute is in the following terms:

1. The parties are in dispute in relation to the operational status of a member of the Union Senior Sergeant Jeanette Demar.
2. On 6 April 2016, Senior Sergeant Demar suffered an injury to her right knee resulting from a fall during training exercises at the Maylands Police Complex. On 11 April 2016, Senior Sergeant Demar received a medical certificate from her treating doctor to the effect that she could return to work on restricted or light duties.
3. On 29 June 2016, Senior Sergeant Demar had a surgical procedure on her right knee performed by Dr Peter Annear, an orthopaedic surgeon.
4. Senior Sergeant Demar commenced a graduated return to work program developed by her physician Dr Govindappa on 25 November 2016. On 12 December 2016, Senior Sergeant Demar's condition was subject to a review by Dr Powers, the Commissioner of Police's consultant occupational physician. The result of the review by Dr Powers was to the effect that Senior Sergeant Demar be placed on permanent light semi-sedentary restrictions, which the Union says effectively classifies Senior Sergeant Demar as permanently non-operational. The Union maintains this status will significantly affect Senior Sergeant Demar's future career.
5. The Union contends that Senior Sergeant Demar has been declared medically fit to resume full operational duties by her treating physician and specialist and has completed the Commissioner of Police's testing for operational readiness. She should be returned to full operational status.
6. The Commissioner of Police maintains that Senior Sergeant Demar is not fit for full operational duties. The Commissioner of Police says this was confirmed by further consideration by Dr Powers of Senior Sergeant Demar's circumstances, as contained in Dr Power's most recent report of 21 February 2018.
7. The Union seeks the return of Senior Sergeant Demar to full operational duty status. The Commissioner of Police objects to and opposes the Union's claim.

Agreed facts

6 Helpfully, the parties have provided an agreed a statement of facts in this matter. It is in the following terms:

1. The Applicant's member, Ms Jeanette Demar, is currently employed by the Respondent at the rank of Senior Sergeant.
2. Ms Demar has been employed by the Respondent for over 32 years.
3. During her 32 years of service, Ms Demar has had a series of medical issues.
4. On 6 April 2016 Ms Demar sustained an injury to her right knee resulting from a fall at the Maylands Police Complex.
5. Following review from her treating doctor Dr Prelude Kenworthy, Ms Demar received a medical certificate providing some capacity for work from 11 April 2016 on modified or alternative duties.
6. On 29 June 2016 Ms Demar underwent a surgical procedure on her right knee performed by Orthopaedic Surgeon Dr Peter Annear.
7. On 25 November 2016 Ms Demar's physician Dr Vasanth Govindappa provided a medical certificate providing some capacity for work from 25 November 2016 on modified or alternative duties, with modified hours for 4 hours per day, 5 days per week.
8. On 12 December 2016, at the instruction of the Respondent, Ms Demar undertook a medical assessment with WA Police Force Consultant Occupational Physician Dr Karina Powers.
9. Dr Powers produced a report dated 12 December 2016 providing that Ms Demar was fit for full hours of light semi-sedentary desk-based office type work with other restrictions, including some permanent restrictions.
10. On 22 March 2017 Dr Annear produced a medical certificate providing that Ms Demar was able to return to her full operational duties as a police officer.
11. Following this, Ms Demar obtained the following certificates and letters in relation to her capacity:
    a. 23 March 2017 - letter from Physiotherapist Zac Conaghan providing that Ms Demar was able to return to full time operational duties.
    b. 20 April 2017 - medical certificate from Dr Govindappa providing that Ms Demar had full capacity for work from 20 April 2017.
    c. 9 May 2017 - letter from Mr Conaghan providing that Ms Demar was able to return to full time operational duties.
    d. 12 May 2017 - medical certificate from Dr Govindappa providing that he supported Ms Demar's view that she was ready and fit for operational duties.
12. On 5 May 2017 Ms Demar also undertook requalification 'Critical Skills 3' (CS3) training from which she was deemed competent.
13. On 29 May 2017 Ms Demar had a further medical assessment with Dr Powers, after which Dr Powers produced a report providing that Ms Demar was fit for full hours of light non-operational work with the permanent restrictions that had been noted in Dr Powers' previous report.

14. On 22 June 2017 Dr Annear conducted further review of Ms Demar and produced a medical certificate providing his confidence that Ms Demar would be clear to return to operational duties following a further x-ray in four months' time.
15. On 27 September 2017 Ms Demar had a further medical assessment with Dr Powers, after which Dr Powers produced a report providing that Ms Demar was fit for full hours of light non-operational work with the permanent restrictions that had been noted in Dr Powers' previous report.
16. On 9 October 2017 Dr Annear conducted further review of Ms Demar and produced a medical certificate noting Ms Demar's good healing that would continue to remodel over the following six months or so, and that she could return to her full time operational active duties.
17. On 2 November 2017 Dr Govindappa conducted further review of Ms Demar and produced several reports, noting that Ms Demar was fit to return to full operational duties with no ongoing physical restrictions.
18. On 15 November 2017 Dr Powers reviewed Ms Demar's medical file and produced a further report providing that Ms Demar was fit for non-operational work with permanent light semi-sedentary restrictions.
19. On 22 December 2017 Ms Demar again undertook CS3 requalification training from which she was deemed competent.
20. On 13 February 2018, following proceedings at the Western Australian Industrial Relations Commission, the Applicant (on Ms Demar's behalf) provided a report identifying perceived inaccuracies in Dr Powers' previous reports.
21. On 21 February 2018 Dr Powers produced a report responding to the concerns raised in Ms Demar's 13 February 2018 report, and confirming Dr Powers' medical view of Ms Demar' s non-operational status.
22. On 26 April 2018 Ms Demar undertook requalification 'Critical Skills 1' and 'Critical Skills 2' training from which she was deemed competent.
23. The parties are in dispute in relation to Ms Demar's operational status.

7 Much of the evidence in these proceedings went to the various medical assessments and fitness for work assessments undertaken by both the Commissioner of Police and Senior Sergeant Demar's treating medical practitioners. I turn to consider that evidence now.

Medical assessments

8 The consideration of the medical evidence in this case involves reports and testimony of Dr Powers, the Commissioner of Police's occupational physician; written reports of Dr Govindappa; written reports from Dr Annear; written reports from Senior Sergeant Demar's physiotherapist Mr Conaghan and evidence from Senior Sergeant Demar herself. Senior Sergeant Demar referred in her evidence to various assessments undertaken by her treating doctors and specialists, and a functional assessment that she undertook with another occupational physician, Dr Pavic.

9 As noted earlier in these reasons, Senior Sergeant Demar undertook an assessment with Dr Powers in December 2016, on the request of the Commissioner of Police's Health and Safety Branch. This was presumably part of the graduated return to work program implemented at that time, to assess her progress. It was Senior Sergeant Demar's evidence that there was no physical examination undertaken in this assessment. Dr Powers could not recall whether she undertook a physical assessment or not. Dr Powers did say however, that she took extensive notes during the consultation.

10 Dr Powers, in both her oral evidence and in her written report (see exhibit KP1 to her witness statement), said that Senior Sergeant Demar had a medical history which included two rhizotomies in relation to a prior back condition; an arthroscopy procedure on her left knee in 2011; and two prior foot surgeries. In addition, Dr Powers noted that in her view, Senior Sergeant Demar had ongoing weakness in her left leg and noted that she was "unable to run/jump/lift greater than 15kg". Mention is made by Dr Powers, that Senior Sergeant Demar also reported to her that she had pain in her right hip.

11 It was Dr Powers' assessment and her evidence, that based on what she had been told by Senior Sergeant Demar, her prior medical record and Dr Powers' own clinical observation, that Senior Sergeant Demar was suitable for:

> permanent light semi-sedentary restrictions … and there was a moderate to high likelihood of significant symptom exacerbation or injury aggravation if Ms Demar was to work unrestricted in a fully operational role.
>
> (Medical Report exhibit KP1 to Dr Powers' witness statement)

12 Whilst it was disputed by Senior Sergeant Demar, Dr Powers said she mentioned to Senior Sergeant Demar that her work restrictions could lead to her being medically retired. Dr Powers undertook a further assessment of Senior Sergeant Demar on 29 May 2017. Dr Powers' evidence was that she had not changed her view from her initial assessment in December 2016. Dr Powers said that she again referred to the possibility of Senior Sergeant Demar being medically retired. Again, this was disputed by Senior Sergeant Demar.

13 As Senior Sergeant Demar had sought clearance for full operational duties, Dr Powers undertook another assessment on 27 September 2017. In this assessment, Dr Powers said that she reviewed Senior Sergeant Demar's medical file and the various reports from her treating physician, Dr Govindappa and her specialist, Dr Annear. Additionally, as noted above, Senior Sergeant Demar had completed a full functional assessment undertaken by Dr Pavic. According to Senior Sergeant Demar, this involved a full and thorough assessment in the gymnasium including performing dead lifts; squats; shoulder presses; lunges; and jogging. In addition, Senior Sergeant Demar testified that she showed Dr Pavic the forms reviewed and signed by Dr Govindappa, as required by the police force, to certify an officer fully fit for operational duties. A copy of these forms, setting out the list of both operational and non-operational duties of a police officer were annexure 20 to Senior Sergeant Demar's witness statement. Included in these documents, is reference to the "Critical Skills (Weapons) Training and Medical

Report Critical Skills 1 and 2". This form requests the medical practitioner to assess and sign off on a police officer's fitness to undertake the critical skills training and testing.

14 It was Senior Sergeant Demar's evidence that she relayed the outcome of her functional assessment with Dr Pavic to Dr Powers. She had not however been able to obtain a written report from Dr Pavic, due to the cost. Despite this, Dr Powers remained of the opinion that permanent light semi-sedentary restrictions in a non-operational role, was still the appropriate recommendation for Senior Sergeant Demar.

15 On 15 November 2017, Dr Powers was asked to undertake a further review of Senior Sergeant Demar's progress, given her ongoing request to be restored to full operational status. Further and new information was provided by Senior Sergeant Demar for Dr Powers' consideration. This included a WorkCover Final Certificate from Dr Govindappa dated 20 April 2017; a letter from Dr Arora (an orthopaedic fellow to Dr Annear) of 9 October 2017, along with an x-ray report of Senior Sergeant Demar's right tibia; the clinical skills medical report signed by Dr Govindappa mentioned above, and a final medical clearance certificate from Dr Govindappa dated 2 November 2017. The letter from Dr Arora of 9 October 2017, was in the following terms:

> 9 October 2017
>
> Dr P Kenworthy
>
> Wangara Medical Centre
>
> 4/2 Prindiville Drive
>
> WANGARA WA 6065
>
> Dear Prelude
>
> **RE: Jeanette TRANDOS DOB: 2 Apr 1964 Our Ref: P16590.WC**
>
> **Level 2 226 Adelaide Terrace PERTH WA 6000**
>
> Jeanette comes along today; she is now eighteen months post high tibial osteotomy on the right side, which is doing well. She has no pain; she is kneeling and does gym activities.
>
> She was concerned about some incomplete healing on her last scan and we had a repeat scan that shows good healing. This will continue to remodel over the next six months or so.
>
> Jeanette can return to her full time operational active duties, which involve jumping across fences and catching offenders.
>
> We will see Jeanette in twelve months for a plate removal if she wishes.
>
> Kind regards
>
> Yours sincerely
>
> **MANIT ARORA**
>
> **(Orthopaedic Fellow to Dr P Annear)**
>
> **In review with Dr Peter Annear**

16 Despite this further information and the functional assessment by Dr Pavic, as reported to Dr Powers by Senior Sergeant Demar, Dr Powers was not persuaded to change her mind. Dr Powers maintained her view, previously expressed, that a non-operational role was more appropriate for Senior Sergeant Demar and there was a "moderate likelihood of symptom or injury aggravation". Copies of Dr Powers' reports, following the various assessments outlined above, were annexed to her witness statement.

17 Finally, on 21 February 2018, Dr Powers responded to written comments made by Senior Sergeant Demar in response to Dr Powers' various reports concerning her medical assessments. Dr Powers maintained that there were no discrepancies of any significance in her reports, in her opinion. As to Senior Sergeant Demar having passed the DRT, Dr Powers' evidence was that this test is not a determination of operational capacity or fitness, as it is conducted in a controlled environment. Dr Powers' evidence was that her assessment of a police officers' fitness for work takes account of the demands of operational policing, which may involve "high level uncontrolled forces and loading, uneven surfaces, stresses and fatigue and variable shifts" (exhibit KP6 to Dr Powers' witness statement). Additionally, Dr Powers testified that she must assess a police officers' fitness for work in the context of an officer's whole medical history. This goes beyond a specialist assessment of a specific medical condition, taken in isolation.

18 It was the overall tenor of Senior Sergeant Demar's evidence that she is fully fit and indeed, was the fittest that she has been for many years. Senior Sergeant Demar outlined the various assessments undertaken by her treating physician Dr Govindappa, her specialist Dr Annear and her physiotherapist Mr Conaghan. Up until about April 2017, Senior Sergeant Demar had been assessed as fit for the work she was then performing in the Management Audit Unit. Dr Govindappa, on 20 April 2017, assessed Senior Sergeant Demar as having full capacity for work from that time.

19 By mid-2017, Senior Sergeant Demar testified that she had recovered from her right knee surgery, and had no pain from it, or from any prior surgeries or interventions, for a long period of time. She said she was operationally fit. Senior Sergeant Demar said that by this time, which she had reported to Dr Powers, she was training in the gymnasium three times per week with a personal trainer, was jogging two kilometres two to three times per week and she felt strong and fit.

20 As I have already noted, Dr Govindappa also undertook a detailed assessment of Senior Sergeant Demar in accordance with the Police Force's Medical Practitioners Assessment of Police Officer's Capacity for Work. This assessment, on 2 November 2017, also involved a review of Dr Annear's report of 9 October 2017. This assessment required Senior Sergeant Demar to fully flex her arms and shoulders and flex and rotate her legs. Kneeling and crouching was required also. From this

assessment, Dr Govindappa certified Senior Sergeant Demar fit to return to full operational duties with "no ongoing physical restrictions" (annexure 20 to Senior Sergeant Demar's witness statement).

Police Force operational fitness testing

21 On 5 May 2017, Senior Sergeant Demar attended at the Joondalup Police Academy and successfully completed the CS3 requalification, including the DRT. As set out at annexure 1 to Senior Sergeant Demar's witness statement, and as noted at the outset of these reasons, police officers are required, in accordance with CS1, CS2 and CS3, to requalify annually. The relevant policy refers to "Operational" as being the status of an officer who is "currently qualified to the "Organisational Standard" in critical skills weapons training and requalification programs. Those officers who engage in patrol duty must be "Operational" as defined. The reference to "Organisational Standard" means the requirement to achieve competency in both weapons training and in the requalification program. Importantly for present purposes, "Patrol Duties" is defined to mean "Any foot, mounted, or vehicular official duties in which members are deployed to conduct target observations of areas, respond to complaints or perform other tasks for which it can be reasonably expected that those duties may require members to apply or respond by the use of force". The DRT, which is part of the CS3 requirement, is a fitness test which requires police officers to complete physical tasks in a set time. The test is set out in the form of an obstacle course, whereby a police officer is required to demonstrate competency in a range of physical tasks in the broad areas of running, jumping and landing, climbing, lifting and carrying. Officers also need to demonstrate handcuffing techniques, with bending and kneeling as required.

22 Notably also for present purposes, where an officer fails to successfully complete the DRT component of the requalification requirement after two attempts over a three-month period, the officer is to be referred to the Health and Safety Division and they are to be managed in accordance with the relevant health and safety policy.

23 Senior Sergeant Demar, again successfully, completed the CS3, including the DRT, in December 2017 and the CS1 and CS2 requalification in April 2018. Thus, Senior Sergeant Demar has successfully completed the DRT twice in seven months.

Consideration

24 There is no doubt the present matter is an industrial matter for the purposes of s 7 of the Act and the Arbitrator has jurisdiction to enquire into and determine the dispute referred for determination under s 44(9) of the Act. The breadth of the jurisdiction and powers conferred by s 44 of the Act has been dealt with in many decisions of the Commission and it is unnecessary to refer to them. Whilst both parties referred to decisions of the Fair Work Commission in relation to conflicting medical opinion in unfair dismissal cases, those matters were decided under the Fair Work Act 2009 (Cth) unfair dismissal provisions dealing with an employee's capacity (or more appositely incapacity) to perform work.

25 Accordingly, those cases are distinguishable from the present proceedings. The present proceedings are not in the nature of an unfair dismissal claim and are brought under the general dispute resolution powers of the Act in s 44(9) enabling the Commission under s 23(1) of the Act, to enquire into and determine the industrial matter. In these proceedings, the Arbitrator is required to consider and assess the evidence in the usual way. This includes an evaluation of the medical evidence and the resolution of any conflicts.

26 The difficulty presented by the present case is not a conflict in the evidence in the strict sense. This is because, the evidence of the parties in this matter, is directed to somewhat different issues. The evidence adduced by the Union through Senior Sergeant Demar, was directed to her present fitness for work, arising from her many medical assessments and the current state of her physical capacity, as demonstrated by the completion of the requalification tests. On the other hand, the Commissioner of Police's evidence, through the assessments performed by Dr Powers, was directed primarily towards Senior Sergeant Demar's future likelihood of symptom and injury exacerbation, given her total medical history, along with natural ageing, having regard to the demands of operational policing. As I have mentioned earlier, it was not disputed that Dr Powers did not undertake a full functional assessment. This was perhaps because, as I have mentioned, her primary concern and focus seemed to be on Senior Sergeant Demar's future prognosis.

27 There can be no doubt as to Dr Powers' qualifications and experience as an occupational physician. Her work with police officers enables her to understand the rigours of policing, which can be very demanding. All things being equal, considerable weight should be placed on the medical opinion of a party's occupational physician. Also, too, there can be no doubting the expertise of Senior Sergeant Demar's specialists and her treating physician and physiotherapist, all of whom were involved in her treatment and rehabilitation. Additionally, she did consult with another occupational physician, Dr Pavic, although as I have already mentioned, Senior Sergeant Demar was not able to afford the cost of a full report. I was also impressed by Senior Sergeant Demar's commitment and dedication to her own rehabilitation and her return to work. She has plainly very actively engaged with the Commissioner of Police's Illness and Injury Management Policy, in an endeavour to return to full operational duty.

28 On the evidence, I am satisfied on balance that Senior Sergeant Demar's right knee surgery has successfully resolved, she is injury free, suffers no pain or disability and has full movement without restriction. As to the rhizotomy treatment, this was some years ago now and Senior Sergeant Demar reported no pain or difficulties with this since 2014. The left knee arthroscopy, with further surgery, again performed some years ago, had resolved without residual issues, apart from a very mild foot drop, which Senior Sergeant Demar said did not present any difficulty for her. Similarly, previous procedures on her feet for bunions also did not present any ongoing residual issues. A cortisone injection for hip pain many years ago has not required any follow up procedure and no pain or discomfort was currently reported by Senior Sergeant Demar in relation to this issue. Additionally, Senior Sergeant Demar had an arthroscopy procedure on her shoulders some years ago however, again, the condition was resolved and no residual issues or pain were reported since that time.

29 The other important matter to consider in this case, is the Commissioner of Police's own testing regime. The DRT is a physical obstacle test. It seemed from the evidence, to be quite rigorous. Whilst Dr Powers viewed this testing as being in a controlled environment, which by its nature it must be, along with the other critical skills tests, the fact remains, this regime of tests is the benchmark that the Police Force uses, along with the other critical skills tests, to assess a police officer's capacity to remain

fully operational and to undertake patrol duties, which are the day to day duties of a police officer, most likely to potentially involve use of force options. The engagement in patrol duties, includes the reference, putting it in the vernacular, to "jumping fences and catching offenders", to which Dr Annear and his colleague referred in their reports in evidence. As I have noted earlier, Senior Sergeant Demar has passed the DRT twice in the seven-month period between May and December 2017. Given the nature of the medical evidence of both the Union and the Commissioner of Police, in the circumstances of this case, I accord the successful completion by Senior Sergeant Demar of the CS1, CS2 and CS3, including the DRT on two occasions in close succession, significant weight.

Conclusion

30 I have carefully considered the evidence in this case. I have also weighed in the balance the duty of care obligations concerning the deployment of police officers on operational duty. In my view, having regard to these considerations and the equity, good conscience and substantial merits of the matter, Senior Sergeant Demar should be returned to full operational status. Her current non-operational status is a substantial impediment to Senior Sergeant Demar pursuing promotion and transfer opportunities. In being restored to full operational status, Senior Sergeant Demar will, of course, undergo the full range of annual testing, as with all other operational police officers, to be regarded as maintaining her capacity for operational duty. I will order accordingly.

2018 WAIRC 00688

DISPUTE RE UNION MEMBERS OPERATIONAL STATUS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 14 AUGUST 2018
FILE NO	PSACR 3 OF 2018
CITATION NO.	2018 WAIRC 00688

Result	Application upheld
Representation	
Applicant	Ms K Taylor and with her Mr P Hunt
Respondent	Mr A Chapple

Order

HAVING heard Ms K Taylor and with her Mr P Hunt on behalf of the applicant and Mr A Chapple on behalf of the respondent the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979, hereby orders –

THAT the respondent restores Senior Sergeant Demar to operational status in accordance with his relevant policies and procedures.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00730

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 12 JULY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD ACN 133892350
	APPLICANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 6 SEPTEMBER 2018
FILE NO/S	APPL 58 OF 2018
CITATION NO.	2018 WAIRC 00730

Result	Order issued
Representation	

Applicant	Mr G Giorgi of counsel and with him Ms E Leith and Ms E Jones of counsel
Respondent	Ms R Harding of counsel and with her Ms B Swanson of counsel

Order

This is an application for review of a decision of the Construction Industry Long Service Leave Payments Board referred to the Commission pursuant to s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985*.

On Tuesday, 4 September 2018, the Commission convened a conference for the purpose of scheduling the matter. At the conference, the following orders were resolved to ensure an expeditious hearing of the matter.

Pursuant to the powers conferred under the *Industrial Relations Act 1979* and the *Construction Industry Portable Paid Long Service Leave Act 1985* the Commission hereby orders:

(1) THAT within four weeks (5 October 2018) of the date of this order, the applicant deliver to the respondent a statement of proposed agreed facts stating those facts that the applicant is willing to agree for the purposes of the final hearing and which the applicant expects the respondent may be willing to agree. The applicant is to attach to the statement of proposed agreed facts:

(a) a statement describing all of the relevant documents; and

(b) copies of all of the relevant documents,

relating to all of the work performed by the applicant other than at its own premises as at 12 July 2018.

(2) THAT within eight weeks (2 November 2018) of the date of this order, the respondent deliver to the applicant a written response to the statement of proposed agreed facts stating each fact that it is willing to agree.

(3) THAT upon delivery of the respondent's written response, the parties are to confer as soon as reasonably possible to consider the terms in which any agreed facts might be expressed. At this point, the respondent should disclose any reasons why it is not willing to agree any of the facts proposed by the applicant in the statement of proposed agreed facts.

(4) THAT within 10 weeks (16 November 2018) of the date of this order, the applicant file and serve a statement of agreed facts agreed between the parties.

(5) THAT after 10 weeks of the date of this order (not before 16 November 2018), the Commission convene a directions and scheduling conference to deal with any remaining interlocutory matters.

(6) THAT, save as otherwise determined by the Commission, having been admitted into evidence, it is not necessary for the facts contained in the statement of agreed facts to be adduced.

(7) THAT the parties have leave to apply.

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

2018 WAIRC 00693

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PRESLEY JOHN PETERS
	CLAIMANT
	-v-
	KEVIN FRED
	WARRALONG COMMUNITY
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 20 AUGUST 2018
FILE NO/S	B 17 OF 2018
CITATION NO.	2018 WAIRC 00693

Result	Order issued
Representation	
Claimant	In person
Respondent	Ms K Forrest of counsel

Order

HAVING HEARD the claimant and Ms K Forrest of counsel for the respondent the Western Australian Industrial Relations Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby ORDERS:

(1) THAT the respondent in this matter shall be the Karntimarta Aboriginal Corporation.

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

2018 WAIRC 00732

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DON BILMALKA SUJAN KURUPPUARCHCHI
	APPLICANT
	-v-
	WICKER IP ROYALTIES PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 7 SEPTEMBER 2018
FILE NO/S	B 147 OF 2017
CITATION NO.	2018 WAIRC 00732

Result	Springing order issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	No appearance required

Order

HAVING HEARD from Mr P Mullally as agent for the applicant, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT if by **4.00 pm Australian Western Standard Time** on **Friday, 28 September 2018** the applicant has not filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of this application, the application is dismissed.

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

2018 WAIRC 00733

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WANNINAYAKE MUDIYANSELAGE NIRASHA SANDARENU WANNINAYAKE
	APPLICANT
	-v-
	WICKER IP ROYALTIES PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 7 SEPTEMBER 2018
FILE NO/S	B 150 OF 2017
CITATION NO.	2018 WAIRC 00733

Result	Springing order issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	No appearance required

Order

HAVING HEARD from Mr P Mullally as agent for the applicant, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT if by **4.00 pm Australian Western Standard Time** on **Friday, 28 September 2018** the applicant has not filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of this application, the application is dismissed.

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

2018 WAIRC 00728

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00728
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	TUESDAY, 13 FEBRUARY 2018, WEDNESDAY, 29 AUGUST 2018, MONDAY, 23 JULY 2018, MONDAY, 21 MAY 2018
DELIVERED	**:**	WEDNESDAY, 5 SEPTEMBER 2018
FILE NO.	**:**	C 6 OF 2018
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Parties fail to agree memorandum of matters due to dispute about nature of hearing to be conducted - Nature of hearing considered
Legislation	**:**	*Industrial Relations Act* *Industrial Relations Commission Regulations 2005*
Result	**:**	*Draft memorandum of matters issued*
Representation:		
Counsel:		
Applicant	**:**	Mr G Walsh
Respondent	**:**	Ms J Vincent of counsel and with her Mr M Staples
Solicitors:		
Respondent	**:**	The State Solicitor's Office

Reasons for Decision

1 Pursuant to regulation 31 *Industrial Relations Commission Regulations 2005*, if a matter is to be heard and determined at the conclusion of a conference under section 44 *Industrial Relations Act 1979*, the Western Australian Industrial Relations Commission is to draw up a memorandum of the matter requiring hearing and determination.

2 In this application a conference under section 44 *Industrial Relations Act 1979* was held on 13 February 2018. The matter did not settle and, as is normal, the Western Australian Industrial Relations Commission gave the parties an opportunity to produce an agreed memorandum.

3 The parties were unable to agree a memorandum. The dispute behind the inability to agree a memorandum related to the nature of the hearing that would take place before the Western Australian Industrial Relations Commission.

4 That issue was the subject of filed submissions and oral hearings before me for directions on 21 May 2018 and for argument on 23 July 2018 and 29 August 2018.

5 Argument on the matter raised many interesting issues which, ultimately, I find I do not need to resolve.

6 I say this because the matters in dispute between the parties are, as things have turned out, simple and capable of clear expression and, what is more, guide what will occur at the hearing, subject to the usual debates about admissibility that may arise at a hearing.

7 There is, as things have turned out, no need to decide wider issues of principle and procedure.

8 The applicant made it clear in conference that it asserts that its member was not accorded procedural fairness in the process that led to findings of misconduct being made against her.

9 As part of this the applicant asserts that there were some persons who should have been spoken to by the respondent before she made her decision, that were not spoken to, and that this amounts to a breach of procedural fairness.

10 Also as part of this, the applicant says that better or different information was available to be obtained from some persons who were spoken to and that the failure to obtain that better or different information amounts to a breach of procedural fairness.

11 Finally, the applicant will argue that in light of what emerges at the hearing before me, or in any event, the penalty imposed was too harsh.

12 The kind of hearing that would occur to test those assertions is easily imagined.

13 The applicant will make submissions about what it says were the breaches of procedural fairness, referring to the evidence that is already available about the process that was followed.

14 The applicant will also seek to lead evidence from persons who were not spoken to, who it says should have been, and may then, on the basis of that evidence, attempt to demonstrate that, in light of what has emerged, it was demonstrably unfair for the respondent to have not spoken to those persons and obtained that evidence for herself before making a decision.

15 The applicant will lead evidence from some persons who were spoken to by the respondent and may then, on the basis of that evidence, point to matters that should have been discovered by the respondent, and were not, and argue that it was demonstrably unfair that that evidence was not obtained before the respondent made her decision.

16 To some extent this evidence is a slightly unusual way to deal with an allegation of a breach of procedural fairness, in that it anticipates an argument that if there was a breach it would have made no difference to the outcome, but some flexibility in procedure is appropriate in the Western Australian Industrial Relations Commission. Ultimately, it will allow this aspect of the claim to be fully tested.

17 Finally, the applicant will make submissions about the penalty being too harsh on the basis of what was before the respondent originally or on the basis of what should have been before her and which was, unfairly according to the applicant, not before her.

18 The kind of hearing that will, in prospect, occur on the basis of the applicant's dispute with the respondent will be a largely normal and uncontroversial one testing the issue of procedural fairness. There will be evidence and argument about the process that occurred supplemented by evidence that goes directly to demonstrating that if things had been done differently, fairly the applicant says, it would have made a difference to the outcome.

19 A "fresh" hearing on the allegations with the Western Australian Industrial Relations Commission starting from scratch is neither contemplated nor necessary given the matters in dispute.

20 To, by decision as this stage, confine the hearing to an examination of whether the respondent acted reasonably is not desirable given the matters the applicant is in dispute with the respondent about. I prefer to look at the hearing as simply one in which the applicant says the respondent did not accord its member procedural fairness. The reasonableness of the respondent's conduct is obviously relevant to such an enquiry but it would be overly restrictive to say it is the whole of the dispute.

21 It is, in my view, premature at this time to try and anticipate and deal with evidential disputes that may arise at the hearing. I will deal with them as and when they arise and in light of these reasons.

22 I issue a draft memorandum under regulation 31 *Industrial Relations Commission Regulations 2005* with these reasons and direct that within seven days the applicant provide to my chambers the missing information so that the memorandum may be completed.

23 Once the memorandum is settled I propose to make programming directions and will revert to the parties about these.

2018 WAIRC 00694

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 3 OCTOBER 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LUKE KRISTIAN DYMOCK
	APPELLANT
	-v-
	LANDGATE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MR N WITKOWSKI - BOARD MEMBER
DATE	TUESDAY, 21 AUGUST 2018
FILE NO	PSAB 21 OF 2017
CITATION NO.	2018 WAIRC 00694

Result	Directions issued
Representation	
Appellant	In person
Respondent	Mr J Carroll of counsel

Directions

HAVING heard from the appellant and Mr J Carroll of counsel for the respondent the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby DIRECTS:

1. THAT the applicant provide informal discovery of any material in his possession that he may rely upon at the hearing by 3 September 2018.
2. THAT the applicant and the respondent exchange a list of witnesses to be called by them not later than seven days prior to the commencement of the hearing.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Westcare Incorporated Supported Employment Services Enterprise Agreement 2018 - 2022 AG 14/2018	08/13/2018	Michael G Braybrook Hon Treasurer Disabled Workers Union	Chief Executive Officer - John Mitchell Westcare Incorporated	Chief Commissioner P E Scott	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2018 WAIRC 00270

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 26 FEBRUARY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MANDI BRENNAN
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR BARRY MCAULIFFE - BOARD MEMBER
	MS JACI HILLS-WRIGHT - BOARD MEMBER
DATE	TUESDAY, 1 MAY 2018
FILE NO	PSAB 6 OF 2018
CITATION NO.	2018 WAIRC 00270

Result	Direction issued
Representation	
Appellant	Ms S Grieco
Respondent	Mr S Barrett

Directions

(1) THAT each party shall give informal discovery by serving its list of documents by 14 May 2018.

(2) THAT inspection of documents shall be completed by 21 May 2018.

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

(4) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 14 days prior to the date of hearing.

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

(6) THAT the appellant be granted leave to adduce evidence by video-link from Karratha from a suitable venue as approved by the Appeal Board.

(7) THAT the appellant and respondent file an agreed statement of facts (if any) no later than seven days prior to the date of hearing.

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

(9) THAT the matter be listed for hearing for one day.

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

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

2018 WAIRC 00667

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 26 FEBRUARY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00667
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER- CHAIRMAN MR G SUTHERLAND - BOARD MEMBER MS J HILLS-WRIGHT - BOARD MEMBER
HEARD	**:**	TUESDAY, 5 JUNE 2018
DELIVERED	**:**	FRIDAY, 27 JULY 2018
FILE NO.	**:**	PSAB 6 OF 2018
BETWEEN	**:**	MANDI BRENNAN Appellant AND DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT Respondent

Catchwords	*:*	*Industrial Law (WA) – Appeal against decision of the respondent to take disciplinary action – Whether the applicant's failure to complete improvement actions on time constituted disregarding a lawful and reasonable direction of the respondent – Impact of applicant's significant mitigating circumstances – Principles applied – Applicant committed breach of discipline – Penalty imposed harsh in the circumstances – Penalty adjusted - Appeal upheld and order issued*
Legislation	*:*	*Industrial Relations Act 1979 (WA)* *Public Sector Management Act 1994 (WA) ss 80(a), 80A(b)* *Public Service and Government Officers CSA General Agreement 2017*
Result	*:*	*Appeal upheld. Order issued.*
Representation:		
Appellant	**:**	Ms D Larson and with her Ms S Grieco
Respondent	**:**	Mr S Barrett and with him Ms A Tovey

Case(s) referred to in reasons:

Titileus v Public Service Appeal Board and Ors [1999] WASCA 19

Case(s) also cited:

Baron v George Western Foods Ltd (1984) 64 WAIG 590

Byrne v Australian Airlines Limited (1995) 131 ALR 422

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

Titelius v Ministry of Justice, 1997 WAIRC 12136

Reasons for Decision

Background

1 The appellant Ms Brennan has been employed by the respondent, the Department of Transport, since early 2011. Ms Brennan's most recent position, leading up to the circumstances giving rise to this appeal, was a Senior Regional Officer at the Department's Karratha office, a level 4 position covered by the *Public Service and Government Officers CSA General Agreement 2017*. Two incidents occurred involving Ms Brennan, one in February and the other in May 2017, in relation to the home garaging of departmental vehicles. By letter of 5 September 2017, the Department informed Ms Brennan that allegations of breaches of discipline had been made out. Later, by letter of 19 October 2017, the Department imposed disciplinary action against Ms Brennan by way of a reprimand and additionally, required Ms Brennan to undertake improvement action. The improvement action that the Department required Ms Brennan to undertake was:

(a) familiarising herself with the Department of Transport Code of Conduct and notifying the Executive Director of People and Organisational Development (ED POD), via email that she had done so by 30 November 2017;

(b) retaking the Accountable and Ethical Decision Making online training course and forwarding the certificate of completion to the ED POD by 30 November 2017;

(c) familiarising herself with the Department of Transport Motor Vehicle Use Procedures; and

(d) writing to the Director of Northern Regions, advising him of her understanding of the appropriate use of Departmental vehicles including home garaging requirements by 30 November 2017.

2 Ms Brennan did not complete the improvement action by the due date of 30 November 2017. The improvement action was not completed until about one week later, on 8 December 2017. As a result, the Department took further disciplinary action against Ms Brennan which led to a finding, set out in a letter from the Department to Ms Brennan dated 14 December 2017, that she had committed a further breach of discipline by disregarding a lawful and reasonable direction from her employer. Later by letter dated 21 February 2018, the Department imposed disciplinary action against Ms Brennan by way of a reprimand and a demotion, reducing her classification to level 3 and transferring her to the position of Regional Officer.

Appeal

3 Ms Brennan now appeals against both the finding of a breach of discipline and the penalty imposed by the Department.

4 In short, Ms Brennan contended that the Department wrongly concluded that Ms Brennan had failed to show remorse for her failure to comply with the improvement action. Furthermore, the Department had wrongly concluded that Ms Brennan had disregarded a lawful order when she had not done so. It was also contended that the Department, in its final response upholding its breach of discipline and imposing the penalty in February 2018, appeared to change the basis for the allegation and finding against Ms Brennan, by indicating that "you believe that it was acceptable for you to disregard *part of my instruction* to you, specifically the due date for completion of the improvement action." (our emphasis).

5 Ms Brennan also maintained that the penalty of a demotion and transfer was excessively harsh in the circumstances. It was contended that the Department failed to have regard to significant mitigating circumstances, particularly the serious illness of Ms Brennan's father over the time the improvement action was to be undertaken. Other factors included the available work time to Ms Brennan to complete the actions given her absence on personal leave and the requirement to perform other duties at the Karratha office.

6 It was also Ms Brennan's contention that the Department's actions in serving her with its final penalty notice on 26 February 2018, on her first day back from personal leave after her father's recent funeral, was harsh. Additionally, Ms Brennan maintained that she has been further penalised by the Department beyond that set out in the penalty letter, in that she may no longer use the Regional Officer uniform and she has been required to undertake front counter duties required of a level 2 officer.

7 In the circumstances, Ms Brennan seeks orders that the finding of a breach of discipline and the penalty imposed be quashed and that she be reinstated to her former Senior Regional Officer position without loss.

The evidence

8 The evidence of Ms Brennan was that she first became aware of the disciplinary action the subject of these proceedings when she received an email dated Friday 8 December 2017 from Ms Tovey the Department's Employee Relations Consultant. This email was received by Ms Brennan on Monday 11 December 2017 when she arrived at work. Ms Brennan said that she attempted to speak with Ms Tovey by telephone however, she was not available and instead spoke with Mr Barrett, the Department's Manager of Employee Relations. Ms Brennan said that she told Mr Barrett that she had completed the improvement action on the previous Friday 8 December 2017 and had informed the relevant officers of the Department at the same time. She said Mr Barrett requested that she provide an explanation for the lateness for the completion of the improvement action, which Ms Brennan did straight away after speaking with Mr Barrett. Ms Brennan said she was not aware that this would be regarded as her response to the disciplinary allegation and she did not intend it to be so.

9 As to the background circumstances, Ms Brennan gave evidence about the state of her parents' ill health at around the time of the relevant events. She said that in the months prior to 8 December 2017, her father had been diagnosed with secondary cancer and depression. The prognosis was very poor. As her father wished to return to his own home, Ms Brennan testified that she and other family members spent considerable time arranging for this and for full time home care in Perth, in order that as much time as possible could be spent with her father.

10 Additionally, at about the same time, Ms Brennan's mother also was in a serious state of ill health, was bed-ridden. Ms Brennan and family members were also trying to spend as much time with her as was possible. Ms Brennan said that her father passed away in February 2018 and her mother also passed away shortly after, in March 2018.

11 Ms Brennan said that the circumstances of her parents' ill health had a significant impact on her. She testified that she was highly emotional and very preoccupied throughout this time. Ms Brennan said that this contributed to her not completing the improvement actions by 30 November 2017 on time. Her evidence was that she never intended to disregard her obligations in this regard. Insofar as what the improvement actions required, Ms Brennan's evidence was that she understood they were to reaffirm with her the Department's code of conduct, procedures in relation to vehicle usage and home garaging, and additionally, required her to retake the online training course in Accountable and Ethical Decision Making. Ms Brennan understood these were for her benefit to ensure she was reacquainted with the relevant Department policies. She did not consider that her failure to complete them by the due date of 30 November 2017, had any negative impact on either the Department or its customers.

12 In her evidence Ms Brennan responded to the Department's calculations that she had about 17 and a half working hours available to complete the required improvement actions. These included three and a half hours available on 19, 20, 30 October and 21 and 23 November 2017. It seems to have been later accepted by the Department that the 23 November date was an error, as Ms Brennan had taken four and a half hours' personal leave on this particular day. Furthermore, whilst the Department's notice of requirement for her to undertake improvement action was dated 19 October 2017, it was not served on her until the afternoon of 27 October 2017. Thus, Ms Brennan maintained she did not know of the requirements placed on her before this time and therefore, the days of 19 and 20 October could not be included by the Department. Ms Brennan said that given her absences on personal leave etc, there were only two working days, 30 October and 21 November 2017, that were available for her to complete the improvement action tasks.

13 As to these days, Ms Brennan said that in addition to undertaking her usual duties, she was also required to assist on front counter operations in the office. Furthermore, Ms Brennan said that on 30 October her partner sustained a serious work injury and she needed to return home as soon as possible to assist in his travel to Perth for urgent medical attention.

14 Despite what the Department maintained, Ms Brennan said that she was truly apologetic for the lateness in completing the improvement action and did raise in mitigation, her personal circumstances regarding her parents and the other matters to which she referred in her evidence. Ms Brennan also maintained that she understood that management of the Department were aware of these personal circumstances. Ms Brennan also testified that she was distressed that on her first day after returning to work from bereavement leave to attend her father's funeral, she was served with the Department's letter imposing the penalty of demotion arising from the disciplinary action.

15 Ms Brennan also maintained that she has been undertaking her required duties in the remote services area of the Department without difficulties; has travelled extensively in remote locations; has good relationships with the communities that she deals with and has received commendations from some of them as to her work. Ms Brennan maintained that the lateness in completing the improvement actions in the circumstances applicable to her, did not and do not reflect on her decision making and capacity to undertake the job that she is employed to do.

16 On behalf of the Department evidence was led from Mr Scanlan, the Director Northern Region, for the Department. Mr Scanlan gave evidence as to the background circumstances to the incidents in February and May 2017 concerning Ms Brennan's home garaging of Department vehicles. His evidence was that he agreed that the appropriate outcome to those disciplinary proceedings was a formal reprimand and that Ms Brennan be required to undertake the improvement actions. Mr Scanlan testified that he did not consider that the requirements imposed by the improvement action were particularly onerous and nor did he see any need for the Department to provide any reminders to Ms Brennan to complete the required actions, given the prior events. No request was made by Ms Brennan to seek an extension of time to complete the improvement action either. Additionally, whilst Mr Drummond, who was the Department's Pilbara Operations Manager, was not called to give evidence, Mr Scanlan did recall a conversation with him that he was "monitoring" the situation regarding Ms Brennan's improvement action. Also, he said that Ms Gaunt, another Senior Regional Officer, had reminded Ms Brennan of her obligations. Mr Scanlan said that he was not aware of Ms Brennan's personal circumstances, as outlined in her evidence.

17 When the due date for completion of the improvement action had passed, Mr Scanlan said he made enquiries on 1 December 2017 to see whether the improvement actions had been completed. Ms Tovey followed up with him on 4 December 2017 and he confirmed with her that there had been no report to him of the completion of the improvement actions by Ms Brennan. It was after this point that the matter became a disciplinary matter. On 8 December 2017 Mr Scanlan received Ms Brennan's email advising that she had completed the improvement action. However, it was Mr Scanlan's view that there was real remorse evident in her response. We note at this point however, that Ms Brennan was required to advise him of her completion of the improvement action and she was not aware at that stage, that there was any disciplinary action in the wind.

Consideration

18 It is undoubtedly important for an employee, who has had imposed upon them by their employer a disciplinary penalty and who is required to complete improvement action, to fully complete the improvement action as a part of the disciplinary process. In this case Ms Brennan did comply with the improvement action but not within the time frame that was required, that being by 30 November 2017. All other things being equal, this would constitute at least in part, disobeying or disregarding a lawful direction for the purposes of s 80(a) of the *Public Sector Management Act 1994*. On the evidence also, we accept that there was no request for an extension of time by Ms Brennan to complete the required tasks. With the benefit of hindsight, given the circumstances in which she was placed, she ought to have done so and explained the circumstances to her employer.

19 However, having regard to the evidence in this matter, we do not conclude that Ms Brennan's non-compliance with the improvement action, to the extent that the time frame required was not met, constituted wilful non-compliance. On the evidence there were plainly significant mitigating circumstances that impacted upon her. The very poor health of both of her

parents and both passing away a short time after the relevant events, would no doubt have had a significant emotional effect on Ms Brennan. She did take personal leave away from the workplace for these reasons. Additionally, the time periods initially nominated by the Department in which it was said Ms Brennan had available to complete the improvement action, do have to be adjusted for the circumstances referred to above. It could not be the case that Ms Brennan could be accountable for any time prior to receiving the notification of the improvement action and for periods when she was absent from the workplace on authorised personal leave.

20 Additionally, whilst not evident in her initial response on 8 December 2017, we accept that Ms Brennan did express genuine remorse when she became aware that disciplinary action was being taken in response to her failure to meet the timetable for compliance with the improvement action. Ms Brennan ought to have made the circumstances that she found herself in clearer, as we have already mentioned. However, on balance, having regard to the evidence, we do not accept that Ms Brennan "disregarded" the instruction from her employer as maintained by the Department.

21 Furthermore, apart from the garaging of the vehicles issue (which seems to have resulted from a change of policy of the Department) there was no evidence that Ms Brennan has not performed the duties and responsibilities of her job in regional services effectively. As we have referred to above, some commendations have been received in respect of the work she has performed for the Department. The importance of responding in a timely way to improvement actions arising from disciplinary matters cannot be downplayed. Ms Brennan argued that the consequences of non-compliance are of some consideration. It was contended that the improvement action imposed on Ms Brennan was principally for her benefit to ensure that she was reacquainted with the Department's policies in relation to vehicles, home garaging and other matters. It was argued that the non-compliance, in terms of being late to complete the improvement actions, had no direct impact on the Department or its business operations.

22 In our view this is not a relevant consideration in this case. The consequences for an employer of the actions of an employee, leading to disciplinary action being instituted, may be relevant to the exercise of discretion, in terms of the penalty to be imposed on the employee: *Titileus v Public Service Appeal Board and Ors* [1999] WASCA 19. However, once a finding of a breach of discipline has been made, the penalty imposed is not subject to the same considerations.

23 The penalty of a demotion in this case has a direct and significant financial impact on Ms Brennan, which will be ongoing. Having regard to the issues in this case, we conclude that the failure by Ms Brennan to complete the improvement action in the time allocated was a breach of discipline. However, given that the breach related to the timeliness of the completion of the required tasks and in view of the significant mitigating circumstances applicable to Ms Brennan at the material time, we consider the penalty imposed by the Department of a demotion, as a matter of equity and good conscience, to be harsh. In the circumstances we consider it appropriate to adjust the Department's decision to instead impose a penalty in relation to Ms Brennan's non-completion of the improvement action within time, of a fine of five days' pay. The reprimand will, of course, stand and a fine of the maximum amount specified in s 80A(b) of the PSM Act, affirms the importance of compliance with the improvement action imposed on Ms Brennan by the Department, but pays regard to the significant mitigating circumstances which existed at the time on the facts of this case.

Conclusions

24 Accordingly, for the foregoing reasons we will uphold the appeal and adjust the decision of the employer in accordance with the orders to issue.

2018 WAIRC 00668

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 26 FEBRUARY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MANDI BRENNAN
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR G SUTHERLAND - BOARD MEMBER
	MS J HILLS-WRIGHT - BOARD MEMBER
DATE	FRIDAY, 27 JULY 2018
FILE NO	PSAB 6 OF 2018
CITATION NO.	2018 WAIRC 00668

Result	Appeal upheld. Order issued
Representation	
Appellant	Ms D Larson and with her Ms S Grieco
Respondent	Mr S Barrett and with him Ms A Tovey

Order

HAVING heard Ms D Larson and with her Ms S Grieco on behalf of the appellant and Mr S Barrett and with him Ms A Tovey on behalf of the respondent the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

(1) THAT the appellant be reinstated to the position of Senior Regional Officer Level 4 at the respondent's Karratha office without loss effective from 21 February 2018 by no later than seven days from the date of this order.

(2) THAT the appellant pay a fine of five days' pay to consolidated revenue by no later than 21 days from the date of this order.

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

2017 WAIRC 00949

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 20 JUNE 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MICHAEL WILLIAMS
	APPELLANT
	-v-
	COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 20 NOVEMBER 2017
FILE NO.	PSAB 11 OF 2017
CITATION NO.	2017 WAIRC 00949

Result	Direction issued
Representation	
Appellant	In person
Respondent	Mr N van Hattem of counsel and with him Ms J Broderick

Direction

HAVING heard the appellant on his own behalf and Mr N van Hattem of counsel and with him Ms J Broderick on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the appellant file and serve on the respondent an outline of the

witness evidence upon which he intends to rely by no later than 21 days prior to the date of the hearing.

(2) THAT the respondent file and serve on the appellant an outline of the witness evidence upon which it intends to rely by no later than 14 days prior to the date of the hearing.

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

(4) THAT the appeal be listed for hearing for two days on dates to be fixed.

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

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

2018 WAIRC 00272

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 20 JUNE 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MICHAEL WILLIAMS
	APPELLANT
	-v-
	COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MR N CINQUINA - BOARD MEMBER MS B CONWAY - BOARD MEMBER
DATE	TUESDAY, 1 MAY 2018
FILE NO	PSAB 11 OF 2017
CITATION NO.	2018 WAIRC 00272

Result	Order issued
Representation	
Appellant	Mr G McIntyre SC of senior counsel
Respondent	Mr T Pontre of counsel

Order

HAVING heard Mr G McIntyre SC of senior counsel on behalf of the appellant and Mr T Pontre of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

(1) THAT the hearing of the herein appeal be and is hereby adjourned to a date to be fixed for one day.

(2) THAT the appellant file and serve on the respondent an outline of the witness evidence upon which he intends to rely by no later than 15 May 2018.

(3) THAT the appellant file and serve on the respondent an outline of submissions and any list of authorities upon which he intends to rely by no later than 15 May 2018.

(4) THAT should the appellant fail to comply with pars (2) and (3) of this order then the appeal will be taken to be dismissed.

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

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

2018 WAIRC 00720

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 20 JUNE 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00720
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER- CHAIRMAN MR N CINQUINA - BOARD MEMBER MS B CONWAY - BOARD MEMBER
HEARD	**:**	TUESDAY, 29 AUGUST 2017, TUESDAY, 1 MAY 2018, MONDAY, 20 NOVEMBER 2017, THURSDAY, 26 JULY 2018
DELIVERED	**:**	WEDNESDAY, 29 AUGUST 2018
FILE NO.	**:**	PSAB 11 OF 2017
BETWEEN	**:**	MR MICHAEL WILLIAMS Appellant AND COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE Respondent

Catchwords	*:*	*Industrial Law (WA) – Appeal against decision of the respondent to terminate employment – Whether the appellant committed a serious offence – Consideration of appellant's criminal conviction in this appeal – Whether the respondent waived the appellant's misconduct by continuing employment – Whether the appellant was afforded procedural fairness – Whether dismissal was proportionate in the circumstances – Principles applied – Appellant committed a serious offence – Respondent entitled to terminate appellant's employment – Appeal dismissed.*
Legislation	*:*	*Criminal Code Act Compilation Act 1913 (WA) s 440A* *Public Sector Management Act 1994* (WA) ss 58(4), 59(1), 80, 80A, 80I, 92(1) *Sentencing Act 1995* (WA) ss 9AA, 11
Result	*:*	*Appeal dismissed*
Representation:		
Counsel:		
Appellant	**:**	Mr G McIntyre of senior counsel
Respondent	**:**	Mr T Pontre of counsel
Solicitors:		
Appellant	**:**	Thexton Lawyers
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Bennett v The State of Western Australia [2012] WASCA 70

Gaudet v the Department of Corrective Services [2013] WAIRC 00032; 93 WAIG 279

Harvey v Department of Corrective Services [2017] WAIRC 00728; 97 WAIG 1525

Hollington v F Hewthorn and Co Ltd [1943] KB 587

Jorgensen v News Media (Auckland) Ltd [1969] NZLR 961

Kioa v West [1985] HCA 81

Mickleberg v Director of Perth Mint (1986) WAR 365

Plaintiff S10/2011 v Minister for Immigration and Citizenship [2012] HCA 31

R v Hill [1979] VR 311

Raxworthy v The Authority for Intellectually Handicapped Persons (1989) 69 WAIG 2266

Schugman v Menz [1970] SASR 381

Case(s) also cited:

Addis v Gramophone Co Ltd [1909] AC 488

Alkemade v SERCO Gas Services (Vic) Pty Ltd [1999] AIRC 45

Belinda Pinker v Director General Department of Education [2014] WAIRC 1312

Blyth Chemicals v Bushnell (1933) 49 CLR 66

Byrne v Australian Airlines Ltd (1995) 185 CLR 410

Carlyon v Commissioner of Police [2004] WAIRC 11428

Commonwealth Bank v Barker (2014) 253 CLR 169

Concut Pty Ltd v Worrell [2000] HCA 64

Container Terminals Australia Limited v Toby (2000) AIRC 97

Cosco Holdings Pty Ltd v Thu Thi Van Do & Ors [1997] FCA 1353

Crozier v Palazzo Corporation Pty Ltd (2000) 98 IR 137

Danijel Pantovic v Public Transport Authority of Western Australia [2011] WAIRComm 876

Federal Supply and Cold Storage Co of South Africa v Angehrn (1910) 103 LT 150

Gilles Gaudet v Commissioner Ian Johnson Department of Corrective Services [2013] WAIRC 32

Herbert Clayton v Oliver [1930] AC 209

Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44

Krishna Thavarasan v The Water Corporation [2006] WAIRC 04089

Leahy v Liquor, Hospitality and Miscellaneous Union (2009) WAIRC 00580

Lewis v Motorworld Garages Ltd [1986] ICR 157

Malik v Bank of Credit and Commerce International S.A. [1998] AC 20

Marbe v George Edwardes (Daly's Theatre) Ltd [1928] 1 K.B. 269

McDonald v State of South Australia [2008] SASC 134

McGrath v Commissioner of Police (2005) WAIRC 01989

Morton v Transport Appeal Board (No 1) [2007] NSWSC 1454

Nettlefold v Kym Smoker Pty Ltd (1996) 69 IR 370

North West County Council v Dunn [1971] HCA 34

Paul Smith v Director General - Department of Transport [2014] WAIRComm 134

Public Employment Industrial Relations Authority v Scorzelli [1993] NSWIRC 48

Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2008] NSWCA 217

Selvachandran v Peteron Plastics (1995) 62 IR 371

State School Teachers Union of WA (Inc) v The Director General, Department of Education [2017] WAIRC 00241

State School Teachers Union of WA (Inc) v The Director General, Department of Education [2017] WAIRC 00737

Thi Le Nguyen v Commissioner of Police [1997] WAIRC 213

United Voice WA v Director General, Department of Education (2014) WAIRC 01137

Victoria Laundry (Windsor) Ld v Newman Industries Ltd [1949] 2 K.B. 528

Wadey v YWCA Canberra [1996] IRCA 568

Warner v Commissioner of State Revenue [1997] IRCA 269

Wenham v Ella [1972] 127 CLR 454

Westen v Union des Assurances de Paris [1996] IRCA 610

Withers v General Theatre Corporation Ltd [1933] 2 K.B. 536

Woods v W.M. Car Services (Peterborough) Ltd [1982] ICR 693

Reasons for Decision

1 The appellant worked for the respondent as a level 3 Call Taker/Radio Operator at the respondent's Police Operations Centre. The appellant started work with the respondent in November 2007 and has been a Call Taker/Radio Operator since about January 2010.

2 The circumstances giving rise to the current appeal had their beginnings on the night of 18 March 2015. Between the hours of 9.00pm and 9.15pm that evening, the appellant attended at the respondent's Operations Centre. The appellant was on leave at that time. Earlier that day, the appellant had been at the respondent's Joondalup Police Academy to attend a lecture by a visiting police officer from America. The appellant then went to the Operations Centre and spoke to a work colleague, who was unable to attend the lecture with him earlier in the day.

3 While in the workplace, the appellant's computer was used to access the registration numbers of four vehicles and eight female persons connected with those vehicles, using the respondent's Information Management System (IMS). The IMS is a restricted access computer database which may only be accessed by authorised users for authorised work purposes. The access to the IMS by the appellant was disputed. The appellant maintained that he left his login open and someone else must have used his access. The respondent maintained that it was the appellant who accessed the information for both the vehicles and the female persons concerned.

4 In accordance with usual procedures the respondent's Internal Affairs Unit (IAU) were notified of and investigated the incident. The IAU investigation concluded on 22 December 2015. Earlier, on 5 June 2015, the appellant was charged with unlawful access to a restricted access computer system under s 440A of the *Criminal Code* (WA). Shortly after, on 17 June 2015, the respondent notified the appellant that it suspected that he had committed a breach of discipline under s 80 of the PSM Act. The respondent commenced its own disciplinary investigation into the appellant's conduct at about that time, which was subsequently suspended, pending the disposition of the criminal proceedings.

5 On 2 May 2016, the appellant pleaded guilty to the criminal charge and was convicted in the Magistrate's Court. On 14 July 2016, the appellant was sentenced to a fine of $5,000. The conviction was for a "serious offence" for the purposes of ss 80 and 92(1) of the *Public Sector Management Act 1994* (WA). Upon the appellant's conviction, the disciplinary process recommenced. It took some time. When the disciplinary process had taken its course, which involved the appellant's Union, the Civil Service Association acting on his behalf, it was not until 22 June 2017 that the respondent terminated the appellant's employment by payment of salary in lieu of notice. Some issue was taken by the appellant with the fact that he was deployed on other duties over this time. We will return to this issue later in these reasons.

The appeal

6 The appellant now appeals against his dismissal by the respondent under s 80I of the PSM Act.

7 The appellant maintained that his dismissal was in all the circumstances harsh, oppressive and unfair. The appellant contended that he admitted one access of a vehicle on the night in question, in response to a registration number being "called out" from the North Pod when he was present in the workplace. Otherwise, the appellant said he had no explanation for his actions other than expressing regret for leaving his computer login access open. The appellant maintained that he had no sinister motive nor did he personally benefit from the commission of the offence.

8 Other matters raised by the appellant in the appeal notice included that he was placed back into the police operations role with monitoring by the IAU after the incident; that the respondent has in the past been more lenient on other employees; and that his original conviction was in error. The appellant sought reinstatement without loss.

Relevant principles

9 It is trite to observe that appeals to the Appeal Board under s 80I of the PSM Act in relation to matters of the present kind proceed as a hearing de novo. As an appeal however, greater scope is given to the Appeal Board to enquire into the circumstances of the dismissal and to decide for itself on the evidence, if misconduct occurred. It is for the employer to establish on the evidence, the conduct of which it complains, whilst the overall onus remains on the appellant to persuade the Appeal Board that it should interfere with the employer's decision and adjust it: *Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266; *Harvey v Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525.

10 It is not in dispute in these proceedings that the appellant was charged and convicted of a serious offence. In these circumstances, s 92 of the PSM Act is enlivened. This provision is in the following terms:

> **92. Employee convicted of serious offence, powers as to**
>
> (1) Despite the *Sentencing Act 1995* section 11, if an employee is convicted or found guilty of a serious offence, the employing authority may take disciplinary action or improvement action, or both disciplinary action and improvement action, with respect to the employee.
>
> (2) Before any disciplinary action or improvement action is taken with respect to an employee under this section, the employee must be given an opportunity to make a submission in relation to the action that the employing authority is considering taking.

(3) If an employee is dismissed under this section, for the purposes of sections 58(4) and 59(1) the employee is taken to have been dismissed for breach of discipline.

11 The terms of s 92 were considered by the Appeal Board in *Gaudet v the Department of Corrective Services* [2013] WAIRC 00032; (2013) 93 WAIG 279 at par 24. In that case, the Appeal Board observed that under the legislation, in the case of an employee committing a serious offence, dismissal is not the only outcome. The terms of s 92(1) contemplate that an employer may take disciplinary action or improvement action or a combination of both. The discretion is to be exercised having regard to the circumstances of the case. The view of the employee is required to be sought in response to the employer's proposed action.

12 As this appeal is a civil proceeding, it is necessary to consider the consequences of the appellant's conviction for a serious offence under s 440A of the *Criminal Code* and the ability for it to stand in this appeal as evidence of not only the fact of the conviction itself, but also the facts on which the conviction was based. This question arose before the Western Australian Court of Appeal in *Bennett v The State of Western Australia* [2012] WASCA 70. In that case, the issue was the admissibility in a District Court criminal trial of the appellant's prior conviction (after trial) some years prior. In considering the cases, the Court of Appeal referred to *Hollington v F Hewthorn and Co Ltd* [1943] KB 587, which held that evidence of a criminal conviction was not admissible in subsequent civil proceedings. This approach of the English courts was not followed by the Full Court of the WA Supreme Court in *Mickleberg v Director of Perth Mint* (1986) WAR 365, which preferred and followed the approach taken by the New Zealand Court of Appeal in *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961. In *Jorgensen*, it was held that evidence of a prior conviction for a criminal offence may be admitted in subsequent civil proceedings, not just as evidence of the conviction but also as evidence, although not conclusive, of the relevant facts underlying it.

13 By parity of reasoning, the Court of Appeal in *Bennett* concluded (per Martin CJ at pars 60-66; Buss and Mazza JA agreeing) that the prior criminal conviction should be admissible in the subsequent criminal proceedings and should stand in the same fashion. In further considering the issues, and relevantly for present purposes, Buss JA also said at par 110:

> 110 Similarly, a plea of guilty to a criminal charge necessarily involves an admission by the offender of each of the elements of the offence, including all of the essential facts necessary to constitute the offence. See ***R v Hill*** [1979] VR 311, 312 (Young CJ, Menhennitt & Crockett JJ). The plea also negatives all defences. See ***Schugman v Menz*** [1970] SASR 381, 381- 382, 386 (Bray CJ). A plea of guilty does not, however, constitute an admission of all of the facts stated in the State's or Crown's depositions or witness statements. See ***Hill*** (312).

14 Where there is not a clear identification of the facts established by a conviction, the record of the criminal proceedings is the best guide. Also, whether, and if so to what extent, evidence may also be led in a subsequent proceeding to augment or to undermine or impugn the conviction, remains an open question: *Bennett* at par 67 per Martin CJ.

15 These matters are directly relevant to the appeal at hand. We consider that the appellant's plea of guilty and his conviction for the offence against s 440A of the *Criminal Code* must be taken on its face as evidence of the fact of the conviction and the factual circumstances upon which the learned Magistrate proceeded to convict and sentence the appellant. There was no demur by the appellant from the Statement of Material Facts before the Magistrate's Court. The appellant maintained in his evidence in these proceedings, that he only pleaded guilty because of an indication by the prosecutor on the day of his criminal trial, that the prosecution would seek a custodial sentence if the appellant was convicted. The appellant also contended that he instructed his counsel, that he would plead guilty only "on the basis that the facts of the offending would be amended to simply state that I had left my computer logged in and unlocked" (appellant's witness statement par 23).

16 Of course, the Statement of Material Facts (see exhibit R1) was not so amended and nor could it have been. This is because the conduct of the kind that the appellant said he mentioned to his counsel, as the condition for him pleading guilty, does not constitute a criminal offence under the *Criminal Code*. We consider that the Appeal Board is obliged to accept the Statement of Material Facts and the record of the proceedings before the Magistrate's Court, as marking out the facts on which the appellant's conviction was obtained. In these proceedings in his evidence, the appellant confirmed the consistency between the allegations of fact in the Statement of Material Facts and what his counsel submitted to the court on his plea and in subsequent sentencing submissions.

Issues to be determined on the appeal

17 Having regard to the submissions of senior counsel for the appellant and counsel for the respondent, we consider that the issues arising for determination on the appeal are:

(a) Did the appellant commit a serious offence?

(b) What were the circumstances of the offending?

(c) Did the respondent waive the appellant's misconduct by placing him in other work, especially work involving access to the IMS, pending the disposition of the criminal and disciplinary processes?

(d) Did the respondent afford the appellant procedural fairness?

(e) Having regard to s 92(1) of the PSM Act was disciplinary action in the form of dismissal an appropriate penalty? and

(f) If dismissal was a disproportionate response, what other penalty could have been imposed and are there any other reasons why it should not be imposed?

Serious offence

18 As noted earlier, it is not contested that the appellant was convicted on 2 May 2016 of an offence under s 440A of the *Criminal Code* and that this was a serious offence for the purposes of ss 80 and 92 of the *PSM Act*. We find accordingly.

The circumstances of the offending

19 As discussed above, the circumstances of the appellant's conduct, insofar as it constituted a criminal offence, is the record of the criminal proceedings before the learned Magistrate. Firstly, is the summons dated 2 June 2015. The Statement of Material Facts recorded that the accused attended the respondent's Police Operations Centre on Wednesday 18 March 2015. Between 9:03pm and 9:15pm it was alleged that the appellant accessed the IMS and searched four vehicles and eight female persons associated with the vehicles. The Statement of Material Facts noted that as a restricted database, the appellant was required to access the IMS by entering his own login credentials and that the database must only be used for official work purposes. As we have also mentioned earlier, the Statement of Material Facts noted that the appellant was not on duty at the time.

20 On the day listed for the appellant's trial on 2 May 2016 and prior to the hearing commencing, the transcript revealed that there were some discussions between defence counsel and the prosecutor. The upshot was the appellant entered a guilty plea. It is not uncommon in criminal proceedings for there to be a degree of plea negotiation. An accused may plead guilty to an offence in return for some charges to be discontinued or that submissions on a lesser sentence will not be opposed by the prosecution, for example. (See generally E Colvin and J McKechnie *Criminal Law in Queensland and Western Australia Cases and Commentary* 5th Ed at pars 27.37-27.41 and s 9AA *Sentencing Act* 1995 (WA)). Important to such arrangements is that an accused must not maintain their innocence. On any objective view, this is what occurred in this case. The appellant pleaded guilty, in anticipation of a possible advantage in relation to sentencing. We also refer to the observations of Buss JA above in *Bennett* at par 110, as to the effect of the guilty plea. The plea of guilty in the circumstances in which the appellant said it was entered by him, should not be regarded as impugning or undermining the conviction.

21 It was noted by the prosecutor at the hearing on 2 May 2016 that the appellant declined to be interviewed by the investigating officers and offered no explanation for his conduct: ts 5. This has not been disputed by the appellant in these proceedings. At the later sentencing hearing on 6 July 2016, from the transcript of the proceedings, the appellant's counsel informed the court that the appellant admitted the facts as alleged: ts 3. There was no qualification. The appellant's counsel conceded that the offending was "serious" and a "breach of trust": ts 3. Counsel for the appellant also informed the court that the appellant was not able to say why he did access the IMS on the night in question. There was a submission made about a practice of the appellant seeing suspicious activity outside of work and noting registration numbers (ts 5), presumably to search them later at work on the IMS. However, regardless of that submission by his defence counsel at the time, and in any event, such access would not be authorised. Submissions were also made that none of the female persons whose information was accessed on the IMS, were contacted in any way by the appellant or followed by him. Defence counsel submitted that there was no sinister motive: ts 6. It was not in dispute that four of the eight females whose details were accessed on the IMS were aged between 19 and 24 years. The others were considerably older: ts 8.

22 The learned Magistrate was taken by the prosecution through the "audit track" of documents, which are copies of screenshots of what was said to have been seen by the appellant on his computer, when the subject vehicles and individual person details were accessed on the IMS system. We were also taken through the same documents by the respondent, copies of which were contained in exhibit R1. It was contended by the prosecution that an inference was open that for the appellant to access the details of young females aged between 19 and 24 years of age in the fashion that he did, the appellant had a sinister purpose. This was especially so in circumstances where the appellant gave no explanation for his conduct, except that he could not recall accessing the system. The prosecutor submitted to the court that its case was strong. Apart from the audit track reports, evidence would have been that others saw the appellant present at the computer where the access to the IMS was performed and that he sent emails to himself from that computer: ts 17. Whilst the prosecution accepted there could be some discount for the guilty plea, it was submitted that it should not be large because of its lateness, being on the day of the trial: ts 16-17.

23 On 14 July 2016 the matter returned to the Magistrate's Court for sentencing. The learned Magistrate found that the appellant's access to the IMS was planned and was not opportunistic. The act was done in the course of his employment, such that persons in the appellant's position, even though he was on leave at the time, could be expected to access such information. This was therefore an aggravating circumstance, as such unauthorised accesses would be more difficult to detect: ts 2-3. The learned Magistrate was not able to find however, beyond reasonable doubt, that there was a sinister purpose involved in the appellant accessing the IMS records: ts 2. The learned Magistrate imposed a fine of $5,000 and no spent conviction order was made: ts 4.

24 As we have already noted above, when the content of the record of the criminal proceedings was put to him in these proceedings, including the Statement of Material Facts, the appellant accepted that it and the submissions made to the Magistrates Court on his behalf, were consistent. The appellant maintained his contention however, that he only pleaded guilty because he was fearful of receiving a custodial sentence, if convicted after trial.

25 Following the appellant's conviction and sentencing, the respondent wrote to the appellant on 18 November 2016 and informed him that he had been convicted of a serious offence. The respondent, under s 92(1) of the PSM Act, was pursuing the issue of disciplinary action against the appellant. The respondent noted, as was emphasised in the testimony in these proceedings from Mr Clark, the respondent's Acting Director of Human Resources, that no explanation had been provided by the appellant for his conduct. It was the appellant's case however, that he could provide none, as he had no recollection of the material events and denied that he had improperly and unlawfully accessed the IMS in any event.

26 In the respondent's letter the appellant was invited to respond to the breach of discipline allegations. Whilst the letter was undated, it seems that on 6 January 2017 the appellant did respond. In the letter and in his testimony before the Appeal Board, the appellant referred to the events on the night in question on 18 March 2015. He said that he was seated in the 000's POD and was checking his emails. He heard a registration number being called out and he logged onto the IMS to "run the registration". The appellant testified that he then spoke to another officer for ten minutes or so, left the area for a short while, returned, logged off the system and then left the building.

27 The appellant said in his written response to the respondent, that he only admitted to one access of the IMS, being the first referred to above. He denied all other access, other than to say that he accepted that his identifier was logged on and it accessed the four vehicles and eight female individuals. This denial is, of course, completely at odds with the plea of guilty, the submissions of defence counsel, and the sentencing remarks of the learned Magistrate in the criminal proceedings to which we have referred in some detail above.

28 As part of the appellant's response to the respondent, he referred to there being no sinister motive found by the learned Magistrate in the criminal proceedings. The appellant also expressed remorse for his actions and noted the toll it had taken on him personally, both in terms of his mental health and the breakdown of his relationship with his fiancé. It was later accepted in these proceedings, that the latter event was largely the result of the stresses caused by the criminal proceedings. The appellant also referred to his period of employment in the "CAD" project for some 18 months or so in which he said he did well. He also referred to moving back to the POC for a period, prior to his dismissal. We will comment on this further below. The appellant also referred to his nine and a half years of employment with the respondent and his claim of a good employment record.

29 In his oral evidence in this appeal, the appellant accepted that there were inconsistencies between what was before the Magistrate's Court in the criminal proceedings and what he told the respondent in response in the disciplinary action. Importantly, I note that the appellant's explanation that he told his counsel he would only plead guilty because of the possibility of a custodial sentence and that he understood that he was only pleading to leaving his computer logged on only emerged for the first time in this appeal. No mention of this was made to the respondent at the time of the recommencement of the disciplinary investigation. This is reflected in the correspondence between the appellant, his Union on his behalf, and the respondent. One would have thought that these matters would have been raised by the appellant or his Union on his behalf at the first opportunity, explaining what had occurred in the criminal proceedings. Whether an adverse inference should be drawn about this is a matter we will consider below.

30 Having regard to the principles discussed in *Bennett*, we accept the appellant's conviction on its face and the facts on which it was founded, from the record of proceedings before the Magistrate's Court. We are satisfied that the offending was serious for the reasons identified by the learned Magistrate in his sentencing remarks.

31 Furthermore, not only is the fact of the offending serious, the appellant's explanation as to what he says he instructed his defence counsel to indicate to the court that he was prepared to admit to, lacks credibility. As we have just mentioned, none of this was put to the respondent in the appellant's explanations for what occurred, despite ample opportunity to do so. As already noted too, it was some 21 months ago that the respondent confirmed it was proceeding with the disciplinary action under s 92 of the PSM Act and invited the appellant to respond in full. Some oblique reference to the appellant's "conviction was in error" appears in a letter from the CSA to the respondent of 15 May 2017, but there is no reference to the matters now raised by the appellant for the first time in these proceedings. Nor did the appellant raise with the respondent in his responses in the disciplinary matter, that he only pleaded guilty to avoid a possible custodial sentence. Again, this is a matter raised for the first time in these proceedings. Nor does the Appeal Board have the benefit of any corroborating evidence of what the appellant was said to have told his counsel when he entered his guilty plea, or in the subsequent sentencing proceedings.

32 We note that there was a substantial period between the appellant pleading guilty on 2 May 2016 and the hearing on 6 July 2016, when sentencing submissions were made by the prosecution and defence. Despite this time lag, there was still no demur by the appellant's counsel on 6 July, from anything put to the court when the guilty plea was entered.

33 The respondent did not accept the appellant's response to the proposed disciplinary action. The respondent maintained that the appellant's suggestion that someone else used his login to access the details of four vehicles and eight individual females, over the timespan involved and in the circumstances described, was not credible. Nor was his assertion that he accessed the first registration number based on it being "called out" on the night in question, able to be established. The respondent considered in the circumstances that there had been a breach of trust. On what is before us in this appeal, we consider, for the reasons developed further below, that it was open for the respondent to reach those views.

Waiver

34 It was contended by the appellant that because he continued in employment after his conviction then the respondent has, by its conduct, waived the appellant's misconduct. For the following reasons we do not accept this contention. Mr Clark gave evidence that it was a common practice for an employee subject to disciplinary processes to be kept at work and gainfully engaged. This was said to benefit both the employer and the employee. When the appellant was placed on the CAD project work he did not have access to critical and sensitive information technology systems. Later, in about mid-November 2016, the appellant, due to then staff shortages, was placed back in the POC as a dispatcher for a period. Mr Clark's evidence was that this was subject to a risk assessment and that the appellant's use of the databases was subject to close supervision and audit by the IAU. We accept that it was in this context, that the appellant received the email from the IAU dated 18 April 2017, to which the appellant referred, indicating that no breaches had been committed by the appellant of the respondent's security system.

35 Additionally, it is clear from the correspondence between the appellant, the CSA on behalf of the appellant and the respondent, that the disciplinary process had resumed by the 18 November 2016 letter from Mr Clark to the appellant. The material contained in exhibit R1 and the material annexed to the notice of appeal and the notice of answer, makes it plain that the disciplinary process was continuing and did so up to and including the letter dated 20 June 2017 from the respondent to the appellant, which terminated the appellant's employment. Viewed objectively, and having regard to this material, there could be no conclusion reached in our view, that the appellant's misconduct had, at any time, been waived by the respondent.

Procedural fairness

36 The appellant in his written submissions maintained that he was not afforded procedural fairness by the respondent. This was said to be so, as we understood the contentions, that the respondent in its correspondence with the appellant, had proposed to

him that it considered the appropriate disciplinary penalty was dismissal and sought the appellant's response. It seemed to be the appellant's argument that this constituted prejudgment and the respondent was not affording the appellant an opportunity to be heard on possible outcomes.

37 There can be no doubt that in public sector disciplinary matters, the principles of procedural fairness apply. This is recognised in the "Commissioner's Instruction No. 3 Discipline-general" that applies to public sector employers in relation to disciplinary matters. The general principles in relation to procedural fairness applicable to the exercise of statutory powers that may have an adverse effect on a person's interests are well known and do not require any exposition (See for example *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; (2012) 246 CLR 636). The content of the obligation to afford procedural fairness will also be conditioned by the terms of the statutory provision in question.

38 In this case, the terms of s 92(2) specify what an employer is required to do before taking any disciplinary or improvement action. It requires that before taking the proposed action, the employer is to provide the employee with an opportunity to make a submission. In this case the proposed action was dismissal. The chain of correspondence in evidence discloses that the respondent first wrote to the appellant on 17 June 2015 and set out in some detail the allegations and the process that was to be followed. On 18 November 2016, the respondent again wrote to the appellant referring to his conviction and invited the appellant to provide any explanation or response, before considering what disciplinary response may be proposed by the respondent. As mentioned above, the appellant did so in some detail by his letter of reply provided on 6 January 2017. On 7 March 2017 the respondent advised that it was proposing the disciplinary action of dismissal and invited the appellant to make any representations that he wished to in response, which he did by way of a letter from the CSA to the respondent, requesting the respondent's reasons for the proposed action and an extension of time to further reply. In its letter of 12 April 2017, the respondent set out in some detail the reasons for its proposed action and granted an extension of time to reply.

39 On 15 May 2017, the CSA on the appellant's behalf, provided a reply, again in some detail, to the proposed action of dismissal. Supporting documents were attached to the reply. The respondent subsequently responded by letters of 13 and 20 June 2017, the latter confirming and implementing the respondent's decision to terminate the appellant's employment. It is plain from the above steps that the respondent did take account of the matters raised by the appellant and on his behalf.

40 Given these steps, which arguably go beyond the strict requirements of s 92(2) of the PSM Act, it cannot be concluded that the appellant was to any extent, denied procedural fairness in our view.

Was dismissal a proportionate response?

41 Improper access to the respondent's IMS system is an act of serious misconduct. The appellant's conduct, on its face, as was submitted on his behalf to the Magistrates Court, was serious and involved a breach of trust. It is the case that the sanction of dismissal is the most severe form of disciplinary action open to an employer under s 80A of the PSM Act. As mentioned earlier, s 92(1) does not mandate that dismissal is the only outcome in cases where an employee has committed a serious offence. The circumstances of the case need to be considered.

42 In relation to proportionality, the appellant raised the issue of the treatment of other staff by the respondent, both sworn police officers and public service staff, who had improperly accessed the respondent's IMS system and had not been dismissed. At par 39 of the appellant's witness statement, he referred to several other individuals in this regard. Whilst each case must turn on its own circumstances, the following will briefly outline the evidence and submissions made in this respect.

43 In the case of a public servant Ms K, in 2009, she was charged with an offence under s 440A of the *Criminal Code* and a spent conviction was entered. Ms K accepted her misconduct, was contrite and Mr Clark testified from a review of the file, that Ms K received a reprimand for a serious breach of discipline. Another public service employee, Ms P, was also found guilty of an offence in 2010. She was later dismissed from the Police Force in 2013 for other reasons. Mr Clark said that in her case, Ms P had admitted her guilt and expressed remorse. The persons that she accessed on the system were known to her and she provided an explanation why she had acted as she did. Mr Clark was not generally aware of cases involving sworn police officers, as these matters were referred to the Professional Standards Division and not the Human Resources Division.

44 Another case in 2007, involved a public servant Ms C, who was also found guilty of an offence. An explanation was provided as to who the persons were that she accessed on the IMS. Ms C was contrite and accepted that she had done the wrong thing. Two other public service employees were disciplined for improper access to the IMS, both of whom resigned in the face of proposed dismissal. One case occurred in 2014 and the other occurred in 2016.

45 Whilst the Appeal Board is concerned with the facts and circumstances of the present case, what these other cases demonstrate is that each case will turn on its own circumstances, as is implicit under s 92(1) of the PSM Act.

46 This case has involved some unusual features. In some respects, the Appeal Board is placed in a difficult position. On the one hand we are obliged to accept the appellant's criminal conviction on its face, and the facts upon which that conviction is based. However, we are now told, well after the events in question, that the respondent was not told the full story at the time. The appellant says the respondent should have accepted the appellant's denial of his actions for the reasons he then outlined, as effectively supplemented by what he tells us now on this appeal, which was not mentioned to the respondent, some two years or so earlier. Furthermore, we are invited to conclude we should accept the appellant's version of events that, despite the guilty plea, someone else opportunistically used the appellant's login credentials to conduct targeted searches of records kept in the respondent's IMS over a short period of some 12 minutes between 9.03pm and 9.15pm on 18 March 2015.

47 There is a fundamental difficulty with this contention in face of the guilty plea, the conviction and sentencing, given the conclusions discussed above in *Bennett*. Additionally, the scheme in s 92 of the PSM Act is also inconsistent with the appellant's position. The section enables an employer to take disciplinary action on the strength of the conviction for a serious offence alone. It is implicit in s 92 that, as the employer may take disciplinary action, which can involve dismissal, the conviction or finding of guilt constitutes a breach of discipline, in this case for misconduct, in the terms of the statutory scheme in Division 3 of Part 5 of the PSM Act. It is inconsistent with the statutory scheme for an employee, duly convicted, to later

deny the conduct the subject of the serious offence they committed and for which they were convicted. The conviction or finding of guilt for the purposes of s 92(1) must be taken as conclusive in our view.

48 In any event and alternatively, the 35 pages or so of the copy of the screenshots of the computer screen reveal that the search conducted on the appellant's login was plainly performed by someone well versed in the use of the IMS. The search was targeted and was not random. Whilst other females were searched, there was a focus of the inquiries on young females between the ages of 19 and 24 years of age. It is the case that the respondent was rightly able to be concerned as to the nature of the searches and the apparent targeting of young females. Furthermore, other employees were apparently working relatively close to the appellant's location, as can be seen from the diagrammatical floor plan of the POD in evidence before us. From this plan of the POD area, in particular the location of the 000 call takers, it is difficult to accept that in the short period of time the appellant says he was absent from the work station where he was sitting, someone else arrived and sat at that same location, completely unnoticed, and then conducted searches of the IMS over a period of 12 minutes. This is especially so in circumstances where the appellant was not supposed to be at work on this occasion and on his own admission, was noticed by others present that evening and engaged in conversations with them. We consider it highly implausible that this occurred. None of the persons present were called to give evidence in these proceedings.

49 Given the fact of the conviction, and that the respondent was entitled to rely on it as evidence of misconduct establishing a breach of discipline for the purposes of s 92(1) of the PSM Act, the evidential burden rests on the appellant to make out his case on this issue. We are not convinced that he has.

50 Despite the appellant's claim to the contrary, he did not have an unblemished employment record with the respondent. There was an earlier incident in 2009 where the appellant, along with others it seems, engaged in inappropriate use of the respondent's email system by sending images of a sexual nature to others. A reprimand was issued at that time about appropriate use of the respondent's information systems. There was a further matter in 2013 when the appellant was provided with "verbal guidance" following occurrences of neglect of duty.

51 Having regard to these considerations, we are not persuaded that the dismissal of the appellant by the respondent was a disproportionate response. In view of our conclusions on the question of proportionality, it is not necessary to consider alternatives to dismissal.

Conclusions

52 We are not persuaded that the appellant has established a case such that the Appeal Board should interfere with and adjust the respondent's decision. The appeal is accordingly dismissed.

2018 WAIRC 00721

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 20 JUNE 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MICHAEL WILLIAMS
	APPELLANT
	-v-
	COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MR N CINQUINA - BOARD MEMBER
	MS B CONWAY - BOARD MEMBER
DATE	WEDNESDAY, 29 AUGUST 2018
FILE NO	PSAB 11 OF 2017
CITATION NO.	2018 WAIRC 00721

Result	Order issued
Representation	
Appellant	Mr G McIntyre SC of senior counsel
Respondent	Mr T Pontre of counsel

Order

HAVING heard Mr G McIntyre SC of senior counsel on behalf of the appellant and Mr T Pontre of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Senior Commissioner
[L.S.] 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 12/2018	Henry Chimbama	Wayne Salvage Chief Executive North Metropolitan Health Service	Emmanuel C	Appeal against the decision to take disciplinary action on 3 April 2018	N/A	Discontinued
PSAB 16/2017	Robert Adams	WA Country Health Service	Emmanuel C	Appeal against the decision to terminate employment on 2 August 2017	10/10/2017	Discontinued

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Matters dealt with—

2018 WAIRC 00699

REFERRAL OF EMPLOYMENT DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00699
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	FRIDAY, 22 JUNE 2018
DELIVERED	**:**	WEDNESDAY, 22 AUGUST 2018
FILE NO.	**:**	APPL 27 OF 2018
BETWEEN	**:**	NABEEL ASHRAF Applicant AND MS MICHELLE HOAD MANAGING DIRECTOR NORTH METROPOLITAN TAFE Respondent

Catchwords	*:*	Industrial law (WA) – Dispute whether clause is a referral agreement – Found that clause is a referral agreement but that agreement had expired prior to referral.
Legislation	*:*	*Employment Dispute Resolution Act 2008 s 3, s 12* *Industrial Relations Act 1979 s 41*
Result	*:*	*Application dismissed*
Representation:		
Counsel:		
Applicant	**:**	Mr S Maré of counsel
Respondent	**:**	Mr J Carroll of counsel
Solicitors:		
Applicant	**:**	Workwise Advisory
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Kos v Department of Transport 94 WAIG 1623

Reasons for Decision

1 The applicant says that clause 23 of the Western Australian TAFE Lecturer's General Agreement 2014 is a "referral agreement" under the *Employment Dispute Resolution Act 2008* (WA).

2 The respondent disputes this relying upon the decision of *Kos v Department of Transport* 94 WAIG 1623 and submissions to the effect that the decision is correct.

3 Section 3(1) *Employment Dispute Resolution Act 2008* defines "referral agreement" to have "the meaning given in section 12(1)".

4 Section 12(1) *Employment Dispute Resolution Act 2008* provides as follows:

> Two or more parties may enter into an agreement in writing (a ***referral agreement***) that a particular employment dispute, or employment disputes of a particular class, between the parties may be resolved by the IR Commission.

5 Pursuant to clause 23, two parties, the State School Teachers' Union of W.A. (Inc) and Director General of the Department of Training and Workforce Development (the latter for all intents and purposes being the respondent in this matter) agreed that employment disputes of a particular class, that being grievances of employees about disciplinary penalties imposed on them short of termination, may be referred to the Western Australian Industrial Relations Commission for determination.

6 Clause 23 is, in my view, plainly a "referral agreement" under section 12(1) *Employment Dispute Resolution Act 2008*.

7 The respondent says that an industrial agreement is materially different from a referral agreement, something they say was correctly determined by the Western Australian Industrial Relations Commission in *Kos v Department of Transport* 94 WAIG 1623.

8 While this may be true I do not, with respect, see any reason to conduct a comparison between "industrial agreements" and "referral agreements". I do not think there is anything material about a "referral agreement" being in an "industrial agreement", so long as it is actually a referral agreement.

9 In *Kos v Department of Transport* 94 WAIG 1623 the Western Australian Industrial Relations Commission said "a referral agreement has particular characteristics which are not found in a registered industrial agreement". That, while true, is, in my respectful view, not material.

10 The Western Australian Industrial Relations Commission said that a referral agreement has a "sole purpose". I do not see why that purpose may not be achieved by inclusion of a referral agreement in an industrial agreement.

11 The Western Australian Industrial Relations Commission considered it material that referral agreements come into force by "agreement of the parties" and "not by registration" and that a referral agreement does not need to be "registered by the Commission".

12 I do not see anything material in an industrial agreement only operating when registered. What is material is whether the industrial agreement evidences an agreement of the sort referred to in section 12 *Employment Dispute Resolution Act 2008*. Here such an agreement is evident from a plain reading of clause 23 of the Western Australian TAFE Lecturer's General Agreement 2014.

13 I do not consider, for the reasons given above, that the features of an industrial agreement referred to in the first three sentences of [8] of *Kos v Department of Transport* 94 WAIG 1623 are material. What is material is whether the industrial agreement contains an agreement which corresponds to section 12 *Employment Dispute Resolution Act 2008*.

14 Assuming that it is a basic principle of construction that all provisions of a document ought be given some work to do, I wonder what work clause 23 would do if it is not a referral agreement.

15 It has become clear in related proceedings that the clause does not and cannot act to expand the Western Australian Industrial Relations Commission's jurisdiction beyond that statutorily provided to it.

16 It seems to me that if clause 23 is a referral agreement this gives the clause some work to do. This is, of course, not the reason for my ultimate decision, given that I consider clause 23 is a referral agreement, but it is a source of comfort to me that this result gives clause 23 some work to do when nothing is put forward as to the work it might do absent this conclusion.

17 In the last sentence of [8] in *Kos v Department of Transport* 94 WAIG 1623 the Western Australian Industrial Relations Commission noted "there can be unilateral withdrawal [from an industrial agreement] by giving the prescribed notice, in contrast to withdrawal from an industrial agreement."

18 The materiality of the comment is not immediately apparent to me but it did cause me to consider section 12(6) *Employment Dispute Resolution Act 2008* and its effect, if any, on this matter. I sought comment from the parties about the issue.

19 Section 12(6) of the *Employment Dispute Resolution Act 2008* provides as follows:

> (6) A referral agreement —
>
> (a) comes into force —
>
> (i) if a commencement date is specified in the agreement — on that date; or
>
> (ii) otherwise — on the date on which it is made;
>
> and
>
> (b) remains in force until —
>
> (i) if an expiry date is specified in the agreement but all the parties agree to withdraw from the agreement prior to that date — the date on which the parties agree to withdraw; or
>
> (ii) if an expiry date is specified in the agreement and subparagraph (i) does not apply — that expiry date; or
>
> (iii) otherwise — the third anniversary of the date on which the agreement came into force.

20 It is clear from section 12(6)(b) *Employment Dispute Resolution Act 2008* that referral agreements do not remain in force forever.

21 Section 12(6)(b)(i) of the *Employment Dispute Resolution Act 2008* has no application to this matter.

22 The question is whether an expiry date is specified in the referral agreement or not.

23 Clause 7.1 of the Western Australian TAFE Lecturer's General Agreement 2014 says as follows:

> This agreement shall operate on and from the date of registration and will remain in force until the **15 December 2017**. Notwithstanding the expiry of this Agreement, its terms and conditions will continue in force until it is replaced by a new agreement.

24 The question then is whether an expiry date is "specified in the agreement" by clause 7.1 of the Western Australian TAFE Lecturer's General Agreement 2014 and, if so, whether that date is "15 December 2017" or the date upon which the Western Australian TAFE Lecturer's General Agreement 2014 is replaced by a new agreement.

25 Of course, if clause 7.1 does not provide an expiry date for the referral agreement, then section 12(6)(b)(iii) *Employment Dispute Resolution Act 2008* will operate to the effect that the referral agreement expired on 7 May 2018 (that is three years after the agreement was made) and, accordingly, was not in force at the time the referral in this matter was made.

26 The language of section 12(6)(b)(ii) *Employment Dispute Resolution Act 2008* could not be clearer. A relevant expiry date is one specified "in" the referral agreement. The applicant's argument, which I have accepted as correct, is that clause 23 of the Western Australian TAFE Lecturer's General Agreement 2014 is a referral agreement. No expiry date is specified in that agreement. "In" must mean "inclusion within a particular space or limit" or "on the inside, within" and there is simply no expiry date in the referral agreement.

27 I cannot be assisted by principles of construction that would have me read the whole of the industrial agreement and interpret a clause of that agreement in light of other provisions within it. Clause 23 comprises a "stand alone" referral agreement.

28 It may seem an odd result that, insofar as clause 23 is a referral agreement, the clause ceases to operate despite the provisions of clause 7.1 and, indeed, despite section 41(6) of the *Industrial Relations Act 1979*. This might be pointed to as exposing a folly in treating a clause in an industrial agreement as a referral agreement.

29 However, I think this is overcome by the principle of statutory construction that a specific statutory provision prevails over an inconsistent general provision.

30 Section 41(6) *Industrial Relations Act 1979* is more general, in the current context, than the specific provision of section 12(6)(b)(iii) *Employment Dispute Resolution Act 2008*.

31 That is, a provision of an industrial agreement will continue to operate pursuant to section 41(6) *Industrial Relations Act 1979* except for a provision that is a referral agreement which does not specify an expiry date. Such a provision will not continue to operate beyond the third anniversary of the date on which the agreement came into force.

32 The referral in this matter was made at a time after the referral agreement had ceased to be in force. The referral was not made before the third anniversary of the date on which the referral agreement was made, that third anniversary date being the date upon which the referral agreement ceased to be in force.

33 As a result of the operation of section 12(6)(b)(iii) *Employment Dispute Resolution Act 2008* I do not have jurisdiction to accept and determine the referral and the application that I do so must be dismissed.

2018 WAIRC 00698

REFERRAL OF EMPLOYMENT DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NABEEL ASHRAF
	APPLICANT
	-v-
	MS MICHELLE HOAD MANAGING DIRECTOR NORTH METROPOLITAN TAFE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 22 AUGUST 2018
FILE NO/S	APPL 27 OF 2018
CITATION NO.	2018 WAIRC 00698

Result	Application dismissed
Representation	
Applicant	Mr S Maré of counsel
Respondent	Mr J Carroll of counsel

Order

HAVING HEARD Mr S Maré of counsel for the applicant and Mr J Carroll of counsel for the respondent the Commission pursuant to the power conferred under the *Industrial Relations Act 1979* hereby orders that the application be and is hereby dismissed.

(Sgd.) D J MATTHEWS,

[L.S.] Commissioner.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 6/2015	Geoffrey Rimmer	Department of Corrective Services of W.A.	Emmanuel C	Discontinued	18/01/2017