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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2020 WAIRC 00087

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2018

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

FLOYD BEDFORD BROWNE

APPELLANT

-v-

DIRECTOR GENERAL,
DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION

RESPONDENT

CORAM

BUSS J

DATE

FRIDAY, 7 FEBRUARY 2020

FILE NO/S

IAC 3 OF 2018

CITATION NO.

2020 WAIRC 00087

Result

Confidentiality Order Issued

Confidentiality Order

It is ordered that:

1. Until judgment is delivered in this matter only the following persons (authorised persons) may view the advance reasons in this matter or be informed of any information from those advance reasons:
 - (a) each party who is an individual;
 - (b) where any party is not an individual:
 - i. one representative of that party who is authorised to represent the party or to instruct its legal advisers (if any) with respect to the orders properly made at judgment delivery; and
 - ii. any legal practitioner who is employed by the party to provide the party with legal advice generally, even if that legal practitioner is not representing the party in the matter;
 - (c) if any party is legally represented, the party's legal advisers including barristers or counsel; and
 - (d) if the case has been conducted on behalf of a party by its insurer, one representative of the insurer who is authorised to represent the party or to instruct the legal advisers (if any) with respect to the orders properly made at judgment delivery.

2. Until judgment is delivered in this matter:

- (a) a person who has a copy of the advance reasons or any information from those reasons is personally responsible to take all reasonable steps to maintain the confidentiality of those reasons except as otherwise provided in this order;
- (b) an authorised person may only provide a copy of the advance reasons, or disclose information from the advance reasons, to an authorised person; and
- (c) any authorised person who provides a copy of the advance reasons, or discloses information from the advance reasons, to any other authorised person is personally responsible to take all necessary steps to ensure that the advance reasons remain confidential in the hands of any and all of those to whom they provide the advance reasons, including but not limited to providing a copy of these confidentiality orders.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

[2020] WASCA 16

JURISDICTION : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION : BROWNE -v- DIRECTOR GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION [2020] WASCA 16
CORAM : BUSS J
MURPHY J
LE MIERE J
HEARD : 16 AUGUST 2019
DELIVERED : 11 FEBRUARY 2020
FILE NO/S : IAC 3 of 2018
BETWEEN : FLOYD BEDFORD BROWNE
Appellant
AND
DIRECTOR GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION
Respondent

ON APPEAL FROM:

Jurisdiction : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
Coram : J H SMITH AP
T EMMANUEL C
D J MATTHEWS C
Citation : 2018 WAIRC 00817
File Number : FBA 5 of 2018

Catchwords:

Public service - Voluntary severance - Continuous service - Whether appellant's service in the Tasmanian public service to be taken into account with his service in the Western Australian public service in calculating his entitlement to a severance payment - *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) - Award Wages Employees' Long Service Leave General Order of the Industrial Commission 1986 - Proper construction of relevant provisions

Legislation:

Public Sector Management (Redeployment and Redundancy) Regulations 2014 (WA), reg 3, reg 13

Result:

Appeal allowed

Representation:

Counsel:

Appellant : Mr A L Drake-Brockman
Respondent : Mr R J Andretich

Solicitors:

Appellant : Industrial Agent for Appellant
Respondent : State Solicitor's Office (WA)

Case(s) referred to in decision(s):

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) [2009] HCA 41; (2009) 239 CLR 27

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd [2005] HCA (2005) 221 CLR 568

Bull v Attorney-General (NSW) [1913] HCA 60; (1913) 17 CLR 370

Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; (1996) 186 CLR 389

IW v City of Perth [1997] HCA 30; (1997) 191 CLR 1

Kelly v The Queen [2004] HCA 12; (2004) 218 CLR 216

Khoury v Government Insurance Office (NSW) [1984] HCA 55; (1984) 165 CLR 622

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

BUSS & MURPHY JJ:

1 This appeal from the Full Bench of the Western Australian Industrial Relations Commission is concerned with the proper construction of reg 13(2) of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (the Redundancy Regulations) and the now repealed *Award Wages Employees' Long Service Leave General Order* of the Industrial Commission 1986 (the Long Service Leave General Order).

2 The Redundancy Regulations were made pursuant to s 94(1) and s 108 of the *Public Sector Management Act 1994* (WA).

3 Regulation 13(2), read with the definition of 'continuous service' in reg 3 of the Redundancy Regulations, directs attention to the meaning of 'continuous service' in the Long Service Leave General Order. Essentially, the issue for determination is the proper construction of the phrase 'each complete year of continuous service served by the employee in the Public Sector' in reg 13(2) of the Redundancy Regulations, having regard to its incorporation of the meaning of 'continuous service' in the Long Service Leave General Order.

4 'Continuous service' is not defined in the Long Service Leave General Order. Its meaning, instead, is to be discerned from an understanding of the relevant provisions of the Long Service Leave General Order and their operation.

5 The appellant was employed between 3 June 1997 and 18 October 2011 in the Public Service of Tasmania.

6 On 24 October 2011, the appellant commenced employment in the Public Service of Western Australia.

7 By letter dated 22 November 2017, the respondent offered the appellant voluntary severance under a scheme approved by the Minister pursuant to reg 16 of the Redundancy Regulations.

8 The offer took into account the appellant's service in the Tasmanian Public Service in calculating the estimated amount of voluntary severance that would be paid to the appellant should he accept the offer.

9 On or about 7 December 2017, the appellant purported to accept the offer.

10 On 11 December 2017, the respondent informed the appellant that his service in the Tasmanian Public Service was not service for the purpose of calculating the severance payment under the Redundancy Regulations and therefore an amended letter of offer would be sent to him.

11 The amended offer of voluntary severance did not take into account the appellant's service in the Tasmanian Public Service in calculating the estimated amount of voluntary severance that would be paid to the appellant should he accept the amended offer.

12 The appellant was aggrieved by the respondent's decision to reduce the amount of the offer of voluntary severance. He commenced proceedings in the Commission pursuant to s 95 of the *Public Sector Management Act*.

13 Senior Commissioner Kenner held that the appellant's complaint was made out. The Senior Commissioner:

(a) declared that, for the purposes of reg 3 and reg 13(2) of the Redundancy Regulations, 'continuous service' includes service in the employment of the Commonwealth or of another State in accordance with clauses 2, 3 and 16 of the Long Service Leave General Order; and

(b) ordered that, for the purposes of the calculation of the appellant's severance payments under pt 3 of the Redundancy Regulations, the appellant's service in the Public Sector in Western Australia be deemed to include the period from 18 September 1991 to the date of termination of the appellant's employment.

14 On appeal to the Full Bench, a majority (Commissioner Emmanuel and Commissioner Matthews; Acting President Smith dissenting) allowed the respondent's appeal and, in effect, reinstated the respondent's decision. The reasoning of the majority and the minority is summarised by Le Miere J in his reasons.

15 The appellant now appeals to this Court.

The statutory scheme**The Redundancy Regulations*****Definitions***

16 Regulation 3 of the Redundancy Regulations provides for the definitions of 'continuous service' and 'period of continuous service':

continuous service has the same meaning as it has in the *Wages Employees Long Service Leave General Order* of the Industrial Commission;

period of continuous service, in relation to an employee, means the period of continuous service in the Public Sector (including a ministerial office) served by the employee -

- (a) in any period greater than 10 years for which, in the opinion of the employing authority of the employee, there are reliable records of the hours worked each week by the employee; and
- (b) if paragraph (a) does not apply, in the period of 10 years, ending on the day of acceptance by the employee of -
 - (c) an offer referred to in regulation 26(1) or 40(1); or
 - (d) an offer of severance payment referred to in regulation 13(2).

17 The words 'employee', 'Public Sector' and 'ministerial office' are not defined in the Redundancy Regulations. They are, however, defined in the *Public Sector Management Act* (see [37] - [41] below) and those statutory definitions apply to corresponding terms in the Redundancy Regulations: s 44(1) of the *Interpretation Act 1984* (WA).

Application

18 Regulations 4 and 5 of the Redundancy Regulations provide:

4. Application

- (1) *Except as provided in regulation 5, these regulations apply to all employees in departments and organisations.*
- (2) Despite regulation 5, these regulations apply to all employing authorities of departments and organisations in their capacity as employing authorities.

5. Limits on application of regulations

- (1) In this regulation -

seasonal employee means an employee who is employed to work for limited periods during a season of the year.
- (2) Parts 2 to 6 do not apply to the following employees -
 - (a) an executive officer;
 - (b) an employee to whom section 59 of the Act applies;
 - (c) a ministerial officer;
 - (d) an employee who is a casual employee or a seasonal employee;
 - (e) an employee who is to retire or is called on to retire from employment on the grounds of ill health, whether under section 39 of the Act or otherwise;
 - (f) an employee whose employment in the Public Sector is to be terminated because of substandard performance;
 - (g) an employee who is to be dismissed under Part 5 Division 3 of the Act.
- (3) Subregulation (2)(a) does not limit the operation of section 58(5) of the Act. (emphasis added)

Registrable employees

19 Part 2 of the Redundancy Regulations is headed 'Registrable employees' and includes reg 9, which provides:

9. Employee must be notified if registrable or to become registrable

- (1) An employing authority must give an employee written notice that -
 - (a) the employee's office, post or position is or is to be abolished and the employee may be -
 - (i) transferred under regulation 10; or
 - (ii) registered under regulation 18;
 or
 - (b) the employee is, or will become, surplus to the requirements of the employee's department or organisation and the employee may be -
 - (i) transferred under regulation 10; or
 - (ii) registered under regulation 18.
- (2) The notice may be revoked at any time.
- (3) If the notice is revoked, the employing authority must give the employee written notice of the revocation.

Voluntary severance

20 Part 3 of the Redundancy Regulations is headed 'Voluntary severance' and includes reg 11 to 17.

21 Regulation 11 provides:

11. Registrable employees may be offered voluntary severance

- (1) In this regulation -
notified employee means an employee who has been given notice under regulation 9(1).
- (2) The employing authority of a notified employee may offer voluntary severance to the employee if the employing authority is satisfied that the employee cannot be transferred within his or her department or organisation.
- (3) The offer must -
- (a) specify a period of not less than 8 weeks after the offer is made within which the employee may accept or refuse the offer; and
 - (b) provide for the employee to accept the offer and resign from his or her employment with effect on and from a day that is not later than 4 weeks after the day on which the offer is accepted; and
 - (c) *provide for the making of a severance payment under regulation 13 to the employee.*
- (4) The offer must include a notification that refusal to accept the offer may result in the employing authority registering the employee under regulation 18 and that, if the employee is registered and not offered suitable employment, the employee's employment may be terminated under Part 6.
- (5) An acceptance of an offer must be in writing signed by the employee. (emphasis added)

22 Regulation 13(1) defines the word 'pay' for the purposes of reg 13. The word 'pay' is defined to mean, in effect, the definition of 'pay' in reg 3, together with certain other specified allowances.

23 Regulation 13(2), which is the critical provision, provides:

Subject to subregulations (3), (4) and (5), a severance payment made to *an employee* is the payment of an amount equal to 3 weeks' pay for *each complete year of continuous service served by the employee in the Public Sector (including a ministerial office)*. (emphasis added)

24 Regulations 13(3) - (5) deal with periods of continuous service, and provide:

- (3) A severance payment made to an employee who has completed more than one year of continuous service but less than 2 years of continuous service is the payment of an amount equal to 4 weeks' pay.
- (4) The amount of a severance payment must not exceed the amount of 52 weeks' pay.
- (5) For the purposes of subregulations (2), (3) and (4), the weekly pay of an employee who, during the employee's period of continuous service, worked a different number of hours in different weeks must be calculated as follows -

$$A = B \times C$$

where -

- A is the employee's weekly pay;
- B is the employee's full-time weekly pay;
- C is the employee's average weekly hours expressed as a percentage of the employee's potential full-time weekly hours.

25 Regulations 13(6) and (7) provide:

- (6) Despite subregulations (2) to (5), an employee in respect of whom all or some of the conditions of employment are determined under a Commonwealth award is not entitled to any payment provided for by those subregulations.
- (7) An employee mentioned in subregulation (6) is entitled to such payment as is determined by the employee's employing authority, being an amount not greater than the amount that would be payable under this regulation to the employee if none of his or her conditions of employment were covered by a Commonwealth award.

26 Regulation 14 deals with other benefits payable on voluntary severance. Regulation 15 deals with incentive payments for early resignation. Regulation 16 provides, in effect, that the Minister may approve a scheme under which employees are invited to apply to be offered voluntary severance. Regulation 17 provides:

17. Restriction on employment in Public Sector

- (1) Subject to subregulation (2), a person to whom a severance payment is made under regulation 13 or under a scheme approved under regulation 16 must not subsequently be employed in the Public Sector before the expiry of the number of weeks (the *period of restriction*) after the day on which the severance payment is made that is equal to the number of weeks in respect of which the person received a severance payment (the *severance pay period*).

- (2) The Commissioner may, in writing, as from a specified day, exempt from subregulation (1) a person to whose employment that subregulation would otherwise apply.
- (3) If the person's severance pay period exceeds the portion of the period of restriction up to the specified day, the exemption is subject to the person repaying to the employing authority an amount that bears to the severance payment the same proportion as the excess bears to the severance pay period.

Registered employees

27 Part 4 of the Redundancy Regulations is headed 'Registered employees' and includes regs 18 and 20, which provide:

18. Registration of registrable employee

- (1) The employing authority of an employee may register the employee in accordance with the Commissioner's instructions if -
 - (a) the employee -
 - (i) has been given a notice under regulation 9(1); and
 - (ii) is a registrable employee; and
 - (iii) cannot be transferred within his or her department or organisation;
 and
 - (b) at least 14 days before the day of registration, the employing authority has given the employee written notice of the employing authority's intention to register the employee.
- (2) The notice referred to in subregulation (1)(b) must not be given to the employee before the employee is given notice under regulation 9(1).

...

20. Retraining of registered employees

- (1) The employing authority of a registered employee may arrange for the registered employee to be employed for retraining purposes inside or outside the Public Sector in an office, post or position other than the employee's present or former office, post or position under that employing authority.
- (2) Subject to subregulations (3) and (4), the arrangements for the retraining of a registered employee, and the terms and conditions that apply to the retraining, are to be as agreed between -
 - (a) the employee; and
 - (b) the employing authority of the employee; and
 - (c) the employer or employing authority that employs the employee for retraining purposes.
- (3) A registered employee must not be employed for retraining purposes for a period that is greater than the employee's redeployment period, as defined in regulation 28.
- (4) An employing authority who arranges for a registered employee to be employed for retraining purposes must bear the whole cost of that arrangement, unless it is otherwise agreed between that employing authority and the employing authority or employer which employs the registered employee for training purposes.
- (5) A period of employment of a registered employee for retraining purposes is, if regulation 25(4) applies to the registered employee, to be disregarded for the purposes of calculating the period of 6 months referred to in that provision.

Redeployment

28 Part 5 of the Redundancy Regulations is headed 'Redeployment' and includes reg 23 to the effect that the Commissioner may, in writing, direct a registered employee to accept an offer of employment if the Commissioner is satisfied that the offer is for suitable employment in a department or organisation (as defined), and the registered employee has refused the offer or hindered or obstructed his or her redeployment to that suitable employment.

29 Regulation 25(1) provides, in effect, that an employing authority whose offer of an office, post or position is accepted by a registered employee, must credit the registered employee with (amongst other things) all accrued and accruing rights of annual leave and long service leave in accordance with the relevant employment instrument, up to the time of that acceptance.

30 Regulation 26(1) provides for certain benefits to be paid to the registered employee if an employing authority arranges for an offer of a suitable office, post or position 'outside the Public Sector', which the registered employee accepts.

Termination of employment

31 Part 6 of the Redundancy Regulations is headed 'Termination of employment' and includes regs 28 - 36.

32 In broad terms, reg 30 provides that the employment of a registered employee terminates after the last day of the employee's 'redeployment period' (as defined). Regulation 32 provides, in effect, for an earlier termination where earlier termination is requested by the employee and accepted by the employing authority.

33 By reg 32(4), the amount of redundancy pay for an employee whose employment is terminated under reg 32 is (subject to specified adjustments) (a) equal to '3 weeks' pay for each complete year of continuous service served by the employee in the Public Sector (including a ministerial office)', or (b) the minimum amount specified in reg 34. Regulation 33 provides for redundancy pay to be paid to the employee in (broadly speaking) not dissimilar terms, where the employee's employment is terminated under reg 30.

34 Regulation 34 (referred to in relation to the determination of redundancy pay under each of reg 32(4) and reg 33) provides:

34. Minimum amount of redundancy pay

The amount of redundancy pay must not be less than an amount equal to the employee's pay for the number of weeks set out in column 2 of the Table that corresponds to the period of the employee's continuous service calculated up to the end of the day on which the employee's employment is terminated.

Period of continuous service with the employer at termination of employment	Redundancy pay period
At least one year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years	16 weeks

35 Regulation 36(1) provides that subject to its terms, a person to whom a redundancy payment is made under reg 32 or reg 33 'must not subsequently be employed in the Public Sector' before the expiry of a certain period of time.

The Public Sector Management Act

36 The *Public Sector Management Act* contains definitions of, amongst other terms, 'employee' and 'Public Sector'.

37 The term 'employee' is defined in s 3(1) of the *Public Sector Management Act* as:

employee means a person employed in the Public Sector by or under an employing authority.

38 Section 5 of the *Public Sector Management Act* refers to 'employing authority', and provides:

5. Term used: employing authority

(1) For the purposes of this Act, but subject to this section -

employing authority means, in relation to -

- (a) a chief executive officer (other than a chief executive officer referred to in section 4), the Commissioner; or
- (b) a chief employee (other than a chief employee referred to in section 4), the person or board, committee or other body specified by a written law as being the employer of the chief employee; or
- (c) a department or organisation or an employee (other than a chief executive officer or chief employee) employed in a department or organisation -
 - (i) subject to subparagraph (iii), if a chief executive officer or chief employee is the accountable authority of the department or organisation, the chief executive officer or chief employee; or
 - (ii) subject to subparagraph (iii), if a board, committee or other body established under a written law is the accountable authority of the department or organisation, that board, committee or other body; or
 - (iii) if a written law confers on a person or board, committee or other body the power to appoint or employ staff, the person or board, committee or other body;

or

(d) a ministerial office or a ministerial officer, the Minister,
or, when used otherwise than in relation to a public sector body or a chief executive officer, chief employee, employee or ministerial officer, means employing authority of any public sector body, chief executive officer, chief employee, employee or ministerial officer.

(2) For the purposes of this section -

(a) a department -

(i) which is established to support an organisation (other than an organisation which is a Minister); and

(ii) which is not prescribed as an independent department for the purposes of this paragraph,

is to be taken to be a part of the organisation referred to in subparagraph (i); and

(b) **accountable authority** has the meaning given by section 3 of the *Financial Management Act 2006*.

(3) Despite anything in paragraph (c) of the definition of **employing authority** in subsection (1), regulations made under section 108 may provide that the holder of an office, post or position, or a board, committee or other body, created or established under a written law is the employing authority of a department or organisation or of an employee (other than a chief executive officer) employed in a department or organisation.

39 Section 3(1) of the *Public Sector Management Act* defines 'Public Sector' as:

Public Sector means all -

(a) the agencies; and

(b) the ministerial offices; and

(c) the non-SES organisations;

40 The term 'agency' is defined in s 3(1) to mean a 'department' or 'a SES organisation'. A 'department' is defined to mean a 'department established under s 35'.¹ A 'non-SES organisation' is defined to mean (in general terms) an entity which consists of a body, or the holder of an office, that is established or continued for a public purpose under a written law and persons employed by or for the purposes of that body or holder under that written law or another law, subject to specified exceptions. The term 'SES organisation' is defined (broadly speaking) to mean an entity which consists of a body or the holder of an office, post or position established or continued for a public purpose under a written law and which is specified in column 2 of sch 2 of the Act, as well as persons employed by or for the purposes of that body or holder under that written law or another law.

41 The term 'ministerial office' is defined in s 3(1) to mean 'one or more ministerial officers appointed to assist a particular office holder'.

42 Section 94 of the *Public Sector Management Act* relevantly provides:

(1A) In this section -

registered employee means an employee registered under arrangements prescribed under subsection (1);

registrable employee means -

(a) an employee who is surplus to the requirements of a department or organisation; or

(b) an employee whose office, post or position has been abolished; or

(c) an employee in a category prescribed by the regulations.

(1) The Governor may under section 108 make regulations prescribing arrangements for registrable employees in relation to -

(a) redeployment and retraining; and

(b) redundancy.

(2A) Regulations referred to in subsection (1) must specify which parts of the Public Sector must comply with the regulations.

(2) Without limiting the generality of subsection (1), regulations referred to in that subsection may provide for -

(a) the situation in which the whole or any part of -

(i) the undertaking of a department or organisation is, or is to be, sold or otherwise disposed of to; or

¹ Section 35(1) provides: '**department** means a department established under section 35'.

- (ii) the production or provision of goods or services or both by a department or organisation is, or is to be, replaced by the production or provision of goods or services or both by,
 - a person outside the Public Sector, and an employee of the department or organisation is offered a suitable office, post or position by that person; and
- (b) an employee referred to in paragraph (a) who -
 - (i) refuses the offer of a suitable office, post or position, to be directed by his or her employing authority to accept that offer; or
 - (ii) hinders or obstructs the process by which an employee is selected for the making of an offer of a suitable office, post or position, to be directed by his or her employing authority to refrain from that hindrance or obstruction;
- and
- (c) the terms and conditions (including remuneration) which are to apply to an employee who accepts an offer referred to in paragraph (a); and
- (d) the terms and conditions (including remuneration) which are to apply to an employee who is dismissed under section 82A(3)(a), 88(a) or 89(1).

The Long Service Leave General Order

43 The relevant provisions of the Long Service Leave General Order are set out verbatim in the schedule to these reasons.

44 The Long Service Leave General Order provides, in effect, that it was made pursuant to div 3 pt II of the *Industrial Relations Act 1979* (WA).

45 Clause 1 of the Long Service Leave General Order provides, in effect, subject to its conditions, for the provision of long service leave for all Government wages' employees 'employed by a Public Authority'² after and by reference to specified qualifying periods of 'continuous service'.

46 The phrase 'continuous service' is not defined in the Long Service Leave General Order, or in the *Industrial Relations Act*. The word 'continuous' in its ordinary meaning includes 'having the parts in immediate connection, *unbroken*'.³ In the context of cl 1 of the Long Service Leave General Order, it is evidently used to apply both to unbroken consecutive years of service, and to service within a year of service which is unbroken.

47 Clause 2(a) provides that the word 'service', for the purposes of the Long Service Leave General Order, means 'service as an employee of a Public Authority'. The content of its meaning is not defined, but its scope is enlarged upon by cl 2(a), which also provides that 'service' shall 'be deemed to include' the matters in pars (i) to (ix) of cl 2(a). As a result, and in general terms, 'service as an employee of a Public Authority' is deemed to include:

1. Where the employee employed by a Public Authority:
 - (a) is absent whilst on specified types of leave;⁴
 - (b) is absent whilst engaged in National Service;⁵ and
 - (c) is absent whilst on workers compensation.⁶
2. Where the employee employed by the Public Authority has been employed in the service of the Commonwealth or another State of Australia, employment in the service of the Commonwealth or that other State as provided in cl 16.⁷

48 Clause 2(b) limits the ambit of 'service' for the purposes of the Long Service Leave General Order by providing that certain matters are deemed 'NOT' to be included in the term 'service'.

49 Clause 3, in general terms, provides that, subject to cl 2, the service of an employee 'shall not be deemed to have been broken' by three specified matters which concern, in effect, (1) where the employee has ceased employment (by

² The term 'Public Authority' is defined in s 7(1) of the *Industrial Relations Act* as:

public authority means the Governor in Executive Council, any Minister of the Crown in right of the State, the President of the Legislative Council or the Speaker of the Legislative Assembly or the President of the Legislative Council and the Speaker of the Legislative Assembly, acting jointly, as the case requires, under the *Parliamentary and Electorate Staff (Employment) Act 1992*, the Governor or his or her delegate under the *Governor's Establishment Act 1992*, State Government department, State trading concern, State instrumentality, State agency, or any public statutory body, corporate or unincorporate, established under a written law but does not include a local government, regional local government or regional subsidiary.

³ *Macquarie Dictionary Online*.

⁴ Clauses 2(a)(i), (ii), (iii), (iv), (vii) and (viii) of the Long Service Leave General Order.

⁵ Clause 2(a)(v) of the Long Service Leave General Order.

⁶ Clause 2(a)(vi) of the Long Service Leave General Order.

⁷ Clause 2(a)(ix) of the Long Service Leave General Order.

resignation or termination), and (2) where his absence from employment is treated as leave by the employer. The words 'shall not be deemed to have been broken' indicate that without them, the matters referred to would impair continuity of service. The three specified matters in this regard are (broadly speaking):

- (a) By resignation, if the employee resigns from one Public Authority 'in this State' and commences with another Public Authority 'in this State' within one week.
- (b) If the employment is ended by the employer for any reason other than serious misconduct but only if (1) the employee resumes employment with the Government⁸ not later than six months from the date of termination of the employment and (2) payment in lieu of long service leave has not been made pursuant to cl 11.
- (c) '[B]y any absence approved by the employer as leave with or without pay'.

50 Clause 3 is subject to cl 2. Accordingly, despite the interruption in employment wrought by resignation (as contemplated in cl 3(a)) or termination by the employer (as contemplated in cl 3(b)), the employee's preceding and subsequent employment (in the manner contemplated by those provisions) are effectively treated as continuous, but the employee's 'service' must still be in accordance with cl 2. It is less clear how cl 3(c) is intended to operate subject to cl 2 and, in particular, cl 2(b)(iv) and cl 2(a)(i) - (iv) and (vii) - (viii). However, that was not a matter the subject of any submissions.

51 Clause 16 deals with an employee in the service of a Public Authority who, immediately prior to being engaged in such service, was employed in the service of the Commonwealth or another State. Clause 16 provides, in effect, that if the other (earlier) Commonwealth or State service 'was continuous with this service under cl 3', then the employee is entitled to long service leave 'determined' in the manner specified in cl 16.

52 It was not in dispute in this appeal that in cl 16, the words 'was continuous with this service under cl 3' are designed to apply to cl 16 the concept of continuity of service evident in cl 3, although there was some dispute as to how, as a matter of construction, cl 3 was intended to be adapted so as to achieve that result in its application to cl 16.⁹

53 For present purposes, the effect of the Long Service Leave General Order is that when determining periods of continuous service:

1. An employee employed by a Public Authority is deemed to be in the service of a Public Authority despite, within any year, the employee's absence from work on leave, on National Service or on worker's compensation, in accordance with cl 2(a)(i) - (viii).
2. In the case of an employee employed by a Public Authority, temporary cessations of employment associated with returns to employment in accordance with cl 3(a) and (b) are deemed not to affect continuity of service.
3. Where an employee of a Public Authority was, immediately prior to the employee's employment, employed in the service of the Commonwealth or another State, then the employee's employment in the service of the Commonwealth or other State is deemed to be, to the extent and in the manner provided for under cl 16(a) - (c), service as an employee of the Public Authority, providing that such earlier service elsewhere is unbroken (in the sense provided for under cl 3) with the service with the Public Authority.

The parties' arguments

54 It was not in dispute that the bodies in the definition of 'Public Sector' are all bodies constituted under Western Australian State law.

55 Nor was it in dispute that whilst the definition of 'Public Sector' in the *Public Sector Management Act* overlapped to some extent with the definition of 'Public Authority' in the Long Service Leave General Order, the two are not co-extensive in their operation.¹⁰

56 The appellant contends that in reg 13(2), the words 'served by the employee in the Public Sector (including a ministerial office)' read in the context of the preceding words 'each complete year of continuous service' and in the context of the definition of 'continuous service' in reg 3, are apt to include deemed service in the Commonwealth or another State as provided for in the Long Service Leave General Order.¹¹ The appellant's submissions included:¹²

16. When one understands the Regulations as a whole, and in their proper context and purpose, it is clear that the purpose of the Regulations is to provide a mechanism whereby periods of service which are continuous can be determined for the purpose of calculating severance payments for public sector employees.
17. The purpose of the use of the meaning of 'continuous service' in the Regulations is to determine and include periods of service or absences which would not otherwise be counted as service in and for the public sector.

⁸ 'Government' is presumably intended to be a reference to the government of the State of Western Australia; cf the definition of 'Government' in s 5 of the *Interpretation Act*.

⁹ Appeal ts 8 - 10, 22 - 25.

¹⁰ Appeal ts 4 - 5, 22.

¹¹ Appellant's submissions, pages 9 - 10.

¹² Appellant's submissions, pars 16 - 20.

18. What constitutes 'continuous service' within the meaning of the General Order must first be ascertained before the meaning of 'continuous service' in reg 3(1) of the Regulations can be read into the substantive provision (Reg 13(2)).]
19. This is because the meaning of 'continuous service' is not found within one provision of the General Order. This task requires the whole of cl's 2, 3 and 16 of the General Order to be read in its relevant context which context includes incorporation by reference of the words 'continuous service' in reg 3(1) of the Regulations.
20. Once the meaning of 'continuous service' in the General Order is ascertained, the meaning of those words are to be read with the definition of 'Public Sector' (in section 3(1) of the PSMA), and then by reading both of these definitions in the text of reg 13(2) of the Regulations. Regulation 13(2) can then be construed within its context and purpose. (Smith AP at [48]). The term Public Sector is not defined in the Regulations, but the meaning of 'Public Sector' in section 3(1) of the PSMA is not disputed.

57 The respondent contends that reg 13(2) excludes prior service in another State or the Commonwealth. The respondent contends that under reg 13(2) service must be both 'continuous' (as understood in the Long Service Leave General Order) and served in the Public Sector (as defined in the *Public Sector Management Act*).¹³ The respondent contends that the appellant's construction makes the words 'in the Public Sector (including a ministerial office)' in reg 13(2) redundant.¹⁴ The respondent contends that the only features of continuity in the Long Service Leave General Order which can sensibly be applied to service 'served by the employee *in the Public Sector ...*' are those referred to in [53.1] and [53.2] above.

Proper construction of the Redundancy Regulations

58 The effect of the definitions in reg 3 is that in reg 13(2):

- (a) the term 'continuous service' has the same meaning as it has in the Long Service Leave General Order; and
- (b) the term 'period of continuous service', when used in relation to an 'employee',¹⁵ means 'the period of continuous service in the Public Sector ... served by the employee ...'.

59 There is no difficulty in applying *mutatis mutandis* the meaning of 'continuous service', evident in the operation of the Long Service Leave General Order referred to in [53.1] and [53.2] above, to an employee in the Public Sector for the purposes of regs 13(2), (3) and (5). The dispute in essence is whether deemed service referred to in [53.3] above is picked up in regs 13(2), (3) and (5).

60 Regulation 13(2) is evidently a remedial provision which is *prima facie* to be given a beneficial construction. This requires that the provision be construed so as to give the fullest relief which the fair meaning of its language will allow, but not that its true signification should be strained or exceeded. See *Bull v Attorney-General (NSW)*;¹⁶ *Khoury v Government Insurance Office (NSW)*.¹⁷ But the court is not at liberty to give the provision a construction that is unreasonable or unnatural. See *IW v City of Perth*.¹⁸

61 Also, in *Project Blue Sky Inc v Australian Broadcasting Authority*,¹⁹ the plurality said:²⁰

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* [(1905) 2 CLR 405, 414] Griffith CJ cited *R v Berchet* [(1688) 1 Show KB 106 [89 ER 480]] to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or

¹³ Respondent's submissions, par 7.

¹⁴ Respondent's submissions, pars 13 - 19.

¹⁵ Being a person employed in the Public Sector by or under an employing authority: definition of 'employee' in s 3(1) of the *Public Sector Management Act*; s 44(1) of the *Interpretation Act*.

¹⁶ *Bull v Attorney-General (NSW)* [1913] HCA 60; (1913) 17 CLR 370, 384 (Isaacs J).

¹⁷ *Khoury v Government Insurance Office (NSW)* [1984] HCA 55; (1984) 165 CLR 622, 638 (Mason, Brennan, Deane & Dawson JJ).

¹⁸ *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1, 12 (Brennan CJ & McHugh J).

¹⁹ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355.

²⁰ *Project Blue Sky* [70] - [71] (McHugh, Gummow, Kirby & Hayne JJ).

word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'. (citations omitted)

62 Further, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*,²¹ the plurality said:²²

This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (citations omitted)

63 The function of a definition in a statute is not, except in rare cases, to enact substantive law. Rather, its function is to provide aid in construing the substantive enactment that contains the defined term. The meaning of the definition depends on the context, and the purpose or object, of the substantive enactment. See *Kelly v The Queen*,²³ *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*.²⁴

64 The general principles applicable to the construction of statutes apply to the construction of delegated legislation. See *Collector of Customs v Agfa-Gevaert Ltd*,²⁵ *ADCO Constructions Pty Ltd v Goudappel*.²⁶

65 When reg 13(2) is read with the definitions of 'employee' and 'Public Sector', reg 13(2) relevantly provides:

[A] severance payment made to a person employed in the Public Sector by or under an employing authority is the payment of an amount equal to 3 weeks' pay for each complete year of continuous service served by the person employed in the Public Sector (including a ministerial office).

66 When read with the definition of 'continuous service' in reg 3, this means:

[A] severance payment made to a person employed in the Public Sector by or under an employing authority is the payment of an amount equal to 3 weeks' pay for each complete year of service served by the person employed in the Public Sector (including a ministerial office) which is continuous service within the meaning of the Long Service Leave General Order.

67 On a literal reading of reg 13(2) (as elaborated upon in the preceding paragraphs), it is the service served by the relevant employee 'in the Public Sector ...' which must be continuous within the meaning of the Long Service Leave General Order, but that still begs the question as to the scope and operation of the word 'continuous' in this context. Ultimately, the point of construction turns upon whether and to what extent, and in what manner, the very compressed reference to 'continuous service' in reg 13(2) of the Redundancy Regulations is used to control or influence the meaning of the concluding words 'served by the employee in the Public Sector ...'.

68 There is some force in the respondent's contention that the only 'continuous service' under the Long Service Leave General Order which can be read harmoniously with the requirement that the service be served 'in the Public Sector' is that referred to in [53.1] and [53.2] above.

69 However, the Long Service Leave General Order was made before the enactment of the *Public Sector Management Act*. The Long Service Leave General Order referred to the term 'Public Authority' (as defined in the *Industrial Relations Act*) and not to the term 'Public Sector'. By contrast, the *Public Sector Management Act* adopted and defined the term 'Public Sector' and did not refer to the term 'Public Authority' (as defined in the *Industrial Relations Act* or at all). Nevertheless, the drafter of the Redundancy Regulations chose to define the term 'continuous service' in reg 3 by reference to the Long Service Leave General Order.

70 The Long Service Leave General Order does not ascribe a meaning to the term 'continuous service' in the abstract. Rather, it ascribes a meaning to the term in the context of continuous or unbroken service by reference to the term 'Public Authority'. The deeming provisions in cl 2 are a significant and integral feature of the meaning which the Long Service Leave General Order ascribes to 'continuous service'.

71 The definition of 'continuous service' in reg 3 of the Redundancy Regulations states that in the Redundancy Regulations 'continuous service' has the same meaning as it has in the Long Service Leave General Order. It is the meaning of 'continuous service' in the Long Service Leave General Order, in the context of continuous or unbroken service by reference to the term 'Public Authority', including the deeming provisions in cl 2, that is picked up by the definition of 'continuous service' in reg 3.

72 By necessary implication, that meaning is transposed in the Redundancy Regulations:

²¹ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27.

²² *Alcan* [47] (Hayne, Heydon, Crennan & Kiefel JJ).

²³ *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 [103] (McHugh J).

²⁴ *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA (2005) 221 CLR 568 (McHugh J).

²⁵ *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389, 398 (Brennan CJ, Dawson, Toohey, Gaudron & McHugh JJ).

²⁶ *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; (2014) 254 CLR 1 [28] (French CJ, Crennan, Kiefel & Keane JJ).

- (a) to continuous or unbroken service, as explained in the Long Service Leave General Order, by reference to the defined term 'Public Sector' (instead of the term 'Public Authority'), including the deeming provisions in cl 2; and
- (b) having regard to the fact that an entitlement to long service leave crystallises upon the service of a specified period of service or deemed service whereas an entitlement to a severance payment is calculated by reference to the actual period of service or deemed service by the employee.

73 It is that transposed meaning which is applied for the purposes of, relevantly, regs 13(2), (3) and (5).

74 The transposed meaning which is applied for the purposes of, relevantly, regs 13(2), (3) and (5) includes the actual period of any employment in the service of the Commonwealth or another State that was continuous with service in the Public Sector under the provisions of cl 2(a)(ix) read with cl 3 and the chapeau of cl 16(a) of the Long Service Leave General Order.

75 Accordingly, the better view, which is open on the language of reg 13(2) read with the definition of 'continuous service' in reg 3, is that the reference to 'continuous', within the meaning of the Long Service Leave General Order, is intended to pick up the actual period of any service which is deemed service under the Long Service Leave General Order, and that the words 'served by the employee in the Public Sector' are to be understood in that light. On that view, the words 'for each complete year of continuous service served by the employee in the Public Sector' are, objectively, to be read as 'for each complete year of service served or which would be deemed to be served by the employee in the Public Sector if the Public Sector were a Public Authority and the relevant employee was an employee of a Public Authority for the purposes of the Long Service Leave General Order'.

76 The construction referred to in the preceding paragraph 'best gives effect to ... [the] purpose and language [of reg 13(2)] while maintaining the unity of the statutory scheme'.²⁷ Further, such a construction appears to us to be not unreasonable or unnatural, and gives the fullest relief which the fair meaning of the language would allow. Also, such a construction does not involve any element of redundancy as the respondent contends. Rather, such a construction gives meaning to each of the words in reg 13(2), albeit in a manner different from that advanced by the respondent.

77 For these reasons, in our view the majority of the Full Bench erred in concluding that reg 13(2) of the Redundancy Regulations operated, on its proper construction, to exclude deemed service in another State in accordance with the meaning of continuous service in the Long Service Leave General Order reflected in [53.3] above.

78 We would allow the appeal.

79 The orders made by the majority of the Full Bench should be set aside and the declaration and order of Senior Commissioner Kenner reinstated.

Schedule - the Long Service Leave General Order

The Long Service Leave General Order provides relevantly:²⁸

Long Service Leave Conditions.

State Government Wages Employees.

Clause 1

1. Subject to the conditions hereinafter prescribed all Government wages employees employed by a Public Authority shall become entitled to 13 weeks' long service leave:

- (a) after a period of 10 years' *continuous service*; and
- (b) after each further period of seven years' *continuous service*.

The long service leave prescribed in this clause may, by consent between the employer, the employee and the employee's union be taken in more than one portion provided that no portion shall be less than four consecutive weeks.

Provided further that these conditions shall have no application to employees who are subject to long service leave entitlements on an industry basis or wage employees who at the date of this order, or subsequent to this order, receive long service leave conditions which, when viewed as a whole, are more favourable than the conditions specified in this order.

Any qualifying service prior to 1 January 1986 for the second period of long service leave, shall be calculated on a 10 year qualifying period basis but all qualifying service after 1 January 1986 shall be calculated on a seven year qualifying period basis.

Clause 2

- 2.(a) For the purpose of these conditions 'service' means service as an employee of a Public Authority and shall be deemed to include:-

- (i) absence of the employee on annual leave or public holidays;
- (ii) absence of the employee on paid sick leave or on an approved rostered day off;

²⁷ Adopting and adapting the language in *Project Blue Sky* [70] (McHugh, Gummow, Kirby & Hayne JJ).

²⁸ Headings are provided here for convenience only. They are not part of the terms of the Long Service Leave General Order.

- (iii) absence of the employee on approved sick leave without pay except that portion of a continuous absence which exceeds three months. Provided that prior to 1 July 1957 only two weeks in any year shall be allowed and provided that prior to 1 April 1974 and after 1 July 1957 only six weeks in any year shall be allowed;
 - (iv) absence of the employee on approved leave without pay, other than sick leave without pay but not exceeding two weeks in any qualifying period;
 - (v) absence of the employee on National Service or other military training, but only if the difference between the employees' military pay and his civilian pay is made up, or would, but for the fact that his military pay exceeds his civilian pay, be made up by his employer;
 - (vi) absence of the employee on workers' compensation for any period not exceeding six months, or for such greater period as the Minister for Industrial Relations may allow;
 - (vii) absence of the employee on long service leave which accrues on or after 1 April 1974;
 - (viii) absence of an employee on approved leave to attend Trade Union training courses or on approved leave to attend Trade Union business; and
 - (ix) employment in the service of the Commonwealth or another State of Australia as provided in Clause 16 hereof, when employment in the State Government commences on or after 1 April 1974.
- (b) The Service of an employee shall be deemed NOT to include:-
- (i) service of an employee after the day on which he has become entitled to 26 weeks' long service leave until the day on which he commences the taking of 13 weeks of that leave;
 - (ii) any period of service with an employer of less than 12 months. Provided where after 1 April 1974 an employee has service of a month or more but less than 12 months immediately prior to being transferred by one State Government employer to another; becoming redundant or qualifying for pro rata payment in lieu of leave pursuant to Clause 11, then such period of service shall count;
 - (iii) any period during which an employee has been paid as a casual;
 - (iv) any other absence of the employee except such absences as are included in service by virtue of subclause (a) hereof; and
 - (v) any service of an employee prior to 1 April 1974 where that employee was less than 18 years of age.

Clause 3

3. Subject to the provisions of Clause 2 of these conditions the service of an employee shall not be deemed to have been broken -
- (a) by resignation, if he resigns from one Public Authority in this State and commences with another Public Authority in this State within one working week of the expiration of any period for which payment in lieu of annual leave and/or public holidays has been made by the employer from which he resigned, or, if no such payment has been made, within one working week of the day on which his resignation became effective;
 - (b) if his employment is ended by his employer for any reason other than serious misconduct, but only if
 - (i) the employee resumes employment with the Government not later than six months from the day on which his employment was ended; and
 - (ii) payment pursuant to Clause 11 of these conditions has not been made; or
 - (c) by any absence approved by the employer as leave whether with or without pay.

...

Clause 11

11. If the employment of an employee ends before he has completed the first or further qualifying periods in accordance with Clause 1 of these conditions, payment in lieu of long service leave proportionate to his length of service shall not be made unless the employee -
- (a) has completed a total of at least three years' *continuous service* and his employment has been ended by his employer for reasons other than serious misconduct; or
 - (b) is not less than 55 years of age and resigns, but only if the employee has completed a total of not less than 12 months' *continuous service* prior to the day from which the resignation has effect; or

- (c) has completed a total of not less than 12 months' *continuous service* and his employment is ended by his employer on account of incapacity due to old age, ill health or the result of an accident; or
- (d) has completed a total of not less than three years' *continuous service* and resigns or whose services are terminated because of her pregnancy after 1 April 1974 and who produces at the time of resignation or termination certification of such pregnancy and the expected date of birth from a legally qualified medical practitioner; or
- (e) dies after *having served continuously* for not less than 12 months before his death and leaves a spouse, children, parent or invalid brother or sister dependent on him in which case the payment shall be made to such spouse or other dependant; or
- (f) has completed a total of not less than three years' *continuous service* and resigns in order to enter an Invitro Fertilisation Programme provided she produces written confirmation from an appropriate medical authority of the dates of involvement in the programme.

...

Clause 16

- 16.(a) Subject to subclause (c) of this clause where an employee was, immediately prior to being engaged, employed in the service of the Commonwealth or another State of Australia and that employment was continuous with this service under Clause 3 of these conditions that employee shall be entitled to long service leave determined in the following manner:
- (i) Service with the previous employer shall be converted into service for the purpose of these conditions by calculating the proportion that the service with the previous employer bears to a full qualifying period in accordance with the provisions that applied in the previous employment and applying that proportion to a full qualifying period in accordance with the provisions of these conditions.
 - (ii) Service with the State necessary to complete a qualifying period for an entitlement of long service leave shall be calculated in accordance with the provisions of these conditions.
 - (iii) An employee shall not become entitled to long service leave or payment for long service leave unless he has completed three years' continuous service with the State.
 - (iv) Where an employee would but for the provisions of paragraph (iii) hereof have become entitled to long service leave before the expiration of three years' continuous service with the State, service subsequent to that date of entitlement shall count towards the next grant of long service leave.
- (b) No employee shall be entitled to the benefit of this clause if service with the previous employer was terminated for reasons which would entitle that employer to dismiss the employee without notice.
- (c) Nothing in these conditions confers on any employee previously employed by the Commonwealth or another State of Australia any entitlement to a complete period of long service leave that accrued prior to the date on which the employee was employed by the State.
- (d) Any dispute as to the application of paragraph (i) of subclause (a) hereof or whether the employee was previously engaged in the service of the Commonwealth or another State of Australia shall be determined by the Long Service Leave Appeal Committee. (emphasis added)

LE MIERE J:

Summary

80 The appellant, Mr Browne, was employed by the Department of which the respondent is the Director General. Mr Browne had previously been employed in the Tasmanian public service. Mr Browne accepted an offer of voluntary severance. The Director General calculated the severance payment to which Mr Browne is entitled. Mr Browne says that the Director General erred in determining the payment to which Mr Browne was entitled under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (the Regulations). The Regulations provide for a severance payment based on the number of years of 'continuous service'. Mr Browne says that on a proper construction of the Regulations his service in Tasmania should have been counted as part of his 'continuous service' and the Director General erred by failing to take that service into account in calculating the severance payment to which Mr Browne is entitled.

81 Mr Browne referred the Director General's decision to the Industrial Relations Commission. The Senior Commissioner upheld Mr Browne's contention. On appeal, the Full Bench of the Industrial Relations Commission overturned the Senior Commissioner's decision and in effect reinstated the Director General's decision. Mr Browne now appeals to this court.

82 For the reasons which follow I would allow the appeal and quash the decision of the Full Bench.

Mr Browne's grievance

83 Mr Browne was employed by the former Environmental Protection Authority (EPA) in Western Australia from October 2011. Machinery of government changes implemented in July 2017 led to the EPA becoming part of the Department of which the respondent is the Director General. Mr Browne had a prior period of service in the Western Australian Public Service between September 1991 and May 1995. From May 1995 to October 2011 he was employed in the Tasmanian public service.

84 Mr Browne accepted an offer of voluntary severance from the respondent. Regulation 13 of the the Regulations provides for a severance payment of three weeks' pay for each year of continuous service up to a maximum of 52 weeks. The Director General decided that Mr Browne's continuous service did not include his service in Tasmania and calculated the severance payments due to the appellant on that basis.

85 Mr Browne was aggrieved by that decision. He asserted that continuous service includes employment in the service of another State.

86 Section 95 of the *Public Sector Management Act 1994* (WA) (PSM Act) gives employees the right to refer 's 94 decisions' to the Industrial Relations Commission. The Director General's decision is a 's 94 decision'. In exercising the jurisdiction, conferred on it, the Industrial Relations Commission must confine itself to determining whether the regulations have been fairly and properly applied to or in relation to the employee. Mr Browne referred the Director General's decision to the Industrial Relations Commission.

The voluntary severance scheme

87 The Regulations were made under s 94(1) of the PSM Act which empowers the Governor to make regulations prescribing arrangements for registrable employees in relation to redundancy.

88 Part 3 of the Regulations sets out the arrangements for voluntary severance. Regulation 11 provides for the employing authority to make an offer of voluntary severance. The offer must provide for the making of a severance payment under reg 13. Regulation 13(2) provides:

Subject to sub-regulations 3, 4, and 5, a severance payment made to an employee is the payment of an amount equal to three weeks' pay for each complete year of continuous service served by the employee in the Public Sector (including a ministerial office).

89 Regulation 3(1) is a definition section. It provides, amongst other things:

Continuous service has the same meaning as it has in the Wages Employees Long Service Leave General Order of the Industrial Commission.

90 The Long Service Leave General Order of the Industrial Commission (the General Order) is the order made in 1986 under the *Industrial Relations Act 1979* (WA) and published in vol 66 of the *Western Australian Industrial Gazette*. The General Order was repealed by s 64 of the *Labour Relations Legislation Amendment Act 2006* (WA). Nevertheless, for the purposes of the Regulations 'continuous service' has the same meaning as it has in the General Order.

91 Whilst it was in effect the General Order applied to all government wages employees employed by public authorities as defined in s 7 of the *Industrial Relations Act*²⁹ except those receiving long service leave conditions which are more favourable than the conditions specified in the General Order.

92 The General Order does not contain a definition of 'continuous service'.

93 Clause 1 of the General Order provides that subject to the conditions thereafter prescribed all government wages employees employed by a Public Authority shall become entitled to 13 weeks' long service leave after a period of 10 years continuous service and after each further period of 7 years continuous service.

94 Clause 2(a) provides that for the purpose of these conditions 'service' means service as an employee of a Public Authority and shall be deemed to include the absences and employment set out in subpars (i) - (ix) which include employment in the service of the Commonwealth or other State.

95 Clause 2(b) provides that service of an employee shall be deemed not to include service in the circumstances set out in [(i)] - [(v)].

96 Clause 3 sets out the circumstances in which the service of an employee shall not be deemed to have been broken including by resignation if he resigns from one Public Authority in this State and commences with another Public Authority in this State within the period specified.

97 Clauses 4 to 15 deal with applications for leave, when leave shall be taken and other matters relating to the taking of, and payment during, long service leave. It is not necessary to further refer to those clauses.

98 Clause 16 deals with where an employee was, immediately prior to being engaged, employed in the service of the Commonwealth or another State. Clause 16 provides:

16(a) Subject to subclause (c) of this clause where an employee was, immediately prior to being engaged, employed in the service of the Commonwealth or another State of Australia and that

²⁹ Public Authority is defined to mean, amongst other things State Government Department, State trading concern, State instrumentality, State agency, or any public statutory body established under a written law but does not include a local government, regional local government or regional subsidiary.

employment was continuous with this service under Clause 3 of these conditions that employee shall be entitled to long service leave determined in the following manner:

(i) Service with the previous employer shall be converted into service for the purpose of these conditions by calculating the proportion that the service with the previous employer bears to a full qualifying period in accordance with the provisions that applied in the previous employment and applying that proportion to a full qualifying period in accordance with the provisions of these conditions.

...

(b) ...

(c) Nothing in these conditions confers on any employee previously employed by the Commonwealth or another State of Australia any entitlement to a complete period of long service leave that accrued prior to the date on which the employee was employed by the State.

(d) ...

99 Clause 17 deals with ill health during long service leave. Clause 18 establishes a long serve leave appeal committee to hear appeals by any employee in respect of their long service leave entitlement.

Proceedings in the Industrial Relations Commission

100 Mr Browne's application to the Industrial Relations Commission was heard by Senior Commissioner Kenner. Mr Browne contended that the terms of the General Order applied to the Regulations in relation to severance payments in the same manner as it does to long service leave. That is, as with the calculation of long service leave entitlements, where an employee has a period of service in the service of another State or the Commonwealth, that service is deemed to be continuous service for the purposes of pt 3 of the Regulations. Therefore, Mr Browne's service in Tasmania should be included as service in calculating his severance pay entitlements.

101 The Director General contended that the Regulations provide for 'continuous service', when determining a severance payment, to be both:

- service that constitutes continuous service as defined in the General Order; and
- service that has been served by the employee in the Western Australian Public Sector as defined in s 3 of the PSM Act and does not include employment in the service of the Commonwealth or another State.

102 Senior Commissioner Kenner preferred the appellant's construction of the Regulations and the General Order. The Senior Commissioner found that, just as for the purposes of the General Order in cl 2(a) 'service as an employee of a Public Authority' includes the various matters in [(i)] to [(ix)] [including employment in the service of the Commonwealth or another State], so does 'service served by the employee in the Public Sector ...', as specified in reg 13(2). The Senior Commissioner held that the deeming provisions apply to both the General Order reference to 'service as an employee of a Public Authority' and the Regulation's reference to 'continuous service served by an employee in the public sector', and extend their meaning.

103 The Director General also contended that there was a break in Mr Browne's service from him ceasing employment on 19 October 2011 in Tasmania and taking up his new employment in Western Australia on 24 October 2011.

104 The Commissioner rejected that argument. The Commissioner found that on the proper construction of the Regulations, having regard to cl 3 and cl 16(a) of the General Order, a break in service of no more than one week does not break service for continuity of service purposes.

105 The Senior Commissioner declared that for the purposes of reg 3 and reg 13(2) of the Regulations 'continuous service' includes service in the employment of the Commonwealth or of another State in accordance with cl 2, 3 and 16 of the General Order and ordered that for the purposes of the calculation of the appellant's severance payments the appellant's service in the Public Sector in Western Australia is deemed to include the period from 18 September 1991 to the date of the termination of the appellant's employment, that is including the period of his employment in Tasmania.

Appeal to the Full Bench

106 The appellant appealed to the Full Bench of the Industrial Relations Commission. The Director General appealed on the grounds that the Senior Commissioner erred in:

1. Finding 'continuous service served by the employee in the Public Sector' for the purposes of the Public Sector Management (Redeployment and redundancy) Regulations 2014 included the Respondent's service in the Tasmanian Public Service when section 3 of the Public Sector management Act 1994 defines the Public Sector to mean:
 - (a) the agencies, and
 - (b) the ministerial offices, and
 - (c) the non SES organisations
2. Deciding the break in service between 19 October and 23 October 2011 should not be considered a break in 'continuous service served by the employee in the Public Sector' for the purpose of the Regulations.
3. Deciding a fair application of the Regulations required recognition of the Respondent's Tasmanian Service in calculating the amount of voluntary severance payable to him under the

Regulations when that service was not 'continuous service served by the employee in the Public Sector' for the purpose of Regulation 13(2).

107 The Full Bench allowed the appeal, quashed the decision of Senior Commissioner Kenner and dismissed Mr Browne's application to the Commission. The majority, Commissioners Emmanuel and Matthews, held that Public Sector in reg 13(2) has the same meaning as in the PSM Act and accordingly service in another State is not service in the Public Sector and does not count in the calculation of severance payments under the Regulations. The majority upheld appeal ground 1 and did not consider appeal grounds 2 and 3.

108 In dissent, Acting President Smith held that the words 'continuous service' and 'Public Sector' in reg 13(2) are not to be read disjunctively and when the provisions of cl 2, 3 and 16 of the General Order are read into reg 13(2) by the operation of the definition of 'continuous service' in reg 3(1), together with the definition of 'Public Sector', the effect is that the continuous service in another State that is (subsequently) continuous with service in the 'Public Sector' is to be deemed to be 'continuous service served by the employee in the Public Sector' for the purpose of calculating severance pay (and for no other purpose).

Appeal to this court

109 The appellant has appealed to this court against the decision of the Full Bench. There are two grounds of appeal:

1. In concluding that the Public Sector (Redeployment and Redundancy) Regulations 2014 (Regulations) excluded service outside of Western Australia in the calculation of the severance payment under the Regulations, the Full Bench in its decision of 22 November 2018 erred in its interpretation and/or construction of the Public Sector management Act 1994 (PSM Act) and the Regulations in particular ss 3, 94, 95 and 108 of the PSM Act and Regulations 3(1), 13(2), 13(3) and 14 of the Regulations.
2. The Full Bench in its decision of 22 November 2018 erred in its interpretation and/or construction of the regulations in that the Full Bench:
 - (a) failed to properly interpret and/or construe the definition of 'continuous service' in Regulation 3(1) as having the same meaning as in the Government Wages Employees Long Service Leave General Order of the Industrial Commission (General Order); and
 - (b) failed to properly interpret and/or construe the General Order in particular in relation to clauses 2(a), 3, 16(a), 16(b), and 16(c) of the General Order (properly read together with the Regulations) deeming service with the Commonwealth or another State of Australia to be service with a WA Public Authority (Public Sector) in the calculation of the severance payment under the Regulations.

110 Section 90(1) of the Industrial Relations Act provides that an appeal lies to this court from any decision of the Full Bench on the ground, amongst others, that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, Regulation, award, industrial agreement or order in the course of making the decision appealed against. The appellant's grounds of appeal are that there has been an error in the interpretation of the PSM Act and the Regulations. An appeal lies to this court on those grounds.

111 The Director General did not file a notice of contention that the decision of the Full Bench should be affirmed on grounds other than those relied on by the Full Bench. Therefore, it is not necessary to consider the matters raised by grounds 2 and 3 of the Director General's appeal to the Full Bench. This court is concerned only with Mr Browne's grounds of appeal.

Reasons of Full Bench majority

112 Commissioner Matthews found that Public Sector in reg 13(2) has the same meaning as it does in the PSM Act - it means entities within the Western Australian Government. Commissioner Matthews rejected Mr Browne's contention that 'continuous service served by the employee in the Public Sector' must be construed as a whole and that as 'continuous service' has the same meaning as it has in the General Order and that meaning includes servicing government outside of Western Australia, then Public Sector, by necessary intendment, does not have the same meaning as in the PSM Act. Commissioner Matthews held that the term 'continuous service' served by the employee in the Public Sector' in reg 13(2) requires service in the Public Sector as defined by the PSM Act but once that requirement is met the General Order determines what is and what is not continuous service.

113 Commissioner Emmanuel held that reg 13(2) requires the period of service to be continuous **and** served in the Public Sector (emphasis in the original reasons). The Commissioner held that while Mr Browne's employment in Tasmania may have been continuous, in the sense that it did not break continuity of service under the General Order, it was not served in the Public Sector because Public Sector is defined in the PSM Act and does not include entities outside the Western Australian Government. Section 3 of the PSM Act defines Public Sector to mean all the agencies and the ministerial offices and the non-SES organisations, which are themselves defined in s 3. All of the definitions apply 'unless the contrary intention appears'. Commissioner Emmanuel found that a contrary intention does not appear in reg 13(2) notwithstanding the reference to 'continuous service'.

Reasons of Acting President Smith

114 As I have said Acting President Smith interpreted 'continuous service served by the employee in the Public Sector' in reg 13(2) to include service in the public service of another State.

Preferred interpretation

115 The PSM Act does not itself provide for or regulate redundancy. Section 94(1) provides that the Governor may make regulations prescribing arrangements for registrable employees in relation to redeployment and retraining and redundancy. Section 94(3) provides that the regulations may provide for, amongst other things, the remuneration to an employee who accepts voluntary severance.

116 Part 3 of the Regulations deals with voluntary severance of Public Sector employees. Regulation 11 provides for the employing authority to offer voluntary severance to an employee and for an employee to accept voluntary severance. Regulation 13 prescribes the amount of the severance payment to be paid to an employee who accepts voluntary severance.

117 Regulation 13(2), subject to sub-regulations 3, 4 and 5, sets out a formula for calculating the severance payment. The severance payment is a function of two factors - three weeks' pay and 'each complete year of continuous service served by the employee in the Public Sector (including a ministerial office)'. Regulation 3(1) provides that 'continuous service' has the same meaning as it has in the General Order.

118 The use of defined terms in statutory provisions is a common drafting technique. When interpreting statutory provisions which contain a defined term the proper course is to read the words of the definition into the substantive enactment and then construe the substantive enactment in its context and bearing in mind its purpose.³⁰ However, that is not a course that can be followed in this case because 'continuous service' is not a defined term in the General Order. The court must ascertain the meaning of 'continuous service' in the General Order having regard to its context, and then apply that meaning in reg 13(2) having regard to its context and purpose.

119 The meaning of 'continuous service' in the General Order must be determined by considering the terms of the General Order as a whole. The General Order makes provision for long service leave for government wage employees employed by a Public Authority. Clause 1 provides that employees employed by a Public Authority shall become entitled to specified long service leave after a specified period of 'continuous service'. The natural and ordinary meaning of service is a period during which an employee is employed by an employer. The natural and ordinary meaning of 'continuous service' is a period of unbroken service with an employer by an employee. The General Order enlarges the natural and ordinary meaning of both 'service' and 'continuous'.

120 Clause 2 of the General Order enlarges the natural and ordinary meaning of service in a number of ways, including by deeming the service as an employee of a Public Authority to include periods during which the employee is not employed by the employer. That is the effect of cl 2(a) which provides that for the purpose of these conditions 'service' means service as an employee of a Public Authority and shall be deemed to include:

...

(v) absence of the employee on National Service or other military training, but only if the difference between the employees' military pay and his civilian pay is made up, or would, but for the fact that his military pay exceeds his civilian pay, be made up by his employer;

... and

(ix) employment in the service of the Commonwealth or another State of Australia as provided in Clause 16 hereof, when employment in the State Government commences on or after 1 April 1974.

121 Clause 3 of the General Order enlarges the natural and ordinary meaning of 'continuous', in the context of service. Clause 3(a) deems service of an employee not to have been broken by resignation if the employee resigns from the Public Authority and commences with another Public Authority in the State within a specified period. Clause 3(b) deems the service of an employee not to have been broken if his employment is ended by his employer for any reason other than serious misconduct if the employee resumes employment with the Government within a specified period and he has not received a proportionate part of long service leave payment from the previous employer.

122 The enlarged meaning of continuous service by a Public Authority under the General Order includes periods during which an employee is not employed by the Public Authority, including a period of employment in the service of another State. 'Continuous service' in reg 13(2) must be given the same enlarged meaning in its context, that is the context of service by an employee in the Public Sector. Relevantly, 'continuous service' served by an employee in the Public Sector' includes employment in the service of another State of Australia.

123 I find that the majority of the Full Bench erred in their interpretation of reg 13(2) and the General Order. I would allow the appeal and set aside the decision of the Full Bench.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Western Australian Industrial Appeal Court.

JM

Research Associate to the Honourable Justice Buss

11 FEBRUARY 2020

³⁰ *Kelly v The Queen* (2004) 218 CLR 216 [103] (McHugh J).

2020 WAIRC 00092

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2018

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

FLOYD BEDFORD BROWNE

APPELLANT

-v-

DIRECTOR GENERAL

DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION

RESPONDENT**CORAM**

BUSS J

MURPHY J

LE MIERE J

DATE

TUESDAY, 11 FEBRUARY 2020

FILE NO/S

IAC 3 OF 2018

CITATION NO.

2020 WAIRC 00092

Result

Order Issued

Representation**Appellant**

Mr A Drake-Brockman

Respondent

Mr R J Andretich (of counsel)

Order

It is ordered that:

1. The appeal is allowed.
2. The orders made by the majority of the Full Bench are set aside.
3. The declaration and order of Senior Commissioner Kenner in Application 2 of 2018 made on 30 May 2018 is reinstated.

(Sgd.) S KEMP,
Clerk of Court.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2020 WAIRC 00037

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA, PUBLIC TRANSPORT CENTRE

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

FRIDAY, 17 JANUARY 2020

FILE NO/S

APPL 44 OF 2019

CITATION NO.

2020 WAIRC 00037

Result

Award varied

Representation (by correspondence)**Applicant**

Mr J Cunniffe

Respondent

Mr J Dekuyer

Order

HAVING heard Mr J Cunniffe on behalf of the applicant and Mr J Dekuyer on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after Monday, 20 January 2020.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

SCHEDULE

- 1. Clause 3.3 – Meal and Rest Breaks: Delete paragraph (b) of subclause 3.3.2 of this clause and insert the following in lieu thereof:**
- (b) The employer shall provide such employee a meal allowance of \$12.85 to cover the cost associated with the purchase of foods associated with the taking of a second crib.
- The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.
- 2. Clause 4.3 – Suburban Electric Railcar Allowance: Delete paragraph (a) of subclause 4.3.1 of this clause and insert the following in lieu thereof:**
- 4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.
- | | Rate per week |
|------------------|---------------|
| (1) First Year | \$42.85 |
| (2) Thereafter | \$43.15 |
| (3) Special Case | \$43.85 |
- 3. Clause 5.1 – Shift Work: Delete subclause 5.1.1 of this clause and insert the following in lieu thereof:**
- 5.1.1 The employer may, if the employer so desires, work any part of its business on shifts in accordance with the following provisions;
- (a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of \$2.94 an hour on all time paid at ordinary rate.
- (b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of \$3.41 an hour on all time paid at ordinary rate.
- (c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of \$2.94 an hour on all time paid at ordinary rate.
- (d) In addition to the hourly shift work allowance, an employee will be paid an allowance of \$3.41 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
- (e) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.
- (f) The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
- 4. Clause 5.2 – Temporary Transfer Allowance: Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:**
- 5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:
- (a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employee's home depot, the employee shall be paid an allowance of \$1.72 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled.
- The rates referred to in this subclause shall be adjusted by the Employer from time to time by reference to changes to the median of the Perth metropolitan Tariff 1 weekday pay rates per kilometre charged by all licensed taxis in Perth. The adjustment shall take effect from the date nominated by the employer, which shall be no later than 28 days after being notified in writing by the Union of a change to the median weekly rate.
- (b) When the period of relief is for one week or less the allowance of \$7.85 per shift shall be paid in recognition of the disruption to the employee's normal roster.
- The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

- 5.3.1 Employees on call outside the ordinary hours of duty will be paid an allowance of \$4.37 per hour for all time on call.
The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2020 WAIRC 00036

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA, PUBLIC TRANSPORT CENTRE

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE FRIDAY, 17 JANUARY 2020
FILE NO/S APPL 43 OF 2019
CITATION NO. 2020 WAIRC 00036

Result Award varied
Representation (by correspondence)
Applicant Mr J Cunniffe
Respondent Mr J Dekuyer

Order

HAVING heard Mr J Cunniffe on behalf of the applicant and Mr J Dekuyer on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the *Public Transport Authority (Transwa) Award 2006* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after Monday, 20 January 2020.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 5.1 - Shift Work: Delete this clause and insert the following in lieu thereof:

5.1 - SHIFT WORK

- 5.1.1 On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of \$2.87 an hour on all time paid at ordinary rate.
- 5.1.2 On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of \$3.30 an hour on all time paid at ordinary rate.
- 5.1.3 On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of \$2.87 an hour on all time paid at ordinary rate.
- 5.1.4 In addition to the hourly shift work allowance, an employee will be paid an allowance of \$3.30 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
- 5.1.5 In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.
- 5.1.6 The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 5.2 - Temporary Transfer Allowance: Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:

5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:

- (a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of \$1.72 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled, and in addition:
- (b) When the period of relief is for one week or less the allowance of \$7.85 per shift shall be paid in recognition of the disruption to the employee's normal roster.

3. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of \$4.75 per hour for all time on call.

That allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 5.5 - Away From Home And Meal Allowances: Delete subclause 5.5.2 of this clause and insert the following in lieu thereof:

5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of \$31.35 for each 8 hour period and, where less than 8 hours is worked, at the rate of \$7.75 for each 2 hour period or part thereof worked.

2020 WAIRC 00038

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA, PUBLIC TRANSPORT CENTRE

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, ELECTRICAL TRADES UNION OF WA

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS

DATE FRIDAY, 17 JANUARY 2020

FILE NO/S APPL 45 OF 2019

CITATION NO. 2020 WAIRC 00038

Result Award varied

Representation (by correspondence)

Applicant Mr J Cunniffe

First Respondent Mr J Dekuyer

Second Respondent Ms P Lim

Third Respondent Mr A Giddens

Order

HAVING heard Mr J Cunniffe on behalf of the applicant, Mr J Dekuyer on behalf of the first respondent, Ms P Lim on behalf of the second respondent and Mr A Giddens on behalf of the third respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the *Railway Employees' Award No. 18 of 1969* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after Monday, 16 January 2020.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 4.3 – Experience Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - EXPERIENCE ALLOWANCE

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - \$ 6.80

After 24 months service with the employer - \$ 14.20

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance: Delete paragraph (a) of subclause 4.4.1 of this clause and insert the following in lieu thereof:

- (a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of \$17.30 per week to such tradesperson/apprentice.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 – Leading Hands: Delete this clause and insert the following in lieu thereof:

4.5. - LEADING HANDS

Leading Hands shall be paid the following rate per week:

- (a) Class 3
When in charge of not less than three and not more than ten others, paid \$32.10 extra per week
- (b) Class 2
When in charge of more than 10 but fewer than twenty others, paid \$48.30 extra per week
- (c) Class 1
When in charge of more than twenty others, paid \$62.30 extra per week

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 4.6 – Electrical Licence Allowance: Delete this clause and insert the following in lieu thereof:

4.6. - ELECTRICAL LICENCE ALLOWANCE

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current “A” grade or “B” grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of \$22.80 per week.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.1 – On Call Allowances: Delete subclause 5.1.2 of this clause and insert the following in lieu thereof:

5.1.2 On Call Allowance

An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of \$4.75 per hour.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

6. Clause 5.3 – Meal Breaks: Delete paragraph (a) of subclause 5.3.1 of this clause and insert the following in lieu thereof:

- (a) An employee who having responded to a call is unable to return to the employee’s home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of \$11.15 as provided under this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

7. Clause 5.4 – Away from Home Allowances:

A. Delete subclause 5.4.2 of this clause and insert the following in lieu thereof:

5.4.2 Where sub clause 5.4.1. applies, the employee shall be paid an allowance of \$51.70 per day except when the accommodation includes dining facilities and meals, in which case an allowance of \$38.75 per day shall be paid.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

B. Delete subclause 5.4.5 of this clause and insert the following in lieu thereof:

5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of \$13.60 per day.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

8. Clause 5.6 – Travelling Time – Traffic: Delete subclause 5.6.3 of this clause and insert the following in lieu thereof:

5.6.3 When the period of relief is for one week or less an allowance of \$7.85 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

9. Clause 5.7 – Meal Allowance: Delete this clause and insert the following in lieu thereof:

5.7. - MEAL ALLOWANCE

5.7.1 Refreshment Allowance

An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of \$5.60 where:

- (a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and
- (a) The employee is not entitled to a meal allowance as prescribed elsewhere in this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

5.7.2 Meal Allowance

Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid \$11.15 in lieu where:

- (a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or
- (b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

9. Clause 5.8 – Shifts and/or Night Work Allowance – (Six – Day Shift Work): Delete subclause 5.8.1 of this clause and insert the following in lieu thereof:

5.8.1 The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.

- (a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of \$2.87 an hour on all time paid at the ordinary rate.
- (b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of \$3.30 an hour on all time paid at ordinary rate.
- (c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of \$2.87 an hour for all time paid at ordinary rate.
- (d) In addition to the hourly shift work allowance an employee will be paid an allowance of \$3.30 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

- (e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee's continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of \$3.41 per hour.
- The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
- (f) Provided that shift penalties do not apply to Saturday and Sunday hours, which are paid as follows: ordinary hours on Saturday are paid with a 50% loading in accordance with subclause 3.3.2(c), additional hours on Saturdays are paid at double time in accordance with subclause 3.3.2(b) and all time on Sunday is paid at double time in accordance with subclause 3.3.2(a).

INDUSTRIAL MAGISTRATE—Claims before—

2020 WAIRC 00061

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00061
CORAM : INDUSTRIAL MAGISTRATE M. FLYNN
HEARD : WEDNESDAY, 22 MAY 2019
DELIVERED : THURSDAY, 30 JANUARY 2020
FILE NO. : M 33 OF 2018
BETWEEN : CRAIG IVAN BOTICA

CLAIMANT

AND

TOP CUT TMS HOLDINGS PTY LTD (ACN 134 606 661)

RESPONDENT

CatchWords : INDUSTRIAL LAW – Whether the claimant was an ‘employee’ of the respondent for the purposes of the *Fair Work Act 2009* (Cth) or was an independent contractor – Whether the claimant was an ‘employee’ of the respondent for the purposes of the *Long Service Leave Act 1958* (WA) or was an independent contractor – Interpretation of the definition of ‘employee’ in the *Long Service Leave Act 1958* (WA) as ‘any person who is the owner of any vehicle used in the transport of goods if the person is in all other respects an employee’

Legislation : *Fair Work Act 2009* (Cth)
Long Service Leave Act 1958 (WA)
Superannuation Guarantee (Administration) Act 1992 (Cth)
Industrial Arbitration Act 1979 (WA)
Industrial Relations Act 1979 (WA)
Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)

Instruments : *Road Transport and Distribution Award 2010* (Cth)

Case(s) referred to in reasons: : *Hollis v Vabu Pty Ltd* [2001] HCA 44
Abdalla v Viewdaze Pty Ltd t/as Malta Travel (2003) 53 ATR 30
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37
Tattsbet Ltd v Morrow [2015] FCAFC 62
Hall (Inspector of Taxes) v Lorimer [1992] 1 WLR 939
Howard v Merdaval Pty Ltd t/as North Essendon Auto Spares [2019] FCCA 1127
Miles v Brendon Penn Nominees Pty Ltd (2006) WAIRC 5752
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Readymix Group (WA) and Others (1981) 61 WAIG 1705
Paul Ernest Dallaston v Canon Foods [2005] WAIRComm1978
Sharrock v Downer EDI Mining Pty Ltd [2018] WAIRC 00377
Wright v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 00887
Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited [2014] FCA 878

Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd [2008] WAIRComm 350
Cuzzin Pty Ltd v Grnja [2014] SAIRC 36
Qube Ports Pty Ltd v Maritime Union of Australia [2018] FCAFC 72
Stagnitta v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 886
Al-Hakim v Toyoor Al Jannah Pty Ltd & Ors [2018] FCCA 3184
Marshall v Whittaker's Building Supply Co [1963] HCA 26
Moffet v Dental Corporation Pty Ltd [2019] FCA 344
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
ACE Insurance Ltd v Trifunovski [2011] FCA 1204
Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539
Australian Education Union v Victoria (Dept of Education and Early Childhood Development) [2015] FCA 1196
Whitby v ZG Operations Australia Pty Ltd [2018] FCA 1934
Vabu Pty Ltd v Federal Commissioner of Taxation (1996) 33 ATR 537
Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation [2010] FCAFC 52; (2010) 184 FCR 448
Australian Air Express Pty Limited v Langford [2005] NSWCA 96
United Construction Pty Ltd v Birighitti [2002] 82 WAIG 2409
United Construction Pty Ltd v Birighitti [2003] WASCA 24
David Kershaw v Sunvalley Australia Pty Ltd [2007] WAIRComm 520
Paul Ernest Dallaston v Canon Foods [2004] WAIRComm13246

Result : Judgment for the claimant on the long service leave claim

Representation:

Claimant : Mr J Leslie (of counsel) from Zafra Legal

Respondent : Mr J Raftos (of counsel) as instructed by Sparke Helmore

REASONS FOR DECISION

- 1 The claimant, Mr Craig Ivan Botica (Mr Botica) worked for a meat supply business (the Meat Business) between January 2007 and 4 September 2017. The Meat Business was acquired by the respondent, Top Cut TMS Holdings Pty Ltd (ACN 134 606 661) (the Company) in July 2009 and operated under the name *Top Cut* from that date. Mr Botica's work involved driving a refrigerated vehicle to collect and deliver packaged meat to customers of the Meat Business. Mr Botica supplied the vehicle that he used when working for the Meat Business. He worked between six and nine hours each week day. The Company paid for Mr Botica's work upon a weekly invoice to the Company. The payment reflected the number of hours worked by Mr Botica and an hourly rate of pay. The invoice was from a partnership named 'The Bull Run' (the Partnership). The partners were Mr Botica and, his wife, Ms Tracy Botica (Ms Botica).
- 2 The *Fair Work Act 2009* (Cth) (FW Act) confers upon employees of the Company an entitlement to annual leave and superannuation in accordance with the terms of the statute and any relevant modern award, including the *Road Transport and Distribution Award 2010* (Cth) (the Award).
- 3 The *Long Service Leave Act 1958* (WA) (LSL Act) confers an entitlement to long service leave upon employees of the Company who have completed, in accordance with the statute, 10 years of 'continuous employment'.
- 4 Mr Botica alleges that his work in the Meat Business was undertaken as an employee of the entity that operated the Meat Business. He alleges that, as an employee of the Company when his employment ended, the Company failed to account for his entitlements to annual leave, superannuation and long service leave. The Company denies that Mr Botica's work in the Meat Business was undertaken as an employee. It argues that Mr Botica worked as an independent contractor and that any work done by him for the Company was done as a contractor.
- 5 The issue in this case is whether, for the purposes of Mr Botica's claim to annual leave and superannuation entitlements, Mr Botica was an 'employee' of the Company as defined by the FW Act and, for the purposes of long service leave entitlements, Mr Botica was an 'employee' of the Company as defined by the LSL Act.

Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court of Western Australia (IMC)

- 6 The annual leave and superannuation claims will be determined according to the law governing the jurisdiction, practice and procedure of the IMC when dealing with claims made under the FW Act. The relevant provisions of the FW Act are identified in an endnote.¹ If Mr Botica proves that, for the purposes of the FW Act, he was an employee of the Company:
 - a. The Company is a national system employer and Mr Botica is a national system employee as those terms are defined in the FW Act.
 - b. Mr Botica was entitled to four weeks of paid annual leave for each year of service as a result of the National Employment Standard (NES) pursuant to s 87 of the FW Act (unless he was a casual employee). Section 87 of the FW Act is a civil remedy provision. The IMC may order the Company to pay to Mr Botica any (unpaid) amounts that the Company was required to pay under s 87: s 545(3) of the FW Act.

- c. The Award applied to and covered the Company and Mr Botica. The summary of non-contentious facts in paragraph [1] of the judgment and cl 4.1 of the Award is sufficient to reveal that:
- i. the Award covered the Company as a result of it being in the ‘**road transport and distribution industry**’ as defined in cl 3 of the Award;
 - ii. the Award covered Mr Botica as a result of him being a ‘transport worker’ identified by reference to cl 15 of the Award; and
 - iii. the Award applied to the Company and to Mr Botica as a result of the operation of s 47(1) of the FW Act.
- d. The Company was required to make superannuation contributions for the benefit of employees in accordance with cl 21.2 of the Award. Section 50 of the FW Act has the result that the terms of the Award, including cl 21.2, are enforceable as a civil remedy provision of the FW Act. The IMC may order the Company to make superannuation contributions, on behalf of Mr Botica, of any (unpaid) amounts that the Company was required to contribute under cl 21.2 of the Award: s 545(3) of the FW Act.
- 7 The long service leave claim will be determined according to the law governing the jurisdiction, practice and procedure of the IMC when dealing with claims made under the LSL Act. The relevant statutory provisions are identified in an endnote.² The IMC has the jurisdiction to determine all questions arising from Mr Botica’s long service leave claim, including whether he is an ‘*employee*’ for the purposes of the LSL Act.

The Facts

- 8 Many facts are either not in dispute or are the subject of uncontroverted evidence that I consider to be reliable. The witness’ called by the Company were only able to attest to their knowledge of the operations of the Meat Business from the time of their involvement with the Company, for example, from March 2013 in the case of Mr Jay Ovens (Mr Ovens) and February 2017 in the case of Mr Grant Taylor (Mr Taylor). In those circumstances, it is convenient to set out the facts in a narrative form, identifying and resolving any relevant factual disputes.
- 9 In January 2007, Mr Botica accepted an offer of work at the Meat Business made during a telephone conversation with Mr Steve Litton (Mr Litton). At this time the Meat Business was known as *Total Meat Solutions* and Mr Litton was the manager. Mr Botica had been a delivery driver for a business known as *Perth Meat Export* since 1999. It was agreed that Mr Botica would use his own purpose-built vehicle to deliver frozen packaged meat throughout Perth and would be paid \$35 per hour for this work. Mr Botica would also receive ‘free meat’. Mr Litton requested that Mr Botica invoice *Total Meat Solutions* for the hours that he worked. The Partnership was the entity, since 1999, that had been receiving income for Mr Botica’s work for *Perth Meat Export*. In the result, each invoice to the Meat Business for the hours worked by Mr Botica was from the Partnership.
- 10 Mr Botica was the only driver working for *Total Meat Solutions* as at January 2007. Later in 2007, a second driver, Mr Paul Bedford (Mr Bedford), commenced delivering meat for the Meat Business. Mr Bedford also used his own vehicle. Mr Botica observed approximately 25 other workers involved in the Meat Business. Their work included receiving orders from customers and butchering the meat as necessary before packaging the meat for delivery.
- 11 Mr Botica attended the premises of *Total Meat Solutions* early each morning from Monday to Friday. He would be given a ‘run sheet’ listing details of each customer delivery he was to make that day. He was also given an original and a copy invoice for each customer. Mr Botica would personally load his vehicle with the meat needed to fill the deliveries listed in the run sheet. The Meat Business supplied him with cool room gloves. Mr Botica would spend the rest of the day delivering meat to each customer listed in the run sheet. He would drive approximately 200 km each day making deliveries to customers. On average, the time taken by Mr Botica to complete deliveries was 7.6 hours.³ Mr Botica’s work for the Meat Business usually finished sometime between 12.00 pm and 3.00 pm, upon completion of his last delivery. He was not required to return to the premises of the Meat Business and was free to go home. The copy invoice and (completed) run sheet were returned by Mr Botica to the Meat Business on the following day. Mr Botica never received an express request to attend for work on a particular day. Nor was he ever asked not to attend for work on a particular day.
- 12 Subject to meeting any specific delivery time as advised by the transport supervisor of the Meat Business,⁴ Mr Botica determined the route he would follow each day and, consequently, the order of deliveries. The most efficient route was usually self-evident. On completion of each delivery, the customer signed a copy invoice (retained by Mr Botica). The original invoice was left with the customer. The arrival and departure times to and from the customer were recorded on the run sheet. Mr Botica was required to complete, by the end of the day, all of the deliveries listed in the run sheet. If instruction to Mr Botica was required, it came from a supervisor working in the Meat Business. For example, if there was any issue with a customer delivery while Mr Botica was on the road, Mr Botica would contact a supervisor. Occasionally, a supervisor would initiate a call to Mr Botica. There was evidence of Mr Lincoln McDermott (Mr McDermott), a supervisor at *Total Meat Solutions*, requesting Mr Botica to attend upon a customer to re-collect meat that a customer had subsequently rejected. Mr Botica was instructed to return the meat to the premises of the Meat Business and, on occasion, this necessarily resulted in Mr Botica storing the collected meat overnight at his own house.
- 13 The Company, associated with entities involved in the meat industry on the east coast of Australia, acquired the business of *Total Meat Solutions* from Mr Litton in July 2009. Mr Litton continued to manage the Meat Business, now known as *Top Cut*, for the Company. Mr Botica continued to deal with Mr McDermott. Mr Botica’s daily routine and remuneration arrangements did not change. Mr Botica noticed that the volume of the Meat Business increased. The operations moved to new and larger premises in Bibra Lake. Deliveries commenced to be made to large retail customers including Coles Supermarkets. Mr Botica observed about 50 other workers involved in the Meat Business from about this time, growing further to have approximately 100 workers until, in 2016, the volume of activity commenced to decline.

- 14 At the time that he commenced working for the Meat Business in 2007, the Partnership owned a vehicle that Mr Botica had previously acquired, second hand, for a price of \$10,000. Over the period that Mr Botica worked for the Meat Business, he replaced this first vehicle with a second vehicle and replaced this second vehicle with a third vehicle. The cost of second and third vehicles (with the additional cost of specialist refrigeration) was, respectively, in excess of \$30,000 and \$50,000. The second and third vehicles were each owned by the Partnership.⁵ Mr Botica, on behalf of the Partnership, paid all the expenses of maintaining and operating the vehicle, including insurance.
- 15 On occasions, before March 2013, when Mr Botica's vehicle was being repaired or serviced, Mr Botica attended the premises of the Company and the Company supplied him with a replacement vehicle. Mr Botica performed his usual duties. No adjustment was made to Mr Botica's usual hourly rate; he was paid (on his invoice) at the usual hourly rate notwithstanding that he was using a vehicle supplied by the Company.
- 16 During or after 2009, the Company engaged four additional drivers who each drove a vehicle that had been hired or purchased by the Company (the Company Vehicles). The Company considered the four additional drivers to be employees of the Company (the Employee Drivers). They were paid a wage equating to an hourly rate of \$24 - \$26 and were subject to a contract of employment providing for, inter alia, annual leave and superannuation. Compared to the Company Vehicles, the vehicles of Mr Botica and Mr Bedford were better suited for inner city deliveries. The Employee Drivers returned the Company Vehicles to the premises of the Meat Business upon completion of the last customer delivery of the day. The vehicles used by the Employee Drivers contained tracking technology, enabling Company management to monitor the vehicle's movement. Mr Botica's vehicle did not contain tracking technology. Some (but not all) of the Company Vehicles displayed insignia of the Meat Business. The vehicles used by Mr Botica and Mr Bedford did not display insignia. For example, all drivers determined their own delivery route. Mr Botica gave evidence of: receiving a 'Driver Rest Hours' policy document on an occasion between 2012 and 2014; receiving a Christmas hamper of meat each year he worked for the Meat Business; and being offered salmon at a discounted price on occasion when the Meat Business had an excess supply. Managers of the Company referred to Mr Botica (and Mr Bedford) as 'couriers' or 'subbies' when distinguishing them from the Employee Drivers. Except as noted in this paragraph, the role of Mr Botica (and Mr Bedford) and the Employee Drivers was largely indistinguishable.
- 17 In July 2009, Mr Botica was supplied and commenced to wear a cap with a *Top Cut* logo. On an occasion in 2016 or 2017, Mr Botica and Mr Bedford accepted an invitation to attend a marketing presentation arranged by the Company for all Western Australian employees. Mr Botica was supplied with and commenced to wear (while working) clothing that featured *Top Cut* insignia.
- 18 I have noted that Mr Botica was paid upon an invoice in the name of the Partnership that he arranged to be prepared and delivered to the Meat Business, initially to *Total Meat Solutions* and subsequently to the Company. The invoice was occasionally reconciled against relevant run sheets by the Company's manager. The invoice amount reflected the hours Mr Botica had worked and an hourly rate of pay set by the Company.
- 19 The evidence of the weekly invoices in each financial year between July 2009 and July 2017 reveal the total hours worked each year ranged between 1,608.25 hours in the financial year 2009 - 2010, and 2,184.50 hours in the financial year 2015 - 2016; i.e. a weekly average of between 31 and 42 hours (over 52 weeks).⁶ For each working day of the week, the invoice identified: the unit price; quantity of hours (typically between 5 - 10); and GST and a total daily amount. The average hours worked per week over this eight-year period was 37.5 hours.⁷ Mr Botica gave evidence that he did not take any breaks 'because I was getting paid'. The Meat Business did not expressly or impliedly restrain Mr Botica from working for anyone else. There were periods when Mr Botica worked on four days each week, particularly as business activity commenced to decline from 2016. Although Mr Botica may have had a limited opportunity to engage in work for other business', I am satisfied that he did not, in fact, work for anyone other than the Meat Business.
- 20 Over time the agreed hourly rate increased from \$35 in January 2007 to \$45 in July 2009. However, the hourly rate remained at \$45 from July 2009 until Mr Botica ceased working at the Company in September 2017. Mr Botica was required to meet all of the expenses of operating his vehicle, including fuel (estimated by Mr Botica to be between \$8,000 and \$10,000 per annum) and the costs of servicing his vehicle. On occasion, Mr Botica unsuccessfully attempted to negotiate a higher hourly rate. This occurred in 2011 (with Mr Litton) and in 2015 (with Mr Litton's successor, Mr Neil Peebles).
- 21 The Partnership received income for Mr Botica's work for *Perth Meat Export* from 1999 - 2007 and then received income for Mr Botica's work for the Meat Business from 2007 - 2017.
- 22 Ms Botica performed some administrative duties for the Partnership. For example, she arranged for invoices to be sent by email to the Meat Business. Her email address appeared on the invoice of 'The Bull Run' to the Company. She followed up on any unpaid invoices. The Partnership was registered for GST purposes and submitted necessary returns.⁸ The Partnership submitted an annual income tax return. Two are in evidence, for the years 2013 and 2015. The returns are similar. The 'main business activity' of the Partnership is described as a meat delivery service. The gross income was approximately \$78,000. The net taxable income was between \$48,000 and \$49,000 which was distributed to Mr Botica and Ms Botica in equal shares. The most significant expense of the Partnership was the costs of operating the motor vehicle used by Mr Botica (\$10,770 - \$13,311) and depreciation, including depreciation of that motor vehicle (\$7,943 - \$4,467).
- 23 Mr Botica's practice between 2007 and 2013 was to have approximately two weeks holiday each year. Mr Botica made arrangements for a replacement driver of his vehicle. On occasion, Mr Botica arranged for his friend, Mr Peter Johnson (Mr Johnson), to be the replacement driver and paid Mr Johnson \$20 per hour. Sometime before 2014 (and after Mr Johnson had replaced Mr Botica for a short period), Mr McDermott informed Mr Botica that Mr Johnson would not be permitted by the Company to replace Mr Botica in the future.

- 24 Mr Botica planned a four-week holiday in 2014 and informed Mr McDermott of this fact. After Mr Botica unsuccessfully attempted to find a replacement driver, Mr McDermott informed Mr Botica that the Employee Drivers would cover his duties while he was away.
- 25 There is no evidence on arrangements (if any) regarding Mr Botica's holidays *after* 2014 save for:
- a. Mr Oven's stating that Mr Botica 'always sorted a substitute driver' himself;
 - b. 'any substitute worker was decided by Mr Botica'; and
 - c. Mr Bedford stating that Mr Shaun Murphy 'covered' for Mr Botica as well as other drivers working for the Company.
- 26 Mr Botica did not request and was not offered any leave on account of illness.
- 27 There is no evidence that the Company arranged insurance of any risks associated with work done by Mr Botica. There is evidence of the Partnership paying workers compensation insurance.⁹ There is no evidence of the Company satisfying itself as to Mr Botica (or the Partnership) putting in place any insurance until a single communication in mid 2016.
- 28 Commencing in the middle of 2017, the decline in the activity of the Meat Business resulted in Mr Botica being allocated a reduced number of customer deliveries on each working day. He started working later than his usual time. A review of the operations of the Meat Business, initiated by the Company, resulted in a decision, in September 2017, to cease offering work to Mr Botica and Mr Bedford. On the morning of Saturday, 2 September 2017, Mr Botica received a telephone call at his home from Mr Taylor, a manager of the Company. Mr Taylor told Mr Botica that he was required to attend for work on Monday, 4 September 2017 but the Meat Business may not require Mr Botica to attend for work after that day. On 4 September 2017, Mr Botica was informed by Mr Taylor that he was not required for work on 5 September 2017. On 7 September 2017, Mr Botica received an invitation from Mr Ovens, by text message, to express interest in occasional future work for the Company. Mr Botica and Mr Ovens were unable to agree upon Mr Botica's request for an increased hourly rate of pay (from \$45 to \$60) for any future work.

Who Is An "Employee" Under The FW Act?

- 29 The FW Act confers entitlements found in the NES, including the entitlement to annual leave, upon 'an employee'.¹⁰ An 'employee' is defined to mean a 'national system employee'.¹¹ The phrase '*national system employee*' is defined to be 'an individual so far as he or she is employed, or usually employed' by a *national system employer* (for instance 'a constitutional corporation, so far as it employs, or usually employs, an individual').¹² Similarly, the FW Act confers entitlements found in modern awards, including the entitlement to superannuation found in cl 21.2 of the Award, upon 'an employee' to whom an award applies¹³ and '*employee*' is defined to mean a 'national system employee'.¹⁴
- 30 The absence of a statutory definition of 'employee' in the FW Act has resulted in courts drawing upon the distinction, well known at common law and having origins in the law on vicarious liability,¹⁵ between an employee and an independent contractor when determining whether a 'worker' is an employee for the purposes of the FW Act.¹⁶ Subject to discussion of one preliminary issue in the following paragraph, the distinction is discussed in the remainder of this section of my reasons.
- 31 Counsel for Mr Botica submitted that, for the purposes of Mr Botica's claim to superannuation entitlements, it may also be necessary to consider the extended definition of 'employee' found in s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth).¹⁷ The submission is misconceived. Clause 21.1(b) of the Award speaks of the Award *supplementing* the rights and obligations set out in the *Superannuation Guarantee (Administration) Act 1992* (Cth). The entitlement of an 'employee' to superannuation as provided in cl 21.2 of the Award must be taken to be a reference to an 'employee' as defined in cl 3.1 of the Award, being 'a national system employee within the meaning of' the FW Act. The same conclusion may be reached by an alternative route. The jurisdiction of the IMC to make any order against the Company in favour of Mr Botica is proscribed by s 545(3) of the FW Act. One result is that the IMC does *not* have jurisdiction other than to make orders in relation to parties who fall within the 'ordinary meaning' of '*employer*' and '*employee*'.¹⁸ It is impermissible to draw upon an extended definition of '*employee*' in the *Superannuation Guarantee (Administration) Act 1992* (Cth) to determine the 'ordinary meaning' of employee.
- 32 The employee and the independent contractor have in common that, pursuant to a contract, each supplies their labour to another. An employee is a party to a contract of service supplying labour to an employer. An independent contractor is a party to a contract of services supplying labour to a client. The distinction between the two is 'rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'.¹⁹ An employee represents the business of his or her employer. An employee identifies with the business of his or her employer. The absence of representation and identification is indicative of a relationship of principal and independent contractor.²⁰ There is no one defining factor which places a person into the category of employee or independent contractor. The totality of the relationship between the parties must be evaluated.²¹
- 33 Historically, a prominent factor in determining the nature of the relationship between a person who engages another to do work (a Business) and the person who is engaged (a Worker) is the degree of control which a Business *may* exercise over a Worker.²² At issue is the extent to which a Business may give directions with respect to, or exercise control over, the manner in which work is performed by a Worker. Over time, it has become apparent that the degree of skill and expertise required of a Worker to perform many tasks is not amenable to control by a Business. Accordingly, the emphasis of the control test has shifted from: the *actual* exercise of control by a Business to the *right* to exercise control; and a distinction has been made between control over matters that are *central* to the core activities of a Business and matters that are *ancillary* to the core activities of a Business.²³ Where a Business exercises significant control over the activities of a Worker whose tasks are central to the function of the business, the worker is more likely to be an employee.²⁴ Where a Worker is engaged in tasks that are *ancillary* to the core activities of a Business, 'control' may be less significant.

- 34 Control is one factor to be assessed when evaluating the totality of the relationship between a Business and a Worker. It is a mistake to treat the reservation of control over the manner in which work is performed as decisive in favour of an employment contract if the essence of the totality of the relationship is an independent contract.²⁵
- 35 The focus of the inquiry is upon 'the real substance, practical reality or true nature of the relationship in question'.²⁶ A gross disparity between what is presented on the face of a document purporting to be a contract and the reality of what has truly been agreed may result in the document being ignored as a sham or a pretence.²⁷ The parties to a contract 'cannot alter the truth of that relationship by putting a different label on it'.²⁸ The party's own characterisation may contradict the nature of the relationship that the parties have actually created.²⁹ However, if the nature of an agreement is ambiguous, the parties' own characterisation may assist to remove that ambiguity.³⁰
- 36 The *presence* of the deduction of PAYG instalments by a Business and the remittance of funds by a Business to the superannuation fund of a Worker has been treated as indicative of an employment relationship. More recently, the *presence* of GST collections by a Worker, and the Worker's compliance with regulatory requirements that apply to small business has been relied upon to indicate that a Worker is an independent contractor.³¹ However, caution is required when attributing significance to participation by a Business or a Worker in particular regulatory regimes. There is a risk of circular reasoning where the criteria for participation in a particular regulatory regime requires characterisation of a party as a Business or a Worker. A Business may deduct PAYG instalments because the Business and the Worker both (wrongly) believe that the Worker is an employee.³² A Worker may collect GST from a Business and participate in the GST scheme because the Worker (wrongly) believes that he or she is not an employee of the Business.
- 37 Where a Worker's investment in capital equipment is substantial and a degree of skill or training is required to use or operate the equipment, the Worker is more likely to be an independent contractor. In *Hollis v Vabu Pty Ltd* [2001] HCA 44, the High Court of Australia drew attention to the distinction between a Worker's substantial investment in a motor vehicle and a Worker's modest investment in a bicycle. The plurality observed that, all things being equal, a relatively modest investment in capital by a Worker *may* be a reason for concluding that a Worker is an employee.³³ The fact that a Worker contributes substantial assets to a workplace is significant because the contribution may indicate that the Worker has an opportunity to make a profit. The opportunity may arise from a Worker making decisions on matters such as the timing of the acquisition of the asset, the amount spent on the asset and how to finance the acquisition of the asset.³⁴ However, caution is required before drawing conclusions on the significance of a Worker using her or her own vehicle when working in a Business. A Worker who is 'required' to use his or her own vehicle for transport from job to job where the worker deploys his or her skills on behalf of the Business does not become an independent contractor by reason of the requirement to use his or her vehicle.³⁵
- 38 In *Abdalla v Viewdaze Pty Ltd* (2003) 53 ATR 30, the Full Bench of the Western Australian Industrial Relations Commission identified a number of factors of potential significance when assessing the totality of the relationship between a Business and a Worker. I have adapted the list and added to it from other cases. The list is not exhaustive. Features of a relationship in a particular case which do not appear below may be relevant.
- a. Does a Worker perform work for anyone other than a Business (or have a genuine and practical entitlement to do so)? Does the Worker operate from premises other than that of a Business? Does a Worker advertise his or her services to the world at large? The right of a Business to the exclusive services of a Worker is characteristic of an employment relationship. On the other hand, if a Worker also works for others (or has the genuine and practical entitlement to do so) then this suggests an independent contract.
 - b. Does a Worker have the right to delegate or subcontract work? Does a Worker have an obligation to regularly attend the workplace? If a Worker is entitled to delegate work to others (without reference to a Business) then this is an indicator that a Worker is an independent contractor. An employment contract is personal in nature; it is a contract for the supply of the services of the worker *personally*.
 - c. To what extent do the arrangements for remuneration and leave of a Worker resemble an employment relationship?³⁶ Employees tend to be paid a periodic wage or salary and the rate is often set in advance by the Employer. Employees tend to be afforded paid leave for holidays and when unable to work because of illness. Independent contractors tend to be paid by reference to completion of tasks and there may be genuine negotiations about remuneration. Independent contractors tend not to be paid when on holidays or when unable to work because of illness. Employers tend to meet certain expenses associated with each employee including insurance and the cost of a uniform. Independent contractors often pay these expenses themselves. Compared to independent contractors, employers are rarely entitled to make deductions from payments to Workers on account of poor work performance.
 - d. Does a Business present a Worker to the world at large as an emanation of the business?³⁷ Typically, this will arise because a Worker is required to wear the uniform of the Business. Alternatively, if a Worker generates personal goodwill with customers of the Business and is able to leverage this goodwill into an asset that is saleable, a Worker may be an independent contractor.
 - e. Does a Worker have a special skill that is typically required by a Business for a discrete task or for a discrete time period? Such persons tend to be engaged as independent contractors rather than as employees.
 - f. Does a Worker spend a significant portion of his or her remuneration on business expenses, suggesting an independent contractor?
 - g. Does a Business have the right to suspend or dismiss a Worker in a manner consistent with typical dealings between an employer and an employee, suggesting an employment relationship?
- 39 Finally, something should be said about the preferable methodology to be deployed when determining whether examination of the totality of the relationship leads to a conclusion in favour of a Worker being an employee or an independent contractor. In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 (North and Bromberg JJ, Barker J

concurring) it was suggested that it was helpful to determine, firstly, whether or not a Worker was engaged in the conduct of business in his or her own right. If a Worker is *not* engaged in his or her own business, it follows (it was said) that the worker is serving the interests of a Business and is an employee of the business. A different view was expressed by Jessup J in *Tattsbet Ltd v Morrow* [2015] FCAFC 62 who preferred to determine whether the Worker was an employee without sole emphasis on the activities of the Worker; ‘working in the business of another is not inconsistent with working in a business on one’s own’.³⁸ On both views, the extent to which the activities of a Worker exhibit the characteristics of a business is a matter of significance in determining the question of whether a Worker is an employee or an independent contractor.³⁹ A proper evaluation of those factors can only be assessed in the context of a Worker’s specific involvement with the Business in question. Adopting the approach of Mummery J in *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at 944:

This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.

Submissions Of The Parties: The FW Act

40 In closing submissions, counsel for Mr Botica:

- a. Summarised the relevant legal principles in a manner that emphasised the methodology suggested by North and Bromberg JJ in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 (and explained above).
- b. Identifies three factors that might be thought to suggest that Mr Botica was an independent contractor and rebuts the suggestion. First, Mr Botica arranged his affairs and participated in regulatory regimes characteristic of business. Mr Botica’s labour was supplied by a partnership. The Partnership delivered an invoice to the Company. The invoice was paid without any deduction on account of income tax. Mr Botica responds by noting that this arrangement was done on the initiative of Mr Litton. There was no negotiation. Further Mr Botica notes that he was informed (and accepted) that the Company was content to continue the prevailing practice. Secondly, Mr Botica was not allocated leave of any form by the Company. He had limited powers of delegation, confined to periods when he was on ‘leave’. Mr Botica draws attention to authority for the proposition that ‘a limited or occasional power of delegation’ does not alter the status of a Worker.⁴⁰ Thirdly, Mr Botica invested in and used his own vehicle when working for the Company. However, viewed as a ‘tool of the trade’ of the driver, Mr Botica argued that the vehicle may be said to be characteristic of an employment relationship.
- c. Places emphasis on factors tending to suggest that Mr Botica was not in business on his own account. It was said that there was no evidence of Mr Botica pursuing profits or generating goodwill in connection with any business, including the business name of his partnership, ‘The Bull Run’. It was noted that Mr Botica was expected to regularly attend the work place and did in fact do so. The Company ‘controlled’ the tasks performed by Mr Botica on each and every day of his work.
- d. Places emphasis on factors tending to suggest that Mr Botica’s work was *in* the business of the Company. Mr Botica followed a run sheet drafted by the Company. If a Worker’s vehicle was off-road, the vehicle was replaced by the Company. Mr Botica wore a uniform.

41 In written submissions, counsel for the Company stated:

- a. Mr Botica assumed the risk of business.
- b. Mr Botica ‘had substantial control over the manner in which the work was carried out’. He took leave when it suited. He had ‘no set start and finish times’.
- c. It is significant that Mr Botica:
 - i. was not constrained to working for the Company; he was free to work for other parties;
 - ii. ‘could delegate and he did delegate’ his work to third parties; and
 - iii. Mr Botica supplied his own substantial asset, i.e. a refrigerated vehicle.
- d. There is a similarity between the facts of this case and the facts of *Howard v Mervadal Pty Ltd* [2019] FCCA 1127 in which the Court held that the Worker was an independent contractor.
- e. *Miles v Brendon Penn Nominees Pty Ltd* (2006) WAIRC 5752 (*Miles*) is authority for the proposition that the IMC must be circumspect before making a finding that results in a detriment to a Business where such a finding is inconsistent with an agreed arrangement made between the Business and the Worker.

42 I confess to being puzzled by the Company’s reliance upon *Miles*. The cited case contains the reasons of the Full Bench of the Western Australian Industrial Relations Commission for reversing a decision of the IMC. The Full Bench held that the IMC fell into error when departing from conventional criteria for characterisation of the relationship between the Business and the Worker (totality of the relationship, control et cetera) and considered detriment to the Business.⁴¹ In the result, the Full Bench, after consideration of the relevant factors, substituted a finding of an employer/employee relationship. The case does not assist the Company.

Analysis: The FW Act

- 43 The submissions of each party bear out the obvious observation that this is a case where many of the factors relevant to characterisation of the relationship between the parties suggest an 'employer/employee' relationship and many of the factors suggest that Mr Botica is an 'independent contractor'.
- 44 In this paragraph I identify the factors that suggest an 'employer/employee' relationship between the parties.
- a. Mr Botica attended the premises of the Meat Business early each morning from Monday to Friday. He was never expressly directed to attend for work. He was never directed not to attend for work (until the last day of his work).
 - b. Mr Botica was paid at an hourly rate, set by the Company, on a 'take it or leave it' basis. Mr Botica's attempts at negotiation were rebuffed. The hourly rate was modest once account is taken of Mr Botica's vehicle expenses. Although Mr Botica's remuneration for his work was by payment upon an invoice from a partnership of which Mr Botica was a member, the *sole* source of income of the Partnership were payments from the Meat Business. The *sole* source of income of Mr Botica were payments from the Meat Business to the Partnership.
 - c. Commencing in July 2009, Mr Botica usually wore a hat containing *Top Cut* insignia and, commencing on an unknown date in 2016 or 2017, he usually wore shorts and a shirt with similar insignia.
 - d. There was minimal scope for Mr Botica to vary a daily routine that was determined by the nature of his task (making deliveries) and the requirements of the Meat Business (filling orders placed by customers of the Meat Business).
 - e. The time that elapsed between Mr Botica commencing work and ceasing work was similar to that of a full time employee performing the same task, ie between seven and eight hours.
 - f. After the Employee Drivers commenced work in 2009, almost identical tasks were performed by Mr Botica and the Employee Drivers.
 - g. Although Mr Botica was expected to arrange another person to drive his vehicle when he contemplated having a holiday, the Company retained the right to veto Mr Botica's selection. On one occasion, the Company waived the expectation when Mr Botica found it difficult to find a replacement.
 - h. Although Mr Botica usually supplied his own (Partnership) vehicle when working, there was an occasion when his vehicle was 'off road' and he used a vehicle supplied by the Company.
- 45 In this paragraph I identify the factors that suggest an 'independent contractor' relationship between the parties.
- a. Mr Botica was remunerated for his work for the Meat Business by a payment upon presentation of an invoice by the Partnership. The invoiced amount was based upon an hourly rate set by the Meat Business. The Partnership exhibited many of the features that are characteristic of an actively trading partnership. There were two partners, Mr Botica and Ms Botica. It supplied services to a customer via one of the partners (Mr Botica). Another partner (Ms Botica) was involved in the administration of the Partnership. The Partnership:
 - i. delivered invoices;
 - ii. received an income;
 - iii. owned assets;
 - iv. had expenses;
 - v. had (modest) liabilities;
 - vi. participated in the regulatory regimes relevant to income taxation of a business and the GST; and
 - vii. the profits were distributed to the partners involved in the business.
 - b. Payments to the Partnership varied according to Mr Botica's 'volume' of work, measured by the hours that he worked. Mr Botica was not paid for any periods of leave for any reason such as sickness or holidays.
 - c. The hours that Mr Botica worked were a function of the volume of work assigned to Mr Botica by the Company and was reflected in the run sheet that he collected each morning. Mr Botica was (largely) free to determine himself the manner in which he completed his tasks. He did not stop working for a lunch break. Mr Botica did not return to the premises of the Meat Business upon completion of his last delivery of the day. On infrequent occasions, the routine of Mr Botica was varied insofar as a manager of the Meat Business would contact Mr Botica and give a direction relevant to the business needs of the Company.
 - d. The delivery of meat was not the sole or major activity of the Company. The Company processed orders from customers before the meat was delivered. A significant number of Workers were engaged by the Company in the task of meat processing. Mr Botica was involved in a discrete and specialised area of activity of the Meat Business.
 - e. The Partnership purchased a vehicle for the purpose of Mr Botica using the vehicle in his work for the Meat Business. Each vehicle was purpose built. It was a significant investment. One vehicle cost in excess of \$30,000. It was replaced by a vehicle that cost in excess of \$50,000. The Partnership met all of the expenses of operation of the vehicle. Those expenses were significant, between \$10,000 and \$13,000 per annum in the period 2013 - 2015. Mr Botica was *not* required to personally drive his vehicle insofar as Mr Botica was expected to arrange another person to drive his vehicle on those occasions when he contemplated having a holiday.

- 46 The previous two paragraphs reveal that factors that have been identified as relevant in other cases do not clearly point in one direction in this case. In any event it is necessary to view the totality of the relationship between the parties and not any single factor.
- 47 From the perspective of a customer of the Meat Business, the role performed by Mr Botica was indistinguishable from that of the Employee Drivers. The daily routine of each driver did not vary. Each responded to direction (control), largely manifested in the form of a 'run sheet' that was issued by the Company. Each wore a uniform. These facts speak to Mr Botica being a representative of the Meat Business and favours Mr Botica, like the Employee Drivers, being characterised as an employee.
- 48 However, an evaluation of the *totality* of the relationship between the parties is not undertaken from a single perspective, for instance of a customer of the Meat Business. The totality of the relationship includes the *legal* relationship between the Company and Mr Botica.
- 49 Although the *tasks* performed by Mr Botica and the Employee Drivers when engaging in customer deliveries were indistinguishable, the *legal* relationship between the Company and Mr Botica was distinguishable insofar as the services of Mr Botica were supplied to the Company by the Partnership. If the (implied) agreement for meat delivery services to be supplied by the Partnership withstands scrutiny as being bona fide, it speaks to Mr Botica identifying with the interests of the Partnership and suggests that Mr Botica is not an employee of the Company. Accepting that Mr Litton requested that Mr Botica adopt the Partnership (or a similar) structure in dealings with the Meat Business, the fact remains that Mr Botica (and the Partnership) apparently embraced the suggestion. No sham or pretence was involved in the legal arrangement and the fact that the sole source of income of the Partnership was the Company does not alter the conclusion that the Partnership was not a sham.
- 50 A further distinction between Mr Botica and the Employee Drivers, not necessarily apparent to a customer of the Meat Business, was the fact that Mr Botica drove a vehicle that he supplied (via the Partnership). Mr Botica's vehicle was not tracked. It did not display a logo of the Meat Business. The vehicle had some special features. It was valuable. Mr Botica or the Partnership made decisions about the vehicle that had an impact on the level of profitability of the Partnership including the timing of the purchase of a vehicle and the amount spent on the vehicle. It was not a case of Mr Botica using his own 'normal' vehicle to drive himself from job to job to perform tasks. It should also be observed that Mr Botica was paid a premium, albeit modest, compared to the Employee Drivers and that, compared to the Employee Drivers, Mr Botica was *not* required to personally supply his labour.
- 51 In my view, the role of the Partnership and the fact that Mr Botica supplied (via the Partnership) his own purpose-built vehicle are factors of significance in this case. When assessing the totality of the relationship of Mr Botica and the Company, the relatively minor function performed by Mr Botica when representing the Company to customers is less significant to me than the combined effect of the fact that his services were supplied to the Company via the Partnership and that he used a vehicle that was also supplied by the Partnership. Mr Botica was not serving the Company in the Meat Business carried on by the Company. Mr Botica was serving his own business.
- 52 I am not satisfied that Mr Botica was an '*employee*' of the Company as defined by the FW Act. His claims to annual leave and superannuation entitlements cannot succeed.

The LSL Act

- 53 The LSL Act provides for an employee's entitlement to long service leave of 8 2/3 weeks on '*ordinary pay*' upon completion of 10 years 'continuous employment' with one and the same '*employer*'.⁴² The Act also provides for a proportionate entitlement where employment is terminated (other than for serious misconduct) and an employee has completed at least 7 years of continuous employment.⁴³
- 54 The terms '*employee*' and '*employer*' are each defined in the LSL Act. The definitions of '*employee*' and '*employer*' appear in s 4(1) of the LSL Act:
- 'employee'* means, subject to subsection (3) —
- (a) any person employed by an employer to do work for hire or reward including an apprentice;
- (b) any person whose usual status is that of an employee;
- (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
- (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee;
- 'employer'* includes —
- (a) persons, firms, companies and corporations; and
- (b) the Crown and any Minister of the Crown, or any public authority, employing one or more employees;
- 55 The alternative definitions of '*employee*' in s 4(1)(a) ('a person employed by an employer to do work') and s 4(1)(b) ('person whose usual status is that of an employee') in the LSL Act have been construed by appellate authority in this jurisdiction in a manner that is consistent with the authorities discussed above on the meaning of '*employee*' in the FW Act. The totality of the relationship between the parties must be examined to determine whether a Worker is an employee or an independent contractor.⁴⁴ Accordingly, for the same reasons as given above with respect to the definition of '*employee*' in the FW Act, Mr Botica is not an employee as defined in s 4(1)(a) and s 4(1)(b) of the LSL Act.

- 56 The alternative definition of ‘*employee*’ in s 4(1)(c) (‘a person employed as a canvasser’) has no application to the facts of this case.
- 57 The alternative definition of ‘*employee*’ in s 4(1)(d) of the LSL Act contains a specific reference to vehicle ownership (the Vehicle Ownership Clause or VOC). The parties each made written submissions on the significance of the VOC.
- 58 Mr Botica submits that the VOC ‘empowers a court, when determining whether somebody is an employee ... to disregard the factor ... that the person owned the vehicle he was using in transporting goods’. If Mr Botica’s vehicle ownership was the ‘factor that “tipped the scales”’ in favour of characterisation of Mr Botica as an independent contractor, the VOC ‘allows that factor to be removed entirely’. The result, in this case, is that, compared to the result of the application of the common law criteria, Mr Botica is more likely to be characterised as an ‘*employee*’ as a result of the VOC. The effect of the VOC is that a Worker’s vehicle ownership is deemed to be a ‘neutral’ factor.
- 59 The Company’s submission places weight upon the reasoning in two cases: *Transport Workers’ Union of Australia, Industrial Union of Workers, Western Australian Branch v Readymix Group (WA) and Others* (1981) 61 WAIG 1705 (*Readymix*); *Paul Ernest Dallaston v Canon Foods* [2005] WAIRComm1978 (*Dallaston*). The Company relies upon the reasons of Brinsden J in *Readymix* and Sharkey P in *Dallaston* and submits that that the VOC is to be construed by attributing a literal meaning to the word ‘all’ in the phrase ‘all other respects an employee’ (emphasis added). If all factors except for vehicle ownership point toward an employee/employer relationship, the fact of vehicle ownership by a Worker is to be ignored and the Worker is to be characterised as an employee. However, if *one or more* factors point toward an independent contractor relationship, the VOC has no role to play. The result, in this case, is that Mr Botica is not an employee because at least one factor in addition to vehicle ownership (for example, the Partnership) point toward an independent contractor relationship. The effect of the VOC is that vehicle ownership is deemed not to be *the* determinative factor.
- 60 The relevant text of the LSL Act and the effect of the different views may be summarised as follows:

LSL Act, s 4(1)	Mr Botica says (vehicle ownership ‘neutral’):	The Company says (vehicle ownership not determinative):
<p>‘<i>employee</i>’ means, subject to subsection (3) —</p> <p>...<i>(d) any person who is the ... owner ... of any vehicle used in the transport of goods ... if the person is in all other respects an employee;</i></p>	<p>‘<i>employee</i>’ means, subject to subsection (3) —</p> <p>...<i>(d) any person who is the ... owner ... of any vehicle used in the transport of goods ... if the person is [otherwise] an employee;</i> (emphasis added)</p>	<p>‘<i>employee</i>’ means, subject to subsection (3) —</p> <p>...<i>(d) any person who is the ... owner ... of any vehicle used in the transport of goods ... if the person is in [every] other [respect] an employee;</i> (emphasis added)</p>

- 61 At issue in *Readymix*, a decision of the Western Australian Industrial Appeal Court, was whether each person who was paid to drive a vehicle by a company was an ‘*employee*’ as defined by the *Industrial Arbitration Act 1979* (WA) (IA Act). Each vehicle was owned by the driver or by a family company of which the driver was a shareholder.⁴⁵ In separate judgments, Wallace J, Brinsden J and Kennedy J published reasons for upholding a finding of the Commission that the driver was *not* an employee. The IA Act definition of ‘*employee*’ is not the same as the definition of ‘*employee*’ found in the LSL Act. It is helpful to have a ‘side by side’ comparison, revealing that the differences may be considered immaterial.

IA Act, s 7(1)(d) at 25 November 1981	LSL Act, s 4(1)
<p>‘<i>employee</i>’ means any person employed by an employer to do work for hire or reward and includes —</p> <p>(a) any person whose usual status is that of an employee;</p> <p>(b) an apprentice;</p> <p>(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward;</p> <p>(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,</p>	<p>‘<i>employee</i>’ means, subject to subsection (3) —</p> <p>(a) any person employed by an employer to do work for hire or reward including an apprentice;</p> <p>(b) any person whose usual status is that of an employee;</p> <p>(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or</p> <p>(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee;</p>

- 62 The reasons of Brinsden J are accurately reflected in the submission of the Company summarised above. The VOC has no application where ‘one or more of the *indicia*’ of work arrangements point to the Worker being an independent contractor (original emphasis). For Brinsden J, ‘in [such a] case it is not possible to say that the person concerned is *in all other respects an employee*’ (emphasis added).⁴⁶ If all factors (other than vehicle ownership) point towards an employer/employee relationship, vehicle ownership is deemed not to be *the* determinative factor favouring characterisation in favour of an independent contractor.

- 63 Kennedy J was concerned that if vehicle ownership was deemed not to be *the* determinative factor, a single inconsequential *indicium* favouring a contract of service would stultify the VOC. Kennedy J held that the mere fact of Worker vehicle ownership is not to be considered at all in answering the question whether the Worker is an employee.⁴⁷ The reasons of Kennedy J support the submission made by Mr Botica; vehicle ownership is to be treated as a 'neutral' factor when determining whether a Worker is an employee.
- 64 Wallace J records agreement with the reasoning of O'Dea P in the primary decision under appeal and does not expressly address the competing approaches of the Brinsden J and Kennedy J.⁴⁸ The reasoning of O'Dea P favours a construction of the VOC resulting in vehicle ownership being a 'neutral' factor.⁴⁹ However, when summarising the reasons of O'Dea P, Wallace J placed some emphasis upon it being 'first necessary to determine whether a driver is an employee within the ordinary notion of that term'.⁵⁰
- 65 At issue in *Dallaston*, a decision of the Full Bench of the Western Australian Industrial Relation Commission was whether a person who used their own refrigerated vehicle when working as a salesperson was an '*employee*' as defined by the *Industrial Relations Act 1979* (WA) (IR Act). In the decision, Sharkey P (with whom Wood C agreed) and Gregor SC published reasons for upholding the determination of the primary decision maker (Kenner C) that the driver was *not* an employee. The IR Act definition of '*employee*' under consideration in *Dallaston* is the same as the definition of '*employee*' found in the LSL Act, including the VOC.
- 66 In the *Dallaston* case, the reasoning of Sharkey P (with whom Wood C agreed) takes the following steps:
- a. The IA Act definition of '*employee*' considered in the *Readymix* case is not materially different from the IR Act definition of '*employee*'.⁵¹
 - b. The views of Brinsden J and Wallace J were 'sufficiently similar' so as to be able formulate a ratio of *Readymix*;
 - c. The following statements constitute the ratio of *Readymix*:
 - i. The correct approach to the VOC is to determine, first, whether the Worker was an employee within the 'general part of the definition ... in accordance with accepted common law tests'.⁵²
 - ii. The effect of the VOC is that a Worker is not taken out of the category of an '*employee*' simply because the Worker owns a vehicle.⁵³
 - iii. The VOC has no application where the circumstances are that 'one or more of the *indicia* point to' the Worker being an independent contractor (emphasis added).⁵⁴
 - d. The VOC prevents a Worker who is an '*employee*' at common law being declared not to be an employee because the Worker owns a vehicle; ownership of a vehicle does not decide the issue.⁵⁵
 - e. If the principles expressed in *Readymix* were applied to the facts of the *Dallaston* case, the Worker 'could not be ... an employee' at common law and the VOC has no application.⁵⁶
 - f. Considering the effect of the VOC to the facts of the *Dallaston* case, vehicle ownership by the Worker is noted. However, the Worker 'must be an employee "*in all other respects*" before ... [vehicle] ownership ... ceases to be a bar to a finding that he was an employee' (emphasis added).⁵⁷ Noted is the presence of multiple factors, apart from vehicle ownership, pointing to a conclusion that the Worker is *not* an employee.⁵⁸ The presence of those other factors 'preponderantly lead to the conclusion' that the Worker is an independent contractor. In the terms of the VOC, the presence of those other factors is inconsistent with a conclusion that the Worker is *in all other respects* an employee. Two factors are highlighted.⁵⁹ First, the salesperson purchased a list of clients from a fellow worker. Secondly, the salesperson offered to sell his business.
- 67 In brief reasons, Gregor SC expresses agreement with the reasoning of the primary decision maker (Kenner C)⁶⁰ and the reasoning of Sharkey P.⁶¹ However, Gregor SC does not avert to the fact that in the primary decision Kenner C favours the view of Kennedy J in *Readymix* (vehicle ownership is a 'neutral' factor)⁶² whereas Sharkey P expresses agreement with the view of Brinsden J in *Readymix* (vehicle ownership is not determinative).
- 68 It seems to me that the reasoning of Sharkey P summarised in (b) and (c) of paragraph [66] is ripe for debate, particularly insofar as the views of Wallace J are equated with the views of Brinsden J.⁶³ However, it is not appropriate (or necessary) for me to embark on that debate in circumstances where the reasoning summarised in (f) evidences the ratio of the *Dallaston* case. The reasoning is consistent with the reasoning of Kennedy J and Wallace J in *Readymix*. That summary reveals a process of reasoning by which the VOC is construed to mean that a Worker's vehicle ownership is deemed to be a 'neutral' factor when determining whether the Worker is an '*employee*' for the purposes of the LSL Act. Adapting the conclusion of the primary decision maker in *Dallaston* (Kenner C), the reference to 'in all other respects an employee' means one applies the common law test (disregarding ownership of the vehicle) and if, looking at the relationship in its totality, the *indicia* are against the Worker, then he or she would not be an '*employee*' as defined in the VOC.⁶⁴

Analysis: LSL Act

- 69 The result in this case is that I must re-apply the 'totality of the relationship' test applied when considering Mr Botica claims under the FW Act, *excluding consideration of the fact that Mr Botica owns or partly owns (through the Partnership) the vehicle he used to transport goods (for example meat)*, to determine whether he is an '*employee*' as defined in s 4(1)(d).
- 70 Specifically:
- a. I must re-examine the factors suggesting an employment relationship that I set out in paragraph 44, *excluding* those factors identified in sub-paragraphs (g) and (h) because they concern Mr Botica's vehicle ownership.

- b. I must re-examine the factors suggesting an 'independent contractor' relationship that I set out in paragraph 45, *excluding* the factor concerning vehicle ownership identified in subparagraph (e).
 - c. I must re-examine the applicability of the reasoning in paragraphs 46 - 51.
 - d. The reasoning in paragraphs 46 - 49 does not involve any express or implicit reference to Mr Botica's vehicle ownership. In broad terms, the point made in those paragraphs is that, save for Mr Botica supplying his services to the Company via the Partnership, his role and function within the Company was indistinguishable from the role and function performed by the Employee Drivers.
 - e. I must exclude from my consideration the reasoning in paragraph 50 which concerns the significance of Mr Botica's vehicle ownership.
 - f. The reasoning and conclusions expressed in paragraph 51, drawing upon the fact of Mr Botica's vehicle ownership, must be set aside and the issue considered afresh. This is undertaken in the following paragraph.
- 71 In my view, the role of the Partnership is the only significant factor in favour of a conclusion that Mr Botica was not an employee of the Company. The point has been made that Mr Botica's role and function within the Company was indistinguishable from the role and function performed by the Employee Drivers. There is no doubt that the Employee Drivers were employees of the Company. When assessing the totality of the relationship between Mr Botica and the Company, the fact that his services were supplied to the Company via the Partnership does not, in my view, displace the combined effect of the factors favouring an employment relationship. Mr Botica operated from the premises of the Meat Business each morning. Mr Botica did not work for anyone other than the Company. The fact that the Company did not withhold PAYG tax installments or superannuation and that Mr Botica was not paid for holidays or was afforded 'sick leave' are all factors that derived from the parties self-characterisation of their relationship as 'independent contractor' and are not to be afforded weight. Mr Botica embraced the taxation advantages to him afforded by operating via a Partnership. However, this fact does not obscure the true nature of relationship between the parties. Mr Botica's control over his work was limited to the extent that it was dictated by the contents of the run sheet formulated by the Company. I do not agree with the submission of the Company that the following factors suggest a relationship of 'independent contractor':
- a. Mr Botica was paid an agreed hourly rate;
 - b. there was some variation in the hours that he worked each day; and
 - c. he ceased working for the Company at the conclusion of his last delivery.
- 72 Those factors are unremarkable to me. The extent of delegation of his work by Mr Botica was limited to very brief periods and was subject to approval by the Company. Mr Botica represented the Meat Business in his dealings with customers of the business. Like the Employee Drivers, he identified with the Meat Business and *not* with his own business.
- 73 I am satisfied that Mr Botica was an '*employee*' of the Company as defined by s 4(1)(d) of the LSL Act.
- 74 I have noted that the LSL Act provides for an employee entitlement to long service leave of 8 2/3 weeks on ordinary pay upon completion of 10 years *continuous employment* with one and the same employer and for a proportionate entitlement where employment is terminated and an employee has completed at least seven years of continuous employment.
- 75 The Originating Claim of Mr Botica contained particulars of his long service leave claim of \$12,497.15 on the basis of eight years, two months and nine days employment (from 1 July 2009 to 10 September 2017) resulting in 6.9428606 weeks of long service leave to be paid on the basis of an average of 40 hours per week at a rate of \$45 per hour. On publication of the reasons I allowed an amendment to the particulars of the claim reflecting employment ending on 4 September 2017.
- 76 These amended particulars were not challenged by the Company. In those circumstances:
- a. The claim to long service leave entitlements on the basis of continuous employment from 1 July 2009 to 4 September 2017 will be allowed (7.08794840 weeks). Although the LSL Act does not define 'continuous employment', s 6 of the LSL Act provides for the effect of: particular absences from employment,⁶⁵ particular events (that are deemed *not* to break continuous employment,⁶⁶ and for effect of the sale of a business upon the 'continuous employment' of employees of the vendor who continue to be employed by the purchaser). Mr Botica was continuously employed for at least the period particularised in his claim.⁶⁷
 - b. The claim to long service leave entitlements on the basis of an average of 40 hours per week is *not* allowed; the claim is allowed on the basis of an average of 37.5 hours per week. Section 4(1) of the LSL Act defines '*ordinary pay*' to mean 'remuneration for an employee's normal weekly number of hours of work' and s 4(2) provides that 'where the normal weekly number of hours have varied over the period of employment ... [the] hours of work shall be deemed to be the average weekly number of hours worked'. Mr Botica's evidence was that during the eight years of his employment, he 'averaged a working week of 37.5 hours'.⁶⁸ Mr Botica is entitled to long service leave entitlements on the basis of an average of 37.5 hours per week.
 - c. The claim to long service leave entitlements on the basis of \$45 per hour will be allowed. Section 4(1) of the LSL Act defines '*ordinary pay*' to mean remuneration 'calculated on the ordinary time rate of pay applicable ... as at the time when any period of long service leave ... commences, or is deemed to commence'. Section 9(2) of the LSL Act provides, in effect, that the leave of Mr Botica is deemed to have commenced immediately prior to his termination in September 2017 with the result that \$45 per hour was the 'ordinary time rate of pay applicable'.
 - d. There will be an order that the Company pay to Mr Botica the sum of \$11,960.91 (which is sum of 7.08794840 weeks x 37.5 hours x \$45 per hour) on account of his entitlements under the LSL Act.

Conclusion

- 77 I have concluded that Mr Botica is not an ‘employee’ as defined by the FW Act with the result that he has not succeeded in his annual leave and superannuation claims.
- 78 I have concluded that Mr Botica is an ‘employee’ as defined by s 4(1)(d) of the LSL Act with the result that he has succeeded in his long service leave claim.

M FLYNN

INDUSTRIAL MAGISTRATE

¹ Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court of Western Australia Under The Fair Work Act 2009 (Cth)

1. The IMC, ‘a court constituted by an industrial magistrate’ is ‘an eligible state or territory court’ for the purposes of the FW Act: see definitions of ‘*magistrates court*’ and ‘*eligible State or Territory court*’ in s 12 of the FW Act.
2. The jurisdiction of the IMC under the FW Act is primarily defined by three provisions:
 1. Section 539 of the FW Act identifies the civil remedy provisions of the FW Act which may be the subject of an application to an eligible state or territory court;
 2. Section 545(3) of the FW Act describe the criteria for an eligible state or territory court to make an order for an employer to pay an amount to an employee upon the contravention of a civil remedy provision; and
 3. Section 546(1) of the FW Act provides for the making of a pecuniary penalty order upon the court being satisfied of a contravention of a civil remedy provision.
3. Civil remedy provisions cast obligations upon *national system employers* to *national system employees* in:
 1. The National Employment Standards (NES) (Part 2-2);
 2. A modern award that applies to and covers the parties (Part 2-3);
 3. An enterprise agreement that applies to and covers the parties (Part 2-4);
 4. A national minimum wage order (where neither a modern award nor an enterprise agreement applies to the employee i.e. an award/agreement free employee) (Part 2-6);
 5. Section 323(1) providing that ‘an employer must pay an employee amounts payable to the employee in relation to the performance of work ...in full’; and
 6. Part 3-6, Div 3 providing for ‘employer obligations in relation to employee records and pay slips’.
7. A ‘national system employer’ is defined in s 14(1) of the FW Act to include ‘a constitutional corporation, so far as it employs ... an individual’ and a ‘national system employee’ is defined in s 13 of the FW Act to be ‘an individual so far as he or she is employed by a national system employee’.
8. Section 539 of the FW Act identifies, from among the several civil remedy provisions of the FW Act, the particular civil remedy provisions for which application may be made to an eligible state or territory court ‘for orders in relation to a contravention of the provision’. The provision also identifies, for each civil remedy provision, the person with standing to make application to the relevant court and, expressed in penalty units, the maximum penalty for a contravention.
9. Section 545(3) of the FW Act provides that an eligible state or territory court ‘may order an employer to pay an amount to ... an employee ... if the court is satisfied’ of two criteria. First, the failure to pay the relevant amount must be a contravention of a civil remedy provision. Secondly, the employer must have an obligation, ‘under this Act [for example, a NES] or a fair work instrument’ (for example, a modern award or an enterprise agreement) to pay the relevant amount.
10. The meaning of ‘under this Act’ as it appears in s 545(3) was the subject of examination in *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 377 and *Wright v Bechtel Construction (Australia) Pty Ltd* [2018] WAIRC 00887 [38] with the result that where the claim concerns an allegation of the civil remedy provision created by s 323(1) of the FW Act (‘an employer must pay an employee amounts payable to the employee in relation to the performance of work ...in full’), the claimant must identify another provision under the act that creates an obligation to pay the amount. For example, s 542(1) of the FW Act provides that ‘a safety net contractual entitlement’ has effect as an entitlement of an employee under the FW Act. A ‘safety net contractual entitlement’ is defined in s 12 of the FW Act to mean an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in s 61(2) (which deals with the NES); or s 139(1) (which deals with modern awards). It should be noted that ‘neither the particular terms of a minimum standard, nor the necessity to engage the terms of a particular modern award, are necessary to the existence of the statutory obligation which now exists to observe the terms of a safety net contractual obligation’: see *Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited* [2014] FCA 878 [19] per Buchanan J, especially at [22].

Rules of Evidence

11. Section 551 of the FW Act provides that ‘a court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention’. It has been held that the effect of the provision is that an ‘eligible State or Territory court’ is required to apply the rules of evidence found in the common law and relevant state legislation when a claim concerns the contravention of a civil remedy provision of the FW Act: *Gayle Balding, Workplace Ombudsman v*

Liquid Engineering 2003 Pty Ltd [2008] WAIRComm 350; Cuzzin Pty Ltd v Grnja [2014] SAIRC 36 [14]. In Qube Ports Pty Ltd v Maritime Union of Australia [2018] FCAFC 72 [94] - [108] White J (with whom Mortimer and Bromwich JJ agreed) undertook a comprehensive analysis of the issue in the context of contravention proceedings before a state court of South Australia, the former Industrial Relations Court of South Australia (IRCSA). In a schedule to the judgment in Stagnitta v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 886, the IMC gave reasons for concluding that the law of evidence applied by a state court of general jurisdiction when exercising jurisdiction in non-criminal matters including the Evidence Act 1906 (WA), was to be applied by the IMC when determining a claim alleging the contravention of a civil remedy provision of the FW Act and seeking the imposition of a penalty.

12. The onus of proving a claim is on the claimant and the standard of proof required to discharge this onus is proof 'on the balance of probabilities'. When, in these reasons, I state that 'I am satisfied of fact or matter', I am saying that I am satisfied on the balance of probabilities of that fact or matter.

² Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court Of Western Australia Under The Long Service Leave Act 1958 (WA)

1. An employee is entitled in accordance with the LSL Act to long service leave on ordinary pay in respect of continuous employment with one and the same employer: s 8(1) of the LSL Act.
2. The IMC has jurisdiction to hear and determine all questions and disputes in relation to rights and liabilities under the LSL Act including questions as to whether a person is an employee or an employer: s 11(1) of the LSL Act. A party to proceedings under the LSL Act may be represented by a lawyer or an agent: s 37 of the LSL Act.
3. The jurisdiction of the IMC under the LSL Act is an instance of the general jurisdiction of the court (s 81CA(1) of the IR Act), with the result that the powers, practice and procedure of the IMC when exercising that jurisdiction are to be found in the IR Act (s 81CB, s 81D and s 81F) and the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA).

Employee

4. An 'employee' (subject to certain exceptions) is defined to mean a person who falls into any one of four categories: '(a) any person employed by an employer to do work for hire or reward'; '(b) any person whose usual status is that of an employee'; '(c) any person employed as a canvasser and remunerated by commission; '(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee': s 4(1) of the LSL Act.

Entitlement to Long Service Leave

5. Upon completion of at least 10 years continuous service, an employee is entitled to 8 2/3 weeks leave and for each five years completed after 10 years, to 4 1/3 weeks leave: s 8(2) of the LSL Act. Where an employee has completed at least seven years continuous service, provision is made for payment of a proportionate amount on termination (otherwise than by the employer for serious misconduct) calculated on the basis of 8 2/3 weeks for 10 years of continuous employment: s 8(2)(c) and s 8(3) of the LSL Act. Different provisions apply to an employee who had completed 9 - 15 years continuous employment as at 4 July 2006: s 8(4) of the LSL Act.

Continuous employment

6. The period of employment is deemed to include certain periods of absence from duty (annual leave, long service leave, public holidays, sick leave to a maximum of 15 days per year, periods of military service): s 6(1)(a), s 6(1)(b) and s 6(1)(d) of the LSL Act). The period of employment also includes any period following termination by an employer with the intention of avoiding long service leave obligations: s 6(1)(c) of the LSL Act. Certain events that may otherwise interrupt a period of employment are deemed not to do so: transmission of a business; authorised absences from employment; stand down periods; absence due to an industrial dispute; termination on grounds of slackness of trade if re-employed within six months and termination on any ground if re-employed within two months; reasonable absence on legitimate union business; absence by reason of any other cause unless the employer, within 14 days of the termination of the absence gives written notice to the employee that continuity of employment has been broken: s 6(2) of the LSL Act.

³ An inference from Mr Botica's evidence of working 38 hours per week: Witness Statement of Mr Botica filed 8 May 2019, [106](e).

⁴ Transcript of proceedings dated 22 May 2019, page 80. Mr Ovens gave evidence of a colour coding on the run sheet being used to indicate to drivers that a first run of deliveries close to the Company premises should be undertaken before returning and collecting stock for a final run of deliveries.

⁵ Exhibit 4.

⁶ Witness Statement of Mr Botica filed 8 May 2019, [74].

⁷ Witness Statement of Mr Botica filed 8 May 2019, [76].

⁸ Transcript of proceedings dated 22 May 2019, page 34.

⁹ Exhibit 4.

¹⁰ *Fair Work Act 2009* (Cth), s 87.

¹¹ *Fair Work Act 2009* (Cth), s 60.

¹² *Fair Work Act 2009* (Cth), s 13 and s 14.

¹³ *Fair Work Act 2009* (Cth), s 47.

¹⁴ *Fair Work Act 2009* (Cth), s 42.

¹⁵ *Al-Hakim v Toyoor Al Jannah Pty Ltd & Ors* [2018] FCCA 3184 at [62], referring to *Marshall v Whittaker's Building Supply Co Ltd* [1963] HCA 26 at [5].

¹⁶ The structure and much of the content of the summary of the law in the following paragraphs draws upon the summary in *Moffet v Dental Corporation Pty Ltd* [2019] FCA 344 at [12].

¹⁷ Transcript of proceedings dated 22 May 2019, pages 106 - 109.

¹⁸ *Fair Work Act 2009* (Cth), s 538.

¹⁹ *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21 at 39 [40] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ citing *Marshall v Whittaker's Building Supply Co* [1963] HCA 26; (1963) 109 CLR 210 at 217 per Windeyer J).

²⁰ *Hollis v Vabu Pty Ltd* [2001] HCA 44 at [39] - [40].

²¹ *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 28 - 29; *ACE Insurance Ltd v Trifunovski* [2011] FCA 1204; (2011) 200 FCR 532 at [29], Perram J: 'a number of indicia have accreted over time in the authorities which are thought to throw light to varying degrees on the outcome without being determinative ... the terms of the contract; the intention of the parties; whether tax is deducted; whether sub-contracting is permitted; whether uniforms are worn; whether tools are supplied; whether holidays permitted; the extent of control of, or the right to control, the putative employee whether actual or de jure; whether wages are paid or instead whether there exists a commission structure; what is disclosed in the tax returns; whether one party "represents" the other; for the benefit of whom does the goodwill in the business inure; how "business-like" is the alleged business of the putative employee - are there systems, manuals and invoices; and so on - the list is neither exhaustive nor short'.

²² *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 28 - 29.

²³ *Hollis v Vabu Pty Ltd* [2001] HCA 44, [49], [57].

²⁴ *Hollis v Vabu Pty Ltd* [2001] HCA 44, [57].

²⁵ *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539 at 552.

²⁶ *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37, (2015) 228 FCR 346 at 377 to 378 [142] per North and Bromberg JJ.

²⁷ *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR 346, 377 - 378.

²⁸ *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR 346, 377 - 378.

²⁹ *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR 346 at [148].

³⁰ *Australian Education Union v Victoria (Dept of Education and Early Childhood Development)* [2015] FCA 1196; (2015) 239 FCR 461 at 490.

³¹ *Tattsbet Ltd v Morrow* [2015] FCAFC 62; (2015) 233 FCR 46 at 63 - 64.

³² *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 at [136].

³³ *Hollis v Vabu Pty Ltd* [2001] HCA 44. At issue in the High Court of Australia was whether the Business (Vabu) of a Worker was a bicycle courier was vicariously liable for an injury caused by the bicycle courier to a pedestrian. The courier supplied his own *bicycle*. In an earlier (and different case), the New South West Court of Appeal had held that, for taxation purposes, different couriers engaged by Vabu and who supplied their own *motor vehicles*, were independent contractors: *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537. In the plurality judgment, Gleeson CJ, Gaudron, Gummow, Kirby, and Hayne JJ, gave reasons for concluding that the bicycle courier was an employee, stating at [22]:

It is significant to note that one of the considerations mentioned by Meagher JA in the taxation decision as indicating that the couriers were independent contractors was that they bore the "very considerable" expense of providing, maintaining and insuring their own vehicles. It is apparent that Meagher JA was there concerned with expense in relation to motor vehicles and motorcycles. The purchase and maintenance of a bicycle could hardly be termed a "very considerable" expense. It may be that, in the taxation decision, a case that was, as his Honour put it, "hardly without difficulty", a different result might properly have been reached respecting Vabu's bicycle couriers from that which obtained respecting its other couriers. However, it is unnecessary to express any conclusion on this matter.

McHugh J resolved the case by deciding that, although the bicycle courier was *not* an employee, Vabu was vicariously liable for the injury: see [72]. In deciding that the bicycle courier was *not* an employee, McHugh J observed at [71].

If the couriers were confined to bicycle riders, there would be much force in the contention that, on the classical tests, they were employees. That is because the couriers were subject to extensive control and direction - always a strong indication that the worker is an employee. But the couriers included those who provided their own motor vehicles. Given the course of authority ... concerning workers who provide their own equipment, it seems impossible to say that those couriers who provided their own motor vehicles were employees. The right to supervise or direct the performance of a task cannot transform into a contract of service what is in substance an independent contract and, when a person has to provide equipment such as a motor vehicle, the conventional view is that the person is not an employee. In principle, there can be no distinction between those couriers working for Vabu who provide their own bicycles and those couriers who provide their own motor vehicles.

³⁴ *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934, [153].

³⁵ *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* [2010] FCAFC 52; (2010) 184 FCR 448, [41].

³⁶ *Hollis v Vabu Pty Ltd* [2001] HCA 44, [54].

³⁷ *Hollis v Vabu Pty Ltd* [2001] HCA 44, [50].

³⁸ *Tattsbet Ltd v Morrow* [2015] FCAFC 62, [61]:

As Buchanan J put it in ACE Insurance (209 FCR 146 at [128]), “[w]orking in the business of another is not inconsistent with working in a business of one’s own ” On the other hand, if the putative employee’s circumstances exhibit the characteristics of a business, that will undoubtedly be a matter proper to be taken into account in determining the question at hand, so long as sight is not lost of the question itself. The question is not whether the person is an entrepreneur: it is whether he or she is an employee.

See also *United Construction Pty Ltd v Birighitti* [2002] 82 WAIG 2409 (Full Bench of the Western Australian Industrial Relations Commission) at [70](o).

³⁹ *Tattsbet Ltd v Morrow* [2015] FCAFC 62, [3].

⁴⁰ *Australian Air Express Pty Limited v Langford* [2005] NSWCA 96 at [59], ‘a limited or occasional power of delegation may not be inconsistent’ with employment.

⁴¹ *Miles v Brendon Penn Nominees Pty Ltd* (2006) WAIRC 5752, [28]:

... With respect, we are of the opinion that the Industrial Magistrate misdirected himself as to the appropriate way in which to approach the issue of whether the appellant was an employee. Although the Industrial Magistrate said he was aware of and cited some of the authorities which have set out and applied a test of the consideration of various indicia to determine the true nature of a relationship between a putative employer and employee, the Industrial Magistrate did not adopt and follow such an approach. Indeed after reference to these decisions the Industrial Magistrate said ‘notwithstanding’ them was it ‘fair to an employer who agrees to conditions, initiated by an employee, that he be employed as a subcontractor and accepts the agreed conditions for approximately three years until being made redundant to then claim to be an employee and claim entitlements under an award?’. The issue of fairness, expressed in this way, is not, as established by the cases (to which reference is made below), the method by which one determines whether somebody is an employee or independent contractor.

⁴² *Long Service Leave Act 1958* (WA), s 8(1) and s 8(2). See the summary of the *Long Service Leave Act 1958* (WA) in endnote, [2].

⁴³ *Long Service Leave Act 1958* (WA), s 8(3).

⁴⁴ *United Construction Pty Ltd v Birighitti* [2002] 82 WAIG 2409 (Full Bench of the Western Australian Industrial Relations Commission); *United Construction Pty Ltd v Birighitti* [2003] WASCA 24 (Western Australian Industrial Appeal Court); *David Kershaw v Sunvalley Australia Pty Ltd* [2007] WAIRComm 520.

⁴⁵ *Readymix* at 1707.

⁴⁶ *Readymix*, Brinsden J at 1708: ‘I think the subsection has no application where the circumstances are that one or more of the indicia point to a contract for services for in that case it is not possible to say that the person concerning is in all other respects an employee’.

⁴⁷ *Readymix*, Kennedy J at 1709: ‘The definition has the effect, in my view, that the mere fact that the vehicle which is used by the person concerned is not owned by the employer is not to be considered in answering the question whether he (sic) is an employee.’ And at 1710: ‘I am unable to accept that the words ‘in all other respects an employee’ are to be read absolutely literally. In reaching a determination ... a multitude of factors have to be considered. ... The purported expanded definition would be stultified if the presence of one minor factor would prevent it’s application...’.

⁴⁸ *Readymix*, Wallace J at 1706.

⁴⁹ *Readymix* at 857: ‘It seems to me that what was intended [by the VOC] was that you find a person to be an employee in all respects other than that characteristic which involves ownership of the vehicle which is then set aside’.

⁵⁰ *Readymix*, Wallace J at 1706.

⁵¹ *Dallaston* at [73].

⁵² *Dallaston* at [73].

⁵³ *Dallaston* at [73].

⁵⁴ *Dallaston* at [74].

⁵⁵ *Dallaston* at [74].

⁵⁶ *Dallaston* at [75].

⁵⁷ *Dallaston* at [78].

⁵⁸ *Dallaston* at [76]. Those factors included: paying his own income tax, purchasing clients from another Worker and attempting to sell his “business” including goodwill.

⁵⁹ *Dallaston* at [77].

⁶⁰ *Paul Ernest Dallaston v Canon Foods* [2004] WAIRComm13246; 84 WAIG 3850.

⁶¹ *Dallaston* at [82].

⁶² *Paul Ernest Dallaston v Canon Foods* [2004] WAIRComm13246; 84 WAIG 3850 at [29] (Kenner C).

⁶³ Compare the analysis of *Readymix* undertaken by Kenner C in *Paul Ernest Dallaston v Canon Foods* [2004] WAIRComm13246; 84 WAIG 3850 at [28]-[29].

⁶⁴ *Paul Ernest Dallaston v Canon Foods* [2004] WAIRC 13246; 84 WAIG 3850 at [29] - [30] and see the application of this interpretation at [31] - [33].

⁶⁵ *Long Service Leave Act 1958* (WA), s 6(1).

⁶⁶ *Long Service Leave Act 1958* (WA), s 6(2).

⁶⁷ Relevant to the sale of the Meat Business by Mr Litton to the Company in July 2009 is s 6(4) of the *Long Service Leave Act 1958* (WA): “Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called the transmittor) to another employer (herein called the transmittee) and an employee who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee — the period of the continuous employment which the employee has had with the transmittor (including any such employment with any prior transmittor) shall be deemed to be employment of the employee with the transmittee.” When the business operating under the name *Total Meat Solutions* was transmitted to the Company in July 2009 (and assuming Mr Botica to be an employee of the entity operating *Total Meat Solutions* and an employee of the Company) the two year and six month period of Mr Botica’s work in *Total Meat Solutions* (January 2007 - July 2009), is deemed by s 6(4) of the *Long Service Leave Act 1958* (WA) to be employment with the Company.

⁶⁸ Witness Statement of Mr Botica filed 8 May 2019, [76].

2020 WAIRC 00019

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00019
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : WEDNESDAY, 6 NOVEMBER 2019
DELIVERED : WEDNESDAY, 6 NOVEMBER 2019
FILE NO. : M 178 OF 2018
BETWEEN : JANINE MARIE CALLAN, DEPARTMENT OF MINES, INDUSTRY
REGULATION AND SAFETY

CLAIMANT

AND

SAMANTHA NARALEE GOH-EDWARDS TRADING AS SAMANTHA'S HIDDEN VALLEY

RESPONDENT

Legislation : *Industrial Relations Act 1979* (WA)
Magistrates Court (Civil Proceedings) Act 2004 (WA)
Minimum Conditions of Employment Act 1993 (WA)
Taxation Administration Act 1953 (Cth)
Industrial Magistrates Court General Jurisdiction Regulations 2005 (WA)

Instrument : *Farm Employees Award 1985* (WA)

Case(s) referred to in reasons : *Sammut v AVM Holdings Pty Ltd No. 2* [2012] WASC 27
Hollis v Vabu Pty Ltd [2001] 207 CLR 21
Paul Victor Genovesi v Affluence Pty Ltd T/As Swan Districts Real Estate [2005] WAIRC 00828
Sascha Milosevic v Mildesa Pty Ltd [2005] WAIRC 3206

Result : Claim proven

Representation:

Claimant : Mr J. Bennett (of counsel) as instructed by Department of Mines, Industry Regulation and Safety

Respondent : No appearance

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited)

- 1 On 23 October 2018, Janine Marie Callan, Department of Mines, Industry Regulation and Safety (the claimant) an Industrial Inspector, pursuant to s 98(1) of the *Industrial Relations Act 1979* (IR Act), lodged a claim in the Industrial Magistrates Court of Western Australia (IMC) alleging Samantha Naralee Goh-Edwards Trading As Samantha's Hidden Valley (the respondent) a sole trader, contravened or failed to comply with the *Farm Employees Award 1985* (WA) (the Award), in failing to pay Ms Christin Auras (Ms Auras) certain award entitlements as a farm hand.
- 2 On 28 November 2018, the respondent lodged a response to the claim, denying the claim, where she said Ms Auras was not an employee but was a volunteer at the farm, but as part of the arrangement with Ms Auras, she offered her food and accommodation and payslips for the purposes of her obtaining a second-year working visa. To that end, she also paid income tax and superannuation on behalf of Ms Auras.
- 3 Ms Auras was put on the books as a casual worker and paid the right amount and the respondent made a variety of other assertions that, in my view, appear, largely, unrelated to the claim.
- 4 Ms Auras denies that she received any wages or payment from the respondent, although she accepts she received food and accommodation and that income tax and superannuation was paid on her behalf.
- 5 However, the claimant says the amount of money withheld, by the respondent, for food and accommodation, was in excess of that provided by the Award and it was contrary to the Award for the respondent to defray the whole of the payments or wages owed to food and accommodation. The claimant says that a proper analysis of the evidence demonstrates that Ms Auras was an employee, not a volunteer, and subject to the terms of the Award during the course of her employment.
- 6 The claimant says, Ms Auras was not paid wages owed, minus deductions, under the award for food and accommodation, sick leave or annual leave, as required by the Award. In terms of the jurisdiction of the IMC, it has the jurisdiction conferred by the IR Act and other legislation.
- 7 Section 83 and s 83A of the IR Act, confer jurisdiction on the IMC to make orders for the enforcement of a provision of an instrument, where a person has failed or failed to comply, with the instrument. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order, including an interim order, necessary for the purpose of preventing any further contravention.
- 8 The IMC must order the payment of any unpaid entitlements due under an instrument. Section 83 of the IR Act outlines those people or organisations that may apply to the IMC and includes, relevantly, at subsection 1(b), an Industrial Inspector. An instrument, to which s 83 of the IR Act applies, is provided in subsection (2) and relevantly includes an award.
- 9 The powers, practices and procedures of the IMC are the same as a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA). The onus of proving a claim is on the claimant and the standard of proof required to discharge this onus is proof on the balance of probabilities. The IMC is not bound by the rules of evidence and may inform itself on any matter, and in any manner, it seeks fit.
- 10 In *Sammut v AVM Holdings Pty Ltd No. 2* [2012] WASC 27, at [40] to [47], Commissioner Sleight, as he was, examined a similarly worded provision, regulating cases the State Administrative Tribunal of Western Australia, noting:

The rules of evidence are not to be ignored, after all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.
- 11 The claimant relied upon witness evidence provided by herself, Ms Auras and Ms Rachel England-Brassy (Ms England-Brassy). Having regard to the content of their evidence, elicited through witness statements, primarily, I found their evidence to be truthful and credible and therefore, their evidence is capable of being relied upon.
- 12 It is, following that, convenient to set out the relevant facts in a narrative form. Many of the relevant facts are either not in dispute or were the subject of uncontroverted evidence, that as I have already indicated, I consider to be reliable. Save where I identify conflicting evidence on a fact, I am satisfied, on the balance of probabilities, of the facts that I will now refer to. Where I identify conflicting evidence, my state of finding should be taken to be findings on the balance of probabilities.

Background

- 13 The respondent operates a farm located at 11486 Bussell Highway, Forrest Grove, Western Australia (the Farm). On the Farm, the respondent operated a business of breeding, selling and grazing miniature horses and other animals. A variety of animals, approximately 250, were kept at the property. Ms Auras, and her boyfriend, Mr Marcel-Dominik Linz (Mr Linz), were in Australia, as German citizens, on working holidays. There were similar to many other overseas travellers in Australia, originally on a tourist visa, and then converting this visa to a working holiday visa.
- 14 In order to obtain a second working holiday visa, Ms Auras needed to complete 88 days of work in three months, in a specified field, in regional Australia. Following her completion of work for the respondent, Ms Auras was subsequently granted a second working holiday visa on 19 January 2017. Ms Auras answered a Facebook advertisement, by the respondent, offering 'Willing Workers on Organic Farms', commonly referred to as WWOOFers, and 'Second Year visa regional work'.
- 15 Originally, the intention was for Mr Linz to commence a position to complete 88 days of regional work and Ms Auras, to be a WWOOFer. After some cursory messages, it was agreed for Mr Linz and Ms Auras to travel to South West of Western Australia and they arrived on 22 June 2016. On 23 June 2016, Ms Auras and Mr Linz met the respondent. Approximately one week later, the respondent informed them that she did not want Mr Linz undertaking the regional farm work and offered it to Ms Auras instead. Ms Auras agreed to take up the farm work.

- 16 In terms of the arrangements made. The respondent told Ms Auras that the respondent would pay wages because the money she would earn would cover the respondent's costs in providing food and accommodation. The respondent would provide payslips so that Ms Auras could obtain the second working holiday visa, and that she would pay income tax and superannuation on behalf of Ms Auras.
- 17 The respondent required Ms Auras to work:
- four 8-hour days on weekdays; and
 - two 4-hour days, one on a weekday and one on a weekend.

This totalled an expected 40-hour week, although Ms Auras worked many more hours than this. Ms Auras was also required to do other menial tasks for the respondent, including taking the respondent's son to sporting events and being, in essence, a personal attendant to the respondent.

Issues For Determination

- 18 There are three essential issues for determination:

- was Ms Auras an employee or volunteer, in respect of the respondent's business;
- was Ms Auras' employment, if she was an employee, covered by the relevant award, being the Award; and
- was Ms Auras paid in accordance with the Award, if she was an employee, and covered by the Award.

Was Ms Auras An Employee Or A Volunteer?

- 19 An employee is defined by s 7(1) of the IR Act, relevantly, as follows:

Employee means [subject to subsection (3)]

- (a) *any person employed by an employer to do work for hire or reward including an apprentice; or*
- (b) *any person whose usual status is that of an employee.*

- 20 The exception indicated by the words 'subject to subsection (3)' of the definition is not applicable in this case. The definition, in paragraph (a), is made by reference to an employer. That term is relevantly defined by s 7(1) of the IR Act, as including persons employing one or more employees.
- 21 The issue is whether Ms Auras was either a person employed by the respondent to do work for hire or reward; or a person whose usual status was that of an employee.
- 22 In both cases, the characterisation of Ms Auras' relationship with the respondent depends on whether Ms Auras' position matches the common law tests for what constitutes an employee. That is, whether Ms Auras is an employee for the purposes of the IR Act and the Award, depends on whether she had a valid employment contract. If no employment contract can be established, then no employment relationship will exist. In those circumstances, the worker cannot be regarded as employed or having the usual status of employee.
- 23 The claimant's submissions helpfully outline the common law understanding of employee and the test to be applied by the IMC. For completeness, I will recite the claimant's submissions, which I have adopted for the purposes of stating the law.
- 24 In *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21, the High Court stressed the need to examine the totality of the relationship between parties. This assessment takes into account a range of factors. In doing so, and I quote:

*'The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.'*¹

- 25 In *Paul Victor Genovesi v Affluence Pty Ltd t/as Swan Districts Real Estate* [2005] WAIRC 00828, the Western Australian Industrial Relations Commission usefully set out the law governing whether a person can properly be characterised as an employee of an employer. This decision was cited, with approval, in *Sasha Milosevic v Mildesa Pty Ltd* [2005] WAIRC 03206. The decision cited in *Genovesi* and *Milosevic* are authorities for a range of forensic propositions to be considered when determining whether a person is an employee of an employer, as follows:²
- The relationship of employer and employee is a contract of service where an employee contracts to provide his or her work and skill.
 - There is no conclusive test for determining whether a person is an employer; regard must be had to the whole of the relationship.
 - A prominent factor is the degree of control which the person who engages the other can exercise over the person engaged to perform the work.
 - Control is not the sole factor, others include:
 - o the mode of remuneration;
 - o the provision and maintenance of equipment;
 - o the obligation to provide exclusive services;
 - o provision of holidays;

- o deduction of income tax;
 - o delegation of work;
 - o the right to suspend or dismiss; and
 - o the right to dictate the place of work and hours of work.
- Control does not have to be actually exercised by one person over another for it to be relevant. If there is a right to exercise control over a person then this will suggest that the relationship is one of employee and employer.
 - Whether a person is carrying on the business for himself or for a superior is relevant to determining whether that person is an employee (the organisation test). If a person is carrying on work for the benefit of a superior then this suggests that the person is an employee of the superior.
 - The parties' subjective intentions, while relevant, are not determinative. Merely because a person is labelled an 'employee', or considers him or herself to be one, does not mean that, at law, they are one.
- 26 For the following reasons, I find, on the balance of probabilities, that Ms Auras was an employee of the respondent and not a volunteer.
- 27 Firstly, there was no written contract between Ms Auras and the respondent, however, a contract of employment can exist where there is no written contract.
- 28 It was clear from Ms Auras' evidence that there was an agreement that Ms Auras would perform work, as directed by the respondent, for a period of 88 days. This was in exchange for Ms Auras receiving accommodation, food, payslips, superannuation and a signed Employment Verification Form for the purposes of obtaining her second year working visa. PAYG taxation was also paid by the respondent.
- 29 Ms Auras understood the wages she was to be paid were withheld to cover the expense of accommodation and food. This agreement was formed through an exchange via Facebook Messenger and subsequent conversations between the respondent and Ms Auras, approximately one week after Ms Auras commenced working at the Farm.
- 30 The respondent also exchanged Facebook Messenger conversations with Ms Auras, instructing her to perform certain tasks, which Ms Auras would then complete. On that basis, there was clearly an agreement between the respondent and Ms Auras, whereby Ms Auras agreed to perform various tasks for the respondent, on the Farm, in exchange for accommodation, food, payslips, superannuation and completion of the Employment Verification Form, in order for her to obtain the second working visa.
- 31 Secondly, in terms of control, the respondent issued Ms Auras instructions, often through Facebook Messenger, with the clear expectation that she would follow these instructions. Ms Auras did not work for any other person while she was working for the respondent.
- 32 It was apparent, from Ms Auras' evidence, that the respondent expected Ms Auras to:
- follow her directions to perform work;
 - attend work at the times and on the days she directed;
 - perform the work competently, exercising due care and skill;
 - perform work that was productive for the operation of the business; and
 - perform work independently of supervision but in the manner directed.
- These are all indicative of a relationship of employment, irrespective of the party's subjective intentions, principally, the respondent's subjective intentions.
- 33 In terms of organisation, all of Ms Auras' work, whether it be looking after animals on the farm or the more menial tasks associated with the respondent, herself, was for the benefit of the respondent. In terms of mode of remuneration, Ms Auras received no monetary payment for her services. Instead, her understanding was that anything she would have earned went towards food and accommodation.
- 34 In terms of taxation, Ms England-Brassy's evidence is that the respondent made PAYG taxation payments to the Australian Taxation Office, purportedly, out of wages paid to Ms Auras. In terms of other entitlements, including superannuation and workers' compensation, Ms Auras took a period of sick leave, while performing services for the respondent. Ms Auras and Ms England-Brassy's evidence is that superannuation was paid to Ms Auras' superannuation account.
- 35 In terms of the party's other subjective intentions, Ms Auras intended to work so that she could obtain a second working holiday visa and she understood she was being paid for her work from the respondent. However, she received no money, payments for her work, as it all went towards accommodation and food. Thus, her intention was that there was an employee/an employer relationship formed between her and the respondent.
- 36 Whatever might have been the arrangement leading up to 22 June 2016, between the respondent and Ms Auras, within a week of Ms Auras being at the Farm, that arrangement had changed and Ms Auras was no longer considered a WWOOFer. Further, comments made by the respondent in correspondence with Ms Auras, namely, an email dated 20 July 2017, indicated that, contrary to assertions by the respondent, that Ms Auras was a volunteer, the respondent did not consider that she was.

37 By way of example, this included reference by the respondent to the employment contract being terminated. I leave aside for one moment, that this was not, in fact, the case but it highlights the respondent's attitude, at the time. Further, an email dated 25 July 2017, to the claimant, stated that:

'Chrissy can as a Wwoof working but then wanted to get Second year visa ... So then she became as farm hand (NOT WWOOF working).'

38 Further, there was the instruction, by the respondent, to Ms England-Brassy, to prepare payslips indicating, albeit falsely, that she had paid Ms Auras as an employee; and I leave aside, the thoroughly disingenuous nature of her doing so. Simply put, there is no basis for finding in the alternative, that Ms Auras was a volunteer.

Was Ms Auras' Employment Covered By The Award?

39 The second issue is whether, as an employee, as found of the respondent, was Ms Auras covered by the Award. Section 37(1) of the IR Act provides that:

An award has effect according to its terms ... [and] extend to and bind:

- (i) *all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and*
- (ii) *all employers employing those employees.*

40 Clause 3 of the Award relevantly provides:

This award shall apply throughout the State of Western Australia to employees employed:

- (a) *On farms in connection with the sowing, raising, harvesting and/or treatment of grain, fodder or other farm produce.*
- (b) *On farms or properties in connection with the breeding, rearing or grazing of horses, cattle, sheep, pigs or deer; or*
- (c) *In clearing, fencing, well sinking, dam sinking or trenching on such farms or properties except employees who are bound by the award of the Australian Conciliation and Arbitration Commission and known as the "Pastoral Industry Award, 1965" as varied or replaced from time to time and the award of the Western Australian Industrial Commission, known as the "State Research Stations, Agricultural Schools and College Workers" Award No 23 of 1971 as varied, and as varied or replaced from time to time.*

41 For the following reasons, I find on the balance of probability that Ms Auras was covered by the Award.

42 Ms Auras' evidence is that the respondent operated the Farm at a miniature horse stud in breeding, rearing and grazing miniature horses. Her work involved all aspects of animal husbandry, relating to the miniature horses, including feeding, maintaining the pastures and other animal accommodations and providing care and medication to the miniature horses.

43 As such, it is relatively clear that Ms Auras was an employee, employed on a property, in connection with the breeding, rearing or grazing of horses. That said, she also did other menial tasks, at the respondent's beck and call, and it is not to the point where I am satisfied Ms Auras' work was primarily as a farm hand carrying out farm type work. I also note that this farm work involved the care and attention to other animals also on the property.

44 I am also satisfied on the balance of probabilities that, contrary to assertions in correspondence by the respondent, that Ms Auras was a casual employee, and find that, in accordance with cl 5(a) of the Award, she was deemed to be employed on terms of weekly hiring.

Was Ms Auras Paid In Accordance With The Award?

45 In terms of issue three, what, if anything, is Ms Auras owed, under the Award, following on from whether the respondent contravened the Award in failing to comply with paying certain entitlements.

46 The respondent did not keep any records applicable to Ms Auras' employment. The respondent paid \$1,755 in PAYG taxation to the Australian Taxation Office, in respect of wages, as recorded on the payslips. The respondent made superannuation payments, in respect of wages on the payslips, into Ms Auras' superannuation account. The respondent provided meals and accommodation to Ms Auras.

47 I accept the evidence by the claimant and Ms Auras, in relation to the minimum rates of pay applicable to Ms Auras, for the hours worked between 23 June 2016 and 25 September 2016, when she was employed, as a farm hand, by the respondent.

48 I find as follows:

- Ms Auras agreed to work 40 hours per week, but due to illness on three occasions, worked less than 40 hours, in those weeks.
- On other weeks, Ms Auras worked in excess of 40 hours, as required by the respondent.
- Ms Auras did not receive payment for:
 - o any of the hours she worked between 23 June 2016 and 25 September 2016;
 - o sick leave for any of the hours she did not work, when she was unable to work due to ill health; and
 - o she did not receive accrued annual leave on termination.

- 49 In terms of the Award entitlements and contraventions, at the time Ms Auras commenced employment, the minimum weekly rate of wages, for an adult employee, pursuant to cl 14 of the Award, was \$679.90. From the commencement of the first pay period after 1 July 2016, the minimum weekly rate of wages was \$692.90. I accept that cl 14(1)(a) of the Award provides that minimum weekly wage payable for an adult employee, who is a farm hand, with less than 12 months experience, and I accept that at all material times, Ms Auras was an adult employee.
- 50 The hourly rate of pay for the Award is calculated on a 38-hour week. The minimum hourly rate of pay, from 23 June 2016 to was \$17.89 and from the commencement of the first pay period after 1 July 2016, was \$18.23. Clause 12 of the Award permits an employer to 'make a deduction at the rate of \$45.60 per week of seven days', where board and lodgings are provided to an employee.
- 51 For the period 23 June 2016 to 29 June 2016, Ms Auras worked 48.75 hours and the respondent was required, pursuant to cl 14(1) of the Award, to pay Ms Auras a minimum of \$17.89 per hour, totalling \$872.14, in wages, less the deduction of \$45.60 for board and lodging, allowed pursuant to cl 12 of the Award, resulting in a non-payment of wages for that period of \$826.54.
- 52 The sick leave provisions in cl 9(1)(a) and cl 9(1)(b) of the Award are less favourable than the provisions of s 19 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act). Therefore, the Award provisions have no effect and the sick leave entitlement, pursuant to s 19 of the MCE Act is implied into cl 9 of the Award, by virtue of s 5(1)(b) of the MCE Act.
- 53 The entitlement to sick leave accrues pro-rata, on a weekly basis, as provided for in s 19(2) of the MCE Act, based on the number of hours the employee is required, ordinarily, to work in a two-week period, up to 76 hours. In week one, Ms Auras accrued 1.461 hours of sick leave. A similar methodology will now be used by the IMC in determining the wages to be paid and entitlements owed for each following week.
- 54 For the period 30 June 2016 to 6 July 2016, Ms Auras worked 43 hours and the respondent was required to pay her \$17.89 per hour, totalling \$769.27 in wages, less the deduction of \$45.60 for board and lodging, with a total of \$723.67. Similarly, Ms Auras accrued 1.461 hours of sick leave at the end of week two, being 30 June 2016 to 6 July 2016.
- 55 For the period 7 July 2016 to 13 July 2016, Ms Auras worked 44 hours and the respondent was required to pay, pursuant to the same clause of the Award, now, \$18.23 per hour (on the basis that a State wage order varied the minimum weekly wage, from 1 July 2016) totalling \$802.12, less the deduction of \$45.60 for board and lodging, with a total payment of \$756.52. Similarly, for the same period, Ms Auras accrued 1.46 hours of sick leave.
- 56 For the period 14 July 2016 to 20 July 2016, Ms Auras worked 48.5 hours and the respondent was required to pay her at \$18.23 per hour, totalling \$884.16, less the deduction of \$45.60 for board and lodging, resulting in a total of \$838.58. Again, Ms Auras accrued 1.461 hours of sick leave during that week.
- 57 For the period 21 July 2016 to 27 July 2016, Ms Auras worked 36 hours and on 26 July 2016, left work after one hour, because she was unable to work due to illness. The respondent was required to, pursuant to the Award, to pay Ms Auras \$18.23 per hour, for 36 hours, totalling \$656.28 in wages, less the deduction of \$45.60 for board and lodging, with a total owed, \$610.68. Ms Auras had accrued sick leave entitlement balance of 5.844 hours of sick leave.
- 58 The respondent was required to pay Ms Auras, pursuant to s 20(1) of the MCE Act, for two hours of sick leave for 26 July 2016, totalling \$36.46. Ms Auras was not paid \$610.68 in wages or \$36.46 in sick leave, thus the non-payment for that week was \$647.14. Ms Auras had accrued 1.461 hours of sick leave, took two hours of sick leave and thus, had a balance of 5.305 hours of sick leave at the end of that week.
- 59 For the period 28 July 2016 to 3 August 2016, Ms Auras worked 44 hours and the respondent was required, pursuant to cl 14 of the Award, to pay Ms Auras \$18.23, totalling \$802.12, less the deduction of \$45.60 for board and lodging, with a total of, \$756.52. Similarly, Ms Auras accrued 1.461 hours of sick leave.
- 60 For the period 4 August 2016 to 10 August 2016, Ms Auras worked 47 hours and the respondent was required to pay her \$18.23 per hour, totalling \$856.81, less the deduction of \$45.60 for board and lodging, with a total of, \$811.21. Again, Ms Auras accrued 1.461 hours of sick leave.
- 61 For the period 11 August 2016 to 17 August 2016, Ms Auras worked 36.75 hours and the respondent was required to pay her at \$18.23 per hour, totalling \$669.95 in wages, less the deduction of \$45.60 for board and lodging, resulting in a non-payment of \$624.35. Similarly, Ms Auras accrued 1.461 hours of sick leave.
- 62 For the period 18 August 2016 to 24 August 2016, Ms Auras worked 39.5 hours and the respondent was required to pay her at the rate of \$18.23 per hour, totalling \$720.09 in wages, less the deduction of \$45.60 for board and lodging, resulting in a total of \$674.49. Again, Ms Auras accrued 1.461 hours of sick leave.
- 63 For the period 25 August 2016 to 31 August 2016, Ms Auras worked 25 hours and the respondent was required to pay her \$18.23 per hour, totalling \$455.75, less the deduction of \$45.60 for board and lodging, with a total of \$410.15. Ms Auras did not work 40 hours that week because she was unwell, on 29, 30 and 31 August, and worked less than her usual hours. As at 25 August 2016, Ms Auras' accrued pro-rata sick leave balance was 11.149 hours.
- 64 The respondent was required to pay Ms Auras 11.149 hours of sick leave, pursuant to s 20(1) of the MCE Act, resulting in a non-payment of sick leave for that period, totalling \$203.25. Ms Auras was not paid \$410.15 in wages and \$203.25 in sick leave, thus the total is \$613.40 for that week.
- 65 In week 10, Ms Auras took all accrued sick leave and accrued 1.390 hours of sick leave and therefore, had a balance of 1.39 hours of sick leave, at the end of this week.

- 66 For the period 1 September 2016 to 7 September 2016, Ms Auras worked 25.5 hours and the respondent was required to pay her \$18.23 per hour, totalling \$464.87, less the deduction of \$45.60 for board and lodging, with a total of \$419.27. On 1 and 2 September 2016, Ms Auras was unwell and did not work. At 1 September 2016, Ms Auras' accrued pro-rata sick leave balance was 1.390 hours.
- 67 The respondent was required to pay Ms Auras 1.390 hours of sick leave for 1 September 2016, resulting in a non-payment of sick leave for that pay period, totalling \$25.34. Ms Auras was not paid \$419.27 in wages, and \$25.34 in sick leave, so the non-payment for that week is \$444.61. In that week, Ms Auras took all accrued sick leave and accrued 1.034 hours of sick leave and therefore, had a balance of 1.034 hours of sick leave at the end of that week.
- 68 For the period 8 September 2016 to 14 September 2016, Ms Auras worked 41.83 hours and the respondent was required to pay her \$18.23 per hour, totalling \$762.56, less the deduction of \$45.60 for board and lodging, with a total of \$716.96. In that week, Ms Auras accrued 1.461 hours of sick leave.
- 69 For the period 15 September 2016 to 21 September 2016, Ms Auras worked 41.25 hours and the respondent was required to pay her \$18.23 per hour, totalling \$751.99, less the deduction of \$45.60 for board and lodging, with a total of \$706.39. Ms Auras accrued 1.461 hours of sick leave, at that stage.
- 70 For the period 22 September 2016 to 25 September 2016, Ms Auras worked 34.75 hours and the respondent was required, pursuant to cl 14 of the Award, to pay her \$18.23 per hour, totalling \$633.49. In week 14, Ms Auras accrued 1.336 hours of sick leave and therefore, had a balance of 5.292 hours of sick leave owing at the end of that week.
- 71 Pursuant to cl 9(1)(c) of the Award, an employee is entitled payment, on termination, in respect of absences '*on the grounds of personal ill health ... for a period longer than his [or her] entitlement to paid sick leave, ... to the extent the employee has become entitled to further paid sick leave during that year of service*'. The respondent was required, pursuant to cl 9(1)(c) of the Award, to pay Ms Auras 5.292 hours of sick leave at \$18.23 per hour, totalling \$96.47.
- 72 In respect of leave, Ms Auras took, for a period, longer than her entitlement to paid sick leave, to which she subsequently became entitled, prior to termination of her employment. Pursuant to s 24(2) of the MCE Act an employee is to be paid for annual leave to which he or she is entitled, if the employee leaves his or her employment before taking the annual leave.
- 73 Section 24 of the MCE Act is implied into cl 8 of the Award, by virtue of s 5(1)(b) of the MCE Act. Clause 8(9) of the Award has no effect, as it is less favourable than the MCE Act.
- 74 The respondent was required to pay Ms Auras for a pro-rata entitlement, based on 152 hours of annual leave for each year of service. The annual leave entitlement accrued pro-rata on weekly basis, at the rate of 2.923 hours per week, pro-rata, for weeks where unpaid sick leave was taken. Ms Auras was entitled to annual leave in respect of 14 weeks employment, totalling 39.675 hours annual leave and the respondent was required to pay, pursuant to cl 8 of the Award, \$723.28, at the end or completion of Ms Auras' employment.
- 75 In terms of contraventions, I find that the following contraventions occurred. The respondent did not pay Ms Auras in contravention of the Award:
- wages, on 14 occasions, contrary to cl 14 of the Award, totalling \$10,101.59 or \$9508.79 after deductions of a total of \$592.80 for board and lodging;
 - sick leave on three occasions, in contravention of cl 9 of the Award, totalling \$361.52;
 - sick leave on termination of employment, contrary to cl 9(1)(c) of the Award, totalling \$96.47; and
 - pro-rata annual leave on termination of employment, in contravention of cl 8 of the Award, totalling \$723.28.
- 76 In terms of a penalty, I note s 83(4) of the IR Act provides that the IMC may, upon finding that there has been a contravention of an instrument, in this case, an award, and found that the contravention has been proven by the claimant, may issue a caution or impose such penalty as the IMC thinks just but not exceeding \$2,000 in the case of an employer, organisation or association and \$500 in any other case or may dismiss the application.
- 77 I have had regard to the evidence given by, principally, Ms Auras, and I note that the respondent's failings, in my view, were both egregious and deliberate, and involved a vulnerable, overseas worker and demonstrated a poor representation, of Australian employers, on young workers who have come to Australia under the umbrella of a working holiday visa.
- 78 In my view, it was deliberate because the respondent had instructed Ms England-Brassy to prepare payslips after the work had been completed, paid income taxation and paid superannuation, both of which are, ordinarily, associated with somebody's employment status and thus, deliberately withheld an amount of money that could not have, in any way, reasonably, nor under the umbrella of the Award, been used to offset costs associated with food and accommodation. Accordingly, I impose a penalty of \$1,500.

Orders

- 79 Subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), the respondent pay to the claimant, \$10,593.58 for Ms Auras' award entitlements, arising from the non-payment of wages, sick leave, sick leave on termination of employment and pro-rata annual leave on termination of employment, in contravention of the Award.
- 80 Pursuant to reg 12(1) of the *Industrial Magistrates Court General Jurisdiction Regulations 2005* (WA), the respondent pay, to the claimant, prejudgment interest, on the judgment amount, at the 6% per annum, fixed in the amount \$1,979.94, being from 25 September 2016 to 6 November 2019.

81 Pursuant to s 83(c)(1) of the IR Act, the respondent pay to the claimant disbursements, incurred by claimant, in bringing the claim, fixed at \$595, and pursuant to s 83(4) of the IR Act, the respondent pay to the claimant, penalty, in respect of the contraventions, of \$1,500.

D SCADDAN

INDUSTRIAL MAGISTRATE

¹ *Roy Morgan Research Pty Ltd v Commissioner of State Revenue* [2005] VSC 136; (2005) 22 VAR 467 [10].

² The claimant's statement at [14].

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE—Matters dealt with—

2019 WAIRC 00860

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2019 WAIRC 00860
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	WEDNESDAY, 16 OCTOBER 2019
DELIVERED	:	WEDNESDAY, 11 DECEMBER 2019
FILE NO.	:	APPL 37 OF 2019
BETWEEN	:	QUANTUM BLUE PTY LTD
		Applicant
		AND
		THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE SCHEME
		Respondent

Catchwords	:	<i>Review of a decision of the Construction Industry Long Service Leave Payments Board - Requirement to register as an employer under the Construction Industry Portable Paid Long Service Leave Act 1985 - Whether employees are engaged in the construction industry - Definition of "construction industry" and "telegraphic" - Whether employees are employed in classification of work in prescribed industrial instrument under the Regulations - Application to review upheld</i>
Legislation	:	<i>Construction Industry Portable Paid Long Service Leave Act 1985 (WA) ss 3, 30 Telecommunications Act 1997 (Cth) Trade Practices Act 1974 (Cth) s 6(3) Fair Work Act 2009 (Cth)</i>
Result	:	Application to review upheld. Order issued.
Representation:		
Counsel:		
Applicant	:	Mr S Kirkby
Respondent	:	Ms R Harding of counsel and with her Ms B Swanson of counsel
Solicitors:		
Respondent	:	Jackson McDonald

Case(s) referred to in reasons:

Austereo Pty Ltd v Trade Practices Commission [1993] FCA 429; 115 ALR 14

Australian Competition and Consumer Commission v Jutsen and Others (No 3) [2011] FCA 1352

Aust-Amec Pty Ltd t/a Metlab Mapel and SRC Laboratories and Ors v Construction Industry Long Service Leave Payments Board (1995) 62 IR 412

Construction Industry Long Service Leave Payments Board v Positron Pty Limited (1990) 70 WAIG 3062

Darwin Turf Club v the Commonwealth (1966) 8 FLR 46

Doropoulos and Others t/a Swan Dry Cleaners v Transport Workers' Union of Australia, WA Branch (1989) 69 WAIG 1290

Federated Clerks' Union of Australia, WA Branch v Cary (1977) 57 WAIG 585

Jones v the Commonwealth [No 2] (1965) 112 CLR 206

Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board [2019] WAIRC 00843

R v Gee (2003) 212 CLR 230; 196 ALR 282; [2003] HCA 12

RCR Resources Pty Ltd v The Construction Industry Long Service Leave Payments Board [2015] WAIRC 00984; (2015) 95 WAIG 1709

Case(s) also cited:

Sparks 'N' Security Pty Ltd v Ritzline Pty Ltd t/a IC Cool Refrigeration, Mechanical and Electrical Services [2017] WAIRC 00164; (2017) 97 WAIG 366

Reasons for Decision

Introduction

- 1 The applicant's business employs persons who install cabling and equipment and perform related work at residential properties for subscription television installations and work undertaken for the national broadband network. The employees are technicians (or training to become technicians) who hold a Certificate III in Telecommunications. The applicant maintains that its business and the work of its employees is in the telecommunications industry, which is regulated by federal legislation, including a federal award, applying to that industry.
- 2 The applicant disputes the position of the respondent that the applicant is, to any extent, engaged in the "construction industry" for the purposes of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA). It disputes that it is required to register as an employer under the Act and it does not wish to do so. As a result, the applicant disputes the respondent's decision that it is required to register and seeks a review of the decision and to have it set aside.
- 3 It is common ground that the applicant is an employer of persons and the work performed is performed on a "site". That being at a location away from the applicant's premises. A key issue in this case is whether the applicant employs employees who are engaged on "works for the transmission of wireless or telegraphic communications" as these phrases are used in the definition of "construction industry" in the Act. Another issue is whether the employees of the applicant are engaged in work involving the installation of "fixtures" for the above purposes, in the same definition.

Nature of the applicant's business

- 4 Mr Kirkby is a director of the applicant and he gave evidence that the applicant's business has two main aspects. The first is the provision of services under contract in relation to Telstra Foxtel for the installation of pay television equipment. The second is with Telstra NBN for connections to the NBN network to provide internet access to premises. Mr Kirkby explained that under the *Telecommunications Act 1997* (Cth) there exists a "network boundary" which essentially entails all work up to the outside of residential premises. Work done inside a house, is what is referred to as the "internal cabling system". This part of the scheme is the responsibility of the homeowner.
- 5 As noted in the introduction to these reasons, the applicant employs technicians under the Telecommunications Services Award 2010, a modern award made under the *Fair Work Act 2009* (Cth). The employees are engaged in the classification of Telecommunications Technician. The applicant employs a total of five technicians, three who are exclusively engaged on NBN work and two who are exclusively engaged on Foxtel installation work. In addition, Mr Kirkby's business partner, who in the main, provides supervision and performs other duties, also from time to time works as a technician. The company also engages trainees who are in the process of obtaining their Certificate III qualification and who assist technicians on the job as a part of their training. Mr Kirkby's evidence was that his wife assists in the business in relation to administration matters too. Mr Kirkby, who is also a qualified telecommunications technician, from time to time does some work in relation to the installation of security systems and television antennas. He said this is a very small part of the company's activities. The bulk of the business is in the two streams referred to above.
- 6 Mr Kirkby outlined how the work is obtained by the applicant. As a contractor, the company is contacted by a services company acting on behalf of Telstra. The applicant may accept a job that is offered. Once the job is accepted, the employees then travel to the location and undertake the required works.

Work done by the applicant's employees

- 7 Mr Kirkby outlined what the company's technicians do on a typical job. Firstly, in relation to the NBN work, the technicians are required to locate the closest access point. This may be outside the property address or somewhere else in the street. This will often involve the location of a "pit", in which are the ducts or conduits, through which the cabling is run to the particular property. In the case of the NBN work, fibre optic cabling is used and is run from the access point to the house. The cabling from the street is connected to the house by what is called a "Premise Connection Device". This is physically attached to the house with screws and acts as a connection point. From there, the cabling is then run into the house to a "Network Termination Device". This is, as described by Mr Kirkby, a white "router" type of box, located inside the property, at a location directed by the occupier. This device receives the signal from the NBN network and marks the outer boundary of that network.

- 8 At this point, Mr Kirkby said that essentially the applicant's technicians' work is complete. The customer then contacts their service provider and the necessary modem equipment is obtained and installed. This is done by a cable connection to the NTD, in order that the customer can then access the internet. The system uses high speed VDSL broadband, which means that the network connection can be used for computers, telephones and television.
- 9 In terms of the origin of the connection in the street of the customer's property, Mr Kirkby said that sometimes work is required on a pit, to make it larger in order to accommodate new equipment that is now used for the NBN network. This is because, as Mr Kirkby explained, some of the pits were made for older telephone equipment and connections. Mr Kirkby said that it is not the applicant's responsibility to install pathways for cabling that his technicians use. In the case of new houses, this is the responsibility of the builder. In the case of older properties, Telstra ducts are used.
- 10 The second aspect of the work done by the applicant's technicians is in relation to Foxtel pay television installation. The pay television services are delivered via satellite or a cable network. In the latter case, Mr Kirkby said that the applicant uses a hybrid fibre coaxial cable. In the case of a satellite system, the applicant's technicians will install a satellite dish on the roof of a customer's property, in order to receive the satellite signal for pay television services. Cabling is then installed into the house so that the signal can be connected to the customer's pay television equipment. In addition to these two main aspects of the company's work, as mentioned above, Mr Kirkby testified that he himself, but not other employed technicians, may on occasion, do work to install a television antenna on a property. He said this work is now very rare and forms a very small part of the applicant's overall business. This work involves the physical installation of a television antenna onto the roof of the customer's property. The antenna is secured in place by screws on a mounting plate. The cable is then run from the antenna down into the house and then it is connected to the customer's television.
- 11 A final aspect of work performed by the applicant's business, again on Mr Kirkby's evidence, which is seldom performed, is the installation of security camera systems. Mr Kirkby said that as with the occasional work of installing television antennas, because it is only a very small part of the work done by the company, he does that type of work himself. This is because the other technicians are fully engaged on the two main streams of business. This work involves the fixing of a camera to premises or a structure with screws. A data cable is then run from the camera to a network video recorder unit inside the property. The cabling is often run through the roof space of the property. The cable between the camera and the recorder is both a power and data cable, which provides power to the camera from the recorder unit and returns data from the camera back to the recorder unit.

The statutory scheme

- 12 By its short title the Act is to "make provision for paid long service leave to employees engaged in the construction industry and for related purposes". The scheme under the Act provides for the registration of employers under s 30. By s 3 of the Act, an "employer" is defined to mean "a natural person, firm or body corporate who or which engages persons as employees in the construction industry". "Employee" in s 3 is defined to mean "(a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification". Thus, the focus is on the work performed by the employee being within a particular classification, without the requirement for the employee or employer to be covered by or bound by the award so prescribed: *Construction Industry Long Service Leave Payments Board v Positron Pty Limited* (1990) 70 WAIG 3062.
- 13 The obligation upon an employer to register under s 30(1) of the Act is not dependent on the employer being engaged in the construction industry. It is dependent on the employer employing persons as employees, who are engaged in the construction industry: *Aust-Amec Pty Ltd t/a Metlab Mapel and SRC Laboratories and Ors v Construction Industry Long Service Leave Payments Board* (1995) 62 IR 412.
- 14 The definition of construction industry in s 3 of the Act is quite complex. The introductory words to the definition provide:
- construction industry** means the industry —
- (a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —
- ...
- 15 There follow several subparagraphs, of which subpars (xiv) and (xvi) are relied upon by the respondent in this case. These provide as follows:
- (xiv) works for the transmission of wireless or telegraphic communications; and
- ...
- (xvi) structures, fixtures or works for use on or for the use of any buildings or works of a kind referred to in subparagraphs (i) to (xv); and

It is necessary to consider the meaning of construction industry, in s 3 of the Act. In doing so, it is necessary to apply the well-settled principles in relation to the meaning of a statute. First and foremost, statutory interpretation is a text-based activity and the process of interpretation must begin and end with the text of the statute in question. In *RCR Resources Pty Ltd v The Construction Industry Long Service Leave Payments Board* [2015] WAIRC 00984; (2015) 95 WAIG 1709 I observed:

The interpretation of legislation is a text based activity and it is to the text of the statute or other instrument, that primary regard must be given. An interpretation consistent with the purpose and object of the legislation should be preferred to one that is not: s 18 *Interpretation Act 1984* (WA). Recently, in *Taylor v Owens – Strata Plan No 11564* (2014) 88 ALJR 473, Gageler and Keane JJ said at par 65:

[65] Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always."¹¹² Context sometimes

favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation.¹¹³ the (sic) constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.

- 16 First, work must be carried out on “a site”. This refers to a physical location or place at which work is performed. The word “site” is not prefaced by the word “construction”, thus it is not necessary for the relevant work to be performed on a building site or construction site, as those phrases are commonly understood, as long as it is performed away from the employer’s premises: *Aust-Amec* at 114. I also agree with Scott CC that the words “on a site” are to be construed in accordance with the following words in the introductory part of the definition, such that the “site” is the location at which the relevant “construction, erection, installation etc” work is performed: *Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board* [2019] WAIRC 00843. As is noted at the outset of these reasons, it is not in dispute that the applicant’s employees work on a site, that being at a location where the relevant work is performed, other than the employer’s premises.

Does the applicant employ employees covered by the Act?

- 17 Two steps are required for the conclusion to be reached that a person is “engaged in the construction industry” for the purposes of the Act. The first is that they are employed in a classification of work in one of the prescribed industrial instruments under the *Construction Industry Portable Paid Long Service Leave Regulations 1986*. The second is that the work the employees do can be characterised as work in the construction industry, as defined. This latter aspect will be a matter of fact and degree: *Aust-Amec* per Ipp J at 423.
- 18 Turning to the second issue first, that being whether the applicant’s employees perform work in the construction industry. It was submitted by the respondent that in relation to the Foxtel installation work, the installation of satellite dishes on the roof of a house, involves works for the transmission of wireless communications because the dishes receive wireless signals from satellites used for pay television services.
- 19 In relation to the other aspects of the work, relating to the installation of the NBN services, the respondent submitted that the process of the installation of cabling for internet, telephone and television, involves work for the transmission of telegraphic communications. Furthermore, the installation of the devices such as PCDs and NTDs, are “fixtures”, in connection with the works for such communications, and fall within the definition, on the respondent’s case. This includes the installation of fixtures such as satellite dishes and television antennas. It was also contended by the respondent, as I understood the submissions, that these installation works for the NBN, performed by the applicant’s technicians, “enable” the customer to access the internet. Thus, as the submission went, this work enables wireless internet signals and transmissions throughout a customer’s property.
- 20 An issue that arises is the meaning of “telegraphic communications” used in subpar (xiv) of the definition of construction industry, set out above. The applicant contended that this refers to communication systems of a bygone era, having application to old technology such as telegrams and telegraph systems operated by, for example, the post office. The applicant submitted that this definition did not contemplate the advent of the internet and modern technology, such as the use of fibre optic and coaxial cables used by the applicant’s employees in the course of their work. Thus, according to the applicant, this work comprises the modern telecommunications industry, which is not covered by the Act, being legislation dating back to the 1980s.
- 21 Consideration of this issue must begin with the foundation principle that in the construction of an Act of Parliament, one adopts the approach to the law as always speaking. This means a word or phrase in an Act, subject to its context, is to be accorded the meaning reasonably able to be given to it at the time it falls for consideration, and not at the time that the Act was made. Thus, future changes to the subject matter of an Act can be accommodated, without the need for constant amendment: *R v Gee* (2003) 212 CLR 230; 196 ALR 282; [2003] HCA 12 (see generally DC Pearce and RS Geddes *Statutory Interpretation in Australia* 8th edition par 4.9).
- 22 It is appropriate to have regard to dictionary definitions of “telegraphic” in order to determine its meaning. The Shorter Oxford Dictionary defines telegraphic to mean, relevantly, “**2.a.** making signals (as by glance or gesture); conveyed by sign or signal. **b.** resembling an (electric) telegraph; conveying impulses or intelligence as by electricity.” The Macquarie Dictionary defines telegraph to mean “**1.** an apparatus, system or process for transmitting messages or signals to a distance, especially by means of an electrical device consisting essentially of a transmitting or sending instrument and a distant receiving instrument connected by a conducting wire, or other communications channel, the making and breaking of the circuit at the sending end causing a corresponding effect, as on a sounder, at the receiving end.”
- 23 In *Australian Competition and Consumer Commission v Jutsen and Others (No 3)* [2011] FCA 1352, in proceedings under the *Trade Practices Act 1974* (Cth) in relation to misleading and deceptive conduct, the Court considered the meaning of “telegraphic” in the expression “postal, telegraphic or telephonic services” in s 6(3) of the TPA. In this connection, Nicholas J at par 100 said as follows:

The expression “postal, telegraphic or telephonic services” as used in s 6(3) of the *Trade Practices Act* extends to conduct involving the use of the internet. I think this must be so having regard to the very broad way in which the word “telegraphic” is defined in most of the well-known dictionaries. For example, the Macquarie dictionary (3rd ed), the Maquaries Library, 1997 at p 1276 defines telegraph as:

- 1.** an apparatus, system or process for transmitting messages or signals to a distance, especially by means of an electrical device consisting essentially of a transmitting or sending instrument and a distant receiving instrument connected by a conducting wire, or other communications channel, the making and breaking of the circuit at the sending end causing a corresponding effect, as on a sounder, at the receiving end.

- 24 Whilst the above case applied the meaning of “telegraphic” in a different statutory context, in my view, it is of some assistance in understanding the breadth of the meaning of the word and it should not be construed as being limited to technology only in existence at the time that the Act was made (see too *Jones v the Commonwealth* [No 2] (1965) 112 CLR 206; *Darwin Turf Club v the Commonwealth* (1966) 8 FLR 46; *Austereo Pty Ltd v Trade Practices Commission* [1993] FCA 429; 115 ALR 14.
- 25 Therefore I am satisfied that the work of the applicant’s technicians, in relation to the installation of NBN services and Foxtel satellite pay television services, for customers, as outlined on Mr Kirkby’s evidence, is work falling within the definition of the “construction industry” for the purposes of s 3(a)(xiv) and (xvi) of the Act. I am satisfied that it can be concluded, given the breadth of the meaning to be accorded to “telegraphic”, that the relevant work, the installation of cabling etc for the NBN network can be viewed as works “for” (in the sense of with the object or purpose of) the transmission of communications over the internet, including the installation of fixtures for these purposes. The work in relation to the installation of Foxtel cabling and satellite receival equipment is works for, in the sense described, the transmission of wireless communications and the installation of fixtures for these purposes.
- 26 Having reached that view, I also need to be satisfied that the applicant’s employees are employed in a classification of work referred to in the awards set out in Schedule 1 to regs 2 and 3 of the Regulations. In this connection, the respondent referred to several possibilities, that it submitted may cover the work of the applicant’s employees. These included the “Antenna Installer” under the Radio and Television Employees’ Award; the “Cable Jointer” under the Electrical Contracting Industry Award; an “Installer and/or Serviceman” in groups B and C in the Electrical Trades (Security Alarms) Industry Award and the “Electronic Serviceperson” and “Installer” under the Electronic Industry Award. In addition, the respondent contended that other possibilities, of a more general description, included the “Tradesperson” classification under various awards including the Metal Trades (General) Award; the Airconditioning and Refrigeration Industry (Construction and Servicing) Award and the “Trades labourer” or “Builders labourer” or “Labourer” under the WA Civil Contracting Award, the Building Trades Award and the Metal Trades (General) Award.
- 27 Notwithstanding the length of this list of possible classifications, the respondent also, in a supplementary written submission, added to it the Materials Testing Employees’ Award 1984 and the classifications contained in it, including that of “Technician”. The respondent’s citation of at least 11 classifications from some nine awards set out in Divisions 1 and 2 of Schedule 1 to the Regulations, suggests to me that it has had some difficulty in identifying a particular prescribed classification of work, for the purposes of establishing that the applicant’s employees, were employees for the purposes of s 3 of the Act.
- 28 Before I consider the list of classifications and awards referred to by the respondent, I return to the definition of “employee” in s 3 of the Act, set out above. From that definition, to qualify as an employee, who is also required to register under the Act, the person must be employed under a contract of service “in a classification of work ...”. To be so employed, a person must clearly have more than a passing association with the work identified by the classification in the relevant prescribed industrial instrument. To be employed “in” a prescribed classification, requires the employee to be substantively occupied in the work identified in the relevant classification in the award concerned. For the purposes of establishing a classification, in *Federated Clerks’ Union of Australia, WA Branch v Cary* (1977) 57 WAIG 585, on an appeal to the Industrial Appeal Court from an award enforcement proceeding, Burt J (as he then was) said at 58 as follows:
- ... one judges the question as it may arise in any particular case simply by finding as a fact what it is that the worker was employed to do and then deciding whether upon the facts so found he was employed to "make written entries, keep accounts" and other work of that character. Of course one has regard to the substantial nature of the employment in terms of the purpose to be achieved by it, the question being, I think, very much controlled by the difference, which is not always accepted by philosophers but which serves the purposes of practical men, between ends and means. If in substance the worker's job is to write and the job is done when the writing has been done he is a clerk, but if in substance the writing done by the worker is but a step taken in the doing by him of something extending beyond it then he is not. The "substance" of the work identifies the question as being one of degree and it indicates the answer to it will be, or may be, very much the product of a value judgment.
- 29 This issue raised in *Cary* was also discussed by the Full Bench of the Commission in *Doropoulos and Others t/a Swan Dry Cleaners v Transport Workers’ Union of Australia, WA Branch* (1989) 69 WAIG 1290, where at 1293 the Full Bench observed:
- Thus, incorporated in the consideration of major and substantial employment on that authority, are questions of substantial nature of the employment, the substance of it, and the purpose to be achieved by it. One has to look at the contract or evidence of it, and obtain a comprehensive picture of the whole of the employment, to enable one to apply Burt J.'s test.
- 30 I turn firstly to the award the subject of the respondent’s supplementary written submission, that being the Materials Testing Employees’ Award. This award can no longer be relied on by the respondent as a prescribed award, as it was cancelled by order of the Commission on 25 May 2015: (2015) 95 WAIG 726. Reference to this award should be removed from Division 2 of Schedule 1 of the Regulations.
- 31 In the Radio and Television Employees’ Award in cl 29, there is a classification of “Antenna and/or Television Installer”. There is no definition in the award as to what this classification may include but presumably, it applies to an employee whose job it is, and whose purpose for employment, is to install television antennas or at least the major and substantive part of the work they do, is to be so engaged. Presumably, this classification was referred to by the respondent given the evidence of Mr Kirkby, where he said that on the odd occasions when the applicant gets a job of this kind, he completes it. I do not consider that Mr Kirkby could realistically be classified as being an employee (accepting that as a working director of the applicant company he is an employee) who was employed substantively, as a television antenna installer. The evidence was that Mr Kirkby is a qualified telecommunications technician who holds a Certificate III in Telecommunications and he runs the

applicant business, with the assistance of his wife and business partner. Doing the occasional television antenna installation in my opinion, would fall far short of enabling Mr Kirkby to be described as an employee the substance of whose work, would identify him as an “Antenna and/or Television Installer”.

- 32 The next classification referred to by the respondent was a “Cable Joiner” under the Electrical Contracting Industry Award. This award extends to the industry of electrical contracting. The classification of “Cable Joiner” is defined as “an employee who is engaged in joining cables or sweating lugs in connection with the installing and maintenance of underground or overhead distributing systems”. Firstly, I have no idea as to what “sweating lugs” means and there was no attempt by the respondent to explain it. However, regardless of this, whilst it may be said on the evidence that some aspects of the work of the applicant’s technician employees may involve joining together cables that they install for NBN and Foxtel pay television services, that is not the principal or dominant nature of their work. But most importantly, this classification must be understood in the context of the phrase “underground or overhead distributing systems”. In the context of this award, which is an award about electrical power and electricity, the “distributing system” referred to in the definition must be taken to be in connection with an electricity distributing system. This makes sense when read with the rest of the award. The applicant’s employees do not work with nor are they qualified to work with power or electricity systems. That was the evidence. The applicant’s employees work on the installation of data cabling for the receipt of internet and pay television signals. Accordingly, this classification is not relevant.
- 33 The next classification said to be applicable was that of “Installer and/or Serviceman” in groups B and C in the Electrical Trades Security Alarms Industry Award. This award concerns itself with the installation and maintenance of security systems. The classification of “Installer and/or Serviceman” is defined to mean “an employee engaged in connection with the wiring, manufacturing, installation, testing and repair of all manner of electrical and electronic security surveillance detectors and equipment”. Presumably, this suggested classification was also directed at Mr Kirkby’s evidence that from time to time on occasions, he and he alone, may perform a security system installation for a customer. I regard this suggested classification in the same light as the very occasional television antenna installation job that Mr Kirkby also said that he may perform. No other person apart from Mr Kirkby does any of this work and as he said, overall, it forms a very small part of what the applicant business does. On the evidence, as I have suggested, the substantial nature of Mr Kirkby’s job is to run the business, seemingly assisted by his wife on the administration side. In my view, it could not be the case, and nor could it be reasonably construed, that the occasional security system installation job done by Mr Kirkby, means that he could be characterised as employed, in substance, as an installer and/or serviceman of security systems. It would be different if the evidence was that the applicant employed a person whose substantive job was to do this sort of work, and did do this sort of work, on an ongoing basis. That, however, was not the evidence.
- 34 The next classification sought to be relied upon by the respondent was that of “Electronic Service Person” and “Installer” under the Electronics Industry Award. This award concerns itself with various things in relation to electronic components, instruments, equipment and/or systems. The classification of “Electronic Serviceperson” is defined to mean:
- ... an employee, other than an apprentice, who has successfully completed an electronic servicing apprenticeship or another appropriate trade course or has otherwise reached an equivalent standard of skills and knowledge and applies general trade skills on work carried out by the employer ...
- 35 The definition of “Installer” is as follows:
- ... an employee who is engaged in connection with the installation or wiring of electronic equipment, provided that any work in the nature of fault diagnosis, testing, adjusting and commissioning which is complex in nature shall be the work of service person and above.
- 36 Despite the fact that the applicant’s employees are not tradespersons who have completed an apprenticeship, and there was no evidence before the Commission to establish an equivalent standard of skills and knowledge specifically, a major difficulty with these suggested classifications is that they are concerned with employment in connection with electronics, which is the subject matter of this award. In the absence of a definition of “electronics” in the award, I apply its ordinary and natural meaning. The *Macquarie Dictionary* defines “electronics” as:
- the investigation and application of devices involving the conduction of electricity in semiconductors, gasses or a vacuum.
- 37 Similarly, the *Concise Oxford Dictionary* defines “electronics” as:
- branch of physics and technology concerned with phenomena associated with movement of electrons in vacuum, gas, semiconductors, etc, circuits etc ...
- 38 This is not what any employees of the applicant do, in terms of the substance of their employment. Their work does not involve semiconductors, circuits or the movement of electrons and nor does it concern electronic equipment, involving the conducting of electricity.
- 39 I finally turn to consider the suggested general classifications of “Tradesperson” and “Labourer” under the various awards noted above. Firstly, as to the submission of the respondent that the applicable classification is that of “Tradesperson”, there was no evidence before the Commission that any of the applicant’s employees can be so described. For example, under the Metal Trades (General) Award, the level C10 classification of “Engineering Tradesperson” is a person with a Trade Certificate in the various branches of work set out in the award. The applicant’s employees, on the evidence, have not completed trade training in terms of an apprenticeship. On the evidence, they undertake and have undertaken a Certificate III qualification in telecommunications. Trainees may be employed too, undertaking on the job work and training and progressing towards this qualification. They are not tradesperson classifications in the sense used in the awards in question. It is also not apparent, in any event, how the “Tradesperson” classification under the Air Conditioning and Refrigeration Industry (Construction and Servicing) Award is relevant to the work of the applicant’s employees. Nor are any of the employees of the applicant employed

as “labourers” or as “builders’ labourers” under the Building Trades Award, the WA Civil Contracting Award or the Metal Trades Award.

- 40 For example, in the Building Trades Award, in cl 6(3) definitions, there is a lengthy definition of “Builders Labouring” which encompasses work as a scaffolder, rigger, dogman, gear hand, hod carrier, mortar mixer or drainage worker employed in connection with building operations; working in and around lifts, filling boxes with materials to be lifted by winches, elevators and cranes etc, to service other trades; and also including a large number of other work descriptions, normally associated with unskilled work in a building and construction environment. This is not work that on the evidence, is undertaken by the applicant’s employees who are qualified and skilled technicians or training to be so.
- 41 In the Metal Trades Award there is no “labourer” classification as such. The basic, unskilled classifications are those of the Engineering/Production Employee level I and level II. A person at level I is one who is undertaking structured training to work at level II. The level II work includes work such as repetitive work on machines or equipment; assembling components; soldering and welding or cutting scrap metal, amongst other similar work. I do not consider this reflects the evidence as to the work of the applicant’s employees.
- 42 There are no classifications in any of the awards to which reference has been made by the respondent, which adequately cover the work performed by a “telecommunications technician” or a “telecommunications trainee” as defined and described in the Telecommunications Services Award 2010 (Cth). At Schedule B – Classification Structure and Definitions of this award, at Part B.4 Technical Stream Classifications, is set out the work of Telecommunications Trainee, Telecommunications Technical Employee and Telecommunications Technician, in terms of role definitions and indicative tasks. These are broadly consistent with the duties of the applicant’s employees, on the evidence given in these proceedings.

Conclusions

- 43 I am not satisfied that it has been established that the applicant’s employees are employed under a contract of service “in” one of the prescribed classifications of a prescribed industrial instrument for the purposes of the Regulations. Therefore, I cannot be satisfied on the evidence that the applicant is an “employer” as defined in s 3 of the Act as one who engages an “employee(s)” as defined. Thus, there is no obligation on the applicant to register under s 30 of the Act. The applicant’s application to review the respondent’s decision is upheld.

2019 WAIRC 00638

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

QUANTUM BLUE PTY LTD

APPLICANT

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE SCHEME

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE FRIDAY, 16 AUGUST 2019
FILE NO/S APPL 37 OF 2019
CITATION NO. 2019 WAIRC 00638

Result Extension of time granted
Representation
Applicant Mr S Kirkby
Respondent Ms R Harding of counsel

Order

HAVING heard Mr S Kirby on behalf of the applicant and Ms R Harding of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for the filing of the notice of review be and is hereby extended to 29 July 2019.

[L.S.]

(Sgd.) S J KENNER,
 Senior Commissioner.

2019 WAIRC 00861

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

QUANTUM BLUE PTY LTD

APPLICANT

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE SCHEME

RESPONDENT**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** WEDNESDAY, 11 DECEMBER 2019**FILE NO/S** APPL 37 OF 2019**CITATION NO.** 2019 WAIRC 00861**Result** Application to review upheld. Order issued.**Representation****Applicant** Mr S Kirkby**Respondent** Ms R Harding of counsel and with her Ms B Swanson of counsel*Order*

HAVING heard Mr S Kirby on behalf of the applicant and Ms R Harding of counsel and with her Ms B Swanson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the application to review be and is hereby upheld.
- (2) THAT the respondent's decision that the applicant be required to register as an employer under the Construction Industry Portable Paid Long Service Leave Act 1985 be and is hereby set aside.
- (3) THAT the applicant is not required to register.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2020 WAIRC 00043

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00043
CORAM : COMMISSIONER D J MATTHEWS
HEARD : TUESDAY, 7 JANUARY 2020
DELIVERED : FRIDAY, 17 JANUARY 2020
FILE NO. : B 142 OF 2019
BETWEEN : FIONA VAN HEERWAARDEN
Applicant
AND
RICHARD JAMES TRAINER, THE TRUSTEE FOR THE M4 UNIT TRUST
Respondent

CatchWords : Industrial law (WA) – Denied contractual benefit claim – Claimed entitlement to salary – Claim for denied contractual benefit upheld – Order issued – Name of respondent amended

Legislation : *Western Australian Industrial Relations Act 1979*

Result : Claim upheld

Representation:

Claimant : In person

Respondent : No appearance

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

- 1 The respondent has not appeared either in person or by representative today despite having been served with notice of the hearing and despite having been called by my Associate.
- 2 My Associate also informed me that there was no arrangement made whereby the respondent would appear by telephone or video or anything like that.
- 3 Accordingly, I decided to proceed in the absence of the respondent.
- 4 The claimant, Mrs Fiona van Heerwaarden, brings a claim for denied contractual benefits relating to a period of employment she had with the respondent. She named the respondent as The Trustee for the M4 Unit Trust. She gave evidence that Richard James Trainer was the trustee and I will amend the name of the respondent to Richard James Trainer, the Trustee for the M4 Unit Trust.
- 5 The claimant gave evidence she was employed by the respondent from 11 February 2019 to 29 March 2019 and she gave evidence that she was to be paid \$25 per hour. Exhibit 1 supports this, it being an offer of employment which offers the claimant casual employment at the rate of \$25 per hour.
- 6 The claimant gave evidence that she worked five and a half hours on three days in each week, giving a total of 111 hours for the period of 11 February 2019 to 29 March 2019.
- 7 The claimant also gave evidence that she received by way of payment from the respondent for her work an amount of \$1,553, that is a net figure, being after tax. The claimant's calculations, which I accept, is that amount reflects a gross amount of \$1,949.13.
- 8 The claimant's calculation, which I accept, is that 111 hours of work at \$25 per hour is an amount of \$2,775 which means that she has not been paid, on her calculation which I accept, an amount of \$825.87.
- 9 So having heard evidence from the claimant which goes unchallenged, and which I accept in its totality, there being absolutely no reason based on the presentation of the claimant in the hearing room today as to why I ought not accept her as a credible and believable person, I accept the respondent has underpaid the claimant the amount of \$825.87, or put another way, has denied her a contractual benefit in that sum and therefore I order that the respondent herewith pay to the claimant the sum of \$825.87.

2020 WAIRC 00044

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

FIONA VAN HEERWAARDEN

APPLICANT

-v-

THE TRUSTEE FOR THE M4 UNIT TRUST

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

FRIDAY, 17 JANUARY 2020

FILE NO/S

B 142 OF 2019

CITATION NO.

2020 WAIRC 00044

Result	Order made
Representation	
Claimant	In person
Respondent	No appearance

Order

HAVING heard from the claimant, in person, on Tuesday, 7 January 2020 and there being no appearance for, or on behalf of, the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the name of the respondent be amended from 'The trustee for the M4 unit trust' to 'Richard James Trainer, the Trustee for the M4 Unit Trust'.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2020 WAIRC 00045

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

FIONA VAN HEERWAARDEN

APPLICANT

-v-

RICHARD JAMES TRAINER, THE TRUSTEE FOR THE M4 UNIT TRUST

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE FRIDAY, 17 JANUARY 2020
FILE NO/S B 142 OF 2019
CITATION NO. 2020 WAIRC 00045

Result Order made
Representation
Claimant In person
Respondent No appearance

Order

HAVING heard from the claimant, in person, on Tuesday, 7 January 2020 and there being no appearance for, or on behalf of, the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the respondent pay to the claimant the sum of \$825.87 forthwith.

(Sgd.) D J MATTHEWS,
 Commissioner.

[L.S.]

2020 WAIRC 00057

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00057
CORAM : COMMISSIONER D J MATTHEWS
HEARD : THURSDAY, 16 JANUARY 2020
DELIVERED : THURSDAY, 30 JANUARY 2020
FILE NO. : U 150 OF 2019
BETWEEN : NICOLA NATHAN
 Applicant
 AND
 THE STATE OF WESTERN AUSTRALIA DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Industrial law (WA) - Unfair dismissal application - Respondent raises jurisdictional objection on basis that applicant resigned - Applicant claims constructive dismissal - Taking applicant's case at its highest there was no dismissal - No jurisdiction for application to be determined by Western Australian Industrial Relations Commission as there was no dismissal

Legislation : *Industrial Relations Act 1979* s23A(1)
Workers' Compensation and Injury Management Act 1981

Result : Application dismissed

Representation:
Applicant : In person
Respondent : Mr J Carroll (of counsel)

Reasons for Decision

- 1 Where, as here, the applicant in an unfair dismissal application resigned and alleges constructive dismissal, the circumstances may be such that the jurisdictional question, that is whether or not there was a dismissal, may conveniently be the subject of a discrete preliminary hearing.
- 2 On review of the filed documents, this appeared to be such a case.
- 3 In her “Unfair Dismissal Application”, Ms Nicola Nathan wrote that she lodged an application under the *Workers’ Compensation and Injury Management Act 1981* in early 2019 and that “since June 2019, the [respondent] has repeatedly offered a lump sum settlement of \$70,000 payment in exchange for my resignation”.
- 4 Ms Nathan wrote that, by October 2019 she was in very serious financial trouble and that, as a result of the conduct of the respondent’s agents, both while working and in relation to the claim under the *Workers’ Compensation and Injury Management Act 1981*, her “mental health, feelings of little self-worth have detrimentally worsened”.
- 5 Ms Nathan wrote that because of the above, the respondent “left me no other choice than to resign, circumstantially giving rise to constructive dismissal”.
- 6 In the “Employer Response to Unfair Dismissal Application”, the respondent wrote that Ms Nathan was not dismissed and that, rather, she voluntarily resigned as part of a settlement of her workers’ compensation claim. The respondent wrote that Ms Nathan was represented by an experienced “workers’ compensation legal practitioner” in those settlement negotiations.
- 7 The respondent wrote:

“In the circumstances, it is clear that the applicant had a choice whether or not to resign. She was offered a settlement which included the payment of a sum of money to her, in exchange for her resignation and the settlement of her workers’ compensation claim. She did not have to accept that offer, however, with the benefit of legal representation and advice, she accepted the offer. This was a real choice with the benefit of legal advice.”
- 8 A hearing on the matter of jurisdiction was held on 16 January 2020.
- 9 Ms Nathan gave evidence about problems at Clarkson Community High School which she said led to her putting in a claim under the *Workers’ Compensation and Injury Management Act 1981*. The problems centred on the alleged conduct of the school principal, Mr John Young, toward her. I do not need to decide where the truth lies in relation to Ms Nathan’s allegations against Mr Young.
- 10 Ms Nathan gave evidence that at the first conciliation conference in relation to her claim under the *Workers’ Compensation and Injury Management Act 1981*, she was represented by a lawyer allocated to her by the State School Teachers’ Union. Ms Nathan gave evidence she received an offer at the conference but rejected it. Ms Nathan also gave evidence that she broke ties with “the SSTU lawyer” and “sought legal advice from an independent lawyer” after the conference.
- 11 Ms Nathan went on to give evidence that eventually she accepted an offer of \$70,000 to compromise her claim under the *Workers’ Compensation and Injury Management Act 1981*, with a condition of settlement being she resign from her employment with the respondent.
- 12 She gave evidence that her reasons for accepting the offer were as follows:

“I received a foreclosure notice from Keystart Home Loans, my, um, mortgage lender at the end of September which frightened me very much. I have a teenage daughter and myself and built the house two years earlier on my own and I was frightened to lose that and because of the economy my house value had actually dropped so I couldn’t sell the property for the amount that I’d paid for it which really frightened me. And by getting that lump sum payout I’ve been able to extend my, you know, living accommodation.”
- 13 Ms Nathan gave evidence she received a draft letter of resignation from the respondent, but she refused to sign it and ended up signing a version she amended which she felt better served her interests.
- 14 Ms Nathan gave evidence she believed her problems could have been solved by the respondent if the respondent had transferred her to another school, but accepted she understood by signing the letter of resignation she was resigning from her employment with the respondent.
- 15 Ms Nathan, as a matter of common sense causation, resigned from her employment to achieve the payment to her of a sum of money in circumstances where her financial situation had become very bad.
- 16 Ms Nathan did not resign, as a matter of common sense causation, because of anything that happened to her at Clarkson Community High School. What happened at the school led to the claim under the *Workers’ Compensation and Injury Management Act*, but as a matter of common sense causation, it did not lead to her resignation. There were other factors at play by this stage. That is why I do not need to turn my mind to the allegations against Mr Young.
- 17 The question is whether the resignation, in the circumstances described by Ms Nathan, can possibly be said to be a constructive dismissal.
- 18 If it is possible it could be a constructive dismissal, I must allow the matter to proceed to a substantive hearing. However, if there cannot possibly be a constructive dismissal, taking Ms Nathan’s case at its highest, I must decline to hear and determine the matter on the basis that I have no jurisdiction to do so.
- 19 The legal meaning of “dismissal” in section 23A(1) *Industrial Relations Act 1979* is an act on the part of the employer which brings the employment to an end. A resignation may still be a dismissal if the employer has acted to leave the employee with no effective or real choice but to resign.
- 20 In this case, Ms Nathan does not seriously allege that she had no choice but to resign. She gave evidence that “I had two choices, to keep fighting in arbitration or take the lump sum with resignation”.

- 21 Ms Nathan gave evidence that to pursue the first option would have caused her serious financial difficulties. However, those difficulties did not deprive her of a choice and to the extent she felt they did, Ms Nathan has failed to make any case that raises even a suggestion that those difficulties were the fault of the respondent, or that the respondent “acted” to leave Ms Nathan with no real choice.
- 22 Ms Nathan had a choice. It may not have seemed like much of a choice at the time, but she clearly had one. To the extent her choices were limited, or one choice was better than another in all of the circumstances, this was not a result of actions of the respondent.
- 23 Evidence that Ms Nathan knew she had a choice, in the sense that her will was not overborne, is found in her not signing the draft letter of resignation until it was amended in what she considered to be her own best interests.
- 24 Clearly the amendment was in Ms Nathan’s best interests and, accordingly, it is good evidence of presence of mind at a crucial time. Ms Nathan appears to have been thinking straight, if I can put it that way.
- 25 Ms Nathan’s will was not overborne. She had a real choice and was aware she had a real choice. She may not now resile from that choice.
- 26 I find that there cannot possibly have been a dismissal in this matter and consequentially find that I do not have jurisdiction to hear and determine the appeal. It will be dismissed by order.

2020 WAIRC 00056

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
NICOLA NATHAN

PARTIES**APPLICANT**

-v-

THE STATE OF WESTERN AUSTRALIA DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE THURSDAY, 30 JANUARY 2020
FILE NO/S U 150 OF 2019
CITATION NO. 2020 WAIRC 00056

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

Order

HAVING heard from the applicant in person and Mr J Carroll, of counsel, for the respondent on Thursday, 16 January 2020;
NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order that the application be, and is hereby, dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2020 WAIRC 00035

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
QUSAI ABDULRAHEEM BATTO ALSHAWI

PARTIES**APPLICANT**

-v-

CHARCOAL CHICKEN/DANELLA PLAZA

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE THURSDAY, 16 JANUARY 2020
FILE NO/S B 84 OF 2019
CITATION NO. 2020 WAIRC 00035

Result Application dismissed for want of prosecution

Representation

Applicant No appearance

Respondent No appearance

Order

WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) that was listed for a show cause hearing on 16 January 2020;

AND WHEREAS at the hearing on 16 January 2020 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;

AND HAVING given reasons for the decision during the hearing on 16 January 2020;

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

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

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00058

**UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00058
CORAM : COMMISSIONER D J MATTHEWS
HEARD : THURSDAY, 16 JANUARY 2020
DELIVERED : THURSDAY, 30 JANUARY 2020
FILE NO. : U 145 OF 2019
BETWEEN : SARAH COLOMB
 Applicant
 AND
 DEPARTMENT OF EDUCATION WESTERN AUSTRALIA
 Respondent

CatchWords : Industrial law (WA) - Unfair dismissal application - Respondent raises jurisdictional objection on basis that applicant resigned - Applicant claims constructive dismissal - Application filed out of time - Unable to decide questions - Jurisdiction and matter to accept out of time to be determined at substantive hearing

Legislation : *Industrial Relations Act 1979* s29(3)
Workers' Compensation and Injury Management Act 1981

Result : No decisions made; Matter to proceed to substantive hearing

Representation:

Applicant : In person

Respondent : Mr J Carroll (of counsel)

Reasons for Decision

- 1 Where, as here, the applicant in an unfair dismissal application resigned and alleges constructive dismissal, the circumstances may be such that the jurisdictional question, that is whether or not there was a dismissal, may conveniently be the subject of a discrete preliminary hearing.
- 2 On review of the filed documents, this appeared to be such a case.
- 3 By her "Unfair Dismissal Application", Ms Colomb accepted that she had resigned as part of the settlement of a claim under the *Workers' Compensation and Injury Management Act 1981* but said she was, in fact, "forced into resigning" in such a way as to make the ending of her employment a "constructive dismissal".
- 4 By the "Employer's Response to Unfair Dismissal Application", the respondent said that the resignation was a "voluntary" one effected as part of the settlement of a workers' compensation claim.
- 5 The respondent wrote that Ms Colomb had a lawyer and that, with the benefit of legal advice, she made a real choice to resign.
- 6 This matter was listed so that the issue of jurisdiction could be explored. If there is no possibility that there was a dismissal, it would be inappropriate to hear and determine the matter at a full hearing. However, if it was to emerge that there might have been a dismissal, or it could simply not be said one way or the other, the matter will have to be heard and determined at the substantive hearing.

- 7 Having heard evidence from Ms Colomb, I find myself unable to decide whether there was a dismissal in this case or not.
- 8 It is true that Ms Colomb resigned as part of a deal by which she received a significant sum of money and that the deal was reached at a time when she had a lawyer acting for her.
- 9 However, there are some unusual aspects to the matter about which Ms Colomb gave evidence that leave me in a position where I need to hear more before addressing the question of jurisdiction.
- 10 Ms Colomb gave evidence, among other things, that the following occurred:
- (1) she initially engaged a law firm to represent her in relation to her claim under the *Workers' Compensation and Injury Management Act 1981*;
 - (2) the law firm asked Ms Colomb if she would like to enter into settlement negotiations, which might result in her resigning to get a deal done, or, if not, to pay \$10,000 into its trust account to pay for work toward representation of her at an arbitration hearing;
 - (3) she rejected both options, making it clear to her lawyer that she would not accept any offer that included resignation and that she could not afford to pay \$10,000;
 - (4) she told the law firm she would represent herself;
 - (5) the respondent's agents subsequently informed her that it would enter into negotiations to settle the *Workers' Compensation and Injury Management Act 1981* claim on a basis that would not involve her resigning, but only if she engaged a lawyer to assist her in those negotiations;
 - (6) based on the assurance that resignation was off the table, she engaged a lawyer and attended a settlement conference;
 - (7) just before the conference commenced, the respondent's lawyer informed her lawyer that he had received new instructions and that her resignation would be a condition of any settlement;
 - (8) she believed that if the respondent then made any reasonable offer she would have to pay the bill of the law firm she had originally engaged and her then lawyer (both of whom had been engaged on a 'no win, no fee' basis);
 - (9) she felt trapped in that she thought if she walked out of the conference at that stage, but did so in circumstances where a "reasonable offer" ended up being made, even one requiring her resignation, she would have to pay the legal bills and she could not afford to do so;
 - (10) her then lawyer did not give her full advice about what was happening;
 - (11) accordingly, she accepted an offer which maximised her financial return even though it came at the cost of her employment, which she did not want to end.
- 11 Ms Colomb's evidence was not shaken by cross-examination, although a new aspect was introduced being some concurrent negotiations being undertaken by the State School Teachers' Union on Ms Colomb's behalf.
- 12 Taking the evidence at its highest, it gives me pause for thought about the actions of the respondent and whether those actions may have, in a real sense, led to the end of Ms Colomb's employment.
- 13 I cannot close my mind, at this time, to the possibility that the respondent, by its conduct, orchestrated a situation in which Ms Colomb had no real choice but to resign. The issue of the concurrent negotiations being undertaken by the State School Teachers' Union and Ms Colomb's evidence about them did nothing to clarify matters one way or the other.
- 14 I do not decide the issue of jurisdiction at this time. I will decide that as part of the substantive hearing.
- 15 I note also that the application was filed out of time. The respondent did not wish to be heard at the preliminary hearing on whether or not I should act under section 29(3) *Industrial Relations Act 1979*.
- 16 I have not yet heard enough to make up my mind in relation to the section 29(3) *Industrial Relations Act* question and I will decide it also as part of the substantive hearing.

CONFERENCES—Matters arising out of—

2019 WAIRC 00794

DISPUTE RE FIXED TERM CONTRACTS OF EMPLOYMENT WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2019 WAIRC 00794
CORAM	:	PUBLIC SERVICE ARBITRATOR SENIOR COMMISSIONER S J KENNER
HEARD	:	THURSDAY, 31 OCTOBER 2019 WRITTEN SUBMISSIONS 4 AND 5 NOVEMBER 2019
DELIVERED	:	THURSDAY, 7 NOVEMBER 2019
FILE NO.	:	PSAC 19 OF 2019
BETWEEN	:	CIVIL SERVICE ASSOCIATION (INC.) Applicant AND DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION Respondent

Catchwords : *Industrial Relations Law (WA) - Application for interim relief under s 44 of the Industrial Relations Act 1979 - Application considered - Requisite opinion as to how continuation of employment would encourage the parties to exchange or divulge attitudes or information not formed - Actions of respondent do not evidence an attitude uncondusive to the exchange of information and attitudes - Application dismissed*

Legislation : *Industrial Relations Act 1979 (WA) ss 6, 26(1), 44(6)(ba), 44(9)*

Result : Application dismissed

Representation:

Counsel:

Applicant : Mr M Amati

Respondent : Mr J Carroll of counsel

Solicitors:

Applicant : Civil Service Association of Western Australia Inc

Respondent : State Solicitor's Office of Western Australia

Case(s) referred to in reasons:

Civil Service Association of Western Australia (Inc.) v Department of Education (2019) WAIRC 00644; (2019) 99 WAIG 1564

Director General Department of Education v The State School Teachers' Union of WA (Inc) [2011] WAIRC 00058; (2011) 91 WAIG 166

Case(s) also cited:

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 990

Reasons for Decision

- 1 The substantive claim in this matter is one brought under s 44 of the *Industrial Relations Act 1979* (WA) by the applicant on behalf of its member, Mr Byrnes, that his fixed term contract of employment be converted to an offer of permanent employment, in accordance with a document known as "Commissioner's Instruction No. 23". This document, published by the Public Sector Commission, sets out criteria for the conversion of fixed term contracts and casual employees engaged in the public sector, to permanency.
- 2 Mr Byrnes has been engaged on a series of fixed term contracts since in or about August 2015, it is alleged. A dispute arises between the parties as to whether Mr Byrnes' employment history satisfies the terms of cl 2 of the CI, dealing with the criteria for converting or appointing a fixed term contract employee to a permanent position. Specifically, the issue is whether, in accordance with cl 2.1(a) of the CI, Mr Byrnes' "reason for engagement on a fixed term contract" is, or is not, due to "a circumstance mentioned in the relevant industrial instruments". If it is, then the criteria are not met. That is the nub of the dispute between the parties. It seems not to be in dispute that the relevant industrial instrument in this case, was s the Public Service Government Officers (CSA) General Agreement 2017.
- 3 The Arbitrator convened a s 44 compulsory conference between the parties on 31 October 2019. At the conference the parties put their respective positions. The remedy sought in the application seeks firstly, an extension of Mr Byrnes' contracts of employment until such time, as it was described, as the process set out in the CI was finalised, including any possible arbitration of the dispute. Secondly, agreement that Mr Byrnes had worked for the respondent for over four years; that his service was not a circumstance mentioned in a relevant industrial agreement; and accordingly, he is eligible for conversion to permanency in accordance with the CI.
- 4 Whilst the s 44 application did not claim it as such, as the compulsory conference proceeded, it became clear that what in essence the applicant was seeking on behalf of Mr Byrnes, at least in so far as it relates to the first part of the relief claimed, was an interim order under s 44(6)(ba) of the Act. Accordingly, I granted the applicant leave to amend the s 44 application to make this explicit.
- 5 The parties were given an opportunity to file written submissions in support of the application for interim relief, which they have done. In the meantime, as a result of discussions at the compulsory conference, the respondent agreed to extend Mr Byrnes' employment from its intended cessation date of 31 October 2019 through to 8 November 2019.
- 6 Section 44(6)(ba) of the Act deals with the Commission's powers at or in relation to a compulsory conference and is in the following terms:
 - (ba) with respect to industrial matters, give such directions and make such orders as will in the opinion of the Commission —
 - (i) prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter; or
 - (ii) enable conciliation or arbitration to resolve the matter in question; or
 - (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;

and

...

- 7 It is trite to observe that the exercise of the powers under this provision of the Act arising in the course of a s 44 compulsory conference, are not simply for the asking. Mere reference to s 26(1) of the Act and general notions of fairness are insufficient. The onus is on the party seeking interim orders to establish one or more of the relevant criteria specified in s 44(6)(ba). The Arbitrator must form the opinion, that one or more of the sub-pars (i), (ii) or (iii) are satisfied: *Director General Department of Education v The State School Teachers' Union of WA (Inc)* [2011] WAIRC 00058; (2011) 91 WAIG 166. It is undoubted that s 44(6)(ba) is to be exercised in accordance with the requirements of the objects of the Act in s 6 and s 26(1). However, it is also trite to observe that s 26(1) is not a head of power, rather, it governs the manner of the exercise of the Commission's powers in determining matters before it.
- 8 In its outline of submissions, the applicant relies on s 44(6)(ba)(iii) as I understood the submission. What the applicant submitted was a "material misunderstanding" by the respondent of the facts or the existence of erroneous records. As an extension of this proposition, the submission was made that to encourage the parties to exchange or divulge attitudes or information would in some way, result in a settlement of the matter. The applicant also referred to and relied upon my recent decision in *Civil Service Association of Western Australia (Inc.) v Department of Education* (2019) WAIRC 00644; (2019) 99 WAIG 1564. In that case, which also dealt with an application for interim orders, I had occasion to comment on the nature of the powers conferred on the Commission under s 44(6)(ba) of the Act, and subpar (iii) in particular. Whilst that matter involved a claim that the Union member concerned, who was stood down pending retirement on the grounds of ill health, be returned to work, I commented at pars 9 to 12 as follows:
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.
- 9 The applicant sought to distinguish the above case on the facts. It was also submitted by the applicant that a prima facie case was demonstrated in its submissions and that the matter concerns the proper application of the policy intention of the CI.
- 10 The respondent, through its counsel, contended that there was nothing contained in the applicant's written submissions that supported any interim order being made by the Arbitrator. In particular, the contention was put that there is nothing before the Arbitrator that would suggest that maintaining Mr Byrnes in employment, albeit temporarily, would have the effect of encouraging the parties to exchange or divulge attitudes or information which would assist in the resolution of the matters in dispute. Furthermore, in referring to *CSA v Department of Education*, the respondent said that, in reliance on the above passages from my decision, they support the conclusion that there can be no foundation for the Arbitrator to form the required opinion that the making of the interim order sought would encourage the parties to exchange or to divulge attitudes or information. Additionally, it was submitted that there was no indication that the respondent was unwilling to exchange attitudes or information in any event.
- 11 As I have mentioned above, the making of interim orders are not based on general claims as to unfairness or the invocation of s 26(1) of the Act. It is incumbent on an applicant seeking interim orders in a compulsory conference under s 44(6)(ba) of the Act, to establish *how* any of the criteria in subpars (i) to (iii) are met if the order sought is made and how the Commission (in this case the Arbitrator), can reach the requisite opinion. With respect to the applicant's submissions, and the brief history of the dispute to date, what they highlight is a difference of view existing between the parties as to the operation and effect of the CI in relation to Mr Byrnes' employment history. There is nothing in the submissions in support of the application for interim

orders, to enable the Arbitrator to reach the requisite opinion as to *how* it is, that Mr Byrnes' continuation in temporary employment at this stage would satisfy the criterion in subpar (iii) to "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". The ultimate determination of the matters in dispute in this case, will no doubt turn on the correctness or otherwise, of the parties' views as to the operation and effect of the CI, in the circumstances of Mr Byrnes' employment and his history of fixed term contract engagement.

- 12 Further, on the basis of the history of the matter to date, there is no suggestion to enable me to form the requisite opinion under s 44(6)(ba)(iii) of the Act, that the respondent has not been prepared to divulge information or to exchange attitudes. On the contrary, by its letter of 10 June 2019 to Mr Byrnes, informing him of the outcome of its review of his circumstances in accordance with the CI, which seemed to have commenced many months prior, whilst concluding that it was its decision that Mr Byrne was not eligible under the CI for conversion to permanency "at this time", he was invited to "offer information relevant to your employment and engagement that you believe we may not have considered prior to reaching our outcome". There followed in the months after, substantial written and oral dialogue between the parties, which ultimately did not resolve the matter. This hardly evidences an attitude uncondusive to the exchange of information and attitudes in relation to the matters in dispute.
- 13 I should add too, if there is no resolution of the dispute through conciliation, then Mr Byrnes' rights are preserved in the event that the dispute is referred for hearing and determination under s 44(9) of the Act.
- 14 Accordingly, not being satisfied that the terms of s 44(6)(ba) of the Act are met in this case, the application for interim orders must be dismissed.

2019 WAIRC 00795

DISPUTE RE FIXED TERM CONTRACTS OF EMPLOYMENT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CIVIL SERVICE ASSOCIATION (INC.)

PARTIES**APPLICANT**

-v-

DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION

RESPONDENT**CORAM**PUBLIC SERVICE ARBITRATOR
SENIOR COMMISSIONER S J KENNER**DATE**

THURSDAY, 7 NOVEMBER 2019

FILE NO

PSAC 19 OF 2019

CITATION NO.

2019 WAIRC 00795

Result	Order issued
Representation	
Applicant	Mr M Amati
Respondent	Mr J Carroll of counsel

Order

HAVING heard Mr M Amati on behalf of the applicant and Mr J Carroll 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,
Senior Commissioner,
Public Service Arbitrator.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—**2020 WAIRC 00084**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ADAM RODD FEILDING
APPLICANT

-v-
HAMIWOOD ENTERPRISES PTY LTD
RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE WEDNESDAY, 5 FEBRUARY 2020
FILE NO. B 81 OF 2019
CITATION NO. 2020 WAIRC 00084

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 formal discovery by serving its list of documents on each other by no later than 26 February 2020;
2. THAT inspection and provision of the documents, including any financial reports to each other shall be completed by no later than 4 March 2020;
3. THAT the parties give notice to one another of witnesses they intend to call to give evidence at the proceedings no later than 18 March 2020;
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 25 March 2020;
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 1 April 2020;
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.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.**2020 WAIRC 00059****APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 2 OF 2019 GIVEN ON 13 DECEMBER 2019**

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

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

-v-
SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS
RESPONDENTS

CORAM BUSS J
DATE THURSDAY, 30 JANUARY 2020
FILE NO/S IAC 3 OF 2019
CITATION NO. 2020 WAIRC 00059

Result Order Issued

Order

1. There be one consolidated appeal book in IAC 3 of 2019 and IAC 1 of 2020.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

2020 WAIRC 00060

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 2 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS

APPELLANT**-v-**

SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE
PHARMACY GUILD OF WESTERN AUSTRALIA, THE SHOP, DISTRIBUTIVE AND ALLIED
EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

RESPONDENTS**CORAM**

BUSS J

DATE

THURSDAY, 30 JANUARY 2020

FILE NO/S

IAC 1 OF 2020

CITATION NO.

2020 WAIRC 00060

Result

Order Issued

Order

1. There be one consolidated appeal book in IAC 3 of 2019 and IAC 1 of 2020.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

2020 WAIRC 00100

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

FRIDAY, 14 FEBRUARY 2020

FILE NO.

OSHT 5 OF 2019

CITATION NO.

2020 WAIRC 00100

Result

Direction issued

Representation**(by correspondence)****Applicant**

Mr Scott Puxty (of counsel)

Respondent

Ms Chynne Stamp (of counsel)

Direction

HAVING heard from Mr S Puxty (of counsel) on behalf of the applicant and Ms C Stamp (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 Directions 3 to 7 issued on 11 December 2019 ([2019] WAIRC 00859) are amended;

2. THAT the applicant file and serve upon the respondent any statement of evidence and expert report by 13 February 2020;
3. THAT the respondent file and serve upon the applicant any statement of evidence of lay witnesses by 4 March 2020;
4. THAT the respondent be at liberty to apply for further time for preparation of expert report in response, if the respondent considers it necessary, but with such application to be made by 4 March 2020;
5. Subject to the respondent considering Direction 4 not being necessary:
 - (a) the parties to advise each other of witnesses required for cross examination by 6 March 2020;
 - (b) the parties file written submissions and list of authorities by 12 March 2020; and
 - (c) that the hearing date of 19 March 2020 is confirmed
6. THAT the parties have liberty to apply on 48 hours' notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00102

REVIEW OF DECISION - S.61A - OSH ACT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL
LASTING IMPRESSIONS CONSTRUCTION AND LANDSCAPING

PARTIES

APPLICANT

-v-
WORKSAFE

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 14 FEBRUARY 2020
FILE NO/S OSHT 9 OF 2019
CITATION NO. 2020 WAIRC 00102

Result	Name of applicant amended
Representation	
Applicant	Mr Danny Rawlinson-Shelton
Respondent	Ms Chynne Stamp (of counsel) and Ms T Hollaway (of counsel)

Order

HAVING heard the applicant on his own behalf and Ms C Stamp (of counsel) and with her Ms T Hollaway (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the name of the applicant be amended to "Mr Danny Rawlinson-Shelton".

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00103

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LASTING IMPRESSIONS CONSTRUCTION AND LANDSCAPING

PARTIES

APPLICANT

-v-
WORKSAFE

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 14 FEBRUARY 2020
FILE NO. OSHT 9 OF 2019
CITATION NO. 2020 WAIRC 00103

Result	Direction issued
Representation	
Applicant	Mr Danny Rawlinson-Shelton
Respondent	Ms Chynne Stamp (of counsel) and Ms T Hollaway (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Ms C Stamp (of counsel) and with her Ms T Hollaway (of counsel) on behalf of the respondent, The Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT all matters requiring to be served on either party or the Tribunal may be served by email on each parties' nominated email address and proof of service is by the email sent notification;
2. THAT any request for production of documents or materials for either party be by letter of request served no later than 6 March 2020;
3. THAT each party provide documents or materials requested by the other party by 27 March 2020;
4. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as evidence in chief;
5. THAT the applicant file and serve upon the respondent any witness statements upon which he intends to rely by no later than 17 April 2020;
6. THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely by no later than 8 May 2020;
7. THAT the applicant file and serve upon the respondent an outline of submissions by no later than 29 May 2020;
8. THAT the respondent file and serve upon the applicant an outline of submissions by no later than 19 June 2020;
9. THAT the parties shall give notice to each other of any witnesses required to attend the hearing for cross-examination by 3 July 2020;
10. THAT the application be listed for hearing for one day on a date to be fixed; and
11. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00095

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 28 OCTOBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

YUSOOF ARIFF

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MRS L KENNEWELL - BOARD MEMBER
MR D FERGUSON - BOARD MEMBER

DATE

TUESDAY, 11 FEBRUARY 2020

FILE NO.

PSAB 21 OF 2019

CITATION NO.

2020 WAIRC 00095

Result	Direction issued
Representation	
Applicant	Mr M Giles (as agent)
Respondent	Mr J Carroll (of counsel)

Direction

HAVING heard from Mr M Giles (as agent) on behalf of the appellant and Mr J Carroll (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 17 March 2020.
2. THAT the appellant file his outline of evidence and documents, other than the agreed documents, on which he intends to rely by 7 April 2020.
3. THAT the respondent file its outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 29 April 2020.
4. THAT the appellant file a written outline of his submissions by 13 May 2020.
5. THAT the respondent file a written outline of its submissions by 27 May 2020.
6. THAT discovery be informal.
7. THAT this matter be listed for a two-day hearing.
8. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00094

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 1 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PONNURAJAH (PON) RATNASINGHAM

APPELLANT

-v-

DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER D J MATTHEWS - CHAIRMAN
MR G LEE - BOARD MEMBER
MS M BASTIAN - BOARD MEMBER

DATE

TUESDAY, 11 FEBRUARY 2020

FILE NO

PSAB 22 OF 2019

CITATION NO.

2020 WAIRC 00094

Result

Respondent name amended

Representation

Appellant

Mr M Amati (as agent)

Respondent

Ms J Vincent (of counsel) and with her Ms L Symons

Order

HAVING heard from Mr M Amati, as agent, for the applicant and Ms J Vincent, of counsel, for the respondent on Tuesday, 11 February 2020 and by consent:

The Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that the respondent in this matter be “Director General, Department of Mines, Industry Regulation and Safety”.

(Sgd.) D J MATTHEWS,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00096

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 7 NOVEMBER 2019

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION EDWARD PICKS	APPLICANT
	-v-	
	WA COUNTRY HEALTH SERVICE BOARD	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MR D HILL - BOARD MEMBER MR M GOLESWORTHY - BOARD MEMBER	
DATE	TUESDAY, 11 FEBRUARY 2020	
FILE NO.	PSAB 23 OF 2019	
CITATION NO.	2020 WAIRC 00096	

Result	Direction issued
Representation	
Applicant	Mr C Studsor (as agent)
Respondent	Ms S Waterton (as agent)

Direction

HAVING heard from Mr C Studsor (as agent) on behalf of the appellant and Ms S Waterton (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 4 March 2020.
2. THAT the appellant file his outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 18 March 2020.
3. THAT the respondent file its outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 1 April 2020.
4. THAT the appellant file a written outline of his submissions by 17 April 2020.
5. THAT the respondent file a written outline of its submissions by 4 May 2020.
6. THAT discovery be informal.
7. THAT this matter be listed for a three-day hearing.
8. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00029

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6 NOVEMBER 2019

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JARRAD MURDOCK	APPELLANT
	-v-	
	NORTH METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MS A KACZMAREK - BOARD MEMBER MR M AULFREY - BOARD MEMBER	
DATE	MONDAY, 13 JANUARY 2020	
FILE NO.	PSAB 24 OF 2019	
CITATION NO.	2020 WAIRC 00029	

Result	Application adjourned
Representation	
Appellant	On his own behalf
Respondent	Mr M Golesworthy (as agent)

Order

HAVING heard from the appellant on his own behalf and from Mr M Golesworthy as agent on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), orders –

THAT application PSAB 24 of 2019 be adjourned until 6 April 2020.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00099

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 1 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TIMOTHY ANDREW MCNEILL CAMPBELL

APPLICANT

-v-

DEPARTMENT OF HEALTH

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MS S BHAR - BOARD MEMBER
MR C BROWN - BOARD MEMBER

DATE FRIDAY, 14 FEBRUARY 2020

FILE NO. PSAB 28 OF 2019

CITATION NO. 2020 WAIRC 00099

Result	Direction issued
Representation	
Applicant	Ms M Hillier (of counsel)
Respondent	Ms J Vincent (of counsel)

Direction

HAVING heard from Ms M Hillier (of counsel) on behalf of the appellant and Ms J Vincent (of counsel) on behalf of the respondent about programming the hearing in relation to whether the appellant was dismissed, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 12 March 2020.
2. THAT the appellant file his outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 26 March 2020.
3. THAT the respondent file its outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 9 April 2020.
4. THAT the appellant file a written outline of his submissions by 29 April 2020.
5. THAT the respondent file a written outline of its submissions by 13 May 2020.
6. THAT discovery be informal.
7. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00047

UNFAIR DISMISSAL APPLICATIONWESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ROBERT MATHEW**PARTIES****APPLICANT****-v-**

THE LEGACY CLUB OF WESTERN AUSTRALIA INCORPORATED

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON
DATE TUESDAY, 21 JANUARY 2020
FILE NO. U 110 OF 2019
CITATION NO. 2020 WAIRC 00047**Result** Direction issued
Representation
Applicant Mr Robert Mathew
Respondent Ms Layla Langridge (of counsel)*Direction*

WHEREAS the applicant filed and served an affidavit in support of their application on 17 September 2019;

WHEREAS the matter of jurisdiction had been listed for hearing on 19 September 2019;

WHEREAS the respondent's request for the hearing to be vacated to enable the respondent to consider the affidavit was granted;

WHEREAS the applicant states that they will not be submitting any further evidence from witnesses; and

HAVING heard from the applicant on his own behalf and Ms L Langridge (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

1. THAT the respondent file and serve any witness statements upon which it intends to rely with respect to the issue of jurisdiction by 31 January 2020;
2. THAT the applicant to give notice to the respondent of any witnesses required for cross-examination at the jurisdictional hearing by 5 February 2020;
3. THAT both parties file and serve outline of submissions one week prior to the hearing by 12 February 2020;
4. THAT the issue of jurisdiction is listed for a one-day hearing on 20 February 2020; and
5. THAT the parties have liberty to apply at short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00085

UNFAIR DISMISSAL APPLICATIONWESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ROBERT MATHEW**PARTIES****APPLICANT****-v-**

THE LEGACY CLUB OF WESTERN AUSTRALIA INCORPORATED

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON
DATE WEDNESDAY, 5 FEBRUARY 2020
FILE NO. U 110 OF 2019
CITATION NO. 2020 WAIRC 00085**Result** Direction issued
Representation
Applicant Mr Robert Mathew
Respondent Ms Layla Langridge (of counsel)

Direction

WHEREAS on 30 January 2020 the respondent applied for an extension until 4 February 2020 for the filing of a witness statement due on 31 January 2020 as a result of availability issues between the respondent and its representative;

AND WHEREAS the applicant objected to the respondent's application for an extension and sought an extension to the time for notification of requirement to cross exam the respondent's witness to 10 February 2020, sought an extension for the filing of outlines of submissions to 17 February 2020 and requested that the hearing scheduled for 20 February 2020 be adjourned to a date no earlier than the following week;

AND WHEREAS the grounds for the applicant's request for extensions of time is to provide the same time allowed for in the Directions issued on 21 January 2020 ([2020] WAIRC 00047) and to assess the need to obtain legal advice or engage a representative;

AND WHEREAS the respondent filed and served upon the applicant an executed witness statement on 3 February 2020, being three calendar days (one business day) beyond the date set down in Directions issued on 21 January 2020;

AND WHEREAS on 4 February 2020 the applicant notified the respondent that its witness is required for cross examination;

AND WHEREAS the respondent, noting the applicant has mistaken the number of days extension required to equate to the dates set in the direction issued on 21 January 2020, is prepared to file and serve its outline of submissions by 12 February 2020 and does not object to the extension of time for the applicant to file and serve his outline of submissions by 17 February 2020;

AND WHEREAS the respondent does object to the request by the applicant for the hearing scheduled on 20 February 2020 to be adjourned, however has not detailed the injustice to it resulting from an adjournment;

AND WHEREAS an application for an adjournment is within the discretion of the Commission. Where the refusal of an adjournment would result in a serious injustice to one party an adjournment should be granted unless in turn this would mean serious injustice to the other party (*Myers v Myers* [1969] WAR 19).

AND WHEREAS the Commission has considered the injustice to the applicant in not granting the adjournment would be that he is concerned he would not have adequate opportunity to seek to obtain legal advice on the contents of the witness statement and a reduction in the time available to prepare for hearing may result in an injustice to the applicant;

AND WHEREAS the injustice to the respondent in granting the adjournment is not apparent;

AND WHEREAS the Commission is mindful that the matters of this nature ought to be dealt with expeditiously (see *Culverhouse v John Septimus Roe Anglican Community School* (1995) 75 WAIG 1960) and this matter results from an application made in July 2019, the Commission reluctantly grants the request for the hearing to be adjourned;

NOW THEREFORE, having heard in chambers from the applicant on his own behalf and Ms L Langridge (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

1. THAT the respondent file and serve any witness statements upon which it intends to rely with respect to the issue of jurisdiction by 4 February 2020;
2. THAT both parties file and serve outline of submissions concerning the issue of jurisdiction by 17 February 2020;
3. THAT the hearing set down for 20 February 2020 be vacated and an alternate date be set; and
4. THAT the parties have liberty to apply at short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00048

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELEESHA COOTE

APPLICANT

-v-

SHIRE OF BROOKTON

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 22 JANUARY 2020

FILE NO.

U 126 OF 2019

CITATION NO.

2020 WAIRC 00048

Result	Direction issued
Representation	
Applicant	Ms Michelle McDiarmid (of counsel)
Respondent	Ms Thalia Kailis (of counsel)

Direction

WHEREAS On 7 January 2020 the applicant made application for an extension in time to file and serve witness statements and further unspecified directions to be issued;

AND WHEREAS at a directions hearing on 14 January 2020 the respondent withdrew their objection to the Commission hearing and determining this matter on the grounds that the Commission does not have jurisdiction;

AND WHEREAS the applicant sought that the respondent file and serve an affidavit stating that it is not a National Employer and that it will cease holding itself out as a National Employer;

AND WHEREAS the respondent declined to admit that it is not a national system employer;

AND WHEREAS The Commission has determined that the matter of jurisdiction be heard and determined as preliminary matter; and

HAVING heard from Ms M McDiarmid (of counsel) on behalf of the applicant and Ms T Kailis (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

1. THAT the parties are to file and serve written submissions with respect to the issue of jurisdiction to deal with this application and any evidence upon which they rely in support of their contentions by way of statutory declaration by 4:00 pm on 13 February 2020;
2. THAT the parties provide notice to the Commission as to whether they intend to cross examine any person that has provided a statutory declaration by 20 February 2020;
3. THAT the matter is listed for a one-day hearing on 4 March 2020; and
4. THAT the parties have liberty to apply at short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00101

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELEESHA COOTE

APPLICANT

-v-

SHIRE OF BROOKTON

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE FRIDAY, 14 FEBRUARY 2020

FILE NO. U 126 OF 2019

CITATION NO. 2020 WAIRC 00101

Result	Direction issued
Representation	
Applicant	Ms Michelle McDiarmid (of counsel)
Respondent	Ms Thalia Kailis (of counsel)

Direction

HAVING heard from Ms M McDiarmid (of counsel) on behalf of the applicant and Ms T Kailis (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

1. THAT the respondent is to file and serve written submissions with respect of the issue of jurisdiction to deal with this application and any evidence upon which it relies in support of its contentions (by way of affidavit) by 4:00pm on 18 February 2020;

2. THAT the applicant is to file and serve written submissions with respect of the issue of jurisdiction to deal with this application and any evidence upon which she relies in support of her contentions (by way of affidavit) by 4:00pm on 21 February 2020;
3. THAT the parties provide notice to the Commission as to whether they intend to cross examine any person that has provided a statutory declaration by 26 February 2020;
4. THAT the matter is listed for a one-day hearing on 4 March 2020; and
5. THAT the parties have liberty to apply at short notice.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2020 WAIRC 00088

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ROBERT HARRY CROSSETT PATTERSON

APPLICANT

-v-

EAST METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM** COMMISSIONER T EMMANUEL**DATE** MONDAY, 10 FEBRUARY 2020**FILE NO.** U 139 OF 2019**CITATION NO.** 2020 WAIRC 00088**Result** Direction issued**Representation****Applicant** Mr W Edwardes (of counsel)**Respondent** Ms M Di Lello (as agent)*Direction*

HAVING heard from Mr W Edwardes (of counsel) on behalf of the applicant and Ms M Di Lello (as agent) on behalf of the respondent, about programming the respondent's interlocutory application to dismiss application U 139 of 2019 (**Interlocutory Application**), the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the respondent file a written outline of submissions by 26 February 2020;
2. THAT the applicant file a written outline of submissions by 11 March 2020;
3. THAT the Interlocutory Application be listed for a half-day hearing;
4. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.**INDUSTRIAL AGREEMENTS—Notation of—**

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Communities (Family Support Officers) CSA Agreement 2019 PSAAG 7/2019	01/13/2020	Department of Communities	Civil Service Association of WA	Commissioner T Emmanuel	Agreement registered
Department of Justice (Youth Custodial Officers) CSA Agreement 2019 PSAAG 9/2019	01/28/2020	Department of Justice	Civil Service Association	Commissioner D J Matthews	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Disability Services Commission (Social Trainers) CSA Agreement 2019 PSAAG 8/2019	01/28/2020	Disability Services Commission	Civil Service Association of WA	Commissioner D J Matthews	Agreement Registered
Insurance Commission of Western Australia (Government Officers) CSA General Agreement 2019 PSAAG 6/2019	01/28/2020	Insurance Commission of Western Australia	Civil Service Association of Western Australia	Commissioner D J Matthews	Agreement registered
Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2020 AG 3/2020	02/17/2020	Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner D J Matthews	Agreement registered

NOTICES—General Matters—

2020 WAIRC 00106

NOTICE

REVIEW OF AWARDS UNDER SECTION 40B OF THE *INDUSTRIAL RELATIONS ACT 1979 (WA)*

Notice is given of applications on the motion of the Western Australian Industrial Relations Commission to review the following awards with a view to varying those awards in accordance with s 40B of the Industrial Relations Act 1979. The awards concerned are:

Application No.	Award name
APPL 4/2020	Restaurant, Tearoom and Catering Workers' Award 1979
APPL 5/2020	Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977
APPL 6/2020	Building Trades (Constructions) Award 1987
APPL 7/2020	Metal Trades (General) Award 1966
APPL 8/2020	Hairdressers Award 1989

Section 40B(1) provides that the Commission may vary awards of its own motion for a number of purposes being:

- (a) to ensure that the award does not contain wages that are less than the minimum award wage as ordered by the Commission under section 50A;
- (b) to ensure that the award does not contain conditions of employment that are less favourable than those provided by the *Minimum Conditions of Employment Act 1993*;
- (c) to ensure that the award does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984*;
- (d) to ensure that the award does not contain provisions that are obsolete or need updating;
- (e) to ensure that the award is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises.

A conciliation and scheduling conference will be convened by the Commission:

On: Friday, 27 March 2020
 At: 10:30 am
 At: Western Australian Industrial Relations Commission
 Level 18, 111 St Georges Terrace, Perth WA 6000

Any person wishing to appear at that conference or obtain further information should contact the Associate to Commissioner Walkington – maria.ashdown@waipc.wa.gov.au.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

19 February 2020

PUBLIC SERVICE APPEAL BOARD—

2019 WAIRC 00118

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 1 OCTOBER 2018

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CRAIG D'ROZARIO

APPELLANT

-v-

DEPARTMENT OF TRANSPORT

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER D J MATTHEWS - CHAIRMAN
MR G LEE - BOARD MEMBER
MR T DILABIO - BOARD MEMBER

DATE FRIDAY, 8 MARCH 2019

FILE NO PSAB 24 OF 2018

CITATION NO. 2019 WAIRC 00118

Result Respondent name amended

Representation

Appellant In person

Respondent Mr S Barrett

Order

HAVING heard from the applicant in person and Mr S Barrett for the respondent on Tuesday, 26 February 2019 and by consent: The Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the respondent in this matter be "Director General, Department of Transport".

(Sgd.) D J MATTHEWS,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00046

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 1 OCTOBER 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00046

CORAM : PUBLIC SERVICE APPEAL BOARD
COMMISSIONER D J MATTHEWS- CHAIRMAN
MR G LEE - BOARD MEMBER
MR T DI LABIO - BOARD MEMBER

HEARD : TUESDAY, 23 JULY 2019, WEDNESDAY, 24 JULY 2019, THURSDAY, 25 JULY
2019, FRIDAY, 20 SEPTEMBER 2019

DELIVERED : FRIDAY, 17 JANUARY 2020

FILE NO. : PSAB 24 OF 2018

BETWEEN : CRAIG D'ROZARIO

Appellant

AND

DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT

Respondent

CatchWords	:	Industrial law (WA) – Appeal against decision to terminate employment for substandard performance – No investigation held to determine whether or not the appellant’s performance was substandard – Failure to conduct an investigation under section 79(5) Public Sector Management Act 1994 open to be cured on appeal – In this case Public Service Appeal Board unable to determine question of substandard performance on evidence before it – Decision to dismiss quashed
Legislation	:	<i>Public Sector Management Act 1994</i> s78, s79
Result	:	Appeal upheld Decision to dismiss quashed

Representation:

Counsel:

Appellant : In person

Respondent : Ms M Jones (of counsel)

Case(s) referred to in reasons:*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355*Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1*Director General, Department of Education v Patrick Guretti* (2014) 94 WAIG 425*Reasons for Decision*

- 1 The appellant was employed by the respondent from 1 October 2012 until 1 October 2018, the latter date being that upon which his employment was brought to an end for substandard performance pursuant to section 79 *Public Sector Management Act 1994*.
- 2 The Full Bench of the Western Australian Industrial Relations Commission held in *Director General, Department of Education v Patrick Guretti* (2014) 94 WAIG 425 at [79] that:

Pursuant to s 79(5) of the PSM Act, prior to the employing authority forming the opinion that an employee's performance is substandard two steps must occur. Firstly, the provision contemplates that allegations of substandard performance must be put to the employee and the employee must not admit that his or her performance is substandard. After the denial is made, the employing authority **must cause an investigation to be held into whether or not the performance of the employee is substandard**. [Our emphasis.]
- 3 At [80] the Full Bench held that:

Prior to the commencement of an investigation, an assessment of performance of an employee would have to necessarily be made. Unless there is some prima facie evidence of substandard performance, it would be inappropriate for an employing authority to cause an investigation into the performance of an employee.
- 4 There is no definition of “investigation” in the *Public Sector Management Act 1994*. We are therefore content to rely on the Macquarie Dictionary meaning of “a searching inquiry in order to ascertain facts; a detailed or careful examination.”
- 5 As all that is required before an investigation is commenced is “prima facie” evidence of substandard performance and a denial, against that evidence, of substandard performance, it seems to us that it is obvious that the dictionary definition is that which should be applied to what follows, that being an “investigation” as per section 79(5) *Public Sector Management Act 1994*.
- 6 We are reinforced in that view by a consideration of the whole of the text of section 79(5) *Public Sector Management Act 1994*. The investigation is, according to section 79(5), to be held “into whether or not the performance of the employee is substandard.”
- 7 This, in our view, determines that the “investigation” is the process by which, as the dictionary definition suggests, facts are ascertained.
- 8 A finding about whether or not the performance of an employee is substandard could hardly be made before an investigation took place.
- 9 Further, such a finding could hardly be made without ascertaining facts.
- 10 It follows that the investigation is the stage in the process by which facts are ascertained.
- 11 The process said by the respondent in this case to be the investigation under section 79(5) *Public Sector Management Act 1994* was no such thing.
- 12 In July 2018 the Acting Director General of the Department of Transport wrote to a Mr Adrian Robinson at Beilby Consulting in the following terms:

“Dear Mr Robinson,

SUBSTANDARD PERFORMANCE INVESTIGATION

Appointment

In accordance with Part 5, Division 2, Substandard Performance of the *Public Sector Management Act 1994*, I appoint you as the person to undertake the investigation of whether or not the performance of [the appellant] employed within the Finance and Procurement Services Directorate of the Department of Transport, is substandard. To assist in the process, Ms Alex Moore, HR Business Consultant, has been nominated to coordinate the management of this matter.

You will be given access to all relevant Department of Transport records and documentation relating to the matter except those that are legal privileged or commercial in confidence. You will be provided with the documents listed in Attachment 1 of this letter.

Conduct of Investigation

The investigation will be undertaken expeditiously and in such a way as to ensure that the requirements of procedural fairness and natural justice are met.

In accordance with the Public Sector Commission’s Managing Substandard Performance: A Guide for Agencies you will explore and reach a finding on the following:

- The criteria used to assess the employee were fair, objective, proper and equitable under the circumstances;
- Sufficient and appropriate evidence was gathered and assessed;
- The employee was provided with a reasonable opportunity to respond and supporting documentation was provided to them;
- Due consideration and regard has been given to the employee’s response;
- Appropriate measures and improvement actions were taken to encourage the employee to meet the minimum standards required by the position;
- The employee was made aware of the consequences of continued substandard performance;
- The rules of procedural fairness were upheld during the process.

In conducting the investigation of the Department of Transport’s behalf, I request that you:

- Review all documentation relevant to the matter, including but not limited to, the documented opinion of substandard performance and the response from the employee;
- Interview the employee to whom the opinion of substandard performance has been issued;
- Consider interviewing the line manager and if necessary relevant others who have information material to the matter;
- Document all statements and present them for verification and signature;
- Conduct follow up interviews as necessary to establish the facts;
- Provide a draft report for comment prior to submission of the final report;
- Prepare a detailed report that outlines your methodology, process and recommendation in respect to the opinion of substandard performance.

Report of Investigation

You are required to provide me with a final report of investigation, which will include:

1. Your assessment of the process undertaken; and
2. Your recommendation as to whether or not the employee’s performance is substandard.

Should you require further information or clarification please contact Ms Alex Moore Barrett, HR Business Consultant on 6551 6074.

Yours sincerely

Nina Lyhne

A/Director General”

13 Some parts of the letter seem to ask that some things occur which would be consistent with an investigation.

14 For instance, in the second lot of bullet points, Mr Robinson is “requested” to:

- Interview the employee to whom the opinion of substandard performance has been issued;
- Consider interviewing the line manager and if necessary relevant others who have information material to the matter; and
- Conduct follow up interviews as necessary to establish the facts.

15 However, Mr Robinson produced a report, the date of which we are unable to find within it, which reveals that he did not conduct anything like an investigation.

- 16 The report reveals that Mr Robinson's "investigation" was, in truth, simply a review of what had gone before and an assessment of whether it had been fair.
- 17 Having read the report, we find within it no analysis at all of whether the applicant's performance was substandard or not.
- 18 Mr Robinson simply says that "there is no evidence to suggest the criteria used to assess the employee was anything but fair, objective, proper and equitable".
- 19 In relation to the "evidence" against the applicant, Mr Robinson says he has formed the opinion "that evidence gathered and assessed was sufficient and appropriate".
- 20 The above are references to the work of others.
- 21 Other findings of Mr Robinson are of a similar nature, such as his findings that the appellant:
- was given reasonable opportunity to respond to claims against him;
 - due consideration was afforded to the appellant throughout the internal process;
 - the appellant was made fully aware of the consequences of substandard performance; and
 - the rules of procedural fairness afforded to the appellant were upheld during the process.
- 22 Mr Robinson concludes as follows:
- "The Investigator finds the performance of the applicant **TO BE SUBSTANDARD**"
- 23 An investigation would involve the investigator actually gathering evidence and applying the evidence to criteria relating to performance so as to make an assessment, applying one to the other, of whether or not the employee's performance was substandard.
- 24 It is clear from a reading of the report that Mr Robinson did not do this. The report is really no more than Mr Robinson comforting the Acting Director General in relation to the fairness of the process conducted by her officers.
- 25 Mr Robinson's ultimate conclusion that the performance of the appellant is substandard is clearly not an original and substantive opinion based on his investigation into the matter.
- 26 Mr Robinson did not do what is required by section 79(5) *Public Sector Management Act 1994*.
- 27 It is true that Mr Robinson interviewed the appellant and his direct line manager, Ms Andrezza Fulfaro Ferreira. However, it is not clear from reading the report why he did this. Mr Robinson did nothing with the information he gathered other than to attach it to his report.
- 28 Mr Robinson notes that he was given some documents by the appellant during his interview of him but, in relation to those documents, writes in his report :
- "It is important to note that the nature and content of the emails/documents received from [the appellant] does not form part of the investigative brief as to whether or not the performance of [the appellant] is substandard; and therefore, has not been considered or factored into the Investigator's finding."
- 29 This is tantamount to saying that the "investigation brief" was to not conduct an investigation.
- 30 On the whole, considering the letter to him, we agree. Overwhelmingly, the letter asked Mr Robinson to review what had been done and did not request him, let alone direct him, to conduct an investigation.
- 31 In any event, whatever may have been asked of Mr Robinson, no investigation under section 79(5) *Public Sector Management Act 1994* was carried out in this matter by him.
- 32 The question then is what are the consequences of a failure by the respondent to have conducted an investigation under section 79(5) *Public Sector Management Act 1994* before terminating the appellant's employment.
- 33 In our view, quoting from *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1 at [74], that question:
- "... is to be determined by asking whether the [respondent's] failure to follow the steps required by [section 79(5) *Public Sector Management Act 1994*] or the principles of natural justice amounted to a mere procedural defect in an otherwise proper exercise of jurisdiction, or a fatal flouting of a jurisdictional or statutory precondition which rendered the decision to terminate invalid."
- 34 We note that a decision on this is one the Supreme Court considered could and should be made by a body such as this one. That is, there can be no suggestion that by asking and considering the question we are encroaching into the territory of administrative review. So much is clear from [76] of the decision of the Chief Justice in *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1.
- 35 The significance of the answer to the question is laid out by the Chief Justice at [74] of *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1 as follows:
- Arguably, if it were a mere defect in an otherwise proper exercise of its jurisdiction under [section 79(5) *Public Sector Management Act 1994*], the Board would be required to determine whether to reverse the decision by having regard to both the substantive and procedural issues, as held in *Byrne v Australian Airlines* (1995) 185 CLR 410: see also Lord Evershed in *Ridge v Baldwin* [1964] AC 40 (at 86, 91-92). On the other hand, *Williamson v Commonwealth* (1907) 5 CLR 174, is authority for the proposition that there needs to be strict compliance with statutory procedural requirements, and the other authorities demonstrate a consistent principle.

- 36 So here, the question is as follows: “Is a failure to comply with section 79(5) *Public Sector Management Act 1994* something that may be cured on the appeal before us or is it a statutory procedural requirement requiring strict compliance such that, it being absent, the decision to dismiss must be quashed?”
- 37 Although the Supreme Court decision in *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1 means that we **could** determine the matter in the appellant’s favour because of the failure to comply with section 79(5) *Public Sector Management Act 1994* we do not consider it to stand as authority for a proposition that we **must** do so.
- 38 In *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1 a constituent authority of the Western Australian Industrial Relations Commission roughly equivalent to this one held that a decision to dismiss ought be quashed because of a failure to comply with a procedural requirement and the Supreme Court held that conclusion was within the body’s power.
- 39 However, the Supreme Court did not, on our reading of the case, find that the only thing the constituent authority could have done was that which it did.
- 40 Even if it had done so, the question arises before us in the context of a different legislative scheme.
- 41 Ultimately, of course, the consequences of a breach of a statute by a statutory body will depend on a decision maker’s interpretation of what Parliament intended should be the consequences of such a breach.
- 42 That matter was not considered in the present context by the Supreme Court in *Re Railway Appeal Board; ex parte Western Australian Government Railways Commission* (1999) 21 WAR 1.
- 43 Framing the question in the well-known language of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the question before us is: “Is it the intention of the *Public Service Management Act 1994* that a failure to comply with section 79(5) *Public Sector Management Act 1994* renders a decision to dismiss for substandard performance invalid or not?”
- 44 We note the relevant observations of McHugh, Gummow, Kirby and Hayne JJ at [91] of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355:
- An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied (63); there is not even a ranking of relevant factors or categories to give guidance on the issue.
- 45 In deciding what Parliament intended to happen in a case where the Public Service Appeal Board determines there has been a failure to comply with section 79(5) *Public Sector Management Act 1994*, we have been influenced by the following:
- (1) Parliament intended the Public Service Appeal Board to conduct appeals by way of a hearing de novo;
 - (2) bodies within the Western Australian Industrial Relations Commission should, consistent with the overarching purpose of the Western Australian Industrial Relations Commission, aim to resolve disputes if it is possible to do so rather than to allow them to continue; and
 - (3) the terms of section 78(5) *Public Sector Management Act 1994*.
- 46 If the Public Service Appeal Board is supposed to conduct appeals by way of a hearing de novo this suggests to us that Parliament intended that procedural defects may be cured at the hearing of the appeal if the Public Service Appeal Board is of a mind to allow this to occur.
- 47 We are emboldened in this by the terms of section 78(5)(a) *Public Sector Management Act 1994*.
- 48 Section 78(5)(a) *Public Sector Management Act 1994* provides:
- “If it appears to the Industrial Commission or the Public Service Appeal Board that the employing authority failed to comply with a Commissioner’s instruction or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the Industrial Commission or Public Service Appeal Board –
- (a) is not required to determine the reference or allow the appeal solely on that basis and **may proceed to decide the reference or appeal on its merits** [our emphasis].”
- 49 We consider that Parliament cannot have intended that a failure to comply with section 79(5) *Public Sector Management Act 1994* renders, as a matter of course, and without more, a decision to dismiss for substandard performance invalid and void in the present circumstances. We consider that we may exercise a power to decide the matter on its merits.
- 50 Being able to do so, we have to decide whether in this case it is appropriate to do so.
- 51 We have decided not to determine the matter on its merits.
- 52 We have decided that the appeal should be decided on the basis that a good challenge has been made out, being that section 79(5) *Public Sector Management Act 1994* was not complied with in that the matter of whether the appellant’s performance was substandard or not was not the subject of an investigation as contemplated by the subsection.
- 53 We have so decided because our view is that the lack of an investigation has had a real and significant effect on the quality and quantity of evidence before us.

- 54 In short, our view is that we are unable to come to any meaningful conclusion about the appellant's work performance based on the evidence we have before us. We simply do not have good evidence to assist us one way or the other. For this reason we stop at the point of determining there has been a failure to comply with section 79(5) *Public Sector Management Act 1994*.
- 55 All we had before us in relation to the appellant's work performance was the evidence of Ms Fulfaro Ferreira.
- 56 Ms Fulfaro Ferreira is to be commended for conducting a thorough, fair and high-quality "Performance Improvement Plan" process in relation to the appellant. We cannot praise her efforts highly enough.
- 57 However, the process she ran was one designed to improve the appellant's performance and not to judge it.
- 58 As the respondent's Manager of Employee Relations, Mr Scott Barrett, gave evidence at ts 320 to 321:
 "So in relation to a PIP process, the owner of that process is the employee. So it's up to the employee to make the effort to be open to and to understand the issues and to rectify them. And it's a space for the manager to try and guide them in that."
- 59 Ms Fulfaro Ferreira cannot be guiding an employee and also be, effectively, the final word on the employee's performance. If this were the case a person in her position would be irretrievably, and most unfairly, conflicted in the role they are supposed to play in a Performance Improvement Plan process. You cannot be both trying to assist an employee to improve in a process with that dedicated purpose and fairly and dispassionately assessing the employee's performance in a substantive way.
- 60 Further, it would be very unfair if a process that an employee was supposed to "own" ended up constituting the entirety of the evidence relied upon to determine that his performance was substandard.
- 61 We only heard substantive evidence about the appellant's performance from Ms Fulfaro Ferreira. No employee senior to her gave substantive evidence about the key matter of whether or not the appellant's performance was substandard.
- 62 Ms Fulfaro Ferreira's evidence related mainly to the Performance Improvement Plan and the conclusions she reached at the end of that process. For the reasons given above, that evidence cannot be enough to allow us to fairly judge the appellant's performance.
- 63 The Performance Improvement Plan process was not designed to judge the appellant's performance.
- 64 Insofar as the process allowed for judgments to be made, they could only be prima facie judgments. The respondent's policy provided that there would be another step after such judgments were formed. The *Public Sector Management Act 1994* requires it. The step was not taken and the result is we do not have enough evidence to assess for ourselves the appellant's performance.
- 65 Had we had evidence of matters considered, actions taken and information gathered during an investigation this may have allowed us to assess the appellant's performance on the merits. Absent that evidence we simply find ourselves unable to progress confidently or meaningfully into the realm of the merits.
- 66 In the absence of us hearing the kind of evidence an investigation should have produced, we consider ourselves unable to assess the appellant's performance for ourselves.
- 67 This appeal will succeed on the basis that the legislative process provided for by section 79(5) *Public Sector Management Act 1994* was not carried out.
- 68 We do not remit the matter back to the respondent to recommence the process at the point at which a prima facie opinion had been reached that the applicant's performance was substandard and that the applicant had denied that his performance was substandard.
- 69 Although Ms Fulfaro Ferreira conducted a truly impressive process to bring the respondent to this point, the process was conducted more than 18 months ago. The opinion based on it is now stale.

2020 WAIRC 00049

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 1 OCTOBER 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CRAIG D'ROZARIO

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER D J MATTHEWS - CHAIRMAN
MR G LEE - BOARD MEMBER
MR T DI LABIO - BOARD MEMBER**DATE**

THURSDAY, 23 JANUARY 2020

FILE NO

PSAB 24 OF 2018

CITATION NO.

2020 WAIRC 00049

Result	Appeal upheld
Representation	
Appellant	In person
Respondent	Ms M Jones (of counsel)

Order

HAVING heard from the appellant in person and Ms M Jones, of counsel, for the respondent on Tuesday, 23 July 2019, Wednesday, 24 July 2019, Thursday, 25 July 2019 and Friday, 20 September 2019, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that the decision by the respondent to dismiss the appellant on 1 October 2018 be quashed.

(Sgd.) D J MATTHEWS,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2019 WAIRC 00879

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES BALLRASS TRANSPORT PTY LTD

APPLICANT

-v-

C&D LOGISTICS PTY LTD

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER

DATE WEDNESDAY, 18 DECEMBER 2019

FILE NO/S RFT 4 OF 2019

CITATION NO. 2019 WAIRC 00879

Result	Order issued
Representation	
Applicant	Mr J Collier as agent
Respondent	Mr C Nelson

Consent Order

HAVING heard Mr J Collier as agent on behalf of the applicant and Mr C Nelson 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 by consent -

THAT the herein matter is resolved on the basis that the respondent pay to the applicant the sum of \$3,897.25 inclusive of GST, by no later than 27 December 2019.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00678

DISPUTE RE OUTSTANDING PAYMENTS
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

CHARLES SPARSHATT-POTTER

APPLICANT

-v-

STRETCH EXPRESS PTY LTD ABN 67 622 592 429

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER**DATE** WEDNESDAY, 1 AUGUST 2018**FILE NO/S** RFT 2 OF 2018**CITATION NO.** 2018 WAIRC 00678**Result** Order issued**Representation****Applicant** Mr C Sparshatt-Potter**Respondent** No appearance*Order*

HAVING heard Mr C Sparshatt-Potter on behalf of the applicant and there being no appearance on behalf of the respondent the Tribunal, pursuant to the powers conferred on it by the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders-

THAT the name of the applicant be amended by the deletion of the name 'Charles Sparshatt-Potter' and the insertion in lieu thereof the name 'Nightstone Enterprises Pty Ltd'.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2018 WAIRC 00696

DISPUTE RE OUTSTANDING PAYMENTS
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

NIGHTSTONE ENTERPRISES PTY LTD

APPLICANT

-v-

STRETCH EXPRESS PTY LTD ABN 67 622 592 429

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER**DATE** TUESDAY, 21 AUGUST 2018**FILE NO/S** RFT 2 OF 2018**CITATION NO.** 2018 WAIRC 00696**Result** Consent order issued**Representation****Applicant** Mr C Sparshatt-Potter**Respondent** Mr M Mumme

Order

HAVING heard Mr C Sparshatt-Potter on behalf of the applicant and Mr M Mumme on behalf of the respondent the Tribunal, pursuant to the powers conferred on it by the Owner-Drivers (Contracts and Disputes) Act 2007, by consent, hereby orders -

- (1) THAT the respondent pays to the applicant the sum of \$1,600.00 in fortnightly instalments of \$100.00 by no later than 2 April 2019.
- (2) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00717

DISPUTE RE OUTSTANDING PAYMENTS
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	:	2018 WAIRC 00717
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	FRIDAY, 27 JULY 2018, TUESDAY, 21 AUGUST 2018
DELIVERED	:	WEDNESDAY, 29 AUGUST 2018
FILE NO.	:	RFT 2 OF 2018
BETWEEN	:	NIGHTSTONE ENTERPRISES PTY LTD
		Applicant
		AND
		STRETCH EXPRESS PTY LTD ABN 67 622 592 429
		Respondent

Catchwords	:	Owner-driver contract - failure to comply with summons to attend compulsory conference - respondent duly notified - enforcement proceedings - respondent could not demonstrate good cause for failure to appear - order issued
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 84A <i>Owner Drivers (Contracts and Disputes) Act 2007</i> (WA) ss 45(3), 46(1)(a) and 46(4)
Result	:	Enforcement proceedings upheld
Representation:		
Counsel:		
Applicant	:	No appearance required
Respondent	:	Mr M Mumme

Reasons for Decision

- 1 The Tribunal of its own motion under s 46(1)(a) of the *Owner Drivers (Contracts and Disputes) Act 2007* (WA) has commenced these proceedings for the enforcement of the summons issued to the respondent on 18 July 2018, requiring it to attend a compulsory conference before the Tribunal on 27 July 2018 at 2.15 PM.
- 2 By s 45(3) of the OD Act, there is an obligation on a person summoned to appear before the Tribunal at a compulsory conciliation conference, unless good cause is shown by the person summoned, as to why they are not able to appear.
- 3 The relevant facts in this matter are contained in the affidavit of Ms Danielle Amy Lisbon, my Associate, sworn on 20 August 2018. Ms Lisbon's affidavit sets out the steps taken by her to contact the parties in the present application; to list the matter for a compulsory conference; and to issue summonses to the parties for that purpose, in accordance with the terms of the OD Act.
- 4 From the terms of Ms Lisbon's affidavit, I am satisfied and I find that both parties to these proceedings were summonsed under s 45 of the OD Act, by both letter and email, at their addresses for service, set out in the notice of referral in application RFT 2 of 2018. The content of the affidavit, put to the respondent at the enforcement proceedings, including the steps taken by Ms Lisbon to contact the parties, was not disputed by the respondent. Furthermore, I am satisfied that the respondent, on advising my Associate of a new email address for service, was duly served with the notice. Accordingly, the Tribunal is satisfied that both parties were duly served the s 45 summonses.

- 5 On the date listed for the conciliation conference, that being 27 July 2018 at 2.15 PM, the respondent failed to appear. Ms Lisbon made telephone contact with Mr Mumme of the respondent, the person summonsed to appear, at approximately 2.15 PM. Ms Lisbon asked Mr Mumme if he was on his way to the conciliation conference as he had failed to appear at the listed time for its commencement. Ms Lisbon's evidence was that Mr Mumme informed her that he would not be attending the conciliation conference and referred to work commitments. There seems to have been some issue from Ms Lisbon's affidavit in relation to Mr Mumme moving residential premises however, as the Tribunal has already indicated, I am satisfied that the notices were eventually duly served on the respondent.
- 6 The respondent appeared at the enforcement proceedings. Mr Mumme informed the Tribunal that he did not dispute the fact that he had failed to comply with the summons, referred to the failure of his business and significant financial difficulties that he was experiencing at that time. Mr Mumme informed the Tribunal that he apologised for the failure to comply with the summons, was regretful of his actions, had learned his lesson and would ensure that any further summons or other requirements imposed by the Tribunal in any later proceedings, were complied with.
- 7 In dealing with enforcement proceedings, the Tribunal under s 46(4) of the OD Act has the powers of the Full Bench of the Commission under s 84A of the *Industrial Relations Act 1979* (WA) in relation to the enforcement of the IR Act. Those powers, on a finding of a contravention being proved, include:
- (a) accepting an undertaking from the person concerned;
 - (b) issuing a caution by order; or
 - (c) imposing a penalty not exceeding \$2,000 for an employer, organisation or association, and \$500 in any other case.
- 8 It is plainly important to the functioning of the Tribunal that parties comply with summons to attend proceedings before it. In this case, Mr Mumme has accepted the error of his ways and has given an undertaking to the Tribunal that failure to comply will not occur again in the future. Having regard to the circumstances of the failure to comply, and Mr Mumme's undertakings to the Tribunal in the enforcement proceedings, the Tribunal will on this occasion, accept the undertaking he has given.

2018 WAIRC 00722

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

NIGHTSTONE ENTERPRISES PTY LTD

APPLICANT

-v-

STRETCH EXPRESS PTY LTD ABN 67 622 592 429

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

WEDNESDAY, 29 AUGUST 2018

FILE NO/S

RFT 2 OF 2018

CITATION NO.

2018 WAIRC 00722

Result Enforcement proceedings upheld**Representation****Applicant** No appearance required**Respondent** Mr M Mumme*Declaration and Order*

HAVING heard Mr M Mumme on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the *Owner-Drivers (Contracts and Disputes) Act 2007* hereby –

- (1) DECLARES that Mr Mumme on behalf of the respondent having been summonsed by a summons issued under s 45(1) of the *Owner-Drivers (Contracts and Disputes) Act 2007* and having failed to attend a conciliation conference in the herein proceedings on 27 July 2018 at 2.15 PM contravened or failed to comply with s 45 of the Act.
- (2) ORDERS that the Tribunal accepts an undertaking by Mr Mumme on behalf of the respondent that he will in the future attend any conference to which he may be summonsed under the provisions of the Act and comply with all or any orders, directions or declarations given or made in future by the Tribunal.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.