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INDUSTRIAL MAGISTRATE—Claims before—

2018 WAIRC 00809

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2018 WAIRC 00809
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 27 JUNE 2018
DELIVERED	**:**	THURSDAY, 18 OCTOBER 2018
FILE NO.	**:**	M 109 OF 2017
BETWEEN	**:**	BRIAN JOHN MCCORMACK
		CLAIMANT
		AND
		THE COMMISSIONER OF POLICE
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW (WA) - Construction of industrial agreement - Alleged contravention of clause of the *Western Australia Police Industrial Agreement 2014* on non-work related medical and pharmaceutical expenses – Whether therapy delivered by a machine was the result of 'service under a referral given by a Medical practitioner' – Whether clause created 'authority to pay' or conferred a discretion upon employer – What constitutes contravention of an obligation upon an employer to exercise a discretion
Instrument	**:**	*Western Australia Police Industrial Agreement 2014* *Western Australia Police Industrial Agreement 2009*
Legislation	**:**	*Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) *Industrial Relations Act 1979* (WA) *Magistrates Court (Civil Proceedings) Act 2004* (WA) *Police Act 1892* (WA) *Interpretation Act 1984* (WA) *Fair Work Act 2009* (Cth) *Acts Interpretation Act 1901* (Cth)

Case(s) referred to in reasons	:	***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27
		Fedec -v- The Minister for Corrective Services [2017] WAIRC 828
		City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union [2006] FCA 813
		Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd [2013] FCA 638
		Minister for Police v Western Australian Police Union of Workers (1995) 75 WAIG 1504
		Pearce v Commissioner of Police [2018] WAIRC 679
		Western Australian Police Union of Workers v Commissioner of Police (2003) WAIRC 7604
		Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357
		Toyota Motor Corporation Australia Limited v Marmara [2014] FCAFC 84
		Vincent -v- Department of Finance [2016] WAIRComm 35 ***Burnie Port Corporation Pty Ltd v Maritime Union of Australia*** [2000] FCA 1768
Result	:	Judgment for the claimant; Commissioner required to re-consider employee claims for non-work related medical expenses
Representation:		
Claimant	:	Mr A. Crocker as instructed by Tindall Gask Bentley Lawyers
Respondent	:	Mr J. Carroll and with him Mr F. Cardell-Oliver as instructed by the State Solicitor's Office

REASONS FOR DECISION

Introduction

1 Brian McCormack (the claimant) is a member of the Western Australia Police Force. The terms and conditions of his employment are found in an industrial agreement, the *Western Australia Police Industrial Agreement 2014* (the Agreement).[1] Over the period August 2015 – October 2015, he received treatment for a medical condition and incurred expenses in connection with that treatment. Relevant to this case, the expenses included hospital charges following an overnight stay in hospital (Hospital Expense, $250) as well as the cost of hiring and subsequently purchasing of medical equipment (Machine Hire Expense, $250 and Machine Purchase Expense, $1,780). The expenses will be referred to, collectively, as 'the Three Expenses'.

2 Clause 36 of the Agreement concerns 'non work-related medical expenses' and provides that the Commissioner of Police (the Commissioner) may reimburse the reasonable medical expenses of an employee where those expenses fall within categories proscribed by the clause.[2] The claimant lodged claims for reimbursement of the Three Expenses (the Reimbursement Claims). The Commissioner refused the Reimbursement Claims. The claimant alleges that the refusal was a contravention of cl 36 of the Agreement. The case requires my determination of three issues.

3 First, the Commissioner contends that, on any view of the facts, the Three Expenses do not fall within the categories proscribed by cl 36 of the Agreement. Specifically, the Commissioner contends that the expenses are not, as mandated by cl 36(1)(b) of the Agreement, the result of '*service'* or follow a '*referral given by a medical practitioner'.* For the reasons set out below under the heading, 'Issue 1', I reject the Commissioner's contention, finding that it was open to the Commissioner to conclude that the Three Expenses fall within cl 36 of the Agreement.

4 Secondly, the claimant contends the Commissioner was *required* to grant the Reimbursement Claims. The clause was said to confer upon the Commissioner the '*authority to reimburse*' expenses that fall within categories proscribed by the clause and it was said that, on any view of the facts, the Three Expenses fall within those categories. The Commissioner responds that, properly construed, cl 36 of the Agreement confers upon the Commissioner the discretion to grant or refuse a claim that falls within the categories proscribed by the clause. For the reasons set out below under the heading, 'Issue 2', I reject the claimant's submission, concluding that the clause confers a discretion on the Commissioner.

5 Thirdly, it is necessary to determine whether, in refusing the Reimbursement Claims, the Commissioner has properly exercised the discretion conferred upon the Commissioner by cl 36 of the Agreement. For the reasons set out below under the heading, 'Issue 3', the claimant has satisfied me that the Commissioner has failed to exercise the discretion in the manner required by cl 36 of the Agreement, with the result that an order will be made for the Commissioner to re-consider the Reimbursement Claims.

6 These three issues are examined after setting out immediately below: observations on the jurisdiction, practice and procedure of this court; a summary of the Agreement including principles applicable to interpreting the Agreement; and facts relevant to the Commissioner's refusal of the Reimbursement Claims.

The jurisdiction, practice and procedure of the Industrial Magistrates Court (IMC)

7 The IMC has the jurisdiction conferred by the *Industrial Relations Act 1979* (WA)[3] (IR Act) and other legislation. Sections 83 and 83A of the IR Act confer jurisdiction on the court to make orders for the enforcement of a provision of an industrial agreement where a person has contravened or failed to comply with the agreement. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty[4] and make any other order, including an interim order, necessary for

the purpose of preventing any further contravention.[5] The IMC must order the payment of any unpaid entitlements due under an industrial agreement.[6]

8 The powers, practice and procedure of the IMC are the same as a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA).[7] The onus of proving a claim is on the claimant and the standard of proof required to discharge this onus is proof 'on the balance of probabilities'. The IMC is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.[8] In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27 [40] – [47], Commissioner Sleight examined a similarly worded provision regulating cases in the State Administrative Tribunal of Western Australia, noting:

> *[T]he rules of evidence are [not] 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. …*
>
> *The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.*

The Agreement

9 This case involves construing the Agreement. The IR Act provides for the registration by the Commission of an agreement between an organisation of employees and any employer made with respect to any industrial matter.[9] On registration, an industrial agreement binds employees (as indicated in the agreement) and employers who are a party to the agreement.[10] The relevant principles to be applied when interpreting an industrial agreement were set out by the Full Bench of the Western Australian Industrial Relations Commission in ***Fedec -v- The Minister for Corrective Services*** [2017] WAIRC 00828 [21] – [23]. In summary (omitting citations), the Full Bench stated:

a. 'The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement.'

b. 'The primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument. It is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;'

c. 'The objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context. The apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances';

d. 'An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ';

e. 'An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation'; and

f. 'Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.'

To the above list I would add:

g. Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed. ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813 [53] – [57] (French J).

h. Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate. ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813 [53] – [57] (French J); ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638 [28] – [30] (Katzmann J).

10 The Agreement is primarily concerned with the salaries, hours of work, allowances, and leave entitlements of members of the Western Australia Police Force.[11] Provision is also made for mechanisms to deal with change and dispute settlement.[12] Part V of the Agreement concerns 'Allowances' and sets out the conditions for an employee entitlement to specified payment for particular purposes.[13] Part VI of the Agreement concerns 'Leave of Absence' and, *except* for clauses 35 and 36, sets out the conditions for an employee entitlement to (paid or unpaid) leave for a particular purpose, e.g. annual leave, long service leave, bereavement leave, parental leave, illness or injury etc.[14]

11 Clauses 35 and 36 of the Agreement concern the entitlement of employees to have certain medical expenses paid by the Commissioner. These clauses are proximate to clauses 33 and 34 of the Agreement concerning, respectively, the entitlement to paid leave for illness or injury and the entitlement to carer's leave on account of a sick family member. The relevant text of clauses 33, 34, 35 and 36 of the Agreement is set out in full in an endnote to these reasons.[15]

12 Clause 35 of the Agreement states that, subject to exceptions, the Commissioner '*shall* pay the reasonable medical, dental, medical aides, hospital and travelling expenses incurred by an employee as a result of illness or injury' (emphasis added) during employment (the Work-Related Medical Expenses Benefit). The claimant and the Commissioner are in agreement that cl 35 of the Agreement is to be construed with the result that reasonable medical, dental, etc. expenses incurred by an employee as a result of illness or injury during employment *must* be paid by the Commissioner.

13 The effect of cl 36 of the Agreement is threefold. First, subject to exclusions found in cl 33(7)(b) and cl 36(3) of the Agreement (the Exclusions) and lodging a claim that complies with cl 36(4) (the Claim Form Requirements), the Commissioner 'may pay the reasonable medical illness or injury related expenses ... of an employee who receive[d] any consultation, treatment or other service by a medical practitioner' (the Non-Work Medical Practitioner Expenses Benefit).

14 Secondly, subject to the Exclusions and to the Claim Form Requirements, the Commissioner may pay the reasonable medical illness or injury related expenses of an employee who received any x-ray or other service provided by a third party under a referral given by a medical practitioner (the Non-Work Third Party Expenses Benefit).

15 Thirdly, subject to the Claim Form Requirements, an employee is entitled to be paid the costs of medicine supplied by a pharmacist on the prescription of a medical practitioner (the Pharmacist Expenses Benefit).

16 The entitlement to the Non-Work Third Party Expenses Benefit is at issue in this case and gives rise to the three issues identified in the introduction to these reasons. The claimant and the Commissioner are in agreement that, upon an employee satisfying the Claim Form Requirements, the Pharmacist Expenses Benefit *must* be paid by the Commissioner. I agree. Clause 36(2) of the Agreement provides that, subject to the Claim Form Requirements, an employee 'is entitled to' the benefit. The ordinary meaning of the word 'entitle' is to 'give a person a right to something'.[16] The word 'entitled' in a legal instrument suggests a person has been given a legal right. A legal right (usually) attracts a correlative legal duty.[17] This result is consistent with reasoning of the majority of the Industrial Appeal Court in ***The Minister for Police & Anor v Western Australian Police Union of Workers*** (1995) 75 WAIG 1504 (discussed below).

Facts

17 On 3 May 2016, the Commissioner's Director of Human Resources wrote to the claimant confirming the refusal of the Reimbursement Claims. This was said to be after a 'review [of] the information compiled at the earlier stages' and after undertaking 'any further investigations deemed necessary'. For the purposes of resolving the three issues identified in the introduction to these reasons it is helpful to compile a chronology by drawing upon the contents of documents supplied by the claimant to the Commissioner before 3 May 2016.

5 January 2015

18 On this day, Dr Peter Bairstow, a General Practitioner, wrote to Dr Michael Prichard, a respiratory and sleep physician, stating that the claimant's family had suggested 'obstructive sleep apnoea as an issue' and requesting a review and consideration of management of the claimant as appropriate. Dr Prichard's premises were identified as the 'Mount Respiratory/Perth Sleep Clinic' at Suite 27, 146 Mounts Bay Road, Perth.

5 August 2015

19 Dr Prichard records that the claimant 'attended the Mount Hospital to complete an overnight sleep study' on this date.[18] The claimant states that the overnight sleep study was 'at the Mount Hospital under the supervision of Dr Michael Prichard'.[19] A receipt of this date issued by an entity described as, variously, 'The Mount Private Hospital' and 'Healthscope Operations Pty Ltd' records $250 as 'inpatient deposits' received from the claimant. A document entitled 'Informed Financial Consent' and issued by an entity identified as 'Healthscope' contains reference to: 'AD:05/08/15 Mount'; Dr M Prichard; 'fund excess patient cost (per day) of $250. The Reimbursement Claim relating to the Hospital Expense records a 'hospital stay – Mount Hospital' on this day and a 'gap balance' of $250.[20]

6 August 2015

20 Dr Prichard records that the claimant was diagnosed with 'obstructive sleep apnoea and prescribed nasal CPAP therapy' on this date.[21] (CPAP is an acronym for 'continuous positive airway pressure'). Dr Prichard's fee of $379.35 for an 'initial assessment' on this date was paid by the claimant and reimbursed to the claimant, as to $224.35 by Medicare Australia and as to $155 by the Commissioner.

21 The claimant records that he commenced a trial of 'CPAP therapy' involving 'a CPAP machine' on this date that this continued until an overnight sleep study on 15 September 2015.[22] A tax invoice/receipt on 6 August 2015 records $250 for an 'Initial CPAP trial – 1 month rental' received by the claimant. The receipt identifies various entities: 'ResSleep Perth (of) suite 27/146 Mounts Bay Road'; and 'Goldrange Nominees Pty Ltd ATF The CPAP Services Trust'. The Reimbursement Claim relating to the Machine Hire Expense records 'CPAP treatment – Initial hire assess' of $250.[23]

15 – 16 September 2015

22 An overnight sleep study takes place. Dr Prichard considers CPAP therapy 'to be beneficial' and recommends that the claimant purchase 'his own CPAP pump to manage CPAP therapy in the long term'.[24] Dr Prichard's fee of $187.30 for this 'follow up consultation' was paid by the claimant and reimbursed to the claimant, as to $112.30 by Medicare Australia and as to $75 by the Commissioner.

8 October 2015

23 On this day, upon the advice of Dr Prichard, the claimant purchased a CPAP machine. A tax invoice/receipt on 8 October 2015 records $2,500 for '*AirSense 10 with built-in wireless connectivity, HumidAir and ClimateLineAir'* received by the claimant. The receipt is in the same terms as the one noted to have issued on 6 August 2015 for '1 month rental'. A health insurance

claim resulted in a benefit of $720 for 'an appliance' being paid to the claimant.[25] The Reimbursement Claim relating to the Machine Purchase Expense records 'Purchase of CPAP Machine as directed by Dr Prichard' of $1,780.

3 May 2016

24 On this day, the Commissioner's Director of Human Resources wrote to the claimant in response to a grievance procedure invoked by the claimant in connection with the Commissioner's refusal of the Reimbursement Claims relating to the Hospital Expense and the Machine Hire Expense:

> *[T]he approval or not of this claim rests on whether the Commissioner of Police has used his discretion appropriately when determining whether he may or may not pay this claim.*
>
> *This discretion must allow the Commissioner to limit which expenses are reasonably deemed payable in such circumstances. Having looked at the evidence before me, the industrial provisions and historical application of the Commissioner's discretion in such matters I have determined that the rejection of your claim … is consistent with all previous applications and is made in line with the Commissioner's discretion which has not, in my view, been capricious, arbitrary or unreasonable.'*
>
> *I also note that the Executive Director confirmed Western Australia Police's position in relation to the hiring of short-term diagnostic equipment in a letter to the Union dated 27 November 2015 in which it is stated: …the short term hire of diagnostic equipment such as 'holter-monitoring' will be considered for reimbursement on a case by case basis.*
>
> *As the Commissioner has used his discretion appropriately and consistently, the decision made to deny your two non work-related claims … will be upheld…*

Issue 1: Meaning of 'Referral' and 'Service'

25 The Commissioner contends that, on any view, the Three Expenses do not fall within the description of Non-Work Third Party Expenses Benefits in cl 36(1) of the Agreement because those expenses do not follow a 'referral' by Dr Prichard and are not referable to a 'service'.

26 Observing that a Non-Work Third Party Expenses Benefit is an expense 'provided under a *referral* given by a medical practitioner', the Commissioner submits that the material in support of the Three Expenses was incapable of sustaining a conclusion that the expense was the result of a *referral* given by Dr Prichard. The argument is in the form of a syllogism (underlined):

a. A 'referral' for the purposes of the cl 36(1)(b) of the Agreement requires a *direction* from Dr Prichard to the claimant to attend upon a third party. A 'referral' was distinguished from a (mere) 'recommendation'. This interpretation was supported by reference to dictionary definitions of 'referral' and the text of cl 36(5)(a)(iv) of the Agreement. Reference was also made to the absurd consequences of an interpretation that may result in an employee making a valid claim for the expense of a holiday or a particular food when acting upon the recommendation of a medical practitioner to 'take a holiday' or to 'go on a diet'.

b. The evidence before the Commissioner was Dr Prichard confirmed the attendance of the claimant upon a third party, the Mount Hospital.

c. Evidence of attendance upon a third party is incapable of sustaining a finding that Dr Prichard directed the claimant to attend upon the Mount Hospital.

27 My view is that proposition a. in the previous paragraph is incorrect. The ordinary meaning of a 'referral' in a medical context is the introduction of a patient by one medical practitioner to another medical practitioner for treatment. This meaning is confirmed by the dictionary definitions quoted by counsel for the Commissioner.[26] The *means* of the introduction (formal or informal) and the *language* of the introduction (a direction or a recommendation) are insignificant features of a 'referral' compared to its *purpose*. The purpose of a referral is for treatment that is not available from the referring medical practitioner.

28 Clause 36 of the Agreement confirms that the Non-Work Third Party Expenses Benefit is for treatment by a medical practitioner *and* any other service '*not* provided by a medical practitioner but under a referral'. Any communication by Dr Prichard to the claimant for the purpose of treatment of a medical illness or injury, and resulting in the claimant receiving 'an X-ray or other service' is capable of being a 'referral'. The risk of absurd consequences is overstated insofar it is *only* the '*reasonable* medical illness or injury related expenses' that are payable. It would be incorrect of the Commissioner to construe cl 36(1) of the Agreement such that it was not open to find that the Reimbursement Claims related to expenses under a *referral* by Dr Prichard.

29 Observing that a Non-Work Third Party Expenses Benefit is payable to an employee who receives 'any X-ray or other *service*', the Commissioner submits that, on any view of the facts, the claims for the Machine Hire Expense and the Machine Purchase Expense did not relate to a *service.* A comparison is invited between cl 35 of the Agreement on Work Related Medical and Hospital Expenses benefit which contains a specific reference to the employer paying for 'medical aides' on a work related claim and the text of cl 36 of the Agreement which omits reference to 'medial aides'. The comparison is of limited utility to the extent that the user of a 'medical aide' may also be said to receive a 'service'.

30 It is also said that the claimant's legal rights in relation to the CPAP machine are properly characterised as the temporary (or permanent) 'right to the possession and enjoyment of goods' and this characterisation precludes a finding that the claimant received a service when using the equipment. Again, the submission falters to the extent that the claimant's (admitted) right to possess and enjoy the CPAP machine is not inconsistent with the claimant simultaneously receiving a 'service'.

31 The Commissioner's submissions assume that 'service' in cl 36(1)(b) of the Agreement has a particular technical meaning. I see no warrant for that conclusion. The word 'service' appears in the context of a phrase, 'X-ray or other service'. An x-ray involves the use of a machine. The Macquarie Dictionary defines 'service' to include 'an act of helpful activity', 'the supplying of articles, commodities, activities etc. required or demanded', 'the performance of any work for another'.[27]

32 The Claim Form Requirements in cl 36(5)(a)(iv) of the Agreement are stated to include 'documentary evidence that the health *service'* was provided under a referral given by a medical practitioner. Clause 36 of the Agreement does not qualify the means by which the 'service' or the 'health service' is to be delivered to an employee other than to state that it must be delivered 'under a referral' by a medical practitioner. It would be incorrect of the Commissioner to construe cl 36(1) of the Agreement such that it was not open to find that the Machine Hire Expense and the Machine Purchase claims related to an '*X-ray or other service*'.

Issue 2: Does cl 36(1) of the Agreement Create an *Authority* to Pay Medical Expenses or Confer a *Discretion* Whether to Pay Medical Expenses?

33 Clause 36(1) of the Agreement provides that, upon the Claim Form Requirements being satisfied and none of the Exclusions arising, the Commissioner 'may' pay the reasonable expenses within the categories proscribed by the clause. The ordinary meaning of the word 'may' is denote a *possible* outcome.[28] The ordinary meaning of a word is to be preferred absent indications that (objectively) the parties intended a different meaning. The claimant submits that 'the word 'may' confers authority to exercise the power to make the payment' in the absence of an 'expressly stated' creation of a discretion.[29]

34 It is said that the Claim Form Requirements and the Exclusions are 'gateways' intended to exclude unmeritorious claims and that the Commissioner must pay on claims that fall within the categories proscribed by the clause.[30] My view is that the characterisation of the Claim Form Requirements and the Exclusions as 'gateways to payment of the claim by the Commissioner' is unhelpfully pejorative; those pre-conditions to payment could also be characterised as 'gateways to exercise of a discretion by the Commissioner'.

35 The claimant correctly submits that other clauses of the Agreement adopt phrases such as 'absolute discretion' or 'may exercise discretion' or 'sole discretion' to confer upon the Commissioner the power to make discretionary decisions concerning salaries, hours of duty, allowances and bereavement leave.[31] Indeed, in ***Pearce v Mr. Christopher Dawson, Commissioner of Police, Western Australia Police*** [2018] WAIRC 00679 [45] (Scaddan IM), this court confirmed that the effect of cl 17(12)(c) of the *Western Australia Police Industrial Agreement 2009* was to confer a discretion upon the Commissioner with respect to certain allowances.

36 The claimant also notes that other clauses of the Agreement provide a payment or indulgence to an employee which is subject to the Commissioner's approval.[32] My view is that it is not necessary for the Agreement to use a particular word or expression to create a discretion. The claimant's submission also overlooks the use of the permissive word 'may' in cl 36(1) of the Agreement in contrast to the use of the unpermissive words 'entitled' in cl 36(2) of the Agreement (in connection with the Pharmacist's Expenses Benefit) and 'shall' in cl 35 of the Agreement (in connection with a Work-Related Medical Expenses Benefit).

37 The different auxiliary verbs ('may', 'entitled', 'shall') used in close proximity to each other in connection with similar but different subject matter is an objective indication of a different meaning being attributed to the permissive ('may') and unpermissive ('entitled', 'shall') auxiliary verbs. The variety of expressions used throughout an agreement ('absolute discretion', 'discretion', 'may', 'shall', 'entitled' etc.) is no reason to displace the ordinary meaning of a word ('may') that results in coherence in the treatment of similar subject matter (clauses 35 and 36 of the Agreement).

38 The claimant submits that there are 'sound policy reasons why members of the police force should not be discouraged' from seeking appropriate medical care for non-work related matters.[33] It is incontestable that members of the police force 'should not be discouraged from seeking appropriate medical care'. However (as discussed below under the heading, 'Issue 3'), cl 36(1) of the Agreement casts an obligation upon the Commissioner to exercise the discretion on whether to pay the Non-Work Third Party Expenses Benefit honestly and conformably with the purposes of the Agreement. Of obvious relevance to the exercise of the discretion in each case will be any evidence of the significance of the claimed expense to the police work of the employee. The result of the exercise of the discretion may (or may not) lead to employee disappointment. However, the result is not 'a nonsense' and there is no evidence of resulting 'practical inconvenience'.

39 The existence of a discretion is consistent with the purpose and objective of the Agreement, evident from clauses 33 – 36. Those clauses create an entitlement, subject to conditions, to distinct classes of benefits following illness or injury: employee leave (cl 33); carer's leave (cl 34); the Work-Related Medical and Hospitals Expenses Benefit (cl 35); Non-Work Related Medical Practitioner Expenses Benefit (cl 36(1)(a)); Non-Work Third Party Expenses Benefit (cl 36(1)(b)); and Pharmacist Expenses Benefit (cl 36(2)). I have already noted that some of those benefits *must* be paid when relevant conditions are satisfied: Work-Related Medical Expenses Benefit and the Pharmacist Expenses Benefit.

40 In contrast, the entitlement to paid leave by reason of illness or injury in cl 33 of the Agreement is subject to the discretion of the Commissioner: ***Western Australian Police Union of Workers v Commissioner of Police*** [2003] WAIRC 7604 [29] - [31] ff (Scott C). It may be inferred that the purpose and object of the Agreement was to reserve to the Commissioner in some but not all classes of illness or injury benefits a discretion on whether the benefit will be paid. In that context, it is unremarkable that the entitlement to the Non-Work Third Party Expenses Benefit found in cl 36(1) of the Agreement is a discretionary decision.

41 At issue before the Industrial Appeal Court in ***The Minister for Police & Anor v Western Australian Police Union of Workers*** was whether a dispute concerning a decision by the Commissioner pursuant to regulations made under the (now repealed) *Police Act 1892* (WA) gave rise to an 'industrial matter'.[34] The regulations were, relevantly, in identical terms to cl 35, cl 36(1) and cl 36(2) of the Agreement. A dispute arose after the Commissioner decided, for budgetary reasons, to

suspend payment of non-work related medical expenses. The whole court concluded that the dispute concerned an 'industrial matter'. Franklyn J (with whom Rowland J agreed) offered the following view on the effect of the regulations (at 1508):

> *[T]he Commissioner thereby conferred upon the members and cadets an entitlement to apply for reimbursement, reserving to himself, in the case of medical treatment identified in reg 1307(1)* (i.e. clause 36(1) of the Agreement), *a discretion as to whether or not he would, in any particular case, reimburse but, in the case of pharmaceutical expenses identified in reg 1307(2)* (i.e. clause 36(2) of the Agreement), *conferring an entitlement to reimbursement.*

It is apparent that the reasoning of Franklyn J (with whom Rowland J agreed) is consistent with my preferred construction of the clauses of the Agreement concerning the Non-Work Third Party Benefit. The significance of the consistency should not be overstated. The decision in ***The Minister for Police & Anor v Western Australian Police Union of Workers*** was on a different issue (characterisation of a dispute as an 'industrial matter') and concerned a different instrument (regulations) in a different legal context. Kennedy J appeared to take a different view on the effect of the regulations as 'not in terms conferring *any* discretion on the Commissioner' (at 1504, my emphasis). However, Kennedy J concluded that, 'in any event', the dispute concerned the compensation of employees and was an 'industrial matter'.

42 Section 56(1) of the *Interpretation Act 1984* (WA) provides that in a 'written law' the word 'may' 'shall be interpreted to imply that the power so conferred may be exercised or not, at discretion'. A 'written law' is defined to include any instrument made under any Act 'and having legislative effect'. I note that an enterprise agreement made under the *Fair Work Act 2009* (Cth) is not subject to the 'rules' of construction in the *Acts Interpretation Act 1901* (Cth): ***Toyota Motor Corporation Australia Limited v Marmara*** [2014] FCAFC 84 [58]. Neither party addressed me on whether the Agreement is a 'written law' with the consequence that s 56(1) of the *Interpretation Act 1984* (WA) has application to the Agreement. It has not been necessary to consider the issue in reaching my conclusion above.

Issue 3: Has the Commissioner Exercised the Discretion Conferred by cl 36 of the Agreement?

43 In ***Silverbrook Research Pty Ltd v Lindley*** [2010] NSWCA 357 [5] – [6] Allsop P (Beazley JA agreeing) stated the effect of a contractual term conferring a discretion upon an employer on whether to pay a performance bonus to an employee where the employee met objectives that were to be set in accordance with a process proscribed by the contract:

> *[5]... That the decision as to whether the respondent* [employee] *should receive the bonus was "entirely within the discretion of" the appellant* [employer] *should not be construed so as to permit the appellant to withhold the bonus capriciously or arbitrarily or unreasonably; it should not be construed so as to give the appellant a free choice as to whether to perform or not a contractual obligation. The relevant discretion should be understood against the proper scope and content of the contract. This was a bargained for bonus to be assessed against set objectives. Such a clause should receive a reasonable construction and not permit the appellant to choose arbitrarily or capriciously or unreasonably that it need not pay money the set objectives having been satisfied...*
>
> *[6] The discretion is to be exercised honestly and conformably with the purposes of the contract. There may be many circumstances in which it would be legitimate, and conformable with the purposes of the contract, not to pay the bonus. There may be financial stringency or misbehaviour by the respondent or some other consideration. It is unnecessary to explore the possibilities in detail. What, however, would not be permitted is an unreasoned, unreasonable, arbitrary refusal to pay anything, come what may. This would be a denial of the very clause that had been agreed. If these parties wished to make payment under the clause entirely gratuitous and voluntary such that payment could be withheld capriciously, notwithstanding the compliance with solemnly set objectives they needed to say so clearly.*

44 Similar observations have been made on the effect of a term of an industrial agreement registered under the IR Act that confers a discretion upon the employer: ***Pearce*** [111] ('nothing manifestly unreasonable in the [employer's] assessment and determination of the [employee's] eligibility for payment of [an allowance]'); ***Vincent v Department of Finance*** [2016] WAIRC 00035 [93] – [106] ('Was the Decision Made Capricious, Arbitrary, or Unreasonable?').

45 I have noted that the effect of cl 36 of the Agreement is that, subject to the Exclusions and to the Claim Form Requirements, the Commissioner 'may pay the reasonable medical illness or injury related expenses of an employee who received any x-ray or other service provided by a third party under a referral given by a medical practitioner.'

46 It follows that the Commissioner was entitled to refuse a claim for a Non-Work Third Party Expenses Benefit made by the claimant upon making a finding that: (1) one of the Exclusions applied; (2) the Claim Form Requirements had not been satisfied; (3) the claim did not concern 'medical illness or injury related expenses'; (4) the claim concerned medical or injury related expenses that were not reasonable; (5) the claim did not concern expenses of 'any X-ray or other service'; (6) the claim concerned expenses of any x-ray or other service that were not provided 'by a third party under a referral given by a medical practitioner'; or (7) after due consideration, the discretion to pay the claimed expenses should not be exercised.

47 The claimant will not succeed on his allegation of a contravention of cl 36(1) of the Agreement unless he proves that, in reaching one (or more) of those seven findings, the Commissioner was: dishonest, capricious, arbitrary, unreasoned, manifestly unreasonably, or not acting in conformity with the purposes of the Agreement. It is necessary to examine the stated findings of the Commissioner in response to the claims for the Three Expenses.

48 The claim for the Hospital Expense was accompanied by a receipt from the Mount Private Hospital in the amount of $250 for 'inpatient deposits'. The initial response of the Commissioner is evident from an email on behalf of the Commissioner of 8 January 2016, stating that 'we would need [the claimant] to produce something from the provider establishing what the $250.00 was allocated to, consistent with' cl 36 of the Agreement, because inpatient deposits for hospital admissions are not covered under non-work related expenses.

49 The claimant supplied the Commissioner with a letter from Dr Prichard of 13 January 2016 confirming that the claimant attended the Mount Hospital to complete an overnight sleep study. The response of the Commissioner, in an email dated 19 January 2016 stated that, simply confirming Mr McCormack's attendance at hospital is not details of a medical expense. The

Commissioner's final position is evident from the Human Resources Director letter of 3 May 2016 stating that, 'rejection of the claim is consistent with all previous applications and is made in line with the Commissioner's discretion which has not, in [her] view, been capricious, arbitrary, or unreasonable'.

50 The findings of the Commissioner in response to the claim for the Hospital Expense are difficult to discern from the communications on behalf of the Commissioner. The Commissioner's letter of 8 January 2016 is not clear as whether the claimed expenses were found not to be 'medical expenses' or were found not to be expenses of an 'X-ray or other service' or whether the claim was not paid for some other reason e.g. the letter may also be interpreted to suggest that the Claim Form Requirements had not been satisfied (insofar as cl 36(5)(a)(iv) of the Agreement requires a claimant to supply documentary evidence that the health service was provided under a referral given by a medical practitioner).

51 The Commissioner's letter of 13 January 2016 suggests an acceptance that the claim was for expenses associated with an *attendance* at the Mount Hospital on 5 August 2015. However, it is not clear whether the claim was refused because of a finding that those expenses were not 'medical expenses' or because those expenses were not for an 'X-ray or other service' or whether the claim was not paid for some other reason. The Commissioner's letter of 3 May 2016 did nothing to clarify the findings of the Commissioner other than to assert the proper exercise of the discretion not to grant the claim.

52 The claimant was left in a position of uncertainty as to the findings of the Commissioner which resulted in his claim for Hospital Expenses being refused. The claimant was not in a position to know whether the Commissioner had made a finding that the expenses were not 'medical expenses' or that he had made a finding that the expenses did not concern a 'service' or whether, after due consideration, the Commissioner had exercised the discretion to refuse the claim.

53 The Commissioner's failure to communicate to the claimant the finding (or findings) that resulted in the claim being refused was a significant omission. The extract from ***Silverbrook Research Pty Ltd*** makes clear that a contractual obligation to exercise a discretion has consequences for an employer. The claimant has satisfied me that, in failing to make findings that enabled the claimant to satisfy himself that cl 36(1) of the Agreement had been correctly applied his claim for the Hospital Expense, the Commissioner had not acted in conformity with the purposes of the Agreement and, accordingly, has contravened the clause.

54 It was suggested by the Commissioner that if the claim for Hospital Expenses was for hospital accommodation, it could not be a claim for an 'X-ray or other service' because a temporary right to occupy a hospital bed was not a 'service'. It is not clear from the Commissioner's communications to the claimant that the Commissioner took the view that 'accommodation' was not a 'service'. When discussing the meaning of 'service' in the context of the expenses of a CPAP machine (above under the heading, 'Issue 1'), I concluded that the word 'service' did not have a technical legal meaning. My view is that expenses of 'accommodation' are capable of being expenses of a 'service' within the ordinary meaning of the word 'service'.

55 The response of the Commissioner to the claim for the Machine Hire Expense and the Machine Purchase Expense is evident from communications of 27 October 2015, 8 January 2016, 19 January 2016 and 3 May 2016. The memorandum of 27 October 2015 states:

> *... [E]ven though your doctor directed you to obtain or purchase the machine, he is not performing the function or the service, the equipment is undertaking the treatment service.*
>
> *Therefore, as there is no extension under section (sic) 36 for the reimbursement of equipment items, such (sic) sleep apnoea machines, we are not in a position to reimburse you for the purchasing of the CPAP machine.*

56 Again, when discussing the meaning of 'service' in the context of the expenses of a CPAP machine (above under the heading, 'Issue 1'), I concluded that it would be incorrect of the Commissioner to construe cl 36(1) of the Agreement such that it was not open to find that the Machine Hire Expense and the Machine Purchase claims related to an 'X-ray or other service'. It is apparent that the quoted finding has been made on the basis of an erroneous legal interpretation of cl 36(1) of the Agreement.

57 I have considered whether, because of the contents of the letter of 3 May 2016, the inference may be drawn that the Commissioner has nevertheless lawfully exercised a discretion to refuse the claims. My view is that the references in the letter to reviewing the previous applications of the Commissioner's discretion does not satisfactorily address the possibility that any exercise of the discretion was based upon an erroneous legal interpretation of the word 'service'; the Commissioner had not acted in conformity with the purposes of the Agreement and, accordingly, has contravened the clause.

58 Clause 36 of the Agreement casts an obligation on the Commissioner to make findings and, ultimately, to exercise a discretion with respect to a payment to an employee. There is no warrant in the text of the clause or in the IR Act for the court to assume those obligations or to exercise the discretion.

59 My view is that, as a result of my findings, it is appropriate to make an order pursuant to s 83(5) of the IR Act to the effect that the Commissioner be required to re-consider the Reimbursement Claims in light of these reasons. I will hear from the parties on the precise for of orders. I will also hear from the parties on the making of any orders with respect to a penalty as provided by s 83(4) of the IR Act.

M. FLYNN

INDUSTRIAL MAGISTRATE

[1] Under the Agreement, the claimant is 'an Employee' and the Commissioner of Police is the 'Employer'.

[2] The claimant does not allege that his medical condition is related to his employment.

[3] Section 81A of the IR Act 1979 (WA) states, 'An industrial magistrate's court has the jurisdiction conferred on it by sections 77, 80(1) and (2), 83, 83A, 83B, 83D, 83E, 96J, 97V(3), 97VJ(3), 97YC, 97YG, 110, 111 and 112.'

[4] Section 83(4)(a) IR Act 1979 (WA).

[5] Section 83(5) IR Act 1979 (WA).

[6] Section 83A(1) IR Act 1979 (WA).

[7] Section 81CA(2) IR Act 1979 (WA).

[8] Reg 35(4) *Industrial Magistrates Courts (General Jurisdiction) Regulations* 2005 (WA).

[9] Section 41 IR Act 1979 (WA).

[10] Section 41(4) IR Act 1979 (WA).

[11] Parts III, IV, V and VI respectively of the Agreement.

[12] Part II of the Agreement.

[13] On Call allowances (cl 15); Shift allowance (cl 16) ; Additional allowances (cl 17); District allowances (cl 19); Motor Vehicle allowances (cl 20); Property allowance (cl 21); Higher duties allowance (cl 22); Camping allowances (cl 23); Disturbance allowance (cl 24); Relieving allowance (cl 25); Transfer and Removal allowances (cl 26); Travelling allowances (cl 27); Conditions to Apply at Multi-Functional Policing Facilities (MFPFs) (cl 28).

[14] Annual Leave; Long Service Leave; Bereavement Leave; Parental Leave; Entitlement to Leave and Allowances through Illness or Injury; Carer's Leave; Work Related Medical and Hospital Expenses; Non Work-Related Medical and Pharmaceutical Expenses; Retirement, Removal or Death of an Employee; Cultural/Ceremonial Leave; Purchased Leave - 42/52 Leave Arrangement; Purchased Leave - Deferred Salary Scheme; Leave Without Pay; Blood/Plasma Donors Leave; Union Communication with Members and Facilities for Union Representatives; Leave to Attend Union Business; Trade Union Training Leave; Leave for International Sporting Events; Leave for Training with Defence Force Reserves.

[15]

33. ENTITLEMENT TO LEAVE AND ALLOWANCES THROUGH ILLNESS OR INJURY

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

(a) notify the employee's Officer in Charge of that fact and of the his or her whereabouts; and

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

(2) Except in respect of a day on which an employee becomes incapacitated while on duty and for the first 5 single day absences in a calendar year, an application for leave by an employee on account of incapacity shall be supported by a certificate of a medical practitioner or, where the incapacity involves a dental condition, by a certificate of a dentist. Save that where the employee is stationed in a remote or rural locality and there is no medical practitioner within that locality, a certificate from an attending registered nurse or certification of the incapacity by the employee's Officer in Charge shall suffice. Where the Employer has good reason to believe that the absence may not be legitimate, the Employer may request that evidence be provided. Should an employee become incapacitated while on duty, an application for leave on account of that incapacity does not require a supporting certificate.

(3) The application shall be:

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

(b) submitted to the Manager, and the certificate in its support shall be -

(c) submitted to the employee's Officer in Charge.

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

(a) for up to one hundred and sixty eight days in a calendar year; and

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

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

(6) The district allowance prescribed by District Allowance (Government Officers) General Agreement 2010 or any subsequent replacement agreement ceases to be payable:

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

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

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

(b) An employee who suffers illness or injury through the employee's fault or misconduct is not entitled in respect of that illness or injury to receive the benefits contained under clause 35 - Work Related Medical and Hospital Expenses or clause 36. – Non Work-Related Medical and Pharmaceutical Expenses of this Agreement.

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

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

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

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

(b) *Where an employee has been examined under subclause 10 (a) of this clause, and the examining medical practitioner expresses the opinion in writing to the Employer that the employee is unfit for duty because of illness or injury, the Employer may direct the employee, to apply for leave on that ground and the employee shall obey such a direction.*

(11) An employee who is required to travel to Perth or a location other than his or her locality for medical treatment arising from a work related illness or injury is entitled to travel allowances in accordance with Clause 27. – Travelling Allowances.

34. CARER'S LEAVE

(1) Employees are entitled to up to 40 hours per calendar year carer's leave to care for a sick family member.

(2) Where employees have exhausted the entitlements provided under subclause (1) of this clause they are able to access up to an additional 40 hours of their illness and injury leave entitlements as prescribed under clause 33 of this Agreement, per calendar year to care for a sick family member.

(3) For the purposes of this clause a "sick family member" means

(a) *the partner of the employee;*

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

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

(d) *the sibling of an employee; or*

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

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

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

35. WORK RELATED MEDICAL AND HOSPITAL EXPENSES

Subject to the provisions contained within subclause (7) (b) of Clause 33. - Entitlement to Leave and Allowances Through Illness or Injury of this Agreement, the Employer shall pay the reasonable medical, dental, medical aides, hospital and travelling expenses incurred by an employee as a result of illness or injury arising out of or in the course of the employee's duties or suffered by the employee in the course of travel to or from a place of duty.

36. NON WORK-RELATED MEDICAL AND PHARMACEUTICAL EXPENSES

Medical and Pharmaceutical Expenses

(1) Subject to the provisions contained within subclause (7) (b) of Clause 33. - Entitlement to Leave and Allowances through Illness or Injury of this Agreement, the Employer may pay the reasonable medical illness or injury related expenses (less the amount of any Medicare benefits and private health insurance or other benefit fund, paid or payable) of an employee who receives:

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

(b) *any X-ray or other service not provided by a medical practitioner but provided under a referral given by a medical practitioner.*

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

Exclusions

(3) Without affecting by implication the meaning of "medical illness or injury related expenses" in subclause (1), above, the Employer shall not be liable for any medical or pharmaceutical expenses referred to in subclause (1) and (2), above, associated with the following:

(a) *All Dental procedures performed by a Dentist or Surgeon.*

(b) *Elective surgery for cosmetic (e.g. breast implants, liposuction, gastric banding), contraception, and conception procedures.*

(c) Illness or injury caused through the employee's fault or misconduct.

(d) Obstetrician costs in excess of $2000 per financial year.

(e) Illness or injury caused by Secondary Employment.

(f) Illness or injury due to participation in the following sporting activities:

(i) Racing, other than on foot;

(ii) Diving with an artificial breathing device (unless the employee has an open water diving certificate or is being directly supervised by a qualified diving instructor);

(iii) Hang-gliding, skydiving or activities involving a parachute;

(iv) Mountaineering or rock climbing;

(v) Hunting;

(vi) Yachting which involves sailing in international waters;

(vii) Any sporting activity played in a professional capacity for which the employee receives a financial sponsorship or other financial reward.

(g) Illness or injury that occurs during a period of leave without pay.

(h) Experimental surgery for which there is no Medicare Number at the time of the surgery.

(i) Medical and pharmaceutical expenses incurred by officers whilst outside of Western Australia on paid or unpaid leave.

Making a Claim

(4) A minimum amount to be reimbursed of $200 must be accumulated in medical and pharmaceutical expenses before a claim is to be submitted to Health and Welfare Branch, provided that on termination of an employee's employment, all outstanding amounts will be paid. A rolling date of 24 months from the date of treatment is allowed for employees to claim reimbursement.

(5) An employee claiming reimbursement of expenditure shall submit with his or her claim:

(a) in the case of expenditure of a kind referred to in subclause (1) of this clause -

(i) a receipt for the amount paid;

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

(iii) a statement of the amount received from a private health insurer or other benefit fund;

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

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

[16] Macquarie Concise Dictionary, 6th edn (2013) at page 388 on 'entitle'.

[17] ***Burnie Port Corporation Pty Ltd v Maritime Union of Australia*** [2000] FCA 1768 [22].

[18] In letters dated 18 September 2015 and 13 January 2016 addressed, 'To Whom it May Concern'.

[19] Employee Grievance Face Sheet of 10 March 2016.

[20] Lodged by the claimant with the Commissioner on 13 August 2015.

[21] In a letter dated 18 September 2015 addressed, 'To Whom it May Concern'.

[22] In a memorandum written by the claimant in October 2015 and included in 'BM5' at page 25 of the Affidavit of the claimant sworn 20 June 2018.

[23] Lodged by the claimant with the Commissioner on 13 August 2015.

[24] In a letter of Dr Prichard dated 18 September 2015 addressed, 'To Whom it May Concern' and in a memorandum written by the claimant in October 2015 and included in 'BM5' at page 25 of the Affidavit of the claimant sworn 20 June 2018.

[25] HBF statement of benefit.

[26] Transcript, ts 24 – 25 (27 June 2018).

[27] Macquarie Concise Dictionary, 6th edn, 2013, page 1086.

[28] Macquarie Concise Dictionary, 6th edn (2013) at 725 on 'may': '1. expressing uncertainty… 2. to have permission to…3. to be possible'

[29] 'Submissions on Behalf of the Claimant', 26 June 2018, paragraphs [15] – [16]

[30] 'Submissions on Behalf of the Claimant', 26 June 2018, paragraphs [23] – [25]

[31] 'Submissions on Behalf of the Claimant', 26 June 2018, paragraph [17]

[32] 'Submissions on Behalf of the Claimant', 26 June 2018, paragraph [17]

[33] 'Submissions on Behalf of the Claimant', 26 June 2018, paragraph [20] – [22]

[34] For the purpose of determining whether the dispute was within the jurisdiction of the Western Australian Industrial Relations Commission, see IR Act, sections 7 and 23.

2018 WAIRC 00834

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2018 WAIRC 00834
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 19 SEPTEMBER 2018
DELIVERED	**:**	THURSDAY, 8 NOVEMBER 2018
FILE NO.	**:**	M 22 OF 2018
BETWEEN	**:**	LUKE SMITH
		CLAIMANT
		AND
		NEW ACCORD PTY LTD ATFT AMI UNIT TRUST T/A GLOBAL MARITIME DATA & AIRTIME SERVICES
		RESPONDENT

Catch Words	**:**	Alleged contraventions of the *Fair Work Act 2009* (Cth) – Failure to pay unpaid wages, annual leave, public holiday pay and personal leave – Status of 'return of service' clause in contract of employment – Unauthorised deductions contrary to s. 323 and s. 324 of the *Fair Work Act 2009* (Cth) – Whether medical certificate issued constitutes satisfactory medical evidence under s. 107 of the *Fair Work Act 2009* (Cth) – Alleged misconduct discovered after notice of termination
Legislation	**:**	*Fair Work Act 2009* (Cth) *Fair Work Regulations 2009*
Case(s) referred to in reasons	**:**	***Anderson v Crown Melbourne Ltd*** [2008] FMCA 152 ***Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited*** [2014] FCA 878 ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 ***Construction, Forestry, Mining and Energy Union & ORs v RGN Mining Services Pty Ltd & Anor*** [2017] FCCA 1546 ***Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor*** [2014] FCCA 1115 ***Marshall v Commonwealth of Australia*** [2012] FMCA 1052 ***Maslen v Core Drilling Service Pty Ltd & Anor*** [2013] FCCA 460 ***Murrihy v Betezy.com.au Pty Ltd*** [2013] FCA 908 ***Tomvald v Toll Transport Pty Ltd*** [2017] FCA 1208
Result	**:**	Claim proven (in part)
Representation:		
Claimant	**:**	Mr W Milward (of counsel)
Respondent	**:**	Mr V Tranchita (director)

REASONS FOR DECISION

1 Luke Smith was employed as a sales engineer by New Accord Pty Ltd ATFT AMI Unit Trust t/a Global Marine Date & Airtime Services (GMDAS) from 3 August 2015 to 29 December 2017.

2 Mr Smith signed a contract of employment on 28 May 2015 (contract of employment).

3 GMDAS is a division of the broader AMI Group which sells satellite communication equipment and undertakes after sales maintenance support of products sold by GMDAS.

4 Mr Smith claims GMDAS contravened: (1) s. 323 of the *Fair Work Act 2009* (Cth) (FWA) by deducting without authorisation $7,675.85 from Mr Smith's final payment processed on 29 December 2017; and (2) s. 44(1) of the FWA by failing to pay Mr Smith $3,605.77 in personal leave from 11 December 2017 to 22 December 2017 and 27 December 2017 and 29 December 2017 as required by s. 99 of the FWA.

5 GMDAS denies Mr Smith's claim saying that all payments due to him were calculated in accordance with the employment contract and that Mr Smith is liable to pay $3,958.00 to GMDAS. Further, GMDAS says Mr Smith engaged in gross misconduct discovered after Mr Smith's resignation precluding GMDAS from terminating him without notice and he failed to disclose a pre-existing medical condition which effected his ability to carry out his role while he was employed by GMDAS.

6 On the originating claim form Mr Smith referred to s. 550 of the FWA. Accessorial liability was not particularised in any further way in the statement of claim. Mr Smith's counsel sought to amend the statement of claim on the day of the hearing explaining that it was a very recent oversight. I denied this amendment on the basis that notwithstanding reference was made to s. 550 of the FWA on the claim form, to allow Mr Smith to amend the statement of claim involved a substantial injustice to the other party where the claim was lodged in February 2018 and a directions hearing occurred on 16 August 2018. There was ample opportunity for Mr Smith to either fully particularise his claim or make an application to do so prior to the hearing. The directions hearing on 16 August 2018 was certainly an opportune time for his counsel to clarify Mr Smith's claim if necessary, thus giving GMDAS an opportunity to respond to a claim for accessorial liability.

7 Section 551 of the FWA provides that a court must apply the rules of evidence and procedure for civil matters where hearing proceedings relating to a contravention or proposed contravention of a civil remedy provision. The onus of proving an allegation is upon Mr Smith and an allegation is not proved unless it has been proved on the balance of probabilities. An allegation of a contravention of a civil remedy provision is an allegation of 'quasi-criminal' conduct and regard must be had to the nature of the allegation when considering whether it has been proved on the balance of probabilities: ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 at 662; ***Tomvald v Toll Transport Pty Ltd*** [2017] FCA 1208 [14].

Background facts

8 Save as otherwise indicated, the following background facts are not in dispute or is uncontroverted from evidence tendered by the parties.

9 The respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) that sells and maintains marine communication electronics and employs employees, including previously Mr Smith, for this purpose. Accordingly, the respondent is a constitution corporation within the meaning of that term in s. 12 of the FWA.

10 Mr Smith was employed by the respondent. Accordingly, the respondent is a national system employer within the meaning of that term in s. 14(1)(a) of the FWA. Further and as a result, Mr Smith is a national system employee within the meaning of that term in s. 13 and s. 15 and items one and 10 of s. 539(2) of the FWA.

11 As a result, s. 61(2) of the FWA applies to Mr Smith, namely the minimum standards of employment which cannot be displaced.

12 As part of his role with GMDAS Mr Smith was responsible for securing sales and for undertaking after sales maintenance support of product sold by GMDAS. GMDAS is a representative of NSSL Global, a United Kingdom (UK) based company whose products are sold principally by GMDAS. NSSL Global required all technicians working on NSSL Global products to have completed NSSL Global training.

13 During the interview for the position, Mr Smith accepts that NSSL Global training was discussed and he knew this was a requirement for the position. He undertook the training in the UK from approximately 6 September 2015 to 18 September 2015 (NSSL training).

14 In March 2017, Mr Smith undertook a seven-day training course held at the AMI Group offices in Perth for Kelvin Hughes navigational equipment. This course was run internally by an AMI sales service engineer (Kelvin Hughes training).

15 The purpose of the Kelvin Hughes training was to increase Mr Smith's work capacity for AMI Sales by increasing the number of technicians available in the navigational communication area and to increase GMDAS revenue streams[1].

16 Relevant to Mr Smith's claim the contract of employment contained a 'return of service' clause:

> *xvi.* ***Training and Return of Service Provision*** *– the company from time to time will provide training for Products or for Certification required to undertake your duties. The cost of the training will be paid for by the company and at no cost to the employee. In consideration of this training the employee hereby undertakes to either refund the training costs or to undertake to continue working with the company for a guaranteed minimum return of service period from the completion of the training. The guaranteed minimum return of service period will be based on the training costs and shall be as per below schedule.*

17 The schedule referred to in the contract of employment provides that if course costs are: (1) less than $1,000, the guaranteed minimum return of service period is 12 months; (2) greater than $1,000, the guaranteed minimum return of service period is 24 months; and (3) greater than $5,000, the guaranteed minimum return of service period is 36 months.

18 Mr Smith accepts that at the time of signing the contract of employment he understood its terms, including the minimum return of service period, and agreed to the terms.

19 Mr Smith was previously employed by AMI Sales, another business within the AMI Group, from May 2006 to June 2008. During this time, he attended two courses and, on each occasion, signed a return of service document setting out the costs of the course and the amount he was required to repay[2].

20 He did not sign a similar document prior to undertaking the NSSL training or the Kelvin Hughes training.

21 On 27 October 2017, Behram Irani, the General Manager for GMDAS and Mr Smith's supervisor, and Mr Smith had an email exchange about undertaking a training course in America for O3b Networks (O3b training). At the time of the email the cost of attending the O3b training was estimated at US$9,000, but final figures could not be provided as the negotiations for the training had not been finalised[3].

22 Mr Smith in response to Mr Irani's email, and contrary to his more strident oral evidence and at most, queried the cost and requested a breakdown of the costs, but indicated a willingness to discuss a return of service agreement in more detail. I note, consistent with GMDAS oral submissions, Vince Tranchita, Managing Director of AMI Group, responded to the email chain saying '[t]*he RSA is already part of the employment agreement. No new agreement required*'[4].

23 On 23 November 2017, Mr Smith submitted an annual leave form for eight days leave over the Christmas period. The reasons why or how this came about are irrelevant to the claim, but Mr Irani agreed to the leave being taken.

24 On 22 November 2017, Mr Smith received his usual fortnightly salary for the ending on 24 November 2017.

25 On 29 November 2017, Mr Smith emailed a letter of resignation to Mr Irani giving 30 days' notice for his resignation.

26 Suffice to say the relationship between Mr Smith and GMDAS thereafter deteriorated.

27 The gravamen of the dispute, as evidenced in a series of emails, was Mr Tranchita informing Mr Smith that he owed money to GMDAS for the failure to complete the return of service for, at least, the NSSL training, Mr Tranchita cancelling Mr Smith's approved annual leave and the withholding of Mr Smith's salary on 6 December and 20 December 2017 in lieu of an exact calculation for training costs.

28 On 11 December 2017, Mr Smith attended his general practitioner and obtained a medical certificate stating that he was unfit for work from 11 December 2017 to 29 December 2017[5]. On the same day Mr Smith submitted a sick leave form and had a discussion with Mr Irani. The content of the discussion is in part disputed, but, again, little turns on it because it is common ground Mr Irani did not sign the sick leave form and it was submitted to Maureen Barnaville, or at least placed in her in-tray by Mr Smith, for processing.

29 I accept Mr Irani's evidence that on 11 December 2017 he did not appreciate Mr Smith had applied for 13 days sick leave. Mr Irani impressed me as an honest witness who harboured no ill will towards Mr Smith and by his own admission was an easy-going supervisor who was prepared to accept a person's word. In addition, Mr Irani had returned from leave and wanted to organise a handover prior to Mr Smith's leaving.

30 Between 11 December and 18 December 2017, there was an email exchange between Mr Tranchita and Mr Smith concerning the veracity of Mr Smith's application for sick leave. It is common ground that Mr Smith did not attend a 'company doctor' or an 'independent doctor' so GMDAS could obtain a second opinion about the time off work and no such arrangement was made by GMDAS.

31 On or around 11 December 2017, Mr Smith's company network access had been terminated. However, by this time Mr Smith had already accessed other employees' email accounts, including Mr Irani's email account, and using these email accounts forwarded emails to a private email account in his name[6]. This included, arguably, confidential reports prepared by Mr Irani to AMI Group directors[7].

32 On 3 January 2018, Mr Smith received an email from Mr Tranchita and from GMDAS payroll attaching a payslip showing Mr Smith's entitlements according to GMDAS[8]. In summary, according to the GMDAS payroll Mr Smith was owed $5,095.85 (inclusive of annual leave entitlement, public holiday and normal hours of work, minus taxation). GMDAS says it was owed $9,053.89 by Mr Smith for training expenses with the net result being Mr Smith owed GMDAS $3,958.04.

33 For the most part, Mr Smith's claim and GMDAS's response hinges on the applicability of return of services clause in the contract of employment.

Does the return of services clause in the contract of employment authorise deductions under the FWA?

34 Section 323(1)(a) of the FWA requires an employer to pay in full an employee amounts payable to the employee in relation to the performance of work, except for permitted deductions in s. 324 of the FWA.

35 Pursuant to s. 324(1) of the FWA an employer may deduct an amount from an amount payable to an employee in accordance with s. 323(1) if:

(a) the deduction is authorised in writing by the employee and is principally for the employee's benefit; or

(b) the deduction is authorised by the employee in accordance with an enterprise agreement; or

(c) the deduction is authorised by or under a modern award or an Fair Word Commission order; or

(d) the deduction is authorised by or under a law of the commonwealth, a state or a territory, or an order of a court.

36 It is common ground that (b) to (d) does not apply in this case. Therefore, applicable to Mr Smith the deduction must be authorised in writing by him and be principally for his benefit.

37 But, an authorisation for the purposes of (a) must also specify the amount of the deduction and may be withdrawn in writing by the employee at any time: s. 324(2) of the FWA. Further, any variation in the amount of the deduction must be authorised in writing by the employee: s. 324(3) of the FWA.

38 Section 325(1) of the FWA provides that an employer must not directly or indirectly require an employee to spend, or pay to the employer or another person, an amount of the employee's money or the whole or any part of an amount payable to the employee in relation to the performance of work, if the requirement is unreasonable in the circumstances and where the

payment is directly or indirectly for the benefit of the employer or a party related to the employer. Section 325(1A) applies similarly in relation to prospective employment.

39 Section 326(1) of the FWA (relevantly) provides that a contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is directly or indirectly for the benefit of the employer or a party related to the employer and is unreasonable in the circumstances. The regulations may prescribe circumstances in which a deduction is not reasonable (I note regulation 2.12 of the *Fair Work Regulations 2009* and note that this does not apply to Mr Smith's circumstances).

40 Similar provisions in s. 326(2) of the FWA apply in relation to a contract of employment where a term permits or has the effect of permitting an employer to require an employee to spend or pay to the employer an amount of the employee's money or directly or indirectly requires an employee to spend or pay an amount if there is a contravention of s. 325(1).

41 GMDAS relies on the return of service clause in the contract of employment to deduct monies from Mr Smith's final pay stating that Mr Smith was always aware and agreed to the term prior to signing the contract of employment. Further, Mr Smith has been employed by another Respondent company in the past and was fully aware of the contractual requirement to repay the costs of training if he did not complete the requisite employment period post training.

42 GMDAS contends that in the communications industry employers and employees are contractually bound to maintain professional development and it is financially unfeasible for small companies to train employees and an employee thereafter take the knowledge to another company without giving something in return.

43 Further, GMDAS contends that Mr Smith received the benefit of the training and it was his choice to leave GMDAS even though he was encouraged to stay with the company for an additional nine to ten months so the 'debt' did not crystallise. There was no requirement for Mr Smith to pay back the training costs unless he decided to leave prematurely, which he did.

44 It is common ground that Mr Smith did not sign an individual agreement for deductions for each training course undertaken, but GMDAS rely upon the authority under the contract of employment to do so.

45 The claimant refers to two cases which he says discuss general authority clauses, namely ***Maslen v Core Drilling Service Pty Ltd & Anor*** [2013] FCCA 460 and ***Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor*** [2014] FCCA 1115.

46 I do not agree that ***Maslen*** comments on general authority clauses but referred to specific clauses in an award and contract of employment and made determinations in relation to the applicability of s. 326 of the FWA.

47 ***Glasshouse Mountains*** discussed the application of s. 324 of the FWA to a term of an employment contract requiring the employee to pay for certain qualifications or licence fees where the employer paid for the licence fees and then sought to deduct the monies from the employee pursuant to another term authorising the employer to deduct monies owing to them from their pay.

48 Judge Burnett noted at [119] to [121] that while there was nothing in principle contentious about the term of the contract, s. 324 of the FWA was directive insofar as it provides that an authorisation for deduction must *(a) specify the amount of the deduction*. Therefore, there can be no blanket authorisation but only an authorisation in writing that specifies the amount of the deduction. In ***Glasshouse Mountains*** there was a deduction of a certain amount, but it was not specified in the written authority constituted by the employment contract. No other written authority was put to the Court to satisfy the requirements of s. 324 of the FWA. Accordingly, in that case the deduction was unauthorised, and the contravention was established for want of form.

49 Like ***Glasshouse Mountains***, GMDAS did not produce, because it could not produce, any written authorisation by the employee specifying the amount of the deduction for the cost of any training course he attended (namely, NSSL training and Hughes training). At best an email was sent to Mr Smith or to the GMDAS payroll with either an estimate of the training costs or the final costs and associated invoices[9]. This is further corroborated by an email from Mr Tranchita dated 4 December 2017 where he states '[a]*s for training costs you have already been advised of the estimated amount and Maureen shall advise you of the actuals ASAP*'[10].

50 This contrasts with previous written authorities for deductions signed by Mr Smith in 2007 when he was employed by an associated AMI company[11].

51 Accordingly, for the same reason as given in ***Glasshouse Mountains***, in the absence of a written authority by Mr Smith authorising a deduction for a specified amount, GMDAS has contravened s. 324(2)(a) of the FWA as it relates to s. 324(1)(a) and the deductions from Mr Smith's pay of the NSSL and Hughes training costs were unauthorised. The contravention being for want of form which cannot be cured by relying on the return of services clause in the contract of employment.

52 Given the absence of the essential requirement of form it is unnecessary to make any findings in relation to whether the training was *principally* for Mr Smith's *benefit*. However, by way of general observation, having regard to the evidence, at best the training benefited both parties for different reasons, the likely result being the training was not *principally* (meaning predominantly) for Mr Smith's benefit.

53 Having determined the return of services clause in the contract of employment did not authorise under the FWA the deduction of training costs, the next issue is whether Mr Smith is entitled to various payments and, if so, what is he entitled to?

What, if any, entitlements are Mr Smith owed?

Mr Smith's contentions

54 Pursuant to s. 323 of the FWA, Mr Smith claims:

- $3,028.85 in unpaid wages for the period 27 November 2017 to 11 December 2017;

- $4,070.08 in annual leave; and
- $576.92 for public holidays on 25 December and 26 December 2017.

55 Pursuant to s. 44(1) and s. 99 of the FWA, Mr Smith claims:

- $3,605.77 in personal leave for the period 11 December to 22 December 2017 and 27 December to 29 December 2017.

56 Section 323(1)(a) of the FWA requires an employer to amounts payable in full to an employee in relation to the performance of work.

57 Section 545(3) of the FWA enables an eligible state court (of which the Industrial Magistrates Court (IMC) is an eligible state court) to order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that: (a) the employer was required to pay the amount under this Act or a fair work instrument; and (b) the employer has contravened a civil remedy provision by failing to pay the amount.

58 Therefore, there are three preconditions to an order by the IMC under s. 545(3): (1) an amount payable by the employer to the employee; (2) a requirement to pay the amount by reference to an obligation under the FWA or a fair work instrument; and (3) the failure to pay constitutes a civil remedy provision under s. 539(1) and s. 539(2) of the FWA.

59 Section 44(1) of the FWA provides that an employer must not contravene a provision of the National Employment Standards. Chapter 2, Part 2.2, Division 2 of the FWA refers to the national employment standards and s. 61(1) provides that Part 2.2 sets the minimum standards that apply to the employment of employees which cannot be displaced.

60 Section 61(2) of the FWA itemises the minimum standards on several matters. Relevant to Mr Smith's claim this includes annual leave (d), personal/carer's leave (e) and public holidays (h). Section 61(2) does not itemise normal payment of wages.

61 A contravention of s. 44 is a civil remedy provision which may be determined by the IMC: s. 539(2) of the FWA.

62 In terms of the failure to pay normal payment of wages, Mr Smith's primary contention is that s. 323 of the FWA establishes the contravention of a civil remedy provision and provides the foundation or the statutory basis under the FWA for GMDAS to pay the contracted amount in full. Mr Smith further contends that s. 323 of the Act should not be read to limit the payment in full to only those amounts payable under the Act.

63 In ***Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited*** [2014] FCA 878, Buchanan J, at [37], determined that the ordinary language of s. 323 was sufficiently wide to enable an application that there have been breaches of s. 323 through a failure to pay contractually obligated amounts (referring also to ***Murrihy v Betezy.com.au Pty Ltd*** [2013] FCA 908). This decision and the decision in ***Murrihy*** were followed ***in Construction, Forestry, Mining and Energy Union & ORs v RGN Mining Services Pty Ltd & Anor*** [2017] FCCA 1546.

64 Notably these three cases were determined in the Federal Court or the Federal Circuit Court where the orders made are broader than in the IMC: s. 545(1) and s. 545(2) of the FWA. In addition, in those cases the claimants sought recovery of the unpaid amounts as compensation for loss suffered because of a contravention of a civil remedy provision pursuant to s. 545 of the FWA. In ***Association of Professional Engineers,*** the underpayment of bonus and incentive-based payments were considered 'safety net contractual entitlements' of a kind referred to in s. 139(1) of the FWA.

65 Giving proper regard to those decisions, a failure to pay a contractual entitlement is capable of contravening s. 323 of the FWA and such a contravention if capable of an application to the IMC as a contravention of a civil remedy provision.

66 While s. 323 of the FWA reinforces a legal obligation to pay an amount in full for performance of work for which there are additional consequences on the employers if they do not pay employees in full, I do not accept that it provides the remedy or creates an underlying legal obligation to pay for which the employer is responsible. The words required to pay the amount 'under this Act' in s. 545(3) of the FWA must have work to do or meaning in the context of the amount required to be paid by the employer. These words in effect qualify what amount the employer is required to pay.

67 Therefore, in my view, Mr Smith's claim for normal payment of wages under his contract of employment needs to be referrable to another section of, or obligation under, the FWA over and above the legal obligation to pay in full in s. 323 for any amount sought to be paid by GMDAS.

68 The IMC is not empowered under s. 545(3) of the Act to make an order for compensation and the failure to pay normal wages is not an amount required to be paid by GMDAS under the FWA or fair work instrument, but under a contract of employment only. The normal payment of wages is not a 'safety net contractual entitlement' as specified by the subject matter in s. 61(2) of the FWA and it is also not a minimum standard itemised in the same section.

69 While s. 323 of the FWA opens the door to a claim under the FWA capable of being heard by the IMC it does not, of itself, empower the IMC to make the order sought by Mr Smith in relation to the failure to pay normal wages.

70 Contrast this with the Federal Court and the Federal Circuit Court which are empowered to make an order for compensation which arguably arises from a breach of contractual entitlement.

71 Of course, it is open for Mr Smith to commence a breach of contract claim for payment of normal wages in the Federal Court or Federal Circuit Court or a state court (not the IMC) thus he is not locked out from bringing a claim in a jurisdiction which can make the order sought.

72 In the alternative, Mr Smith contends that pursuant to s. 293 of the FWA an employer must not contravene a term of a national minimum wage order.

73 A contravention of s. 293 of the FWA is a civil remedy provision capable of application to the IMC: s. 539(2) of the FWA.

74 Therefore, in the alternative, Mr Smith says that if he is not entitled to the full payment of normal wages owed under the contract of employment, he is at the very least entitled to the payment of the national minimum wage under the FWA for the period 27 November 2017 to 11 December 2017.

75 The applicable National Minimum Wage Order 2017 prescribing the national minimum wage for an award/agreement free employee for the period 1 July 2017 to 30 June 2018 was $694.90 per week.

76 I accept Mr Smith's alternative contention as it relates to the non-payment of normal wages in the sense that it is an order capable of being made by the IMC under s. 545(3) of the FWA.

GMDAS's contentions

77 GMDAS's primary contention was Mr Smith was not owed any outstanding entitlements because he owed GMDAS for training costs associated with the return of service clause in the contract of employment.

78 For reasons already given, I found the deductions from Mr Smith's final payment were unauthorised.

79 GMDAS's alternative contentions are that Mr Smith engaged in 'serious misconduct', discovered after he submitted his notice of resignation, when he accessed other employees' email accounts to send company emails to his private email address. Had this 'serious misconduct' been discovered earlier then Mr Smith's employment would have been terminated immediately. Further, Mr Smith's reason for taking personal leave was not bona fide and the medical certificate failed to demonstrate sufficient reasons for taking personal leave.

80 Mr Smith admitted accessing other employees' email account to forward company emails to his private email address. He did so after he submitted his notice of resignation and without permission from any person in GMDAS. There is no doubt this conduct is reprehensible and maybe unlawful, and it is entirely understandable that GMDAS and its directors feel aggrieved.

81 However, to the extent that it is relevant to Mr Smith's claim, s. 123(1)(b) of the FWA provides that Division 11 (Notice of Termination and Redundancy) does not apply to an employee whose employment is terminated for 'serious misconduct'. Therefore, if Mr Smith's conduct in accessing other employees' email accounts was characterised as 'serious misconduct', GMDAS could have terminated Mr Smith without notice or payment in lieu of notice. This does not abrogate GMDAS' obligation to pay those entitlements that have already accrued. Further, and relevantly, Mr Smith had already submitted his notice of resignation and his employment was not terminated by GMDAS.

82 Section 107 of the FWA provides that an employee must give his or her employer notice of taking personal/carer's leave. The notice must be given to the employer as soon as practicable and must advise the employer of the period, or expected period, of leave.

83 Section 107(3) of the FWA provides that an employee who had given his or her employer notice of the taking of personal/carer's leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that if it is paid personal/carer's leave, the leave is taken for a reason specified in s. 97 of the FWA. Relevantly, s. 97(a) of the FWA provides that an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness.

84 On 11 December 2017, Mr Smith provided a medical certificate dated 11 December 2017 signed by Dr Trevor Claridge. The content of the medical certificate is sparse stating '*Mr Luke Smith has a medical condition and will be unfit for work from 11/12/2017 to 29/12/2017 inclusive*'. On the same day Mr Smith also submitted a sick leave form and the form and medical certificate was left with Ms Barnaville or placed in her in-tray.

85 Coincidentally the period specified in the medical certificate covers, at least in part, the period previously the subject of approved annual leave which was revoked by Mr Tranchita on 4 December 2017[12] after Mr Smith resigned. As previously stated there was much email disagreement between Mr Smith and Mr Tranchita concerning the revocation of the approved annual leave.

86 Like in ***Glasshouse Mountains***, GMDAS says, in effect, that a reasonable person would not be satisfied on the evidence of the medical certificate because Mr Smith's annual leave application had been revoked following his notice of resignation and the period covered by the medical certificate coincided with the last two and a half weeks of his employment (some of which was originally part of the application for annual leave).

87 While not expressly stated, I infer from Mr Tranchita's submissions, GMDAS contends that in the circumstances the medical certificate (of itself) was not sufficient to satisfy a reasonable person that the personal leave was for the reasons specified in s. 97 of the FWA. That is, the medical certificate did not provide enough information to satisfy a reasonable person against the background of other facts, namely Mr Smith's annual leave had been revoked after he submitted his notice of termination and the disagreement over the payment/repayment of training expenses.

88 In his oral evidence, Mr Smith denied having a pre-existing medical condition which he failed to disclose prior to accepting employment with GMDAS. He stated he first saw a general practitioner in June 2016 and was placed on a mental health plan. In terms of his attendance upon Dr Claridge on 11 December 2017, Mr Smith stated this was in relation to work related stress and the medical certificate was given for a stress related condition. He denied refusing to attend 'a company doctor' for a second opinion, saying that no arrangements were made for him to attend any other medical practitioner. Further, Mr Smith said he gave permission for GMDAS to discuss his case with Dr Claridge if elaboration of his condition was required.

89 A medical certificate from a qualified medical practitioner within the practitioner's area of expertise is prima facie to be accepted: ***Anderson v Crown Melbourne Ltd*** [2008] FMCA 152 [80] (referred to in ***Marshall v Commonwealth of Australia*** [2012] FMCA 1052).

90 This is not to say that a court or an employer is necessarily bound to treat a medical certificate as binding upon them where the facts and surrounding circumstances demonstrate an employer, or a court would not accept the validity of a medical certificate.

91 It is important to note that in ***Anderson***, the claimant attended a medical practitioner and obtained a medical certificate to attend an AFL game in Western Australia because he was emotionally invested in the last game played by James Hird and coached by Kevin Sheedy. The facts of that case were highly unusual. In ***Marshall***, the employer challenged the claimant's claim that he was unfit for work, having regard to the claimant's medical evidence and to declarations he made to be considered for a television game show. In both cases, the claimants' medical practitioners gave evidence at the hearings.

92 Dr Claridge did not give oral evidence about the reasons for issuing the medical certificate (because no party, specifically GMDAS, summonsed him to do so). Thus, the question is whether other surrounding facts and circumstances could lead to a conclusion that the medical certificate should not being accepted?

93 There was work place tension between Mr Smith and Mr Tranchita, mainly concerning the repayment of training monies and revocation of annual leave. The emails between the two men demonstrate this. Further, Mr Smith stated in his oral evidence he had previously attended a general practitioner from June 2016 for stress related matters. There is no other evidence rebutting this statement.

94 While some scepticism might be expressed regarding the timing of Mr Smith's attendance at his general practitioner, where the dates in the medical certificate coincided with revoked annual leave, the facts and surrounding circumstances were not such that they would displace the validity of the medical certificate.

95 The period of unfitness for work was lengthy, however Mr Smith accepted GMDAS's request to refer him to the company's doctor for review or to contact Dr Claridge for clarification of the medical condition. GMDAS did not make any arrangements to refer Mr Smith for an independent assessment. Dr Claridge or the medical notes were not summonsed and to that extent the prima facie status of the medical certificate is unchallenged.

96 Therefore, the medical certificate from Dr Claridge should be accepted and is sufficient to satisfy the reasonable person that the leave was taken because Mr Smith was not fit for work because of a personal illness.

Determination

Unpaid wages for the period 27 November 2017 to 11 December 2017

97 Pursuant to s. 293 of the FWA, an employer must not contravene a national minimum wage order.

98 I find that GMDAS failed to pay Mr Smith the national minimum wage pursuant to National Minimum Wage Order 2017 for the period 27 November 2017 to 11 December 2017 contrary to s. 293 of the FWA which is a civil remedy provision under s. 539(2) of the FWA.

99 Accordingly, I find GMDAS is required to pay the amount of $1,389.80 for unpaid normal hours of pay (under the national minimal wage).

Annual leave

100 Section 90(2) of the FWA provides that if, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employee must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave (payable at the employee's base rate of pay for the ordinary hours worked).

101 I find that GMDAS failed to pay Mr Smith untaken paid annual leave entitlements when Mr Smith's employment ended contrary to s. 90(2) of the FWA which is contrary to s. 44(1) of the FWA because of s. 61(2)(d) of the FWA and a civil remedy provision under s. 539(2) of the FWA.

102 Accordingly, I find GMDAS is required to pay the amount of $4,070.08 for untaken paid annual leave.

Public holiday pay for 25 and 26 December 2017

103 Section 115(1) of the FWA defines public holidays for certain days of the year, including 25 December and 26 December 2017, being Christmas Day and Boxing Day.

104 Pursuant to s. 116 of the FWA if an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.

105 I find that GMDAS failed to pay Mr Smith for public holidays on 25 December and 26 December 2017 at the requisite rate of pay contrary to s. 116 of the FWA which is contrary to s. 44(1) of the FWA because of s. 61(2)(h) of the FWA and a civil remedy provision under s. 539(2) of the FWA.

106 Accordingly, I find GMDAS is required to pay the amount of $576.92 for unpaid public holidays on 25 and 26 December 2017.

Personal Leave

107 Pursuant to s. 96(1) of the FWA for each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

108 Relevant to Mr Smith's claim, pursuant to s. 97(a) of the FWA, an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee. Pursuant to s. 99, if an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

109 As already discussed, s. 107 of the FWA refers to the notice and evidence requirements related to personal/carer's leave.

110 I find that GMDAS failed to pay Mr Smith for personal leave for the period 11 December to 22 December 2017 and 27 December to 29 December 2017 at the requisite rate of pay contrary to s. 99 of the FWA which is contrary to s. 44(1) of the FWA because of s. 61(2)(e) of the FWA and a civil remedy provision under s. 539(2) of the FWA.

111 Accordingly, I find GMDAS is required to pay the amount of $3,605.77 for unpaid personal leave.

Result

112 Pursuant to s. 545(3) of the FWA, the court being satisfied to the requisite standard that GMDAS is required to pay the amount under the FWA and GMDAS has contravened a civil remedy provision in failing to pay the amount, it is ordered that GMDAS pay to Mr Smith $9,642.57 being:

1. $1,389.80 for normal hours of pay
2. $4,070.08 for untaken paid annual leave
3. $576.92 for public holidays
4. $3,605.77 for personal leave

113 I will hear from the parties in respect of any further application or order sought.

INDUSTRIAL MAGISTRATE

D. SCADDAN

[1] Witness Statement of Luke Smith at annexures C and D (exhibit 1)

[2] Witness Statement of Luke Smith at annexure B (exhibit 1)

[3] Exhibit 1 at annexure F

[4] Exhibit 1 - annexure F

[5] Exhibit 1 – annexure M

[6] Exhibit 3 – documents 46 to 56

[7] Exhibit 3 – document 52

[8] Exhibit 1 – annexure O

[9] Exhibit 2 – documents 30 to 32

[10] Exhibit 2 – document 57

[11] Exhibit 2 – document 2

[12] Exhibit 1 – annexure I

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00816

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MADISON BAKER
	APPLICANT
	-v-
	ERIN MARGARET BROWNE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 29 OCTOBER 2018
FILE NO/S	U 110 OF 2018
CITATION NO.	2018 WAIRC 00816

Result	Application dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Ms C Lewin of counsel

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 11 September 2018.

2. The Commission convened a conciliation conference on 17 October 2018. At the conference, the parties reached agreement to resolve the matter. In accordance with that agreement, on 24 October 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 00282

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00282
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 3 MAY 2018
DELIVERED	**:**	FRIDAY, 4 MAY 2018
FILE NO.	**:**	U 7 OF 2018
BETWEEN	**:**	WILLIAM JAMES NUNN Applicant AND THE SHIRE OF MURRAY Respondent

CatchWords	**:**	Application lodged out of time - Principles applied - Finding made would be unfair to not accept application out of time
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Finding made
Representation		
Applicant	**:**	Mr P Mullally, as agent
Respondent	**:**	Mr J Darams of counsel
Solicitors:		
Respondent	**:**	Clyde & Co

Case referred to in reasons:

Malik v Albert, Director General, Department of Education of Western Australia (2004) 84 WAIG 683

Reasons for Decision

1 On 19 October 2017 the applicant was called to and attended a meeting with the Chief Executive Officer of the respondent at which he was informed, according to the statement of the Chief Executive Officer filed in these proceedings, that his position "was no longer justified" and that "a decision had been made to terminate his employment." It was stressed at the meeting that the decision "was not made in any way based on performance or attitude." The applicant was also told that there was no alternative employment available for him with the respondent.

2 The applicant left at the end of the day and did not return to work. He was paid all his entitlements in due course.

3 According to the witness statement of the Chief Executive Officer, the applicant acknowledged that there were factors at play affecting the volume of work for the position he held and said at the end of the meeting that "I thought the meeting would be bad but not this bad."

4 Eighty-nine days later the applicant lodged an unfair dismissal claim with the Western Australian Industrial Relations Commission on 16 January 2018. This was 58 days out of time

5 The applicant seeks that the Western Australian Industrial Relations Commission accept his claim despite it being well out of time on the basis that, as per section 29(3) *Industrial Relations Act 1979*, "it would be unfair not to do so".

6 The factors that loom largest in the mix of matters I must consider in the exercise of my discretion are the length of the delay, the explanation for the delay, the prejudice to the respondent caused by the delay and the merits of the applicant's substantive claim.

7 Guidance on the way in which these factors are to be balanced is not hard to find and is most relevantly given in *Malik v Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683.

8 In this case the delay is a relatively long one and one which must be adequately explained. Potential respondents and the industrial relations legislative scheme are entitled to assume that if a person who has been dismissed has not prosecuted an unfair dismissal claim within 28 days of dismissal that the person will not be prosecuting such a claim and that the resources of the potential respondent and the Western Australian Industrial Relations Commission will not need to be expended on the matter. If there is a delay, then the delay generally must be adequately explained and, of course, the longer the delay the better the explanation required.

9 Here the applicant says that the delay was caused by mental health issues, mainly related to his dismissal, which inhibited action on his part.

10 The applicant provided evidence of having suffered from mental health issues at the relevant time and evidence of the opinion of a psychologist, given 12 March 2018, that "the symptoms from which [the applicant] was, and is still, suffering would have prevented him from being able to take immediate action in relation to pressing matters that he may have had to deal with at the time."

11 Given this opinion is in a letter to the applicant's agent I take it as being an expert opinion touching upon the issue of timeliness relevant to this application.

12 I take it, and have nothing to suggest I should not, that the expert is saying that the applicant's mental health issues would have prevented him from prosecuting his unfair dismissal claim in a timely fashion.

13 In my view there is an acceptable explanation for a two-month delay in lodging the claim.

14 The respondent did not try to point to any prejudice caused by the delay beyond what might be ordinarily experienced; that is having to defend a claim that the respondent thought was not going to be brought. That is prejudice which, of course, I take into account but, in the mix, it would weigh more against the granting of the application if there was some particular prejudice arising out of the delay.

15 Given the delay was two months, and not many months or years, it is not surprising that no particular prejudice relating to loss of memory or scattering of witnesses or the like is pointed to.

16 The main prejudice the respondent points to is bound up with an assessment of the strength of the applicant's substantive case. The respondent argues that the applicant's case is weak and that, given this, it would be unfair for it to have to go to expense and inconvenience in meeting it at a hearing.

17 The strength of the applicant's case is a relevant consideration. There is obviously no point in extending time, even if delay is explained and a respondent will be able to meet the case unaffected by prejudice arising out of the passage of time, if the case is so weak that it is doomed to fail. There are various other ways of expressing the role of this factor in the mix.

18 The applicant's case is to be assessed in a rough and ready way at this stage.

19 The applicant's case is clearly arguable. The applicant says, essentially, that the dismissal happened all too quickly and without procedural fairness. The applicant says that if he had been given time to discuss the issues relating to his dismissal it was possible that he could have convinced the respondent that his position still had a sufficient volume of work to continue or that he should have been transferred to some other position. He seeks to go back into his position and for a consultation process to play out. He accepts that his employment could still end, and end for the reasons given by the respondent, but says he should have the opportunity to try and save his employment as part of the process.

20 Given what happened on 19 October 2017, as described by the Chief Executive Officer, it cannot possibly be said that the applicant's case is without merit or is doomed to fail. It is plainly arguable that there is something unfair about being summoned to a meeting after almost five years of employment and walking out of the meeting with no job, given the history preceding the event as revealed by the papers before me, which include that the applicant had no notice that his dismissal was a possible let alone the likely outcome of the meeting.

21 I find that it would be unfair to not accept the claim out of time.

2018 WAIRC 00803

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00803
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	THURSDAY, 3 MAY 2018, FRIDAY, 17 AUGUST 2018 AND WRITTEN SUBMISSIONS FILED FRIDAY, 21 SEPTEMBER 2018, MONDAY, 8 OCTOBER 2018
DELIVERED	**:**	TUESDAY, 16 OCTOBER 2018
FILE NO.	**:**	U 7 OF 2018
BETWEEN	**:**	WILLIAM JAMES NUNN Applicant AND THE SHIRE OF MURRAY Respondent

CatchWords	:	Unfair dismissal claim - Dismissal due to genuine redundancy - Dismissal not oppressive or unfair in all of the circumstances - Dismissal was harsh in all of the circumstances - Reinstatement and re-employment impracticable - Compensation awarded
Legislation	:	
Result	:	Application granted in part
Representation:		
Counsel:		
Applicant	:	Mr P Mullally as agent
Respondent	:	Mr J Darams of counsel
Solicitors:		
Respondent	:	Clyde & Co

Case(s) referred to in reasons:

CMP Manufacturing Pty Ltd v Barbieri [2018] FCA 622

Case(s) also cited:

Williams v Melbourne Corporation (1933) 49 CLR 142

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353

Precision Plastics Pty Ltd v Demir (1975) 132 CLR 362

R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Ltd (1977) 44 SAIR 1202; (1977) 16 SASR 6

Jones v Department of Energy and Minerals (1995) 60 IR 304

FDR Pty Limited v Gilmore (1998) 80 IR 411

Bogunovich v Bayside Western Australia Pty Ltd (1998) 86 IR 101

AWI Administration Services Pty Ltd v Andrew Birnie [2001] WAIRC 04015

Garbett v Midland Brick Company Pty Ltd (2003) 129 IR 270

Dibb v Federal Commissioner for Taxation (2004) 136 FCR 388

Trades & Labor Council of Western Australia v Minister for Consumer & Employment Protection (2005) 143 IR 149; [2005] WAIRC 01715

Sealanes (1985) Pty Limited v Foley & Buktenica [2006] WAIRC 04110

UGL Rail Services Pty Ltd v Janik (2014) 246 IR 320

Reasons for Decision

1 The applicant commenced employment with the respondent in February 2013 as its Principal Building Surveyor. On 19 October 2017 the respondent's Chief Executive Officer, Mr Dean Unsworth, and the respondent's Director of Planning and Sustainability, Mr Rodney Peake, met with the applicant and Mr Unsworth told the applicant that his employment was terminated, effective close of business that day.

2 The applicant had been given no warning of what the meeting was about. That morning he had received an email simply asking him to attend a meeting that afternoon at which, as it turned out, he was dismissed from his employment on the ground of redundancy.

3 It was stressed at the meeting by Mr Unsworth, quoting his evidence at T80:

> I respected Mr Nunn, um, I don't have a problem with him, his attitude was very good. His work was good. It was absolutely nothing to do with his performance. It was nothing to do with his attitude. It was purely on the significant downturn of building applications that were coming to the Shire.

4 The evidence at hearing from the respondent, which was not undermined in any way by the applicant, satisfies me that the applicant's position was redundant.

5 The principal duty of the applicant's position was the processing of building applications. Following the applicant's dismissal that duty has been performed by the person holding the position of the respondent's Manager of Building Services, as was the plan at the time of the applicant's dismissal.

6 The respondent had decided that this work that had been done by the applicant could be absorbed into the workload of the person holding that position and this is what has occurred.

7 At T60 Mr Peake gave the following evidence; which I accept in its entirety because Mr Peake was a credible witness and because the applicant led no evidence to contradict it:

> Those applications are all being – have been absorbed into the role the Manager of Building Services and, ah, he's comfortably dealing with what his role was previous, ah, and also, ah, the processing of all of those, um, building applications at the present time.

8 What the respondent did was a restructuring or re-ordering of the duties or tasks required to be performed by an employee which resulted in the applicant's position becoming redundant because the bundle of duties that had constituted his position were no longer required to be performed by anybody as a bundle of duties constituting that position.

9 This is a genuine case of redundancy (see *CMP Manufacturing Pty Ltd v Barbieri* [2018] FCA 622 and the cases referred to therein) and accordingly I find that the applicant's position was redundant when he was dismissed from it.

10 I note there was a lot of evidence about the number and complexity of building applications received by the respondent over the course of the applicant's employment. I find that the numbers were reducing, but that is ultimately beside the point. The point is that whatever the number and whatever their complexity the processing of them was able to be accommodated within someone else's position.

11 In this circumstance, there was nothing oppressive or unfair about the applicant losing his job. Employers are entitled to reorganise their businesses to save money in circumstances where someone's duties may be carried out entirely by someone who has the ability and capacity to do so. There is no evidence competing with that called by the respondent that this is what occurred here.

12 However, the dismissal was harsh for the following reasons:

(1) the applicant had been employed for over four years in a relatively senior position;

(2) the applicant had given impeccable service to the respondent;

(3) the applicant was called to a meeting at which he was sacked without being given any notice of what the meeting was about and, thus, was denied the opportunity to prepare himself to say anything about what he was to be told at it; and

(4) given that the reason for his dismissal was that his position was redundant (and not for any other reason) he was denied the opportunity to turn his mind to and propose to the respondent for its consideration any alternative to his dismissal. That is, he was not genuinely consulted about the decision.

13 I expressed the view during the hearing, and now find, that it is inherently harsh for a good and loyal employee to walk into a meeting not knowing his employment is in jeopardy and to leave half an hour later without a job. I find this even though I acknowledge that Mr Unsworth and Mr Peake were as nice as possible to the applicant in that meeting in terms of their manner and delivery of the bad news.

14 The applicant, having given good service to the respondent, ought to have been given an opportunity to fight for his job by thinking about, and presenting to the respondent, alternatives to his dismissal. The respondent tells me that such a fight would have been a hopeless one – and I have no evidence to gainsay that view – but the applicant should have been involved in a process which allowed him to come to that conclusion himself if it was so obvious. There was no risk to the respondent in this; the applicant presented as a fundamentally decent and loyal person who would have caused no trouble for the respondent as he was politely but, as the respondent says, inevitably made to understand that he was truly redundant.

15 That process would have taken, at the outside, two weeks.

16 Given I accept the respondent's evidence, which was uncontested and given by persons I find to be credible and honest, that the applicant's position was redundant and that he could not otherwise be accommodated within its employ, I find reinstatement and re-employment to be impracticable.

17 In terms of compensation for the harsh dismissal of the applicant I find that, for the reasons given above, he ought be awarded two weeks of salary calculated on the basis that he earned $96,000 per annum.

18 I also award the applicant by way of compensation a small amount of money, $500, for the effect the means of dismissal had on his emotional wellbeing. At T24 he said that when he was dismissed he felt "a bit numb and sort of lost." Those feelings are understandable and compensable.

2018 WAIRC 00808

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WILLIAM JAMES NUNN
	APPLICANT
	-v-
	THE SHIRE OF MURRAY
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 18 OCTOBER 2018
FILE NO/S	U 7 OF 2018
CITATION NO.	2018 WAIRC 00808

Result	Application granted in part
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr J Darams of counsel

Order

HAVING heard Mr P Mullally as agent for the applicant and Mr J Darams of counsel for the respondent on Thursday, 3 May 2018 and Friday, 17 August 2018 and having read written submissions filed Friday, 21 September 2018 and Monday, 8 October 2018; and

HAVING given Reasons for Decision in which I determined to uphold the application in part and award the applicant 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 $4,192.30 forthwith.

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

2018 WAIRC 00814

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00814
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 17 OCTOBER 2018
DELIVERED	**:**	WEDNESDAY, 17 OCTOBER 2018
FILE NO.	**:**	B 92 OF 2018
BETWEEN	**:**	MURRAY PEARCE
		Applicant
		AND
		MINH LE
		Respondent

CatchWords	**:**	Contractual entitlement claim - Agreement reached at conference - Agreement enforced
Legislation	**:**	*Workers' Compensation and Injury Management Act 1981* *Industrial Relations Commission Regulations 2005*
Result	**:**	Agreement Enforced
Representation:		
Counsel:		
Applicant	**:**	No appearance
Respondent	**:**	In Person

Case(s) referred to in reasons:

Harrop-Marriner v. Tahlia Ferguson t/as Playful Ink 2018 WAIRC 739

Reasons for Decision

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

1 A conference was held in this matter, and a related matter, on 5 September 2018.

2 I have a good recollection of the conference.

3 Relevantly, I asked the respondent whether he owed the applicant any money and he said he did, around $1,000 to $1,500. The respondent was at pains to make clear at the conference, however, that he disputed that there was an employer-employee relationship between himself and the applicant.

4 The applicant said at the conference that he thought he was owed a sum around $1,650.

5 Asked by me whether he was prepared to make an offer to compromise this and the related matter the respondent offered to pay the applicant the sum of $1,300.

6 The applicant accepted the offer and said he would discontinue this and the related matter and the conference was brought to an end by me.

7 As I was leaving the room, the respondent said that he required an invoice from the applicant in the sum of $1300.

8 I explained to the respondent that the settlement had overtaken all of the issues between the parties in this jurisdiction, including, and particularly, the issue of whether there was an employer-employee relationship between him and the applicant. I explained that the need for an invoice had been overtaken by the agreement.

9 After the conference, my Associate, to his credit, sent an email to the parties which said in part:

> At the conference this morning agreement was reached that the respondent would pay to the applicant the sum of $1300 and the applicant would discontinue the two matters before the Western Australian Industrial Relations Commission.

10 The email went on to deal with other matters and, in particular, that the settlement implied no concession on the part of the respondent that the applicant was his employee or anything along those lines. The email also pointed out that the settlement did not, and could not, impact on any action the applicant had taken under the *Workers' Compensation and Injury Management Act 1981*.

11 The respondent has not paid the settlement sum and accordingly this, and the related matter, were set down for hearing today. The only question at the hearing was whether to make orders enforcing the agreement reached at the conference or not.

12 I note that the applicant is not present today. He has explained by email his reasons for this and I am content to proceed in his absence.

13 I note also that the applicant has filed notices of discontinuance in this and the related matter pursuant to his promise to do so at the hearing, and despite not having received any money from the respondent.

14 I asked the respondent today why I should not make orders in terms of the agreement made at the conference.

15 The respondent told me essentially that he was inexperienced in legal processes and was not expecting what happened at the conference to happen. It was clear that the respondent's concern remains that he does not want to concede, imply or suggest in any way that he was in an employer-employee relationship with the applicant.

16 The respondent did, however, volunteer that he does want these matters to end.

17 I interpret what the respondent told me today to mean that he wanted to make the point at the conference that he was not in an employer-employee relationship with the applicant, that he felt that settling the matter might have brought this implication and that, while he wants the matter to end, he also does not want in any way to resile from his position that he never employed the applicant.

18 It is clear that I have power to make orders in terms of a settlement agreement reached at a conference. In this regard see *Harrop-Marriner v. Tahlia Ferguson t/as Playful Ink* 2018 WAIRC 739 and the cases discussed therein.

19 I intend to make orders reflecting the agreement reached between the parties at the conference. I will, for the sake of convenience, make the orders in this matter. I will dismiss the related matter for reasons given separately.

20 The orders will make it abundantly clear, as do these reasons, that the respondent does not concede in any way or for any purpose that he was in an employer-employee relationship with the applicant.

21 As this matter was set down for hearing before the applicant filed his notice of discontinuance it is necessary for me to grant leave for it to be discontinued and regulation 16(5) *Industrial Relations Commission Regulations 2005* provides that I may order that the matter be discontinued or dismissed.

22 It is convenient that along with an order that the respondent pay the applicant the sum of $1300 that I otherwise formally dismiss this application and I will do so by order.

2018 WAIRC 00813

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MURRAY PEARCE
	APPLICANT
	-v-
	MINH LE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 19 OCTOBER 2018
FILE NO/S	B 92 OF 2018
CITATION NO.	2018 WAIRC 00813

Result	Agreement enforced
Representation	
Applicant	In person
Respondent	In person

Order

HAVING heard from the respondent in person on Wednesday, 17 October 2018; and

WHEREAS there was a conference between the parties on Wednesday, 5 September 2018;

AND WHEREAS at that conference the respondent maintained that he had never employed the applicant but was prepared to pay the applicant $1,300.00 to bring all claims brought against him by the applicant in this jurisdiction to an end and on the basis that payment of this amount would preclude the applicant bringing any further claims against him, insofar as the law allows;

AND WHEREAS the applicant agreed to discontinue all matters brought by him against the respondent in this jurisdiction;

AND WHEREAS the respondent maintains that he never employed the applicant and payment of the settlement sum involves no admission in any way that he did;

AND WHEREAS the applicant has filed notices of discontinuance in all matters he has brought in this jurisdiction against the respondent;

AND HAVING given Reasons for Decision ex tempore on Wednesday, 17 October, which will be published as soon as possible, in which I determined to enforce the agreement reached between the parties on Wednesday, 5 September 2018;

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

(1) THAT the respondent pay to the applicant $1,300.00 forthwith; and

(2) THAT the matter otherwise be dismissed.

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

2018 WAIRC 00812

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00812
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 17 OCTOBER 2018
DELIVERED	**:**	FRIDAY, 19 OCTOBER 2018
FILE NO.	**:**	U 92 OF 2018
BETWEEN	**:**	MURRAY PEARCE
		Applicant
		AND
		MINH LE
		Respondent

CatchWords	**:**	Claim of unfair dismissal - Matter discontinued after hearing date set - Matter dismissed
Legislation	**:**	*Industrial Relations Commission Regulations 2005*
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	No appearance
Respondent	**:**	In person

Reasons for Decision

1 I refer the reader to my reasons for decision given in a related matter, B92 of 2018.

2 As the notice of discontinuance in this matter was filed after the matter was set down for hearing regulation 16(5) *Industrial Relations Commission Regulations 2005* requires that I give leave for the matter to be discontinued and that I may make orders that this matter be dismissed or discontinued.

3 For the reasons given in B92 of 2018, being that it is convenient to make orders finalising the dispute between the parties in this jurisdiction in that matter, I will simply make an order dismissing this application.

2018 WAIRC 00810

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MURRAY PEARCE
	APPLICANT
	-v-
	MINH LE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 19 OCTOBER 2018
FILE NO/S	U 92 OF 2018
CITATION NO.	2018 WAIRC 00810

Result	Application Dismissed
Representation	
Applicant	In person
Respondent	In person

Order

HAVING heard from the respondent in person on Wednesday, 17 October 2018; and

WHEREAS there was a conference between the parties on Wednesday, 5 September 2018;

AND WHEREAS a notice of discontinuance was filed by the applicant after the matter was set down for hearing;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby order that the application be and is hereby dismissed.

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

2018 WAIRC 00807

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00807
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	TUESDAY, 16 OCTOBER 2018
DELIVERED	**:**	WEDNESDAY, 17 OCTOBER 2018
FILE NO.	**:**	B 38 OF 2018 AND B 39 OF 2018
BETWEEN	**:**	GLENYS DAWN VIERSMA & LEO VIERSMA
		Applicants
		AND
		SIN-AUS-NANGA BAY PTY LTD
		AVER GROUP (ABN 44096738733)
		Respondent

CatchWords	:	WA industrial law – Denied contractual benefits – Compromise agreements – Tax – Public interest
Legislation	:	Section 26, s 27(1)(a) and s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA)
Result	:	Orders and declarations issued
Representation	:	
Applicants	:	In person (by video)
Respondent	:	Ms Wong (as agent by telephone)

Case(s) referred to in reasons:

Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service [2004] WAIRC 11100 (2004) 84 WAIG 2613

Green v Rozen and others [1955] 2 All ER 797

Maurice Bradbury v Jos van Baren, John Denwick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate (1995) 75 WAIG 2921

Prudential Assurance Co. Ltd. V McBains Cooper [2000] 1 WLR 2000

Reasons for Decision

1 Glenys and Leo Viersma filed notices of claim for denied contractual benefits on 17 April 2018. They requested that their matters be heard together because they were both employed by Sin-Aus-Nanga Bay Pty Ltd (**Nanga Bay**) and they were denied the same contractual entitlements, being unpaid wages and notice of termination.

2 The Viersmas started working at Nanga Bay on 16 December 2017. Mrs Viersma performed a range of tasks including office administration and cleaning and Mr Viersma's tasks included building and generator maintenance. Their last day of work was 3 January 2018, when they were both told they were dismissed.

3 Nanga Bay filed notices of answer disputing the Viersmas' claims.

4 The parties agree that at the conciliation conference on 6 June 2018 they settled applications B 38 and B 39 of 2018 on the following terms:

- by close of business, Monday 11 June 2018, Nanga Bay would pay:
  - Mrs Viersma $2,836.32 (gross) by electronic funds transfer;
  - Mr Viersma $2,836.32 (gross) by electronic funds transfer;
- within two business days of receiving these payments, the Viersmas would discontinue their claims B 38 of 2018 and B 39 of 2018; and
- shortly after the end of this financial year, Nanga Bay would send group certificates to the Viersmas care of the Marree Hotel, South Australia 5733.

5 The parties also agree that the compromise agreements were confirmed with the Viersmas and Nanga Bay by email on 6 June and again on 7 June 2018.

6 On 8, 9, 11, 14, 17, 20, 22 and 25 June 2018, the Viersmas wrote to the Commission and said Nanga Bay had not complied with the compromise agreements reached during the conciliation conference of 6 June 2018 because:

- payments were to Mr Viersma's bank account only;
- Nanga Bay said it would not pay superannuation until 28 July 2018;
- an incorrect amount of tax was taken out of the gross settlement payment; and
- Nanga Bay owes each applicant an outstanding amount of $6.

7 Mr and Mrs Viersma have informed the Commission on several occasions that until they feel they had been paid the correct net settlement sum, they will not withdraw their claims B 38 and B 39 of 2018. On 25 June 2018 the Viersmas asked the Commission to proceed with their claims on the basis that Nanga Bay had not complied with the compromise agreements. The next day Nanga Bay paid the Viersmas $6 each.

8 A hearing in July was adjourned to allow the Viersmas time to seek legal advice. After receiving that advice, the Viersmas asked the Commission to proceed to a hearing. They again said they had not been paid according to the agreement reached at conciliation because they believed too much tax had been withheld.

9 Nanga Bay says it withheld the correct amount of tax and complied with the compromise agreements. It says the Commission should dismiss the claims.

Question I must decide

10 I must decide whether the Commission should hear the Viersmas' claims under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) in circumstances where the Viersmas and Nanga Bay reached agreements to compromise applications B 38 and B 39 of 2018.

Documents provided

11 Payslips provided to the Commission show that Nanga Bay paid $1,961.32 (net) and withheld $875.00 in tax for each of the Viersmas. Bank acknowledgements show that $3,922.64 was transferred to Mr Viersma's bank account.

12 The Viersmas and Nanga Bay referred to the Australian Taxation Office's 'Weekly Tax Table (NAT 1005)' for payments made on or after 1 July 2017. Nanga Bay relies on page eight of this document, which shows $869 is the tax to be withheld on a gross payment of $2,836.

13 The Viersmas say because their employment contracts provided for weekly payment, the tax table should be interpreted to require $328 in tax to be withheld. This is because they say the obligation to withhold tax should be the same as if the settlement sums under the compromise agreements were paid across four weekly instalments. However the Viersmas agree that the compromise agreements did not require the settlement sums to be paid across four weekly instalments.

Consideration

14 It is common ground that the parties reached concluded compromise agreements to settle the claims as set out in [4] and that Nanga Bay paid the Viersmas $3,922.64 (net). Here the dispute is about whether Nanga Bay withheld too much tax from the payments made to the Viersmas.

15 An unimpeached compromise agreement represents the end of the dispute or disputes from which it arose: ***Prudential Assurance Co. Ltd. V McBains Cooper*** [2000] 1 WLR 2000, 2005. The compromise agreements reached by the parties have overtaken the Viersmas' claims for denied contractual benefits: ***Maurice Bradbury v Jos van Baren, John Denwick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate*** (1995) 75 WAIG 2921 (**Bradbury**); ***Green v Rozen and others*** [1955] 2 All ER 797. Now before the Commission are not the claims for denied contractual benefits but the compromise agreements of the parties in settlement of those claims.

16 I agree with the reasoning of Smith C (as she was then) that the Commission has inherent power to make an order in the terms of a compromise agreement: ***Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service*** [2004] WAIRC 11100*;* (2004) 84 WAIG 2613, [44] – [53].

17 However, in the circumstances of this matter I am not persuaded that I should make orders in the terms of the compromise agreements. For a start, it is not the case that Nanga Bay has failed to pay the Viersmas. The bank acknowledgements show, and the parties do not dispute, that two payments of $1,961.32 were transferred into the account 'Viersma, Leo'. I find Nanga Bay paid $3,922.64 into Mr Viersma's bank account. Finding, as I do, that Nanga Bay has made the payments as a result of the compromise agreements, and in good faith in that it withheld an amount consistent with the tax tables, it would be contrary to s 26 of the *Industrial Relations Act 1979* (WA) (**IR Act**) for the Commission to now make orders in the terms of the compromise agreements.

18 Further, by arguing that Nanga Bay has withheld too much tax, I consider that what the Viersmas are asking the Commission to do is *enforce* the compromise agreements. Enforcement of agreements lies outside the Commission's jurisdiction.

19 In my view it is not in the public interest to hear these applications. The Full Bench in ***Bradbury*** stated 'It is certainly not in the public interest, too, that the Commission should have proceeded to hear something which had been settled by agreement, even if, as a matter of law, the Commission could have heard the matter, which it could not have. The Commission did not err in the exercise of its discretion or otherwise.' (2928)

20 Given the unimpeached compromise agreements and the payments made by Nanga Bay, I am satisfied that further proceedings are not necessary or desirable in the public interest: s 27(1)(a) of the IR Act.

21 For these reasons, I will declare that the parties have compromised applications B 38 and B 39 of 2018 and dismiss the applications.

2018 WAIRC 00805

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENYS DAWN VIERSMA
	APPLICANT
	-v-
	SIN-AUS-NANGA BAY PTY LTD
	AVER GROUP (ABN 44096738733)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 17 OCTOBER 2018
FILE NO/S	B 38 OF 2018
CITATION NO.	2018 WAIRC 00805

Result	Declaration and order issued
Representation	
Applicant	In person (by video)
Respondent	Ms J Wong (as agent by telephone)

Declaration and Order

HAVING heard the applicant in person and Ms J Wong (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA):

1. DECLARES that the parties have compromised application B 38 of 2018; and
2. ORDERS that this application be, and by this order is, dismissed.

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

2018 WAIRC 00806

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEO VIERSMA
	APPLICANT
	-v-
	SIN-AUS-NANGA BAY PTY LTD
	AVER GROUP (ABN 44096738733)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 17 OCTOBER 2018
FILE NO/S	B 39 OF 2018
CITATION NO.	2018 WAIRC 00806

Result	Declaration and order issued
Representation	
Applicant	In person (by video)
Respondent	Ms J Wong (as agent by telephone)

Declaration and Order

HAVING heard the applicant in person and Ms J Wong (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA):

1. DECLARES that the parties have compromised application B 39 of 2018; and
2. ORDERS that this application be, and by this order is, dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Amanda Culver	Jim Hauraki Chief Executive Officer Avon Youth Community & Family Services	U 58/2018	Commissioner D J Matthews	Discontinued
Benjamin John Hicks	ACR Plastering	U 68/2018	Senior Commissioner S J Kenner	Discontinued
Benjamin John Hicks	ACR Plastering	B 68/2018	Senior Commissioner S J Kenner	Discontinued
Colin R Dixon	Department of Education WA	U 19/2018	Commissioner D J Matthews	Discontinued

Parties		Number	Commissioner	Result
Connor Koon Hei Ling	CQ & JM Dowsing Pty Ltd ATF The Dowsing Family Trust	B 101/2018	Commissioner T Emmanuel	Discontinued
Drew Maslin	Derrick Dusterhoft, Apex Electrical Control	B 80/2018	Senior Commissioner S J Kenner	Discontinued
Nicolas Pierre Joel Etiennette	Port-Hedland Yacht Club Inc.	U 9/2018	Senior Commissioner S J Kenner	Discontinued
Nicolas Pierre Joel Etiennette	Port-Hedland Yacht Club Inc.	B 9/2018	Senior Commissioner S J Kenner	Discontinued
Steven Patrick Post	Sparaxis Pty Ltd t/as Centrewest Insurance Brokers	B 91/2018	Senior Commissioner S J Kenner	Discontinued

CONFERENCES—Matters referred—

2018 WAIRC 00206

DISPUTE RE ALLEGED REFUSAL TO REINSTATE OR TO RE-EMPLOY UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER

DATE MONDAY, 26 MARCH 2018

FILE NO. CR 10 OF 2017

CITATION NO. 2018 WAIRC 00206

Result Direction issued

Representation

Applicant Mr C Fordham of counsel

Respondent Mr D Anderson of counsel

Direction

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

(1) THAT each party shall give an informal discovery by serving its list of documents by no later than 9 April 2018.

(2) THAT the applicant and respondent file an agreed statement of facts by no later than 16 April 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.

(4) THAT the applicant file and serve upon the respondent any signed witness statements upon which it intends to rely by no later than 30 April 2018.

(5) THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely by no later than 14 May 2018.

(6) THAT the applicant file and serve an outline of submissions and any list of authorities upon which it intends to rely by no later than 28 May 2018.

(7) THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely by no later than 11 June 2018.

(8) THAT the matter be listed for hearing for five days.

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

(Sgd.) S J KENNER,

[L.S.] Senior Commissioner.

2018 WAIRC 00820

DISPUTE RE ALLEGED REFUSAL TO REINSTATE OR TO RE-EMPLOY UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00820
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 26 MARCH 2018, MONDAY, 30 JULY 2018, TUESDAY, 31 JULY 2018, WEDNESDAY, 1 AUGUST 2018, THURSDAY, 2 AUGUST 2018, WRITTEN SUBMISSIONS FRIDAY, 21 SEPTEMBER 2018
DELIVERED	**:**	TUESDAY, 6 NOVEMBER 2018
FILE NO.	**:**	CR 10 OF 2017
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

Catchwords	**:**	Industrial Law (WA) - respondent's refusal to re-employ or reinstate the applicant's member - scope of "industrial matter" and s 44(9) of the Industrial Relations Act 1979 - application of s 41(3) of the Working with Children (Criminal Record Checking) Act 2004 - Principles applied - Commission satisfied that ongoing refusal of respondent to employ applicant's member was industrially unfair - respondent ordered to offer applicant's member a contract of employment and pay an amount representing loss of salary
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 6, 7, 23(1), 23(2a), 23A, 26(1), 26(2), 27(1), 29, 44, 44(6), 44(9), *Criminal Code 1913* (WA) s 313 *Industrial Relations Commission Regulations 2005* r 31 *Public Sector Management Act 1994* (WA) ss 8(1), 8(3), 97(1) *School Education Act 1999* (WA) s 240 *School Education Regulations 2000* (WA) r 38 *Working with Children (Criminal Record Checking) Act 2004* (WA) ss 22, 23, 41(2), 41(3)
Result	**:**	Order issued
Representation:		
Counsel:		
Applicant	**:**	Ms P Giles of counsel and with her Mr C Fordham of counsel
Respondent	**:**	Mr J Carroll of counsel and with him Ms Z Bush of counsel
Solicitors:		
Applicant	**:**	The State School Teachers' Union of W.A. (Incorporated)
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Blackadder v Ramsey Butchering Services Pty Ltd (2005) 79 ALJR 975

Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers' Association WA (1975) 55 WAIG 543

Charles Brett V Sharyn O'Neill, Director General, Department of Education [2015] WASCA 66; (2015) 95 WAIG 429

Cliffs WA Mining Co Pty Ltd v Association of Architects, Engineers, Surveyors and Draftsmen of Australia, WA Division (1978) 58 WAIG 486

Construction, Forestry, Mining and Energy Union of Workers v BHP Iron Ore Pty Ltd and Anor [2005] WAIRC 01797

Jones v Dunkel (1959) 101 CLR 298

Kounis Metal Industries Proprietary Limited v Transport Workers Union (1992) 45 IR 392

Kwinana Construction Group Pty Ltd v The Electrical Trades Union of Workers (Western Australian Branch) (1954) 34 WAIG 51

Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1] (1920) 28 CLR 278

Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Perth and Fremantle Bread Carter's Union (1903) 2 WAAR 71

Public Transport Authority v The Australian Rail, Tram and Bus Union of Employees, West Australian Branch (2016) 96 WAIG 408

Public Transport Authority v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch [2017] WAIRC 00452; (2017) 97 WAIG 324

Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia (1987) 21 IR 151

RGC Mineral Sands v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch (2000) 80 WAIG 2438

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1988) 69 WAIG 990 *(Peppler's case)*

State School Teachers' Union of W.A. (Incorporated) v Director General, Department of Education [2017] WAIRC 000241; (2017) 97 WAIG 564

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2013] WAIRC 00754; (2013) 93 WAIG 1431

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

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

The Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch [2015] WASCA 150; (2015) 95 WAIG 1593

The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd (2006) 86 WAIG 1268

Tip Top Bakeries v Transport Workers Union of Australia, Industrial Union of Workers, WA Branch (1994) 74 WAIG 1729

Case(s) also cited:

Anthony D Mullen, Christopher C Sharpe v Anne Gisborne, President of the State School Teachers Union of Western Australia (Inc.), The State School Teachers Union of Western Australia Inc [2009] WAIRC 001192

Attorney-General (NT) v Maurice [1986] HCA; (1986) 161 CLR 475

BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers & Anor [2006] WASCA 49 (*Brandis case*)

Commonwealth of Australia v Temwood Holdings Proprietary Limited [2002] WASC 107

Mann v Carnell [1999] HCA 66; (1999) 201 CLR 1

Nguyen v Vietnamese Community in Australia trading as Vietnamese Community Ethnic School South Australia Chapter [2014] FWCFB 7198

Sharon Hislop v Department of Education [2016] WAIRC 00053

Tarong Energy Corporation Limited v South Burnett Regional Council [2009] QCA 265

Temwood Holdings v The Western Australian Planning Commission [2003] WASCA 112

Reasons for Decision

Brief background

1 This matter has a lengthy and somewhat torturous history.

2 Mr Buttery is a qualified teacher with nine years' teaching experience and until the event the subject of this decision occurred, he had an exemplary record of teaching service. Mr Buttery commenced training as a teacher in 2003. He holds a Bachelor of Education (Primary) degree and graduated in 2007 with First Class Honours. Mr Buttery commenced as a teacher with the respondent in 2008. He was a teacher at Parkwood Primary School until July 2011 and transferred to Greenfields Primary School (the School) at the beginning of term three in 2011. Mr Buttery presently works as a sometime driving instructor and "mystery shopper".

3 On 31 August 2016 an incident occurred at the School involving a year four student "S". A charge of aggravated common assault against Mr Buttery under s 313 of the *Criminal Code* (WA) followed, along with the issuance of notices under the *Working with Children (Criminal Record Checking) Act 2004* (WA) (WWC Act) and cancellation of Mr Buttery's teacher registration by the Teacher Registration Board. On 10 November 2016 Mr Buttery's employment was summarily terminated by the respondent, on the strength of the WWC Act notice, which the respondent contended led to Mr Buttery having "repudiated" his contract of employment.

4 Subsequent requests by Mr Buttery's Union, the applicant in this matter, that he be re-employed or reinstated without loss, were refused. Conciliation failed to resolve the dispute and interim order applications made to the Commission were not successful. Mr Buttery now claims that the termination of his employment was unnecessary and unfair and he seeks to be

employed again without loss. Furthermore, Mr Buttery maintained that the disciplinary investigations commenced into the relevant events were flawed. He also denied that he engaged in the act of misconduct alleged.

The s 44(9) referral

5 Following a conference under s 44 of the *Industrial Relations Act 1979* (WA) (the Act) before the Commission as otherwise constituted, the dispute between the parties remained unresolved. Under s 44(9) of the Act where "any question, dispute, or disagreement in relation to an industrial matter has not been settled by agreement between all of the parties, the Commission may hear and determine that question, dispute or disagreement and may make an order binding only the parties in relation to whom the matter has not been so settled". That is what has occurred in this case.

6 A few things need to be said as to s 44 and, in particular, s 44(9). First, the power of the Commission to refer an unresolved dispute for determination is not dependent to any extent, on the parties' consent for the Commission to do so. The referral of an unresolved question, dispute or disagreement is solely a matter for the Commission. It is an open question as to whether "may" in s 44(9) should be construed as "shall", although given the objects in s 6 of the Act, there would seemingly need to be a very good reason why an unresolved dispute was not referred for determination.

7 Second, the Commission's jurisdiction and powers under s 44 are and have been consistently interpreted by the Full Bench and the Industrial Appeal Court as being very broad and its terms should not be read down (see for example *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1988) 69 WAIG 990 per Nicholson J at 999 (*Robe River)*). It is the case that the nature of a question, dispute or disagreement may change from the time a s 44 conference application is made, to the point at which the Commission refers the unresolved question, dispute or disagreement for determination under s 44(9) of the Act. It is not uncommon for issues in dispute to enlarge or contract as s 44 proceedings progress.

8 Under s 44(9) of the Act, read with reg 31 of the *Industrial Relations Commission Regulations 2005* (WA), where matters remain in dispute at the conclusion of a compulsory conference, a memorandum of matters to be heard and determined is drawn up by the Commission. It is the s 44(9) memorandum which marks out the parameters of the contentions of the parties and the issues to be determined by the Commission: *Public Transport Authority v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2017] WAIRC 00452; (2017) 97 WAIG 324. The ultimate referral under s 44(9) is not to be strictly construed in accordance with the application for the s 44 compulsory conference that preceded it. The requirement is, of course, that the question, dispute or disagreement must be in relation to an "industrial matter" as defined in s 7 of the Act. The source of the Commission's jurisdiction and power lies in s 23(1) of the Act, which enables the Commission to have "cognisance of and authority to enquire into and deal with any industrial matter". In doing so, the Commission is obliged to act in accordance with equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, as required by s 26(1)(a) of the Act. The equity and good conscience of a matter is my good conscience: *Perth and Fremantle Bread Carter's Union* (1903) 2 WAAR 71 per Parker J. Furthermore, by s 26(2) of the Act, the Commission is not, in granting relief or redress under the Act, restricted to the specific claim made or the subject matter of the claim. This is subject to the requirement on the Commission, by s 26(3), to afford the parties an opportunity to be heard on matters or information not raised before it, if they are to be taken into account by the Commission in deciding any matter before it.

9 The s 44(9) referral in this case, is lengthy and quite complicated. After reciting the applicant's contentions of fact, it sets out key contentions and orders sought in the following terms:

> The applicant contends that:
>
> A. In relation to the period of non-employment from January 2017 to 2 October 2017 -
>
> 1. The termination of Mr Buttery's employment on 11 November 2016 was unnecessary and unfair;
>
> 2. Prior to effecting the dismissal, the respondent ought to have had regard to the practical alternatives to dismissal as referred to by the Court of Appeal in ***Charles Brett v Sharyn O'Neill, Director General, Department of Education*** [2015] WASCA 66; (2015) 95 WAIG 429 at [40];
>
> 3. In circumstances where the conditions that purportedly caused Mr Buttery's dismissal had ceased to exist in January 2017, the respondent ought to have re-employed Mr Buttery and placed him on paid suspension pending the resolution of criminal and/or internal disciplinary matters;
>
> 4. Mr Buttery was denied natural justice by the respondent's refusal to reinstate his employment pending the final decision handed down on 2 October 2017; and therefore,
>
> 5. Mr Buttery ought to receive back-pay and/or compensation for the period of non-remuneration ended 2 October 2017.
>
> B. In relation to the respondent's final decision as set out in the letter of 2 October 2017 -
>
> 1. The disciplinary investigation was commenced in July 2017 in response to the applicant's request for re-employment of Mr Buttery;
>
> 2. The respondent's findings and comments articulated in the letter of 2 October 2017 constituted a further and final refusal to employ Mr Buttery;
>
> 3. The respondent's final decision was based on a finding of misconduct arising from the incident on 31 August 2016;
>
> 4. Mr Buttery denies the allegations of misconduct;

5. The respondent's investigation into the incident was flawed and no finding of misconduct was or could reasonably be established;
6. If the Commission finds that Mr Buttery has not committed an act of misconduct that would otherwise justify the termination of his employment, then he should be provided relief by way of reinstatement and compensation for lost wages and superannuation.

The applicant seeks the following orders:

1. The respondent reinstate or re-employ Mr Buttery on terms and conditions that are no less favourable than his previous position with the Department of Education; and
2. The respondent pay Mr Buttery the amount that reflects the income (including superannuation) he would have earned for the period from 21 February 2017 to date; or
3. In the event Mr Buttery is found to have engaged in misconduct sufficient to justify termination of his employment, the respondent pay Mr Buttery an amount that reflects the income and superannuation he would have earned from 21 February 2017 to 2 October 2017.

10 There follows "questions for consideration" that the applicant invites the Commission to answer, posed in pars (1)(a) to (h).

11 The respondent contended that the application for a s 44 conference by the applicant on 21 February 2017 did not seek compensation and did not contend that the termination of Mr Buttery's employment on 11 November 2016 was unnecessary and unfair, and thus the applicant's contentions at par A, set out above, were not maintainable. For the reasons set out above in relation to the scope of s 44 powers and the purpose of a s 44(9) memorandum, I reject the respondent's contentions in this respect.

12 The respondent also contended that because of the terms of s 41(3) of the WWC Act it was not open for the applicant to argue that the termination of Mr Buttery's employment was procedurally unfair. The respondent in effect maintained that s 41(3) provides a complete defence against any contention by the applicant that the termination of Mr Buttery's employment was unfair or the seeking by the applicant of any remedy arising from the termination of Mr Buttery's employment in circumstances where the respondent was obliged to do so because of this provision. The respondent in the alternative, in relation to the contention by the applicant of a refusal to re-employ, says the issues for determination are whether there was a refusal to employ Mr Buttery; if so was it unfair; and if so, what remedy should follow. The parties were subsequently invited to provide further submissions on the effect of s 41(3) of the WWC Act, which I deal with below.

13 Part of the respondent's contentions were that the refusals to employ Mr Buttery on 16 January and 3 February 2017, are subject to an exclusion of the Commission's jurisdiction under s 23(2a) of the Act. This was a re-agitation of the point taken, and rejected, in my earlier decision concerning the applicant's second interim order application. The respondent also contended that there could be no refusals to employ because Mr Buttery made no application for employment at the material times. Any proposals by the applicant on behalf of Mr Buttery to "settle" these proceedings, involving Mr Buttery's re-employment, which offers were not accepted by the respondent, do not constitute "refusals to employ", as I understood the respondent's contentions.

14 Other issues raised by the respondent for consideration included that any claim for compensation without any entitlement to the same was beyond power (citing *Robe River*) and the fact that Mr Buttery was facing criminal charges at the material time, justified the respondent's refusal to employ him. In this respect, the respondent referred to the first interim order proceedings before Matthews C and his subsequent decision, in which he declined to make the order sought on this ground: *State School Teachers' Union of W.A. (Incorporated) v Director General, Department of Education* [2017] WAIRC 000241; (2017) 97 WAIG 564. Indeed, the respondent went further on this issue and argued given Matthews C's finding, it was not open for the applicant to argue to the contrary on this point.

15 Finally, it was part of the respondent's case that even if the Commission found that the respondent's refusal to employ Mr Buttery was unfair, this would not give rise to any right to an order of employment in Mr Buttery's favour.

Interim relief applications refused

16 The applicant, on behalf of Mr Buttery, made application for a s 44 conference on 21 February 2017 and sought an order for Mr Buttery to be either reinstated or re-employed. As part of those proceedings, the applicant sought an interim order for the re-employment of Mr Buttery, pending the hearing and determination of the substantive claim. The respondent raised the Commission's jurisdiction and power to make such an order, given that the applicant's claim was not for unfair dismissal that would otherwise attract the Commission's power to grant interim relief under s 44(6)(bb)(ii) of the Act.

17 In considering the arguments of the parties, Matthews C was undecided as to the scope of the Commission's powers under s 44 to make such an interim order. However, he concluded that had he not been satisfied of the Commission's powers to do so, he would not have granted an interim order in the circumstances. This was because at the time of those proceedings, Mr Buttery was facing a criminal charge of assault and Matthews C considered that the Commission were not able to conclude that there would be a prima facie case or that the balance of convenience would support the making of such an order. Commissioner Matthews considered that it would be damaging to the standing of the respondent and not in the interests of the community, to put Mr Buttery back in charge of teaching children in these circumstances.

18 A few months later, after the criminal charges against Mr Buttery were discontinued on 19 June 2017, and by letter of 20 June 2017, the applicant wrote to the respondent and again sought Mr Buttery's re-employment without loss. On 20 July 2017 the applicant was informed by the respondent that the respondent did not intend to re-employ Mr Buttery. As a result, the applicant again pressed the Commission for interim orders for Mr Buttery's re-employment or reinstatement. It was accepted by the parties to the second interim order proceedings, which came before me, that as Matthews C had not determined the issue of jurisdiction, it was open to the Commission to consider the matter further.

19 As well as the respondent's objection to the applicant's application on the basis that there was no power under the Act for the interim order sought, the respondent also raised a jurisdictional objection based on s 23(2a) of the Act. The respondent contended in this respect that any claim for re-employment of Mr Buttery was covered by the Employment Standard made by the Public Sector Commission. As such, this constituted a procedure referred to in s 97(1)(a) of the *Public Sector Management Act 1994* (WA) (PSM Act).

20 The Commission rejected the respondent's argument based on s 23(2a) of the Act and held that the matter before the Commission involved an industrial dispute between the applicant and the respondent in relation to the applicant's claim on behalf of its member, Mr Buttery, that he was unfairly and unjustly removed from his employment and the unfair and unjust refusal of the respondent to re-employ Mr Buttery. The Commission held that the matter did not involve Mr Buttery's participation in a process to "fill a vacancy" as contemplated by the Employment Standard. In relation to the second issue, that being the power of the Commission to make the interim order sought, the Commission held that there was no power under s 44 of the Act to make such an order in the circumstances of this case and the application was dismissed.

Jurisdiction, power, objections and related applications

21 It is convenient at this point to deal with several issues and objections raised, including applications made by the respondent, concerning the Commission's jurisdiction and power to enquire into and deal with the present industrial dispute and other matters.

Refusal to employ

22 The respondent submitted that the exercise of the Commission's jurisdiction and powers in this matter was confined to the first two refusals to employ Mr Buttery on 16 January 2017 and 3 February 2017. As to these, the respondent submitted that they were evidenced by the two letters to the applicant from Mr Gillam of the respondent, of the same dates. The assertion by the applicant of at least two further refusals to employ, on 20 June 2017 and 14 July 2017, were contested. As to 20 June 2017, the respondent argued that correspondence on that date from the applicant to the respondent was a without prejudice communication and could not be relied on by the applicant in these proceedings. As to the 14 July 2017 request, the respondent contended that as that was made at a s 44 compulsory conference and those proceedings were for the purposes of attempting to resolve the issues in dispute, then again, any proposal put by the applicant for the respondent to re-employ Mr Buttery was made on a without prejudice basis and could not be relied on now.

23 The position of the applicant was that there has been an ongoing dispute as to the respondent's refusal to re-employ Mr Buttery and that the respondent has expressly refused to do so on at least six occasions. The applicant maintained that the first refusal to employ Mr Buttery occurred when his employment record was, on his dismissal, "red flagged" by the notation that he should not be considered for further employment. The second refusal to employ by the respondent was contained in its letter of 16 January 2017, referred to earlier. The third refusal to employ was contained in the respondent's letter of 3 February 2017, also referred to earlier. The fourth refusal to employ Mr Buttery took place following a letter from the applicant to the respondent dated 20 July 2017 containing an open proposal that Mr Buttery be re-employed. The fifth refusal to employ by the respondent also took place on 20 July 2017 and was evidenced by email communications between the State Solicitor's Office on behalf of the respondent and my Chambers. Finally, the applicant submitted that the sixth refusal to employ was evidenced by the present proceedings and the hearing before the Commission conducted over some four days, whereby the respondent maintained its steadfast refusal to employ or to re-employ Mr Buttery.

24 I will deal specifically with the letter of 20 June 2017 and the proposal put at the compulsory conference on 14 July 2017, further below. In general terms though, as to the breadth of the Commission's powers in relation to industrial matters, and specifically refusals to employ, for the reasons to follow, the attempt by the respondent to confine the scope of the dispute to the letters from the respondent dated 16 January 2017 and 3 February 2017 must be rejected. As I have already observed earlier in these reasons, the scope of the Commission's jurisdiction and powers under s 44 are broad and are not to be read down. There is no doubt, and the respondent concedes, that a "refusal to employ" is an industrial matter for the purposes of the definition of "industrial matter" in the Act. Section 7(1) relevantly provides as follows:

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

25 Not only does the definition of "industrial matter" expressly refer to the "dismissal of or refusal to employ any person or class of persons" in par (c), but emphasis must also be placed on the breadth of the introductory words in the definition of industrial matter especially the words "any matter affecting or relating or pertaining to …". Furthermore, the definition extends in par (b) to "conditions which are to take effect after the termination of employment" and also in par (ca) "the relationship between employers and employees". Importantly also, the definition extends to any matter that relates to the work of employees and employers in any industry.

26 The reality is, with all respect to the respondent's submissions, that the parties to the present industrial dispute have been in dispute since 16 January 2017, and up to and including the present time, remain in dispute, in relation to the termination of Mr Buttery's employment and a claim that he be employed or re-employed by the respondent. Mr Buttery was employed by the respondent for some nine years as a teacher and sometime Deputy Principal of a primary school. This is not a case where a person, who has never been in an employment relationship with the respondent, was refused employment prior to the proposed commencement date, as was the circumstance in *Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers' Association WA* (1975) 55 WAIG 543. In that case, a radiographer entered into a contract of employment with the hospital. Just before the person was due to commence in employment, the hospital wrote to him and refused to let him start work.

27 The matter ultimately went before the Industrial Appeal Court. Burt J held that the Commission's order for the employer to employ the employee was within power and was an industrial matter. Burt J said at 545:

> I agree entirely with the decision and with the reasons in the ***Kwinana*** case and in substance with the reasons which led the Commission in Court Session to its conclusion in the present case. In a case such as the present one where, as I think is the case, there has been a refusal to employ a person, that refusal is an industrial matter clearly within paragraph (c) of the definition. If there is a dispute about that refusal between an industrial union of workers of which the worker concerned is or is eligible to be a member and the employer concerned, then there is an industrial dispute and then with reference to its determination, if an order directing the employer to employ or in the case of dismissal (the ***Kwinana*** case) an order for reinstatement is "fair and right in relation" to that matter "having regard to the interests of the persons immediately concerned, and of the community as a whole" then it too, that is to say, the employment of the worker or the reinstatement of the worker as the case might be, becomes an industrial matter. See paragraph (h) of the definition of industrial matters. And if the making of an order to employ or to reinstate as the case might be, be thought of as the exercise of a power within the jurisdiction, then it is I think within the power to "determine (the) industrial matter". *Section 61 (1) (e).*
>
> Furthermore the same conclusion can I think be sustained on a broader ground, it being that the dismissal or refusal to employ a worker is within the general words of the definition of "industrial matters" as being a matter "affecting or relating to the work, privileges, rights, and duties of employers or workers in any industry". If this is so, and, by analogy, s. 61 (2) (c) would suggest that the legislature considered it to be so, then again and for the same reasons, if the required relationship to that matter appears, then the employment or the reinstatement of the worker becomes an industrial matter and if it be the subject of a dispute between an industrial union of workers and an employer it is then an industrial dispute, and an order to reinstate or to employ as the case may be is then seen to be an order within power, being an order made "determining" the industrial matter in dispute.

28 In *Kwinana Construction Group Pty Ltd v The Electrical Trades Union of Workers (Western Australian Branch)* (1954) 34 WAIG 51, a case referred to in *Princess Margaret Hospital*, a dispute found its way to the Court of Arbitration in relation to the dismissal of a group of employees who had been summarily dismissed because they refused a lawful direction from the employer to work overtime. A Conciliation Commissioner at first instance ordered the reinstatement of the employees. The jurisdiction of the Commission to deal with the dispute was raised. In deciding that the dispute was an industrial matter, Jackson J said at 51:

> It was argued both in the first instance and on appeal that neither this Court nor the Conciliation Commissioner, acting under delegated power from the Court, has the power to order the reinstatement of a dismissed employee. I do not agree. The Industrial Arbitration Act defines "Industrial matters" as including "all matters relating to ..... the dismissal of or refusal to employ any person or class of persons" in any industry. I draw attention particularly to the words "all matters relating to." An industrial dispute is one in relation to industrial matters. The Court's jurisdiction under the sub-section of section 61 which is relevant in this case is "to settle and determine ..... all industrial matters and disputes" as to which a compulsory conference has been held and which, on no agreement being reached, have been referred into Court.
>
> In my view, a claim by a union that a dismissed employee should be reinstated is a matter relating to the dismissal, and it follows that in determining a dispute consequent on a dismissal the Court has power to make an order for reinstatement and such other incidental matters, including payment of wages from the time of dismissal, as the Court considers just and equitable. To hold otherwise would be to imply some restriction on the Court's powers of settling and determining a dispute for which there is no warrant in the Act.

29 In the later case of *Cliffs WA Mining Co Pty Ltd v Association of Architects, Engineers, Surveyors and Draftsmen of Australia, WA Division* (1978) 58 WAIG 486, the Commission's power to order reinstatement was confirmed by the Industrial Appeal Court, as an industrial matter. Importantly however for present purposes, was the view of the Court as to the breadth of the definition of 'industrial matter' in the legislation. Wallace J observed at 487:

> The appellant recognises the difficult hurdle of overcoming the conclusions reached by this Court in ***Kwinana Construction Group v. E.T.U.***, (1954) 34 W.A.I.G. 51 and ***Princess Margaret Hospital Board v. Hospital Salaried Officers' Association***, (1975) 55 W.A.I.G. 543. It relies again upon the previous unsuccessful arguments that the jurisdictional provision of the statute - s. 61 - does not include a reference to reinstatement as is the position in the Commonwealth statute. To do this it argues that there is an implied term in every contract of employment whether for a defined period or weekly, that a worker shall not be dismissed from his employment harshly or unconsciously. It then follows that this is the basis of the jurisdiction exercised by the Commission in a reinstatement argument. That being the case specific mention thereof should be made in s.61 and the failure to do so leaves the Commission without jurisdiction in a reinstatement area.
>
> I hope I have not done the appellant an injustice in setting out in such a brief form what I understand to be the basis of its appeal. In my opinion it is untenable. There is no authority for the proposition that every contract of employment

contains an implied term that the employee's services will not be terminated harshly and unconsciously. That may well be the case where a weekly term is concluded upon the required notice and where a contract of employment is for a defined term the harsh and unconscionable severance thereof will result in an appropriate action for damages. Furthermore the term "refusal to employ any person" has been held to cover both reinstatement, as in the ***Kwinana*** case, and employment, as in the Princess Margaret case. For these short reasons I was of the opinion that this appeal should be dismissed, so declared, and now publish my reasons therefor.

30 The jurisdiction and powers of the Commission in a refusal to employ case were also the subject of consideration by Le Miere J in *BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers & Anor* [2006] WASCA 49; (2006) 86 WAIG 1193 (*Brandis)*. In that matter, when considering the nature of a 'refusal to employ' His Honour said at pars 78-82 as follows:

> 78 A refusal by an employer in an industry to employ a person may be an industrial matter even though that person is not employed by the employer and had never been employed by that employer in the past. Further, an employer may be obliged when seeking to employ a person in a vacancy to make an offer of employment to a particular person: ***RGC Mineral Sands v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch*** (2000) 80 WAIG 2438 at 2445 per Parker J. The effect of s 23(1) of the Act is that the Commission has power to "deal with" the industrial matter constituted by the refusal to employ a person. Once the jurisdiction of the Commission is enlivened it has the power to make an order to "deal with" the industrial matter. Any order made by the Commission must be sufficiently related to the jurisdictional fact enlivening the Commission's jurisdiction, that is the refusal of the employer to employ the person: see ***RGC Mineral Sands v CFMEU*** (*supra*) per Parker J. An order to employ a person is sufficiently related to the industrial matter constituted by a refusal to employ that person so as to be within the power of the Commission to deal with that industrial matter.
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> 79 In ***Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers Association of Western Australia (Union of Workers)*** (1975) WAIG 543, Burt J (as he then was) expressed the opinion that the Commission in Court Session had no jurisdiction to "reinstate" the contract of employment. His Honour continued:
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> > "I am not sure what an order in those terms means, and what its effect would be, and in particular what effect it would have upon the worker who was not of course a party to the proceedings. The order should in my opinion be an order directed to the employer … requiring it upon the worker presenting himself for work at a particular place and time, to engage and so to employ the worker on the agreed terms and in the agreed vocation."
>
> 80 Section 23A(3) of the Act empowers the Commission to order an employer to reinstate an unfairly dismissed employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.
>
> 81 The Act does not expressly confer upon the Commission the power to order an employer to "reinstate" a person it has unfairly refused to employ. Indeed, it could not. The power "to reinstate" in the context of an employee unfairly dismissed means that the employment situation, as it existed immediately before the termination, must be restored. It requires restoration of the terms and conditions of the employment in the broadest sense of those terms: ***Blackadder v Ramsey Butchering Services Pty Ltd*** (2005) 79 ALJR 975 per McHugh J at [14]. There was no contract of employment between BHPB and Mr Brandis prior to the decision of the Commission at first instance. That is, there was no employment situation to be reinstated.
>
> 82 An order to employ should generally take the form of the order referred to by Burt J in the ***Princess Margaret Hospital*** case, that is, an order directed to the employer requiring it upon the worker presenting himself for work at a particular place and time to engage and so to employ the worker on the agreed or specified terms and in the specified position.

31 What these earlier cases demonstrate is the breadth of the definition of "industrial matter" as it has been successively cast in the Act and its predecessors for many years and, in particular, the breadth of the terms "matters affecting or relating or pertaining to work … of employers and employees" and of "any matter affecting or relating or pertaining to …" (e) "the dismissal of or refusal to employ any person or class of persons".

32 The present matter, properly characterised, is an industrial dispute between the applicant and the respondent, in relation to the applicant's member Mr Buttery, and the ongoing refusal of the respondent to employ him, despite repeated requests by the applicant, on behalf of Mr Buttery, as an organisation for the purposes of s 7 of the Act, with standing to make an application under s 44(7)(a)(i) of the Act. The question, dispute or disagreement between the applicant and the respondent as to the respondent's ongoing and persistent refusal to employ Mr Buttery was not resolved by conciliation and by s 44(9), was referred for hearing and determination. By s 23(1) of the Act, read with s 44(9), the Commission has ample jurisdiction and power to enquire into and deal with the industrial matter so referred for determination.

33 The next matter to be considered is the effect of s 41 of the WWC Act.

Section 41 WWC Act

34 A matter of some significance and one raised in response to some questions from the Commission in closing submissions, is the application of the WWC Act to this case. Irrespective of the contentions of the parties, the Commission must satisfy itself that it has jurisdiction and power to determine a matter before it. That being so, I had my Associate write to the parties on 10 September 2018, posing some questions that the Commission was considering and inviting their written responses within 14 days. The issues raised with the parties were firstly, whether s 41(3) applies in the circumstances of the present case, given that the applicant is a Union and not the affected employee. Secondly, if s 41(3) does apply, does the reference in the introductory part of s 41(3) to "a person's right to seek or obtain a remedy" mean that this may also preclude the claiming of a remedy, as opposed to the grant of a remedy, by the Commission under the Act? Thirdly, should the terms of par (a) be construed as

meaning words to the effect of "the remedy sought or obtained relates to or arises from the dismissal of the person"? Fourthly, in par (c), when read with par (b), what level of connection is necessary between the ground(s) on which the remedy is sought and the employer's compliance with the WWC Act? A question arising from this is whether, on its proper construction, read in context, s 41(3) totally precludes the seeking or obtaining of any remedy arising out of the termination of an employee's employment, not just a claim of unfair dismissal, however that remedy might be described, if the preconditions in (a), (b) and (c) are met.

35 For the Union, its additional written submissions were as follows. As to the first point above, the applicant submitted that on its proper construction, s 41(3) of the WWC Act does not prevent the Commission from making orders in relation to a remedy in respect of an application made by the applicant, as a Union, in relation to the respondent's refusal to employ Mr Buttery. The general submission was made that s 41(2) of the WWC Act is intended to protect an employer against any liability which an employee may otherwise impose, where the employer dismisses the employee to comply with the legislation. In this respect reliance is placed on observations of the Industrial Appeal Court in *Charles Brett v Ms Sharyn O'Neill, Director General, Department of Education* [2015] WASCA 66; (2015) 95 WAIG 429 (*Brett*) at par 20. The applicant further submitted that s 41(3) is a provision which saves the right of the person to seek or obtain a remedy, subject to the conditions specified in sub pars (a), (b) and (c) being met. In this respect, the applicant submitted that "person" referred to in the introductory part of s 41(3), referring to a right to seek or obtain a remedy, is the same person referred to in sub pars (a), (b) and (c), that being the person who has been dismissed.

36 As to the second question posed, the applicant submitted that there is nothing in s 41(3) to provide a bar to the Commission from conducting an enquiry into a claim. Furthermore, given the terms of ss 41(2) and (3) read together, these provisions effectively require the Commission to consider a claim to determine whether any remedy sought is excluded by the legislation. The submission was further made that given the industrial context of the WWC Act, s 41(3) contemplates that a person, being a member of a Union, can exercise a "right" to seek a remedy following the termination of their employment by an application under s 29 or Part 3 of the Act, or by way of seeking an order under s 44 of the Act.

37 In relation to the third point, the applicant submitted that the answer to this question lies in the use of the word "for" as it is applied in context. That is, the use of the word "for" indicates that a remedy may be prohibited where it would affect or impact on the employer's decision to dismiss a person. This however, does not preclude all remedies because they have a connection or arise out of a dismissal. Thus, a person would not be precluded from pursuing entitlements arising from their employment. The nature of the relief sought and that which is excluded by s 41(3)(a), must impact on the dismissal itself and seek to interfere or modify the employer's decision to dismiss in some way.

38 Finally, the applicant maintained that the language of s 41(3)(c), read with subparagraph (b), means that a person may still be able to seek a remedy for a dismissal, even when a person was dismissed to comply with the WWC Act. What is provided for in s 41(3)(c), is that a remedy may be available in circumstances where there is no reliance upon the fact that a person was dismissed to comply with the WWC Act.

39 The respondent's further submissions were as follows. It was contended that s 41(3) does have application in the present case, despite the party to the proceedings being a Union and not an individual employee. The general submission was made that the "practical reality" is that the applicant's claim is made for and on behalf of Mr Buttery. Any other construction of s 41(3) would undermine the purpose of the provision. For these purposes, the respondent accepts that having regard to the ordinary and natural meaning of s 41(3)(a), (d) and (c) of the WWC Act, the "person" who seeks or obtains a remedy, is a reference to the person who was dismissed because of the terms of the WWC Act. The submission was made by the respondent however, that the applicant in this case brings the claim on behalf of Mr Buttery, in its representative capacity. Thus, in substance, so the submission went, it is Mr Buttery who is making the claim to the Commission through the applicant. The submission was further made that to construe s 41(3) as having no application where a Union brings a claim, but which is in substance, a claim brought on behalf of its member, would strain the words of s 41(3) to, in effect, require an applicant in proceedings, to be the person who was dismissed, contrary to what the provision itself says.

40 The respondent also contended that to exclude s 41(3) when a Union brings a proceeding to the Commission arising from a dismissal, would undermine the purpose of ss 41(2) and (3), as it would narrow the protection afforded to employers for reasons with no connection to the purpose of the protection itself. There is no reason, according to the respondent's submission, that there should be any difference in terms of potential liability of an employer, whether an employee is a Union member or not.

41 Irrespective of these points, an alternative interpretation of s 41 was advanced by the respondent. Reference was made to s 41(2) to the effect that all liability is excluded, in circumstances where to comply with the WWC Act, the employer does not start or continue to employ the person in child-related employment. The savings provision in s 41(3) extends to some potential liability under the Act and only applies to natural persons. On this submission, this means that in the case of a Union bringing a claim on behalf of a member, arising from a dismissal, s 41(2) applies in its entirety. There can be no liability on an employer arising from compliance with the WWC Act and any such claim by a Union cannot succeed. On this construction, the present claim by the applicant, being a refusal to employ Mr Buttery, is one which, applying s 41(2), is entirely excluded because it relies upon the dismissal of Mr Buttery to ground its claim for unfairness in the failure of the respondent to re-employ him.

42 The respondent raised a further proposition. This was to the effect that, because I indicated in the interim order proceedings, that the applicant had commenced the s 44 application due to s 41(3) of the WWC Act, this constitutes and operates as an estoppel against the applicant and the Commission is unable to depart from that statement. This submission must fail. Firstly, the interim order proceedings were just that, they were proceedings commenced in relation to a claim for interim relief and the observation made by me in those proceedings was clearly obiter. Secondly, and more fundamentally, there could not be an estoppel in circumstances where the effect of the WWC Act was not raised or argued before the Commission in the interim order proceedings. That issue was not essential for the disposition of those proceedings and "only a decision about a matter

which it was necessary to decide – a decision which is fundamental or cardinal to the judgement – can create an issue estoppel" (see *Cross on Evidence* Loose Leaf Australian Edition Vol 1, 1996 at par [5080].

43 In relation to any conclusions reached from the construction of s 41(3) of the WWC Act, the respondent submitted that if the applicant was permitted to depart from a claim being characterised as one of an unfair refusal to employ or re-employ, to one of an unfair dismissal, this would be unfair to the respondent. This is because the respondent has conducted its case on the basis that the claim made was one of an unfair refusal to employ and not unfair dismissal. This view was reasonable having regard to the history of the proceedings and the memorandum of matters referred for hearing and determination. No claim has been made on behalf of Mr Buttery for pay between the period between Mr Buttery's dismissal and the date the claim was filed.

44 As to the second point, the respondent submitted that the introductory words to s 41(3), on their ordinary and natural meaning, prevent a person from both seeking and obtaining a remedy. There is both a bar to commence proceedings and a bar to obtaining relief. In relation to the third question, the respondent submitted no additional words need be read into s 41(3)(a) rather, if a remedy is sought "for the person's dismissal" then s 41(3)(a) applies.

45 Finally, the respondent contended that if any aspect of a claim made by a person, or on their behalf, relates to the fact that the dismissal was for the relevant reason, then s 41(3) has application. This means that s 41(3) of the WWC Act precludes the present claim relating to an unfair refusal to employ, because a basis of the applicant's claim as to why there has been a refusal to employ, was that the respondent dismissed Mr Buttery and then refused to re-employ him. This must relate to the fact that Mr Buttery was dismissed for the reason of complying with the WWC Act, according to the respondent.

46 Section 41 of the WWC Act is part of the statutory scheme providing for checking criminal records of people carrying out or proposing to carry out child related work. It prohibits persons charged with or convicted of criminal offences from carrying out child related work. Child related employment is defined in s 4 and child related work is defined in s 6 of the WWC Act.

47 Section 41 of the WWC Act provides as follows:

> (1) If it would be a contravention of a provision of this Act for a person (the ***employer***) to employ another person in child-related employment, the employer is to comply with the provision despite another Act or law or any industrial award, order or agreement.
>
> (2) The employer does not commit an offence or incur any liability because, in complying with the provision, the employer does not start or continue to employ the person in child-related employment.
>
> (3) Nothing in this section operates to affect a person's right to seek or obtain a remedy under the *Industrial Relations Act 1979* unless —
>
> (a) the remedy is for the dismissal of the person by the employer; and
>
> (b) the reason the employer dismissed the person was to comply with this Act; and
>
> (c) the grounds on which the person seeks the remedy relate to the fact that the person was dismissed for that reason.

48 By s 22 of the WWC Act, an employer is prohibited from employing certain persons in child related employment. Under s 22(3), if the employer is aware that a person has had issued to them an Interim Negative Notice (INN) and it is current, the employer must not employ that person. There is a corresponding obligation on a person to whom such a notice has been issued which is current, to not be employed in child related employment: s 23. It is common ground in this matter that an INN was issued to Mr Buttery on 11 November 2016. Mr Buttery's employment was terminated because of the issuance of the notice and the terms of s 22 of the WWC Act. Mr Buttery was issued with an Assessment Notice, revoking the INN, on 21 December 2016. On 21 February 2017 the applicant made an application for a conference under s 44 of the Act in relation to a dispute between it and the respondent, regarding the refusal of the respondent to reinstate or re-employ Mr Buttery.

49 By s 41(3) there exists a savings provision by which a *person* may seek or obtain a remedy under the WWC Act. This is subject to the requirements of pars (a) to (c) being met. These provisions were considered in *Brett.* In that case the issue for determination was the meaning of s 41(3)(b), as to how the words 'the reason' an employer dismisses a person are to be construed. In considering this provision, the Court noted that Parliament had, by s 41(2), subject to the savings provision in s 41(3), abrogated an employee's rights in cases where they are dismissed by their employer to comply with the WWC Act: *Brett* at par 20.

50 Section 41(2) affords an employer protection from any liability where the employer dismisses an employee to comply with s 22 of the WWC Act. This is so, irrespective of whether other alternatives were open to an employer in order to comply with the WWC Act, if, on the evidence, it is established as a fact that the operative reason, subjectively determined, is that the person making the decision to dismiss did so to comply with the WWC Act: *Brett* at pars 15-16 and 21. Whilst it was not necessary to decide the matter before it, the Court considered the arguments of the parties and held that the WWC Act does not require the termination of a contract of employment for there to be compliance with s 23 of the legislation, if compliance may be achieved in other ways: at pars 39-40.

51 In accordance with the ordinary and natural meaning of the language used, the "person" to whom s 41(3) refers is the "person" to whom an INN is issued and in respect of whom ss 22 and 23 operate. The only reasonable construction to be placed on these provisions is that the "person" of which ss 22 and 23 speaks, is the employee of the employer who is engaged in child related employment and in respect of whom, the employer is obliged to take steps to comply with the WWC Act. The "person" in this case who was the subject of ss 22 and 23 of the WWC Act was Mr Buttery. There seems no capacity under the legislative scheme to issue the INN to any other person. That being so, it is only Mr Buttery, as the former employee of the respondent, who was engaged in child related employment, and who was the subject of an INN, in respect of which ss 22 and 23 operated,

and who was dismissed by the respondent in compliance with ss 22, who can be the relevant "person" to seek or obtain a remedy under the Act.

52 In terms of construing s 41(3)(a) to (c), the relevant "person" of which pars (a), (b) and (c) speak, is the same "person" who seeks a remedy in the introductory part of s 41(3). When read with the WWC Act as a whole, in particular ss 22 and 23, the reference to "person" in ss 22, 23 and 41(3) is the same person who was the former employee of the employer, who the employer dismissed by reason of compliance with the employer's obligation to not continue to employ a person in child related employment.

53 In these proceedings, it is the applicant who has commenced and maintained the claim. In doing so, it is trite to observe that the applicant as an organisation registered and as a body corporate under s 60 of the Act, commences proceedings in its own right as a party principal and not as a mere agent for its member(s): ss 29(1)(a)(ii); 44(7)(a)(i) Act. However, a Union commences a proceeding before the Commission in a "representative capacity", in the sense contended by the respondent. Whilst the Union is a party principal in these proceedings, it is notable that the relief sought is an order that Mr Buttery be employed and that he receive some compensation for his loss of income. Thus, whilst it is the applicant who has commenced these proceedings on Mr Buttery's behalf, it is him and only him who stands to gain any benefit from an order in his favour. It is Mr Buttery who will receive a remedy if the claim is successful and not the applicant Union. Furthermore, as the legislation is directed towards an important social objective of the protection of children in the public interest and should be regarded as beneficial legislation, a liberal interpretation of its provisions should be adopted. On further consideration of the arguments, whilst the matter is not free from doubt, I consider s 41(3) of the WWC Act extends to include claims under the Act brought by a Union on behalf of an employee as well as claims made by employees themselves, assuming sub-pars (a), (b) and (c) are met.

54 If this construction were not to be adopted, I think that there is some force in the argument advanced on behalf of the respondent that the purposes of the legislation could possibly be defeated if s 41(3) imposed no limitation in the present circumstances. Furthermore, given that ss 41(2) and (3) need to be read together, I think that there are respectable arguments to the effect that there would be no savings from the exclusion of liability under s 41(2), if s 41(3) had no application. This would potentially exclude all claims of any kind brought by a Union on an employee's behalf, such as the enforcement of an award, order or industrial agreement to recover an entitlement denied on the termination of an employee's employment. Given that it seems the intention of s 41(3) was to save such claims, I think it would be passing strange to exclude the pursuit of such remedies simply because a Union brings a claim on behalf of a former employee, rather than the former employee themselves bringing it.

55 As to the second issue, consistent with the reasoning of the Court in *Brett*, that there is required to be a factual enquiry as to whether, subjectively viewed, the operative reason the employer dismissed an employee was to comply with the WWC Act, the Commission must be taken to have jurisdiction and power to embark upon such an enquiry. If, however, the Commission is satisfied that the terms of sub-pars (a), (b) and (c) are met, the enquiry can continue no further and the application must be dismissed. There is nothing preventing a claim being made by an employee or a Union on their behalf for a remedy. As noted in the applicant's further written submissions, this could be advanced on several bases. It is only if, when such a claim is made, the terms of pars (a), (b) and (c) are met that a remedy is not available.

56 As to the terms of s 41(3)(a), I consider that the applicant's submissions have force. That is, the reference to a remedy being sought or obtained "for" the dismissal, means that the remedy sought or obtained must in some way operate on or seek to modify the actual decision to dismiss itself and not affect matters incidental or consequential to such a decision. The most obvious remedy of this kind is a claim to reverse the employer's decision by way of an unfair dismissal claim, seeking the employee's reinstatement, with compensation for loss from the date of dismissal to the date of reinstatement, as if the employee had not been dismissed and the making of consequential orders in relation to continuity of employment Examples of the latter kind would be claims to enforce contracts of employment for denied contractual benefits or to enforce an award, order or an industrial agreement, in respect of entitlements that may be due and owing to the employee. The applicant in this case argued that it does not seek to alter or modify the respondent's decision to dismiss Mr Buttery. Rather, the claim of the applicant is one relating to the unfair refusal of the respondent to employ Mr Buttery after the WWC Act prohibition on him had been revoked and his working with children authority and teacher registration returned. I agree with this. Given the remedy claimed, I do not consider s 41(3)(a) is satisfied in this case.

57 Whilst further submissions were not invited on this point, as I have set out earlier in these reasons, it did not seem to be controversial that in the respondent's letter of 11 November 2016, the reason that Mr Buttery was dismissed was the issuance to him of the INN. Therefore, subjectively viewed, the operative reason for his dismissal was to comply with s 22 of the WWC Act. In these circumstances s 41(3)(b) would appear to be satisfied.

58 As to the terms of s 41(3)(c), I consider that the applicant's construction is to be preferred to the respondent's. That is, the grounds on which relief is sought must have a real and substantial connection not just with the dismissal of an employee, but with the dismissal of an employee to comply with the WWC Act. The language in par (c) refers to a dismissal for "that reason" which must be the reason referred to in par (b). If the grounds for claiming a remedy in any given case do not 'relate to', the reason in that sense, in that they place no reliance on the fact that the employee was dismissed for this reason, then par (c) would not be satisfied. Aside from all else, in the circumstances of this case, the respondent's refusal to employ Mr Buttery was not to comply with the WWC Act. It refused to employ him because, even some time after any prohibition on his employment in child related work no longer applied, it considered his prior conduct made him unsuitable to be employed as a primary school teacher, as evidenced by the red flag on his employment record.

59 I do not therefore consider s 41(3) precludes the applicant's claim or his obtaining relief in this matter. Additionally, the actual relief, if any, in terms of the Commission's enquiring into and dealing with the industrial matter, will be a matter for the exercise of the Commission's discretion under s 26(1) and (2) of the Act.

The s 23(2a) point

60 In my interim order decision, I rejected the respondent's argument that the Commission's jurisdiction is ousted by s 23(2a) of the Act. I set out my reasons for reaching that conclusion, at pars 20-41 of my decision, which I do not propose to repeat. I adopt and rely on them for present purposes. I remain of this view.

61 Furthermore, and alternatively, the respondent has previously informed the Commission that the reason for the refusal to employ Mr Buttery on 16 January 2017 and 3 February 2017 were different to the reason he was refused employment on 20 July 2017. On the two earlier dates, the respondent maintained, in a communication from Mr Van Hattem of the State Solicitor's Office to my Chambers, that the refusals involved the respondent declining to appoint Mr Buttery to a vacant position. Accordingly, those two requests, which were the subject of the initial application by the applicant on 21 February 2017, were claimed as excluded from the Commission's jurisdiction because of s 23(2a) of the Act. The refusal to employ of 20 July 2017 was not claimed to be based on any need to fill a vacancy: exhibit A1.

62 The respondent sought to buttress its arguments on the s 23(2a) point through the evidence of Ms Barnard, the Director of Staff Recruitment and Employment Services. Ms Barnard's job is to provide advice and support to schools in relation to recruitment. She outlined the process for recruitment of teachers in government schools and that the Director-General has delegated her powers to school Principals. Decisions as to staffing needs are made by individual schools. The formal process for new recruitment involves compliance with the PSM Act, the relevant PSC Standards and the respondent's own policies. This involves the "5 Step School Staffing process". A vacancy is lodged on the respondent's recruitment system and attempts are made to fill it from existing surplus teaching staff. If this is not successful, the school can appoint from a "fixed term pool" or may have other options, including advertising and recruiting directly.

63 In terms of the formal process where vacancies are advertised, in response to an identified need, then it seems on Ms Barnard's evidence in chief, any such vacancy is processed in accordance with the required policies and standards. However, in cross-examination of Ms Barnard, it appears that in many cases, the respondent takes a flexible approach to employment arrangements for teachers. The evidence of Ms Barnard was to the effect that teachers regularly move within the school system, by way of transfer, and promotion, without the need to proceed through the formal process of filling a vacancy in accordance with the Employment Standard. It seems that the respondent has a very broad discretion as to how it deploys teaching personnel throughout the State, without the formalities of filling a vacancy, in response to a specified need for a position at a school. The number of teachers moved around the education system in this manner seemed to be considerable, on Ms Barnard's evidence.

64 Also, and importantly, the change in policy of the respondent set out in its letter to the applicant of 9 April 2018, which I deal with below, and which emerged late in these proceedings, is directly contrary to the contention advanced in opposition to Mr Buttery's claim that any re-employment or employment of him would trigger a jurisdictional barrier, by way of the need to "fill a vacancy". This is because the Director General of the respondent herself, as the employing authority of teachers under the PSM Act, has determined that the respondent will re-employ teachers who have had notices issued to them under the WWC Act, subject to the conditions set out in the letter, none of which involve a process even remotely resembling that set out in the Employment Standard and other such processes, as described by Ms Barnard in her witness statement.

65 Thus, apart from my conclusions above adopted from the interim order proceedings, I am not persuaded by the respondent's contentions in this regard, based on the totality of the evidence of Ms Barnard and the respondent's own policy position. It is manifestly clear that Mr Buttery can be offered a contract of employment with the respondent, who is ultimately responsible for running and staffing hundreds of primary schools in the State, and he can be placed at a school as a teacher, without the need to "fill a vacancy".

Application to dismiss

66 At the outset of the respondent's case, an application was made for the Commission to dismiss the proceedings under s 27(1)(ii) or (iv) of the Act, because the proceedings were not necessary or desirable in the public interest or for other good reason. The thrust of the application, as I understood it, was that on Mr Buttery's evidence there was no basis on which a remedy could be granted by the Commission in that it would not be practicable for him to be employed and no order could be made for compensation, unaccompanied by an order for re-employment. In reliance on cases such as *Kounis Metal Industries Proprietary Limited v Transport Workers Union* (1992) 45 IR 392, which applied the earlier decision in *Robe River*, it was put that absent an order for an employee being reinstated or re-employed, then there was no power to order compensation. This is subject to the power the Commission now has under s 23A, when read with s 7(1a) of the Act, to award compensation in an unfair dismissal case, which does not apply in the present circumstances. The respondent, whilst not doubting the Commission's jurisdiction to deal with a refusal to employ, contended that no order of compensation could be made, absent an order to employ. So much can be accepted as correct in my view.

67 The next submission, as I understood it, was that taking the applicant's case at its highest on the evidence, there was no basis to grant a remedy because the employment of Mr Buttery would be impracticable. This was put on the basis that there could be no order of employment in circumstances where there had been a breakdown of trust and confidence, as the submission went: *Public Transport Authority v The Australian Rail, Tram and Bus Union of Employees, West Australian Branch* (2016) 96 WAIG 408 at par 83. This submission was based on the evidence of Mr Buttery in his witness statement to the effect that morale amongst teaching staff at the School was very low. Furthermore, reference was made to comments made by Mr Buttery about the management of the School by Mr Wright and Ms Patching and the bad relationship between teaching staff and administration staff of the School. This was submitted to be evidence of the unworkability of the relationship between Mr Buttery and the School leaders, such that it should not be restored.

68 The applicant's submissions in response to the application were in summary these. First, the application was made after most of the evidence, including the respondent's, was put and after two interim order applications had been made and determined by the Commission. Therefore, it would not be in the public interest to dismiss the application at this late stage. Second, the issue of impracticability of employment because of the alleged breakdown in trust between Mr Buttery and the Principal and Deputy Principal of the School, was answered by reference to a matter I raised with counsel for the respondent, that the employer of teachers is the Director General of Education. Under the PSM Act, it is the Director General who is the employing authority. That being so, with hundreds of schools throughout the State, the applicant seeks an order to re-establish an employment relationship with the respondent, and if ordered, it is for the respondent as to where a teacher may be deployed to teach at State Government schools.

69 On the evidence of Ms Barnard, the respondent exercises considerable discretion as to where teachers are sent to teach. In this way, the applicant submitted that given his qualifications and experience, Mr Buttery, if ordered to be employed, would no doubt be sent to an appropriate school. Furthermore, looking at the School itself, Mr Buttery's statements about the poor morale, although not contested by the respondent, were a long time ago and nothing was before the Commission to establish this was still the case. Finally, was the applicant's submission that in any event, the power to dismiss or refrain from further hearing a matter is a power to be exercised with restraint, and only in a clear case, which was not the present case.

70 After adjourning for a time to consider the application, I was not inclined to grant it and the application was dismissed, largely for the reasons identified by the applicant. It is the case that the power to dismiss a matter under s 27(1)(a) of the Act is a significant step and should only be exercised in circumstances where there are sound grounds for its exercise. A party who has invoked the jurisdiction of a court or tribunal is entitled to expect that the jurisdiction will be exercised. In a decision of the Full Bench in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority* [2017] WAIRC 00830; (2017) 97 WAIG 1689 in relation to an application to dismiss a matter on public interest grounds under s 27(1)(a) of the Act, I said at pars 137-139 as follows:

> 137 Section 27(1)(a) is a power to dismiss an application or refrain from further hearing an application. This power is broad in scope and should be exercised with caution. It is in the following terms:
>
> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;
>
> And
>
> …
>
> 138 In ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2013] WAIRC 00754; (2013) 93 WAIG 1431, in considering an application under s 27(1)(a)(ii) to dismiss a matter before the Commission in the public interest, I said at pars 22 and 23:
>
> 22 In another context, in ***The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd*** (2006) 86 WAIG 1268, I considered the meaning of the "public interest" for the purposes of s 36A(1) of the Act. In referring to s 27(1)(a)(ii) of the Act, empowering the Commission to dismiss or refrain from further hearing a matter, I referred to *QEC* and at par 35 I observed as follows:
>
> 35 Given the construction I have placed on s 36A(1) of the Act, it is for the PTA to demonstrate that it would not be in the public interest for the Proposed Award to the made. The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In ***Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia*** (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:
>
> *"The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise or jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, An Introduction to*

> *the Study of the Law of the Constitution, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J,* ***Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association*** *[No 1] (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) Access to Justice, vol II, book 1 (1978) pp 5ff; Raz, The Authority of Law, (1979), at p 217)."*

23 I adopt what I said in ***Skilled Rail Services*** for present purposes. The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1987) 68 WAIG 4.

139 This approach to s 27(1)(a) of the Act was affirmed on appeal to the Full Bench (***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2014] WAIRC 00451; (2014) 94 WAIG 787) and on further appeal to the Industrial Appeal Court (***The Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch*** [2015] WASCA 150; (2015) 95 WAIG 1593).

71 As I have mentioned, I accept that absent an order for employment, there would not be power to order the respondent to pay compensation as a stand-alone order. But that is no basis to dismiss the matter at this stage. Furthermore, on the practicability and trust and confidence point, there would be no barrier to the Commission ordering Mr Buttery to present himself to the Director General and for the Director General to offer him a contract of employment for a teaching position at a school to be determined by the Director General. That need not be at the School, given the wide discretion the Director General has in the deployment of teachers around the State, as established on the evidence. Finally, and irrespective of the forgoing, dismissing the application at a relatively late stage of the proceedings, when most of the evidence in the case was already before the Commission, would not, in the context of the history of this matter, be in the public interest.

The incident

72 Before dealing with the evidence about the incident, the respondent made a blanket objection to a large part of Mr Buttery's evidence at pars 149 to 220 of his witness statement. It was submitted, allied to the respondent's objection to the scope of the refusals to employ, that any evidence from Mr Buttery as to what he wishes to say about the incident with S was irrelevant. As I understood the submissions, it was contended that the only relevant issues are the content of the respondent's Investigation Report, as being the basis of the respondent's refusal to employ Mr Buttery. When the content of the s 44(9) referral was drawn to the respondent's attention, especially those parts of it that raise contentions by the applicant about the facts and issues associated with the Incident, the respondent submitted that objections were made to the form of the s 44(9) referral at the time it was prepared, too.

73 Leaving aside the last-mentioned point, that I have already dealt with above in considering the s 44(9) issue, it cannot be reasonably said that the respondent was not on notice of the contentions that the applicant would raise on the hearing of the matter. The applicant has conducted its case in an orthodox fashion by making its submissions and leading its evidence about the contentions it advanced. The fact that the respondent has chosen to conduct its case on a more limited basis, and has made forensic decisions as to what evidence to call, was a matter for the respondent. No limitation or restriction was imposed by the Commission on the conduct of the parties' cases and how each chose to put their cases was a matter entirely for them.

74 I do not consider the evidence of Mr Buttery in relation to the incident to be irrelevant. The respondent's on-going refusal to employ Mr Buttery was based on his alleged misconduct in using unreasonable force in restraining S in his classroom on the day in question. That was the subject of the investigation and the reason underlying the respondent's decision to dismiss Mr Buttery, and its subsequent and persistent refusals to re-employ him.

75 The incident on 31 August 2016 took place in Mr Buttery's classroom and involved Mr Buttery and S. Mr Buttery had known S at the School for some time prior to this, since about 2013, when S was a year one student. Mr Buttery was a physical education teacher at that time. Mr Buttery testified that he had built up a rapport with S and was on friendly terms with him. S was normally based in the classroom next to Mr Buttery's. Mr Gunn was S's normal classroom teacher.

76 A scheme at the School as part of student management and discipline involves what is known as a "Buddy Class". This is the third stage of the School's behavioural management process. When a student with behavioural management problems reaches this stage, the student goes into another teachers' classroom for a time, depending on the level of disruption the student is causing. If matters progress beyond the stage three Buddy Class, the student is sent to the office or collected by administration staff.

77 Mr Gunn was the classroom six teacher at the School in 2016. Mr Gunn has also known S for several years. According to Mr Gunn, S was a 'very disruptive student' and whilst in his class, displayed significant behavioural management problems. S was sent to Buddy Class regularly, up to four to five times per week. Mr Gunn testified that this was much more frequent than any other student in his class. Mr Gunn also said that S was sent to either the Principal or Deputy Principal's office for behavioural management problems frequently, up to two to three times per week. Whilst Mr Gunn could not recollect an occasion where S was physically violent at the School, he had seen on several occasions, S push or barge other students in a violent manner and described S as having a 'short fuse'. Mr Gunn has many years' experience working with students with anger management problems.

78 Ms Draper has held the position of Special Needs Education Assistant at the School since 2000. Special Needs Education Assistants provide specific help for children with special learning needs. This includes children with autism, physical needs or who exhibit behavioural problems. Ms Draper has training in dealing with children who have behavioural problems and medical conditions. In 2016, Ms Draper was assigned to work in classrooms five and six as a Special Needs Education Assistant.

79 In her work as an Education Assistant in room six, Ms Draper testified that she spent time with S. She was not assigned to any one child, but worked on an "as needed" basis. During 2016 Ms Draper noticed issues with S's behaviour. Ms Draper testified that she observed S "act out" in various ways in class when he was unhappy about something or when challenged. This included throwing his chair back in class; pushing things off his desk onto the floor and pushing past people as he left the room. Ms Draper said that from her observations, S would push his way past people who were in his path.

80 Other behaviours of S observed by Ms Draper included S laying blame on others if he was in trouble at the School. She also said he tended to make up stories. Ms Draper confirmed Mr Gunn's testimony that S was often sent to the Deputy Principal or the Principal's office because of his behaviour. In their absence, Ms Draper said that she had to keep S calm. The Manager Corporate Services at the School, Mr Ransley, also witnessed unruly and violent behaviour from S. On one occasion, he referred to S having to be physically restrained by a teacher. Mr Ransley himself was knocked over by S in the same incident.

81 Mr Buttery testified that prior to the events on the day in question, he had been informed by Mr Gunn that S was in his class and was a student that he needed to keep an eye on. A temporary teacher in Mr Gunn's class at the time, Ms Urquhart, asked Mr Buttery whether he would be S's Buddy Class teacher and Mr Buttery agreed, despite what he had heard previously about his behaviour. Mr Buttery also said that on occasions he had heard various noises and commotion in room six next door and he understood that this was caused by S. He often heard the teacher calling out S's name loudly when he was behaving badly. He also said he had heard noises that sounded like things being thrown about the room and furniture being moved. For these reasons, Mr Buttery testified that he had an inkling that S could be "a violent and forceful student at times". Mr Buttery was not aware that S had been diagnosed with ADHD and that he had been prescribed medication, but was not taking it during 2016.

82 On the morning of 31 August 2016, at around 10.00 am, Mr Buttery was taking a guided reading lesson with his class. Mr Buttery usually had the students separated into four small groups around the corners of his classroom, some of whom were seated in chairs and some of whom were sitting on the floor in front of the "smartboard". Mr Buttery said there was a knock on his classroom door and S was there and simply said to him "Buddy Class". Mr Buttery said that S came into the classroom and he was seated about one metre from the classroom wall facing away from his students, so that S would not try to interact with them and distract them. A short while later, Mr Buttery said that despite his direction to S, S started moving over towards the children in his class and attempting to engage with them. Mr Buttery said that at this point he used what are described as "low-key techniques" to get S to stop what he was doing and to return to his place in the room. Mr Buttery testified that initially, these low-key steps were successful however, S then resumed his disruptive behaviour and tried to interrupt and touch the other children in the class. At this point Mr Buttery said he took a firmer line and told S that if he could not or would not do the right thing he would get the office involved, meaning the administration team at the School.

83 When told this, Mr Buttery said that S angrily stormed out of the door that led to the outside of the classroom. S did not leave via the door that opens into the wet area. He flung the door open and he yelled either "I hate school", or "I hate this school". Because of this, Mr Buttery said that he tried to telephone both the Principal and Deputy Principal but there was no response. He then spoke to the School Officer and informed her that S had left his room and was now outside of his classroom and was unsupervised. This was a part of standard procedure. Mr Buttery then returned to his class and resumed his teaching.

84 It was Mr Buttery's evidence that about 20 minutes or so later, the door of his classroom leading to the wet area outside suddenly and violently flew open without warning. He said the door hit the brick wall behind it. Both he and his class were startled. Mr Buttery said that S entered the room "in a deliberate and forceful manner. He strode directly towards me and my students". A small group of students were seated on the mat next to Mr Buttery. The smartboard was in front and a row of desks and the wall of the classroom were behind the students. Mr Buttery said this meant that there was no room for the students to get up or move away from the area. Those on the floor were sitting cross-legged.

85 Mr Buttery said that there was no warning that S was going to enter the classroom. As soon as he saw S, Mr Buttery testified that he said in a raised voice words to the effect "Excuse me. You do not enter this room without using manners. What are you doing here/why are you here?" There was no response from S. Mr Buttery said S came straight towards him and his students seated on the floor. As S did not respond to his raised voice, Mr Buttery said that he moved himself into S's path and again in a raised voice said words to the effect "Excuse me. Why are you here?". Mr Buttery said that it was at this point that S came straight towards him and attempted to barge past him by pushing him out of the way with his shoulder. Mr Buttery's evidence was that S struck him directly in the stomach area. Mr Buttery said that S had no intention of stopping and was going to push past him. S had said nothing to Mr Buttery by this time. Mr Buttery testified that he reacted by reaching up with his right hand and taking hold of S's shirt at the front where the buttons were. He described this as a "snatching motion".

86 When he did this, Mr Buttery said that S recoiled away from him and twisted towards the wall. S was moving away from him and dropping himself downwards at the same time. Mr Buttery said that whilst this occurred, he was shouting at S "you do not enter our room without permission". Mr Buttery's evidence was that he did not know of S's intentions and was concerned for the safety of the smaller children seated close to him on the floor. He was aware that S could be physically aggressive and was conscious of his behaviour earlier that morning when he left his classroom in an angry state. Mr Buttery said he simply did not know what S would do next. It was, however, clear to Mr Buttery that given the way that S had entered his classroom, he was intent on doing something and he was not going to at all cooperate with or be responsive to Mr Buttery. When S was falling towards the floor, Mr Buttery said that he was pulling back against S's shirt to break his fall as the floor was concrete covered by a thin carpet. Mr Buttery's evidence was that he was bent over to about 90 degrees when doing this.

87 It was Mr Buttery's evidence that at no time did he push or force S into or towards the wall. He did not lift S up by his shirt so he would be standing on his toes or off the ground. A few seconds later S was seated on the ground with his knees pulled up towards his chest. S started to cry and told Mr Buttery words to the effect "I was coming for my book".

88 At about that time, Mr Buttery said that Ms Patching came into the classroom. He said that Ms Patching came and stood close to him and said words to the effect "Did S not use his manners Mr Buttery?" Mr Buttery said that on seeing Ms Patching enter, he let go of S's shirt. Mr Buttery's evidence was that he felt relieved that another teacher was present in the room. Mr Buttery said that the incident took place over a very short time of about 10-15 seconds and that he probably held on to S's shirt for about half that time. Mr Buttery then said he retrieved S's book and handed it to Ms Patching. Both she and S then left his classroom.

89 Also present on the day in question was Ms Draper. Ms Draper is located outside of both classrooms five and six. She testified that the classroom doors were open and there is a short space of about one brick's width between the two door frames. When she saw S, Ms Draper said that he was not running but moving quickly. She said he did a "hairpin turn" and went into Mr Buttery's classroom. Ms Draper said she could see that S was "acting up". Because of this, Ms Draper testified that she followed S into Mr Buttery's classroom and stood at the doorway. She described the incident between S and Mr Buttery as occurring over a few seconds. Ms Draper said that Mr Buttery had little time to react. In her evidence in these proceedings, Ms Draper said that she saw Mr Buttery's hand on S's shoulder near his collar. When this was put to her in cross-examination, Ms Draper clarified that this is the reference she made to Mr Buttery holding S by the collar of his shirt, under his chin, as she stated in her statement to the Police, which was annexed to her witness statement in these proceedings.

90 In her statement to the police Ms Draper referred to the events preceding the incident. S was in Mr Buttery's classroom as a Buddy Class. Ms Draper stated that S ran out of the classroom and hid in the School garden. It took Ms Draper some 10 minutes or so to persuade S to return to the classroom. Shortly after, the Deputy Principal Ms Patching came from the office to collect S. This is when S took off and went to Mr Buttery's classroom. Ms Draper additionally stated to the police that she did hear Mr Buttery, who was in the middle of a lesson with some of the children sitting on the floor in front of him. Ms Draper confirmed that Mr Buttery did, in a loud voice, call out to S. After Mr Buttery had taken S by the shirt collar, S dropped to the ground. According to Ms Draper, Ms Patching was also in the doorway when the incident occurred.

91 Whilst Ms Draper said that Mr Buttery's response, based on what she had seen, was somewhat out of character for him, she did not regard his response as out of the ordinary in terms of a teacher's need to have to restrain a student with behavioural problems. Ms Draper said in her Police statement that she had witnessed other teachers restrain difficult students. Despite also being present and witnessing the incident leading to Mr Buttery's dismissal, Ms Patching was not called by the respondent to give evidence in these proceedings. I will comment on that further below when dealing with submissions made by the applicant in relation to the evidence.

92 Examples of the School uniform shirt of the type that S wore on the day of the incident were tendered as exhibit A3. They are a polo top style of shirt, green and white in colour, containing the School logo. The shirt has a collar and the neck of the shirt has three buttons on it. I would describe the overall look of the shirt as loose fitting, given the size of the shirts tendered in evidence were "S" for small adult and the other being a size 12-children. It was not suggested that S was a particularly large boy and he weighed approximately 30 kilograms. Mr Buttery confirmed in his evidence that S was wearing his school uniform on the day in question.

93 Shortly after the incident, Mr Buttery saw the School Principal Mr Wright, who must have been made aware of the incident because he spoke to Mr Buttery and asked him what had happened. A brief discussion took place and Mr Buttery described the incident. On the same day, Mr Buttery sent an email to Mr Wright, outlining the events as they occurred. A copy of this email was annexed to Mr Buttery's witness statement in these proceedings. Following a further discussion at the end of the school day between Mr Buttery and Mr Wright, Mr Wright wrote an Incident Report, a copy of which was also annexed to Mr Buttery's witness statement. Sometime later, on 24 October 2016, Mr Wright completed an "Initial Reporting Form", again containing an account of the incident. A copy of this document was also annexed to Mr Buttery's witness statement.

94 Whilst Mr Wright was not called to give evidence, Mr Buttery said that Mr Wright told him on the day of the incident when he saw him, that the respondent's Standard and Integrity Directorate (SID) were likely to investigate the matter, which they did.

Criminal charges

95 On 31 October 2016, Mr Buttery was charged by summons with common assault in circumstances of aggravation under s 313(1)(a) of the *Criminal Code* (WA). The circumstances leading up to the decision to charge Mr Buttery are set out in the Police Running Sheet, which was Attachment F to Mr Buttery's witness statement. Attachment E, is a copy of the Police Incident Report of 9 September 2016 which was provided by the School. The narrative in the Report is somewhat revealing. It read (subject to my anonymization) as follows:

> Student S walked unannounced into the classroom of Teacher Justin BUTTERY to retrieve his writing book which had been left there when he had been in buddy class about twenty minutes earlier.
>
> Mr Buttery asked S why he was there, but S ignored him and as he tried to push past Mr Buttery grabbed S by the buttons and collar of his school shirt, pushed S upwards and into the wall. Mr Buttery then shouted at S from close quarters "No

you do not enter this room without permission nor manners." S began to cry, and at this point Deputy Principal Lara Ann Patching walked into the classroom and witnessed Mr Buttery holding S's shirt aggressively and continuing to shout at him as he pushed him against the book rack on the wall. Ms Patching saw Mr Buttery and ·S both shaking and when Mr Buttery noticed her he let go of S, walked away to get S's writing book and left S cowering in the corner with his arms over his head. This was also witnessed by other students in Mr Buttery's classroom. S's mother, C, took him to the doctor and had his back checked because it was sore and tender. S was cleared of any serious damage.

Refer to all SID documents for further data on this matter.

96 It is immediately apparent from the material filed in these proceedings that the narrative is inaccurate in a very material respect. It refers to Mr Buttery pushing S "into the wall" and "against the book rack on the wall" of the classroom. This is simply wrong and did not occur. This came from the Initial Reporting Form provided by Mr Wright to the SID of the respondent on 31 August 2016. In turn, this inaccurate description of the Incident was taken from the description given by both S and Ms Patching, the latter being the person described on the form as the witness. Even though Ms Draper was also present with Ms Patching and witnessed the incident, there was no reference to her in the Incident Report. It seems that she was not spoken to at all by Mr Wright, prior to him reporting the incident to the respondent. In my view this was a serious omission. All relevant witnesses should have been at least spoken to initially, prior to a report of that kind being made to the respondent. Had Ms Draper been interviewed by Mr Wright, then the significant error in the Initial Reporting Form that S was forced into the wall of the classroom, may have been rectified and might not have found its way to the Police.

97 In the statement of Mr Wright taken by the Police on 24 October 2016, Mr Wright refers to "Lara" (Ms Patching) telling him on the day of the Incident that "You need to hear this, it was really bad. Justin was shaking S and had him pinned up against the wall in the corner". Both Mr Wright and Ms Patching then interviewed S and S told them that Mr Buttery had grabbed and shouted at him and pushed him back into the wall. S complained of a sore back. The Police Statement of Mr Wright also contained a hearsay comment from Ms Aim, the other Deputy Principal, that "Lara explained to me that Justin had grabbed S, pushed him into a wall and it sounds nasty". These false allegations, in the respondent's Incident Report and the subsequent Police Report, also found their way into the Statement of Material Facts, in support of the assault charge brought against Mr Buttery. The Statement of Material Facts was set out in the Investigation report and annexed to the witness statement of the investigator, Mr Belshaw, at p 60.

98 Apart from the abovementioned matters, the Incident Reports or the Statement of Material Facts did not refer to S barging into Mr Buttery's body with his shoulder and Mr Buttery grabbing S as he did, to prevent him moving further forward in the classroom. There is also no reference to young children in Mr Buttery's classroom being seated cross-legged on the floor in front of Mr Buttery, when the incident occurred. Thus, the reports used as the basis for the Police Statement of Material Facts were both incomplete and inaccurate. Given the assertions in those documents, as counsel for the applicant rightly observed in my view, it is perhaps unsurprising that Mr Buttery was charged with common assault in circumstances of aggravation. Also contained in Mr Wright's statement to the Police were gratuitous and potentially damaging remarks about Mr Buttery's marriage breakdown and custody dispute in relation to his children, none of which were put to Mr Buttery. Mr Buttery had no knowledge these remarks were being made about him, at the time.

99 I note also that on 17 October 2016, according to the Police Running Sheet, a telephone call took place between the investigating officer, Detective Senior Constable Earnest and Mr Milward of the respondent. The note of the call refers to the Police investigation file having just been received and that Mr Buttery had yet to be interviewed. DSC Earnest asked Mr Milward what the respondent had planned for Mr Buttery. Mr Milward is reported as having said that if the Police did not pursue the matter, then "the outcome of Dept of Ed is likely that the POI would be dismissed". This was before any formal investigation into the incident was undertaken by the SID and was, as I have already indicated, based on inaccurate and incomplete preliminary incident reports. Whilst this cannot be taken to be evidence of a predetermined outcome, given all relevant events, it certainly is indicative of a state of mind predisposed towards removing Mr Buttery from the respondent's workforce.

100 I note that Ms Draper was not interviewed by Police until 13 January 2017, sometime after the charges were brought against Mr Buttery. She had made a note of the Incident sometime earlier on 1 November 2016, which was attached to her Police statement. It is surprising to say the least, that she was not brought to the attention of Police by the School earlier. It seems from the Police Running Sheet this did not occur until early December 2016. Ms Patching said in her statement to Police made on 24 October 2016, that Ms Draper was standing in the wet area about a metre from the classroom door. Ms Draper was plainly a material witness. On 16 June 2017, the Police notified Mr Buttery's solicitors that the prosecution would discontinue the assault charge against Mr Buttery and undertook to pay Mr Buttery's costs in the sum of $800. Given the true state of affairs, as was subsequently revealed, this was perhaps unsurprising and the payment of Mr Buttery's costs is a matter of note.

The investigation starts and Mr Buttery is banned from the School

101 The laying of criminal charges against Mr Buttery had major consequences for him. Indeed, it was this act, which followed the submission to the Police by the School of the Incident Report, that put in train the subsequent events impacting on Mr Buttery, that the applicant, by the commencement of these proceedings, seeks relief from.

102 The first consequence of the laying of the criminal charges, was the receipt by Mr Buttery of a letter from the respondent dated 3 November 2016 to inform him that the respondent was aware of the criminal charges being proffered and the matter would be regarded as a disciplinary matter and an investigation would be undertaken by Mr Belshaw of the SID. Mr Buttery was invited to respond in writing within 10 days to this letter. Additionally, under s 240 of the *School Education Act 1999* (WA) (SE Act), Mr Buttery was ordered to remain away from the School premises until further notice. This provision enables the respondent to order a person who is suspected of a breach of discipline and whose presence at a school constitutes a risk to the safety or welfare of students on the premises, to remain away.

103 I note the Incident took place on 31 August 2016. The Initial Reporting Form, although inaccurate and containing the erroneous statements of Ms Patching, was sent by Mr Wright to the respondent on the same day. Thus, the respondent was made aware of this apparently serious incident almost immediately. However, the notification of both the investigation and the

order for Mr Buttery to leave the School premises, occurred over two months later. In the meantime, Mr Buttery continued to teach, as normal. There was no explanation for this delay. There was no suggestion in the respondent's letter of 3 November 2016, or in the evidence before the Commission, aside from awareness of the laying of criminal charges, how it was that Mr Buttery was said to pose a risk to students at the School as at that time, when the respondent was content to leave him to his teaching duties from 31 August until the date of the letter. If the respondent regarded the matter as seriously as was suggested when the Initial Reporting Form was lodged, then one would have expected the respondent to react almost immediately. It is quite extraordinary that this did not happen. This does not make any sense.

WWC Act interim negative notice and teacher registration

104 Shortly after receiving the letter from the respondent banning Mr Buttery from the School premises, on 8 November 2016 Mr Buttery was issued with an INN by the Department of Child Protection and Family Services under s 13 of the WWC Act. This notice, which was Attachment H to Mr Buttery's witness statement, said that Mr Buttery could not be employed in child related employment. The INN was to remain current until a further notice issued. Also, on 10 November 2016, Mr Buttery received a letter from the Teachers Registration Board of Western Australia, cancelling his teacher registration because he had been issued with an INN under the WWC Act.

Mr Buttery is dismissed and "red flagged"

105 On 11 November 2016, the day after the Teachers Registration Board revoked Mr Buttery's registration as a teacher, the respondent wrote to him and referred to the issuance of the INN under the WWC Act. The letter further referred to s 22 of the WWC Act, set out above and went on to say:

> You are hereby advised that you will not be able to be further employed with the Department by reason of the Interim Negative Notice. You are directed to not attend any Regional office, school or any other workplace of the Department to undertake child-related work.
>
> As you cannot be employed in child-related work, your employment record will be marked as not suitable for re-hire in child-related work. As you have repudiated your contract by reason of the Interim Negative Notice, you are not entitled to a notice period or pay in lieu thereof.

106 The reference in the letter to Mr Buttery having "repudiated" his contract of employment was not explained in the letter. It is thus somewhat unclear whether the dismissal of Mr Buttery was because of the issuance of the INN and the effect of s 22 of the WWC Act, or whether, it was because of the "repudiation" by Mr Buttery of his contract of employment. It is arguable that the issuance of an INN does not operate as a repudiation of a contract of employment. An INN is issued by a third-party, a stranger to the contract of employment, the Department of Child Protection. The operation of s 22(3) itself would appear to involve no notion of repudiation. The provision operates as a statutory prohibition on an employer to continue to employ a person in child-related work, who the employer is aware has been issued an INN or a Negative Notice (NN) under the WWC Act, irrespective of the reason for its issuance. However, construing the letter as best I can and despite the ambiguity caused by some of the language in it, as I have noted above, it seems to be the case when reading the letter as a whole, that the reason the respondent dismissed Mr Buttery was to comply with s 22 of the WWC Act.

107 The letter of dismissal refers to Mr Buttery as having his employment record marked as "not suitable for re-hire in child-related work". It seemed common ground in this matter that despite the revocation of the INN issued to Mr Buttery a short time later, the restoration of Mr Buttery's teacher registration and the later discontinuance of the criminal charges, Mr Buttery's employment file retained this notation. This notation of employee files by the respondent is known as "red flagging". According to the evidence, a person who has a "red flag" on their employment record, who subsequently seeks re-employment by the respondent, generates some sort of alert that the person is not to be considered for further employment by the respondent.

108 The legal basis for such a "red flagging" is not clear. Furthermore, it is not at all clear how such a practice is consistent with the respondent's obligations under the PSM Act, in particular ss 8(1) and (3), in relation to the application of human resource management principles.

109 This question is relevant to these proceedings because, as mentioned earlier in these reasons, it emerged on the final day of the hearing of this matter, through the applicant, when Ms Barnard was under cross-examination, that the respondent's Director General wrote to the applicant on 9 April 2018. The effect of the letter seems to have changed the respondent's approach where teachers have received INN's or NN's under the WWC Act. The letter, formal parts omitted, is in the following terms:

> I refer to my letter dated 20 March 2018, and our meeting on 6 March 2018 regarding teachers who receive an Interim Negative Notice (INN) or Negative Notice (NN) pursuant to the relevant provisions of the *Working with Children (Criminal Record Checking Act) 2004* (WWCC).
>
> I can now confirm that effective immediately the Department of Education (the Department) will alter its policy position in respect of these matters as set out below. A teacher, or any other staff member, who previously had been issued with an INN or NN and, as a consequence, had their employment with the Department terminated may seek re-employment under the following conditions:
>
> 1. They must first have their WWCC, and any other registration requirements, reinstated.
> 2. They must be cleared by the Standards and Integrity Directorate and any outstanding disciplinary or criminal matters finalised.
> 3. They must be considered and cleared by the Department's Employee Suitability Assessment Committee (ESAC).
>
> When these pre-conditions have been met, the Department will re-employ the individual on a similar basis to that which they were employed prior to their employment being terminated. The Department will reinstate their employment and (find a placement for them in a position similar to their prior employment.
>
> For the avoidance of doubt, there will be no payment of back pay for the period of time where the employee was not employed by the Department.

> Each case will be judged on its merits and genuinely considered by the ESAC once all of the relevant pre-conditions for employment are met.
>
> I have asked for the relevant Department policies to be amended and will ensure that you are consulted as part of that policy change.

110 The letter appears to go much further than the mere removal of "red flags" in appropriate cases. It commits the respondent to re-employing teachers where the conditions set out in the letter have been met. The letter also does not refer to any process of "filling a vacancy" allegedly under the Employment Standard, which the respondent has emphasised in the proceedings in this application.

The initial disciplinary investigation ceases

111 Following the letter to Mr Buttery from the respondent notifying him of the disciplinary process and the s 240 SE Act notice, and his subsequent dismissal on 11 November 2016, Mr Buttery received a further letter from the respondent. In the letter, the respondent informed Mr Buttery that given his dismissal and his "red-flagging", consideration had been given to whether the disciplinary investigation should continue under the "former employee" provisions of the PSM Act.

112 The letter informed Mr Buttery that "Considering the current circumstances and given your employment record has already been marked as not suitable for re-hire in child-related work, I see no reason to continue the investigation and I am concluding it at this point". The reference to "current circumstances" in the letter was not explained, but presumably, referred to the assault charge then on foot against Mr Buttery. I note, for the purposes which I will refer to later, when dealing with the resumption of the disciplinary investigation, one of the stated reasons for the discontinuance of the disciplinary investigation, was the red-flagging of Mr Buttery.

WWC Act assessment notice and teacher registration restored

113 On 21 December 2016 the Department of Child Protection issued Mr Buttery with an Assessment Notice the effect of which meant that Mr Buttery could be employed once again in child-related employment. Mr Buttery also has his teacher registration restored. From that point there was no legal impediment to Mr Buttery resuming employment in child related work.

Refusals to re-employ on 16 January and 3 February 2017

114 Mr Buttery testified that on 23 December 2016 he instructed the applicant to write to the respondent on his behalf. The applicant did so and referred to the Assessment Notice and the return of Mr Buttery's teacher registration by the Teachers Registration Board. In the letter, the applicant contended that there was then no barrier to Mr Buttery being re-engaged as a teacher and requested that the respondent do so.

115 In response, the respondent by letter of 16 January 2017, referred to the pending assault charge against Mr Buttery and irrespective of this, noted that it had the power to investigate the incident as a breach of discipline under the PSM Act. Regardless of the return to Mr Buttery of his WWC card, the respondent declined the applicant's proposal that Mr Buttery be re-employed. In this letter it is to be noted that there is no reference to the earlier decision of the respondent that there would be no purpose in the continuation of the disciplinary investigation because Mr Buttery had been dismissed and he had been red-flagged.

116 Mr Buttery again instructed the applicant to approach the respondent with a proposal that he be re-employed. By letter of 24 January 2017, the applicant wrote to the respondent and reiterated the restoration of Mr Buttery's credentials to teach. Also, the applicant maintained that although Mr Buttery had been charged with common assault he intended to strongly defend the charge should it proceed to trial. Additionally, in having his WWC card returned, the applicant contended that the Department of Child Protection had considered Mr Buttery as not presenting an unacceptable future risk to children. Furthermore, the applicant pointed to Mr Buttery's long tenure as a teacher at the School and his exemplary record, up to the incident on 31 August 2016. Character references for Mr Buttery, attesting to his good character, were provided. The applicant also made comparison of the allegations against Mr Buttery with other cases of teachers being dealt with more leniently, as a part of its appeal to the respondent.

117 Finally, the attention of the respondent was drawn to the financial impact on Mr Buttery of the respondent's decision and the fact that re-employing Mr Buttery would impose no barrier to the respondent continuing with the disciplinary investigation process, including placing Mr Buttery on paid suspension.

118 By letter of 3 February 2017, again from Mr Gillam, the respondent informed the applicant that despite the matters raised by it, given the pending charge, it was a matter for the respondent's discretion as to whether it wished to reinstate or re-employ Mr Buttery and that discretion would be exercised against him in this case. No comment or commitment was made by the respondent as to its position following the disposition of the criminal charge against Mr Buttery.

Further request for re-employment on 20 June 2017 and 14 July 2017 and new disciplinary action

119 Following the discontinuance of the criminal charge against him, Mr Buttery requested the applicant to again approach the respondent with a view to his re-employment. This was after the applicant had commenced the s 44 conference application before this Commission, seeking relief on behalf of Mr Buttery. This led to a letter of 20 June 2017 from the applicant to the respondent, a copy of which was Attachment Q to Mr Buttery's witness statement. The content of this letter became controversial in these proceedings.

120 The first part of the letter refers to the background including Mr Buttery's exclusion from the School under s 240 of the SE Act and the fact that the criminal charge was discontinued on 19 June 2017, following representations by Mr Buttery's solicitors that he had no case to answer. Given there was in the applicant's view, no impediment to Mr Buttery being restored to his employment, the applicant again requested that Mr Buttery be reinstated or re-employed.

121 The second part of the letter is headed "**C 10 OF 2017 – WITHOUT PREJUDICE – OFFER TO SETTLE**". There follows in the second page of the letter, a proposal to settle the proceedings by the applicant discontinuing application C 10 of 2017 in return for a range of things, including the reinstatement of Mr Buttery; payment of compensation for loss; and the continuity of his service for benefit purposes amongst other matters.

122 The controversy in these proceedings concerned the "without prejudice" reference in the letter. The respondent submitted that the letter could not be relied on by the applicant to support a further claim that Mr Buttery be re-employed because of the principle that without prejudice communications between parties may not later be relied upon by either of them in subsequent proceedings. The respondent argued that a fair reading of the letter from the applicant leads to the conclusion that the first and second parts are linked. The paragraph immediately above the without prejudice heading, requesting the respondent to re-employ or to reinstate Mr Buttery, is to be read as subject to the conditions then set out below the without prejudice heading, according to the respondent's submissions. That being so, the respondent argued that the whole correspondence must be taken to be without prejudice as a genuine attempt to settle the proceedings, leading to both the entire letter and the course of negotiations around it, being privileged.

123 On the other hand, the applicant contended that the letter of 20 June 2017 must be read in two parts. The first part, containing the request to the respondent to re-employ or re-instate Mr Buttery, is self-contained, as made clear by the final par which says "in formalising the present request on behalf of Mr Buttery…". Then follows the clear heading that refers to the s 44 conference proceeding and the without prejudice offer to settle. The terms of the offer to settle are then set out as I have already indicated.

124 Whilst, as the applicant submitted, it may have been better for it to have written two letters to the respondent, one open and one without prejudice, I consider that the two parts to the letter are separate and distinct. The first, prior to the without prejudice heading, narrates the circumstances and previous recent history, including Mr Buttery's exclusion from the School and the subsequent laying and discontinuance of the assault charge. This is consistent with prior dialogue between the parties in relation to these same matters. Importantly, no mention is made of the s 44 conference proceedings in application C 10 of 2017 or the settlement of the application. I also think it is fair to say that the final paragraph captures the request by the applicant to the respondent.

125 There follows the large heading and subsequent proposal to settle application C 10 of 2017. Given the first part of the letter can be sensibly read on a stand-alone basis, it is the second part of the letter, delineated by the heading which in my view, is the without prejudice communication. It is that part of the letter to which no regard may be had for present purposes. Accordingly, the first part of the letter of 20 June 2017 may properly be regarded as a further request by the applicant for the respondent to re-employ or reinstate Mr Buttery.

126 It was common ground that by a further letter of 5 July 2017 in reply to the applicant's letter of 20 June, not only did the respondent refuse the applicant's further request, but the respondent also informed the applicant that a disciplinary investigation would be conducted into Mr Buttery's conduct on 31 August 2016. Again, no reference was made in the letter to the previously discontinued disciplinary investigation which followed the termination of Mr Buttery's employment.

127 A s 44 compulsory conciliation conference was convened before the Commission on 14 July 2017. By s 44(5) of the Act, such a compulsory conference is to be held in private unless the Commission is of the view that the objects of the Act would be better served if the conference was held in public. The purpose of the s 44 compulsory conference power is to enable the Commission to summons relevant persons to a dispute to a conference before it in order to try to resolve the dispute by conciliation. The compulsory conference, being a relatively informal and private proceeding, is intended to encourage a full and frank exchange of views, to resolve disputes through conciliation.

128 It has long been the view that matters discussed in and arising from a s 44 conference may not be later relied upon by parties once the conference has concluded. To do so would discourage the exchange of views to which I have referred and would be contrary to the objects of the Act in s 6, to promote and encourage the settlement of disputes through conciliation. Accordingly, I do not propose to have regard to what was put by the applicant in the conciliation conference of 14 July 2017. Despite this however, there can be no doubt that as a practical matter, the parties were and remained in dispute as to the circumstances of the termination of Mr Buttery's employment and the applicant's claim that he be once again employed by the respondent. That is what these proceedings have been about from their inception.

Disciplinary investigation and its outcome

129 The disciplinary investigation into the incident was undertaken by Mr Belshaw. Mr Belshaw is a Senior Investigator with the respondent. The SID is constituted by Senior Investigators and Principal Investigators, a Manager, a Director and Executive Director of Professional Standards. Each disciplinary investigation is overseen by a Senior Investigator and a Principal Investigator. In this case the Principal Investigator was Mr Milward. Mr Belshaw testified that he worked closely with Mr Milward and took his advice and guidance on matters as they arose in the investigation.

130 Mr Belshaw confirmed that the Initial Reporting Form was received from Mr Wright, the Principal of the School, on the day of the Incident. The form was passed on to the Police who commenced an investigation. On 1 November 2016, the SID were notified by the Police that Mr Buttery had been charged with aggravated, common assault. Despite Mr Buttery being informed by the SID in November 2016 that the investigation was to be discontinued because he had been dismissed and red flagged, the investigation re-started in July 2017. Mr Belshaw testified when questioned on this, that this was because the criminal charges had been discontinued and Mr Buttery's file marked "not for re-employment". It appeared from Mr Belshaw's evidence that the investigation had been recommenced to establish any breach of discipline, to justify the red flagging of Mr Buttery. Given the stated reason for discontinuing the disciplinary investigation in November 2016, in my view, there was no other logical explanation for the recommencement of the disciplinary process.

131 The specific allegations against Mr Buttery are set out at p 34 of Annexure AB6 to the witness statement of Mr Belshaw.

> 2 INVESTIGATION
>
> 2.1 On 18 July 2017, a letter was served upon Mr Buttery detailing an allegation of misconduct as follows:
>
> **1. On 31 August 2016, at Greenfields Primary School, you committed a breach of discipline, contrary to section 80(c) of the *Public Sector Management Act 1994*, in that you committed an act of misconduct.**

Particulars

(a) You were employed in the role of Teacher at Greenfields Primary School.

(b) You were teaching in room six at Greenfields Primary School when S, Year 4 Student, Greenfields Primary School entered the room.

(c) You directed S to leave the room.

(d) S refused to leave the room and you became irate.

(e) You took hold of S by the collar buttons of his shirt and using a clenched fist, twisted his shirt up, underneath his chin.

(f) Maintaining your hold of S, you pushed him backwards into a book stand, causing his back to collide with it.

(g) The physical contact you made with S was unreasonable and unnecessary in managing his behaviour.

132 As a part of the disciplinary investigation, Mr Belshaw interviewed S, Ms Draper, Ms Patching and Mr Buttery. At the time of its commencement, Mr Belshaw also had access to the statements from the Police investigation. Despite the sensitivity of interviewing child witnesses, Mr Belshaw said that he was not aware that S had been interviewed three times prior to the SID interview on 19 July 2017, which took place almost one year after the Incident. Prior to this, S had been interviewed at the School by Mr Wright and Ms Patching on 31 August 2016, by his mother on the same day and by the Police on 29 September 2016. In this context, Mr Belshaw agreed that repeated interviews of a child may impact on the reliability of any such interview, and the possibility of such evidence being tainted. Despite the caution required in this regard, there was no reference to possible issues of reliability with a child witness in the Investigation Report.

133 In addition to the copy of written interviews with S, a copy of an audio of the interview with him, taken on 19 July 2017 by the investigators, was exhibit R2. I have carefully listened to the audio tape. At the interview, Mr Milward and S's mother were also present. With respect to both Mr Belshaw and Mr Milward, the audio record of interview contains examples of leading questions put to S. To his credit, on reviewing the audio tape, Mr Belshaw in his evidence confirmed that this was so. Additionally, the three prior interviews with S had been either conducted by or in the presence of authority figures. Having regard to these factors, the risk of the interviews with S being tainted by suggestibility was high. Also on occasions on the audio tape, S used language indicative of suggestibility for example when he used phrases such as Mr Buttery had "insulted him" when he plainly meant "assaulted" but did not understand its meaning. Also, S stated that Mr Buttery had in the incident "overwhelmed" him. Again, another concept foreign to the incident which is indicative of adult influence over S in the repeated interviewing.

134 Also, the fact that S was, based on the information obtained by the investigators, prone to be less than frank and to apportion blame to others for incidents, should have put the SID on alert in the interview with S. It elicited considerable caution in me, having reviewed the materials and listened to the audio tape.

135 After conducting interviews and reviewing documents, the Investigation Report in the section headed "analysis" came to its conclusions and they included:

(a) When S entered Mr Buttery's class for the second time S was not aggressive but did open the class door with force because he was excited to get his book and go to the school office with Ms Patching;

(b) On S entering the classroom Mr Buttery had minimal grounds to suspect that S posed any threat to the safety of other students in the classroom;

(c) Mr Buttery did yell and used a firm voice towards S and did lose control of his emotions;

(d) Ms Patching's version of events was accepted that Mr Buttery had grabbed S by the shirt collar and was "aggressively" holding it under S's chin, such that he was almost on his tiptoes due to the force;

(e) The investigation was unable to conclude that S was pushed back into a book stand in the classroom;

(f) It was considered that Ms Draper's statement to the investigation was unreliable because it was not the same as the statement she gave previously to the Police;

(g) Note was made of reg 38 of the *School Education Regulations 2000* that provide that a staff member may use physical contact with a student that is reasonable in all of the circumstances for a number of purposes including "to maintain or re-establish order" and to "prevent or restrain a person from putting another at risk"; and

(h) Considered that Mr Buttery's actions were not reasonable in the circumstances given S's behaviour and "went far beyond what was required to achieve the desired result of preventing S from proceeding any further into the room".

136 In these circumstances, the Investigation Report found that a breach of discipline had been established and that it was recommended to the Director-General of the respondent that an "appropriate consequence/penalty" be imposed.

137 The Investigation Report referred to Ms Draper describing S's medical condition and not being medicated in 2016; S's poor behaviour; his propensity to become angry and aggressive and abuse staff members on occasion, especially when staff raised voices, however no mention of this appeared in the analysis and conclusions in the Investigation Report. There was also no account of Mr Buttery's version of events that S came towards him and barged him with his shoulder, which was conduct quite consistent with the statements of others, as to S's propensity to act in this way. This is especially so, because Ms Patching did not see what happened immediately prior to Mr Buttery taking a hold of S by the shirt. Ms Draper's version of the events to the Police also was that S was moving forward towards the bench in the classroom. At pars 3.4 and 3.5 of the Investigation Report, there was no reference to this contention made by Mr Buttery. It was crucial as it was because of this, that Mr Buttery said he instinctively reached for S's shirt to restrain him, as standing in his way had not stopped S moving forward.

138 As a matter of logic and common sense, the question must be asked and answered, as to why would Mr Buttery, as an experienced teacher of many years standing, consider it necessary to grasp S by the shirt at all? In my view, it defies all reason to suggest that Mr Buttery would simply approach S and do this out of the blue. Whilst the Investigation Report referred to Ms Patching saying that she could provide no reason why Mr Buttery may have had any justification for physical contact with S, the fact is, even on Ms Patching's exaggerated and somewhat hyperbolic description of the events, she did not witness S first enter the classroom nor any contact S made with Mr Buttery prior to Mr Buttery grasping S by the shirt collar. There was no reference in the conclusions in the Investigation Report to Mr Buttery moving into S's path to stop him advancing, consistent with accepted practice.

139 In this regard, I note that reference to S trying to push past Mr Buttery appeared in the Initial Reporting Form of the Investigation Report, at p 49 of Mr Belshaw's witness statement. It was also clearly stated in the Incident Details document at p 51 of Mr Belshaw's witness statement. This referred to "student ignored him and tried to push past the teacher". It is also contained in Mr Buttery's email to Mr Wright on 31 August 2016 annexed as p 48 to Mr Belshaw's witness statement. Mr Buttery was entirely consistent in his explanations of S's actions in this regard in his responses. Given this matter was raised from the very outset of the recording of the incident, the absence of any finding on this issue in the Investigation Report is significantly problematic. Indeed, this issue was identified by Mr Buttery in his response to the respondent's findings and proposed penalty, commencing at p 120 of Mr Belshaw's witness statement. It is open to infer and I do infer, that the investigation did not turn its mind to this crucial issue. It seems to have accepted Ms Patching's version of the events, which for reasons I have already expressed, are open to significant question. It appears that Mr Buttery's contentions in this regard, which really formed the mainstay of his defence, have failed to feature at all in the findings and conclusions of the investigation, whether positively or negatively. For all intents and purposes, they seem to have been airbrushed out of existence. This reveals a serious flaw in the Investigation Report and the reasonableness of the respondent relying on it to make findings of misconduct against Mr Buttery.

140 The fact that it was uncontroversial that S had been very disruptive immediately prior to the incident; had left the classroom saying that he "hated school" or "hated this school", and had to be retrieved from the garden by Ms Draper; had been diagnosed with ADHD and was unmedicated at the time; had the behavioural management history referred to by Ms Draper, Mr Gunn and also Mr Ransley, and the assertion by S himself that he "barged" into Mr Buttery's classroom and at the time was "a bit angry" ought to have placed the investigation on high alert to the possibility that Mr Buttery's description of S's demeanour when he entered Mr Buttery's classroom may well have been accurate. Mr Belshaw himself accepted in cross-examination, that S stated in the audio interview that he did "barge into" the classroom.

141 Also, a real issue arises given S's escalating poor behaviour on the morning in question, as to why he went into Mr Buttery's classroom unaccompanied and unsupervised. The signs were clearly there of a potential problem with S's behaviour and in my view, he should have been supervised when leaving Classroom five to go next door into Mr Buttery's classroom.

142 On 7 August 2017, a Briefing Note was prepared by Mr Belshaw for the respondent's Director General. It was attached to the Investigation Report and seemed to also attach the letter of outcome of the disciplinary investigation to be sent to Mr Buttery. The Briefing Note, along with the Investigation Report conclusions, made no mention of any circumstances of mitigation or other exculpatory factors such as the problematic behaviour of S prior to and on the day in question, including aggressive behaviour; the other witness to the incident being Ms Draper; the reason why Mr Buttery maintained that he responded in the manner that he did, that is because of being barged into by S's shoulder and his concern for his own students sitting cross-legged on the floor, and Mr Buttery's very good and lengthy employment record. The Briefing Note appears to be a one-sided document inimical to Mr Buttery's interests.

143 The respondent responded to the applicant in relation to the Investigation Report by letter of 2 October 2017 and imposed the disciplinary penalty. Again, in its reply, the respondent made no reference at all to Mr Buttery's primary reason for acting as he did, that was being barged by S with young students sitting on the floor at his feet. The respondent simply failed to answer this significant issue raised by Mr Buttery and the applicant on his behalf, at any time. The contention advanced by the applicant was that the investigation into the Incident was flawed and no finding of misconduct, which the finding plainly was, could be reasonably justified. Having considered the evidence and material available at the time, as I have mentioned above, I must agree.

144 I have already commented on the difficulties caused by the repeated interviews of child witnesses, especially in the presence of authority figures. No allowance appears to have been made for this in the analysis stage of the investigation or importantly, for the type of behaviour S engaged in on the day of the Incident, rather than his demeanour in the interview with the investigators on 19 July 2017. The latter stood in stark contrast to how S was behaving on the day in question on 31 August 2016.

145 The almost complete reliance in the investigation on Ms Patching's version of events is also problematic. I have already commented on Ms Patching's version of events in describing the Incident. Her initial description of S being forced to the wall of the classroom by Mr Buttery, as put to the Police in the Incident Report, was wrong. Mr Belshaw also accepted in his evidence, that many of Ms Patching's statements about the incident were highly emotive. A point, accepted by the investigation and which featured in the Investigation Report, was Ms Patching's assertion that Mr Buttery had a grip on S's shirt so tight and aggressively under S's chin, that S was almost up on his "tiptoes". There are at least two key issues with this assertion. Firstly, the School shirts, as I have noted above, are loose fitting polo tops. It was not in dispute that S was not a particularly large child, but still weighed approximately 30 kilograms. For the shirt to be held by Mr Buttery in the way contended by Ms Patching, and accepted by the respondent, such that S was almost elevated off the ground, would seem difficult to achieve without the shirt slipping over the child's head.

146 Secondly, and more importantly, for such an alleged aggressive hold under a child's chin in these circumstances, almost supporting their own body weight, one would expect as a matter of common sense, there to have been a complaint by S of soreness in this area, if not injury in the form of bruising. No such complaint or injury was noted. Instead, the only report made by S after the incident, was of a sore back, which was ultimately not supported by a subsequent medical examination.

Additionally, there was no suggestion made by S during his interviews, that this was how Mr Buttery had hold of him at the time.

147 Also, the conclusion, again on the acceptance of Ms Patching's statements, that Mr Buttery retained his grip on S whilst S was standing, and on the release of Mr Buttery's grip, S fell to the floor, is open to question. It is not at all clear why, as a matter of logic, S would suddenly fall to the classroom floor if he was standing while being held by Mr Buttery around the collar, even in the manner alleged by the respondent. On the other hand, it is far more logical and more in accordance with the basic laws of physics, that S may have fallen to the floor when moving forward and being restrained in the manner described by Mr Buttery. S moving forward in the classroom was entirely consistent with Ms Draper's version of events.

148 I also do not consider it reasonable to discount Ms Draper's version of the events because there were some inconsistencies between her statement to the Police in January 2017, compared to her interview with SID in July 2017. In the SID interview, Ms Draper said that she saw Mr Buttery with his hand on S's shoulder or upper chest area. In her Police statement, she recorded Mr Buttery holding S by the collar up under his chin. In her evidence in these proceedings, Ms Draper said that Mr Buttery had his hand up on S's shoulder near his chin. Ms Draper also said that the incident took only a few seconds and was over very quickly. I do not consider these differences to be so great as to warrant not accepting any of Ms Draper's account, compared to that of Ms Patching's, especially given the emotive descriptions used by the latter.

149 Furthermore, a substantial reason advanced by Mr Belshaw for rejecting Ms Draper's account was because he considered that she had deliberately mislead the investigation, because of her friendship with Mr Buttery. If this was so, several issues arise. Firstly, this was not mentioned as a reason for the rejection of Ms Draper's version of events in the Investigation Report. If it were so, it would have stood out as a strong basis for questioning Ms Draper's credibility. Secondly, to deliberately mislead an investigator in such matters is a very serious issue. It is surprising that no disciplinary action was taken against Ms Draper by the respondent. Mr Belshaw did say that he discussed the possibility of this with Mr Milward, but there was no other evidence to confirm that this occurred. Also, as the applicant pointed out, this allegation was never put to Ms Draper at any stage of either the disciplinary investigation, or in these proceedings.

Consideration

150 I found Mr Buttery to be an honest witness. He gave evidence to the best of his ability. He made concessions against interest willingly and I have no reason to doubt his evidence. I also found Ms Draper to be a credible witness. Despite her association with Mr Buttery, I am not persuaded that her evidence was biased in his favour. Her account of the Incident, both in these proceedings and in her statements to both the SID and the Police, were not dramatically different, as to the location of Mr Buttery's hand relative to S's chin and school shirt. Some differences in these respects, given the passage of time, are to be expected. I would have more cause for concern if Ms Draper's accounts of these matters, in her various statements, including in these proceedings, as an observer, were identical.

151 I also found the evidence of Mr Gunn as to his dealings with S and the fact that S had significant behavioural problems, being prone at times to outbursts of anger and aggression, to be persuasive. Similarly, Ms Draper gave evidence of S's behavioural management problems as well. None of this evidence was challenged. S was obviously a handful to manage at the School. He had a diagnosed medical condition and he was not medicated in 2016. Whilst the applicant was critical of aspects of Mr Belshaw's evidence, I consider that he endeavoured to give his evidence to the best of his ability. Like Mr Buttery, Mr Belshaw also willingly made some concessions. He accepted there may have been some shortcomings in his approach to the investigation and some matters that in retrospect, should have been highlighted in the Investigation Report, were absent. Similarly, in the recorded interview with S, there was an acceptance that leading questions were put to him.

152 I am satisfied that on the morning of the Incident S had been "acting up". He had engaged in disruptive behaviour in Mr Buttery's Buddy Class earlier that morning. When he ran out of Mr Buttery's classroom, S was upset and angry. At the time of the Incident, Mr Buttery was not aware that S had been diagnosed with a medical condition but was aware that he could be troublesome, because of what he had heard in the classroom next door. Mr Buttery should have been made aware of S's medical condition by the School, especially as he was one of the Buddy Class teachers.

153 On the day in question, I am satisfied that Mr Buttery was teaching a year two-three class, with students seated cross-legged on the floor between Mr Buttery and the back of the classroom. S barged into the room quite forcefully. He was still in an agitated state and in my view, on the evidence, he was angry. There was a sufficiently forceful entry into the room by S that Mr Buttery was startled as he was teaching his students. On S entering the room, I accept that Mr Buttery did call out on at least two occasions in an escalating strong voice, to attempt to stop S advancing in the room. No response was received despite Mr Buttery moving into S's path. I am satisfied that Mr Buttery moving into S's path was an appropriate and accepted course of action. I accept that Mr Buttery, given that he had young students seated cross-legged on the floor in front of and around him and close to the wall of the classroom, with little room to move or react, had a legitimate concern for the welfare of his students by this point.

154 Despite standing in S's way, S did not stop or respond to Mr Buttery's loud voice and attempted to push past Mr Buttery and in doing so, S's shoulder contacted Mr Buttery in the torso area. Mr Buttery reacted as he stated in his evidence and made a grabbing or snatching motion towards S's shirt collar. As this occurred, I accept that S moved away from Mr Buttery in a twisting motion and fell towards the floor as described. I do not accept the contention that Mr Buttery had grabbed S by the shirt collar up under S's chin whilst he was in a standing position, with such force to push S up onto his tiptoes.

155 I accept that Mr Buttery by this time was angry and shouting. I do not accept Ms Patching's rather colourful description of Mr Buttery as being "hysterical". It is important to recognise that given the demeanour of S prior to and when he forcefully came into Mr Buttery's classroom, Mr Buttery did not know why he was coming back into his room. Given his duty of care to his own young students, Mr Buttery rightly had cause for concern as to what may transpire with S coming towards him. Whilst I accept that physical contact with a student is a last resort, in the circumstances in which the Incident occurred, I accept that Mr Buttery's reaction was instinctive and was directed to stopping S from potentially colliding with students seated on the floor. To this extent, in accordance with reg 38 of the *School Education Regulations 2000*, the contact made by Mr Buttery was, in the circumstances, reasonable to manage S, to prevent possible risk of injury to those younger students on the floor and

to re-establish order. I do not accept to any extent, that a far lesser type of intervention, as was suggested on the evidence, of a gentle grasping around S's wrists, could have had any possibility of restraining S's conduct.

156 I also note that at the time of the incident, Mr Buttery had only received the minimal level of training available to teachers in dealing with disruptive student behaviour. This programme, apparently called "Team Teach", is a full four-day course. An introductory one-day course, as part of the programme, was the extent of Mr Buttery's participation in it.

157 I have already mentioned that Ms Patching was not called to give evidence. Statements in the Investigation Report made by her were not able to be tested. However, for reasons I have already identified, I regard her statement of events with considerable caution. Her initial report and subsequent statements were, as Mr Belshaw accepted, replete with very emotive descriptions. Also, Ms Patching's description of Mr Buttery having a grip on S's shirt and lifting him upwards under S's chin with such force that he was lifted to his tiptoes, without any sign of soreness or injury afterwards, is a conclusion quite difficult to accept.

158 Also, it is the case that Mr Wright's initial reporting of the Incident, given to both the SID and to the Police, was factually seriously in error and Mr Wright very much relied on both Ms Patching's and S's initial description of events, which were simply wrong. As I have mentioned, Mr Wright's statement to the Police included reference to Mr Buttery's marriage breakdown and custody dispute in relation to his children. None of this had been put to Mr Buttery and these statements were made without his knowledge. They were self-evidently prejudicial towards him. Mr Wright also made the quite extraordinary statement to the Police in his witness statement to them, that there were guidelines for touching children and this case did not fit into them. This statement was made prior to any proper investigation of the facts and was based on misleading and inaccurate accounts of the Incident by both S and Ms Patching.

159 In my view, both Mr Wright and Ms Patching's accounts of the Incident were highly prejudicial to Mr Buttery. Importantly also, Mr Wright's reference to Mr Buttery speaking to him and admitting that he had done "everything Ms Patching had told him" was problematic. This was before Mr Wright had even spoken to Ms Patching about the Incident. All he had was a second-hand report from the other Deputy Principal, Ms Aims, who informed him she had been told by Ms Patching of a "nasty" incident involving Mr Buttery pushing a student into a wall. This of course was untrue.

160 These statements by Mr Wright were referred to in the Investigation Report at par 2.6 on p 44 of Annexure AB6 to Mr Belshaw's witness statement. The only reasonable interpretation that could be placed on his statement to Mr Wright, is that Mr Buttery admitted that he did grip S's shirt. No other circumstances were disclosed or were investigated at this point. Most importantly, why Mr Buttery reacted the way he did. Given Mr Wright's statement (as noted at par 2.6) was made in this context, and was a far from complete account of the Incident, it is not clear to me why it was included in the Investigation Report, at least without that important qualification.

161 Having regard to the evidence and the other material before the Commission, including the content of the Investigation Report, the question to be determined is whether the ongoing refusal of the respondent to employ Mr Buttery was industrially unfair. I am not persuaded that Mr Buttery committed an act of misconduct that would warrant the summary termination of his employment, the placing and retention of a red flag on his employment record and the ongoing refusal of the respondent to employ him. Even if one accepts that Mr Buttery may have over reacted, as a one-off in the circumstances in which the Incident occurred, in the context of an otherwise exemplary employment record, summary dismissal would not be a proportionate response in my view.

162 I do not propose to revisit my conclusions in relation to the Investigation Report, set out in some detail above. In my view, there were substantial flaws in the findings and conclusions that made reliance by the respondent on it unreasonable. As I have noted, the crucial issue of why Mr Buttery reacted the way that he did and the conduct of S immediately prior to Mr Buttery grasping S's shirt, were not the subject of any findings nor was there consideration of any exculpatory or mitigating factors.

163 It was also a part of the applicant's case in this matter, that prior to the dismissal of Mr Buttery, because of the issuance of the INN, no consideration was given to alternatives to dismissal. It is the case, as noted by Le Miere J at para 40 in *Brett* that the effect of s 23 of the WWC Act does not require the termination of a contract of employment. Section 23 prevents a person from continuing in child-related work. The INN was not, of itself, a direction to the respondent to dismiss Mr Buttery. Compliance with the WWC Act at the time, that being between 8 November and 21 December 2016, a relatively short period of time as it turned out, could have been achieved by other means. This could have included by giving Mr Buttery other work if available to do; by maintaining the order for Mr Buttery to stay away from the School under s 240 of the SE Act; or by suspending him from employment under s 82 of the PSM Act. Unlike on the facts in *Brett*, there was no evidence in this case of any consideration of alternatives to the dismissal of Mr Buttery. However, the difficulty with the applicant's contention in this respect is that the Court in *Brett*, as noted earlier in these reasons, concluded that a dismissal may be found to be for reasons of compliance with the WWC Act, despite alternatives being open. I have already found in this case, that the initial action of the respondent in dismissing Mr Buttery was, as the subjective and operative reason, to comply with the WWC Act.

164 The respondent attempted to limit the inquiry as to whether the respondent's actions were based on a belief, on reasonable grounds, that misconduct occurred, as assessed at the time: *Tip Top Bakeries v Transport Workers Union of Australia, Industrial Union of Workers, WA Branch* (1994) 74 WAIG 1729). Thus, the Commission should not adopt the managerial chair and decide for itself whether the conduct occurred. Even adopting that approach, for the reasons identified above, I do not consider that reliance on the investigation and its outcome would constitute reasonable grounds in this case. Whilst I think that the approach referred to in *Tip Top* has much to commend it, more recently, the approach of the Full Bench to analogous cases of summary dismissal for misconduct, has been to require, as a part of the fact-finding process, a determination of whether misconduct did in fact occur: *Minister for Health v Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203 at pars 45-67.

165 Finally, the applicant submitted that the respondent's failure to call Mr Wright, Ms Patching and possibly also Mr Milward, leads to the inference that their testimony may not have assisted the respondent's case. Accordingly, the Commission should draw a *Jones v Dunkel* inference in relation to the absence of this evidence. In the ordinary course, such a submission would have considerable attraction, given the role played by these persons in this matter. However, I incline to the view that the

absence of these witnesses is more related to the approach of the respondent to its case. That is, its contentions, as set out earlier in these reasons, that the evidence of Mr Buttery in relation to the incident was not relevant to the disposition of these proceedings, rather than any conscious decision to avoid scrutiny.

166 Accordingly, the issue for consideration now, in view of my findings and conclusions, is what remedy, if any, should flow. In a case of a refusal to employ, the question to be asked and answered is whether the respondent's refusal to employ was industrially unfair: *Construction, Forestry, Mining and Energy Union of Workers v BHP Iron Ore Pty Ltd and Anor* [2005] WAIRC 01797; (2005) 85 WAIG 1924 at para 351. Despite my earlier observations, I do not consider that it was industrially unfair for the respondent to refuse to re-employ Mr Buttery on 16 January 2017 and 3 February 2017 in circumstances where Mr Buttery was facing a charge of aggravated assault. The decision to lay the criminal charge was made independently by the Police. Although as I have found on the evidence, information initially provided by way of reports from the School were in part erroneous. In view of a serious criminal charge being laid, considered objectively, I do not believe it was unreasonable or unfair for the respondent at that time to decline to place Mr Buttery back in charge of young children as a teacher. This is despite, as I have already mentioned, Mr Buttery being left in charge of his class for over two months after the incident.

167 This situation materially changed, with the discontinuance of the criminal charge in June 2017. Despite this, the respondent considered it would not further employ Mr Buttery because of the disciplinary investigation into the Incident which occurred on 31 August 2016. Again, viewed objectively, as the investigation had yet to run its course, although the outcome for reasons I have indicated, was flawed, the Incident into which the investigation was to be undertaken, on the allegations, was one of some magnitude involving a teacher and a student. In those circumstances, having regard to the respondent's obligations and its duty of care, I do not consider that the refusal to employ Mr Buttery at that point was industrially unfair.

168 However, by the time of the conclusion of the disciplinary investigation and the preparation of the Investigation Report, and the decision by the respondent to red flag Mr Buttery's employment record, the ongoing refusal to employ Mr Buttery was unfair, given my findings and conclusions on the evidence. From that point, given the erroneous and unreasonable conclusions reached in relation to the Incident, viewed objectively, the respondent's continued refusal to employ Mr Buttery and his continued red flagging was industrially unfair. By that time, with the benefit of the evidence now before the Commission, and indeed even on the material available to the investigation, the conclusion that Mr Buttery's actions on the day of the Incident were not reasonable or necessary, was erroneous. Alternatively, even if it could be contended reasonably that Mr Buttery's response, taken in its full context and having regard to the action of S and Mr Buttery's concern for his own students, was excessive, it did not warrant ending his career as a primary teacher in government schools, given his very good teaching record. The ongoing refusal to employ Mr Buttery from this point was industrially unfair.

169 As to the remedy, this is not an unfair dismissal claim. As a claim of an unfair refusal to employ, the remedy will be that the Commission will order that on Mr Buttery presenting himself at the respondent's workplace, that the respondent offer him a contract of employment as a teacher. Also, as part of inquiring into and dealing with the present industrial matter, and as a matter of equity, good conscience and the substantial merits of the case, I consider that in resolving the industrial dispute in accordance with the obligations on the Commission under the Act, that an order be made that Mr Buttery be paid an amount representing his salary that would have been earned by him from 2 October 2017, being the date of the disciplinary investigation outcome, to the date of re-employment.

In the alternative

170 In the alternative, if I am incorrect and in this matter the Commission has no jurisdiction or power to deal with the applicant's claim or to award a remedy because of s 23(2a) of the Act and/or s 41(3) of the WWC Act, or otherwise because there was no relevant refusal to employ, then, given the respondent's change of policy as set out in its letter of 9 April 2018, referred to above, without hesitation, I consider Mr Buttery should be re-employed in accordance with the new policy. This man has been dealt with very harshly and he has had his career as a public school primary teacher ended in circumstances that did not warrant it. It would be unjust for the respondent not to act.

Editor's note:

[85] edited in accordance with Corrigendum 7 November 2018 [2018] WAIRC 00833. This is unpublished to protect the identity of a minor.

2018 WAIRC 00844

DISPUTE RE ALLEGED REFUSAL TO REINSTATE OR TO RE-EMPLOY UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 13 NOVEMBER 2018
FILE NO/S	CR 10 OF 2017
CITATION NO.	2018 WAIRC 00844

Result		Declaration and order issued
Representation		
Counsel:		
Applicant	:	Ms P Giles of counsel and with her Mr C Fordham of counsel
Respondent	:	Mr J Carroll of counsel and with him Ms Z Bush of counsel
Solicitors:		
Applicant	:	The State School Teachers' Union of W.A. (Incorporated)
Respondent	:	State Solicitor's Office

Order

HAVING heard Ms P Giles of counsel and with her Mr C Fordham of counsel on behalf of the applicant and Mr J Carroll of counsel and with him Ms Z Bush of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

(1) DECLARES that the refusal by the respondent to employ Mr Buttery was unfair.

(2) ORDERS that on Mr Buttery presenting himself at the respondent's head office premises at 9.00am on Tuesday 4 December 2018 that the respondent offer to Mr Buttery a contract of employment as a primary school teacher, at a level and salary commensurate with Mr Buttery's qualifications and experience.

(3) ORDERS that the respondent pay to Mr Buttery an amount reflecting the salary and benefits that he would have otherwise earned had he remained employed by the respondent, from 2 October 2017 to the date of any acceptance of an offer of employment by Mr Buttery under par 2 above, less any income received by Mr Buttery from other employment over the same period. Such sum to be paid to Mr Buttery within seven days of any acceptance by him of an offer of employment from the respondent.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Civil Service Association of Western Australia Inc.	Director General Department of Communities	Emmanuel C	PSAC 12/2018	28/05/2018	Dispute re procedural fairness	Discontinued

CORRECTIONS—

2018 WAIRC 00852

WA HEALTH SYSTEM - HSUWA - PACTS INDUSTRIAL AGREEMENT 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CHILD AND ADOLESCENT HEALTH SERVICE, EAST METROPOLITAN HEALTH SERVICE, HEALTH SUPPORT SERVICES

APPLICANTS

-v-

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER T EMMANUEL

DATE THURSDAY, 15 NOVEMBER 2018

FILE NO PSAAG 8 OF 2018

CITATION NO. 2018 WAIRC 00852

Result	Correcting order issued
Representation	
Applicants	Ms R Kelly (as agent)
Respondent	Mr D Hill

Correcting Order

WHEREAS the *WA Health System – HSUWA – PACTS Industrial Agreement 2018* was registered as an industrial agreement by the Public Service Arbitrator's order [2018] WAIRC 00749 on 18 September 2018;

AND WHEREAS on 5 November 2018 the applicants made an application to the Public Service Arbitrator for an order to correct typographical errors in the *WA Health System – HSUWA – PACTS Industrial Agreement 2018* they say were caused by the inadvertence of the parties' representatives (**Application**);

AND WHEREAS the applicants sought leave to amend the Application by replacing table one of schedule B with a table sent to the Commission on 14 November 2018, and leave was granted;

AND WHEREAS the parties ask that the Public Service Arbitrator issue an order correcting the typographical errors outlined in table one of schedule B of the Application as amended, which is reproduced below;

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders–

> THAT the *WA Health System – HSUWA – PACTS Industrial Agreement 2018* be corrected in relation to the typographical errors outlined in table one of schedule B of the Application as amended, reproduced here:

Table One - Typographical Corrections

Page Number	Clause	Amendment	Reason
40	Subclause 18.11(a)	(i): 18.9(a) should read 17.10(a) (ii): 18.9(b)(iii) should read 17.10(b)(iii) (iii): 18.9(c)(iii) should read 17.10(c)(iii)	Incorrect subclauses referenced
97	Subclause 46.5	6.5 should read 46.5	Subclause typing error
100	Subclause 50.9	509.9 should read 50.9	Subclause typing error
106	Subclause 53.6	536 should read 53.6	Subclause typing error
111	Subclause 57.5	114 should read 141	Typing error
119	Schedule 1	G9.2 Rate (2018) $129,304 should read $129,198	Typing error
121	Schedule 2	P1.3 Rate (2018) $80,6751 should read $80,651	Typing error
121	Schedule 2	P6.1 Rate (2018) $145,626 should read $147,626	Typing error
123	Schedule 4 Column B	25.5 should read 25.6.	Incorrect subclause referenced

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

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00855

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	FRIDAY, 16 NOVEMBER 2018
FILE NO/S	APPL 58 OF 2018
CITATION NO.	2018 WAIRC 00855

Result	Order issued
Representation	
Applicant	Mr G Giorgi of counsel
Respondent	Ms S Swanson of counsel

Order

1. 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*.
2. On 6 September 2018, the Commission issued an order for the preparation for the hearing of the matter ([2018] WAIRC 00730; 98 WAIG 1169).
3. On 14 November 2018 the Commission received an email from Mr Giorgi, counsel for the applicant, advising that the parties had conferred in relation to the preparation of a statement of agreed facts and requesting that Order (4) be discharged while the parties formulate a statement of agreed facts by consent.

Pursuant to the powers conferred under the *Industrial Relations Act 1979* and the *Construction Industry Portable Paid Long Service Leave Act 1985*, and by consent, the Commission hereby orders:

THAT Order (4) of the Orders dated 6 September 2018 ([2018] WAIRC 00730; 98 WAIG 1169) be discharged.

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

2018 WAIRC 00856

DISPUTE RE ALLEGED UNFAIR TERMINATION OF EMPLOYMENT

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	FRIDAY, 16 NOVEMBER 2018
FILE NO/S	CR 27 OF 2018
CITATION NO.	2018 WAIRC 00856

Result	Orders issued
Representation	
Applicant	Mr C Fordham of counsel
Respondent	Ms J Vincent of counsel and with her Ms J Whittle

Order

HAVING heard Mr C Fordham of counsel for the applicant and Ms J Vincent of counsel and with her Ms J Whittle for the respondent;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby order that on or before 7 December 2018:

(1) The respondent provide and/or make available for copying all documents, including but not limited to briefing notes, internal memoranda, working notes, guidelines, policies and correspondence, for the years 2016 and 2017 relating to or touching on the way in which the respondent proposed to deal with and/or did deal with fixed term or permanently employed teachers who had failed to pay their teacher registration fee by the due date.

(2) The respondent provide and/or make available for copying any document, email, letter or other communication sent by the respondent to any individual fixed term or permanently employed teacher from 1 January 2016 to 2 May 2018 which contains a written warning or notice of disciplinary action against that teacher in respect of an alleged failure to pay the teacher's registration fee.

(3) The applicant serve a list of documents falling within the category below and identify any objections to production of any or all of the documents:

(a) all written communications and all records of verbal communications between Ms Felicity Halliday and the State School Teachers' Union between 3 May 2018 and 22 May 2018 (inclusive) relating to the cancellation, re-instatement or re-registration (howsoever described) of Ms Halliday's registration with the Teacher Registration Board of Western Australia.

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

2018 WAIRC 00862

DEPARTMENT FOR COMMUNITY DEVELOPMENT (FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS AND PARENT HELPERS) AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT** **-v-** DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES **RESPONDENT**
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 21 NOVEMBER 2018
FILE NO/S	P 8 OF 2018
CITATION NO.	2018 WAIRC 00862

Result Order and Direction issued

Order and Direction

1. This is an application referred to the Commission pursuant to s 40 of the *Industrial Relations Act 1979* on 20 November 2018 to vary the *Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990* (the Award) in relation to the respondent of the Award and other matters.

2. On 20 November 2018, the applicant applied to the Commission for substituted service in relation to the respondent to the Award to the Department of Mines, Industry Regulation and Safety, which holds a standing warrant in respect of the respondent.

3. The Commission is of the opinion that it is appropriate to grant the applicant's application for substituted service. Further, the Commission is of the opinion that it is appropriate to waive the requirements that the area and scope provisions be published in the Western Australian Industrial Gazette.

Pursuant to the powers conferred by the *Industrial Relations Act 1979*, I hereby –

DIRECT –

THAT the area and scope provisions of the *Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990* need not be published at all.

ORDER –

THAT, subject to s 29A(2) of the *Industrial Relations Act 1979*, there be substituted service on the respondent to the *Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990* by service on the Department of Mines, Industry Regulation and Safety, Public Sector Labour Relations branch.

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

2018 WAIRC 00859

EDUCATION DEPARTMENT MINISTERIAL OFFICERS SALARIES ALLOWANCES AND CONDITIONS AWARD 1983 NO 5 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 20 NOVEMBER 2018
FILE NO/S	P 7 OF 2018
CITATION NO.	2018 WAIRC 00859

Result	Order and Direction issued

Order and Direction

1. This is an application referred to the Commission pursuant to s 40 of the *Industrial Relations Act 1979* on 16 November 2018 to vary the *Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983, No. 5 of 1983* (the Award) in relation to the respondent of the Award and other matters.
2. On 16 November 2018, the applicant applied to the Commission for substituted service in relation to the respondent to the Award to the Department of Mines, Industry Regulation and Safety, which holds standing warrants in respect of the respondent.
3. The Commission is of the opinion that it is appropriate to grant the applicant's application for substituted service. Further, the Commission is of the opinion that it is appropriate to waive the requirement that the area and scope provisions be published in the Western Australian Industrial Gazette.

Pursuant to the powers conferred by the *Industrial Relations Act 1979*, I hereby –

DIRECT –

THAT the area and scope provisions of the *Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983, No. 5 of 1983* need not be published at all.

ORDER –

THAT, subject to s 29A of the *Industrial Relations Act 1979*, there be substituted service on the respondent to the *Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983, No. 5 of 1983* by service on the Department of Mines, Industry Regulation and Safety, Public Sector Labour Relations branch.

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

2018 WAIRC 00858

ELECTORATE OFFICERS AWARD 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	THE HONOURABLE SPEAKER OF THE LEGISLATIVE ASSEMBLY, THE HONOURABLE PRESIDENT OF THE LEGISLATIVE COUNCIL
	RESPONDENTS
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 20 NOVEMBER 2018
FILE NO/S	P 6 OF 2018
CITATION NO.	2018 WAIRC 00858

Result	Order and Direction issued

Order and Direction

1. This is an application referred to the Commission pursuant to s 40 of the *Industrial Relations Act 1979* on 16 November 2018 to vary the *Electorate Officers Award 1986* (the Award) in relation to the respondents of the Award and other matters.

2. On 16 November 2018, the applicant applied to the Commission for substituted service in relation to the respondents to the Award to the Department of Mines, Industry Regulation and Safety, which holds standing warrants in respect of those respondents.

3. The Commission is of the opinion that it is appropriate to grant the applicant's application for substituted service. Further, the Commission is of the opinion that it is appropriate to waive the requirement that the area and scope provisions be published in the Western Australian Industrial Gazette.

Pursuant to the powers conferred by the *Industrial Relations Act 1979*, I hereby –

DIRECT –

THAT the area and scope provisions of the *Electorate Officers Award 1986* need not be published at all.

ORDER –

THAT, subject to s 29A(2) of the *Industrial Relations Act 1979*, there be substituted service on the respondents to the *Electorate Officers Award 1986* by service on the Department of Mines, Industry Regulation and Safety, Public Sector Labour Relations branch.

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

2018 WAIRC 00857

GOVERNMENT OFFICERS (INSURANCE COMMISSION OF WESTERN AUSTRALIA) AWARD, 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, INSURANCE COMMISSION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 20 NOVEMBER 2018
FILE NO/S	P 5 OF 2018
CITATION NO.	2018 WAIRC 00857

Result	Order and Direction issued

Order and Direction

1. This is an application referred to the Commission pursuant to s 40 of the *Industrial Relations Act 1979* on 16 November 2018 to vary the *Government Officers (Insurance Commission of Western Australia) Award 1987* (the Award) in relation to the respondent of the Award and other matters.

2. On 16 November 2018, the applicant applied to the Commission for substituted service in relation to the respondent to the Award to the Department of Mines, Industry Regulation and Safety, which holds a standing warrant in respect of the respondent.

3. The Commission is of the opinion that it is appropriate to grant the applicant's application for substituted service. Further, the Commission is of the opinion that it is appropriate to waive the requirement that the area and scope provisions be published in the Western Australian Industrial Gazette.

Pursuant to the powers conferred by the *Industrial Relations Act 1979*, I hereby –

DIRECT –

THAT the area and scope provisions of the *Government Officers (Insurance Commission of Western Australia) Award 1987* need not be published at all.

ORDER –

THAT, subject to s 29A(2) of the *Industrial Relations Act 1979*, there be substituted service on the respondent to the *Government Officers (Insurance Commission of Western Australia) Award 1987* by service on the Department of Mines, Industry Regulation and Safety, Public Sector Labour Relations branch.

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

2018 WAIRC 00850

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	ANIMAL RESOURCES AUTHORITY, BOTANIC GARDENS AND PARKS AUTHORITY, BUILDERS' REGISTRATION BOARD OF WESTERN AUSTRALIA AND OTHERS
	RESPONDENTS
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 15 NOVEMBER 2018
FILE NO/S	P 2 OF 2018
CITATION NO.	2018 WAIRC 00850

Result Order and Direction issued

Order and Direction

1. This is an application referred to the Commission pursuant to s 40 of the *Industrial Relations Act 1979* on 6 November 2018 to vary the *Government Officers Salaries, Allowances and Conditions Award 1989* (the Award) in relation to the respondents of the Award and other matters.

2. On 6 November 2018, the applicant applied to the Commission for substituted service in relation to a number of the respondents to the Award to the Department of Mines, Industry Regulation and Safety, which holds standing warrants in respect of those respondents.

3. The Commission is of the opinion that it is appropriate to grant the applicant's application for substituted service. However, as the application seeks to vary the respondency of the Award and such a variation relates to the scope of the Award, the application is to be published in *The West Australian* newspaper and on the Commission's website.

Pursuant to the powers conferred by the *Industrial Relations Act 1979*, I hereby –

DIRECT –

(A) THAT notice of the proposed variations to the area and scope provisions of the *Government Officers Salaries, Allowances and Conditions Award 1989* be published:

(i) in *The West Australian* newspaper by the Registrar; and

(ii) on the Commission's website,

and a period of seven days be given from the date of publication of the notice in the newspaper for objections to be lodged in Registry.

(B) THAT the proposed variations to the area and scope provisions need not be published in the Western Australian Industrial Gazette.

ORDER –

(1) THAT the following entities be served by the applicant:

(a) Agricultural Produce Commission;

(b) Architects Board of Western Australia;

(c) Legal Practice Board of Western Australia;

(d) Minerals Research Institute of Western Australia;

(e) Corruption and Crime Commission; and

(f) Veterinary Surgeons' Board of Western Australia.

(2) THAT, subject to Order (1) and s 29A(2) of the *Industrial Relations Act 1979*, there be substituted service on the other respondents to the *Government Officers Salaries, Allowances and Conditions Award 1989* by service on the Department of Mines, Industry Regulation and Safety, Public Sector Labour Relations branch.

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

2018 WAIRC 00854

JUVENILE CUSTODIAL OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT** **-v-** CHIEF EXECUTIVE OFFICER, BEING THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES **RESPONDENTS**
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 16 NOVEMBER 2018
FILE NO/S	P 4 OF 2018
CITATION NO.	2018 WAIRC 00854

Result Order and Direction issued

Order and Direction

1. This is an application referred to the Commission pursuant to s 40 of the *Industrial Relations Act 1979* on 9 November 2018 to vary the *Juvenile Custodial Officers' Award* (the Award) in relation to the respondents of the Award and other matters.
2. On 9 November 2018, the applicant applied to the Commission for substituted service in relation to the respondents to the Award to the Department of Mines, Industry Regulation and Safety, which holds standing warrants in respect of those respondents.
3. The Commission is of the opinion that it is appropriate to grant the applicant's application for substituted service. Further, the Commission is of the opinion that it is appropriate to waive the requirement that the area and scope provisions be published in the Western Australian Industrial Gazette.

Pursuant to the powers conferred by the *Industrial Relations Act 1979*, I hereby –

DIRECT –

THAT the area and scope provisions of the *Juvenile Custodial Officers' Award* need not be published at all.

ORDER –

THAT, subject to s 29A(2) of the *Industrial Relations Act 1979*, there be substituted service on the respondents to the *Juvenile Custodial Officers' Award* by service on the Department of Mines, Industry Regulation and Safety, Public Sector Labour Relations branch.

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

2018 WAIRC 00853

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT** **-v-** CHEMISTRY CENTRE, COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE, CURRICULUM COUNCIL OF WESTERN AUSTRALIA **RESPONDENTS**
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 16 NOVEMBER 2018
FILE NO/S	P 3 OF 2018
CITATION NO.	2018 WAIRC 00853

Result Order and Direction issued

Order and Direction

1. This is an application referred to the Commission pursuant to s 40 of the *Industrial Relations Act 1979* on 9 November 2018 to vary the *Public Service Award 1992* (the Award) in relation to the respondents of the Award and other matters.

2. On 9 November 2018, the applicant applied to the Commission for substituted service in relation to the respondents to the Award to the Department of Mines, Industry Regulation and Safety, which holds standing warrants in respect of those respondents.

3. The Commission is of the opinion that it is appropriate to grant the applicant's application for substituted service. However, as the application seeks to vary the respondency of the Award and such a variation relates to the scope of the Award, the application is to be published in *The West Australian* newspaper and on the Commission's website.

Pursuant to the powers conferred by the *Industrial Relations Act 1979*, I hereby –

DIRECT –

(A) THAT notice of the proposed variations to the area and scope provisions of the *Public Service Award 1992* be published:

(i) in *The West Australian* newspaper by the Registrar; and

(ii) on the Commission's website,

and a period of seven days be given from the date of publication of the notice in the newspaper for objections to be lodged in Registry.

(B) THAT the proposed variations to the area and scope provisions need not be published in the Western Australian Industrial Gazette.

ORDER –

THAT, subject to s 29A(2) of the *Industrial Relations Act 1979*, there be substituted service on the respondents to the *Public Service Award 1992* by service on the Department of Mines, Industry Regulation and Safety, Public Sector Labour Relations branch.

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

2018 WAIRC 00772

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 31 JULY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPELLANT** **-v-** COMMISSIONER, WESTERN AUSTRALIAN POLICE FORCE, POLICE AIR WING **RESPONDENT**
CORAM	SENIOR COMMISSIONER S J KENNER - CHAIRMAN MR N CINQUINA – BOARD MEMBER MR G LEE – BOARD MEMBER
DATE	THURSDAY, 27 SEPTEMBER 2018
FILE NO/S	PSAB 20 OF 2018
CITATION NO.	2018 WAIRC 00772

Result	Order issued
Representation	
Applicant	Ms J McCulloch
Respondent	Ms D Southcott

Order

HAVING heard Ms J McCulloch on behalf of the appellant and Ms D Southcott on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT that the name of the respondent be amended by the deletion of the name 'Commissioner, Western Australian Police Force, Police Air Wing' and the insertion in lieu thereof the name 'Commissioner of Police, Western Australian Police Force'.

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

2018 WAIRC 00207

DISPUTE RE TERMINATION OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	BLAST WA PTY LTD, ALAN MENEZES
	APPLICANTS
	-v-
	LINFOX AUSTRALIA PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 27 MARCH 2018
FILE NO.	RFT 6 OF 2017
CITATION NO.	2018 WAIRC 00207

Result	Direction issued
Representation	
Applicant	Mr K Trainer as agent and with him Mr A Menezes
Respondent	Mr A Hindmarsh of counsel and with him Mr S Welsh

Direction

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr A Hindmarsh of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby directs –

(1) THAT the applicant file and serve on the respondent further and better particulars of its claim by no later than 16 April 2018.

(2) THAT the respondent file and serve further and better particulars of answer by no later than 14 days from service of the applicant's further and better particulars of claim.

(3) THAT the matter be re-listed for conciliation on a date to be fixed by the Tribunal.

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

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

2018 WAIRC 00401

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BENJAMIN JOHN HICKS
	APPLICANT
	-v-
	ACR PLASTERING
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 4 JULY 2018
FILE NO/S	U 68 OF 2018, B 68 OF 2018
CITATION NO.	2018 WAIRC 00401

Result	Order issued
Representation	
Applicant	No appearance required
Respondent	Ms B Stanway as agent

Order

WHEREAS on 8 June 2018 the applicant filed a notice of claim of harsh, oppressive or unfair dismissal;

AND WHEREAS on 2 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.

PUBLIC SERVICE APPEAL BOARD—

2018 WAIRC 00849

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 9 MARCH 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00849
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER D J MATTHEWS- CHAIRMAN MR G BROWN - BOARD MEMBER MS M MCHUGH - BOARD MEMBER
HEARD	**:**	WEDNESDAY, 24 OCTOBER 2018
DELIVERED	**:**	WEDNESDAY, 24 OCTOBER 2018
FILE NO.	**:**	PSAB 7 OF 2018
BETWEEN	**:**	MEGAN SCHMIDT Appellant AND MR GRAHAME SEARLE DIRECTOR GENERAL DEPARTMENT OF COMMUNITIES Respondent

CatchWords	**:**	Appeal against decision to terminate - Appeal never served on respondent nor any other formal action taken - Application dismissed for want of prosecution
Legislation	**:**	
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	No appearance
Respondent	**:**	Ms A Gillespie as agent

Reasons for Decision

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

1 In this matter the Board has before it a notice of appeal filed on 3 April 2018. No declaration of service was ever provided to the Registry for the Board, despite, the file reveals, repeated invitations for the appellant to provide one.

2 That means that there is no evidence before the Board that the respondent was ever served with the notice of appeal. Ms Gillespie, for the respondent, who has kindly appeared today on behalf of the respondent, informs that there has been no service of the notice of appeal.

3 Not only is there no evidence before the Board that the notice of appeal was ever served upon the respondent, the Board has been informed by the respondent that is has not, in fact, ever been served with it.

4 Other than the filing of the notice of appeal, it would appear that the appellant has taken no other action whatsoever in relation to this matter. In terms of contact from the Board, which has been through persons holding the role of Associate to me, there has been no contact from the appellant in relation to this matter since 25 June 2018.

5 Because of the failure of the appellant to prosecute her appeal, by which I mean the failure to serve the appeal or do anything else formally in relation to it, this matter was set down for a hearing at which the appellant was to show cause why the matter ought to proceed given the lack of activity in relation to it.

6 The Board is aware from records held that the notice of hearing went to the address that the appellant nominated in the notice of appeal as that upon which she ought be served with documentation.

7 So the Board, being satisfied that the appellant was aware of today's hearing and that the appellant, other than filing the notice of appeal, has taken no other action in relation to the appeal, will, by order, dismiss the appeal for want of prosecution.

2018 WAIRC 00815

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 9 MARCH 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MEGAN SCHMIDT
	APPELLANT
	-v-
	MR GRAHAME SEARLE DIRECTOR GENERAL DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER D J MATTHEWS - CHAIRMAN MR G BROWN - BOARD MEMBER MS MARY MCHUGH - BOARD MEMBER
DATE	THURSDAY, 25 OCTOBER 2018
FILE NO	PSAB 7 OF 2018
CITATION NO.	2018 WAIRC 00815

Result	Application dismissed
Representation	
Appellant	No appearance
Respondent	Ms A Gillespie as agent

Order

WHEREAS on 3 April 2018 the appellant filed an appeal to the Public Service Appeal Board;

AND WHEREAS the appellant has not filed a statutory declaration of service pursuant to regulation 28 *Industrial Relations Commission Regulations 2005*;

AND WHEREAS the appellant has taken no other action in relation to the appeal;

AND WHEREAS a notice of hearing was sent to the address nominated by the appellant on 3 October 2018 setting the matter down for hearing for the appellant to show cause why the appeal should not be dismissed for want of prosecution;

AND WHEREAS at the hearing on 24 October 2018 there was no appearance by or for the appellant and the Public Service Appeal Board proceeded in the absence of the appellant;

AND WHEREAS reasons for decision were given by the Chairman of the Public Service Appeal Board on behalf of the Public Service Appeal Board ex tempore on 24 October 2018;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby order that the application be and is hereby dismissed for want of prosecution.

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

NOTICES—Union Matters—

2018 WAIRC 00860

NOTICE

FBM No. 6 of 2018, FBM No. 7 of 2018, FBM No. 9 of 2018,

FBM No. 10 of 2018 and FBM No. 11of 2018

NOTICE is given of applications by the Registrar of the Western Australian Industrial Relations Commission to the Full Bench of the Western Australian Industrial Relations Commission to cancel the registration of Real Estate Salespersons Association of Western Australia (Inc.) (FBM 6/2018), Metal Industries Association (Industrial Union of Employers) of W.A. (FBM 7/2018), The Footwear Repairers' Association of W.A. (Union of Employers) (FBM 9/2018), Mining Unions Association of Employees of Western Australia (Iron Ore Industry) (FBM 10/2018) and The Western Australian Gold and Nickel Mines Supervisors Association Industrial Union of Workers (FBM 11/2018) on the grounds the organisations are defunct.

The matters are listed for hearing before the Full Bench at **9.30am on Friday, 7 December 2018** on Level 18, 111 St Georges Terrace, Perth.

Any person who desires to object to the application/s may do so by appearing at the hearing before the Full Bench at the above listed date and time.

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

12 November 2018

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2018 WAIRC 00847

DISPUTE RE ALLEGED BREACH OF THE DELIVER AGREEMENT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	DELIVER2U (WA) PTY LTD
	APPLICANT
	-v-
	GD MITCHELL ENTERPRISES PTY LTD T/AS LITE N' EASY PERTH
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 13 NOVEMBER 2018
FILE NO/S	RFT 4 OF 2017
CITATION NO.	2018 WAIRC 00847

Result	Order issued
Representation	
Applicant	Mr W Spyker of counsel
Respondent	Ms S Camilleri of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Blast WA Pty Ltd, Alan Menezes	Linfox Australia Pty Ltd	Kenner SC	RFT 6/2017	26/03/2018	Dispute re termination of contract	Discontinued