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FULL BENCH—Appeals against decision of Commission—

2019 WAIRC 00716

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 36/2018 GIVEN ON 8 OCTOBER 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2019 WAIRC 00716
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
HEARD	**:**	THURSDAY, 4 APRIL 2019
DELIVERED	**:**	THURSDAY, 19 SEPTEMBER 2019
FILE NO.	**:**	FBA 13 OF 2018
BETWEEN	**:**	COLIN R DIXON Appellant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner Matthews**
Citation	**:**	**[2018] WAIRC 00784; (2018) 98 WAIG 1240**
File No	**:**	**U 36 OF 2018**

CatchWords	**:**	Industrial law (WA) – Appeal against a decision of the Commission – Leave granted to amend grounds of appeal – Approach to be taken by Full Bench to an appeal – Discretionary decision – Appeal to be heard and determined on the evidence and matters raised at first instance – Errors of fact and law – Procedural fairness – Teacher registration levels and AITSL Standards – Expert Witnesses – Failure to call witness (*Jones v Dunkel* inference) – Appeal dismissed
Legislation	**:**	*Industrial Relations Act 1979*, s 26(1), s 49(4); *Public Sector Management Act* 1994, s 79(2)(iii), s 80(a), the *Teachers Registration Act 2012*, s 7; *Australian College of Teaching Act 2004*
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	Mr R Skehan as agent
Respondent	**:**	Mr D Anderson of counsel

Case(s) referred to in reasons:

Michael v Director General, Department of Education and Training [2009] WAIRC 01180; (2009) 89 WAIG 2266

House v The King (1936) 55 CLR 499

Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission (2000) 203 CLR 194

Norbis v Norbis (1986) 161 CLR 513

Gronow v Gronow (1979) 144 CLR 513

Monteleone v The Owners of The Old Soap Factory [2007] WASCA 79

Burswood Resort (Management) Ltd v The Australian Liquor, Hospitality and Miscellaneous Union, Western Australian Branch [2000] WASCA 386

The Minister for Health in his incorporated capacity under section 7 of The Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in The Metropolitan Health Services Board v Denise Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Metwally v University of Wollongong (1985) 60 ALR 68

Suttor v Gundowda Pty Ltd (1950) 81 CLR 418

Jones v Dunkel ((1958-59) 101 CLR 298

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Ridge v Baldwin [1964] AC 40

Case(s) also cited:

Connecticut Fire Insurance Co. v. Kavanagh (1892) AC 473

Reasons for Decision

SCOTT CC:

Introduction

1 The appellant, Colin Dixon, was dismissed by the Director General, Department of Education (the Director General) on the grounds that his performance as a teacher was substandard. He claimed the dismissal was harsh, oppressive or unfair.

2 The Commission at first instance found that Mr Dixon's performance was substandard and that the Director General made no error in dismissing him ([2018] WAIRC 00794). Mr Dixon appeals against that decision.

Background

3 Mr Dixon qualified as a teacher in around 1980. He taught for about 3 and a half years at the Rockhampton Grammar School in subjects including computing, mathematics, physics and science. He then worked at Shepparton North Technical School for 3 years and 3 months. He resigned in September 1986. He then ran a business for 23 years.

4 In 2009, Mr Dixon returned to teaching, in Western Australia. This involved a number of fixed term contracts at various high schools throughout Western Australia, for a total of 219 days. On 18 July 2016, Mr Dixon's employment with the respondent became permanent, with a placement at Toodyay District High School (the School).

5 Mr Dixon was having difficulties with managing the behaviour of students at the School. He said that this was a problem inherited from previous teachers and the school's administration. However, after Mr Dixon had spent a number of weeks at the school, the School's Deputy Principal, Mr Innocent Chikwama, commenced a process of examining, and attempting to assist Mr Dixon with, difficulties in managing classroom behaviour.

6 A formal process, including an investigation, was subsequently established to determine whether Mr Dixon's performance was substandard. An investigation report was prepared.

7 The respondent measures performance of teachers against the Australian Professional Standards for Teachers, currently administered by the Australian Institute for Teaching and School Leadership (AITSL). These are known as the AITSL Standards. The Standards set out grades by which to classify teachers at the various stages of their careers, being Graduate, Proficient, Highly Accomplished and Lead. Mr Dixon was assessed against the "Proficient" level. His performance measured against that standard was found to be substandard and his employment was terminated.

8 Mr Dixon brought a claim to the Commission alleging that his dismissal was harsh, oppressive or unfair.

The Decision at First Instance

9 In his reasons for decision ([2018] WAIRC 00795), the learned Commissioner noted that Mr Dixon said that there were cultural and administrative problems at the School which resulted in his not managing student behaviour in his class. Mr Dixon attributed his difficulties in demonstrating his competency by reference to what he described as the administration team's failures. The Commissioner noted that Mr Dixon said that 'the environment became so bad in some of his classes that he had no real or fair chance to show his wares as a teacher' [21].

10 The Commissioner found that the evidence did not support this characterisation. He then recited some of that evidence, and that the evidence was 'all one way and ultimately overwhelmingly persuasive, that the applicant was a substandard teacher' [32] .

11 The learned Commissioner then commented on the evidence of Mr Shane Stiles, the applicant's direct line manager at another school, and 'Mr William Purcell, the expert who assessed the applicant as part of the respondent's substandard performance process.' [33]

12 The learned Commissioner then set out the key themes that he said emerged from the evidence. They are:

> There are some key themes which emerge from the evidence, and I make a finding of each of them, which may be listed as follows:
>
> (1) the applicant may have "known his stuff" but his preferred method of teaching, being to set work and have students work things out for themselves, was totally ineffective;
>
> (2) the applicant was unable or unwilling to closely monitor the spread of abilities within a class and to tailor work to cater to those different abilities;
>
> (3) the applicant was a poor communicator with students;
>
> (4) related to (1), (2) and (3) above the applicant was incapable of setting a "tone" of respect in his classroom where he commanded proper authority;
>
> (5) the applicant blamed others for the problems he encountered in the classroom, or expected others to fix them, rather than confronting them himself; and
>
> (6) perhaps most tellingly, and this fell from the applicant's own lips, the applicant had a tendency to bunker down and become stubborn and argumentative when things were not going his way rather than being flexible and proactive in tackling problems and, in at least one case, he gave up on trying to teach some students altogether [34].

13 The learned Commissioner then gave details of that evidence in relation to each of the themes he had identified.

14 He then dealt with the issue of the reliability of the witnesses. He said that 'some witnesses suffered light blows under cross-examination and that, on occasion, they gave evidence in general terms without reference to specific examples' [66]. However, he did not identify particular areas where those 'light blows' had been suffered.

15 The Commissioner then noted that the applicant complained in his closing submissions that he had been incorrectly assessed against the "Proficient" level of teacher rather than "Graduate" level. He noted that while he had had regard to the AITSL Standards as contemplated by s 79(2)(iii) of the *Public Sector Management Act* 1994:

> [T]he conclusion to which I have come that the applicant is a substandard teacher relies on all of the matters about which I have made reference in these reasons and my conclusion is not in any way limited only to cross referencing those matters in the Standards. So as to be clear, I find the applicant to be substandard regardless of whether I had considered him to be a 'proficient' or 'graduate' teacher so far as the Standards are concerned. I rely on the evidence which supports my findings (1) to (6) above and find that a person displaying those deficiencies is substandard.
>
> Further on this, I note the applicant did not forensically pursue an argument about the appropriate level to apply in the proceedings, by which I mean the applicant did not articulate an argument about this aspect to such an extent that it could fairly be said the respondent had an opportunity to meet it during the hearing [100] - [101].

16 The Commissioner went on to note that if the argument needed to be dealt with, that it was fair to assess the applicant against the "Proficient" level 'given his years of experience as a teacher' and that he also presented himself to his superiors and the Commission as 'a very good and very experienced teacher' [102].

17 The Commissioner rejected the applicant's contention that the blame for any appearance of substandard performance lay with the administration team at the School for failing to support his attempts to manage classroom behaviour.

18 The learned Commissioner then examined the process that led to the dismissal and said that the applicant was given every opportunity and ample support to improve, but failed to do so.

19 The Commissioner then noted that the applicant, in his closing submissions, 'made much of the fact that Toodyay District High School had been the subject of a "Performance Enquiry Report" prepared by an "Expert Review Group" in May 2015 and that report had identified that case management of students at educational risk had been inadequate in terms of intervention or monitoring' [113]. The Commissioner found this was not relevant as it predated the applicant's employment at the School and that 'no attempt was made during the long hearing of this matter to make anything of it from a forensic point of view.' [114]

20 The reasons for decision proceed to deal with issues of Individual Education Plan; compliance with the Schools Intervention Process by school administration; the allegations of failings by the administration team and the NAPLAN results.

21 The Commissioner concluded that it could not be said that the respondent had acted harshly, oppressively or unfairly in terminating the applicant's employment and he dismissed the application.

Grounds of Appeal

22 The grounds of appeal, in essence, are that the Commissioner erred in that he failed to properly consider issues of significance in relation to whether the termination was fair, including:

1. Mr Dixon's performance was incorrectly assessed against the level of a "Proficient" teacher in accordance with the AITSL Standards, rather than the lower level of "Graduate", which he says applied to him;
2. Mr Dixon was denied procedural fairness because the Director General did not follow the proper procedure in s 80(a) of the *Public Sector Management Act 1994* (WA) (PSM Act) Performance Management Policy;
3. The facts do not support the learned Commissioner's conclusion regarding student behaviour in that:

(a) the data before the Commission was given very little weight; and

(b) there were significant inconsistencies in the oral evidence; and

(c) the objective data ought to have been given greater weight.

4. The Commissioner failed in not considering the improvement in behavioural incidents and Mr Dixon's performance, and Mr Dixon was not given a reasonable opportunity and assistance to improve to a satisfactory standard.

5. During the course of the hearing, Mr Dixon sought and was granted leave to amend his grounds of appeal to challenge the Commissioner's description of Mr Purcell as an expert. The appellant says that Mr Purcell had neither the training nor experience to justify his description as an expert. The appellant says that this was a mistake of fact.

Consideration

23 The approach to be taken by the Full Bench on considering an appeal against a discretionary decision is set out in *Michael v Director General, Department of Education and Training* [2009] WAIRC 01180; (2009) 89 WAIG 2266 from [140] - [143], per Ritter AP, by reference in particular to *House v The King* (1936) 55 CLR 499 and *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194:

> The relevant principles were set out in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 as follows:
>
> > 'The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'
>
> As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19]-[21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, that a discretionary decision results from a "decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result'". Instead "the decision-maker is allowed some latitude as to the choice of the decision to be made". At [21] their Honours said that because "a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process". Their Honours then quoted part of the passage of *House v King* which I have quoted above.
>
> Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with "caution and restraint". His Honour said this is "because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view". (See also *Norbis v Norbis* (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535).
>
> These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although "error in the proper weight to be given to particular matters may justify reversal on appeal, … disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge". This is because, in considering an appeal against a discretionary decision it is "well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion", and that when "no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight". (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]) [140-143].

24 It is also important to note that in accordance with s 49(4) of the *Industrial Relations Act* 1979 (the IR Act), an appeal shall be heard and determined on the evidence and matters raised in the proceedings before the Commission. The hearing of an appeal is not an opportunity to raise new matters that were not before the Commission at first instance or which were not the subject of particular analysis.

25 As noted by the Industrial Appeal Court in *Burswood Resort (Management) Ltd v The Australian Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* [2000] WASCA 386, [13]:

> It was submitted on behalf of the union in the appeal before us that the principles laid down in *House v The King* do not apply with full force, if at all, in the case of appeals to the Full Bench of the Industrial Relations Commission. A different approach is appropriate, so it was submitted, because of the peculiar position of the Full Bench as an industrial tribunal having a general supervisory jurisdiction with respect to the settlement of industrial disputes and related matters. Mr

Nolan, on behalf of the union, went so far as to submit that it would not be an error on the part of the Full Bench to depart altogether from the principles in *House v The King*; that application of those principles by the Full Bench was optional. I do not accept this submission. Pursuant to s 12 of the *Industrial Relations Act 1979*, the Commission is a court of record. The Full Bench is bound to decide appeals according to law and to act within jurisdiction and its decisions are, of course, subject to appeal to this Court for error of law and excess of jurisdiction: s 90. There is nothing in the Act to support the proposition that when hearing an appeal from an order made in the exercise of a discretionary power, the Full Bench may exercise the discretion afresh. The powers of the Full Bench set out in s 49(4) to hear and determine appeals "on the evidence and matters raised in the proceedings before the Commission" are consistent with the appellate function of the Full Bench being limited to correcting error when the appeal is against the exercise of a discretionary power. Its function is not to give a second opinion, as it were. In my opinion, what was said by Mason and Deane JJ in *Norbis v Norbis* (*loc cit*) is directly applicable to the functions of the Full Bench where it is hearing an appeal in a matter of this kind. Mason and Deane JJ said:

> 'The principles enunciated in *House v The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal.' (518 - 519)

26 In *The Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Services Board v Denise Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203**,** Smith A/P and Beech CC observed that in conducting an appeal, the Full Bench does 'so by reviewing the evidence and matters raised before the Commission at first instance for itself to ascertain whether an error has occurred' [73]. (See also *Metwally v University of Wollongong* (1985) 60 ALR 68, [7], (HC) per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ and *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, [438] per Latham CJ, Williams and Fullager JJ).

Consideration of Ground 1

The AITSL Standards and Teacher Registration Requirements.

27 The AITSL Standards (Exhibit 26.1), say that they are 'professional standards for teachers that can guide professional learning, practice and engagement'. The Standards 'articulate what teachers are expected to know and be able to do at four career stages: Graduate, Proficient, Highly Accomplished and Lead' (page 1).

28 The purpose of the Standards is described as including that:

> The Graduate Standard will underpin the accreditation of initial teacher education programs. Graduates from accredited programs qualify for registration in each state and territory.
>
> The Proficient Standard will be used to underpin processes for full registration as a teacher and to support the requirements of nationally consistent registration.

29 According to the document that sets out the Standards, they were developed and endorsed at a national level under the auspices of the Ministerial Council for Education Early Childhood Development and Youth Affairs, in 2009, and AITSL assumed responsibility for the Standards in July 2010. They relate to registration at State level in respect of initial registration and full registration stages.

30 Also, the letter from the Teacher Registration Board (TRB) to Mr Dixon advising him of the renewal of his Provisional Registration (Exhibit 1) reinforces this, stating that 'to move to Full Registration a teacher must be able to demonstrate that they have met the (AITSL Standard) at the Proficient Level'.

31 I conclude then that the TRB levels of Provisional Registration and Full Registration are directly linked to the Graduate Standard and the Proficient Standard respectively.

Mr Dixon's performance substandard.

32 I have no hesitation in finding that it was open to the learned Commissioner to conclude that Mr Dixon's performance was substandard, whether he was assessed at the Graduate or Proficient level. This is for a number of reasons.

33 Firstly, at [100] the learned Commissioner said that he concluded that Mr Dixon's performance was substandard in relation to all of the evidence before him, not limited to the Standards. He also said that he relied on the evidence which supported his findings in those six key themes to which he referred. The evidence included evidence of teachers and school administrators who had both observed him and experienced the behaviours emanating from his classroom, as well as his practices in not sufficiently differentiating his teaching.

34 It included evidence of endeavours to assist him, both with the actual management of classroom behaviour and in guiding and encouraging him in terms of professional practice.

35 While it is not beyond controversy, the numbers and regularity of Mr Dixon's reports to administration of classroom behaviour issues demonstrates that it was unusually high. I will also deal with the issue of the evidence regarding the number of such reports later in relation to ground 3.

36 The learned Commissioner also heard evidence from Mr Dixon and others as to Mr Dixon's attitude towards the issue of classroom management - that it was a problem he had inherited, that he was not receiving support, and that there were behaviour management system problems at the School.

37 Mr Dixon suggested that if he had students who were uniformly well-behaved, compliant and eager to learn, then he could successfully teach them. However, a teacher's job includes managing, motivating and encouraging those who do not want to be at school, are distracted, not interested or find it difficult to learn.

38 That evidence was, as the learned Commissioner noted, 'all one way'. Apart from Mr Dixon's own evidence, the evidence heard and considered by the learned Commissioner was sufficient to enable him to draw the conclusion he did.

39 Secondly, Mr Dixon had been a teacher for a number of years, although there had been a very lengthy break between the two periods. He had taught at a range of schools as a casual teacher on fixed term contracts, for a total of 219 days in the last 5 to 6 years. This was more than double the minimum amount of teaching time required for a Graduate teacher to progress to Proficient level. The expectation of the respondent is that a teacher is expected to progress to Proficient within 3 years.

40 Although the evidence is unclear as to when Mr Dixon was first provisionally registered by the TRB, his provisional registration was renewed at least from 20 March 2018 (Exhibit 4).

41 Section 7 of the *Teachers Registration Act 2012* prohibits a person from employing another person to teach unless the other person is a registered teacher. Prior to 2012, the *Western Australian College of Teaching Act 2004* contained similar provisions (see Part 4 - Membership of the College, Division 1. Persons who may teach in schools). In that case it is most likely that Mr Dixon would have been provisionally registered from at least October 2009, when he recommenced his teaching career.

42 According to the letter from the TRB which notified him of his renewal of provisional registration:

> Provisional Registration is generally not able to be renewed unless a teacher can demonstrate to the Board that there are exceptional circumstances for doing so.
>
> Teachers granted Provisional Registration are therefore expected to move to Full Registration prior to the expiry of their Provisional Registration.
>
> To move to Full Registration a teacher must be able to demonstrate that they have met the Professional Standards for Teachers in Western Australia (Professional Standards) at the Proficient Level. (Exhibit 4)

43 While he had not formally attained the Proficient Level Standard and been granted Full Registration, Mr Dixon believed himself to be proficient. He had submitted work to the TRB as part of seeking Full Registration.

44 Thirdly, as the learned Commissioner found, Mr Dixon presented himself at all times as being an experienced and competent teacher. The following are such examples:

(a) Exhibit 6 is a letter from Mr Dixon to the parents of his mathematics students dated 26 July 2016. In it, Mr Dixon introduced himself, saying that he had 'over a decade worth of teaching experience in Western Australia, Victoria and Queensland. During this time I have been employed mostly in Mathematics, Science and IT';

(b) In a document dated 28 October 2016, Mr Dixon said that he had followed the instruction given to him but it was not helping but was making the situation worse. He said:

> I am an experienced maths teacher and know how to teach maths so that students can learn. (Exhibit 16)

(c) In an email to Mr Chikwama dated 10 November 2016, amongst other things, Mr Dixon said 'I am not a novice teacher' (Exhibit 26, document 8);

(d) In his letter to Mr Gillam dated 12 June 2017, Mr Dixon said he was 'a competent, intelligent teacher' (Exhibit 22);

(e) At t 11, on 16 July 2018, Mr Dixon described himself as 'Mr Dixon's a competent teacher who has 15 years - some 15 years' teaching experience'.

45 Fourthly, there was a great deal of correspondence and a considerable number of meetings about Mr Dixon's directed performance management plan, the assessment by Mr Purcell and, finally the investigation report. They included correspondence to Mr Dixon in which it was put to him that his performance was substandard and the standard which was utilised for his assessment was that for a Proficient teacher. At no point in that process did Mr Dixon raise an objection to being assessed at Proficient level. He did not raise it in his own evidence or in the cross-examination of the respondent's witnesses. He raised this objection only in written closing submissions after the conclusion of the hearing, when the matter ought to have been squarely challenged earlier. Having put himself out as a competent teacher rather than someone who ought to be treated as a Graduate, Mr Dixon must live with his course. (*Burswood Resort (Management) Ltd v ALH and MWU* op cit).

<u>The Respondent's Failure to Call Ms Sanders to Enable Mr Dixon to Cross-Examine.</u>

46 Mr Dixon also complains that he did not have an opportunity to cross-examine the investigator, Ms Natalie Sanders, about the issue of the appropriate level for the purposes of the assessment of his performance. He says that a *Jones v Dunkel* ((1959) 101 CLR 298) inference ought to be drawn, that the unexplained failure by the respondent to call Ms Sanders to give evidence was that her evidence would not have assisted the respondent. While the respondent had previously clearly indicated an intention to call Ms Sanders, and that Mr Dixon could have cross-examined her, she was not called.

47 Mr Dixon knew by the time the hearing concluded that the respondent was not going to call Ms Sanders. There was then a period of time for the parties to make closing submissions in writing. During that time, neither at the conclusion of the hearing when it was obvious that the respondent was not going to call Ms Sanders, nor in the time when closing submissions were able to be prepared, did the applicant raise this and ask for her to be called.

48 In any event, it became clear during the hearing of the appeal that before the hearing at first instance commenced, an email was sent from counsel for the respondent to Mr Dixon regarding the witnesses the respondent proposed to call. This email said that 'The Department will only call Natalie Sanders if the Commission is not willing to simply accept (the Investigation Report) at the hearing.' The respondent says that this was the context which must be given to whether Ms Sanders would be called. The Investigation Report was accepted into evidence and therefore the respondent did not need to call Ms Sanders to deal with the receipt of that evidence. It would have been for Mr Dixon to have made clear to the Commission at first instance that he objected to the Investigation Report being received without there being an opportunity to cross-examine her. He did not do so.

49 In any event during the course of the hearing of the appeal, Mr Skehan for the appellant accepted that this difficulty of not being able to cross-examine Ms Sanders was in fact due to the appellant's unfamiliarity with the process and was not a matter that could be corrected on appeal. At the bottom of page 23 of the appeal transcript, Mr Skehan acknowledged that due to the applicant's unfamiliarity with the process 'we simply got it wrong'.

50 These circumstances do not warrant an inference being drawn that Ms Sanders' evidence would not have assisted the respondent.

<u>The Commissioner not qualified.</u>

51 The appellant also argued that the Commissioner at first instance was not qualified to make an assessment of whether Mr Dixon's performance was substandard at any particular level or at all because he was not qualified as an AITSL assessor.

52 The jurisdiction and powers of the Commission on a claim of harsh, oppressive or unfair dismissal are to hear and determine the matter. It does so in accordance with equity, good conscience and substantial merits of the case (s 26(1) the IR Act). The Commission's role is to assess the evidence and make a determination. The evidence before the learned Commissioner in this matter included documents and oral evidence from qualified and experienced witnesses, including experts in their field. The learned Commissioner must consider that evidence and analyse it. In doing so, he does not need expertise or qualifications in the subject matter.

53 It is quite clear that the Commissioner viewed all of the evidence that was put to him including expert evidence about the Standards that apply to a teacher and the observations of Mr Dixon's performance. He had the benefit of an expert providing insight into that evidence.

<u>The ERG Report.</u>

54 Mr Dixon says that the ERG Report demonstrated that student behaviour was at a crisis level before he arrived. However, it does not say that at all. It does refer to a particular management or administration approach as opposed to a leadership approach being in place at the time of the Report. That took the matter before the Commission at first instance no further because there was no link between that time, 14 months before Mr Dixon's arrival at the School, and the time when Mr Dixon's performance was being assessed. In any event the Investigation Report (p19) says that the issues raised in the ERG Report had been adequately addressed.

55 I also note that in his case at first instance, Mr Dixon had the opportunity to put to witnesses that the ERG Report was relevant, that its criticisms of the School had not been addressed and that this unfairly affected Mr Dixon's ability to perform to a satisfactory standard. However, this was not addressed at first instance, except in closing submissions in writing, filed on 17 September 2018, after all of the evidence was in. It is not appropriate now to address it on appeal.

56 The circumstances here are not dissimilar to those referred to by the High Court in *Metwally v University of Wollongong* ((1985) 60 ALR 68) where their Honours said at [7] that:

> Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he has an opportunity to do so.

57 This was reiterated in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at (438) where Latham CJ, Williams and Fullager JJ said:

> The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards. In *Connecticut Fire Insurance Co. v. Kavanagh* (1892) AC 473, Lord Watson, delivering the judgment of the Privy Council, said, " When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below.

58 In that context, as Commissioner Matthews correctly found, the ERG Report was not relevant. I respectfully agree. I would dismiss this ground.

Consideration of Ground 2

59 Mr Dixon alleges that the learned Commissioner erred in not dealing with his argument, that he was denied procedural fairness because the Director General did not follow the proper procedure in s 80(a) of the PSM Act, Performance Management Policy.

60 Mr Dixon did, however, acknowledge, through his representative, at the hearing of the appeal that an area of particular concern was that he was not advised at the time that, what was due to be a performance management process, one which applies to all teachers, was substituted with a substandard performance process without notice. He says that at the first meeting with Mr Chikwama on 14 October 2016, he was not invited to bring a support person.

61 The procedural unfairness also alleged by Mr Dixon was that the Department of Education's Substandard Performance Procedures (Exhibit 26, documents 2, p 73) was not complied with. The particular aspect is set out in clause 3.1 - Substandard Performance. It requires that:

> Subordinates and line managers will:
> …
> - not commence substandard performance management unless an employee has been:
>   - previously formally advised what aspects of their performance are considered unsatisfactory;
>   - formally advised of the possible consequences, which may include a range of sanctions, Including termination of employment, should their performance be found to be substandard; and
>   - given a reasonable opportunity and assistance to improve to a satisfactory standard.

62 At first instance, Mr Dixon put to the Commission that on 14 October 2016, the School implemented a Targeted Support Plan (TSP) with Mr Chikwama being the Performance Manager. Mr Dixon alleged that he felt pressured into signing the TSP and that it was not explained to him that by signing it he could possibly face his employment being terminated. He says it was not explained to him that he could have a support person present at all meetings until after he had signed the TSP.

63 Mr Dixon contends that prior to the commencement of the substandard performance process, the respondent did not, as required, provide him with an explanation of the process, the associated policies, procedures and legal framework, in a manner that was reasonable for a lay person to understand. He says that he was not advised of the aspects of his performance that were considered unsatisfactory, or the possible consequences if his performance was found to be substandard. He says he was not given a reasonable opportunity and assistance to improve to a satisfactory standard.

64 Mr Chikwama gave evidence about the meeting that was supposed to be a performance management or development meeting which turned into a substandard performance process. He said that Mr Dixon had not been forewarned or invited to bring a support person. Mr Chikwama did not refute either of those things but explained that he did not allow a support person because this was the first substandard performance process he had undertaken (Transcript 429 first instance).

65 These failings are said to be contrary to the requirements of s 79 of the PSM Act that requires that a preliminary view is arrived at that an employee's performance is substandard.

66 The learned Commissioner's findings in regard to this issue are set out at [109] - [110] as follows:

> The applicant also complains about the process that led to his dismissal. The relevance of complaints about process diminish, even if made out, where I have conducted a hearing de novo on the applicant's performance and found it to be substandard. Nonetheless, in any such process, it remains important to identify that a teacher was given an opportunity to improve, with appropriate support and in the knowledge of the possible consequences of not improving.
>
> The applicant was given every conceivable opportunity to improve. By late 2016 he was aware of the alleged deficiencies in his performance and the consequences of not addressing them (T79, T96 and T104). I note it was not the fault of the administration team at Toodyay District High School that his deficiencies were in so many areas.

67 Therefore, while the particular issue was not addressed in detail, the learned Commissioner has dealt with the issue of any denial of procedural fairness, and done so in the context of the question of the general requirements of procedural fairness as they relate to a claim of unfair dismissal.

68 The Industrial Appeal Court in *Shire of Esperance v Mouritz* (1991) 71 WAIG 891, commented on the issue of procedural fairness and how it is to be viewed. Nicholson J noted that Lord Reid in *Ridge v Baldwin* [1964] AC 40 at 65 said that where there is 'something against a man to warrant his dismissal', it falls within a class of cases which attracted the principles of natural justice (p 898). This entitles the person 'to a hearing and to a detailed statement of the charges to be answered as well as the time to prepare his defence.' However, at (899), Nicholson J went on to conclude:

> For the reasons I have given, I consider the Full Bench was correct in its conclusion that the respondent had not been given a fair hearing by the appellant. That is an element in determining whether the dismissal was harsh or unjust - *Macken, McCarry and Sappideen, "The Law of Employment"* 3rd ed, 277-8. As there explained, the mere fact that the employee did not have a proper opportunity to explain or has not been warned of the possibility of termination does not automatically entitle the applicant to a remedy. No injustice will result if the employee could be justifiably dismissed.

69 The learned Commissioner made clear that from all of the materials, conversations, communications and observations of Mr Dixon's performance assessment process, he had many opportunities to know and understand the issues and a significant amount of support. His performance was, objectively measured, substandard and remained so. If there was any denial of procedural fairness in the way in which Mr Dixon described it, it was very early on in the process. He did not at that point, or until the last hurdle, complain about any denial of procedural fairness.

70 In my respectful view, this ground of appeal is not made out. Even if it were, it is not a matter of such significance as to warrant upholding the appeal, in circumstances where Mr Dixon's performance, reviewed and assessed in such detail, was so clearly demonstrated as being substandard.

Consideration of Ground 3

71 In this ground Mr Dixon complains in particular, by reference to his comment at paragraph 66 about witnesses suffering 'light blows', that the Commissioner erred in his acceptance of the respondent's witnesses' evidence when there was quite clear

conflict between the data gathered relating to events of poor student behaviour and the evidence of the respondent's witnesses. Mr Dixon says that the objective data ought to have been given greater weight.

72 Firstly, I think that Mr Dixon has drawn an inference that may not be available, that when the Commissioner referred to some of the witnesses suffering 'light blows', that it related to this particular matter.

73 Even if Mr Dixon is correct, the learned Commissioner heard a very significant amount of evidence about Mr Dixon's performance in the classroom and about his dealings with students, and those students' engagement and learning in his class. The evidence of Mr Purcell in particular makes clear that there were problems with student engagement and behaviour even in the presence of a stranger in the classroom.

74 The inconsistency between the evidence of the school-based witnesses, including Mr Chikwama, and the data relating to the numbers of reports to administration of poor student behaviour, in the scheme of things, is not significant in the light of all of the other evidence.

75 Further it should be noted that the evidence of that data related to the whole of the School at various points and not merely to Mr Dixon's referrals of those matters to the administration. There is also evidence that after a point in time, Mr Dixon reduced his reporting of incidents, rather than the incidents actually reducing.

76 In the circumstances, I am not satisfied that the learned Commissioner erred in coming to the conclusion that he did regarding the weight he gave to the various elements of evidence such as to warrant the overturning of that conclusion. Matters of weight are part of the discretion afforded to the Commissioner at first instance. I would not be inclined to interfere with his determination in all of the circumstances.

Consideration of Ground 4

77 In this ground it is said that the Commissioner failed in not considering the improvement in behavioural incidents and Mr Dixon's performance and that Mr Dixon was not given a reasonable opportunity and assistance to improve to a satisfactory standard.

78 Mr Dixon says that the behaviour data, the 2017 NAPLAN results and other evidence supporting his claim of an improvement in student behaviour and results were put aside by the learned Commissioner, and he has given greater weight to Mr Chikwama's unreliable evidence.

79 Once again, this is a ground of appeal challenging the weight given by the learned Commissioner to competing and conflicting evidence. It is also an alternative to Mr Dixon's main argument that his performance was of a satisfactory standard.

80 I am unable to find sufficient evidence to demonstrate that the evidence before the learned Commissioner showed a real improvement in Mr Dixon's performance. The data is not specific to Mr Dixon's classes.

81 As to the ERG Report, firstly, it does not say what Mr Dixon says it does. The Report was made well before he started at the School and there is no evidence of any systemic problem in relation to the issues at the heart of Mr Dixon's performance. Secondly, any issues identified in the ERG Report were said in the Investigation Report to have been addressed.

82 However, I note in passing that in his letter to Mr Gillam dated 12 June 2017 (Exhibit 22) Mr Dixon did identify some areas of improvement. This letter was a response to Mr Gillam having advised Mr Dixon that he had received a report from Mr Grant Brown, the School's principal, alleging that Mr Dixon's performance was substandard. Mr Dixon claimed that there have been improvements in student behaviour. He attributes some of this to '3 of the worst offenders have left the school'; that of the Year 8 group, five or more of the 10 named students attend, 'frequently most of them are away'; and that 'once (certain students) are removed I can teach the rest of the class'. He describes how 'the entire Year 8 group is at risk, and not just in Mathematics, but this is not being addressed by the admin, although the situation is improving slightly through attrition.' Therefore, the inference is clear, that the improvement in classroom behaviour was because the students who caused difficulty were no longer in the class. This does not demonstrate an improvement in student behaviour brought about by any improvement in Mr Dixon's classroom management or student engagement skills.

83 In his reasons for Decision the learned Commissioner cited the variety of assistance Mr Dixon was given throughout 2017 'to address those deficiencies' [111]. He did not acknowledge any improvement in Mr Dixon's performance. Rather, he found that 'the applicant failed to improve' [112]. He noted all of the efforts to assist Mr Dixon to improve his performance. Ms Sanders noted in the Investigation Report that there was no demonstration of 'sufficient improvement' (Exhibit 22).

84 Therefore, even if there was improvement in Mr Dixon's performance, it was not sufficient to bring it to a level that was satisfactory. I would dismiss this ground.

Consideration of Ground 5

85 During the course of the hearing, Mr Dixon sought and was granted leave to amend his grounds of appeal to challenge the Commissioner's description of Mr Purcell as an expert. Mr Dixon says that Mr Purcell had neither the training nor experience to justify such a description and says that in this way the Commissioner made an error of fact.

86 Mr Purcell gave evidence that he is a teacher of approximately 40 years, having taught in both public and private schools. He is a level 3 teacher, the highest level of classroom teacher. He is a maths teacher. He was trained to assess teachers against the AITSL Standards and teachers who were going from "Graduate" level to "Proficient" level or higher, particularly people looking to become recognised as excellent teachers.

87 He said that he twice performed an assessment twice in respect of "Graduate" teachers looking to be deemed "Proficient" teachers. Although he had no training in substandard versus standard performance, what he was assessing in Mr Dixon's performance was by reference to the AITSL Standards and whether they were achieved. Mr Purcell's evidence was not undermined in any way.

88 Mr Purcell's evidence both as to his experience as a maths teacher and his training as an AITSL assessor, make it clear that he is indeed an expert in what can be expected of a "Proficient" maths teacher. Whilst he may not be trained in substandard performance, what he was assessing was performance against the AITSL Standards and whether it was met or not. I respectfully agree that Mr Purcell is an expert as described by the learned Commissioner and I would dismiss this ground of appeal.

Other issues

Staff turnover and retention

89 During the course of the hearing of the appeal, Mr Dixon raised a number of issues which were not directly related to the appeal grounds although he said they fitted within them. He said that staff retention was indicative of a problem. He said that there was 'a complete turnover of administration and academic staff in 12 months…this would indicate Toodyay had a problem with staff retention…a significant problem with staff retention' and he says that this was not taken into account by the Commissioner.

90 This fact of a significant staff turnover in a particular period does not assist the appeal without there being some link between the issue of staff retention and his performance. There is no indication that the turnover in administration and academic staff was in any way other than coincidental. There was no evidence of a particular problem with the School or the individuals. Therefore, the inference he seeks to draw is not available.

Conclusion

91 I find that none of the grounds of appeal is made out. I would dismiss the appeal.

KENNER SC:

92 I have had the opportunity to read a draft of the reasons for decision of the Chief Commissioner. I agree with them. The appellant has not made out his grounds of appeal. The decision of the learned Commissioner that the appellant was a substandard teacher was plainly open on the evidence and matters raised before the Commission at first instance. No error in the exercise of the Commission's discretion has been demonstrated. The appeal should be dismissed.

WALKINGTON C:

93 I have had the opportunity to read a draft of the reasons for decision of the Chief Commissioner. I agree with them. The appeal should be dismissed.

NOTE: HEARD and DELIVERED amended by corrigenda (2019) WAIRC 00718.

2019 WAIRC 00717

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN R DIXON
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	FULL BENCH
	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 19 SEPTEMBER 2019
FILE NO/S	FBA 13 OF 2018
CITATION NO.	2019 WAIRC 00717

Result	Appeal dismissed
Appearances	
Appellant	Mr R Skehan as agent
Respondent	Mr D Anderson of counsel

Order

This appeal having come on for hearing before the Full Bench on Thursday, 4 April 2019, and having heard Mr Skehan on behalf of the appellant, and Mr Anderson on behalf of the respondent, and reasons for decision having been delivered on Thursday, 19 September 2019, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders THAT —

The appeal be and is hereby dismissed.

By the Full Bench
(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

2019 WAIRC 00718

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 36/2018 GIVEN ON 8 OCTOBER 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN R DIXON
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T B WALKINGTON
DATE	(CORRIGENDUM FRIDAY, 20 SEPTEMBER 2019)
FILE NO/S	FBA 13 OF 2018
CITATION NO.	2019 WAIRC 00718

CORRIGENDUM

1. At HEARD [2019] WAIRC 00716 of the Reasons for Decision dated 18 September 2019, delete THURSDAY, 19 SEPTEMBER 2019.

2. At DELIVERED [2019] WAIRC 00716 of the Reasons for Decision dated 18 September 2019, delete WEDNESDAY, 18 SEPTEMBER 2019 and insert THURSDAY, 19 SEPTEMBER 2019 in lieu thereof.

By the Full Bench
(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

FULL BENCH—Appeals against decision of Industrial Magistrate—

2019 WAIRC 00713

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 80/2018 GIVEN ON 1 MAY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2019 WAIRC 00713
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
		COMMISSIONER T EMMANUEL
		COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 5 AUGUST 2019
DELIVERED	**:**	MONDAY, 16 SEPTEMBER 2019
FILE NO.	**:**	FBA 6 OF 2019
BETWEEN	**:**	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
		Appellant
		AND
		DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Western Australian Industrial Magistrates Court
Coram	**:**	Industrial Magistrate D Scaddan
Citation	**:**	2019 WAIRC 00206
File No	**:**	M 80/2018

Catchwords	:	*Industrial Law (WA) - Appeal against decision of Industrial Magistrate - Award interpretation - Clause 37 Public Service Award 1992 - Whether employee should be granted paid leave to attend union business in proceedings before the Public Service Appeal Board - Whether cl 37(1)(a) applies only to Association or union business - If so whether representation of employee by the appellant before the Appeal Board constituted Association or union business*
Legislation	:	*Industrial Relations Act 1979* (WA) ss 44, 66, 72, 72A, 83, 96B, 112A *Interpretation Act 1984* (WA) s 32 *Legal Profession Act 2008* (WA) s 112A *Public Sector Management Act 1994* (WA)
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	Mr W Claydon of counsel and with him Ms D Larson
Respondent	:	Mr D Anderson of counsel and with him Mr T Ledgar of counsel
Solicitors:		
Appellant	:	Civil Service Association
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

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

BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (Western Australian Branch) & Ors [2006] WASCA 124; (2006) 86 WAIG 1477

City of Wanneroo v Holmes (1989) 30 IR 362

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

Kucks v CSR Limited [1996] IRCA 166; (1996) 66 IR 182

Norwest Beef Industries Ltd and Another v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124

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

Suttor v Gundowda Pty Ltd [1950] HCA 35; (1950) 81 CLR 418

University of Wollongong v Metwally (No 2) [1985] HCA 28; (1985) 59 ALJR 481

Water Board (NSW) v Moustakas [1988] HCA 12; (1988) 180 CLR 491

Whooley v Shire of Denmark [2019] WASCA 28; (2019) 99 WAIG 87

Case(s) also cited:

AFMEPKIU v BHP & Ors [2002] WAIRC 05009; (2002) 82 WAIG 2048

ASU v Australian Red Cross Blood Service (1999) 79 WAIG 709

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

Australian Unity Property Ltd v City of Busselton [2018] WASCA 38

Australian Worker's Union v Cleanevent Australia Pty Ltd [2015] FCA 1477

Barlow v Qantas Airways Ltd (1997) 75 IR 100

CFMEU v Sanwell Pty Ltd [2004] WAIRC 1094

Codelfa Constructions Pty Ltd v State Rail Authority (NSW) (1982) 147 CLR 337

Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297

Department of Community Services and Others v Civil Service Association of Western Australia Inc. (1994) 74 WAIG 1709

Fedec v Minister Corrective Services [2017] WAIRC 00828; (2017) 97 WAIG 1595

Hammersley Iron Pty Ltd v AMWSU (1990) 70 WAIG 3001

House v The King (1936) 55 CLR 499

Luck v Independent Broad-Based Anti-Corruption Commission [2013] VCAT 1805

Metal and Engineering Workers Union v Cockburn Engineering WA [1998] WAIRComm 80

New South Wales v Bujdoso (2007) 69 NSWLR 302; [2007] NSWCA 44

Pearce v Commissioner of Police, WA Police (2019) WAIRC 00201; (2019) 99 WAIG 625

R v Cohen Ex parte Motor Accidents Insurance Board (1979) 141 CLR 577

R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia (1957) 97 CLR 71

R v Industrial Commission (SA); Ex parte Fire Brigade Board (1977) 15 SASR 546

R v Portus; Ex parte ANZ Banking Group Ltd (1972) 127 CLR 353

Raylene Jeakings and Trevor Ward v The State School Teachers Union of WA (1998) 78 WAIG 1136

Re Foley; Channell v Foley (1952) 53 SR (NSW) 31

Re Harrison; Ex parte Hames [2015] WASC 247

Re The Manufacturing Grocers' Employees Federation of Australia and Another; Ex parte The Australian Chamber of Manufactures and Another [1986] HCA 23; (1986) 160 CLR 341

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

Toben v Jones (2003) 129 FCR 515

Reasons for Decision

KENNER SC:

Introduction

1 In August 2017, Mr Mayerhofer, a member of the appellant Association, commenced an appeal to the Public Service Appeal Board under s 80I of the *Industrial Relations Act 1979* arising from the imposition of disciplinary action against him by the respondent. The appellant represented Mr Mayerhofer in the appeal proceedings. Mr Mayerhofer attended directions hearings before the Appeal Board in October and December 2017. The appeal was heard over two days in late February and early March 2018. Mr Mayerhofer gave evidence on his own behalf. The appeal proceedings were settled prior to the determination of the merits of the appeal.

2 Mr Mayerhofer, both prior to and after the Appeal Board proceedings, applied for paid leave under cl 37(1)(a) of the *Public Service Award 1992*. This entitles an officer to paid leave in relation to "Association business". The respondent declined to grant it. The appellant commenced proceedings in the Industrial Magistrate's Court for the enforcement of cl 37(1)(a) of the Award, under s 83 of the Act. The enforcement proceedings failed.

3 The learned Industrial Magistrate was not persuaded, as a matter of construction, that cl 37(1)(a) extended to the proceedings at which Mr Mayerhofer attended before the Appeal Board, being essentially proceedings of a private or personal nature, commenced in his name. The learned Industrial Magistrate concluded that cl 37(1)(a) of the Award, construed in the context of the remainder of cl 37 and the terms of the Award as a whole, was concerned with paid leave to attend "union business", with such union business being characterised by the professional operations, and commercial dealings of the appellant. Such matters might include, but are not limited to, the collective representation of members in negotiations with employers directly and before industrial tribunals, and meeting with consultative committees, government ministers and the like. The character of Mr Mayerhofer's appeal before the Appeal Board, although the appellant represented him, was not, in the opinion of the learned Industrial Magistrate, of the kind contemplated by cl 37(1)(a) of the Award.

4 In the alternative, whilst not necessary to decide the matter, the learned Industrial Magistrate commented on the respondent's further arguments, at first instance, that if cl 37(1)(a) of the Award did apply to Mr Mayerhofer's claim for paid leave, then such a provision was contrary to s 96B of the Act, as providing preferential treatment to a person by reason of their membership of an organisation. The appellant now appeals against the decision of the Court.

Relevant provisions of the Award

5 It is convenient to set out relevant provisions of the Award at this juncture. Clause 37 - Leave to Attend Association Business is the key provision in issue. Its terms provide as follows:

37. - LEAVE TO ATTEND ASSOCIATION BUSINESS

(1) The employer shall grant paid leave at the ordinary rate of pay during normal working hours to an officer:

(a) who is required to attend or give evidence before any Industrial Tribunal;

(b) who as a Union-nominated representative is required to attend any negotiations and/or proceedings before an Industrial Tribunal and/or meetings with Ministers of the Crown, their staff or any other representative of Government;

(c) when prior arrangement has been made between the Union and the employer for the officer to attend official Union meetings preliminary to negotiations and/or Industrial Tribunal proceedings; and

(d) who as a Union-nominated representative is required to attend joint union/management consultative committees or working parties.

(2) The granting of leave is subject to convenience and shall only be approved:

(a) where reasonable notice is given for the application for leave;

(b) for the minimum period necessary to enable the union business to be conducted or evidence to be given; and

(c) for those officers whose attendance is essential.

(3) The employer shall not be liable for any expenses associated with an officer attending to union business.

(4) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.

(5) An officer shall not be entitled to paid leave to attend to union business other than as prescribed by this Clause.

(6) The provisions of the Clause shall not apply to:

(a) special arrangements made with the union which provide for unpaid leave for officers to conduct union business;

(b) when an officer is absent from work without the approval of the employer; and

(c) casual officers.

6 Additionally, as it was referred to in submissions, cl 36 – Union Facilities for Union Representatives, provides:

36. - UNION FACILITIES FOR UNION REPRESENTATIVES

(1) The employer recognises the rights of the union to organise and represent its members. Union representatives in the agency have a legitimate role and function in assisting the union in the tasks of recruitment, organising, communication and representing members' interests in the workplace, agency and union electorate.

(2) The employer recognises that, under the union's rules, union representatives are members of an Electorate Delegates Committee representing members within a union electorate. A union electorate may cover more than one agency.

(3) The employer will recognise union representatives in the agency and will allow them to carry out their role and functions.

(4) The union will advise the employer in writing of the names of the union representatives in the agency.

(5) The employer shall recognise the authorisation of each union representative in the agency and shall provide them with the following:

(a) Paid time off from normal duties to perform their functions as a union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the electorate delegates committee and to attend union business in accordance with clause 37 - Leave to Attend Union Business of the Award.

(b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the organisation and shall be in accordance with normal agency protocols.

(c) A noticeboard for the display of union materials including broadcast email facilities.

(d) Paid access to periods of leave for the purpose of attending union training courses in accordance with Clause 38 - Trade Union Training Leave of the Award. Country representatives will be provided with appropriate travel time.

(e) Notification of the commencement of new officers, and as part of their induction, time to discuss the benefits of union membership with them.

(f) Access to awards, agreements, policies and procedures.

(g) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.

(6) The employer recognises that it is paramount that union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a union representative.

7 Finally, cl 41 – Witness and Jury Service is in the following terms:

41. - WITNESS AND JURY SERVICE

Witness

(1) An officer subpoenaed or called as a witness to give evidence in any proceeding shall as soon as practicable notify the manager/supervisor who shall notify the employer.

(2) Where an officer is subpoenaed or called as a witness to give evidence in an official capacity that officer shall be granted by the employer leave of absence with pay, but only for such period as is required to enable the officer to carry out duties related to being a witness. If the officer is on any form of paid leave, the leave involved in being a witness will be reinstated, subject to the satisfaction of the employer. The officer is not entitled to retain any witness fee but shall pay all fees received into the Consolidated Fund. The receipt for such payment with a voucher showing the amount of fees received shall be forwarded to the employer.

(3) An officer subpoenaed or called as a witness to give evidence in an official capacity shall, in the event of non-payment of the proper witness fees or travelling expenses as soon as practicable after the default, notify the employer.

(4) An officer subpoenaed or called, as a witness on behalf of the Crown, not in an official capacity shall be granted leave with full pay entitlements. If the officer is on any form of paid leave, this leave shall not be reinstated as such witness service is deemed to be part of the officer's civic duty. The officer is not entitled to retain any witness fees but shall pay all fees received into the Consolidated Fund.

(5) An officer subpoenaed or called as a witness under any other circumstances other than specified in subclauses (2) and (4) of this clause shall be granted leave of absence without pay except when the officer makes an application to clear accrued leave in accordance with Award provisions.

Jury

(6) An officer required to serve on a jury shall as soon as practicable after being summoned to serve, notify the supervisor/manager who shall notify the employer.

(7) An officer required to serve on a jury shall be granted by the employer leave of absence on full pay, but only for such period as is required to enable the officer to carry out duties as a juror.

(8) An officer granted leave of absence on full pay as prescribed in subclause (6) of this clause is not entitled to retain any juror's fees but shall pay all fees received into the Consolidated Fund. The receipt for such payment shall be forwarded with a voucher showing the amount of juror's fees received to the employer.

Principles of interpretation

8 Relevant principles in relation to the interpretation of awards and industrial agreements are now well settled. The base principle in this jurisdiction is that when interpreting an award or an industrial agreement, the same approach is adopted as in the interpretation of instruments generally: *Norwest Beef Industries Ltd and Another v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth* (1984) 64 WAIG 2124 per Brinsden J at 2127 and Olney J at 2133 (as adopted and applied by the Industrial Appeal Court in *Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights Union of Western Australia and Others* (1987) 67 WAIG 1097). This base principle has been affirmed by the Industrial Appeal Court, with the qualification that a generous and not a pedantic approach to construction is to apply, especially in the case of industrial agreements. In each case, the starting point for interpretation is the text, as interpretation is a text based activity: *Director General Department of Education v United Voice WA* [2013] WASCA 287; (2014) 94 WAIG 1; *BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineerings, Printing and Kindred Industries Union of Workers (Western Australian Branch) & Ors* [2006] WASCA 124; (2006) 86 WAIG 1477; *Kucks v CSR Limited* [1996] IRCA 166; (1996) 66 IR 182; *Amcor Ltd v Construction Forestry Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241.

9 In *City of Wanneroo v Holmes* (1989) 30 IR 362 French J said at 378-379:

> The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words: *Re Clothing Trades Award* (1950) 68 CAR 597 (Aust Indus Ct, Full Ct). The words are to be read as a whole and in context:
>
> *Australian Timber Workers Union v W Angliss & Co Pty Ltd* (1924) 19 CAR 172. Ambiguity if any, may be resolved by a consideration, inter alia, of the history and subject matter of the award: *Picard v John Heine & Son Ltd* (1924) 35 CLR 1. Resort to such matters as prefatory statements and negotiations is of dubious assistance if admissible at all: *Seymour v Stawell Timber Industries Pty Ltd* (1985) 13 IR 289 at 290; 9 FCR 241 at 244 (Northrop J) (13 IR at 299; 9 FCR at 254) (Keely J) cf 13 IR at 309; 9 FCR at 265 (Gray J). The logs of claim and arbitrator's reasons for decision may be referred to to determine the ambit of the dispute which led to the making of the award so that where there are two possible interpretations, one within the ambit and one without, the former may be preferred. Evidence of the conduct of the parties subsequent to the making of the award however, cannot be relied upon to construe it: *Seamen's Union of Australia v Adelaide Steamship Co Ltd* (1976) 46 FLR 444, 446, disapproving *Merchant Seamen's Guild of Australia v Sydney Steam Collier Owners and Coal Stevedores Association* (1958) 1 FLR 248. That is not to say the words must be interpreted in a vacuum divorced from industry realities. As Street J said in *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503:
>
> > '… it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result ... from an agreement between the parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.' – See also *Re Crown Employees (Overtime) Award* [1969] AR(NSW) 60 at 63; *Re Hospital Employees Administrative and Clerical (State) Award* (1982) 2 IR 123.
>
> It is of course no part of the court's task to assign a meaning in order that the award may provide what the Court thinks is appropriate – *Australian Workers Union v Graziers Association (NSW)* (1939) 40 CAR 494. Indeed it has been said that a tribunal interpreting an award must attribute to the words used their true meaning even if satisfied that so construed they would not carry out the intention of the award making authority – *Re Health Administration Corporation; Re Public Hospital Nurses (State) Award* (1985) 12 IR 122; *Rogers Meat Co Pty Ltd v Howarth* [1960] AR(NSW) 291; *Re Government Railways and Tramways (Engineers etc) Award* [1928] AR 53 at 58 (Cantor J).

10 I adopt and apply this approach to the present matter.

Grounds of appeal

Grounds 1 and 2

11 Both grounds 1 and 2 can be conveniently dealt with together. Ground 1 is in the following terms:

> Ground 1 - Construction of clause 37(1)
>
> The learned Industrial Magistrate erred in law in by construing the entirety of clause 37, and implicitly sub-clause 37(1)(a) of the Public Service Award 1992 as being confined to circumstances relevant to union business, between the

union and government departments, ministers or staff in broad terms on matters affecting the public service workforce and at the very least union members as a collective.

1. The learned Industrial Magistrate's conclusion in this regard is at [76] and [77] of the Reasons for Decision.
2. The construction Her Honour attributed to sub-clause 37(1) is an unreasonable or absurd construction. The construction attributed creates ambiguity by incorporating the terms "matters affecting the public service workforce" and "matters affecting union members as a collective."
3. The construction Her Honour attributed to sub-clause 37(1) is unreasonable or absurd because it limits the scope to exclude attendances for industrial tribunal proceedings which involve the union, but do not involve the government entities described, despite the fact that such proceedings might affect the workforce and members. The imposition of these limitations is arbitrary in light of the text of the clause in its context.
4. Her Honour's construction is contrary to the principle that the intention of the instrument is to be gleaned from the words used.
5. Her Honour's construction is contrary to the principle that the industrial instrument should be given a generous construction.
6. Her Honour erroneously had regard, at [57], to the clause heading to construe sub-clause 37(1), overriding or confining the ordinary and natural meaning of clause 37(1)(a) where there was no ambiguity, but for the heading.
7. The correct construction of clause 37(1) is that the "association business" to which it relates is any of the activities listed in sub-clauses 37(1)(a) to 37(1)(d), on their plain and ordinary meaning.

12 Ground 2 is as follows:

Ground 2 - Meaning of "union business" in clause 37

The learned Industrial Magistrate erred in law and in fact in finding implicitly, if not expressly, at [47] and [48] that the term "union business" as it appeared in clause 37(1)(b) to (d), meant the professional operations or commercial dealings of the Appellant as a collective but did not include the union's dealings in individual member matters.

1. Her Honour erred by preferring the dictionary definition of "business" as professional operations or commercial activities over matters, dealings or activities, these latter terms being consistent with the objective intention of the instrument ascertained by reference to the words used in their context and industrial realities.
2. Her Honour erred by failing to give the term a generous construction. None of the text or the context of the clause indicated a requirement to limit the term to professional or commercial matters or activities nor to collective matters or activities.
3. None of the ordinary accepted meanings of the word "business" exclude dealings in individual member matters.
4. Her Honour erred by having regard to inadmissible evidence, namely the Appellant's Rules, in support of Her Honour's construction in circumstances where there was no evidence that the Rules were current or known to the parties at the time of the making of the Public Service Award 1992 such that the Rules were relevant and admissible surrounding circumstances.

13 As to ground 1, in summary, and hopefully not doing any injustice to the detailed and careful submissions made, the appellant contended that the terms of cl 37(1)(a) are clear and unambiguous. It was submitted that taken as a “stand alone” provision, there is no warrant to read it down as conditioned by the other subclauses in cl 37. The appellant submitted that cl 37(1)(a) means what it says: if an officer is required to attend or to give evidence before an industrial tribunal, for any purpose, that is enough to trigger the entitlement. According to the appellant’s submissions, it is to impose an impermissible gloss on cl 37(1)(a) of the Award, to require the proceedings to be concerned with Association or union business. The learned Industrial Magistrate erred in so concluding, as the appellant’s submission went. Furthermore, support for this approach to the interpretation, as advanced by the appellant, was said to be found in cl 37(2)(b), which draws a distinction between “union business” on the one hand, and “evidence to be given” on the other.

14 It was also contended that the learned Industrial Magistrate was in error in placing any weight on the heading to cl 37. This submission was put on the basis that a heading to a statutory provision cannot be used to detract from or to impair the meaning of such a provision, in cases where its meaning is clear and unambiguous.

15 As to ground 2, in the alternative, the appellant contended that even if cl 37(1)(a) must be concerned in some way with Association or union business, then the proceedings brought before the Appeal Board by Mr Mayerhofer, subsequently as represented by the appellant, satisfied this criterion. Some support for this position was sought to be obtained from cl 36(5), set out above. The appellant submitted that the concept of “union business”, in the context of that provision, given the range of matters it sets out, is broad. Some distinction was also drawn between cl 37 – Leave to attend Association business, on the one hand, and cl 41 – Witness and Jury Leave, on the other.

16 Reference was also made to the history of both cls 37 and 41, as being formerly the subject of Administrative Instructions under the former public service legislation. A distinction was sought to be drawn between the history of these provisions and cl 36 of the Award, which was not formerly an Administrative Instruction, and which was introduced into the Award by way of a consent variation in 2004. It was not immediately clear how it is that this history assisted the appellant in its contentions. It was accepted that these matters were not raised or argued before the Court at first instance. I comment on this issue further below.

17 There was also a general submission made that the subject matter of Mr Mayerhofer’s claim before the Appeal Board was an “industrial matter” for the purposes of the Act. Also, the subject matter of his claim before the Appeal Board, and the fact that he was represented by the appellant, was directly connected with the relationship of employer and employee. Accordingly, the

appellant contended this was not a personal or private matter, contrary to the conclusions reached by the learned Industrial Magistrate. As an extension of this argument, the appellant referred to s 112A(3) of the Act, in relation to the representational rights of the appellant, despite the terms of the *Legal Profession Act 2008* (WA). By s 112A(3)(c) and (e), an officer of the appellant is permitted to provide advice and other services to a member of the appellant in relation to industrial relations matters. Consequently, according to the appellant, such advice and representation constitutes "union business".

18 Therefore, the distinction that the learned Industrial Magistrate drew between private business on the one hand, and union business on the other was, according to the appellant, arbitrary and without proper foundation. It was submitted that there may be types of matters, such as unfair dismissals, workplace grievances and workers' compensation matters, that may also be personal or private in nature to an individual, but are still nonetheless, union or Association business. This extends to the core function of the appellant, in furthering its objects, by assisting and providing representation of members in relation to workplace matters, including in relation to matters that concern an employee's individual employment circumstances. The appellant also submitted that on the learned Industrial Magistrate's construction of cl 37(1)(a) of the Award, matters arising under s 66 of the Act, dealing with allegations of non-compliance with union rules and matters under ss 72 and 72A, dealing with amalgamations and the representational rights of unions, would also be excluded.

19 The respondent relied upon and adopted its submissions at first instance, for the purposes of the appeal. In this respect as to the first issue, the respondent submitted that whilst at first sight and taken literally, cl 37(1)(a) would entitle an officer to paid leave to attend or give evidence before an industrial tribunal, irrespective of the nature of those proceedings, the provision must be read in context. This was especially so in circumstances where, as here, the scope of the provision in question is ambiguous. When taken in its context, given the nature of the activity of unions in making, varying and enforcing industrial instruments; in conducting negotiations on behalf of members and other such matters, as expressly referred to in other parts of cl 37 of the Award, then cl 37(1)(a) must be read as referring to proceedings before industrial tribunals in relation to the appellant's business and not just for any reason. It was also contended by the respondent that the heading to cl 37 can be used as a guide to the intended scope of the provision and assistance can be gained from the terms of other clauses of the Award, including cl 41-Witness and Jury Service.

20 As to the second issue, if these contentions are correct and there is a requirement in cl 37(1)(a) that union or Association business be involved, then this criterion was not satisfied in this case. This was because on the respondent's case, the appellant did not and indeed could not, commence the appeal to the Appeal Board in its own right, because it had no standing to do so under s 80I of the Act. It was effectively acting as Mr Mayerhofer's agent in acting on his instructions to pursue an appeal in relation to an individual grievance he had with his employer. This grievance was unrelated to any wider issue with the appellant's members of an industrial relations nature, such as for example, proceedings under s 44 of the Act, that may have implications for the appellant's members more broadly.

Consideration

21 For the following reasons, I am not persuaded that the appellant has made out these grounds of appeal.

22 I have set out the relevant provisions of the Award above. By cl 37(1)(a) an "officer" is to be granted paid leave if they are "required to attend or give evidence before any Industrial Tribunal". There was no dispute in the proceedings at first instance that Mr Mayerhofer is an "officer' as defined in cl 6 – Definitions of the Award, as being a public service officer employed in the public service under Part 3 of the *Public Sector Management Act 1994* (WA). There can also be no doubt, and as the learned Industrial Magistrate found, that the Appeal Board is an "Industrial Tribunal", it being a constituent authority of the Commission, constituted under Part IIA Division 2 of the Act.

23 Clause 37 is headed "Leave to Attend Association Business". Whilst for the purposes of statutes, headings to sections are not part of the written law, headings to Parts, Divisions and Subdivisions do form part of a written law and regard may be had to them: s 32 *Interpretation Act 1984* (WA). This is subject to the proviso that in the case of a conflict between the text of a statutory provision, where the latter is unambiguous, the heading must give way (See generally DC Pearce and RS Geddes *Statutory Interpretation in Australia* 4th edition at [4.35]). In my view, the terms of cl 37(1)(a) are not clear and unambiguous. Furthermore, given this is an award rather than a statutory provision, and a generous approach is to be taken to the interpretation of terms of the Award read as a whole, I see no reason to not give some weight to the clause heading, as an indication of the subject matter that the draftsperson had in mind, when the terms of the Award were settled.

24 Notably, the clause heading refers to "Association Business" and to "union business" in the body of the clause in cls 37(2)(b), (3), (5) and (6)(a). Given the definition of "Union" in cl 6 – Definitions of the Award, as the Civil Service Association, plainly, reference to "Association" and "union", for the purposes of the Award generally and cl 37, are one and the same. There is no definition of "Association Business" or "union business" in cl 6 – Definitions or elsewhere in the Award. The phrase should be given its ordinary and natural meaning, unless the context in which the words are used require otherwise. There is context in this case.

25 The context is that the relevant phrases are used in an industrial award and the parties to it are the appellant (the Association or union) and the employers listed as named respondents. The terms of the Award prescribe conditions of employment for employees governed by it, the rights and entitlements of the Association as a union, and the employees and employers bound by it. Those rights, obligations and entitlements are of an industrial relations nature. Furthermore, as to context, some indication of the intention of the framers of the subclause and the meaning of cl 37 as a whole, can also be gleaned from other parts of cl 37, such as subclauses (1)(b), (c) and (d), and also, from the terms of cl 36 – Union Facilities for Union Representatives, in particular cls 36(1) and (5), especially (5)(a). I do not consider that cl 37(1)(a) should be read in isolation, as appeared to be the import of some of the appellant's submissions. To do so would be contrary to the established principles of interpretation, to which I have referred.

26 Clause 37(1)(b) concerns attendance at negotiations, proceedings before an industrial tribunal and meetings with Ministers and government representatives. Clause 37(1)(c) seemingly covers meetings preparatory to those types of activities set out in cl

37(1)(b). Joint management committees etc are the subject matter of cl 37(1)(d). It seems clear that taking pars (b), (c) and (d) together, that they concern themselves with activities of an industrial relations nature, engaged in by representatives of the appellant, who are nominated by it, and others with whom they have dealings, about matters that one would traditionally associate with the normal industrial activities of a union on behalf of its members generally.

27 In my view, the scope of the right conferred by cl 37(1)(a) is also confirmed by comparing it with the terms of cl 41 – Witness and Jury Service, set out above. By cl 41(2) and (3) an officer subpoenaed or called as "a witness in any proceeding" in an official capacity or on behalf of the crown, is entitled to paid leave. Under cl 41(5), an officer called as a witness or subpoenaed in any other case, is only entitled to leave without pay. There is a conflict between cl 41(5) and cl 37(1)(a). It is not at all apparent why, and it would be an odd result, if a person called in a personal capacity to give evidence in proceedings other than industrial tribunal proceedings is not entitled to paid leave, but the same person, called to give evidence in the same kind of proceeding, would be entitled to paid leave simply because the proceedings were before an industrial tribunal, without there being the need for it to be "official" union business.

28 Furthermore, and put another way, the distinction between cl 37(1)(a) and cl 41 is also illustrated by the fact that for the purpose of cl 41, the reference to giving evidence is in relation to "any proceedings", which could include any tribunal, whereas the draftsperson of cl 37(1)(a) confined the proceedings to those before an "industrial tribunal". It seems somewhat incongruous that if there is no necessary connection between the requirement "to attend and give evidence" and union business, as on the appellant's principal contention, that the draftsperson would confine the attendance or the giving of evidence in cl 37(1)(a) to such a tribunal, rather than to courts and tribunals more generally.

29 I refer to the appellant's argument that cl 37(2)(b) supports its principal contention, because it draws a distinction between union business to be conducted on the one hand, and the giving of evidence on the other. I do not consider this provision can be read in the way submitted. As pointed out by the respondents in its oral submissions to the Full Bench, this provision does not make any reference to a requirement to attend before an industrial tribunal, being the first limb of cl 37(1)(a). As a matter of construction, in the context of cl 37, it thus would make sense to subsume this activity into the broader concept of union business, otherwise it would be an activity unaccounted for in the clause. As to the giving of evidence, it would be an odd result if this activity was to be separate and distinct to the requirement to attend before an industrial tribunal, which is union business, and the giving of evidence is not. Taken in its context, I think the draftsperson intended both activities to be considered in the same way.

30 Clause 37(3) provides that no expenses are payable to an officer who attends to union business. If the appellant's principal submission was accepted, then officers required to engage in the activities set out in cl 37(1)(b), (c) and (d) would not be entitled to the payment of any expenses incurred by them. However, on its face, no such exclusion would apply to officers engaged in the activity in cl 37(1)(a), if that activity is not characterised as union business. There would seem to be no logical reason for such a distinction, given that officers, especially those required to travel any distance from their home base, may all incur some expenses in doing so.

31 Additionally, cl 37(5) provides that no paid leave is available to attend to union business, other than as set out in cl 37. Given there is no reference to business other than union business in this provision, suggests that it is only union business, and not other business, such as attending at or giving evidence before an industrial tribunal, that is the subject matter of the entitlement prescribed by the clause.

32 Finally, it is to be noted that cl 37(6) contains several exclusions to paid leave to attend to union business. One, in cl 37(6)(a), refers to the circumstance of a "special arrangement" with the union, which is the appellant, to provide for unpaid leave to deal with union business. Notably, the making of such a special arrangement with the union itself, in relation to officers conducting such business, tends to confirm the linkage between the business to be undertaken and the union as an entity and the activities it engages in on behalf of its members.

33 As to the written and oral submissions of the appellant in relation to the history of cl 37, it was conceded when the matter was raised by the Full Bench, that such issues had not been raised or argued before the learned Industrial Magistrate at first instance. Whilst the issue does not relate to a matter that may have been met by the other side with additional evidence, nonetheless, the well settled principle is that except in very exceptional circumstances, a party may not raise a point or issue on appeal, that was not taken in the proceedings at first instance: *Whooley v Shire of Denmark* [2019] WASCA 28; (2019) 99 WAIG 87 citing *Suttor v Gundowda Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418*; University of Wollongong v Metwally (No 2)* [1985] HCA 28; (1985) 59 ALJR 481; *Water Board (NSW) v Moustakas* [1988] HCA 12; (1988) 180 CLR 491. No exceptional circumstances were raised by the appellant and in my view, none are apparent, in terms of the interests of justice, that would warrant departing from this principle. In any event, I note that the proceedings before the Commission referred to by the appellant, leading to the making of the *Public Service Award 1992*, as it then was, proceeded by consent without any specific reference to the relevant provisions of the Award. The other history referred to by the appellant, related to the former terms of cl 36 of the Award, which appeared to have been included in various industrial agreements, without any determination by the Commission.

34 Therefore, I consider that on its proper construction, cl 37(1)(a) is not, contrary to the submissions of the appellant, to be considered as a "stand alone" provision, entitling an officer to paid leave of absence if they are required to attend or give evidence before an industrial tribunal for any reason, unrelated to Association or union business, as that phrase should be understood. To construe cl 37(1)(a) in the way urged by the appellant, would require the reader to disregard the rest of the clause and other relevant provisions of the Award and accordingly, the context in which cl 37(1)(a) appears.

35 The next question is the meaning of union or Association business and whether Mr Mayerhofer's proceedings before the Appeal Board could be so characterised. The ordinary meaning of the word "business" includes "an activity…function, stated occupation, profession or trade…" (*Shorter Oxford Dictionary*). Taking into account the terms of cl 37 as a whole, whilst not wanting to overly confine or limit what activity may be involved, the phrase "Association Business" or "union business" wherever it appears, for the purposes of cl 37, should be considered as relating to the functions, trade or work of the appellant

as a collective, which the appellant is, as a registered organisation under ss 60 and 61 of the Act, in relation to activities such as negotiations with employers about terms and conditions of employment for members; proceedings before industrial tribunals in connection with matters pertaining to members of the appellant and to which the appellant is a party principal; the participation in joint committees with employers; meetings with Government Ministers and other government staff in connection with industrial and employment matters and other like activities. In short, as was concluded by the learned Industrial Magistrate, these can be described as the "professional operation of the claimant or the commercial activity or dealings of the claimant… and its operation as a collective" (see reasons at first instance pars 45-48).

36 Furthermore, whilst not in any way detracting from this view, there also seems to be a conceptual distinction between leave for engaging in "union or Association business" under cl 37, by a "union–nominated representative", in relation to which conditions are prescribed in cl 37(2) on the one hand, and the work of "union representatives" in cl 36, on the other. In the case of the latter, these persons as representatives, or "workplace delegates" as they are otherwise known, engaging in the types of activities contemplated by cl 36, have an unqualified right to paid time off from normal duties "to perform their functions as union representatives…" By cl 36(5)(a), such union representatives are also entitled to "attend union business in accordance with cl 37 – Leave to Attend Union Business of the Award". This latter reference tends to suggest that there is some distinction to be drawn between the performance of functions by union representatives under cl 36 on the one hand, and the grant of paid leave to attend to Association or union business, on the other.

37 The right or entitlement to "paid time off from normal duties" for the purposes of cl 36(5)(a) appears to contemplate a workplace union representative engaging in the type of functions there set out, in the workplace itself. That is, the duties normally associated with a union workplace delegate. This is emphasised in cl 36(1), which specifically refers to the performance of functions "*in* the workplace, agency and union electorate". In contrast, cl 37 contemplates the taking of "paid leave" to attend to certain matters, which seems more concerned with the engagement of officers or union-nominated representatives, other than union representatives under cl 36, in activities away from the workplace. Whilst such a union representative under cl 36 may also be a "Union-nominated representative" under cl 37, there seems no requirement for it to be the same person. I also note in this respect, that whilst "individual grievance handling" is a specified activity in cl 36(5)(a) for a union representative, there is no reference to such matters in cl 37. The fact that a union representative in the workplace, for the purposes of cl 36 may apply for leave under cl 37, seems to reinforce the distinction between the two types of activities and those who may engage in them. There does not seem, from the language used in cl 36(5)(a), an entitlement to such leave by a union representative. If an application for leave was to be made, then the terms of cl 37 would need to be complied with.

38 Thus, I am not persuaded by the appellant's submissions to the effect that the activities set out in cl 36(5) inform the meaning of union business for the purposes of the present matter such that it may be regarded as one and the same thing as union business under cl 37. There is no doubt the terms of cl 36(5) set out what union representatives may do in the workplace and receive paid time off normal duty to attend to. However, the context is different. For example, there could be no suggestion that the activity of "organising and recruiting", which is part of the functions of a union representative in cl 36(5), could inform the meaning of cl 37(1)(a), in terms of an application for paid leave. Certainly, there is reference to "collective bargaining", which could find parallels with cl 37(1)(b) and (c). However, the crucial issue is what the entitlement is in cl 37, which was the basis of Mr Mayerhofer's claim.

39 Further, the references to "*Union*-nominated representative" and "official *Union* meetings" in cl 37(1)(b), (c) and (d), reinforce the required connection between the request for leave by an officer and the relevant business involved, being related to the appellant as an entity, in the conduct of its activities contemplated by cl 37(1) as a whole.

40 Returning to the central issue, having regard to the foregoing, I do not consider that cl 37(1)(a) is concerned with the grant of paid leave to an officer who has personally commenced a proceeding in an industrial tribunal against their employer, for the purposes of vindicating a right particular to that individual. Furthermore, I do not consider that cl 37(1)(a) contemplates the provision of paid leave to an officer who may be called to give evidence in a proceeding commenced by another officer, for these purposes, either. The conclusion of the learned Industrial Magistrate that Mr Mayerhofer's appeal did not involve any connection with "union business" in the relevant sense was, in my view, correct.

41 There may well be certain situations where the appellant, as a registered organisation, commences a proceeding in its own right, but on behalf of a member(s), which proceeding has as its purpose or purposes for example, the establishment or the variation of a matter of significant industrial principle, such as a "test case", where it may be able to be established that such a proceeding before an industrial tribunal, is "Association Business" or "union business". This could include as examples, the notification of disputes and conference proceedings under s 44 of the Act, that are ultimately referred for arbitration. There could also be disputed applications by the appellant to vary award(s) of the Commission, as another example, that have a relevant connection with the appellant's business on behalf of its membership. An officer required to attend, perhaps to produce documents or to provide instructions, or to give evidence in any such proceedings may well, depending on the facts, be required to do so in the course of "attending to Association or union business".

42 However, the proceedings instituted by Mr Mayerhofer were instituted in his name and in respect of a matter arising from an individual grievance he had with his employer. There was no evidence or suggestion that it involved any notion of the broader membership of the appellant, as a collective, or the public service generally. Nor was there any evidence or suggestion that it had any impact on other persons as members, or those eligible to be members, of the appellant.

43 Furthermore, simply because it may be said that for the purposes of cl 36(5)(a), a union representative is able to have paid time off to assist Mr Mayerhofer in relation to his handling of his grievance in the workplace at the time that it arose, this does not transform that same grievance into "union or Association business" as that phrase is contemplated by cl 37, by the commencement of proceedings by Mr Mayerhofer, in his own right. The purposes of these two clauses, and the rights and entitlements they confer, seem to be, to a degree at least, separate and distinct.

44 I therefore do not consider that Mr Mayerhofer's claim before the Appeal Board, seeking to overturn the imposition of a disciplinary penalty applicable to him alone in the workplace, should be regarded as, or has in some way, been transformed

into Association or union business, as that concept should be understood, simply because the appellant subsequently represented Mr Mayerhofer in those proceedings, in its representative capacity. It is the proceedings themselves that must be able to be characterised as being union or Association business. If they could not be so described by Mr Mayerhofer commencing and prosecuting his claim on his own behalf, it is difficult to see how this requirement could be met by the simple expedient of the appellant subsequently representing him. The fact that the appellant did so, did not in any way alter the character of the proceedings before the Appeal Board. It also is the case that such appeals, as s 80I(1) of the Act makes clear, are made by the individual public service or government officer concerned, although they may be instituted by the officer or the appellant, on the officer's behalf, under s 80J.

45 In its submissions, the appellant drew attention to the objectives of the appellant, which I take to mean the terms of its registered Rules, in Rule 3 - Objects. Whilst the appellant seemed to take objection in par 4 of appeal ground 2, to her Honour's reference to the appellant's Rules, there was no argument on this point in either the written or oral submissions. A copy of the appellant's Rules was tendered in evidence by the respondent at first instance, without objection by the appellant (see transcript at first instance p 25 and exhibit 2). According to the Rules, they were certified by the Registrar as current and correct as at 16 April 2014. There was no difficulty in her Honour referring to them, particularly as there was no objection from the appellant at first instance. She did so (see pars 41, 42, and 50 reasons at first instance) to highlight the nature of the services provided by the appellant to a member such as Mr Mayerhofer, under its Rules, such as the provision of welfare and representational services. This was in the context of the distinction between the provision of those services on the one hand, and the nature of Mr Mayerhofer's appeal, on the other, and that there was no connection between them. The learned Industrial Magistrate in effect concluded that the fact Mr Mayerhofer availed himself of those services of the appellant under its Rules, to assist him with his appeal, did not "re-characterise the Appeal so that it becomes union business" (see par 50 reasons at first instance). I agree. I also refer to my reasons at par 44 above, without repeating them.

46 The industrial activities of the appellant, in terms of negotiations, applications to industrial tribunals etc, are referred to in sub rule 3(b) and its advisory and representational services to members, are dealt with in sub rule 3(p) of its Rules. In connection with this, the submission was made that conduct of this kind in accordance with the appellant's objectives was "union business" and thus, the advice to and representation of Mr Mayerhofer should be so described, even if it was accepted, contrary to the appellant's principal contention, that cl 37(1)(a) must involve union or Association business. Whilst this argument may have some superficial attraction, it must be remembered that the contravention alleged at first instance was not that the respondent had denied Mr Mayerhofer the opportunity to access his rights as a member of the appellant, but that he had been wrongly refused paid leave under cl 37(1)(a) of the Award. This entitlement to leave is not for the purposes of obtaining advice or representation in relation to his individual grievance with his employer, which no doubt is part of the day to day work of unions for their members, but for the purpose of attending to union business, as that concept should be understood in the context of cl 37 of the Award.

47 I also regard the appellant's submissions in relation to s 112A(3) of the Act in a similar vein. This section of the Act concerns the registration of industrial agents generally and the conduct of the appellant in its representative capacity. I do not think that it assists the appellant in relation to the interpretation and enforcement of cl 37(1)(a) of the Award.

Ground 3

48 This ground of appeal is in the following terms:

> Ground 3 - Freedom of Association
>
> The learned Industrial Magistrate erred in law and in fact in finding at [95] to [100] that section 96B of the Industrial Relations Act 1979 (WA) precluded the operation of clause 37(1)(a) in the manner contended for by the Appellant, Her Honour's finding being manifestly unreasonable.
>
> (1) Sub-clause 37(1)(a) cannot operate in the discriminatory manner which was alleged because the entitlement is not qualified by the requirement that the officer claiming the entitlement be a member of the Appellant or any union.
>
> (2) The observations at paragraphs [95] to [100] contained speculation as to the application of clause 37 in relation to non-union members, which was not supported by evidence.

49 As noted at the outset, given the learned Industrial Magistrate's conclusions at first instance, the determination of this issue was not necessary for the disposition of the proceedings below. As I have concluded that grounds 1 and 2 of the appeal have not been made out, it is not necessary to consider the arguments on this ground any further. This matter is best left to another occasion, when the issue is fairly and squarely raised for consideration.

Conclusions

50 The appeal must be dismissed.

EMMANUEL C:

51 I have had the benefit of reading the draft reasons of the Senior Commissioner. I agree with those reasons and have nothing to add.

MATTHEWS C:

52 I also have read the draft reasons of the Senior Commissioner. I too, agree with those reasons and have nothing further to add.

2019 WAIRC 00714

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 80/2018 GIVEN ON 1 MAY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 16 SEPTEMBER 2019
FILE NO/S	FBA 6 OF 2019
CITATION NO.	2019 WAIRC 00714

Result	Order issued
Representation	
Appellant	Mr W Claydon of counsel and with him Ms D Larson
Respondent	Mr D Anderson of counsel and with him Mr T Ledgar of counsel

Order

The appeal having come on for hearing before the Full Bench on 5 August 2019, and having heard Mr W Claydon of counsel and with him Ms D Larson on behalf of the appellant, and Mr D Anderson of counsel and with him Mr T Ledgar of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the appeal be and is hereby dismissed.

By the Full Bench
(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

SECTION 23—Miscellaneous matters—

2019 WAIRC 00719

APPLICATION TO THE COMMISSION – UNSPECIFIED GROUNDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS JOVANOVSKI
	APPLICANT
	-v-
	DEPARTMENT OF JUSTICE, CORRECTIVE SERVICES DIVISION
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 20 SEPTEMBER 2019
FILE NO/S	APPL 41 OF 2019
CITATION NO.	2019 WAIRC 00719

Result	Application dismissed
Representation	
Applicant	Mr C Woodhouse of counsel
Respondent	Mr N Cinquina

Order

HAVING heard Mr C Woodhouse of counsel on behalf of the applicant and Mr N Cinquina on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

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

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2019 WAIRC 00302

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00302
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 4 FEBRUARY 2019, TUESDAY, 5 FEBRUARY 2019, WEDNESDAY, 6 FEBRUARY 2019, THURSDAY, 7 FEBRUARY 2019, FRIDAY, 8 FEBRUARY 2019, THURSDAY, 28 FEBRUARY 2019, WEDNESDAY, 6 MARCH 2019
DELIVERED	**:**	20 JUNE 2019
FILE NO.	**:**	U 97 OF 2018
BETWEEN	**:**	MR GARY HAWTHORN Applicant AND THE MINISTER FOR CORRECTIVE SERVICES Respondent

Catchwords	**:**	*Industrial law (WA) - Termination of employment of Senior Prison Officer - Harsh, oppressive or unfair dismissal - Whether use of force by deployment of OC spray in two incidents contravened the Prisons Act 1981 (WA) - Whether use of force constitued a breach of discipline under the Public Sector Management Act 1994 (WA) - Use of force in first incident justified - Use of force in first deployment of OC spray in second incident justified - Second deployment of OC spray in second incident not justified - Dismissal harsh, opressive and unfair - applicant to be reinstated without loss.*
Legislation	**:**	*Industrial Relations Act 1979* (WA), s 23A *Corruption, Crime and Misconduct Act 2003* (WA), ss 4, 43 *Occupational Safety and Health Act 1984* (WA) s 19(1)(b) *Prisons Act 1981* (WA) ss 13, 14 *Public Sector Management Act 1994* (WA) ss 8, 76(1)(b), 76(4), 81(1)(a)
Result	**:**	Order issued
Representation:		
Counsel:		
Applicant	**:**	Mr D Stojanoski of counsel and with him Mr C Fordham of counsel
Respondent	**:**	Mr J Carroll of counsel and with him Mr D Akerman
Solicitors:		
Applicant	**:**	Slater and Gordon
Respondent	**:**	State Solicitor of Western Australia

Case(s) referred to in reasons:

Briginshaw v Briginshaw (1938) 60 CLR 336

George v Rockett (1990) 93 ALR 483

Miles v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous WA Branch (1985) 65 WAIG 385

Public Transport Authority v ARTBIU [2016] WAIRC 00236; (2016) 96 WAIG 408

State School Teachers' Union of WA (Incorporated) v Director-General Department of Education [2019] WAIRC 00175; (2019) 99 WAIG 336

SSTU v The Director General, Department of Education [2015] WAIRC 00517; (2015) 95 WAIG 1461

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority [2017] WASCA 86; (2017) 97 WAIG 431

Case(s) also cited:

Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635

Danijel Pantovic v Public Transport Authority of WA (2011) 91 WAIG 2094

Frank Scott v Consolidated Paper Industries (WA) Pty Ltd (1998) 78 WAIG 4940

Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893

Mr Patrick Guretti v The Director General Department of Education (2013) WAIRC 00779

Ms RT v The School [2015] FWC 2927

Public Employment Industrial Relations Authority v Scorzelli [1993] NSWIRC 48

Saybolt Australia Pty Ltd v Milan Hall (2006) 87 WAIG 87

The State School Teachers' Union of W.A. v The Director General, Department of Education (2018) WAIRC 00379

William Walker v P & O Automotive and General Stevedoring [2009] WAIRC 00250

Zainal Omar Mattar v The Minister for Corrective Services (2017) WAIRC 00794

Reasons for Decision

Claim and brief background

1 The applicant had a career as a prison officer for some 22 years. For 11 of those years, up to the events leading to these proceedings, the applicant had been a prison officer appointed by the respondent under the *Prisons Act 1981* (WA) (*Prisons Act*). At the time of the events leading to these proceedings, the applicant was at the rank of Senior Prison Officer. Prior to his appointment as a prison officer in Western Australia, the applicant was a prison officer in the Scottish Prison Service for some 11 years also. As at the time of the relevant events, it was common ground that the applicant had an unblemished record of service and had also received a number of commendations for actions taken in the line of duty. The applicant had been engaged at various prisons including Bandyup and Hakea. He took a secondment to the Eastern Goldfields Regional Prison in September 2016. It was whilst on secondment to this prison that the applicant was involved in two incidents that ultimately led to the termination of his employment.

2 These incidents involve the alleged use of unreasonable force on two prisoners, Mr Wharerau and Mr Bellin. The force option involved was Oleoresin Capsicum spray (OC spray). Allegations were made, and an investigation was conducted in accordance with the *Public Sector Management Act 1994* (WA) (*PSM Act*). The allegations against the applicant were largely sustained and as a consequence, the respondent maintained that there had been a loss of confidence in the applicant as a prison officer and his employment was terminated. The applicant now contends that his dismissal as a senior prison officer was harsh, oppressive and unfair. He seeks both reinstatement and compensation for loss.

3 The respondent maintained that the applicant's use of OC spray on the two prisoners concerned was not justified and constituted an unreasonable and excessive use of force in all the circumstances, in contravention of s 14 of the *Prisons Act* and the relevant policy in relation to use of force options. Additionally, the respondent contended that when the applicant deployed the OC spray on the two occasions concerned, he was not permitted to do so as his training in relation to the use of this force option was not at the time current. Accordingly, the respondent's position was that the decision to terminate the applicant's employment as a senior prison officer was justified and was not unfair.

The allegations and findings

4 On 28 July 2017 the respondent contended that the applicant had committed a breach of discipline in relation to the Bellin incident, under s 81(1)(a) of the *PSM Act*. It was contended that the applicant had used excessive force which constituted misconduct. Two allegations were made against the applicant and they were set out in a letter of the same date in the following terms:

> **Suspected Breach of Discipline**
>
> I have become aware that you may have committed a breach of discipline and I have decided to deal with it as a discipline matter pursuant to the *Public Sector Management Act 1994* **(Act) s** 81(1)(a) and the Public Sector Commissioner's Instruction entitled, *'Discipline - General. '*
>
> I enclose a copy of the Commissioner's Instruction.
>
> Specifically, the allegations against you are:
>
> **Allegation 1**
>
> It is alleged that on 20 May 2017, at Eastern Goldfields Regional Prison, you committed a breach of discipline when you deployed chemical agent at prisoner Jessie Bellin. The deployment of the chemical agent was an excessive use of force which constitutes an act of misconduct.
>
> **Particulars**
>
> a) On 20 May 2017, you were the rostered Unit Manager of Unit 4;
>
> b) Mr Bellin was a remand prisoner who became agitated at not being able to contact a surety for his release;
>
> c) In response to Mr Bellin's behaviour, you drew a chemical agent and pushed him into his cell;
>
> d) Whilst standing outside the cell, with Mr Bellin inside, you deployed the chemical agent at Mr Bellin for approximately two seconds;
>
> e) You then deployed the chemical agent at Mr Bellin a second time for approximately two seconds while he attempted to cover his face with a bed sheet; and
>
> f) The deployment of the chemical agent was excessive and disproportionate in the circumstances to manage Mr Bellin's behaviour.
>
> **Allegation 2**
>
> It is alleged that on 20 May 2017, at Eastern Goldfields Regional Prison, you committed a breach of discipline when you did not administer aftercare and / or decontamination after deploying chemical agent at prisoner Jessie Bellin.
>
> **Particulars**

a) On 20 May 2017, you were the rostered Unit Manager of Unit 4;

b) Whilst standing outside Mr Bellin's cell, with Mr Bellin inside, you deployed the chemical agent at Mr Bellin for approximately two seconds;

c) You deployed the chemical agent at Mr Bellin a second time for approximately two seconds; and

d) You did not take reasonable steps to administer aftercare and / or decontamination of Mr Bellin in a timely manner.

…..

5 Sometime later, on 7 December 2017, it was further alleged against the applicant that he had committed a breach of discipline in relation to the Wharerau incident. The allegations were set out in a letter of the same date as follows:

Suspected Breach of Discipline

I have become aware that you may have committed a breach of discipline and I have decided to deal with it as a discipline matter pursuant to the *Public Sector Management Act 1994* **(Act) s** 81(1)(a) and the Public Sector Commissioner's Instruction entitled, *'Discipline - General.'* This letter sets out those allegations and the particulars that support it.

I enclose a copy of the Commissioner's Instruction.

Allegation 1

It is alleged that on 4 May 2017, you committed a breach of discipline when you used force, which was unreasonable in all the circumstances, on a prisoner, when you used OC Spray prior to utilising de-escalation techniques.

Particulars

On 4 May 2017, at approximately 3:15pm, while performing Senior Officer duties at Eastern Goldfields Regional Prison, you deployed Olea-resin Capsicum Aerosol (OC Spray) into the face of prisoner Ralph Joseph Wharerau.

Clause 3 of Policy Directive 5 provides in the relevant part:

> 3.1 In all instances, ***force shall only be used when all other avenues have been exhausted*** or are considered impractical. ***Force must only be used as a last resort.***
>
> 3.4 ***The amount* of *force used, shall be the minimum required* to *control the situation*** or behaviour and maintain security and good order and shall cease when the level of perceived
>
> threat can be managed without applying force.

If proven, this would constitute a breach of discipline in accordance with s 80 of the Act.

Allegation 2

It is alleged that on 4 May 2017, you committed a breach of discipline when you used OC Spray when you were not permitted to do so.

Particulars

On 4 May 2017, at approximately 3:15pm, while performing Senior Officer duties at Eastern Goldfields Regional Prison, you deployed OC Spray into the face of prisoner Ralph Wharerau. At the time of the deployment you were not up to date with the current training of the use of OC Spray.

Clause 4.1 of Policy Directive 5 provides in the relevant part:

> 4.1.6 ***Use of force must not be applied*** by a prison officer ***unless that officer has successfully undergone a DCS approved training programme.***
>
> 4.1.7 It shall be a shared responsibility between the designated Superintendent of each adult custodial facility ***and the individual staff member, to ensure they remain up to date and competent with the current use of force training packages when available.***
>
> 4.1.8 All prison officer staff shall be refreshed as minimum once annually in the following training:
> - Use of force overview
> - Restraints (including batons)
> - Escorts
> - Self Defence
> - ***Chemical Agent***

If proven, this would constitute a breach of discipline in accordance with the Act s 80.

Background

On 4 May 2017, at approximately 3:15pm, you were present in Unit 2 CD Wing, where Mr Wharerau was involved in a conversation with Principal Officer Stephen Parker. During the conversation you have intervened, restraining Mr Wharerau against the unit wall with the assistance of Mr Solomon ldowu.

Whilst restraining Mr Wharerau, you have requested OC Spray, it was handed to you by a fellow officer. You deployed the spray in Mr Wharerau's direction, contaminating yourself as well as Mr Wharerau and Mr ldowu.

Due to the contamination, attending officers have taken over Mr Wharerau's restraint and escorted him out of the unit.

It appears, from the CCTV footage, that you did not utilise de-escalation techniques prior to choosing to use OC Spray.

In accordance with the Commissioner's Instruction *Discipline - General* and s 81(1) of the Act, I now provide you with the opportunity to provide a response to the allegations.

….

6 The applicant denied the allegations against him. In doing so, the applicant had been shown the CCTV footage of both incidents. The CCTV footage was subsequently tendered in evidence in these proceedings as a part of the agreed tender bundle. In summary, the applicant contended that Mr Bellin became increasingly aggressive when told his surety had been arranged and he would not get access to his telephone account. The applicant maintained that Mr Bellin repeatedly threatened both himself and Prison Officer Bruynzeel who was then present. This included adopting a fighting stance, picking up a chair and taking off and placing his t-shirt over his face. Whilst the applicant had obtained OC spray and gave Mr Bellin a warning that if he continued to fail to comply with directions to return to his cell, spray would be used, it was not in fact used at that point.

7 The applicant then used "open hand" techniques and pushed and directed Mr Bellin back towards his cell. He was accompanied by Officers Bruynzeel and Mulvaney. The applicant maintained that Mr Bellin was still behaving in an aggressive manner and was non-compliant. Once he reached the cell, the applicant noted that Mr Bellin by his words and conduct, was still threatening assault against either himself or the other two officers. Accordingly, the applicant deployed the OC spray towards Mr Bellin. When Mr Bellin was inside the cell, the applicant said that he attempted to cover his face with bedding to avoid the effects of OC spray and the applicant deployed the spray for a second time. The door to the cell was then shut.

8 At all times, the applicant maintained that he was acting in accordance with relevant policies and training materials.

9 In relation to the Wharerau incident, the applicant wrote to the investigators and referred to Mr Wharerau displaying agitated and aggressive behaviour towards Principal Officer Parker. The applicant said he was aware of at least 20 other prisoners who were becoming interested in the events. The applicant said that he ushered Mr Wharerau towards the corner of the room in order to deescalate the situation. He had declared a "code green" by this point. Mr Wharerau grabbed hold of the door handle and despite orders to desist, he remained non-compliant.

10 Given Mr Wharerau's continued non-compliance, the applicant said that he requested OC spray from another officer who was with him. A warning was given to Mr Wharerau that if he continued to fail to comply with his orders then spray would be used. The applicant said he deployed OC spray so that Mr Wharerau would be compliant. He was then restrained and removed from the area.

11 As to the training allegation, the applicant noted that despite the respondent's training records, that he thought he had completed the Chemical Restraints Training Course several times since his appointment as a prison officer. Despite this, the applicant noted that it had been previously highlighted to officers that there had been a significant training deficit for prison officers and he did not consider that it was fair that he had been singled out on this occasion.

12 In relation to both incidents, the applicant referred to a direction that he received from the Principal Officer at Hakea Prison, in relation to the use of chemical agents. This communication, which became known as the "Cooper Email" in the course of the hearing, was dated 11 February 2015. It referred to a high number of assaults by prisoners on prison officers and Principal Officer Cooper's advice to Hakea prison officers, that "if in doubt get the spray out". The applicant informed the respondent in his response, that he took this as an indication of a change in philosophy in relation to situations where the safety of prison officers could be put at risk.

13 At all times the applicant responded that he did not use excessive or unreasonable force on these two occasions, and that he acted in accordance with the *Prisons Act* and the respondent's relevant policies and procedures.

14 Having considered the issues and the applicant's responses, the respondent formed the view, by letter of 25 May 2018, that apart from allegation 2 in connection with the Bellin incident, that the allegations were made out. Importantly, for reasons which will be considered later, given the proximity of the incidents to one another, they were regarded by the respondent together as a single course of conduct, in terms of the applicant's management of prisoners. The letter relevantly provided, without reproducing the allegations, as follows:

> **Suspected breach of discipline - Finding and Proposed Discipline Action l**
>
> On 17 August 2017, Mr Nick Wells a Principal Investigator in the Investigations Branch wrote to you and advised you that as a result of information received, he was commencing a discipline process pursuant to the Public Sector Management Act 1994 (**Act**) s 81(1)(a) and put to allegations to you as follows:
>
> …..
>
> He invited you to respond to the allegations and on 24 May 2017, you made a written submission through you WA Prison Officer's Union representative.
>
> On 7 December 2017, Principal Investigator Mr Mark Riddle wrote you setting out a further two allegations as follows:
>
> …..
>
> As your matters are only sixteen days apart, I have decided to view them together as they relate to conduct of a similar nature in respect of your method and judgment in dealing with prisoners and deployment of OC Spray.
>
> Accordingly, I have reviewed all the available evidence in relation to all four allegations and find that on the balance of probabilities **you did commit** a breach of discipline and an act of misconduct as follows:
>
> **Allegation 1 (Mr Bellin)**
>
> Your actions breached:
>
> a. *Prisons Act 1981, s* 14 in relation to the lawful use of force; and
>
> b. Policy Directive 5, *'Use of Force.'*
>
> And is therefore a breach of discipline under the Acts 80(b). I am also of the view that your actions constitute an act of misconduct under the Acts 80(c).

Allegation 2 (Mr Bellin)

This allegation is withdrawn.

Allegation 1 (Mr Wharerau)

Your actions breached:

a. *Prisons Act 1981*, *s* 14 in relation to the lawful use of force; and

b. Policy Directive 5, *'Use of Force.'*

And is therefore a breach of discipline under the Acts 80(b). I am also of the view that your actions constitute an act of misconduct under the Acts 80(c).

Allegation 2 (Mr Wharerau)

Your actions were contrary to Policy Directive 5 'Use of Force' and is therefore a breach of discipline under the Acts 80(b)(i). I am also of the view that your inaction constitutes an act of misconduct under the Acts 80(c).

Reasons for Decision

In considering both OC spray discharges, I need to be satisfied that on the balance of probabilities your actions in deploying Oleoresin Capsicum spray **(spray / OC spray)** were 'excessive and disproportionate in the circumstances' having regard to the legislation and Policy Directive against which you are bound.

As a Senior Prison Officer, you are authorised to use force (including using OC spray) in certain circumstances set out under the *Prisons Act 1981*. You are also bound by Police Directive Five *'Use of Force'* with the *Prisons Act 1981* prevailing in circumstance where there is any ambiguity between the Act and Policy.

On both occasions, the issue is whether you had objectively sound reasons to deploy the spray against Mr Wharerau and Mr Bellin, in light of the prevailing circumstances at the time. A review of the closed circuit television **(CCTV)** of these incidents, which I understand you have viewed, speak for themselves and in my view your actions in deploying the chemical agent were 'excessive and disproportionate' in the circumstances.

In relation to the incident involving Mr Wharerau, the CCTV footage shows that three to six seconds elapse from the time the OC Spray was requested by you and ultimately deployed. Your Total Offender Management Solutions (TOMS) Incident Report provides in the relevant part:

> The writer requested Chemical Agent from IDOWU, Solomon (ID: D273466) the writer then gave WHARERAU a formal warning that if he continued to be non-compliant Chemical Agent would be used. He continued to resist and the writer deployed the Chemical Agent giving him a warning.

Given the elapsed time, this statement is implausible and even if it was the case that a verbal warning was issued, you did not give Mr Wharerau reasonable time to comply with your order or warning. Moreover, the manner in which you deployed the spray placed Mr Wharerau, and your colleague in an unacceptable risk of hydraulic eye damage.

In relation to Mr Bellin, while there is some argument that deploying the spray in the first instance was necessary when taken as a whole, you could not have had a belief based on reasonable grounds that you needed to deploy the chemical agent twice in order to protect yourself, your colleagues and any other prisoner.

As with 4 May 2018 incident, your characterisation in your TOMS report of what occurred does not align with the CCTV footage:

> It was when he reached his cell did he turn and made a gesture that he was going to continue to fight, I gave him a push into his cell it was then he went to come back at me so I deployed the Chemical Agent.
>
> Due to his aggression the cell door was secured, and the writer informed him to decontaminate himself ...

This is inconsistent with the CCTV footage which shows:

00:09	You shove Mr Bellin along the corridor towards his cell. You and your colleagues arrive at the door with Mr Bellin
00:16	You commence to shove Mr Bellin into the cell door opening.
00:17	Mr Bellin places his right hand against the door and momentarily resists your shove
00:18	You step back and deploy the OC Spray towards Mr Bellin and Mr Bellin runs away from you into the cell.

The footage inside the cell shows the shadows of the above motions just outside the door followed at 00: 16-17 by Mr Bellin running to the rear of the cell, turning towards you, taking cover on the bed, under the blankets with his feet towards the cell door. You are seen continuing to deploy the spray towards Mr Bellin.

Proposed Discipline Action

Having regard to all the circumstances, I am considering dismissal as the most appropriate discipline action.

When I reviewed the footage with your response, I initially considered a range of alternatives including reduction in rank combined with a reprimand and retraining.

However, given the similarities in these two incidents, the apparent disregard for the safety of your colleagues and prisoners in your care, together with the way in which you obviated your actions in your various reports, I believe dismissal is the most appropriate action.

Prior to imposing the proposed discipline action, I now provide you with an opportunity of making a submission to me setting out any mitigating factors you would like me to consider.

…

15 The fact that the respondent treated the two incidents together was confirmed in an internal memorandum to the Director General from the investigators dated 15 May 2018 (p 85 exhibit A1).

The applicant is dismissed

16 By letter of 11 July 2018, having considered the applicant's response to the findings and proposed penalty, the applicant's appointment was terminated by the payment of five weeks' salary in lieu of notice. Formal parts omitted, the letter of dismissal said:

> **Suspected breach of discipline - Imposition of disciplinary penalty**
>
> I refer to my correspondence to you dated 25 May 2018 in which I found that you committed a breach of discipline in relation to the allegations particularised in that correspondence and proposed a discipline action of dismissal.
>
> On 19 May 2018 the Department of Justice received correspondence from Slater and Gordon Lawyers acting on your behalf providing a written submission in response to the proposal to dismiss you. On 21 June 2018 Slater and Gordon Lawyers provided the Department with an updated response.
>
> I note from this correspondence that you continue to rely on your responses to the allegations provided in letters to me on 1 September 2017 and 21 May 2018.
>
> Having considered all of the material, I remain of the view that your actions are inconsistent with the Department's Policy Directive 5 (PD5). Your reference to a briefing which purportedly provided 'lawful directives' by then Acting Assistant Commissioner Schilo in February 2015 and an email provided to staff at Hakea by Principal Officer Jacqueline Cooper on 11 February 2015 referenced in your response does not alter my view.
>
> *As I indicated to you in my previous correspondence when I reviewed the CCTV footage with your response, I initially considered a range of alternatives to dismissal. This included reduction in rank, combined with a reprimand and retraining. However your actions and subsequent responses demonstrate that you are unable to reflect on your conduct or accept responsibility for your actions which were disproportionate and excessive in both circumstances.* (My emphasis)
>
> Despite your rank and experience you have disregarded the safety of your colleagues and prisoners in your care. In addition you have obfuscated your actions in your various reports and have shown no contrition.
>
> I take your misconduct extremely seriously and as the Director General I am required to ensure this type of behaviour is not tolerated within the Department of Justice. The community of Western Australia expects high standards of professional conduct and accountability by public officers. The use of excessive force by Prison Officers on prisoners had the capacity to bring the administration of justice by the Department of Justice into disrepute.
>
> In light of the gravity of your conduct, your lack of insight into the excessive nature of your uses of force, and the high standards of professional conduct expected of Prison Officers both by myself, and the Western Australia community at large, I have lost trust and confidence in your ability to conduct yourself in a manner that accords with such standards.
>
> Having considered all the circumstances in relation to both these matters I find that you did commit a breach of discipline as set out in the Act and accordingly dismiss you from your employment with effect from the date of this letter.
>
> You will be paid five weeks in lieu of notice and your dismissal will be effective from the date of this letter. Your Superintendent will arrange the return of all of your uniforms, identification cards, equipment and any other departmental property.
>
> *I also wish to advise you that had you continued in the employment of the Department the Investigations Branch were in the process of serving further allegations on you. Given my decision these allegations will be stayed*. (My emphasis)

Contentions of the parties

17 For the applicant a number of submissions were made. First, he submitted that in relation to both the Bellin and Wharerau incidents, his actions in deploying OC Spray were in accordance with Policy Directive 5 Use of Force (PD5) (pp 92-98 exhibit A1). The applicant contended that he acted consistently with the principles set out in PD5 in that on both occasions when force was used, it was as a last resort and the minimum amount of force was used to control the situation at hand.

18 Furthermore, in so far as s 14 of the *Prisons Act* is concerned, the applicant submitted that at all times he had reasonable grounds to deploy the OC spray to ensure that his lawful orders were complied with. As to the question of training, the applicant noted that the terms of PD5 are to the effect that a prison officer is not to use a force option unless the prison officer has been trained under an approved training course. To the extent that the respondent relied on this as an allegation of misconduct, the applicant contended that the allegation was misplaced. This was because, as the submission went, the responsibility at law was on the respondent to provide appropriate instruction and training and therefore the respondent could not rely on his own failure to train to impose a disciplinary sanction.

19 I should note at this point, that the respondent maintained in his case, that although the training issue formed part of the disciplinary allegation against the applicant, it did constitute a ground of the respondent's decision to dismiss him. It was not mentioned in the letter of dismissal. I will return to this issue later in these reasons.

20 Furthermore, in relation to the deployment of the OC spray, the applicant maintained that he acted in accordance with the Defensive Equipment and Techniques: Chemical Agent Manual (pp153-180 exhibit A1). To the extent that the applicant deployed OC spray a second time on Prisoner Bellin, he did so in accordance with this manual which states that if a subject has not received a full exposure of chemical agent because of defensive behaviour, a further application may be necessary. In this regard, a further submission of the applicant was that even if a second spray in the circumstances was found not to be necessary, this would fall far short of grounds for dismissal. Rather, this would be a training issue.

21 As to the Cooper email, the subject of what the applicant regarded as a lawful direction to prison officers at Hakea Prison, the applicant maintained that he was only acting consistent with his understanding that if there was some doubt in the mind of a prison officer as to the possibility of a physical assault by a prisoner, the officer should use OC Spray in those circumstances.

22 On the key question of whether the applicant's actions were "disproportionate or excessive", as set out in the respondent's letter of dismissal, the applicant contended that this cannot be assessed in a vacuum. Rather, one must have regard to the volatile environment of a prison.

23 As to the contentions by the respondent that the applicant had brought the administration of justice into disrepute, he submitted that there was no basis for this conclusion. Furthermore, objectively considered, there was also no foundation for the respondent's assertion that the Western Australian community at large had lost confidence in the applicant's ability to conduct himself in accordance with the high standard expected of a prison officer. In any event, given that after the incidents concerned, the applicant was placed in higher acting roles in prisons, including a period as the Principal Officer at Hakea Prison, this undermined the respondent's contention in this regard. Objectively viewed, the applicant submitted that a loss of trust and confidence was not a finding that was reasonably open.

24 A number of other submissions were made. First, to the extent that the respondent in his letter of dismissal referred to the service of further allegations on the applicant, had he remained employed, this was said to be inappropriate. It raised the issue as to whether the respondent may have had regard to these unspecified further allegations in his decision to dismiss the applicant.

25 Second, it was contended that the applicant's dismissal was procedurally unfair on a number of bases. This included that at no time did the respondent inform him of what in the circumstances, was the correct manner of dealing with the two prisoners, in order for him to respond. Furthermore, the applicant also contended that at no time were allegations that the applicant's conduct brought the administration of justice into disrepute, or that the respondent had lost trust and confidence in him, ever put to the applicant prior to his dismissal.

26 Finally, it was submitted that given the applicant's length of service, his unblemished record as a prison officer and his promotion into higher acting positions, the respondent's decision to dismiss him was disproportionate to the gravity of his conduct in all of the circumstances. It would be appropriate having regard to all of these matters, on the applicant's submissions, that if his dismissal was found to be harsh, oppressive or unfair, that he be reinstated without loss.

27 The respondent contended that the incidents which took place at Eastern Goldfields Regional Prison involving the applicant and prisoners Wharerau and Bellin spoke for themselves. In particular, the respondent submitted that the second OC spray directed towards Mr Bellin was not justified. Also, based on the letter of dismissal, the respondent submitted that it relied on three issues. First, was the gravity of the conduct itself. Second, was the applicant's lack of insight into his actions and his position that if confronted by the same events he would respond in the same way. This was said by the respondent to be a basis for the respondent's loss of confidence in the applicant as a prison officer, given the level of trust placed in an officer appointed under the *Prisons Act*.

28 Third, the respondent contended that the applicant's obfuscation of his actions in relation to the incidents, his reporting of them and his response to the disciplinary process, contributed to the decision to dismiss. In all of the circumstances, the respondent contended that the applicant's dismissal was justified.

Use of force principles

29 Use of force by a prison officer in the course of his or her duties must be strictly controlled and is, at all times, subject to legal restraint. The appointment, powers and duties of a prison officer in this State are governed by the *Prisons Act*. Section 13 empowers the respondent to appoint prison officers. Under s 13(2), on engagement, a prison officer takes an oath to well and truly serve the State as a prison officer and to maintain the safety and security of a prison, the prisoners and officers employed at a prison. The oath also obliges a prison officer to uphold the *Prisons Act* and all orders, rules and regulations made under it, to deal fairly with prisoners and to obey lawful orders of superiors.

30 Section 14(1) is most relevant for present purposes. It deals with the powers and duties of prison officers. It provides as follows:

> **14. Powers and duties of prison officers**
>
> (1) Every prison officer —
>
> (a) has a responsibility to maintain the security of the prison where he is ordered to serve; and
>
> (b) is liable to answer for the escape of a prisoner placed in his charge or for whom when on duty he has a responsibility; and
>
> (c) shall obey all lawful orders given to him by the superintendent or other officer under whose control or supervision he is placed and the orders and directions of the chief executive officer; and
>
> (d) may issue to a prisoner such orders as are necessary for the purposes of this Act, including the security, good order, or management of a prison, and may use such force as he believes on reasonable grounds to be necessary to ensure that his or other lawful orders are complied with.

31 For the purposes of these proceedings, s 14(1)(d) is most relevant. That empowers a prison officer to use such force as he considers necessary, based on reasonable grounds, to ensure that either his or other lawful orders are complied with. In terms of the meaning of "reasonable grounds" for these purposes, as was stated by the High Court in *George v Rockett* (1990) 93 ALR 483 at 488:

> When a statute prescribes that there must be "reasonable grounds" for a state of mind — including suspicion and belief — it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. That was the point of Lord Atkin's famous, and now orthodox, dissent in *Liversidge v Anderson* [1942] AC 206 : see *Nakkuda Ali v MF De s Jayaratne* [1951] AC 66 at 76–7 ; *R v IRC; Ex parte Rossminster Ltd* [1980] AC 952 at 1000, 1011, 1017–18 ; *Bradley v Commonwealth* (1973) 128 CLR 557 at 574–5 ; 1 ALR 241 ; *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 169 at 180– 1 ; 30 ALR 559 at 566–7 . That requirement opens many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory powers: see, for example, *Attorney-General v Reynolds* [1980] AC 637 . Therefore it must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist.

32 The respondent also has policies in place dealing with the use of force by prison officers. The relevant policy in this case is PD5. By par 1 titled 'Scope' it is provided that "all staff that are involved or could reasonably be expected to be involved in an incident requiring the use of force shall comply with this document". Paragraph 3 entitled 'Principles' is important, and it provides:

> 3.1 In all instances, force shall only be used when all other avenues have been exhausted or are considered impractical. Force must only be used as a last resort.
>
> 3.2 In the instance that force is used, staff should seek to de-escalate the situation and reduce the level of force used as soon as possible.
>
> 3.3. Force shall never be used as a form of punishment.
>
> 3.4 The amount of force used, shall be the minimum required to control the situation or behaviour and maintain security and good order and shall cease when the level of perceived threat can be managed without applying force.
>
> 3.5 Prisoners should not be held in instruments of restraint for any longer than is necessary to control their behaviour.

33 PD5 also deals with training and at par 4 it is provided as follows:

> 4.1.6 Use of force must not be applied by a prison officer unless that officer has successfully undergone a DCS approved training programme.
>
> 4.1.7 It shall be a shared responsibility between the designated Superintendent of each adult custodial facility and the individual staff member, to ensure they remain up to date and competent with the current use of force training packages by accessing training when available.
>
> 4.1.8 All prison officer staff shall be refreshed as minimum once annually in the following training:
> - Use of Force overview
> - Restraints (including batons)
> - Escorts
> - Self Defence
> - Chemical agents.
>
> All DCS staff shall be refreshed, as frequently as mandated by Adult Custodial.

34 All use of force in a prison is required to be preceded by a warning as mentioned in par 4.4 of PD5, that if the prisoner's actions do not cease, force may be used against them and an allowance of adequate time is made for the prisoner to comply. Annexed to PD5 is a further document providing guidance for the use of chemical agents (including OC spray) and distraction devices. It provides that chemical agents may only be used by officers trained in their use; emphasises the importance of initial responses being negotiation and conflict resolution techniques; and reiterates that "where practicable in the circumstances to do so" to issue appropriate orders to restore good order and security of a prison and to tell a prisoner that if they do not comply with the order then chemical agents will be used.

35 The Training Academy is where prison officers undergo their initial and subsequent training. Mr Kentish is a team leader at the Academy. In this position he is responsible for managing training teams and arranging training for officers. He also sometimes undertakes training directly. In relation to the use of OC spray, Mr Kentish referred to the Academy Defensive Equipment and Techniques: Chemical Agent manual at p 168 of exhibit A1. He referred to the "hydraulic needle effect" which is where a high velocity spray may penetrate layers of soft tissue. Specifically, as prison officers are trained to use OC spray by spraying towards a person's eyes, nose and mouth, consideration needs to be given to safe operating distances. In the case of the OC spray used by the applicant, the minimum recommended engagement distance is 1 metre. Mr Kentish accepted however, that OC spray may be used at a closer distance and each case will be dynamic and depend on its circumstances.

36 As part of its training of prison officers, the Academy has a document called "Defensive Equipment and Techniques Use of Force (Adult Custodial)", a copy of which was exhibit R8. Mr Kentish was taken to this in his evidence. The introductory part of this document is relevant. On p 1 it is stated that:

> **Introduction**
>
> Prison officers are involved on a daily basis in numerous and varied encounters with prisoners and when warranted, may use force in carrying out their duties.

> Officers must have an understanding of, and true appreciation for, the limitations of their authority. This is especially true with respect to officers overcoming resistance whilst engaged in the performance of their duties.
>
> Even at its lowest level, the use of force is a serious responsibility. The purpose of this Manual is to provide officers of this Department with guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, each officer is expected to use these guidelines to make such decisions in a professional, impartial, and safe manner.
>
> 'Reasonableness' of the force used must be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any interpretation of reasonableness must allow for the fact that prison officers are often forced to make split-second decisions, in circumstances that are tense, uncertain and rapidly evolving, about the amount of force that is necessary in a particular situation.
>
> There are many factors that can influence use of force in a prison environment and these factors need to be fully understood in order to allow officers the latitude to properly understand, apply and defend their force decisions in order to keep themselves, prisoners in their care and custody as safe as possible.
>
> Using force can put officers as well as prisoners at risk of physical harm and as such, it is essential officers have the skills and knowledge to de-escalate situations (so force is used only as a last resort) and are trained in how to use force safely when there are no other alternatives.

37 In his evidence Mr Kentish was taken to p 6 of the document which is headed "The Use of Force Model". This is a theoretical model used as a tool to assist prison officers in the assessment of a situation with a prisoner that may involve the use of force. The model includes what factors an individual officer brings to a situation and Mr Kentish agreed with the proposition that the model refers to the perception of the officer (p 11) in terms of their own person characteristics, such as prior personal experience, size, strength and fitness etc. These are relevant as to how an officer may react in any given situation. The training manual recognises that two officers may react differently to a situation, depending on their own perception of events.

The incidents

The Wharerau incident

38 On 4 May 2017 in Unit 2, known at the prison as the "Reception Unit" prisoners were being addressed by Principal Officer Parker. The issue raised was prisoners hoarding bedding in their cells and general housekeeping within the unit. One prisoner, Mr Wharerau, complained that a number of his personal items, including soap, which he had purchased from the canteen, were missing from his cell. Mr Wharerau was told that his personal items were at the officers' post. Mr Wharerau became upset. An exchange took place between Mr Wharerau and Principal Officer Parker and Mr Wharerau became aggressive and adopted a fighting stance. Mr Wharerau had some history of fighting with other prisoners at the prison. A considerable number of other prisoners were present in an open area close to where Mr Wharerau was located.

39 Mr Wharerau was ushered by the applicant into a corner of the unit and attempts were made to restrain him. Mr Wharerau refused to comply with directions to cease resisting and took a firm hold of a door handle close to where he was located and refused to let go. He was described as having a "vice like grip" on the handle. the applicant called a "code green" in order to get assistance from other officers. He also called for OC spray and Mr Wharerau was warned that if he failed to cooperate and comply with orders from the officers then OC spray may be used. Mr Wharerau continued to refuse lawful orders to cease his resistance, so the applicant deployed the OC spray. Mr Wharerau was then restrained in handcuffs and escorted from the area.

40 The applicant's evidence was that at the time Mr Wharerau became aware that his personal items had been removed from his cell he started to become very agitated. Mr Wharerau had some history and was known to get into fights with other prisoners. According to the applicant, Mr Wharerau called Principal Officer Parker a "fat c***" and that Principal Officer Parker responded. At the same time, the applicant testified that he observed that a large number of other prisoners in the open area close to Mr Wharerau were milling around. He became concerned that there might be some disturbance created. In cross-examination the applicant said there were some 15 prisoners behind him and he was conscious of a possible escalation.

41 It was at about this point, that the applicant called a "code green". Other officers attended including Officer Idowu. The applicant testified that given the situation developing, he tried to move Mr Wharerau into the corner of the room immediately next to the office window and an entry door. As he was doing so, the applicant said that Mr Wharerau grabbed the door handle and refused to let go. He had a vice like grip according to the applicant. It was at this point, that the applicant asked Officer Idowu to give him OC spray. The applicant's evidence was that he then gave Mr Wharerau two warnings to remove his hands from the door handle or he would be sprayed. I should observe at this point that whilst the respondent, in its initial allegations, contended based on the timing of events, presumably revealed in the CCTV footage, that the applicant failed to warn Mr Wharerau of the use of OC spray, that was not sustained on the evidence and the CCTV footage timing of the events. Counsel for the respondent, in my view properly so, accepted this was the case.

42 By this time, Officer Hinchcliffe was also behind the applicant. As Mr Wharerau was, according to the applicant, remaining non-compliant and was not going to move, and given his concerns as to the number of prisoners milling about behind them and taking an interest in what was occurring, the applicant deployed his OC spray at Mr Wharerau. Unfortunately, the spray hit the window and some spray also got on the applicant and the other officers. Immediately following the spray deployment, Officer Hinchcliffe provided the applicant with handcuffs and the officers secured Mr Wharerau. He was taken out of the room to the containment unit to calm him down.

43 It was put to the applicant in his evidence that in terms of the respondent's training materials, that there may be some risk of injury if the OC spray cannister used, a mark 4 type, was deployed at less than one metre. The applicant also accepted that in terms of his reporting of the incident, that an officer should record the nature of the lawful order given prior to deploying a force option such as OC spray. The Incident Description Reports or "TOMS" reports of the Wharerau incident appear at pp 32-26 of exhibit A1.

44 Principal Officer Parker is the Principal Officer at the Eastern Goldfields Prison. He testified that an incident occurred in May 2017. He was at the particular prison unit to investigate the use of blankets by prisoners and found soap in a cell that he thought belonged to the prison. Principal Officer Parker accordingly took this item to the office. He then addressed the group of prisoners. It was Principal Officer Parker's evidence that Mr Wharerau became vocal at this time and asked for his soap. He came down the stairs from the upper level. Principal Officer Parker referred to the applicant and Officer Idowu being present at this time. Additionally, there were, on Principal Officer Parker's estimate, about 28 to 40 other prisoners present in the immediate area.

45 It was Principal Officer Parker's evidence that the applicant started moving Mr Wharerau away from him. However, Mr Wharerau continued to come back towards him. Principal Officer Parker said that he foresaw some problems in removing Mr Wharerau at that point. His evidence was that he then tasted OC spray and he went outside.

46 As a part of his responsibilities as the Principal Officer, it was Mr Parker's job to review CCTV footage in relation to such incidents. Principal Officer Parker's evidence was that in the circumstances that occurred on that day, he had no concern with the use of OC spray by the applicant. The prisoner was clearly not complying with his direction. Principal Officer Parker also added that he could see that the applicant was initially trying to de-escalate the situation and to calm Mr Wharerau down.

47 Officer Idowu was a probationary officer at the time of this incident. His evidence was that Principal Officer Parker had undertaken a cell inspection and all laundry in the cells was removed. Mr Wharerau's soap was removed and put in the office. Mr Wharerau became upset by this and he became abusive towards the Principal Officer and also Officer Idowu. Officer Marshall was also present at the time. According to Officer Idowu, the applicant called a "code green". Officer Idowu also mentioned that there were a significant number of other prisoners present and the situation was unpredictable. He testified that the other prisoners present may have been incited to act. He saw the applicant direct Mr Wharerau towards the corner of the room where Mr Wharerau grabbed hold of the door handle and would not let go. Officer Idowu's evidence was that because of this, handcuffs could not be used. He heard the applicant give two warnings to Mr Wharerau that if he did not let go then OC spray would be used.

48 As mentioned above, this is quite at odds with the inference drawn by the investigators that from the CCTV footage, the applicant did not likely have sufficient time to warn. The applicant then deployed the spray and it bounced off the windows and struck the officers also. In his evidence, Officer Idowu agreed that it was important to act quickly in the circumstances that developed on that day. There was a significant chance of an incident occurring as Mr Wharerau was a large prisoner and there was a significant chance of an assault on officers. Evidence was given on behalf of the applicant by Ms Reynolds, presently the Assistant Superintendent of Operations at Bandyup Women's Prison. Ms Reynolds is an officer of some 20 years' experience, including as a senior officer at Hakea Prison. She testified that she worked with the applicant for over five years at Hakea and found him to be a very professional officer well acquainted with prison rules and procedures. Other staff would go to him for advice and guidance.

49 Assistant Superintendent Reynolds was asked about the Cooper Email and she said she remembered it well. She took this as a directive to officers. It came about because of assaults on officers by prisoners and meant that chemical agent should be used rather than having physical contact with prisoners, due to the risk of assaults. It was Assistant Superintendent Reynold's evidence that OC spray was used regularly at Hakea in more volatile areas of the prison in relation to prisoners who were non-compliant, when not following a direction. She accepted that the email directive must be understood and applied in accordance with the PD5 policy on use of force and s 14 of the *Prisons Act*.

50 Assistant Superintendent Reynolds had been shown the CCTV footage of both incidents but had not been given any other information about the incidents or these proceedings by the applicant's solicitors. She had no contact with the applicant prior to giving her evidence. When reviewing the footage, she expressed the view in relation to the Wharerau incident, that there were a lot of other prisoners out of their cells and milling around the area. In her view, it looked like a situation that could escalate and get out of control. Assistant Superintendent Reynold's assessment was she would probably have acted in the same way as the applicant did given the circumstances. In particular, she emphasised the importance of officers getting situations like the Wharerau incident under control quickly, because of the risk of escalation.

51 Officer English is a senior prison officer who has about 27 years' experience. He is currently at Banksia Hill Detention Centre. Senior Officer English has previously acted as Principal Officer and Assistant Superintendent level at Hakea Prison over a number of years. At Hakea, Senior Officer English worked closely with the applicant and described him as a "great senior officer" who had been in charge of the prison as Principal Officer with him on a number of occasions when the other senior management had either left for the day or were otherwise absent. This included occasions when the applicant handled critical incidents in the prison. He also gave evidence about the Cooper Email and that it arose out of an officers debrief meeting usually held on Mondays and Fridays, or possibly every day. However, he could not recall how frequently the meetings occurred at that time at Hakea.

52 Senior Officer English mentioned that the Superintendent Schilo had spoken about the high level of workers' compensation cases from officers being injured in prisoner assaults. The Cooper Email was in response to this and was to the effect that officers should not use physical force with non-compliant, violent prisoners, rather OC spray should be deployed instead. Senior Officer English took this as a directive and he passed it on to officers he supervised. As with Officer Reynolds, Senior Officer English understood the directive also had to be read along with PD5 and the *Prisons Act*.

53 In relation to the Wharerau incident, Senior Officer English had viewed the CCTV footage relatively recently. He said that he saw that there were about 18 other prisoners in the immediate area. In his experience, he said it is paramount to get the non-compliant prisoner out of the area and constrained as quickly as possible, as it doesn't take much for other prisoners to get involved in the incident. Senior Officer English's evidence said the best approach in that situation is to "cordon and contain" and he thought what was done in relation to Mr Wharerau was correct. He also observed that at the time there was an Assistant Superintendent and Principal Officer present and if they had any problems with the way the applicant was handling the situation, they could have done something about it. When it was put to him that there are recommended minimum distances

over which OC spray should be deployed, Senior Officer English said having reviewed the footage, he would have acted in the same way as the applicant did.

54 Evidence was also given by Acting Deputy Commissioner Blenkinsopp on behalf of the respondent. Mr Blenkinsopp's substantive position at the time of the hearing was Superintendent at Hakea Prison for two and a half years and for a number of years prior to this had been the Superintendent at Greenough Regional Prison. Acting Deputy Commissioner Blenkinsopp has also held senior management positions with the respondent and is a very experienced and decorated officer. He had reviewed the CCTV footage on the morning of the hearing. In his view, as there were a number of officers present at the time, they could have assisted in getting Mr Wharerau to release his hands from the door handle without the need to use OC spray.

55 Superintendent Hedges is the prison superintendent at Eastern Goldfields Regional Prison. As the superintendent at the prison, Superintendent Hedges is not only a very experienced officer, but is familiar with the staff at the prison and the prisoner cohort. As a part of his duties as Superintendent, he undertook a review of the use of force. Superintendent Hedges prepared a report as is required. A copy of the report appears at pp 37-42 of exhibit A1. The main body of Superintendent Hedges' report on p 37 reads as follows:

> **Designated Superintendent's Overview (including actions taken and any recommendation(s))**
>
> The Unit 2 prisoner group were being addressed by Principal Officer Parker regarding the hording of bedding items and general housekeeping. Following this, Ralph Wharerau requested to know the location of his canteen purchases, which had been removed from his cell. Mr Wharerau was informed it was within the officer post, he became verbally abusive towards PO Parker and allegedly adopting a fighting stance.
>
> Mr Wharerau was ushered against a wall in an attempt to restrain him and calm the situation. Mr Wharerau refused to present his hands for officers to mechanically restrain him, grabbing hold of the door handle and refusing to let go. Mr Wharerau refused several orders to stop resisting. Mr Wharerau was issued a warning by Senior Officer Hawthorn if he continued his non-compliance Chemical Agent may be used. Mr Wharerau ignored all negotiations and warning, continuing to refuse the lawful order. Chemical Agent was sourced from the Unit office and deployed by SO Hawthorn.
>
> Mr Wharerau was mechanically restrained and relocated to MPU Cell E05, where the restraints were removed, strip searched, decontaminated from Chemical Agent exposure and seen by EGRP medical. Nil injuries have been identified.

56 Superintendent Hedges concluded in the Report that the use of force in the circumstances was "adequate to control the situation and prevent it from escalating". His evidence was the circumstances which arose on that day constituted a volatile situation. Superintendent Hedges testified that this was his view when he made the Report, and this remained his view as at the time he gave evidence in these proceedings. I agree. There was plainly, as Superintendent Hedges and Officer Idowu identified, a risk of involvement of other prisoners. From a review of the CCTV footage, which I have studied carefully, especially from the full room angle, there were a considerable number of prisoners milling about and taking an interest in Mr Wharerau's interaction with the officers. They were edging closer. It was also clear from the CCTV footage, although the lack of audio is a limitation, that Mr Wharerau was becoming argumentative and non-compliant. Situation awareness, as all of the respondent's training material emphasises, is important. This was a factor which Superintendent Hedges considered. I agree with this also.

57 His assessment of the incident was consistent with the evidence of Principal Officer Parker, Officer Idowu and the applicant. I would add that the officers called on the applicant's behalf also supported this assessment, although it was, as with Acting Deputy Commissioner Blenkinsopp's evidence, based on an after the event assessment with all of the limitations that involves. In saying this, I found the evidence of these witnesses to be credible. Superintendent Hedges' view was also consistent, as I have just observed, with the respondent's training materials in relation to use of force guides. As the most senior officer and the Superintendent, who is under the *Prisons Act* responsible for the good order and security of the prison, I found Superintendent Hedges' evidence very persuasive. Having regard to how the incident unfolded, it is difficult to see how else the applicant could have rendered Mr Wharerau compliant in the circumstances. In my view, the actions of the applicant on all of the evidence, were consistent with the respondent's training materials and the respondent's criticisms of his actions were unwarranted.

58 The evidence of Principal Officer Parker, not contradicted, was that the applicant attempted to de-escalate the situation by calming Mr Wharerau down. When this was not successful he then ushered him towards the corner of the room to move him away from the immediate area and particularly, further away from the large number of other prisoners who were taking an active interest in the situation. Those actions are entirely consistent with a prison officer's training, at least as presented on the evidence in these proceedings. Whilst the applicant was subject to some criticism in deploying the OC spray at a distance which was said to be too close, I note from the training materials that the one metre distance is a recommended distance and that Mr Kentish's evidence was that each case must be assessed in accordance with its circumstances.

59 On all of the evidence adduced in this matter, I conclude that the deployment of OC spray by the applicant in the Wharerau incident was justified. It did not, having regard to all of the circumstances, constitute the use of unreasonable force.

60 As to allegation 2, in relation to the applicant using OC spray when his refresher training was not up to date, the respondent submitted that despite this allegation being sustained, this could not be a basis, of itself, for the applicant's dismissal. Whilst the allegation was not abandoned, there was no reference to it in the respondent's dismissal letter. Nor did it seem to form part of the respondent's reasons for decision in its letter of 25 May 2018. In the absence of the Director-General or other senior executive directly involved in the decision making to dismiss the applicant being called to give evidence, this was the only evidence before the Commission as to the basis for the respondent's decision. No reason was advanced as to why the principal decision-makers were not called to give evidence in these proceedings. One would expect them to be. This course of action by an employer is not helpful and is not to be encouraged. Similar observations were made by the Full Bench recently in the context of an appeal from a decision by the Education Department to dismiss a teacher: *State School Teachers' Union of WA (Incorporated) v Director-General Department of Education* [2019] WAIRC 00175; (2019) 99 WAIG 336 at par 86. This

applies not just to the decision to dismiss but also to the questions of what remedy might flow, in the event that a claim is upheld.

61 As I have already noted the training allegation was not expressly abandoned by the respondent. As it was an allegation found to have been made out but did not feature in the letter of dismissal, its relevance to the decision to dismiss is, regrettably, somewhat ambiguous. This is made all the more so by the absence of evidence from Mr Tomison or other senior executives of the respondent, as to what extent, if any, it was relied on by the respondent. However, I simply note, as was raised during the course of the hearing of this matter, that under s 19(1)(b) of the *Occupational Safety and Health Act 1984* (WA), as a part of an employer's general duty of care, there is an obligation to provide "such information, instruction and training to, and supervision of, the employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards; …" This is an obligation that cannot be contracted out of. Whilst the respondent may also require an officer to undergo appropriate training, and failure to do so may constitute a disciplinary matter, the primary obligation, as a matter of law, rests with the employer.

The Bellin incident

62 On 20 May 2017 the applicant was managing the Crisis Care Unit at the prison. A prisoner, Mr Bellin, who was on remand, was enquiring about the status of his surety with prison staff. Mr Bellin was told that his surety had been arranged and it would be completed by the following morning. The prisoner was not responsive to this information and he continued to demand a telephone call to arrange his surety. Mr Bellin became increasingly argumentative and at some point, picked up a plastic chair and adopted a fighting stance. The applicant requested OC spray. Mr Bellin made threats to fight both the applicant and the officers present. Mr Bellin took off his t-shirt and eventually wrapped it around his face in an attempt to deflect any OC spray if it had been deployed at that point. The applicant, in the company of two other officers, Officers Bruynzeel and Mulvaney, both of whom were probationary officers at the time, pushed Mr Bellin back towards his cell. Mr Bellin remained non-compliant.

63 On reaching the cell door, Mr Bellin attempted to grab hold of the door frame, but the applicant pushed him into the cell. The applicant deployed OC spray once at Mr Bellin and then a second deployment was made shortly after. The cell door was then shut. Because Mr Bellin remained in an agitated state, he was shortly thereafter extracted from his cell and placed in a safe cell.

64 The Bellin incident involved the allegation of excessive use of force. Given the terms of the relevant legislation, this is a serious allegation and one which in my view, without question, attracts the higher threshold of proof as set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336. Having regard to the context and surrounding circumstances, on a review of all of the evidence, including the CCTV footage, there could be no criticism of the applicant withdrawing the OC spray cannister from its pouch whilst he, the other officers and Mr Bellin were in the common room. He obtained the spray from Officer Mulvaney. A warning was given by the applicant to Mr Bellin that unless he obeyed the directions for him to return to his cell, then OC spray would be used. Officer Bruynzeel confirmed this was the case, although Officer Mulvaney could not recall this but assumed a warning had been given. As the applicant said in his evidence, the purpose in his actions in this regard, was to render Mr Bellin compliant by the fact of withdrawing the OC spray cannister itself, without the need to use it.

65 Plainly however, Mr Bellin became increasingly agitated and aggressive in relation to the dispute concerning his surety. This was the evidence of the officers who were present at the time. Mr Bellin adopted a fighting stance and picked up a chair, although I do not consider that this was done, from the CCTV footage, with the evident intention to use it to strike any of the officers. However, it is clear from the CCTV footage and the evidence of the applicant, Officer Mulvaney and Officer Bruynzeel, that Mr Bellin remained in a highly agitated state when he was escorted up the corridor towards his cell. At no stage could it be reasonably concluded that Mr Bellin had become compliant prior to reaching the cell door. It is what then occurred that is critical.

66 Mr Bellin was escorted by the applicant to the cell door and Officers Mulvaney and Bruynzeel were following just behind. Officer Bruynzeel testified that as a new officer he had never been in such a situation or faced such a highly agitated prisoner and he found it "fairly scary" and overall, "confronting". Officer Mulvaney also confirmed the state of agitation of Mr Bellin. She agreed that Mr Bellin's behaviour was abusive and threatening under the rules of the prison. With respect to Officer Bruynzeel, and I do not make any criticism of him, but he provided little assistance to the applicant during the incident. This was most likely because he was only a probationary officer at the time and the situation was as he said, very confronting. Indeed, Officer Mulvaney said in her evidence, that she had to move Officer Bruynzeel out of the way before they moved up the corridor. While I am commenting on this, I cannot accept the criticisms by the respondent of the applicant, when he said his colleagues on the day provided him little assistance, and the respondent's assertion that he was attempting to shift blame for the incident to the other officers. Any reasonable assessment of the CCTV footage shows that the applicant did almost all of the work in containing Mr Bellin.

67 From the CCTV footage, immediately prior to arriving at the cell door, Mr Bellin looked to his right seemingly to observe where the applicant was, relative to his own position. The footage however shows that at the point the cell door was reached, Mr Bellin actively resisted entry to the cell and took hold of the cell door by its leading edge. At this point, Officer Mulvaney was still behind and to the left of the applicant and she was not on the other side of the door in order that it may have been quickly shut at that point. Officer Mulvaney said when they got to the door of the cell she made her way behind it and put the key in the lock. She said that she was ready to shut the door. The CCTV footage however shows there was some delay before this happened. On my reckoning there was a period of about four to five seconds between when they arrived at the cell door and when Officer Mulvaney moved to the right-hand side, to be in a position to shut the door.

68 What then occurred is in my view important. Mr Bellin, when holding the leading edge of the door is plainly resisting entry to the cell. The applicant said this in his evidence. The applicant also said that Mr Bellin was also still abusive and threatening towards the officers. Momentarily however, the CCTV footage shows that Mr Bellin moved back to his right and towards the applicant. He then moved quickly to the left through the door and at the same time, the applicant prepared to and deployed the first spray. His evidence was that he deployed the first spray as Mr Bellin was running into the cell and when he was about

three quarters of the way inside it. At this point, and just prior to Mr Bellin entering the cell, Officer Mulvaney was still not in a position to shut the door. As I have noted above, a period of about four to five seconds elapsed from the time the officers and Mr Bellin reached the cell door and before Officer Mulvaney was on the other side of the door and seemed to be, from the footage, putting the key into the door lock. It was only after the second spray, that Officer Mulvaney seems to be in the position to close the cell door but cannot because the applicant remains in the entrance. It was Officer Mulvaney's evidence that she could have shut the cell door earlier had the applicant not been in the doorway.

69 The applicant testified that the first spray was deployed because when the prisoner had moved into the cell he gestured as if he was going to come back at the officers again. The first spray was also directed at the prisoner because the applicant said he told him to move to the back of the cell and was attempting to keep him there. I pause to note that as explored quite extensively in cross-examination, the reference to the further direction for Mr Bellin to move to the back of the cell in the applicant's evidence was the first occasion this explanation had been given for the use of the OC spray. It was not referred to in the applicant's responses in the disciplinary investigation, in his private examination before the Corruption and Crime Commission (CCC), or in his various reports of the incident. Nor could Officers Bruynzeel or Mulvaney recall any other directions given to the prisoner in this respect.

70 It was the tenor of the applicant's evidence that once in the cell Mr Bellin remained non-compliant. He continued his abusive behaviour. Whilst the applicant accepted from the CCTV footage that just prior to the second spray the prisoner was on or just about on the bed covering himself with bedding, he added that Mr Bellin was inching down the bed. Also, the applicant justified his second deployment of OC spray because the first had not been effective and had not contacted the prisoner. This was said to be consistent with the respondent's training material on the use of chemical agent that if the first spray is not effective because the target is covering up for example, a second spray should be deployed. It was the applicant's evidence also that he sprayed the second time to keep the prisoner on the bed and he needed to be sure that he was affected by the spray.

71 Officer Mulvaney's evidence also was that at the cell door Mr Bellin remained very agitated and very aggressive. In her Incident Description Report completed shortly after the incident (see p 23 exhibit A1), which she accepted was the best reflection of her views at the time, Officer Mulvaney said "When he (Bellin) was almost at his cell BELLIN removed the t-shirt from his face, and I believe he would have struck Senior Officer HAWTHORN had he not used chemical agent." She further said in her evidence that she believed that the situation by the time the cell door was reached was escalating between Prisoner Bellin and the applicant. Officer Mulvaney said that it was more than likely in her view that the applicant would have been assaulted if the exchange between the two of them had continued. Whilst Officer Mulvaney was not entirely sure from where she was standing, she thought that Mr Bellin was only sprayed once whilst close to the door. However, when she saw the CCTV footage, she saw that there were two sprays.

72 Officer Mulvaney accepted that some two months or so after the incident, during the disciplinary investigation, she had some difficulties recollecting the detail of the incident and needed to refer to her IDR in order to respond to questions. Importantly, Officer Mulvaney made the point that whilst they formerly could, officers no longer, at the time of these incidents, had the benefit of reviewing CCTV footage prior to completing their IDR. She also said that on reflection, it would have been better if the cell door had been shut earlier, avoiding the need to use the OC spray.

73 Officer Bruynzeel also completed an IDR very shortly after the incident and it appears at p 28 of exhibit A1. In it, after narrating the build up to the cell door events, he said that "When he was almost at his cell, BELLIN removed the t-shirt from his face, and continued in a manner that was highly aggressive and leading towards physical action against Senior Officer HAWTHORN had he not used chemical agent". He said that at the time this was written, shortly after the incident, this was his belief. Officer Bruynzeel added that this was written with his lack of experience and he perceived Mr Bellin as a threat at the time. As with Officer Mulvaney, Officer Bruynzeel seemed to have had a change of heart over the intervening period, which included the disciplinary investigation into the applicant; the CCC investigation; and the benefit of a review of CCTV footage. His evidence was that with the benefit of hindsight, he now thought the door to the cell should have been shut, without the need to use OC spray. The applicant, in his IDR, described Mr Bellin in the common room as being belligerent and argumentative. He instructed staff to return him to his cell. The applicant continued that "I started to push him towards his cell which he started to go to, he stopped at least twice more resulting me in having to push him. It was when he reached his cell did he turn and made a gesture that he was going to continue to fight, I gave him a push into his cell it was then he went to come back at me so I deployed the Chemical Agent…" (exhibit A1 p 29). I note that this particular action of Mr Bellin, was consistent with the applicant's IDR. The applicant referred to Mr Bellin making a gesture that he was going to continue to fight. He then pushed him into the cell. Mr Bellin then hesitated, and the first spray took place.

74 Assistant Superintendent Reynolds said that when she reviewed the CCTV footage she saw Mr Bellin grab either the applicant or something on the door just before he went into the cell. She was of the view that one of the other officers could have pulled the applicant by his belt out of the way, so the door could have been shut earlier. She described this as a standard practice. Senior Officer English also said that, consistent with what is done at Hakea and at Banksia Hill, one of the other officers should have pulled the applicant back away from the door, so it could have been shut quickly. This is what he referred to as a "hot exit". He also put emphasis on the perceptions of an officer at the time of an incident, in accordance with their training. On his review of the CCTV footage he said he would have reacted in the same way. Acting Deputy Commissioner Blenkinsopp said that he didn't think that OC spray was necessary and that the prisoner could have been handcuffed and the cell door should have been shut to contain the prisoner. Whilst he had not heard of the phrase "hot exit", Acting Deputy Commissioner Blenkinsopp accepted that the other officers present in that situation, could help in moving an officer away from the cell door.

75 From all of the evidence, I draw a number of conclusions from this sequence of events. Firstly, Mr Bellin was a young and fit male prisoner in an aggressive state. From the respondent's training materials, the perception of a prison officer in relation to such matters is relevant. I accept also on the applicant's evidence, that his prior history, having been previously assaulted by prisoners, may have shaped his perception of the events up to this point. Secondly, at the point of reaching the cell door,

Mr Bellin was actively resisting entry into the cell. His momentary action at moving back towards the applicant, in the context of Mr Bellin's actions and demeanour leading up to that point, would be on any reasonable view, sufficient to create an apprehension in the mind of a reasonable person, that Mr Bellin may have been intending to physically engage with the applicant or the other officers.

76 That conclusion was plainly open, having viewed the CCTV footage. From the CCTV footage, along with the situational factors and matters of perception that I have referred to, along with the fact that Mr Bellin was resisting at the cell door, and his momentary moving back towards the officers, would be sufficient to create reasonable grounds for a state of mind of a prison officer in the applicant's position, that Mr Bellin may engage physically with the applicant or the other prison officers. Additionally, there can be no doubt that there had been a previous direction for Mr Bellin to return to the cell. This direction did not mean that Mr Bellin was to remain standing outside of it. It was obvious that the lawful direction from the applicant was for Mr Bellin to return into his cell and to stay there.

77 Having regard to these factors, it is not without some oscillation, that I do not think that the first OC spray deployment, constituted an excessive use of force. It is easy with the benefit of hindsight, and not being present in the heat of the moment, to assess whether matters could have been handled differently up to that point. I note that in the Investigator's letter of 7 December 2017 to the applicant, the same concession seems to have been posited, that the first spray may have been justified. This was also mentioned, not insignificantly, in the letter of 25 May 2018, setting out the respondent's findings in relation to both incidents. In my view, having regard to all of the relevant circumstances, it was justified. However, for the following reasons, I have come to different conclusions in relation to the second OC spray delivered by the applicant.

78 A review of the CCTV footage from all of the camera angles shows that once Mr Bellin was inside the cell and prior to the second OC spray he was moving towards and was then on the cell bed, attempting to cover himself with blankets. I have no doubt from the footage that he did so to avoid the effect of any further OC spray. However, I consider that by this point, Mr Bellin was acting defensively. I do not consider that by this time, Mr Bellin constituted a threat to either the applicant or the other two officers who were present at the cell door. Once the first spray had been deployed, I consider that the applicant should have stood clear and the cell door should have been shut by Officer Mulvaney. This is despite the fact that the first spray seemed to have either missed Mr Bellin completely or had little or no effect on him.

79 I do not consider that once Mr Bellin was on the cell bed attempting to cover himself with bedding, that this could create the apprehension in the mind of a reasonable person, that Mr Bellin may have posed a threat to the safety of the applicant or the other officers. It was contended by the applicant that the second spray was deployed because the first was ineffective, as Mr Bellin had not been exposed to the full effects of it, in accordance with the respondent's own policy PD5. However, even if this was so, once Mr Bellin was in the cell and on or close to the cell bed, the need for the deployment of spray for any reason fell away. The cell door should have been shut to contain the prisoner. Most aptly, I do not consider that the second spray was justified to ensure that Mr Bellin was complying with the lawful order to return to and remain in his cell. By that time the order had been complied with. Even if, as the applicant maintained, that a further direction was given by the applicant for Mr Bellin to move to the rear wall of the cell, the further use of OC spray was not necessary to ensure that such an order was complied with.

Consideration

The Cooper Email

80 As noted earlier, this issue seemed to assume some importance in the applicant's case. The contention advanced was that the email from Principal Officer Cooper at Hakea Prison of February 2015, constituted a direction to prison officers, at least at Hakea, to use OC spray if some doubt existed as to whether a prisoner may become violent towards a prison officer. Even though the applicant was on secondment to the Eastern Goldfields Prison, he contended that the Cooper Email formed part of the factual matrix and had some influence on his response in relation to the two incidents. This direction was said to have been issued at the time Superintendent Schilo was the Superintendent at Hakea Prison and was discussed at an officer "debrief" meeting, which Superintendent Schilo was said to have attended.

81 In order to clarify the uncertainty surrounding the status of this document, the Commission relisted the proceedings to take further evidence. Superintendent Schilo, who is now Superintendent at Casuarina Prison, gave evidence. He testified that he had been the superintendent at Hakea Prison on a number of occasions. Superintendent Schilo was shown a human resources document (exhibit R9), that suggested that he was not at Hakea Prison until 16 February 2015, a few days after the date of the Cooper Email. Superintendent Schilo was not, understandably, able to independently recall the dates that he was at Hakea Prison and relied on exhibit R9 for these purposes.

82 According to Superintendent Schilo, "debrief" meetings at Hakea Prison are normally held on a Monday and Friday each week. These involve the Superintendent and senior officer group. Superintendent Schilo could not recall if he was at a debrief meeting when the content of the Cooper Email was discussed. When it was put to him however, Superintendent Schilo accepted that he probably would have been at the debrief meeting on Monday 16 February 2015 and the Cooper Email may well have been discussed but he had no independent recollection of this. He understood that the email arose because of the number of prison officer injuries at Hakea Prison, resulting from prisoner assaults.

83 In the final analysis, I am not persuaded that much weight can be placed on this communication. Firstly, it was issued by a principal officer at Hakea Prison and not the Eastern Goldfields Prison. It was directed to senior officers at Hakea to address specific circumstances that had arisen at that prison in relation to assaults on prison officers by prisoners and injuries sustained. Secondly, it is also clear that the suggestion in the Cooper Email that "if in doubt get the spray out" is, as it must be, qualified by the terms of the respondent's PD5, governing the use of chemical agents in a prison. It also, of course, must be read in the context of the law, in particular s 14 of the *Prisons Act*. Accordingly, I do not consider that it can be relied on by the applicant to provide any justification for in particular, the second OC spray deployment in the Bellin incident.

Joint basis for decision to dismiss

84 As noted earlier in these reasons, the respondent treated both the Wharerau and Bellin incidents together for the purposes of its decision to dismiss the applicant. This issue was the subject of submissions from the parties in the event that the Commission found that one of the incidents of the deployment of OC spray was not unreasonable or an excessive use of force.

85 For the applicant it was contended that the effect of this "fractured" the decision to dismiss and that it should fall away. The applicant contended that if the Commission found that the Wharerau incident did not constitute an unreasonable use of force, then apart from fracturing the decision to dismiss in the way contended, the incident in relation to Mr Bellin could not, taken alone, justify the dismissal of a prison officer of 22 years' experience, 11 of which with the respondent and with an unblemished record of employment.

86 The respondent accepted that if, as I have in fact found, the Wharerau incident fell away and reliance is solely placed on the Bellin incident, then the "correctness" of the decision was open to question. Submissions where made by the respondent that this could, but would not necessarily, make the applicant's dismissal unfair.

87 Whether a dismissal is harsh, oppressive or unfair, involves an assessment of whether an employee has been given a fair go all around and whether the respondent's decision to dismiss, involves an abuse of the right to do so: *Miles v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous WA Branch* (1985) 65 WAIG 385. It is for the Commission in the exercise of its discretion, to have regard to all of the circumstances of a case. In this matter, it is clear that both incidents were taken together by the respondent as the justification for its decision that dismissal was the appropriate outcome. This is set out in the respondent's letter of 25 May 2018, under the heading "Reasons for Decision" and also the heading "Proposed Disciplinary Action". The respondent also considered that the applicant had "obviated his actions" in his various reports. Although, in this respect, as I comment later, at no time did this issue form any part of the allegations against him. Also, in the final letter of 11 July 2018, reference was made to the applicant not being able to reflect on his actions.

88 Nowhere does the respondent say in either of these letters, that the applicant's conduct in respect of only one incident, could form the justification for its decision to dismiss him. This is particularly so when regard is had to the comments by the Director-General in his letter of 11 July 2018, that he considered other options to dismissal, such as reduction in rank along with a reprimand and retraining. However, it seems that the respondent's view that the applicant was not able to accept responsibility for his actions assumed some significance in the Director-General's decision and appears to have "tipped the scales" in terms of the respondent's ultimate decision. That this is so, only goes to further illustrate that if one of the incidents forming a foundation for the respondent's decision to dismiss is removed, then the rationale for the dismissal itself is undermined.

89 In this circumstance, it is difficult to see how the decision to dismiss could be other than unfair. Even if I am incorrect in this conclusion, the issue can be tested as to whether reliance on the one incident alone, in relation to the second OC spray of Mr Bellin, in all of the circumstances, not just some of them, would warrant the ultimate sanction of dismissal. I do not consider that it would. I have already found that the first OC spray in Mr Bellin's case was justified, but not the second. This action must be seen in the context of the applicant's unblemished record of service over 11 years and his prior commendations. It must also be seen in the context of the whole incident with Mr Bellin, from the very beginning in the common room, and ending up with Mr Bellin being extracted from his cell because of his level of agitation and aggression.

90 The fact that the applicant has said in the past to investigators and in his evidence in these proceedings, that he considered his actions appropriate, and for which he was punished by the respondent, as forming part of its decision to dismiss him, is also undermined by the conclusion that in relation to the Wharerau incident, the applicant's actions were justified, and the use of force was not unreasonable. In that context, the applicant's subsequent statements that he would have acted in the same way if confronted by these circumstances again, cannot be the subject of criticism in relation to the Wharerau incident, as the view of his senior colleagues responsible for reviewing his actions at the time, was also that his conduct was reasonable.

91 I therefore do not consider that the Bellin incident alone, having regard to all of the circumstances, justified the dismissal of the applicant. It may warrant a reprimand and retraining, but not the loss of his job after 11 years of good service. Nor in my view, even though its significance in the mind of the employer at the time of its decision was unclear, could the addition of the training allegation "tip the scales" to make an unjustified dismissal, justified.

Obfuscation of actions

92 The contentions of the respondent in respect of this issue, from its letters of 25 May and 11 July 2018, were not entirely clear. The correspondence referred to the applicant obviating his actions in his various reports. No detail of these contentions was put to the applicant by the respondent at any time, either in the course of the disciplinary investigations or subsequently. The respondent in its notice of answer in these proceedings referred to other bases to support the fairness of the dismissal of the applicant, in the event that the allegations the subject of the disciplinary process were not, or not all, made out. This was to the effect that the applicant made inaccurate or false reports in relation to both the Wharerau and Bellin incidents. These allegations were the subject of an investigation by the CCC which resulted in a report, published on 27 June 2018. The CCC Report reached the opinion that the applicant engaged in serious misconduct in relation to his reporting obligations.

93 It was accepted by counsel for the respondent that none of the allegations against the applicant that were the subject of the CCC Report were put to him as disciplinary allegations in relation to either the Wharerau or Bellin incidents. They appear to have emerged and been progressed subsequently. Thus, there was no compliance with s 81(1)(a) of the *PSM Act* and the Commissioner's Instruction No 3 Discipline – general, that obliges employing authorities whose employees are subject to Part 5 of the *PSM Act*, to comply with its terms. There can be no doubt that as a result of legislative changes made in 2014, prison officers are now prescribed for the purposes of s 76(1)(b) of the *PSM Act* and are subject to Part 5 of the *PSM Act*, in relation to disciplinary matters: s 8 *Prisons Act*.

94 Thus, the respondent, in undertaking disciplinary action against a prison officer, is subject to the rigours of the public service and public sector regime that applies. In particular, the Commissioner's Instruction requires, as a minimum obligation, that pars 1-1.10, in relation to procedural aspects of dealing with a disciplinary matter are complied with. In particular, no finding can be made against an employee in relation to an alleged breach of discipline, unless the detail of the alleged breach is put to the employee in writing; the possible consequences for the employee if a breach of discipline is established; and a reasonable opportunity to respond to the allegation is afforded to the employee. Furthermore, before any proposed action is taken by the employer, in relation to the allegation, the employee is to be given an opportunity to respond to the proposed action.

95 None of this occurred in this case, in relation to the assertions made against the applicant that he obviated his actions in relation to his reporting obligations. There has been no compliance with these mandatory statutory obligations in the case of any allegations concerning the applicant's reporting of the use of force in relation to either the Wharerau or Bellin incidents. Nor I might add, has the respondent sought to take disciplinary action against the applicant, as a former employee, as it may do so under s 76(4) of the *PSM Act*, in relation to any such allegation. It may well be that these matters are what the Director-General referred to in his letter of dismissal of 11 July 2018, in the final paragraph, where reference is made to "further allegations" that were to be served on the applicant, which given the decision to dismiss, were to be stayed. In the absence of any confirmation by the respondent that the reporting issues somewhat fleetingly adverted to in the correspondence, are what the Director-General was referring to, is at this point, merely speculative.

96 Whilst on this point, it is not appropriate to foreshadow "other allegations" of breaches of discipline in this manner, when communicating a decision to dismiss an employee. It raises the prospect that those other matters may have had some influence on the decision maker. This is particularly so where, as in this case, there has been an investigation and opinions reached by another body. A similar observation to this effect was made previously by the Commission in *SSTU v The Director General, Department of Education* [2015] WAIRC 00517; (2015) 95 WAIG 1461 per Scott C at 1468.

97 The issue that arises from all of this is to what extent can the respondent rely on these matters now, in these proceedings, to either, as asserted in its notice of answer, justify the decision to dismiss the applicant or, alternatively, to resist reinstatement, in the event that the Commission makes a finding of unfairness. In my view, the answer to this question partly lies in the *Corruption Crime and Misconduct Act 2003* (WA) (*CCM Act*) and partly lies in established principle.

98 Under the *CCM Act*, the CCC is empowered to investigate allegations of serious misconduct by public officers as set out in s 4 of the *CCM Act*. Notably, for present purposes, it is subject to the qualification in s 4(d)(vi) that such conduct "constitutes or would constitute a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the Public Sector Management Act ..."

99 The CCC may assess, provide an opinion and investigate allegations of misconduct by a public officer under Part 3 Division 4 of the *CCM Act*. The CCC may make recommendations as to whether disciplinary action should be taken against a person in respect of whom an opinion of the commission of serious misconduct has occurred. Other recommendations may be made too: s 43(1) *CCM Act*. Importantly however, any recommendation as to disciplinary action is not and is not to be taken to be, a finding that a person has engaged in conduct that warrants, among other things, termination of employment.

100 Thus, with respect, the CCC Report is not, for the purposes of these proceedings, evidence of the commission of misconduct by the applicant that would warrant his dismissal. In accordance with the statutory scheme in the *PSM Act*, in relation to disciplinary matters, it is clear in my view, that the respondent would need to commence disciplinary action and make its findings as required by the statute and the Commissioner's Instruction.

101 Thus, for the respondent to now seek to rely on the CCC Report, the content of which has been the subject of very little evidence before me in these proceedings in relation to the reporting issue, without having complied with its obligations just mentioned, to justify its decision to dismiss the applicant, would be tantamount to circumventing its legal obligations under the *PSM Act*. As a large public service employer, subject to the statutory regime in relation to employment matters, a high standard of conduct is imposed on it as a model employer. Reliance upon the Report by the respondent, without compliance with its statutory obligations under the PSM Act and associated requirements, would in my view, render the dismissal at least partially unlawful. This could not support the dismissal on fairness grounds.

102 It also almost goes without saying, and to his credit counsel for the respondent conceded this, that for the respondent to now seek to rely upon the applicant's alleged obfuscation of his reporting obligations, without those issues being fairly and squarely put to him by way of disciplinary allegations, would be a denial of procedural fairness. I therefore consider that it would be quite unfair on the applicant in these circumstances, to enable the respondent to rely on the CCC Report as an alternative basis to support the fairness of its decision to dismiss the applicant.

Remedy

103 In a case where the Commission finds that a dismissal is harsh, oppressive and unfair, the primary remedy is reinstatement. It is only if reinstatement is impractical, that the Commission then considers the other remedies of re-employment or compensation: s 23A Act. Whether reinstatement is "impracticable" requires an assessment of all of the circumstances of the case and a "bespoke factual evaluation": *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority* [2017] WASCA 86; (2017) 97 WAIG 431 per Kenneth Martin J at par 148. The onus is on an employer to establish that reinstatement is impracticable. In cases where trust and confidence is raised as a barrier to reinstatement, the employer is obliged to establish that the lack thereof is "genuine, credible and rationally based": *Public Transport Authority v ARTBIU* [2016] WAIRC 00236; (2016) 96 WAIG 408 at par 106. This must also take account of the position occupied by the employee.

104 A mainstay of the respondent's opposition to reinstatement was its contention that the applicant obfuscated his response in his various reports of his actions in the Wharerau and Bellin incidents. The respondent also said that the applicant's lack of insight into his actions should militate against reinstatement. Additionally, the respondent raised what it said were inconsistencies between his reporting of the incidents to the respondent, his evidence to the CCC in its investigation and his evidence in these

proceedings, in relation to the Bellin incident in particular. So too, did the respondent seek to rely on the CCC Report to resist reinstatement, seemingly as an alternative to its first position, outlined above, to partly justify the dismissal itself, once the concession was made that it would be a contravention of procedural fairness to do so. I can deal with the latter point at once. In my view, for the same reasons as I have outlined above, the CCC Report cannot be relied on by the respondent to resist reinstatement. To do so would amount to prejudgement, with the effect of depriving the applicant of the opportunity of returning to his employment as a prison officer, without those most serious allegations having been progressed in accordance with the statutory regime binding the respondent and also, as a further issue, without a solid evidentiary case having been put on these issues before this Commission.

105 It goes without saying in my view, that as with police officers, prison officers are in a position of trust. They are able to exercise substantial powers under the *Prisons Act*, including the use of force, in relation to prisoners under their supervision. They do so in an environment largely away from public scrutiny. Thus, the respondent, and the CEO under the *Prisons Act*, must be able to rely on the integrity and honesty of officers in the discharge of their duties. The respondent must be able to have a high level of trust and confidence in an officer.

106 In this respect, the respondent relied on the IDRs, otherwise known as "TOMS Reports", made by the applicant in the Bellin incident. There seems to be no issue with the reporting by officers in relation to the Wharerau incident. I should also note that as mentioned above, the issue of the incident reporting was not part of the disciplinary allegations formally put against the applicant. The evidence in these proceedings in relation to this issue was somewhat scant. The respondent in essence, sought to invite the Commission to infer from the absence of some information recorded by the applicant in his various reports, that this was a deliberate attempt to deceive the respondent to, effectively, "cover up" and minimise any wrong doing on the applicant's behalf. This in particular, extended to there being no reference to the second spraying of Mr Bellin and that there was no reference to him being on the cell bed covering himself with blankets. The respondent submitted that the applicant was, in effect, negligent in leaving out important information or at worst, deliberately dishonest in doing so. Thus, if so, this significantly impacted on the level of trust and confidence that the respondent could place on the applicant in the future.

107 As to the issue of insight into his actions, it is fair to say that the applicant has not wavered in his view, throughout the disciplinary process, seemingly the CCC process and in these proceedings, that in relation to both the Bellin and Wharerau incidents, he was acting correctly and more appositely for present purposes, would do the same again if facing the same circumstances. As to the Bellin incident, this seemed to be based on his assessment of the level of aggression and agitation of the prisoner; on his belief that the first spray in particular was not effective and thus in accordance with the chemical agent training a second would be justified; and that also, he was not assisted by the two other officers present during the incident. In particular, the contention that one of them could have pulled the applicant back from the doorway and shut the door in accordance with what a couple of witnesses said could have occurred.

108 Given that I have concluded on all of the evidence that the second spray was not justified, and in the circumstances of its deployment, the respondent's contentions in this regard are to be acknowledged. I also note that save for this concern, the Director-General in his letter of dismissal set out above, seemed to rely on the applicant's lack of insight into his actions to a significant degree, when considering alternatives to dismissal in the first instance. However, in the context of the respondent's trust and confidence argument, it is important to appreciate that the decision of the respondent to dismiss the applicant was based on an assessment and findings that both incidents were a breach of discipline. To the extent that the failure of the applicant to have insight into his actions was a substantial consideration of the employer in its decision making, and it seems from what is before the Commission that it was, this now must, as a matter of logic and principle, be significantly diminished given my findings in relation to the Wharerau incident and the first OC spray deployment in relation to the Bellin incident.

109 I have no doubt on all of the evidence that the second OC spray in the Bellin case was plainly an error of judgement. There seemed however to have been no consequences arising from the spray, in that it did not seem on the evidence, that Mr Bellin suffered any significant adverse effects from its deployment, although I do not place much weight on this consideration. However, taken overall, I do not consider that this incident in and of itself, constitutes a sufficient basis for the respondent, given the applicant's eleven years of unblemished employment in the corrections service in Western Australia, and a twenty-two-year career overall, to lose trust and confidence in his capacity as a prison officer. Given all of what has transpired in these proceedings, I consider a reprimand and retraining would be an appropriate outcome, although of course in matters of the present kind, no order can be made by the Commission to this effect.

110 As to the contentions of the respondent that the applicant was dishonest in his reporting of events I am unable to reach that conclusion on the evidence in these proceedings. There is some substance however, in the argument that the IDR in relation to the Bellin incident, compiled by the applicant, was deficient in material respects. However, I do not draw an inference as sought by the respondent, that this was the result of any deliberate dishonesty by the applicant. There is simply insufficient evidence before the Commission in relation to those particular matters. I should observe that the IDRs from Officers Mulvaney and Bryunzeel were also deficient, in that they lacked the detail complained of by the respondent. However, despite this, it was put by the respondent that both of these officers were witnesses of truth and should be believed. In this regard too, the applicant also said in his evidence that often IDRs are lacking in some information. Whether this may be the result of a systemic lack of oversight in incident reporting that requires more attention by and training of officers by the respondent, is an open question in my view.

111 I am not persuaded that the applicant was dishonest in his various responses to, in particular the Bellin incident, as contended by the respondent. It is the case that the various responses of the applicant that were the focus of submissions by the respondent contained some discrepancies. However, it is to be borne in mind that these various processes took place over some two years and I would be more concerned if his responses to the innumerable questions put to him over this lengthy period of time were in perfect alignment, suggesting a rehearsal of his responses and testimony.

112 A matter of note in relation to the trust and confidence issue, was the fact that after the applicant completed his secondment to the Eastern Goldfields Regional Prison, and subsequent to the commencement of the disciplinary process, he acted in higher

positions in prisons, including as the officer in charge on several occasions. It was not contested that the applicant performed higher duties. Whilst the respondent asserted that this was consistent with the "presumption of innocence" as such, given the nature of the work of a prison officer and the responsibilities of an officer at an in-charge level of acting appointment, it is somewhat incongruous to suggest there had been such a breakdown in the relationship whilst, at the same time, placing the applicant in a position of higher authority and trust. This was an employment relationship and the applicant was not a citizen charged with a criminal offence. If there had been genuine concern for the safety of prisoners under the applicant's care and supervision because of, in particular the Bellin incident, then placing him in any acting capacity in higher duties was quite inconsistent with it.

113 In all of the circumstances of this case, I will order that the applicant be reinstated in his position as a senior officer without loss. Any loss of income will, of course, need to take account of the applicant's earnings from other employment over the period since his dismissal.

2019 WAIRC 00307

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR GARY HAWTHORN
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 21 JUNE 2019
FILE NO/S	U 97 OF 2018
CITATION NO.	2019 WAIRC 00307

Result	Order issued
Representation	
Applicant	Mr D Stojanoski of counsel and with him Mr C Fordham of counsel
Respondent	Mr J Carroll of counsel and with him Mr D Akerman

Declaration and Order

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

(1) DECLARES that the dismissal of the applicant by the respondent on 11 July 2018 was harsh, oppressive and unfair.

(2) ORDERS the respondent to reinstate the applicant as a Senior Prison Officer within 21 days of the date of this order.

(3) ORDERS the respondent to pay to the applicant an amount in respect of remuneration lost from the date of his dismissal to the date of his reinstatement less any amount received by the applicant from other employment.

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

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

2019 WAIRC 00047

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HRISTO NEGRIESKI
	APPLICANT
	-v-
	DE BARRO NOMINEES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 11 FEBRUARY 2019
FILE NO/S	B 121 OF 2018
CITATION NO.	2019 WAIRC 00047

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

Order

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

(1) THAT the respondent be granted leave to amend its notice of answer in the terms attached to the respondent's solicitor's letter dated 4 February 2019.

(2) THAT the applicant be granted leave to file and serve an amended notice of application by 15 February 2019.

(3) THAT the applicant be granted leave to file and serve a reply to the amended notice of answer by 1 March 2019.

(4) THAT the hearing date listed for 11 February 2019 be and is hereby vacated.

(5) THAT the application be listed for a further conciliation conference on a date to be fixed by the Commission.

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

2019 WAIRC 00115

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HRISTO NEGRIESKI
	APPLICANT
	-v-
	DE BARRO NOMINEES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 7 MARCH 2019
FILE NO/S	B 121 OF 2018
CITATION NO.	2019 WAIRC 00115

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

Order

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

THAT 'Christian De Barro' be and is hereby added as the second respondent in the herein matter.

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

2019 WAIRC 00355

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00355
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 9 APRIL 2019
DELIVERED	**:**	MONDAY, 8 JULY 2019
FILE NO.	**:**	B 121 OF 2018
BETWEEN	**:**	HRISTO NEGRIESKI Applicant AND DE BARRO NOMINEES PTY LTD First Respondent AND CHRISTIAN DEBARRO Second Respondent

Catchwords	:	*Industrial Law – Contractual benefits claim – Claim for two hours pay deducted each week – Whether applicant worked the hours claimed – Contract provided for ordinary working hours of 40 per week – Applicant worked hours claimed - Claim for denied contractual benefit upheld – Order issued*
Legislation	:	*Industrial Relations Act 1979* (WA) s 29(1)(b) *Fair Work Act 2009* (Cth) *Minimum Conditions of Employment Act 1993* (WA)
Result	:	Order issued
Representation		
Applicant	:	Mr P Mullally as agent
Respondent	:	Mr P Nevin of counsel

Case(s) referred to in reasons:

Brett Arthur King v Griffin Coal Mining Company Pty Ltd [2017] WAIRC 00102; (2017) 97 WAIG 527

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

Case(s) also cited:

Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435

Gorval v Employsure [2016] FCCA 231

Hotcopper Australia Ltd v Saab [2002] WASCA 190

MC v JEMS [2014] WAIRC 168

Toll (GGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 211 ALR 342

Reasons for Decision

The claim and relief sought

1 The applicant commenced work as an electrician for the second respondent, trading as Full Current Electrics, on 30 March 2015. He and the second respondent entered into a written contract of employment, the terms of which were controversial in these proceedings. The applicant's employment came to an end on 20 June 2018, partially on grounds that the applicant expressed dissatisfaction with what he regarded as unlawful deductions from his weekly pay. The applicant claims that in the course of his employment by both the first and second respondents, he was paid on the basis of a 38 ordinary working hour week, whereas his contract of employment entitled him to be paid for 40 hours per week. The applicant has claimed the sum of $12,647 as a denied contractual benefit under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA).

2 On the other hand, the respondents in this matter contended that the contract of employment, properly construed, only entitled the applicant to be paid for 38 ordinary hours per week, as the respondents' employees were entitled to and did take work breaks during the course of a working day. In the alternative, the respondents maintain that even if the contract of employment did require the applicant to be paid on the basis of a 40-hour working week, he did not regularly work those hours.

Issues

3 Two issues arise in this case. They are: what were the terms of the applicant's contract of employment with the first and second respondents; and whether on the facts, the applicant worked the hours claimed.

4 As to the first issue, the applicant maintained that the contract of employment was evidenced by and contained in a letter from Mr Debarro dated 30 March 2015, with its various attachments, which was tendered as exhibit A1. The material terms of the letter for present purposes, formal parts omitted, were as follows:

> Dear Hristo,
>
> Full Current Electrics is pleased to confirm this offer of appointment to the permanent full time position of Electrical Tradesperson effective of (sic) Monday 30th of March 2015.
>
> You will report directly to the owner/manager Christian Debarro.
>
> You will be employed in the permanent full time position of Electrical Mechanic and your daily tasks will be delegated each morning at pre start meeting.
>
> *Your hours of work are Monday to Friday 7:00am to 3:30pm with a compulsory 30minute lunch break.* Circumstances may require you to work outside these hours to ensure that the full requirements of your roll (sic) are met. Overtime hours including Saturdays may be required but only on request by Christian Debarro. (My emphasis.)

5 For the respondents, in addition to the letter representing the written terms and conditions of employment, it was also maintained that the employment was subject to the terms of the State *Electrical Contracting Industry Award 1978* until 10 April 2016, when the second respondent's business became incorporated, to become the first respondent. Following this time, the applicant's employment then became subject to the federal *Electrical, Electronic and Communications Contracting Award 2010.* In addition to these written terms and conditions of employment, the respondents also maintained that on 30 March 2015, the applicant and Mr Debarro discussed and agreed on various matters, one of which was that the applicant would be paid for 38 hours per week. The applicant disputed this.

Legal principles

6 As to the relevant principles to apply in this case, these are well settled. In *Hotcopper v Saab* (2001) 81 WAIG 2704, the Full Bench of the Commission set out what is required to be established in a denied contractual benefits claim. The applicant must, on the balance of probabilities, establish that he had an entitlement to be paid 40 hours per week under his contract of employment and that it had been denied to him. Furthermore, as to the interpretation of the contract of employment, I set out the relevant principles in relation to contractual construction in *Brett Arthur King v Griffin Coal Mining Company Pty Ltd* [2017] WAIRC 00102; (2017) 97 WAIG 527 at [11] – [14]. I adopt and apply those principles for present purposes, without repeating them.

Summary of the evidence

7 The applicant is a qualified electrician. He knew Mr Debarro through a family connection. Mr Debarro approached the applicant in late March 2015 and asked him whether he would be interested in working for him. The applicant testified that he had a conversation with Mr Debarro and he questioned whether the second respondent would pay overtime, which was confirmed. He did not recall any discussion of hours of work each week, only that it was Monday to Friday. The applicant agreed to start work for the second respondent and the letter of appointment of 30 March 2015 was prepared by Mr Debarro and the applicant signed it. Whilst the letter was somewhat unusually drafted, in that the body of it included all of the respondents' various policy documents, I have no doubt on the evidence that this was the document presented to and signed by the applicant on 10 April 2015. There was no dispute by the respondents that the letter reflected the terms of the contract of employment, to the extent that it was in writing.

8 As to day to day matters, the applicant said that he largely worked unsupervised. The applicant testified that he would go to the workshop at 7.00am for the start of the day. Mr Debarro would tell him what jobs were required to be attended to each day. He generally worked to 3.30 pm, there were some occasions when he worked later and also a few occasions where he ceased work earlier. The applicant testified that he took a lunch break at 12.30 pm. He would rarely take other breaks during the day. The applicant said he would consider whether, in order to finish a job, he needed to stay on past 3.30pm. The applicant said he would discuss this with Mr Debarro and if Mr Debarro agreed, he would work overtime. The procedure agreed with Mr Debarro for his time recording, involved the applicant sending a text message to Mr Debarro with his hours worked for the week. Copies of these messages were tendered as exhibit A4. Additionally, copies of the applicant's payslips for his period of employment were tendered as exhibit A3. These show that the applicant was paid for 38 ordinary hours per week.

9 The applicant flatly rejected the contention put to him that the 7.00am to 3.30pm in his contract letter referred to his spread of hour, or the hours of the day within which he was required to work. Moreover, the applicant testified that each day he would return to the workshop in the business vehicle also carrying the apprentice. This occurred after working hours and no claim was made for this time.

10 The applicant testified that at a time not established on the evidence, but seemingly prior to May 2018, Mr Debarro approached him and asked him to check his payslips because some employees did not think they were being paid correctly. Following this, the applicant said that he checked his pay records and saw that he was only being paid for 38 ordinary hours per week and not for 40 hours per week. The applicant said that he spoke to Mr Debarro about this. Mr Debarro informed him that the respondents deducted two hours per week from each employee's weekly pay, because they would attend a lunch bar in the mornings and were not working. This was also to account of breaks during the day and the lunch break. Despite raising this matter with Mr Debarro, the applicant testified that nothing changed until he thought, his last or second last pay period, when he was paid correctly.

11 Even though the working hours information and payment details were on each payslip, the applicant testified that he did not notice this issue until he was asked to investigate it by Mr Debarro. He assumed that he would get a rostered day off each month as he did with his previous employer. The loss of two hours pay each week was one of the reasons why the applicant tendered his resignation by letter of 6 June 2018 (see exhibit A2). In the letter, the applicant referred to the respondents underpaying him by two hours per week.

12 Mr Debarro's evidence was that he had been in his own business and started as a sole trader. He always understood that it was normal in the industry to work 38 hours per week plus overtime. Employees were required to have a lunch break and other breaks. He said that he prepared the contract of employment letter himself, with some advice from his Association. Given his understanding of the usual working arrangements, Mr Debarro testified that the reference to 7.00 am to 3.30 pm in exhibit A1, was "based on a 38 hour week". He said that he told the applicant and all other employees this at the time they were employed. Despite this, however, Mr Debarro accepted that the contract of employment letter does provide for 40 working hours, Monday to Friday each week. Mr Debarro also accepted that he only paid the applicant for 38 ordinary hours and he deducted two hours per week. He said that it was his understanding that this took account of lunch and other rest breaks taken by employees during the course of a working day.

Consideration

13 In this case I am not persuaded that the applicant's contract of employment was ambiguous. The letter of 30 March 2015, relevant parts of which are set out above, was clear in its terms. The third paragraph plainly provided for an ordinary working week Monday to Friday of 7.00 am to 3.30 pm with a 30 minute lunch break. This equates to an eight hour day, exclusive of an unpaid lunch break of 30 minutes. The letter does not mean that an employee is to be paid for 7.6 hours per day, or 38 hours per week. If this was the case, the contract of employment would provide for it and specify either working hours between 7.00 am to 3.00 pm or some other variation of working times. This is not what the letter said. The applicant was also entitled to a paid rest break of 10 minutes each morning under the State Award.

14 I accept that once the first respondent became the applicant's employer, the terms of the contract of employment were those as set out in the letter of 30 March 2015, by implication. The parties simply continued on in the employment relationship. There

were increases in the applicant's hourly rate of pay. This is subject to, of course, the State Award no longer applying and the federal Award having application to the employment. There was however, no basis to import any provision of either award as an implied term of the applicant's contract of employment in relation to hours of work or any other provision for that matter. Awards operate by force of statute and the implication or importation of award terms into contracts of employment is unnecessary and contrary to authority: *Byrne v Australian Airlines* (1995) 185 CLR 410. This is subject to the express incorporation of award terms, which does not arise for consideration in this matter.

15 As mentioned the applicant said in his evidence that he generally did not take breaks during the day. This evidence was not seriously refuted by the respondent. There was some mention by Mr Debarro that he thought the applicant would also regularly attend the lunch bar in the mornings, along with other employees. This was denied by the applicant. The applicant said he always had breakfast at home and took his lunch to work. In any event, as I have already mentioned, under the State Award, at least over the period of the applicant's employment by the second respondent, the applicant had an entitlement to a paid rest break of ten minutes per day, even if he didn't regularly take them. No deduction of pay could lawfully be made where any employee of the second respondent took such a rest break.

16 As to the evidence generally, I found the applicant to be a credible witness. His evidence was given cogently. He provided his working hours to the respondent by text message as agreed. The applicant's time recording in exhibit A4 and his payslips in exhibit A3 were generally consistent with his oral testimony given in these proceedings. On the other hand, I found Mr Debarro's generalised assertions that the applicant regularly stopped at the lunch bar in the mornings and took numerous telephone calls on the job as justification for the deduction of two hours of working time from his weekly pay, as unconvincing. This was inconsistent with the applicant's testimony, which I prefer. As to telephone calls, the applicant said 80 to 90 percent of them were work, related which he took on his personal phone at his cost. Regardless of the terms of the State Award entitlement to a rest break, the assertion by the respondents that they deducted two hours' pay per week for alleged time spent not on the job, was tantamount to an admission that the contract of employment letter did provide for ordinary paid working hours of 40 per week and not 38 per week, as maintained by the applicant. This all the more detracts from the assertion made by Mr Debarro that he informed the applicant before he started that the employment was based on 38 hours per week, even though this was completely at odds with the written contract.

17 This case does not turn on the fact that the applicant was paid an over-award rate of pay, which he plainly was. Whilst both the State and federal awards provide for 38 ordinary hours per week, there was nothing in either of them to preclude the working of two additional hours per week as long as it was paid for. Working two additional hours per week could not be construed as "unreasonable working hours" for the purposes of either Part 2A of the *Minimum Conditions of Employment Act 1993* (WA) or Division 3 of Part 2-2 of the *Fair Work Act 2009* (Cth).

18 I have no reason to doubt the accuracy of the spreadsheet prepared by the applicant's accountant and tendered as exhibit A7. The position simply is that the applicant was underpaid by two hours per week for the period of his claim. It may be said that it is somewhat surprising that the applicant did not detect the underpayment earlier than when asked to investigate the matter by Mr Debarro. This is particularly so given that the applicant's payslips were quite clear as to the number of paid hours each week. However, it was the applicant's evidence that he simply did not pick this issue up until he looked at it, following Mr Debarro's request. In any event, irrespective of this, it cannot alter the proper construction of the applicant's contract of employment.

19 Finally, in the respondents' amended answer, an issue was raised as to an alleged over payment of accrued annual leave. Given issues in relation to the Commission's jurisdiction and power to consider such matters, they were not pressed by the respondents. Accordingly, for the foregoing reasons, I am satisfied on balance that the applicant's claim is made out. An order will issue.

2019 WAIRC 00364

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HRISTO NEGRIESKI
	APPLICANT
	-v-
	DE BARRO NOMINEES PTY LTD
	FIRST RESPONDENT
	CHRISTIAN DEBARRO
	SECOND RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 19 JULY 2019
FILE NO/S	B 121 OF 2018
CITATION NO.	2019 WAIRC 00364

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

Order

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

THAT the respondents pay to the applicant the sum of $12,647 as a denied contractual benefit:

(a) in the sum of $3,647.00 by 31 July 2019;

(b) in the sum of $4,000.00 by 31 August 2019; and

(c) in the sum of $5,000.00 by 30 September 2019.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Fiona Bennett	Chemist Warehouse	U 58/2019	Commissioner T Emmanuel	Discontinued
Gavin John Franks	The Trustee for Lavieville Grazing Trust & M.R. & R.E. Collins	U 123/2019	Commissioner D J Matthews	Discontinued
Joanne Soo Khim Teoh	The Trustee for Anne Brotherson Trust & The Trustee for Joanne Teoh Discretionary Trust trading as Pharmacy 777 Glendalough	U 106/2019	Commissioner T Emmanuel	Discontinued

CONFERENCES—Matters arising out of—

2019 WAIRC 00644

DISPUTE RE ALLEGED UNFAIR TREATMENT OF UNION MEMBER
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00644
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 15 AUGUST 2019
DELIVERED	**:**	THURSDAY, 15 AUGUST 2019
FILE NO.	**:**	PSAC 12 OF 2019
BETWEEN	**:**	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC.) Applicant AND DEPARTMENT OF EDUCATION Respondent
Catchwords	**:**	*Industrial Relations Law (WA) - Application for interim relief under s 44 of the Industrial Relations Act 1979 - Application considered - No power to support granting of interim orders - Alternatively no basis for an interim order on the merits - Commission should not interfere with disciplinary process unless action commenced is obviously baseless - Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Public Sector Management Act 1994* (WA)
Result	**:**	Application dismissed
Counsel:		
Applicant	**:**	Mr M Amati
Respondent	**:**	Mr R Andretich of counsel

Case(s) referred to in reasons:

The Director General, Department of Education v State School Teachers' Union [2011] WAIRC 00058

State School Teachers' Union v The Director General, Department of Education (2017) 97 WAIRG 1497

Civil Service Association v Director General of Department for Community Development (2002) 82 WAIRG 2845

Reasons for Decision

Ex Temporé

1 There is a s 44 application by the Civil Service Association on foot that is application PSAC 21/2019. That application relates to a dispute in relation to the suspension with pay of the union's member, Mr Pinto, pending a direction that Mr Pinto retire on

the grounds of ill health in accordance with s 39 of the *Public Sector Management Act*. The matter was initially heard in conference by the Commission otherwise constituted. The applicant challenges the respondent's decision to suspend Mr Pinto and says that the suspension was not lawful and did not involve a fair process, amongst other contentions.

2 The respondent on the other hand says that the suspension of Mr Pinto on full pay pending the outcome of the s 39 Public Sector Management process is lawful and is also appropriate because of the respondent's concern that for Mr Pinto to remain in the workplace, may be detrimental to his health and also the operations of the Department, based on the medical advice to the respondent in accordance with the materials before the Commission.

3 Resulting from the s 44 compulsory conference, the applicant Association seeks an interim order for Mr Pinto to be returned to his workplace. I should indicate that the substantive application filed on 19 June 2019 in terms of the grounds provides, after reference to introductory matters, that the application deals with specifically a purported directive found in the same letter to suspend Mr Pinto with pay, and the issue arising in the application as set out in the relief sought is firstly "that the respondent reconsider its refusal and allow Mr Pinto to return to his workstation or alternatively an order is sought from the Commission for the respondent to do so."

4 Both the parties have filed detailed written submissions in relation to the interim order application that refer to grounds in support of the application, Mr Pinto's employment history and specifically, his medical issues and medical reports in relation to his fitness for work and the reasons that the respondent has commenced the retirement on ill health grounds process under s 39 of the *PSMA*.

5 Section 39 of the *PSMA* provides in subsection (1) that:

> "A public service officer may retire or an employing authority may call upon a public service officer to retire from the Public Service on the grounds of ill health."

6 Subsection (2) then provides that:

> "A public service officer who is called on to retire from the Public Service under subsection (1) shall forthwith so retire."

7 I have read the materials and the submissions and considered carefully that material. Additionally, the proceedings have been listed this afternoon for the Commission to hear oral submissions in connection with the interim order application, which submissions I have carefully taken into account as well. I should also add that on 8 August 2019 the applicant Association filed further written submissions setting out how, in its view, an interim order may be supported under s 44 of the Act, in the circumstances of this case. The applicant in its submissions refers to a decision of the Full Bench in the matter of *The Director General, Department of Education v State School Teachers' Union* [2011] WAIRC 00058 in which it was found that in relation to an employee not claiming unfair dismissal, s 44(6)(ba) did not support the making of an interim order, on the facts of that particular case.

8 Seemingly, as the Commission understands it and as seems to have been confirmed in oral submissions this afternoon, the applicant relies upon s 44(6)(ba) of the Act but says that subpars (i) and (ii) are not applicable. It seeks to rely upon subpar (iii) to support the making of an interim order. The terms of s 44(6)(ba)(iii) provide, and I will also cite the introductory part:

> "With respect to industrial matters the Commission may give such directions and make such orders as will in the opinion of the Commission…(iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter in question."

9 In the earlier submissions of the Association there also seemed to be some reliance on s 44(6)(bb) although the present claim is not, as I have said, a claim of unfair dismissal. I think the applicant now accepts that it cannot rely on s 44(6)(bb)(ii) in those circumstances. Also, for the reasons that I expressed in an earlier decision of the Commission in *State School Teachers' Union v The Director General, Department of Education* (2017) 97 WAIG 1497, the citation of which has been provided to the parties for this afternoon's purposes, the other powers contained in s 44(6)(bb) especially subpar (i), do not provide any independent head of power to support an interim order in s 44 conference proceedings and I do not depart from that view.

10 Section 44(6)(ba)(iii) is a part of the Commission's broad s 44 powers which enables the Commission to do things in the course of an industrial dispute, dealt with by the Commission in a compulsory conference. In my view subpar (iii) of s 44(6)(ba) makes it clear on its plain language, that it is concerned with the Commission's powers to require the parties to exchange information or to divulge their views in relation to the matters in dispute, as an aid in the resolution of a particular industrial dispute. This may include for example, the production of documents or other materials. It may also include the exchange of statements of position on a matters, to reveal a party's position on an issue(s). There are many other examples in my view, which would be caught by this provision.

11 Whilst the s 44(6)(ba) powers are broad and should not be read down, I cannot see any connection between the terms of s 44(6)(ba)(iii) and the return of Mr Pinto to the workplace to restore the status quo, pending the outcome of the s 39 *PSMA* process. Such a proposed order has little to do with the exchange or divulging of information or attitudes and, is, in effect more in the nature of a mandatory injunction, overturning the current suspension. As I have said, in the case to which I have just referred involving Mr Buttery in the interim order application, there needs to be able to be identified a specific power for such an order and with defined criteria for its exercise. As no head of power under s 44 of the Act is available to support the interim order sought by the union in this case, given that s 44(6)(ba)(i) and (ii) are not relied on, in my view there are significant difficulties in the applicant obtaining an interim order on this occasion, as a matter of jurisdiction and power.

12 Even if my view as to the power under s44(6)(ba)(iii) is incorrect, I fail to see on what is before the Commission that such an order would "encourage the parties to exchange or divulge attitudes or information which would assist … in the resolution of the matter in question" when, as the respondent rightly points out, "the matter in question" as identified in the s 44 application is, in terms of the relief sought, the return to work of Mr Pinto whilst the s 39 *PSMA* process takes its course. Therefore, in any

event, the interim order sought is in fact the same as the final relief sought in the s 44 application, which in my view is a further basis for any such purported interim order to be beyond power.

13 Additionally, the Commission has now been informed that by letter dated 7 August 2019, the respondent has written to Mr Pinto informing him of the commencement of disciplinary matters by way of an investigation under s 80 of the *PSMA* by reason of his refusal, as I read the letter, to retire on the grounds of ill health. As a part of this process under s 82 of the *PSMA* the respondent has now suspended Mr Pinto on full pay for the duration of the disciplinary investigation, as the letter sets out. I note also that in accordance with the letter at the top of page 2, Mr Pinto has 10 business days to respond to his suspension which, on my reckoning, is by 21 August 2019.

14 Therefore aside from the abovementioned matters as to jurisdiction, power and merit, as a formal disciplinary process has now commenced, I think it is only appropriate that the disciplinary process take its course given that Mr Pinto of course, as I indicated to the parties, retains all of his rights to challenge the outcome either in person or through the applicant Association. In this regard too, I also note the observations of the Industrial Appeal Court in *The Civil Service Association v Director General of Department for Community Development* (2002) 82 WAIG 2845 that generally, the Commission should not interfere in disciplinary procedures under the *PSMA* unless the action so commenced is obviously baseless. In my view there is nothing before me that would indicate that to be the case. As also indicated to the parties in the hearing, the Commission's views as to whether an interim order should be made should not be taken as any reflection on whether final orders should be made, in the event of a more general challenge being brought by Mr Pinto to the respondent's actions.

15 Accordingly, for the foregoing reasons, the application for an interim order is dismissed.

2019 WAIRC 00645

DISPUTE RE ALLEGED UNFAIR TREATMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC.)
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 15 AUGUST 2019
FILE NO/S	PSAC 12 OF 2019
CITATION NO.	2019 WAIRC 00645

Result	Order issued
Representation	
Applicant	Mr M Amati
Respondent	Mr R Andretich of counsel

Order

HAVING heard Mr M Amati on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the application for an interim order be and is hereby dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Civil Service Association of WA Incorporated	Director General, Department of Water and Environmental Regulation	Kenner SC	PSAC 8/2019	29/05/2019	Dispute re enititlement Annual Leave Travel Concession	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of WA Incorporated	The Director General Department of Mines, Industry Regulation, and Safety	Matthews C	PSACR 30/2018	06/03/2019 06/03/2019 13/03/2019 09/05/2019	Dispute re conversion and appointment of fixed term contract and casual employees to permanency	Discontinued
The Civil Service Association of WA Incorporated	The Director General Department of Mines, Industry Regulation, and Safety	Scott CC	PSAC 30/2018	28/11/2018 03/01/2019	Dispute re conversion and appointment of fixed term contract and casual employees to permanency	Referred for hearing and determination

PROCEDURAL DIRECTIONS AND ORDERS—

2019 WAIRC 00741

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ADAM RODD FEILDING

APPLICANT

-v-

HAMIWOOD ENTERPRISES PTY LTD

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 4 OCTOBER 2019
FILE NO. B 81 OF 2019
CITATION NO. 2019 WAIRC 00741

Result Direction Issued
Representation
Applicant Mr P Williams (of counsel)
Respondent Mr L Lang and Mr M Vegar

Direction

HAVING heard from Mr P Williams (of counsel) on behalf of the applicant and Mr L Lang and Mr M Vegar 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 on each other by no later than 11 October 2019;
2. THAT inspection and provision of the documents, including any financial reports to each other shall be completed by no later than 18 October 2019;
3. THAT the parties give notice to one another of witnesses they intend to call to give evidence at the proceedings no later than 25 October 2019;
4. THAT the applicant file and serve on the respondent an outline of submissions and any list of authorities upon which they intend to rely by no later than 1 November 2019;
5. THAT the respondent file and serve on the applicant an outline of submissions and any list of authorities upon which they intend to rely by no later than 8 November 2019;
6. THAT the matter be listed for hearing for one (1) day on date to be set; and
7. THAT the parties have liberty to apply by two (2) business days.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2019 WAIRC 00745

REVIEW OF IMPROVEMENT NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GHD PTY LIMITED
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 9 OCTOBER 2019
FILE NO.	OSHT 5 OF 2019
CITATION NO.	2019 WAIRC 00745

Result	Direction Issued
Representation	
Applicant	Mr Alex Mossop (of counsel)
Respondent	Ms Stephenie Vahala (of counsel)

Direction

HAVING heard from Mr A Mossop (of counsel) on behalf of the applicant and Ms S Vahala (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984*, hereby directs –

1. THAT the parties give informal discovery by serving its list of documents on the other party by 30 October 2019;
2. THAT the parties provide inspection and provision of documents by 15 November 2019;
3. THAT the parties file an Agreed Statement of facts by 15 November 2019;
4. THAT evidence in chief to be adducted by signed witness statements which will stand as evidence in chief;
5. THAT the applicant file and serve upon the respondent any statement of evidence by 29 November 2019;
6. THAT the respondent file and serve upon the applicant any statement of evidence in reply by 20 December 2019;
7. THAT the parties file written submissions and list of authorities by 24 January 2020;
8. THAT the parties advise each other of witnesses required for cross examination by 24 January 2020;
9. THAT the matter be listed for hearing for one day in February 2020, on a date to be set; and
10. THAT the parties have liberty to apply on 48 hours' notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

PUBLIC SERVICE APPEAL BOARD—Notation of—

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

Application Number	Parties		Commissioner	Matter	Dates	Result
PSAB 12/2019	Magdalen Kaow Ling Foo	Fiona Stanley Fremantle Hospitals Group, South Metropolitan Health Service	Emmanuel C	Appeal against the decision to take disciplinary action on 17 June 2019	05/09/2019	Discontinued

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 1/2019	Lorraine Hutchins	Ron Gabelish Manager System-wide Classification Services	Emmanuel C	Discontinued	30/07/2019
PSA 2/2019	Tony Davidson	Health Support Services	Emmanuel C	Discontinued	26/06/2019

PUBLIC SECTOR MANAGEMENT ACT 1994—Notation of—

The following were matters before the Commission under the Public Sector Management Act 1994.

Application Number	Parties		Commissioner	Matter	Dates	Result
APPL 28/2019	Iain George Martin	Department of Primary Industries and Regional Development	Emmanuel C	Referral to Commission under Public Sector Management Act 1994	N/A	Discontinued

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2019 WAIRC 00742

REVIEW OF IMPROVEMENT NOTICES 49301162 AND 49301163

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES GEOFFREY RAYMOND MORAN

APPLICANT

-v-

WORKSAFE W.A.

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE MONDAY, 7 OCTOBER 2019
FILE NO/S OSHT 2 OF 2019
CITATION NO. 2019 WAIRC 00742

Result Application Dismissed
Representation
Applicant Ms V Kafentzis (of counsel)
Respondent Ms T Hollaway (of counsel)

Order

WHEREAS this is an application pursuant to s 51A of the *Occupational Safety and Health Act 1984;*

WHEREAS on 12 September 2019, the Commission convened a hearing to hear and determine the application;

WHEREAS at the commencement of the hearing the applicant advised that they wished to withdraw their application;

WHEREAS on 17 September 2019, the applicant filed a *Form 1A – Multipurpose Form* to discontinue their application;
NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act, 1984*, hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2019 WAIRC 00146

DISPUTE RE ALLEGED BREACH OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES D & K HOLDEN PTY LTD

APPLICANT

-v-

HOLCIM (AUSTRALIA) PTY LTD

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE THURSDAY, 21 MARCH 2019
FILE NO. RFT 1 OF 2019
CITATION NO. 2019 WAIRC 00146

Result	Direction issued
Representation	
Applicant	Mr J Burton of counsel
Respondent	Ms R Reeves

Directions

HAVING heard Mr J Burton of counsel on behalf of the applicant and Ms R Reeves 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 and respondent shall give informal discovery by 3 April 2019.

(2) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Tribunal.

(3) THAT the applicant file and serve upon the respondent any signed witness statements upon which it intends to rely no later than 24 April 2019.

(4) THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than 15 May 2019.

(5) THAT the applicant file and serve upon the respondent any signed witness statements in reply by no later than 29 May 2019.

(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 5 June 2019.

(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 20 June 2019.

(8) THAT the matter be listed for hearing for one day on a date to be fixed by the Tribunal.

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

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

2019 WAIRC 00354

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	D & K HOLDEN PTY LTD
	APPLICANT
	-v-
	HOLCIM (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 5 JULY 2019
FILE NO/S	RFT 1 OF 2019
CITATION NO.	2019 WAIRC 00354

Result	Order issued
Representation	
Applicant	Mr J Burton of counsel
Respondent	Ms C Vincent of counsel

Order

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

THAT the respondent be granted leave to adduce evidence from Mr Jeff Moss by video-link from a venue approved by the Commission.

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

2019 WAIRC 00724

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2019 WAIRC 00724
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 10 JULY 2019
DELIVERED	**:**	WEDNESDAY, 2 OCTOBER 2019
FILE NO.	**:**	RFT 1 OF 2019
BETWEEN	**:**	D & K HOLDEN PTY LTD Applicant AND HOLCIM (AUSTRALIA) PTY LTD Respondent

Catchwords	**:**	*Industrial Law (WA) – Owner-driver contract – Referral of dispute regarding alleged breach of contract – Whether the respondent unlawfully terminated the contract – Whether the applicant committed serious and wilful misconduct – Whether the respondent made misrepresentations to the applicant to induce entering into the contract – Principles applied – Contract lawfully terminated for serious and wilful misconduct – No misrepresentations made – Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Owner-Driver (Contracts and Disputes) Act 2007* (WA) ss 4, 4(2), 5, 38, 47(4)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr J Burton of counsel
Respondent	**:**	Mr M Baroni of counsel and with him Ms C Vincent of counsel
Solicitors:		
Applicant	**:**	Spyker Legal
Respondent	**:**	Australian Business Lawyers and Advisors

Case(s) referred to in reasons:

ADA Cartage Pty Ltd v Holcim (Australia) Pty Ltd [2010] VCAT 1771

Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349.

Amcor Limited v CFMEU (2005) 222 CLR 241

Buitendag v Ravensthorpe Nickel Operations Pty Ltd [2012] WASC 425

Ferguson v TNT Australia Pty Ltd [2014] WAIRC 00020; (2014) 94 WAIG 110

Jones v Dunkel (1959) 101 CLR 298

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698

North v Television Corporation Ltd (1976) 11 ALR 599

Walton and Anor v BHP Billiton Iron Ore Pty Ltd [2019] WAIRC 00089; (2019) 99 WAIG 299

Case(s) also cited:

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

David Miller Re David Miller v University of New South Wales [2001] AIRC 1055

DP World Sydney Limited v Lambley [2012] FWAFB 4810

Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd [2014] HCA 7

Genio v Woolworths Limit [2012] FWA 6678

Hemi v BMD Constructions Pty Ltd [2013] FC 8664

Jeff Weekley v Essential Energy [2018] FWC 1448

McDaid v Future Engineering and Communication Pty Ltd [2016] FWC 343

Parmalat Food Products Pty Ltd v Wililo [2011] FWAFB 1166

Shacam Transport Pty Ltd v Damien Cole Pty Ltd [2014] WAIRC 00394; (2014) 94 WAIG 627

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52

Whittaker v EDI Rail-Bombardier Transportation (Maintenance) Pty Ltd T/A EDI [2013] FWC 7908

Reasons for Decision

Background

1 The applicant and respondent entered into a contracting arrangement in or around late 2001, which involved the applicant delivering and pouring concrete at various sites for clients of the respondent, as directed by the respondent. This initially took place in Queensland and continued in Perth in 2003, when the applicant's owner and Director, Mr Holden, moved to Perth with his family. From 2003, the applicant continued to contract to Holcim delivering concrete to the respondent's clients in the Perth metropolitan area.

2 In October 2010, the applicant purchased a 2010 model FM Series Hino 26 tonne GVM concrete truck for $140,000.00, to perform the concrete delivery work for the respondent. The new truck was fitted with a frame, motor and concrete mixing bowl (Running Gear), which were owned by the respondent. The truck also contained the respondent's signage. The applicant continued to contract to the respondent in line with the arrangement previously followed, part of which was that the respondent paid the applicant monthly, based on the number of concrete deliveries performed by the applicant in the previous month.

Purchase of the Running Gear

3 Mr Holden gave evidence on behalf of the applicant, that in December 2016, at the respondent's request, he met with Mr Malcolm, Regional Logistics Manager – Western Australia, and Mr Antonioli, Transport Coordinator – Western Australia, of the respondent. Mr Holden said he was informed by Mr Malcolm that the applicant's current contract with the respondent was about to expire and the applicant would be offered a five-year contract extension if the applicant purchased the Running Gear for $20,000.00 plus GST. This was said to be based on $4,000.00 for each year of the contract extension. Mr Holden gave evidence that Mr Malcolm advised him that his pay rate would change because the applicant would need to pay extra maintenance costs for the Running Gear. Mr Holden said he immediately questioned the price the respondent was seeking for the Running Gear, which seemed high given that the Running Gear was already six years old. Mr Malcolm then advised Mr Holden that the applicant could take or leave the offer and that an answer was required as soon as possible. The applicant conferred with other drivers who contracted to Holcim, who said that their price for Running Gear averaged at $4,000.00 per year of their contract extension. Mr Holden's evidence was that he requested Mr Malcolm lower the price on a handful of occasions, however Mr Malcolm declined. Sometime in early 2017, Mr Holden informed Mr Malcolm that the applicant agreed to pay $20,000.00 plus GST, as although he thought this was expensive, he considered he would secure five more years of work with the respondent that would see him through to retirement, so the argument went.

4 Mr Antonioli and Mr Malcolm gave evidence on behalf of the respondent. Mr Antonioli said he attended the meeting in December 2016 with Mr King, who is currently employed as the respondent's Fleet Manager for South East Queensland, however Mr Malcolm was not present. Mr Malcolm's evidence was that he was not the Regional Logistics Manager – Western Australia until February 2017, and that his role prior to this time did not involve interacting with contractors such as the applicant. Mr Malcolm recalled having a conversation with Mr Holden in or around February 2017, where he confirmed that the five-year contract extension was based on the applicant accepting the purchase price of the Running Gear for $20,000.00 plus GST. Mr Malcolm said he informed Mr Holden that the agitator bowl, which formed part of the Running Gear, might need replacing sometime in 2018. Mr Malcolm gave evidence that at no point did Mr Holden express any unwillingness or resistance on behalf of the applicant, to purchase the Running Gear.

5 On 20 April 2017, Mr Malcom emailed the applicant a document titled Agreement for Sale of Concrete Agitator/s specified in Schedule 1 (the Plant) (the Agreement for Sale). The applicant read the document, signed it and returned it to the respondent. Shortly after, the applicant transferred the sum of $22,000.00 to the respondent. The arrangement between the applicant and respondent continued as it had done prior to entering into the Agreement for Sale, however the applicant owned the Running Gear.

Cartage Agreement

6 On 22 May 2017, the applicant signed a document titled Holcim Western Australia Concrete Cartage Agreement - 2016 6 Wheeler Truck and Mixer. The Cartage Agreement was tendered as part of exhibit A2. Mr Holden gave evidence that Mr Malcolm provided him with this document on 22 May 2017, which he read, signed and returned to the respondent. Attached to the Cartage Agreement at Schedule 7 is a certificate of independent financial advice stating that the applicant's accountant advised the applicant of the financial obligations and risks involved in entering into the Cartage Agreement. Mr Malcolm's evidence was that the Cartage Agreement could not have been provided to the applicant on 22 May 2017 as the certificate of independent financial advice, which refers to the Cartage Agreement, was signed by the applicant's accountant on 2 March 2017.

7 Mr Malcolm gave further evidence that he went through items of the Cartage Agreement with the applicant in detail. He said this included but was not limited to pointing out Schedule 2A titled "Mixer True Cost Formula and Utilisation Cartage Rates", the finance annual contribution of $5,959, the annual profit component of $3,722, the annual R&M allowance of $4,827 and the annual bowl replacement allowance of $1,290.

Replacement of mixing bowl

8 The applicant submitted that in or around October 2017, the respondent inspected the applicant's concrete mixing bowl and informed the applicant that the bowl was required to be replaced. This was part of the respondent's annual thickness testing to ensure each truck complies with safety requirements. According to Mr Malcolm, the annual test for the applicant's truck took place on 27 December 2017 and identified that a new mixing bowl would be required by 30 September 2018. Attached to Mr Malcolm's witness statement is a copy of the test results dated 27 December 2017. It was not disputed that in or around

September 2018, the applicant purchased and fitted a new concrete mixing bowl to the truck for the sum of $14,000.00 plus GST.

Incident on Hanssen worksite

9 On 8 December 2018 at approximately 4.30am, Mr Holden drove the applicant's truck to a Hanssen construction site located off Canning Highway in Applecross, to deliver and pour concrete as instructed by the respondent. A "mud map" was provided to the applicant prior to this date, which is a map that drivers use to ascertain a description of a site, instructions for the pour, and the site location, including entry and exits points. The map advises where to wait and where concrete trucks can and must not be parked. Mr Holden gave evidence that this pour was one of the biggest and busiest the applicant had been involved with, with over 70 concrete trucks and five concrete plants required for completion.

10 After completing the pour, at approximately 5.15am, Mr Holden drove his truck towards Kintail Road, which ran parallel to Canning Highway, and towards the exit shown on the "mud map". When leaving the worksite, Mr Holden was required to navigate various obstacles commonly associated with worksites. On his left hand-side were two trucks parked one behind the other, both were adjacent to what appears to be scaffolding, ladders and other equipment that are placed next to a fence. The trucks were parked in a parallel parking arrangement, with some distance between the two. The driver's door on the truck in front, furthest from Mr Holden and closest to the exit point, was open. This truck was truck 8257.

11 On the right-hand side of Mr Holden there was a transportable building, a walkway and a pile of plant and equipment. These items were not blocked off or separated from the main driveway. They were on a separate gravelled area immediately next to the site road. IVMS or "dashcam" footage, as it was referred to in evidence, from the stationary truck parked behind the other stationary truck, truck 8239, shows one view of the area and was tendered as part of exhibit A2. There were two drivers present, Mr Khiple of Singh Logistics Australia Pty Ltd, who was known as "Sookie", and a driver that Mr Holden knew as "Alex". They were standing adjacent to the two stationary trucks, in between the trucks and the items to the right-hand side of Mr Holden's truck, effectively in the opening that Mr Holden was required to drive through to exit the site.

12 Mr Holden's evidence in his witness statement was that the gap he was required to manoeuvre his truck through was narrow, measuring roughly 3-4 metres wide. His truck was approximately 2.5 to 3 metres wide. As such, the applicant submitted that Mr Holden was unable to safely manoeuvre his truck through this gap as the driver's door on truck 8257 was "wide open", leaving insufficient distance between the truck and the items to the right-hand side of Mr Holden's truck. Contrary to this, the respondent submitted that the gap, even with the truck 8257's door open (which the respondent says was partially but not wide open), was large enough for Mr Holden to drive his truck through and that in fact, this is what he did, as Mr Khiple did not close the truck 8257's door before Mr Holden drove through. The only obstacle in the way, according to the respondent, was Mr Khiple.

13 The applicant submitted that Mr Holden stopped his truck and motioned to Mr Khiple to close truck 8257's door. At this point both Mr Khiple and Alex turned to look at the open truck door. Mr Holden maintained, both in his statement given on the day of the incident and at subsequent meetings with the respondent's management on 10 and 17 December 2018, that he did so politely. Mr Khiple then stepped in front of Mr Holden's truck and made a gesture to Mr Holden that appears to be raising his middle fingers. It was the respondent's position that it is unlikely Mr Khiple did this unprovoked. The more probable version of events was that Mr Holden provoked Mr Khiple in some way by, for example, yelling or gesturing from his stationary truck. This accords with Mr Khiple's recollection of events, where in an interview with Mr Malcolm and Mr Antonioli on 10 December 2018, he said that Mr Holden gave him "the finger" and abused him from his truck. It should be noted however that Mr Khiple was not called to testify in the proceedings and therefore, such statements were hearsay and not of great evidentiary value. It should be noted at this point, that the IVMS on Mr Holden's truck was not working at the time of the incident. Therefore, the Tribunal did not have the benefit of footage from Mr Holden's truck.

14 After this, the applicant submitted, Mr Holden manoeuvred his truck toward the Kintail Road exit and in doing so, the left-hand side of his truck contacted Mr Khiple. Mr Holden gave evidence that immediately after Mr Khiple raised his middle fingers at Mr Holden, he straightened the steering wheel of his truck so that he manoeuvred clear around the items on his right-hand side. At this time, Mr Khiple was said to be in a "notorious" blind spot for truck drivers, and Mr Holden said he could not see him from where he was seated inside the truck cab. Consequently, he thought Mr Khiple was out of the way of the truck. Mr Holden then moved his steering wheel to the right, to avoid the open driver's door on the parked truck and drove towards the Kintail Road exit.

15 After the truck contacted Mr Khiple, Mr Khiple attempted to open the passenger door of Mr Holden's truck. Just after, Mr Holden heard a smashing sound from his rear window. Mr Khiple picked up a rock or brick and had thrown it through the rear window of Mr Holden's truck. Mr Holden stopped his truck and got out to see what had happened. He saw Mr Khiple and Alex walking towards him. An altercation then took place, which involved pointing motions and yelling, until Mr Holden and Mr Khiple were separated by another driver.

16 It was the respondent's contention that from the footage taken from truck 8239, after Mr Khiple raised his middle fingers at him, whilst standing in clear view in front of Mr Holden's truck, Mr Holden then turned the wheels of his truck to the left towards Mr Khiple and drove forward striking Mr Khiple as he moved to his right to get out of the way.

17 On the same day, the applicant reported the incident to the respondent by sending a text message to Mr Antonioli. The text message said that an incident had occurred and dashcam footage would need to be obtained from Mr Holden's truck as well as the two other trucks present at the incident site. On 9 December 2018, the day after the incident, Mr Holden emailed Mr Antonioli a statement of his account of the incident. It was the applicant's position that it cooperated with the investigation and acted in accordance with the Cartage Agreement.

Investigation of the incident

18 On 10 December 2018, Mr Holden attended a meeting with Mr Malcolm and Mr Antonioli at the respondent's Welshpool office. Mr Holden gave evidence that he was not informed whether he was being investigated for any offence and was not told

if any allegations had been made against him. At the conclusion of the meeting, Mr Malcolm told Mr Holden that he would be suspended while the investigation took place.

19 On 17 December 2018, Mr Holden attended a further meeting, this time with Mr Malcom and Mr Moss, the respondent's Acting General Manager – Western Australia. Mr Holden brought another driver along, Mr Garston, as a support person. At this meeting Mr Holden was shown the IVMS footage of the incident. Mr Holden gave evidence that the video was shown so quickly that he could not provide a proper response to what he had seen. Mr Holden said at no point during the meeting was he told that he was facing a serious allegation and possible termination of his contract. Mr Moss' evidence in his witness statement was that Mr Holden must have understood the seriousness of the incident as after viewing the footage, Mr Holden said "that's attempted manslaughter isn't it?" in reference to the truck colliding with Mr Khiple. The applicant's position is that this comment referred to the brick or rock being thrown through Mr Holden's rear window.

20 Mr Moss formed the view that Mr Holden became so angry that he intentionally drove his truck at Mr Khiple, and irrespective of whether or not Mr Holden was still looking at Mr Khiple when manoeuvring around the items on his right-hand side, he made a conscious decision to drive his truck forwards knowing that a pedestrian was in the "line of fire". Mr Antonioli and Mr Malcolm also formed the view that Mr Holden was aware that Mr Khiple remained in front of the truck. Mr Malcolm gave evidence that at the conclusion of the interview, he advised Mr Holden that a written response would be provided to him, which could include the possibility of termination of the Cartage Agreement.

Termination of the Cartage Agreement

21 On 19 December 2018, the applicant received a letter from the respondent stating that the Cartage Agreement was terminated immediately and without compensation. The letter, formal parts omitted, read as follows:

> On Saturday 8 December 2018 you were involved in an incident in contradiction of Holcim's Safety & Health Policy, the Cartage Agreement and statutory legislation. Video footage recorded the altercation with another contractor, leading to you driving your Vehicle and [sic] physical hitting another contractor, following which an exchange of physical and verbal threats occurred.
>
> An investigation has been conducted into the above incident. You were provided with a full opportunity to present your recollection of the incident, including an opportunity to review the video footage. Responses throughout the investigation have been carefully considered. It has been determined that you have engaged in serious and wilful misconduct in breach of the Cartage Agreement.
>
> Your behaviour is completely unacceptable and in our opinion a form of common assault. Holcim will not tolerate noncompliance with Safety and Environmental guidelines and policies by any person working on our sites.
>
> In accordance with clause 9.1(i) of the Cartage Agreement, Holcim hereby gives you notice of termination of the Cartage Agreement. Termination will be effective on and from the close of business of this letter (such that the last date of the Cartage Agreement will remain in force will be the date of this letter).
>
> The writer will be in contact with you to agree a transition out plan to ensure minimal disruption is caused to Holcim's operations. You will be required to remove all branding from your vehicle. You will also be required to present your vehicle to remove Holcim's property, including but not limited to the in-vehicle monitoring system, GPS and radio.
>
> For good order, we would appreciate if you would acknowledge receipt of this letter by returning a signed copy of the enclosed duplicate to the writer.
>
> We take this opportunity to thank you for the services and support your organisation has provided since commencement of the Cartage Agreement.

22 Clause 9.1 of the Cartage Agreement reads as follows:

> **9.1 Termination by Holcim Without Compensation**
>
> Holcim may terminate the cartage agreement of an Owner granted by this Agreement immediately and without compensation to the Owner:
>
> (a) where the Owner is in breach of any of its obligations under this Agreement and fails to remedy that breach within fourteen (14) days of a written notice from Holcim to the Owner, identifying the breach and requiring remedy of it;
>
> (b) if the Owner suffers an Insolvency Event;
>
> (c) if the Owner fails to comply with the conditions contained in **clause** 2;
>
> (d) if the Owner is in persistent breach of its obligations under this Agreement;
>
> (e) in the event of persistent serious performance failures notified to the Owner by Holcim;
>
> (f) in the event of serious or persistent safety or environmental breach by the Owner or its Driver(s) and notified to the Owner by Holcim;
>
> (g) if the Owner's Concrete Truck is used for the transportation of materials other than products specified by Holcim, without the prior written consent of Holcim;
>
> (h) if the Owner or any employee or Subcontractor of the Owner or any Subcontractor's employee is in serious breach of the Fairness and Respect policy in **Schedule 5**;
>
> (i) in the event of a fundamental breach by the Owner, or its Driver, of this Agreement, including, but not limited to:
>
> i. serious and wilful misconduct (including, theft, violence or violent threats and fraud);

ii. falsification of documents;
iii. disclosure of confidential information;
iv. dishonesty or negligence;
v. conviction of, or charge with any criminal offence;
vi. being unfit for performance under this Agreement due to use or presence of intoxicating drugs or alcohol;

(j) if the Owner or the Driver engage in conduct that may, in the reasonable opinion of Holcim, cause injury to Holcim's business or reputation;

(k) if there is a purported assignment by the Owner of its rights or obligations without the prior written consent of Holcim, including where the assignment of rights or obligations is deemed to occur in accordance with **clause** 47.3;

23 In its submissions, the respondent relied on cl 9.1(f), (h), (i) i and (j). The applicant submitted that as the respondent was responsible for drafting the Cartage Agreement, it is limited to terminating the Agreement only in accordance with the express situations set out in cl 9.1(i) i, which are when a driver engages in theft, violence or violent threats and fraud. The applicant contended that Mr Holden's conduct did not constitute violence or a violent threat that would justify summary dismissal, or a breach of the Cartage Agreement that justifies termination.

24 The applicant's position is that contact between the applicant's truck and Mr Khiple was due to Mr Khiple being in Mr Holden's blind spot and not due to wilful or deliberate conduct. As such, the termination letter dated 19 December 2018 is invalid by reason that the applicant has not breached cl 9.1 of the Cartage Agreement. The applicant submitted that this constituted a breach of contract and unlawful termination by the respondent.

Procedural fairness

25 The applicant also submitted it was not afforded procedural fairness in the investigation process. The respondent failed to provide the applicant with a written notice of the precise allegations against it, failed to provide minutes of the investigation meetings held on 10 and 17 December 2018, and failed to provide the applicant with the video footage of the incident prior to these meetings. The respondent's position is that the Tribunal does not have jurisdiction to deal with matters of procedural fairness. However, in addressing the applicant's submissions on this point, the respondent says that in any event, the applicant was afforded procedural fairness during the investigation and termination process by being given a right to respond to the allegations against it and being provided a comprehensive explanation of the reasons for the termination.

26 In support of this position, the respondent highlighted the written response provided by the applicant in an email dated 9 December 2018, the meetings which took place on 10 and 17 December 2018 where the applicant was provided with an opportunity to view the IVMS footage and explain its version of events including why the Cartage Agreement should not be terminated, and that the respondent considered all views regarding the incident prior to the imposition of a disciplinary sanction. The respondent says the applicant experienced no detriment in not receiving written notice of the allegations.

Representations made by the respondent

27 A further claim made by the applicant was that it was induced to enter into the Cartage Agreement by the false and misleading representation made by the respondent that the Cartage Agreement would continue for a five-year term if the applicant purchased the Running Gear. The respondent's position was that the applicant's argument is wrong in law. The effect of the success of such an argument would result in a situation where the respondent could never terminate the Cartage Agreement within its terms, despite the Cartage Agreement providing for circumstances of termination. The respondent submitted that at no time did it assert that the Cartage Agreement was not able to be terminated pursuant to its terms, independent legal advice was encouraged and terms of the Cartage Agreement, in particular cl 9 – Termination of Agreement, which includes cl 9.1 – Termination by Holcim Without Compensation, demonstrate that the Cartage Agreement is able to be terminated prior to the expiry of the five-year period.

Remedy sought

28 The applicant claims that the respondent has contravened the Cartage Agreement. It has suffered total loss and damage of $147,957.80. This comprised $38,210.40 lost income; $75,000.00 of additional payments it is entitled to receive under cl 9.2 of the Cartage Agreement; and $34,747.40 for payments made to purchase the Running Gear and a new agitator bowl, in reliance on representations made by the respondent to the applicant, that the applicant would receive a five-year contract extension if the applicant purchased the Running Gear. Orders for compensation in this amount are sought by the applicant. The respondent wholly opposed the applicant's claims.

Legal principles

29 By s 38 of the OD Act the Tribunal can hear and determine disputes referred to it under Part 9 of the OD Act and enquire into and deal with any other matter in relation to the negotiation of owner-driver contracts that may be referred under this Part. The powers of the Tribunal in determining a matter or a dispute referred to it are set out in s 47. Section 47(4) provides that:

(4) In making a determination mentioned in subsection (1), the Tribunal may do one or more of the following –
(a) order the payment of a sum of money –
(i) found by the Tribunal to be owing by one party to another party; or
(ii) by way of damages (including exemplary damages and damages in the nature of interest); or
(iii) by way of restitution;
(b) order the refund of any money paid under an owner-driver contract;
(c) make an order in the nature of an order for specific performance of an owner-driver contract;
(d) declare that a debt is, or is not, owing;
(e) order a party to do, or to refrain from doing, something;

(f) make any order it considers fair, including declaring void any unjust term of an owner-driver contract.

30 In accordance with s 47(5) of the OD Act, the Tribunal cannot insert a term into, or subject to subsection (4)(f), otherwise vary, an owner-driver contract.

Owner-driver contract

31 For the purposes of the applicant's claim the Tribunal must be satisfied that the subject matter of the proceedings relates to an owner-driver contract and that the applicant was an owner-driver. I am satisfied for the purposes of s 4 of the OD Act that the applicant is a body corporate which carries on the business of the transport of goods in one or more heavy vehicles, with a GVM of more than 4.5 tonnes. I am also satisfied on the evidence that Mr Holden was, at the material time, an officer of the applicant whose principal occupation was the operation of the applicant's heavy vehicle. Accordingly, I am satisfied that the applicant was an owner-driver for the purposes of s 4(2) of the OD Act.

32 Furthermore, I am satisfied that the Cartage Agreement entered into between the applicant and the respondent in May 2017, for the applicant to provide cartage services to the respondent to transport its concrete products, was an owner-driver contract for the purposes of s 5 of the OD Act.

Interpretation of contracts

33 This case in part involves the interpretation of the relevant provisions of the Cartage Agreement. As to the approach to adopt in this task, recently, in *Walton and Anor v BHP Billiton Iron Ore Pty Ltd* [2019] WAIRC 00089; (2019) 99 WAIG 299, I had occasion to refer to the principles to apply to the interpretation of contracts and at par 24 I said:

> 24 As to the approach to the interpretation of contracts generally, in *King v Griffin Coal Mining Company Pty Ltd* (2017) 97 WAIG 527 I said at pars 11-13 as follows:
>
> > 11 Some rules have been developed in the cases as to the approach to adopt in construing the terms of a contract. A recent summary of the relevant principles to be applied was set out by the Court of Appeal (WA) in *Black Box Control Pty Ltd* v *Terravision Pty Ltd* [2016] WASCA 219. In this case, Newnes and Murphy JJA and Beech J observed at par 42:
> >
> > **Construction of contracts: general principles**
> >
> > 42 The principles relevant to the proper construction of instruments are well known, and were not in dispute in this case. In summary:
> >
> > (1) The process of construction is objective. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean.[50]
> >
> > (2) The construction of a contract involves determination of the meaning of the words of the contract by reference to its text, context and purpose.[51]
> >
> > (3) The commercial purpose or objects sought to be secured by the contract will often be apparent from a consideration of the provisions of the contract read as a whole.[52] Extrinsic evidence may nevertheless assist in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, its background, the context and the market in which the parties are operating.[53]
> >
> > (4) Extrinsic evidence may also assist in determining the proper construction where there is a constructional choice, although it is not necessary in this case to determine the question of whether matters external to a contract can be resorted to in order to identify the existence of the constructional choice.[54]
> >
> > (5) If an expression in a contract is unambiguous and susceptible of only one meaning, evidence of surrounding circumstances cannot be adduced to contradict its plain meaning.[55]
> >
> > (6) To the extent that a contract, document or statutory provision is referred to, expressly or impliedly, in an instrument, that contract, document or statutory provision can be considered in construing the instrument, without any need for ambiguity or uncertainty of meaning.[56]
> >
> > (7) There are important limits on the extent to which evidence of surrounding circumstances (when admissible) can influence the proper construction of an instrument. Reliance on surrounding circumstances must be tempered by loyalty to the text of the instrument. Reference to background facts is not a licence to ignore or rewrite the text.[57] The search is for the meaning of what the parties said in the instrument, not what the parties meant to say.[58]
> >
> > (8) There are also limits on the kind of evidence which is admissible as background to the construction of a contract, and the purposes for which it is admissible. Insofar as such evidence establishes objective background facts known to the parties or the genesis, purpose or objective of the relevant transaction, it is admissible. Insofar as it consists of statements and actions of the parties reflecting their actual intentions and expectations it is inadmissible. Such statements reveal the terms of the contract which the parties intended or hoped to make, and which are superseded by, or merged into, the contract.[59]
> >
> > (9) An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience.[60] However, it must be borne in mind that business common sense may be a topic on which minds may differ.[61]
> >
> > (10) An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable.[62] If possible, each part of an instrument should be construed so as to have some operation.[63]

(11) Definitions do not have substantive effect. A definition is not to be construed in isolation from the operative provision(s) in which the defined term is used. Rather, the operative provision is ordinarily to be read by inserting the definition into it.[64]

12 One question addressed in this matter was the most recent debate in the cases in relation to the need for ambiguity or differences in meaning, in order for a court to have regard to extrinsic evidence. This arises from the principles discussed in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. In this case, Mason J, in what is described as the "true rule" said at par 22:

> 22 The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.

13 As to the application of the "true rule", in *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29 McLure P observed as follows at pars 74-80:

> **The scope of the "true rule" of construction**
>
> 74 Both parties rely on extrinsic material in support of their submissions as to the proper construction of the 1984 and 1989 Agreements. Accordingly, it is necessary to enlarge on the scope of the "true rule" in *Codelfa*.
>
> 75 The role of the court in construing a written contract is to give effect to the common intention of the parties. The common intention of the parties is to be ascertained objectively. That is, the meaning of the terms of a contract in writing is to be determined by what a reasonable person would have understood them to mean: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. The subjective intention or actual understanding of the parties as to their contractual rights and liabilities are irrelevant in the construction exercise.
>
> 76 The practical limitation flowing from the Codelfa true rule is that surrounding circumstances cannot be relied on to give rise to an ambiguity that does not otherwise emerge from a consideration of the text of the document as a whole, including whatever can be gleaned from that source as to the purpose or object of the contract.
>
> 77 The word "ambiguous", when juxtaposed by Mason J with the expression "or susceptible of more than one meaning", means any situation in which the scope or applicability of a contract is doubtful: *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 456 - 457. Ambiguity is not confined to lexical, grammatical or syntactical ambiguity.
>
> 78 Moreover, the extent to which admissible evidence of surrounding circumstances can influence the interpretation of a contract depends, in the final analysis, on how far the language of the contract is legitimately capable of stretching. Generally, the language can never be construed as having a meaning it cannot reasonably bear. There are exceptions (absurdity or a special meaning as the result of trade, custom or usage) that are of no relevance in this context.
>
> 79 Further, on my reading of Codelfa, pre-contractual surrounding circumstances are admissible for the purpose of determining whether a term is implied in fact. That may be because the stringent test for the implication of a term in fact excludes any possibility of an implied term contradicting the express terms.
>
> 80 If extrinsic evidence is admissible, the next issue is the scope of the "surrounding circumstances" for the purpose of construction. Mason J in Codelfa also answered that question. He said:
>
> > "Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although … if the facts are notorious knowledge of them will be presumed.
> >
> > It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable (352)."

34 Additionally, as interpretation is a text-based activity, the process must always begin with the text of the instrument to be construed: *Amcor Limited v CFMEU* (2005) 222 CLR 241 per Kirby J at par 67. I adopt this approach in the determination of this matter.

Serious and wilful misconduct

35 There is no definition of "serious and wilful misconduct" in the Cartage Contract. In this respect, the applicant relied on *Buitendag v Ravensthorpe Nickel Operations Pty Ltd* [2012] WASC 425 as authority for the proposition that only in exceptional circumstances is an employer entitled to summarily dismiss an employee, and these exceptional circumstances did not exist in this case.

36 The respondent submitted that the phrase "serious misconduct" should be given its ordinary meaning, which is most typically considered in employment cases. For this reason, the usage of the phrase in employment cases has also been applied to owner-driver contracts. In support of this proposition, the respondent relied on *ADA Cartage Pty Ltd v Holcim (Australia) Pty Ltd* [2010] VCAT 1771. In this context, the respondent said the Tribunal should have regard to the definition of serious misconduct in Regulation 1.07(2)(a) and (b) of the *Fair Work Regulations 2009* (Cth).

37 In my view, there is merit in having regard, as a guide, to the concept of serious and wilful misconduct, as it is applied in employment law. However, some caution needs to be taken in this respect, as there are features of a contract of employment, such as the implied term of fidelity and good faith for example, and the application of principles of fiduciary duty, in certain types of employment, for example senior executives, that would not generally apply under owner-driver contracts, absent express terms. With this caveat in mind however, in this sense, "serious and wilful misconduct" should be regarded, relevantly adapted to present circumstances, as conduct by an owner-driver party to the Cartage Agreement, that strikes at the heart of the contract, such that there has been a disregarding of an essential condition of the contract: *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 per Lord Evershed MR at 700. It can also be described, relevantly adapted to present circumstances, as involving such a serious breach of the contract that the employer (or hirer) could not reasonably be expected to keep the employee (or owner-driver) in their employment: *North v Television Corporation Ltd* (1976) 11 ALR 599 per Smithers and Evatt JJ at 607.

38 Taking the employment law context as a guide, the categories of conduct that may constitute misconduct are not fixed and there are a variety of types of conduct that may be involved (see generally the discussion in Sappideen, O'Grady and O'Riley *Mackens Law of Employment* 8th Edition pars [8.250] to [8.340]). There is no doubt that a safety breach could constitute misconduct, if it can be characterised as "serious and wilful". I note also however, that such a breach was expressly contemplated as a separate ground to terminate the Cartage Agreement without compensation, in cl 9.1(f).

39 Returning to *Buitendag*, in this case Le Miere J set out the relevant principles in relation to summary dismissal of an employee at common law, at pars 46 to 49. The "exceptional circumstances" relate to the observations of Kirby J in *Concut v Worrell* [2000] HCA; (2000) 103 IR 160; (2000) 176 ALR 693 at par 51. Whilst Kirby J's comments in that case refer to the common law position, importantly in this case, the Cartage Contract itself requires a "fundamental breach", to trigger the right to terminate without compensation, regardless as to whether the relevant event can be characterised as an "exceptional circumstance" or not.

Misrepresentation

40 In *Halsbury's Laws of Australia 110 – Contract - (A) Misrepresentation in Contract – Introduction* at par [110-5025] a misrepresentation in contract is described as:

> A misrepresentation is a false statement of a material fact made by one person (the representor) to another (the representee) in order to induce that other party to enter into the contract and which has this effect. The misrepresentation does not prevent the contract coming into being, or render the contract void. Instead, the contract is voidable and the principal response of the law of misrepresentation to this misinformation is to say that because the representee's decision to contract was based on a false understanding, the representee should be permitted to resile from the contract. Rescission is thus the usual remedy for misrepresentation.
>
> Although damages may be recovered in tort or under statute in relation to certain misrepresentations, damages for breach of contract are not available for misrepresentation unless the false statement of fact is also a term of the contract.

41 Furthermore, misrepresentations may be characterised as fraudulent or innocent.

Consideration

Meaning of the Cartage Agreement

42 The first issue to consider is the meaning of cl 9.1(i) i of the Cartage Agreement in relation to "serious and wilful misconduct (including theft, violence or violent threats and fraud)". As noted above, the applicant contended that this provision limited the grounds on which the respondent could rely to summarily terminate the Cartage Agreement for misconduct, to the particularised conduct set out in the brackets. Thus, as the submission went, the conduct of the applicant on the day in question did not involve any such behaviour and therefore, the respondent could not rely on this provision to summarily terminate the Cartage Agreement. On the other hand, the respondent submitted that the terms of a contract are to be interpreted objectively and given their ordinary and plain meaning. Attention was drawn to the words "including but not limited to" in cl 9.1(i) in support of the construction that the Cartage Agreement did not intend to limit "serious and wilful misconduct" to specific examples, as advanced by the applicant.

43 I am not able to accept this narrow construction of cl 9.1(i) i. First, the language of this provision, taken in its ordinary and natural sense, is inconsistent with the applicant's approach. The use of the word "including" in the brackets after the words "serious and wilful misconduct" suggests that the examples cited are words of extension and are not intended to be exclusive and limiting. I see no reason to restrict or read down cl 9.1(i) i as contended by the applicant. Second, the reference to other grounds of termination without compensation for fundamental breach in cl 9.1(i) ii– vi suggests too, that objectively, the clause is intended to cover an expansive list of possible grounds on which the respondent could rely to terminate the Cartage Agreement summarily without compensation. For example, it may well be arguable, at least in the context of employment law principles, which may provide some guidance as to what "serious and wilful misconduct" may mean for present purposes, that it also encompasses the sort of conduct set out in cl 9.1(i) ii – v and possibly even vi. Additionally, as to the argument of the applicant that this clause of the Cartage Agreement should be construed *contra proferentem*, as against the respondent as the drafter of the clause, this argument cannot survive the effect of cl 1.2 (e) of the Cartage Agreement, which expressly precludes the operation of this principle of construction.

44 Some idea of what, objectively viewed, a reasonable businessperson in the position of the parties may consider cl 9.1(i) i to mean, is to be gleaned from the introductory words of cl 9.1(i) where reference is made to "a fundamental breach". Regardless of the type of conduct or behaviour to be relied on under the various categories of conduct in cl 9.1 (i), the conduct must meet this criterion.

The incident-findings

45 In relation to the incident that occurred on 8 December 2018, an overview of the incident has been set out above. An important piece of evidence in this respect, was the IVMS footage taken from truck number 8239. The footage was played during the hearing and the parties have had an opportunity to extensively review it and make submissions to the Tribunal. The footage shows that both Mr Khiple's vehicle (truck number 8257) and truck number 8239 (driven by Alex) were parked on the left-hand side of the site roadway, facing the Kintail Road site exit. Both Alex and Mr Khiple are seen towards the right-hand rear of Mr Khiple's truck, talking. At an earlier time, at about 08:16:18 minutes on the footage, Mr Khiple is seen getting out of his truck. It shows the truck door opening fully as he gets out of the cab but then partially closing. The driver's door to Mr Khiple's truck is left open but it is not fully open.

46 At 08:18:16 on the footage, Mr Holden's truck approaches both Alex and Mr Khiple. Alex gestures towards Mr Holden's truck by raising his right arm which seems to be signalling Mr Holden to stop. No direct evidence was before the Tribunal as to why Alex did this. I think it is fair to observe that Mr Holden's truck was moving at quite a speed for an onsite access way. As Mr Holden's truck stops, Mr Khiple looks to his left over his shoulder, in the direction of his truck driver's door. On Mr Holden's version of events, given to the respondent's management during the investigation, Mr Holden said he had politely asked Mr Khiple to close the door to his truck, so he had room to exit the site. In his witness statement, Mr Holden said "I brought my truck to a stop and motioned with my hand to Sookie to close the open driver's door". In cross-examination Mr Holden denied he was abusive towards Mr Khiple. Mr Holden then said that Mr Khiple stepped to the front left of his truck and raised both middle fingers at him.

47 The footage then shows at approximately 08:18:19 Mr Khiple took a step or two to his left, which placed him directly in front of and to the left side of Mr Holden's truck, as it was facing the Kintail Road exit. He raised both hands towards the cab of Mr Holden's truck. This is the "middle finger" gesture that Mr Holden said he saw Mr Khiple give him. Importantly, at the time Mr Khiple is raising both hands towards Mr Holden's truck cab, Mr Holden's truck is moving forward. As it is doing so, the wheels of Mr Holden's truck turn left in Mr Khiple's direction at about 08:18:19 on the footage. Importantly also, and critically for present purposes, Mr Khiple does not move from the position he was first in when he raised both hands towards the cab of Mr Holden's truck. Mr Holden said that he clearly saw Mr Khiple raising both middle fingers at him. At 08:18:21 Mr Holden's truck continues forward and contacts Mr Khiple on the front left-hand side of the cab. Mr Khiple moved to his right as this occurred, with both hands pushing away from Mr Holden's truck.

48 After this occurs, Mr Holden's truck then continues towards the Kintail Road exit. Mr Khiple is then seen running after Mr Holden's truck, picking up an object, and throwing it towards the rear of the truck. The footage then shows both Mr Khiple and Mr Holden, after Mr Holden got out of the truck, having an altercation.

49 As I have noted already, Mr Khiple was not called by either party to give evidence. It was common ground that Mr Khiple was dismissed by his employer as a result of the incident. Also, neither party called Alex, who was the only other person present at the time. There was no submission made of a *Jones v Dunkel* kind, by either party. In all of the circumstances, I draw no adverse inference by the failure to call either Mr Khiple or Alex to give evidence. The upshot is however, that the Tribunal is limited to the direct evidence of Mr Holden and the IVMS footage.

50 Several matters arise from the footage, which I regard as important independent evidence as to the incident. It would appear from the footage and the location of the various trucks, that there was a reasonable gap on the right-hand side of the roadway, enough for Mr Holden's truck to pass both Mr Khiple and Alex's truck, even with Mr Khiple's truck door being in an open position. This was also the evidence of Mr Antonioli, who had some 11 years' experience on the road as a professional driver, that there was enough space to navigate past the two trucks on the left and the obstructions on the right. The fact is as the footage shows, Mr Holden's truck did proceed forward towards the exit, past Mr Khiple's truck with its door open, with some room to spare on the right-hand side of the roadway.

51 Furthermore, it is also apparent from the footage, that Mr Khiple's truck's driver's door was not fully open, rather it appeared to be about three quarters open. It would also appear from the footage that there must have been some words used or gestures made by Mr Holden towards Mr Khiple, that caused him to turn to look over his left shoulder towards the open door of his truck. As to Mr Khiple's response, by raising both middle fingers towards Mr Holden, I find it very difficult to accept the applicant's submission that Mr Khiple would have been motivated to do this without any form of provocation or reason. It defies common sense that he would have behaved in this offensive manner, without some words or conduct from Mr Holden, to provoke him to do so. I therefore do not accept that Mr Holden politely requested Mr Khiple to shut the door of his truck.

52 When Mr Khiple raised both his hands towards Mr Holden's truck cab, the evidence established that he was in clear sight of Mr Holden. Mr Holden admitted this. Importantly as I have already observed, once Mr Khiple raised both middle fingers towards Mr Holden's truck cab, he did not move from his then position. Therefore, on this evidence, all other things being equal, Mr Khiple must have remained within sight when Mr Holden's truck continued to move towards Mr Khiple after Mr Khiple had raised his middle fingers towards the cab of Mr Holden's truck. If he was in clear view of Mr Holden when he first raised his middle fingers, if anything, with a turning of Mr Holden's truck wheels to the left, this placed Mr Khiple further towards the driver's side of Mr Holden's truck cab. It is thus difficult to accept the contention of Mr Holden that Mr Khiple was not able to be seen from the cab of Mr Holden's truck and was in a blind spot when contact was made by Mr Holden's truck with Mr Khiple. I also conclude that Mr Holden's truck continued to move forward towards Mr Khiple when Mr Holden either was, or at the very least, should have been aware, that Mr Khiple was most likely to have been directly in front of the left side of Mr Holden's truck. I therefore do not accept that any blind spot prevented Mr Khiple from being visible from the cab of Mr Holden's truck.

53 There was some suggestion in the interview notes taken by the respondent's management that Mr Holden said at the time immediately after Mr Khiple raised both middle fingers, that he was either looking down or to the right and did not notice Mr Khiple was still standing in front of the truck. In his evidence Mr Holden said that he was looking to his right to see that he

was clear of the building materials over on the right-hand side of the roadway. However, the footage revealed that the building materials on the right-hand side were on an area of gravel beyond the dirt road itself. Immediately after striking Mr Khiple, there is shown to be an ample gap between Mr Holden's truck and the right-hand side where the building materials were, such that the truck did not even run over the gravelled area. This is even allowing for the fact that Mr Holden's truck was some way to the left of Mr Khiple's truck, certainly well clear of the driver's door.

54 On the evidence, Mr Khiple must have been in plain sight when he raised both middle fingers and the video footage shows that he did not move. It is difficult to see how Mr Khiple would not have been noticed but in any event, it would have been in my view dangerous and quite reckless for Mr Holden's truck to continue to move forward in the knowledge that Mr Khiple had been standing right in front of it moments before contact was made with him. In those circumstances, there was the obvious potential for a serious injury to Mr Khiple. I am therefore satisfied on the evidence that the circumstances of the incident are largely as outlined by the respondent. I am particularly persuaded by the IVMS footage.

55 On any view of the situation, a truck continuing towards a person standing in very close proximity to it in a confined space in circumstances where the individual was moments before clearly in the vision of the truck driver, constitutes in my opinion, misconduct which is both serious, and in the circumstances, wilful also. As I have said, it is inconceivable that Mr Holden was not aware of the danger of the situation unfolding in front of him, alternatively, he was recklessly indifferent to the possibility. Whilst Mr Khiple's conduct was also inexcusable and provocative, the evidence was Mr Khiple was dismissed by his employer, as a result. Irrespective of whether Mr Holden's conduct constituted serious and wilful misconduct for the purposes of cl 9.1(i) i, it certainly would constitute a serious safety breach for the purposes of cl 9.1(f) of the Cartage Agreement. Whilst the respondent's letter of termination of the Cartage Agreement did not refer to this provision, in my view, its contravention would also justify the termination of the Cartage Agreement immediately and without compensation. Nonetheless, I am satisfied that the ground relied on by the respondent was justified at the time the decision was made.

56 Accordingly, for the foregoing reasons, I am not persuaded that the termination of the applicant's Cartage Agreement by the respondent was unlawful.

The obligation to afford procedural fairness

57 I need also to consider the further submissions of the applicant to the effect that the applicant was denied procedural fairness in the course of the respondent's decision making leading to the termination of the Cartage Agreement. The essence of that claim has been set out above.

58 It is important to observe that the proceedings before the Tribunal in this matter concern a dispute, as that term is defined in s 37(1) of the OD Act. The allegation made by the applicant is that the respondent contravened the Cartage Agreement, as an owner-driver contract, by summarily terminating it without paying the applicant compensation. By s 38(1)(a), the Tribunal is empowered to hear and determine such disputes. As set out above, on the hearing and determination of such disputes, the Tribunal is empowered by ss 47(1) and (4), to determine such a dispute and make various orders and declarations.

59 The Tribunal's jurisdiction under the OD Act is quite different to the Commission's jurisdiction under the *Industrial Relations Act 1979* (WA). Except in relation to certain aspects of the Tribunal's jurisdiction concerning the negotiation of owner-driver contracts and matters in relation to unconscionable conduct, the Tribunal's jurisdiction in matters of the present kind, is the enforcement of what are, in essence, commercial contracts. In determining matters and making orders under ss 47(1) and (4), the Tribunal is not required to consider general notions of industrial or procedural fairness. The only exception to this is if an applicant can establish that in a particular case, there exists a contractual provision, express or implied, to the effect that a hirer will adopt a particular procedure prior to termination of the contract and the hirer was in breach of it. The applicant was not able to point to any specific provision of the Cartage Agreement of that kind, in this case. Even in the case of an employee summarily dismissed for misconduct, an employer is not generally required to comply with principles of natural justice or procedural fairness before dismissing the employee: *Buitendag v Ravensthorpe Nickel Operations Pty Ltd* [2012] WASC 425 per Le Miere J at par 60.

60 Therefore, in my view, the jurisdiction of the Tribunal in this case is limited to considering whether on the facts, the respondent exercised its right to terminate the Cartage Agreement without compensation in accordance with the contract and thus, lawfully. In the alternative, if I am incorrect and there was an obligation under the Cartage Agreement or imposed generally on the Tribunal, for the respondent to demonstrate that it complied with the principles of procedural fairness, and it is a matter that the Tribunal may have regard to under s 47 of the OD Act, which I do not consider it is, then, for the following reasons, I do not consider that the applicant was denied such procedural fairness in any event.

61 I have referred to the applicant's complaints in this respect earlier in these reasons. The first complaint was that the applicant was not given written particulars of the allegations against him. In my view, none were necessary. The circumstances of the incident alleged by the respondent were simple. Mr Holden was aware of the incident because he himself had reported his version of it, by email, the day after the incident occurred. In the circumstances too, there was an obligation on the respondent to promptly investigate the matter which it did by the commencement of interviews with those directly involved, starting on Monday 10 December 2018. At both this meeting and the subsequent meeting with the respondent's senior management on 17 December, there was ample opportunity for Mr Holden to explain the incident from his point of view, which he clearly did do. The notes of the interview attached to the witness statements of Messers Malcolm and Moss show this. Importantly too, the respondent was not required to adhere to the investigating standards of the police. The respondent was attempting to find out what occurred by interviewing the parties concerned. It is clear from these steps, that the substance of the contentions against Mr Holden were made plain.

62 My comments in respect of the above matters equally apply to the applicant's second complaint, that he was not given a copy of minutes of meetings in a timely way. As pointed out by the respondent in its submissions, the applicant was given a copy of the notes of the meetings held on 10 and 17 December on 19 December 2018. However, procedural fairness would not require that a copy of these notes, which were for the respondent's internal investigation purposes, be given to the applicant. Procedural fairness would require that the substance of the allegations be put to the applicant and they were.

63 Finally, in relation to the IVMS footage, it is apparent from the evidence of both Messers Malcolm and Moss, that the IVMS footage from truck number 8239 was not available at the time of the first interview with Mr Holden on the morning of 10 December. It was later shown to Mr Holden in the meeting on 17 December. Mr Holden viewed the footage several times. Mr Holden's version of events had not changed. I cannot see how a failure to show the footage at some point earlier in time than 17 December, disadvantaged Mr Holden in any material way.

64 Additionally, at the meetings Mr Holden was given the opportunity to and he did take the opportunity, to have a support person with him. I am therefore not persuaded that even if the obligation to afford procedural fairness applied, that the respondent failed to comply with procedural fairness in this case.

Were there misrepresentations?

65 Finally, as to the applicant's complaint of misrepresentations by the respondent in relation to the further five-year contract, I am not persuaded that this claim can succeed. As noted above, the thrust of the applicant's claim in this respect was that the Cartage Agreement would be renewed by the respondent for a further five-year term, if the applicant purchased the Running Gear and the mixing bowl. The applicant contended that but for these representations, it would not have made these purchases.

66 The difficulty with the applicant's argument in this respect is that it was not established, and the respondent never said, that it would not seek to rely on the express terms of the Cartage Agreement in relation to its termination. The terms of the Cartage Agreement, a copy of which was provided to Mr Holden prior to it being signed, required the applicant to obtain independent advice as to its terms. Mr Holden in his evidence confirmed that he got legal advice in relation to the contract and he relied on it. He also obtained financial advice. Mr Holden confirmed in his evidence that he was aware of the Cartage Agreement provisions in relation to early termination, both with and without compensation. Furthermore, there was no evidence from Mr Holden that he felt he was in some way misled by the respondent, prior to entering into the new Cartage Agreement. He may have not been entirely happy about the price he had to pay for the Running Gear, but that is a very different thing to an operative misrepresentation by the respondent.

67 As pointed out by the respondent in its submissions, if the applicant's contentions in this respect were correct, the respondent would never be able to terminate the applicant's Cartage Agreement in reliance on the express terms of the contract. It was also clear in the Cartage Agreement itself, that the agitator was to be provided and maintained by the applicant. The applicant was made aware that the mixing bowl was second hand and may need replacing within a year or so, as this was what Mr Moss told Mr Holden at the time. Additionally, the purchase of the Running Gear, entitled the applicant to a higher level of remuneration under the Cartage Agreement, if there was a termination for reasons other than fundamental breach.

68 At the end of the day, this was simply a commercial transaction where the respondent offered the applicant a further five-year contract, if it would agree to do certain things, which it did. The applicant stood to gain the benefit of ongoing work for the respondent. Therefore, I am not persuaded that the respondent engaged in misleading conduct in relation to the renewal of the Cartage Agreement, as alleged.

69 Additionally, the terms of cl 49 – Entire Understanding of the Cartage Agreement, work against any contentions by the applicant in this regard. Any prior representations, understandings, negotiations and arrangements, even if established on the evidence, were overtaken by the parties entering into the further Cartage Agreement (See too *Ferguson v TNT Australia Pty Ltd* [2014] WAIRC 00020; (2014) 94 WAIG 110 per Kenner C at par 23 and the cases there cited). An exception to reliance on such a provision would be if it could be established that any representations made were fraudulent. I do not consider, even if the applicant's claim could be made out, and comments by the respondent's senior management constituted a representation made about the contract being for a period of five years without the capacity for earlier termination, that the respondent's conduct, on the evidence, could be in any way characterised as deliberately dishonest or deceitful. Furthermore, even if such misrepresentations were made out by the applicant, there may be some doubt as to the relief the Tribunal could grant, having regard to the terms of s 47 of the OD Act, given an action for fraudulent misrepresentation is a tortious action for deceit at common law.

Conclusions

70 The Tribunal is not persuaded that the applicant's claims have been made out. The application must be dismissed.

2019 WAIRC 00726

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	D & K HOLDEN PTY LTD
	APPLICANT
	-v-
	HOLCIM (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 2 OCTOBER 2019
FILE NO/S	RFT 1 OF 2019
CITATION NO.	2019 WAIRC 00726

Result	Application dismissed
Representation	
Applicant	Mr J Burton of counsel
Respondent	Mr M Baroni of counsel and with him Ms C Vincent of counsel

Order

HAVING heard Mr J Burton of counsel on behalf of the applicant and Mr M Baroni of counsel and with him Ms C Vincent 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 orders –

THAT this application be and is hereby dismissed.

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