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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

GENERAL ORDERS—

2020 WAIRC 00203

COVID-19 GENERAL ORDER PURSUANT TO SECTION 50 OF THE ACT THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2020 WAIRC 00203
CORAM	:	COMMISSION IN COURT SESSION CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS COMMISSIONER T B WALKINGTON
HEARD	:	BY WRITTEN SUBMISSIONS
DELIVERED	:	TUESDAY, 14 APRIL 2020
FILE NO.	:	APPL 16 OF 2020
BETWEEN	:	COMMISSION'S OWN MOTION Applicant AND (NOT APPLICABLE) Respondent

CatchWords	:	Industrial law (WA) – General Order under s 50 – COVID-19 pandemic – Flexibility for leave arrangements – Enabling businesses to retain employees – Objects of the Industrial Relations Act 1979 – Unpaid pandemic leave, annual leave on half pay, annual leave in advance – Comparisons with Fair Work Commission modern awards
Legislation	:	<i>Industrial Relations Act 1979</i> , s 6, s 26, s 50 <i>Minimum Conditions of Employment Act 1993</i> , Part 4, s 17D(1)(b)
Result	:	General Order issued
Representation:	–	Ms C Purcell and Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations
	–	Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia (Inc)
	–	Ms M Hammat and Dr T Dymond on behalf of UnionsWA
	–	Ms E Clements on behalf of the Western Australian Local Government Association

Case(s) referred to in reasons:

Statement – [2020] FWCFB 1760

Decision – [2020] FWCFB 1837

Termination Change and Redundancy General Order (2005 WAIRC 01715)

*Reasons for Decision***Background**

- 1 The COVID-19 pandemic has had an unprecedented impact on the world, Australia as a whole and on Western Australia. Governments in Australia have responded in a number of ways. They have imposed severe restrictions on people's movement and physical contact, including access to businesses. Many businesses are closed or are requiring employees to work remotely.
- 2 The BankWest Curtin Economics Centre Research Brief COVID-19 No. 1, *Job Keepers and Job Seekers* predicts that around 1.13 million workers will lose their jobs in the next 12 months, with half of these losses occurring within the next three months if trade restrictions continue. This estimate is said to be conservative and within the context of the current trading restrictions. If more restrictions are put in place, including closing construction and mining sites, there will be far greater job losses.
- 3 The Accommodation and Food Services industry is likely to be most affected with predicted job losses of 467,400. This is followed by the Arts and Recreation Services at 126,000; Transport, Postal and Warehousing at 119,900; Construction at 118,400; Other Services at 100,800; Retail Trade at 75,700; Professional, Scientific and Technical Services at 50,300, and Rental, Hire and Retail Services at 25,700 (BankWest Curtin Economics Centre Research Brief COVID-19 No. 2 – *Potential Job Losses in the COVID-19 Pandemic*).
- 4 Many of the industries likely to be very heavily affected by these job losses are in the small business, non-incorporated sector within the scope of the State industrial relations system.

Protecting employment

- 5 In this context, on Friday, 3 April 2020, the Commission in Court Session published a notice (Notice) indicating the Commission's provisional intention to issue a General Order in accordance with s 50(2) of the *Industrial Relations Act 1979* (WA) (the Act) to provide measures designed to assist employers and employees by enabling more flexible arrangements for leave to be taken. The Commission's aim in proposing to issue the General Order was to assist businesses to continue to operate and to preserve employment and continuity of employment for the benefit of those businesses, their employees and the economy generally. This is both for the immediate benefit, while the measures taken by governments are in place, and in the medium term when businesses attempt to return to normal operation. It is necessary that those businesses have access to and retain in employment those employees who will support the future operations of those businesses.
- 6 The Notice also refers to the Statement issued by the Fair Work Commission on 1 April 2020 ([2020] FWCFB 1760) and the detailed information provided there. We noted the provisional views expressed by the Fair Work Commission and the proposed variations to certain modern awards. We also noted the report for the Fair Work Commission by Professor Jeff Borland, *Benefits from greater flexibility in employment arrangements*.
- 7 Interested persons, including those named in s 50(2) of the Act, were invited to make submissions on the Commission's proposed General Order by midday on Thursday, 9 April 2020. The terms of that proposed General Order provided flexibility and leave options to be available to employees for:
 - a) Unpaid pandemic leave of up to two weeks if the employee is required by government or medical authorities or acting on medical advice to self-isolate or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic, in circumstances where the employee is required to work at premises operated by an employer;
 - b) Double annual leave at half pay, by agreement between the employer and employee; and
 - c) Annual leave to be taken in advance, by agreement between the employer and employee.
- 8 The measures were proposed as temporary only, and the General Order was proposed as applying until 30 June 2020 and it could be extended.
- 9 We also note that the Fair Work Commission issued a Decision ([2020] FWCFB 1837) on 8 April 2020. It confirms, in large part, the provisional views it had expressed in its Statement of 1 April 2020. We note that the context of that Decision is in a system of modern awards and the legislative structure and objectives for those awards. In that regard, the Western Australian awards are different. This affects how we intend to approach the mechanisms for providing the flexibility we earlier proposed and in terms of the General Order we intend to issue.
- 10 Further, the Fair Work Commission proposed and ultimately provided for two weeks' unpaid pandemic leave and double annual leave at half pay. It decided to restrict its flexibility measures for a range of reasons particular to its legislation and the terms of modern awards. On the other hand, we proposed to add to those two issues for the consideration of interested persons, the opportunity for employees to take annual leave in advance with the agreement of their employer. We decided to add this flexibility on the basis that whilst it is not provided for in the Fair Work Commission's Decision, a number of modern awards contain such provisions as do some State awards and industrial agreements, but most importantly, such a measure for flexibility would, we believe, assist in meeting the objective we have set.

Submissions

- 11 Submissions were received from the Minister for Industrial Relations (the Minister), the Chamber of Commerce and Industry of Western Australia (Inc) (the Chamber), UnionsWA and the Western Australian Local Government Association (WALGA). We express our thanks to the Minister, the Chamber and UnionsWA for conferring. This has assisted in narrowing the issues and has led to a substantial degree of agreement between those parties.
- 12 All of the submissions have also very sensibly and helpfully taken account of matters dealt with by the Fair Work Commission in its Decision. We adopt many of those changes as being equitable and sensible and refer to them later.
- 13 WALGA made submissions in respect of the Local Government Officers' (Western Australia) Interim Award 2011 and the Municipal Employees (Western Australia) Interim Award 2011. Apart from some matters which are dealt with later in these Reasons, WALGA made some helpful submissions in respect of detail. It noted also that the Local Government Officers' (Western Australia) Interim Award 2011 already allows employees leave in advance at the discretion of the employer and therefore does not support the application of the proposed General Order to the extent that it seeks to vary the Local Government Officers' Award to include a new provision granting annual leave in advance.

Consideration

- 14 Having considered all of the circumstances and the submissions made to us, we are of the view that it is important that the Commission act to assist industry by providing the increased flexibility in employment for the immediate future. Therefore, we intend to issue a General Order.
- 15 However, we make some changes to the form and content we proposed in the Notice. As we noted in the Notice, we also encourage the parties to awards and industrial agreements to negotiate with a view to resolving terms and conditions most suited to the needs of their particular industries and enterprises. The Commission will expedite the process of reflecting any agreements reached or determining any disputes. However, for the purpose of covering most employees and employers in the private sector in the State jurisdiction, the General Order will provide consistent conditions across the board. It will prevail to the extent of any inconsistency with a term of an award or industrial agreement, except where the term is more beneficial to the employee.

The Statutory Scheme

The Commission's power

- 16 The Commission's powers to make General Orders are set out in s 50 – **General Orders, nature of and making**. Subsections (2) to (4) are relevant and they provide:
 - (2) Subject to this Act, the Commission may, of its own motion or on the application of UnionsWA, the Chamber, the Mines and Metals Association or the Minister –
 - (a) make General Orders relating to industrial matters in accordance with and subject to this Division; and
 - (b) add to, vary, or rescind any General Order so made.
 - (3) A General Order may be made to apply generally to employees throughout the State whether or not they are employed under and subject to awards or industrial agreements or may be limited to employees –
 - (a) who are employed under and subject to awards or industrial agreements; or
 - (b) who are not so employed,but shall not apply to any employee whose conditions of employment may not be determined by the Commission.
 - (4) A General Order applying to or with respect to employees of the kind referred to in subsection (3)(a) may add to or vary all awards and industrial agreements or may be limited in its effect to such awards and industrial agreements or awards or industrial agreements as may be specified in the General Order.
- 17 Therefore, the options include making a General Order to amend each specified award or industrial agreement or to make a stand-alone General Order.

Objects of the Act

- 18 We have also taken account of the objects of the Act. Section 6 sets out a range of objects including 'to promote goodwill in industry and in enterprises within industry' (s 6(a)); 'to facilitate 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' (s 6(af)); and 'to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises' (s 6(ag)). All of these objects are met by the spirit and the terms of the General Order.

The requirements of s 26

- 19 In making this decision, we have had regard to the various considerations set out in s 26 of the Act, including the interests of the persons concerned directly and otherwise, and of the whole community. We have taken account of the state of the national and state economies, in particular the impact of the COVID-19 pandemic on those persons, the community and the economies, and of what we consider to be the benefits to those persons, groups and institutions to which the flexibilities we intend to provide are aimed. The purpose of the General Order is to provide the flexibility in the interests of all of those aspects identified in s 26(1)(a) to (e) of the Act.

Scope of the General Order

- 20 In the Notice, we set out a Schedule B – Awards, which were mainly private sector awards. It was proposed that the General Order would formally vary those awards. We note the submissions supporting the General Order’s scope being expanded to cover all private sector employees in the State system, whether they are covered by awards or not. We agree with those submissions, and consider that it would be equitable to include all employees in the private sector. The Commission’s powers under s 50(3) enable it to do so. Other General Orders of the Commission, such as the Termination, Change and Redundancy General Order ([2005] WAIRC 01715) have such a broad scope.
- 21 In respect of public sector employees, we note that arrangements are in place through the Public Sector Labour Relations Circular 6/20 – *Leave arrangements for COVID-19* and therefore the General Order should not apply to public sector employees.
- 22 In the circumstances, rather than the General Order attaching a list of awards to which it applies, the scope of the General Order will be to all private sector employees in the State system, whether covered by an award or not. It will sit alongside the awards and, where an award contains a more beneficial term than the General Order, the award will apply. Otherwise where there is conflict between the terms of the General Order and the award, the terms of the General Order will apply.
- 23 This has a number of benefits particularly given the varying structures and terms of State awards as compared with modern awards of the Fair Work Commission. It will also mean that there is no formal variation of each award which would require a further variation to remove those conditions when they cease to have effect, or to vary their terms if it becomes necessary to do so, during the term of operation of the General Order. In those circumstances, a stand-alone Schedule to the General Order setting out the conditions is the most effective way of dealing with these extraordinary circumstances.

Duration of the General Order

- 24 UnionsWA, the Chamber and the Minister agree that the term of the General Order ought to be until 31 July 2020, rather than 30 June 2020 as we initially proposed. There are a number of good reasons for doing so. There is no certainty as to how long the current circumstances surrounding COVID-19 will apply. The extended term of the General Order will allow for a reasonable period of certainty given the constantly changing and uncertain circumstances. It will provide a reasonable period of operation for the parties and the Commission to review its effectiveness should there be consideration to extending the term, and by the time the General Order issues, it will have less than three months in which to operate. In the circumstances, we intend to extend the term of the General Order to 31 July 2020. That will also assist those who are making submissions to the State Wage Case, as well as the Commission, in finalising that matter where the legislative timeframe for that decision is 1 July 2020 (s 50A(1) of the Act).

Unpaid pandemic leave

- 25 A number of issues are raised in the submissions, arising from the Fair Work Commission’s Decision. The first is that in the first subclause, there is provision that the employee ‘may elect’ to take up to two weeks’ unpaid leave. We accept the submissions and the rationale set out in the Fair Work Commission’s Decision that the words ‘may elect’ ought to be amended to ‘is entitled’ so as to avoid confusion. Where a person is required to self-isolate and the other conditions are met, then the employee ought to have an entitlement. This is consistent with wording used in Part 4 of the *Minimum Conditions of Employment Act 1993* (WA) which uses the term ‘entitled’ in respect of an employee’s rights to paid and unpaid leave.
- 26 In the same paragraph of the proposed General Order, there is reference to an employee ‘acting on medical advice’. There is almost unanimous agreement that this ought to read ‘acting on advice of a medical practitioner’. For the reasons set out in the Fair Work Commission’s Decision, we are of the view that this is an appropriate change and will adopt it.
- 27 We also note the concerns expressed and the Fair Work Commission’s Decision that the first paragraph refers to ‘where the employee is required to work at premises operated by an employer’. This phrase is confusing because not all employees are required to work at an employer’s premises. It will be deleted.
- 28 We also consider that an employer and employee ought to be able to agree to a period of unpaid pandemic leave greater than two weeks. The entitlement is up to two weeks, but if the employer and employee agree to a greater period, they should not be limited.

Annual leave at half pay

- 29 There is general agreement that a provision ought to be included which allows the employee and employer to agree to leave that would commence before the expiration date of the General Order but conclude after its expiration. We think that this is a sensible suggestion.

Granting annual leave in advance

- 30 There is general agreement that some uncertainty in the proposed clause would be removed if a provision is included that, if an employee’s employment terminates before the employee has accrued an entitlement to all of the period of paid annual leave taken in advance, then the employer may deduct from any monies due to the employee on termination, an amount equal to the amount that was paid to the employee for any part of the period of annual leave taken in advance to which the entitlement has not accrued. We note that s 17D(1)(b) of the *Minimum Conditions of Employment Act 1993* also provides for employers to deduct any amount from other payments due to the employee. We adopt this proposal as sensible and equitable.
- 31 Also, there should be provision for leave commenced before the expiration of the General Order to continue to operate for the period agreed between the parties.

Conclusion

32 We thank those who have made submissions for their prompt and helpful responses. Minutes of the Proposed General Order now issues. Should any person wish to speak to the Minutes, they are to do so in writing before 2.00 pm today. It would be helpful given the urgency of the matter if they would confer with the other persons who made submissions to see if agreement can be reached.

2020 WAIRC 00205

COVID-19 GENERAL ORDER PURSUANT TO SECTION 50 OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT**CORAM**

COMMISSION IN COURT SESSION

CHIEF COMMISSIONER P E SCOTT

SENIOR COMMISSIONER S J KENNER

COMMISSIONER T EMMANUEL

COMMISSIONER D J MATTHEWS

COMMISSIONER T B WALKINGTON

DATE

TUESDAY, 14 APRIL 2020

FILE NO.

APPL 16 OF 2020

CITATION NO.

2020 WAIRC 00205

Result

General Order Issued

Representation

- Ms C Purcell and Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations
- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia (Inc)
- Ms M Hammat and Dr T Dymond on behalf of UnionsWA
- Ms E Clements on behalf of the Western Australian Local Government Association

General Order

Having heard from Ms C Purcell and Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations, Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia (Inc), Ms M Hammat and Dr T Dymond on behalf of UnionsWA and Ms E Clements on behalf of the Western Australian Local Government Association, the Commission in Court Session, pursuant to the powers conferred on it by section 50 of the *Industrial Relations Act 1979* (WA) hereby makes a General Order in the terms set out in the attached Schedule.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

SCHEDULE – PROVISIONS RELATING TO THE COVID-19 PANDEMIC

1. - APPLICATION

- (1) This General Order applies to each employee as defined in subsection 7(1) of the *Industrial Relations Act 1979* throughout the State of Western Australia, except for employees of a public sector body within the meaning of the *Public Sector Management Act 1994* and police officers, police auxiliary officers and Aboriginal police liaison officers. These employees are the subject of the Public Sector Labour Relations Circular 6/20 – *Leave arrangements for COVID-19*.
- (2) Where an award or industrial agreement contains a term provided for in this General Order that is more beneficial to an employee, then the more beneficial term shall apply. Otherwise, where there is conflict between the terms of an award or industrial agreement and this General Order, the terms of this General Order shall apply.
- (3) This General Order shall operate on and from the date this General Order issues until 31 July 2020, unless extended on application or at the initiative of the Commission.

2. - UNPAID PANDEMIC LEAVE

- (1) Subject to subclauses (2) and (3), an employee is entitled to take up to two weeks' unpaid leave if the employee is required, by government or medical authorities or acting on the advice of a medical practitioner, to self-isolate or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic. An employer and employee may agree that the employee may take more than two weeks' unpaid pandemic leave.
- (2) The employee must give their employer notice of the taking of leave under subclause (1) and of the reason the employee requires the leave, as soon as practicable. This may be a time after the leave has started.
- (3) The employee who has given their employer notice of taking leave under subclause (1) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason given in subclause (1).
- (4) Leave taken under subclause (1) does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements.
- (5) Such leave:
 - (a) is available in full immediately rather than accruing progressively during any period of service;
 - (b) will be available until 31 July 2020 (unless extended by further variation depending on the duration of the COVID-19 pandemic);
 - (c) will be available to full time, part time and casual employees (it is not pro-rata); and
 - (d) must start before 31 July 2020, but may end after that date.
- (6) It is not necessary for employees to exhaust their paid leave entitlements before accessing unpaid pandemic leave.
- (7) Such unpaid leave does not operate on a 'per occasion' basis and is available once for those employees compelled to self-isolate, even if they are required to self-isolate on more than one occasion.
- (8) Those caring for others who are compelled to self-isolate are not entitled to unpaid pandemic leave.

3. - ANNUAL LEAVE AT HALF PAY

- (1) Instead of an employee taking paid annual leave at full pay, the employee and their employer may agree to the employee taking twice as much leave at half pay.

Example: Instead of an employee taking one week's annual leave at full pay, the employee and their employer may agree to the employee taking two weeks' annual leave at half pay. In this example:

 - The employee's pay for the two weeks' leave is the same as the pay the employee would have been entitled to for one week's leave at full pay; and
 - One week of leave is deducted from the employee's annual leave accrual.
- (2) Any agreement to take twice as much annual leave at half pay must be recorded in writing and signed by the employee (and a parent/guardian if the employee is under 18).
- (3) The employer must keep the written agreement as part of the employee's employment record.
- (4) The agreed period of leave must start before 31 July 2020, but may end after that date.

4. - GRANTING ANNUAL LEAVE IN ADVANCE

- (1) An employee and employer may agree to an employee taking a period of annual leave in advance of the entitlement being accrued if all of the following conditions are met:
 - (a) Any agreement to annual leave in advance must be recorded in writing and signed by the employee (and a parent/guardian if the employee is under 18); and
 - (b) the written agreement must state the amount of leave to be taken in advance and the date on which the leave will commence; and
 - (c) the employer must keep the written agreement as part of the employee's employment record.
- (2) If, on the termination of the employee's employment, the employee has not accrued an entitlement to all of the period of paid annual leave taken in advance, the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued. This provision will continue to apply notwithstanding the expiration of this General Order.
- (3) Where an agreement has been reached under this clause and the leave commenced before the expiration of this General Order, then the arrangement may continue to operate for the period agreed between the parties.

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2020 WAIRC 00176

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	SHERYL REARDON	
		APPELLANT
	-v-	
	GAETANO ANTHONY LAGANA (ABN 85 867 757 829) T/A STRATTON PARK PHARMACY	RESPONDENT
CORAM	BUSS J	
DATE	MONDAY, 16 MARCH 2020	
FILE NO/S	IAC 3 OF 2020	
CITATION NO.	2020 WAIRC 00176	

Result	Programming Order Issued
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Order

It is hereby ordered that:

1. The appellant file 4 copies of submissions and a list of legal authorities and serve a copy on the respondent by 4pm on 6 April 2020.
2. The respondent file 4 copies of submissions and a list of legal authorities and serve a copy on the appellant by 4pm on 28 April 2020.
3. The appellant file 4 copies of the appeal book and serve a copy on the respondent by 4pm on 22 May 2020.
4. The appeals in IAC 3/2019, IAC 1/2020 and IAC 3/2020 are to be heard together.

[L.S.]

(Sgd.) S BASTIAN,
Clerk of Court.

2020 WAIRC 00193

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	SHERYL REARDON	
		APPELLANT
	-v-	
	GAETANO ANTHONY LAGANA (ABN 85 867 757 829) T/A STRATTON PARK PHARMACY	RESPONDENT
CORAM	BUSS J	
DATE	FRIDAY, 3 APRIL 2020	
FILE NO/S	IAC 3 OF 2020	
CITATION NO.	2020 WAIRC 00193	

Result	Appeal Dismissed
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Order

By consent the appeal in IAC 3 of 2020 is dismissed with no order as to costs.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

[2020] WASCA 36

JURISDICTION : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

CITATION : THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA -v- SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH [2020] WASCA 36

CORAM : BUSS J

HEARD : 3 JANUARY 2020

DELIVERED : 3 JANUARY 2020

PUBLISHED : 24 MARCH 2020

FILE NO/S : IAC 3 of 2019
IAC 4 of 2019

BETWEEN : THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
Appellant
AND
SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH
First Respondent
THE PHARMACY GUILD OF WESTERN AUSTRALIA
Second Respondent
THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS
Third Respondent

ON APPEAL FROM:

Jurisdiction : WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Coram : P E SCOTT CC
S J KENNER SC
T B WALKINGTON C

Citation : 2019 WAIRC 00825

File Number : FBA 2 of 2019 & FBA 3 of 2019

Catchwords:

Industrial law - Appeals from the declaration and orders of the Full Bench of the Industrial Relations Commission - Applications for a stay pending the determination of the appeals - Applicable principles - Special or exceptional circumstances

Legislation:

Industrial Relations (Western Australian Industrial Appeal Court) Regulations 1980 (WA), reg 6

Industrial Relations Act 1979 (WA), s 6, s 7, s 29A, s 46, s 47, s 49, s 87

Result:

Applications for a stay granted

Category: B

Representation:*Counsel:*

Appellant : Mr D Rafferty
First Respondent : Mr N Tindley
Second Respondent : Mr T J Dixon & Mr A Drake-Brockman
Third Respondent : Ms J M Vincent

Solicitors:

Appellant : Self represented
First Respondent : FCB Workplace Law
Second Respondent : Mapien
Third Respondent : State Solicitor's Office

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

Arnhem Land Aboriginal Land Trust v Northern Territory [2007] FCAFC 31; (2007) 157 FCR 255

BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers [2005] WASCA 138

BHP Billiton Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia (Western Australian Branch) [2002] WASCA 16; (2002) 112 IR 31

Bunnings Forest Products Pty Ltd v Bullen (1994) 54 FCR 342

Burswood Resort (Management) Ltd v Australian Liquor Hospitality and Miscellaneous Workers' Union (1996) 65 IR 456

Freshwest Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers, WA Branch (1991) 71 WAIG 1746

Koushappis v The State of Western Australia [2011] WASCA 245

Smolarek v McMaster [2006] WASCA 216

State School Teachers' Union of Western Australia v Bannon (1997) 77 WAIG 1647

The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance 2019 WAIRC 00098

The Western Australian Carpenters & Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd (1970) 50 WAIG 704

Western Australian Mint v Australian Liquor Hospitality and Miscellaneous Workers' Union (1999) 87 IR 91

BUSS J:

1 The appellant in each of these appeals has applied for a stay of:

(a) the declaration and orders made on 13 December 2019 by the Full Bench of the Western Australian Industrial Relations Commission (the Commission) in each of appeal FBA 2 of 2019 and appeal FBA 3 of 2019 (2019 WAIRC 00869); and

(b) any proceedings pursuant to the declaration and orders,

pending this court's hearing and determination of appeal IAC 3 of 2019 and appeal IAC 4 of 2019, or until further order of this court.

2 The respondents in each of these appeals are Samuel Gance trading as Chemist Warehouse Perth (Chemist Warehouse) as first respondent, The Pharmacy Guild of Western Australia (Pharmacy Guild) as second respondent and The Minister for Commerce and Industrial Relations (the Minister) as third respondent.

3 Chemist Warehouse and the Pharmacy Guild oppose the appellant's applications for a stay. The Minister supports the applications.

The relevant background

4 The background to the proceedings between the parties in the Commission and before the Full Bench is as follows.

5 The appellant and the respondents are in dispute about whether the scope of the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (the Award) covers the retail pharmacy industry.

6 The Award was made in 1977. At all times cl 3 of the Award has provided:

This award shall apply to all workers employed in any calling or callings herein mentioned in the industry or industries carried on by the Respondents named in Schedule "C" and to all employers employing those workers.

7 When the Award was made, Schedule "C" – RESPONDENTS included Boans Ltd and Perth United Friendly Society Chemists, which were engaged in the retail pharmacy industry.

8 In December 1988, Boans Ltd was removed from Schedule "C".

9 In April 1995, Perth United Friendly Society Chemists was removed from Schedule "C" by an order of the Commission made pursuant to s 47 of the *Industrial Relations Act 1979* (WA) (the Act).

10 Since 1995, there have been no employers named in Schedule "C" engaged in the retail pharmacy industry.

11 The appellant sought an interpretation of the Award in the Commission pursuant to s 46 of the Act.

12 Section 46(1) of the Act provides:

At any time while an award is in force under this Act the Commission may, on the application of any employer, organisation, or association bound by the award -

(a) declare the true interpretation of the award; and

(b) where that declaration so requires, by order vary any provision of the award for the purpose of remedying any defect therein or of giving fuller effect thereto.

13 By s 46(3) of the Act, subject to the Act, a declaration made under s 46 is binding on all courts and all persons with respect to the matter the subject of the declaration.

14 The question formulated for determination in the appellant's interpretation applications was:

Does [the Award], as varied, apply to workers employed in any calling or callings mentioned in the Award in the retail pharmacy industry and to employers employing those workers?

15 The determination of that question (in particular, the interpretation of cl 3 and Schedule "C" of the Award) involved a consideration and an application of the principles enunciated by Burt J in *The Western Australian Carpenters & Joiners*,

*Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd*¹ and by Franklyn J in *Freshwest Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers, WA Branch*.²

- 16 On 18 January 2019, Commissioner Emmanuel determined, after a hearing in the Commission, that the answer to the question was 'yes'.
- 17 Each of Chemist Warehouse and the Pharmacy Guild appealed against Commissioner Emmanuel's declaration and orders. The appeals were, in essence, in identical terms.
- 18 On 28 February 2019, Chief Commissioner Scott, on the application of Chemist Warehouse and the Pharmacy Guild, granted a stay, pursuant to s 49(11) of the Act, of Commissioner Emmanuel's declaration and orders, pending the hearing and determination of the appeals before the Full Bench or until further order.
- 19 On 21 November 2019, a majority of the Full Bench (Chief Commissioner Scott and Senior Commissioner Kenner; Commissioner Walkington dissenting) allowed the appeals. The Full Bench made orders in each appeal, as follows:
- Now therefore the Full Bench, pursuant to section 49 of the *Industrial Relations Act 1979*, hereby orders –
1. That the appeals be upheld
 2. That the decision at first instance be varied to:
 - (a) Declare that [the] *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* does not apply to the retail pharmacy industry.
 - (b) Order that the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* be varied in accordance with the following schedule and that the variations have effect from 6 January 2020.

The grounds of appeal to this court

- 20 The appellant relies upon four grounds of appeal in each of the appeals to this court. The grounds are identical.
- 21 The issues raised by the grounds of appeal are, in essence, as follows.
- 22 First, did the Full Bench err in law in deciding that the Award did not cover employers and employees in the retail pharmacy industry in circumstances where the last-named employer respondent to the Award in that industry was deleted from the Schedule of Respondents under s 47 of the Act by the Commission on its own motion.
- 23 Secondly, did the Full Bench err in law in deciding that the deletion of Perth United Friendlies Society Chemists pursuant to s 47 of the Act varied the scope of the Award so that it no longer applied to employers and employees in the retail pharmacy industry.

The orders made on the appellant's applications for a stay

- 24 On 3 January 2020, after hearing the appellant's applications for a stay, I made orders on each of the applications as follows:
- (1) No party to this appeal and no person referred to in s 46(3) of the *Industrial Relations Act 1979* (WA) (the Act) is to exercise any right or power conferred by or arising under or by virtue of the declaration made by the Full Bench in order 2(a) of the Full Bench's orders dated 13 December 2019 until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.
 - (2) No party to this appeal and no person referred to in s 46(3) of the Act is to be subject to any obligation arising under or by virtue of the declaration made by the Full Bench in order 2(a) of the Full Bench's orders dated 13 December 2019 until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.
 - (3) The variations to the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* made by the Full Bench in order 2(b) of the Full Bench's orders dated 13 December 2019 are not to have effect until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.
 - (4) Any proceedings (other than the proceedings in this appeal) on any of the Full Bench's orders dated 13 December 2019 are stayed until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.

- 25 When making those orders, I indicated that I would give reasons for making them at a later date. These are those reasons.

My reasons for making the orders on the appellant's applications for a stay

- 26 In the present case, the Full Bench granted a stay, pursuant to s 49(11) of the Act, in respect of the declaration and orders made by Commissioner Emmanuel.
- 27 Section 49(11) of the Act provides:

¹ *The Western Australian Carpenters & Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd* (1970) 50 WAIG 704.

² *Freshwest Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers, WA Branch* (1991) 71 WAIG 1746.

At any time after an appeal to the Full Bench has been instituted under this section a person who has a sufficient interest may apply to the Commission for an order that the operation of the decision appealed against be stayed, wholly or in part, pending the hearing and the determination of the appeal.

28 In s 7(1) of the Act, it is stated that in the Act, unless the contrary intention appears:

(a) '**decision** includes award, order, declaration or finding'; and

(b) '**declaration** means a declaration made by the Commission under this Act'.

29 The power of this court to grant a stay is conferred by s 87(3) of the Act and reg 6 of the *Industrial Relations (Western Australian Industrial Appeal Court) Regulations* 1980 (WA).

30 Section 87(3) of the Act confers wide and undefined powers upon a member of this court to make orders as to any interlocutory proceeding taken before the hearing of an appeal. Section 87(3) includes power to grant a stay of an order made by the Full Bench. See *Burswood Resort (Management) Ltd v Australian Liquor Hospitality and Miscellaneous Workers' Union*,³ *Western Australian Mint v Australian Liquor Hospitality and Miscellaneous Workers' Union*;⁴ *BHP Billiton Iron Ore Pty Ltd v Construction, Mining, Energy, Timbryards, Sawmills and Woodworkers' Union of Australia (Western Australian Branch)*.⁵ However, s 87(3) does not reproduce the language of s 49(11) of the Act.

31 Section 87(3) confers power to stay a decision and order, and power to stay proceedings. By contrast, reg 6 merely gives a judge of this court power to order a stay of proceedings 'on [a] decision being appealed from'. There is a well-established distinction between the staying of an order and the staying of proceedings under the order. See *Burswood Resort (Management) Ltd* (458).

32 It appears to be well-established that the power of this court to grant a stay requires that the applicant for the stay show 'special' or 'exceptional' circumstances. The power should be used sparingly and with caution. Those principles ordinarily require close attention to the strength of the appellant's case on appeal and the balance of convenience. See *Burswood Resort (Management) Ltd* (458); *State School Teachers' Union of Western Australia v Bannon*;⁶ *Western Australian Mint* (91); *BHP Billiton Iron Ore* [3]; *BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers*.⁷

33 It appears doubtful that a declaratory order can be the subject of a stay pending an appeal, in the absence of a statutory power to stay a declaratory order. The rationale appears to be that once a declaration has been made, the legal rights or obligations of the parties which were litigated in the proceedings are, subject to appeal, settled. See *Bunnings Forest Products Pty Ltd v Bullen*;⁸ *Smolarek v McMaster*;⁹ *Arnhem Land Aboriginal Land Trust v Northern Territory*;¹⁰ *Koushappis v The State of Western Australia*.¹¹

34 However, there is no doubt that, even in the absence of a statutory power to stay a declaratory order, this court has power, in an appropriate case, to grant a stay in respect of rights which have been declared to exist and which are challenged or sought to be impugned in the appeal and, also, to grant a stay in respect of consequential orders which give effect to a declaratory order. See *Bunnings Forest Products* [347]; *Smolarek* [26] – [27]; *Arnhem Land Aboriginal Land Trust* [5] – [8]; *Koushappis* [18].

35 The language in s 87(3) of the Act should receive a broad and liberal construction having regard to the objects stated in s 6 of the Act. See *Burswood Resort (Management) Ltd* (458). It is reasonably arguable that the power conferred on this court by s 87(3) includes a power of the kind that is expressly conferred on the Full Bench under s 49(11) of the Act in relation to 'decisions' (as defined in s 7(1) of the Act) appealed against. However, it is unnecessary to resolve that point. The orders I have made refer to the exercise of rights or powers conferred by or arising under or by virtue of the declaration made by the Full Bench. The orders I have made do not operate or purport to operate as a stay of the Full Bench's declaratory order.

36 I am of the opinion that, at this stage and without the benefit of final argument by the parties, the appellant appears to have a reasonably strongly arguable case that:

(a) the scope of the Award is to be determined by the industries carried on by the named Respondents to the Award when it was made in 1977, and not by the industries carried on by the named Respondents as they exist from time to time;

³ *Burswood Resort (Management) Ltd v Australian Liquor Hospitality and Miscellaneous Workers' Union* (1996) 65 IR 456.

⁴ *Western Australian Mint v Australian Liquor Hospitality and Miscellaneous Workers' Union* (1999) 87 IR 91.

⁵ *BHP Billiton Iron Ore Pty Ltd v Construction, Mining, Energy, Timbryards, Sawmills and Woodworkers' Union of Australia (Western Australian Branch)* [2002] WASCA 16; (2002) 112 IR 31.

⁶ *State School Teachers' Union of Western Australia v Bannon* (1997) 77 WAIG 1647, 1648 - 1649.

⁷ *BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* [2005] WASCA 138 [15] - [20].

⁸ *Bunnings Forest Products Pty Ltd v Bullen* (1994) 54 FCR 342, 347.

⁹ *Smolarek v McMaster* [2006] WASCA 216 [26] - [27].

¹⁰ *Arnhem Land Aboriginal Land Trust v Northern Territory* [2007] FCAFC 31; (2007) 157 FCR 255 [5] - [8].

¹¹ *Koushappis v The State of Western Australia* [2011] WASCA 245 [18].

- (b) the scope of an award under the Act can only be varied in accordance with the specific provisions of the Act that permit an award to be varied;
- (c) the specific provisions of the Act which permit an award to be varied were not invoked or relied upon to delete Boans Ltd and Perth United Friendlies Society Chemists, both of which were named Respondents to the Award when it was made in 1977 and both of which carried on business in the retail pharmacy industry at that time;
- (d) the Full Bench should have decided that the Award continued to apply to employers and employees in the retail pharmacy industry as it did when the Award was made in 1977, notwithstanding the deletion of Boans Ltd and Perth United Friendlies Society Chemists;
- (e) further, the deletion of a named Respondent to an award by the Commission on its own motion pursuant to s 47 of the Act does not affect the scope of an award of the kind under consideration in the present case; and
- (f) the variation of the scope of the Award by the removal of Perth United Friendlies Society Chemists required that an application be made in accordance with s 29A of the Act, and no such application was made.

37 Also, I am of the opinion for the following reasons that, at this stage, the balance of convenience favours the granting of a stay.

38 The material before this court indicates that the decision of the majority of the Full Bench will be applied in other pending proceedings in the Industrial Magistrates Court before this court hears and determines these appeals. As I have mentioned, by s 46(3) of the Act, subject to the Act, a declaration made under s 46 is binding on all courts and all persons with respect to the matter the subject of the declaration.

39 In the present case, as I have mentioned, Commissioner Emmanuel's declaration and orders were stayed on 28 February 2019 by Chief Commissioner Scott pending the hearing and determination of the appeals before the Full Bench or until further order. Chief Commissioner Scott held that there were 'special circumstances' which justified the granting of a stay, as follows:

I find that the applicants, now having a declaration that the Award applies to them and their employees, are obliged at law to apply the Award. It is not optional. Whether enforcement action will be taken pending the appeal does not alter their legal obligations.

I find that should the order not be stayed, pending the hearing and determination of the appeals, the applicants will be required to:

1. audit, consider and recalculate the rates of pay of employees for the future, and make any necessary payments of backpay for employees, past and present; and
2. reassess their operating hours, rosters and staffing generally. This may have the effect of changing their opening hours, the number of employees they employ and rearranging those employees' working hours.

These steps will have significant structural, financial and staffing consequences. If the appeals are successful and the order is quashed, all of this work and change will have been disruptive, unnecessary, wasted and irrecoverable. They will not be able to be restored substantially to their former position.

[I]n the circumstances of a finding that an award applies and has always applied to a business and its employees where the employer had, on advice, believed no award applied, a prudent business operator would take the actions the applicants say are necessary and not await the outcome of an appeal where a stay might prevent likely unnecessary, expensive and irrecoverable consequences, including the recovery of back pay to former employees.

See *The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance*.¹²

40 The Full Bench did not publish reasons for decision in the appeals until 21 November 2019 and did not make its declaration and orders until 13 December 2019. The Full Bench, in allowing the appeals from Commissioner Emmanuel's declaration and orders, did not in terms set aside the Commissioner's declaration. Rather, the Full Bench ordered that 'the decision at first instance be varied' to declare that the Award 'does not apply to the retail pharmacy industry' and to order that the Award be varied in accordance with an attached schedule with effect from 6 January 2020.

41 Although the Full Bench did not in terms set aside Commissioner Emmanuel's declaration, that was, in substance, the effect of the Full Bench's order. In particular, the Full Bench's order that 'the decision at first instance be varied' to declare that the Award 'does not apply to the retail pharmacy industry' operated in effect as a new declaration which superseded the Commissioner's declaration.

42 Accordingly, the orders I made, after hearing the appellant's applications for a stay, will not have the effect of reinstating Commissioner Emmanuel's declaration and orders, pending the hearing and determination of the appeals to this court.

43 The orders I made will have the effect of preserving the status quo that existed before Commissioner Emmanuel made her declaration and orders.

44 The issues in the appeals to this court raise a significant matter of general importance in the context of industrial relations in the retail pharmacy industry.

¹² *The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance* 2019 WAIRC 00098 [47] - [50].

- 45 There is no reason why the appeals cannot be heard and determined promptly. If necessary or desirable, one or more of the parties may apply for expedition.
- 46 If the appellant's applications for a stay had been dismissed, employees in the retail pharmacy industry who have been receiving the benefits of the Award may be deprived immediately of those benefits. If that occurs there is a real risk that some of those employees may suffer short term economic disadvantage. If the appeals to this court succeed, inconvenience will have been incurred and financial expenditure in connection with the implementation of the Full Bench's declaration and orders will have been wasted.
- 47 At the hearing of the appellant's applications, counsel for the Pharmacy Guild accepted (properly, in my opinion) that apart from matters of inconvenience, the Pharmacy Guild did not assert that it would be prejudiced by the orders I made (appeal ts 39). Similarly, at the hearing, counsel for Chemist Warehouse did not contend that it would be prejudiced by the orders I made.
- 48 I was persuaded that the combined force of all of the matters to which I have referred, in considering the strength of the appellant's case and the balance of convenience, constituted 'special' or 'exceptional' circumstances which justified the orders I made.

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

24 MARCH 2020

FULL BENCH—Appeals against decision of Industrial Magistrate—

2019 WAIRC 00889

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 46/2018 GIVEN ON 28
FEBRUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2019 WAIRC 00889
CORAM	:	SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	:	FRIDAY, 12 JULY 2019 WRITTEN SUBMISSIONS SATURDAY, 30 NOVEMBER 2019 AND MONDAY, 9 DECEMBER 2019
DELIVERED	:	FRIDAY, 20 DECEMBER 2019
FILE NO.	:	FBA 5 OF 2019
BETWEEN	:	SHERYL REARDON Appellant AND GAETANO ANTHONY LAGANA (ABN 85 867 757 829) T/A STRATTON PARK PHARMACY Respondent

ON APPEAL FROM:

Jurisdiction	:	Industrial Magistrate's Court
Coram	:	Magistrate D Scaddan
Citation	:	[2019] WAIRC 00104
File No	:	M 46 of 2018

Catchwords	:	<i>Industrial Law (WA) - Appeal against decision of the Industrial Magistrate in relation to overtime payments - Effect of Full Bench decision overturning declaration of Commission relied upon by Industrial Magistrate at first instance - Whether s 84 of the Act constitutes a strict appeal or an appeal by way of rehearing - Appeal under s 84 by way of rehearing and error must be established - decision at first instance given in legal and jurisdictional error - Award did not apply to the parties at material times and appellant had no standing to enforce Award - Decision varied</i>
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Legislation : *Industrial Relations Act 1979* (WA) ss 26, 27(1)(n), 46, 49, 84, 90
Conciliation and Arbitration Act 1904 (Cth) s 35
Industrial Arbitration Act 1912-1963 (WA) ss 103A, 108C(5)(b)
Long Service Leave Act 1958 (WA)

Result : Decision varied. Order issued.

Representation:

Counsel:

Appellant : Mr D Rafferty of counsel

Respondent : Mr R Jones as agent

Solicitors:

Appellant : The Shop, Distributive & Allied Employees' Association, Western Australian Branch

Respondent : Atwick Ferres

Case(s) referred to in reasons:

Allesch v Maunz (2000) 203 CLR 172; [2000] HCA 40

Attorney General (NSW) v World Best Holdings Ltd (2005) 63 NSWLR 557

AWU v Poon Bros (WA) Pty Ltd (1983) 4 IR 394

CSR Ltd v Delle Maddalena (2006) 80 ALJR 458

Director General, Department of Education v United Voice WA [2015] WASCA 195; (2015) 95 WAIG 1600

Duralla Pty Ltd v Plant (1984) 54 ALR 29

Eastman v The Queen (2000) 203 CLR 1

Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Limited (1990) 70 WAIG 3040

Fox v Percy (2003) 214 CLR 118

FMWU v Sunny West Co-Operative Dairies Ltd and Ors (1965) 45 WAIG 246

Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, WA Branch (1984) 64 WAIG 852

House v The King (1936) 55 CLR 499

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

The Pharmacy Guild of Western Australia v The Shop, Distributive and Allied Employees' Association of Western Australia; Samuel Gance T/as Chemist Warehouse Perth v The Shop, Distributive and Allied Employees' Association of Western Australia [2019] WAIRC 00825

Pharmacy Guild of Western Australia Organisation of Employers v The Shop, Distributive and Allied Employees' Association of Western Australia, Minister for Commerce and Industrial Relations, Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth [2019] WAIRC 00098; (2019) 99 WAIG 252

Re Rates of Pay for Engineers: and CSIRO Technical Association 167 CAR 497

The Shop, Distributive and Allied Employees Association of Western Australia v Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth [2019] WAIRC 00015; (2019) 99 WAIG 121

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

Sheryl Reardon v Gaetano Anthony Lagana (ABN 85 867 757 829) T/A Stratton Park Pharmacy [2019] WAIRC 00104; (2019) 99 WAIG 258

Transport Workers' Union of Australia WA Branch v Arrow Holdings Pty Ltd (1989) 69 WAIG 1050

Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73

WA Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union v Izzo (1984) 64 WAIG 411

Warren v Coombes (1979) 142 CLR 531

Case(s) also cited:

ALHMU v Great Southern Regional College of TAFE and Others (1994) 74 WAIG 2327

Australian Communication Exchange Ltd v Deputy Commissioner of Taxation [2003] HCA 55

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

Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union [2019] FCAFC 84

George A Bond & Co Ltd (in liq) v McKenzie [1929] AR (NSW) 498

Grunwick Processing Laboratories Ltd v Advisory, Conciliation & Arbitration Service [1978] AC 655

Kezich v Leighton Contractors Pty Ltd (1974) 131 CLR 362

Kucks CSR Ltd (1966) 66 IR 182

Re Steel Works Employees (Australia Iron and Steel Limited) Conciliation Committee [1941] AR (NSW) 445

Spring 2002 Pty Ltd v Katherine Sampson [2006] WAIRC 05864; (2007) 87 WAIG 110

Spring 2002 Pty Ltd v Katherine Sampson [2007] WAIRC 00083; (2007) 87 WAIG 122

State of New South Wales v Stockwell [2017] NSWCA 30

Thompson v Roche Bros Pty Ltd [2004] WASCA 110

United Voice v Wilson Security Pty Ltd [2019] FCAFC 66

Reasons for Decision

KENNER SC:

The appeal and background

- 1 In proceedings before the Industrial Magistrates Court on 23 January 2019, the appellant contended that the respondent had contravened or failed to comply with the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 in relation to payment of overtime under cls 7(1) and 13 of the Award, in respect of her casual employment by the respondent from 8 April 2012 to 13 October 2017. Another claim made by the appellant to the Court, for payment of long service leave under the *Long Service Leave Act 1958* (WA), is not relevant for present purposes. By its decision and order of 28 February 2019, the Court dismissed the part of the appellant's claim that related to overtime payments: *Sheryl Reardon v Gaetano Anthony Lagana (ABN 85 867 757 829) T/A Stratton Park Pharmacy* [2019] WAIRC 00104; (2019) 99 WAIG 258.
- 2 The appellant now appeals against the rejection of her claim for overtime payments. The appellant complained that the learned Industrial Magistrate erred in her construction of the relevant provisions of the Award. It was contended that the appellant, as a casual employee, who regularly worked more than 30 hours per week, was entitled to be paid overtime for those additional hours of work beyond 30 each week. Despite the grounds of appeal being limited in scope to this issue, another matter now arises for consideration by the Full Bench.
- 3 That issue relates to the application of the Award to the retail pharmacy industry. This has been contentious for some time. Prior to the hearing before the Court, in November 2017, proceedings were commenced by the Shop, Distributive and Allied Employees' Association of Western Australia, for a declaration under s 46 of the *Industrial Relations Act 1979* (WA) that the Award applied to employees employed in retail pharmacies. Those proceedings culminated in a decision of the Commission in January 2019, that the Award did so apply and a declaration to this effect was made by the Commission: *The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth* [2019] WAIRC 00015; [2019] WAIRC 00016; (2019) 99 WAIG 121. The declaration was in the following terms:

THAT *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* as varied applies to workers employed in any calling or callings mentioned in the award in the retail pharmacy industry and to employers employing those workers.
- 4 On 31 January 2019, the respondent to the declaration proceedings and the Pharmacy Guild of Western Australia Organisation of Employers, commenced appeals to the Full Bench. The Minister for Industrial Relations was an intervenor in the proceedings. A stay of the declaration under s 49(11) of the Act was sought and on 28 February 2019, the date of the decision and orders from which the present appeal is brought, the stay application was granted by the Chief Commissioner and an order was made: [2019] WAIRC 00098; (2019) 99 WAIG 252.
- 5 The present appeal to the Full Bench was commenced on 20 March 2019. The appeal was heard on 12 July 2019 and the decision was reserved. Since then, on 21 November 2019 the Full Bench, in the declaration proceedings, handed down its decision. Both appeals were upheld and the declaration made by the Commission in January 2019 has been reversed: *The Pharmacy Guild of Western Australia v The Shop, Distributive and Allied Employees' Association of Western Australia; Samuel Gance T/as Chemist Warehouse Perth v The Shop, Distributive and Allied Employees' Association of Western Australia* [2019] WAIRC 00825. In addition to a declaration that the Award did not apply to the retail pharmacy industry, orders were also made by the Full Bench, in relation to consequential variations to the Award, giving effect to the Full Bench's declaration, by the removal of references to pharmacies and chemists shops, where they appear in the Award. The orders made by the Full Bench in the declaration proceedings included a declaration as follows:

DECLARE that that *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* does not apply to the retail pharmacy industry.
- 6 The issue that now arises is what is the effect of the Full Bench decision in the declaration proceedings on the decision of the Court and this appeal? In order to give the parties an opportunity to be heard, the Full Bench wrote to the parties on 25 November 2019 alerting them to the decision of the Full Bench in the declaration proceedings and inviting further written submissions as to the effect, if any, on the present appeals. The parties have provided further submissions.

Contentions of the parties

- 7 In summary, the appellant, by letter dated 30 November 2019, contended that an appeal to the Full Bench under s 49 of the Act is to be heard as a strict appeal. Reliance was placed on a decision of the Commission in Court Session in *FMWU v Sunny West Co-Operative Dairies Ltd and Ors* (1965) 45 WAIG 246 at 246-247 per Schnaars CC. It was submitted that the then s 108C(5)(b) of the *Industrial Arbitration Act 1912-1963* (WA), dealing with the powers of the Commission in Court Session on an appeal were like s 84(4)(a) of the Act. Applying this approach, it was submitted that as a strict appeal, the Full Bench

must consider the appeal on the evidence and law as it stood at the time of the proceedings at first instance before the Court and at the time of the Court's decision: *Allesch v Maunz* [2000] HCA 40 at pars 22-23; *Eastman v The Queen* (2000) 203 CLR 1. Reference was also made to a decision of the Full Bench in *Minister for Health v Denise Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203 per Smith AP and Beech CC, citing and relying on a decision of the Industrial Appeal Court in *Hammersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, WA Branch* (1984) 64 WAIG 852.

- 8 Even though in *Samuel Gance*, a stay of the declaration issued on the same day as the decision of the Court the subject of this appeal, that being 28 February 2019, the order granting the stay was made in the afternoon, after the Court's reasons and orders were handed down earlier that morning. Thus, it was said by the appellant, that the stay had no effect on the decision of the Court at first instance.
- 9 For the respondent, in a letter dated 9 December 2019, it was submitted that the decision of the Full Bench in *Samuel Gance* does affect these proceedings. The submission was made that the effect of the declaration of the Full Bench in those proceedings is that the Award does not apply to the respondent. If this situation had been settled at the time of the appellant's claim being made before the Court, those proceedings could not have continued. Given the present appeal is still before the Full Bench, from the terms of s 84 of the Act, which empowers the Full Bench to vary or to amend a decision of the Industrial Magistrates Court, the Full Bench must be able to rehear the matter, which means that it can consider other material and is required to apply the law as it stands now. This being so, the respondent submitted that the decision of the Court at first instance must be set aside.

The declaration

- 10 The effect of the decision of the Full Bench in the declaration proceedings is that from April 1995, the Award must be taken to have ceased to have application to the retail pharmacy industry. Thus, as at the time of the employment of the appellant by the respondent, and at the time of the alleged contraventions of the Award, the Award must be taken to have had no binding effect on either the appellant or the respondent. A declaration of the Commission, however constituted, is, under s 46(3) of the Act, binding on all courts and persons with respect to the matter the subject of the declaration.

Statutory provisions

- 11 Given the submissions made by the parties and the issues arising, it is convenient at this point to set out both ss 49 and 84 of the Act dealing with appeals to the Full Bench from a decision of the Commission and from an Industrial Magistrate respectively. Section 49, dealing with appeals from the Commission, is in the following terms:

49. Appeal from Commission's decision

- (1) In subsections (2) to (6a) the *Commission* means the Commission constituted by a commissioner, but does not include the Commission exercising jurisdiction under section 80ZE or subsection (11).
- (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of the Commission.
- (2a) An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.
- (2b) An appeal does not lie under this section from a determination —
 - (a) of a relevant industrial authority —
 - (i) under section 97VP; or
 - (ii) in an arbitration under any EEA dispute provision of the kind referred to in section 97UP;

or

 - (b) of the Commission under section 97XC or 97XQ.
- (3) An appeal under this section shall be instituted within 21 days of the date of the decision against which the appeal is brought and may be instituted by —
 - (a) any party to the proceedings wherein the decision was made; or
 - (b) any person who was an intervener in those proceedings.
- (4) An appeal under this section —
 - (a) shall be heard and determined on the evidence and matters raised in the proceedings before the Commission; and
 - (b) shall, if brought by a person referred to in subsection (3)(b), be dismissed unless, on the hearing of the appeal, that person obtains leave of the Full Bench,

and, for the purpose of paragraph (a), *proceedings* includes any proceedings arising under section 35(3).

- (5) In the exercise of its jurisdiction under this section the Full Bench may, by order —
 - (a) dismiss the appeal; or
 - (b) uphold the appeal and quash the decision or, subject to subsection (6), vary it in such manner as the Full Bench considers appropriate; or
 - (c) suspend the operation of the decision and remit the case to the Commission for further hearing and determination.

- (6) Where the Full Bench varies a decision under subsection (5)(b) the decision as so varied shall be in terms which could have been awarded by the Commission that gave the decision.
- (6a) The Full Bench is not to remit a case to the Commission under subsection (5)(c) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.

.....

12 Section 84 is as follows:

84. Appeal from industrial magistrate's court to Full Bench

- (1) In this section *decision* includes a penalty, order, order of dismissal, and any other determination of an industrial magistrate's court, but does not include a decision made by such a court in the exercise of the jurisdiction conferred on it by section 96J.
- (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of an industrial magistrate's court.
- (3) An appeal under this section shall be instituted within 21 days from the date of the decision against which the appeal is brought and may be instituted by any party to the proceedings wherein the decision was made.
- (4) On the hearing of the appeal the Full Bench —
- (a) may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of the appeal; and
 - (b) may remit the matter to the industrial magistrate's court or to another industrial magistrate's court for further hearing and determination according to law; and
 - (c) subject to subsection (5), may make such order as to costs as the Full Bench considers appropriate.
- (5) In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner, or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

Nature of appeals - general principles

13 An appeal is a creature of statute and it is the terms of the statute that govern how an appeal court is to go about its task on an appeal to it. It is trite that appeals can be classified in three ways, which can only be general descriptions, as it will be a question of the terms of the specific statute under consideration that determines the matter. These matters were considered in *Lacey v A-G* (Qld) (2011) 242 CLR 573; (2011) 275 ALR 646; [2011] HCA 10; BC201101794, where French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ observed as follows at pars 56-58:

[56] Ascertainment of the statutory purpose is to be based on the words of s 669A(1) and, in particular, the word "appeal", which encompasses the jurisdiction conferred by the subsection. An appeal is a creature of statute and, subject to constitutional limitations, the precise nature of appellate jurisdiction will be expressed in the statute creating the jurisdiction or inferred from the statutory context. The purpose of s 669A(1) is to create an appellate jurisdiction exercisable upon the application of the Attorney-General and coupled with a wide remedial power. The question is what kind of jurisdiction does it create?

[57] Appeals being creatures of statute, no taxonomy is likely to be exhaustive.¹⁴¹ Subject to that caveat, relevant classes of appeal for present purposes are:

- (1) Appeal in the strict sense — in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given.¹⁴² Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance.¹⁴³
- (2) Appeal de novo — where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.¹⁴⁴
- (3) Appeal by way of rehearing — where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error.¹⁴⁵ In some cases in an appeal by way of rehearing there will be a power to receive additional evidence.¹⁴⁶ In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance.¹⁴⁷

[58] Where the court is confined to the materials before the judge at first instance, that is ordinarily indicative of an appeal by way of rehearing, which would require demonstration of some error on the part of the primary judge before the powers of the court to set aside the primary judge's decision were enlivened.

14 Importantly, for present purposes, an appeal court on a rehearing, determines the appeal on the law as it stands when it hears and determines the appeal: *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106-108; *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 567). This means changes in the law since the original decision was made can be considered in the determination of the appeal.

Consideration of s 49 of the Act

15 In *Hamersley Iron*, it was held (per Brinsden and Kennedy JJ) that an appeal to the Full Bench of the Commission, from a discretionary decision, under s 49 of the Act, should be approached in the same way as the Full Bench of the then Australian Conciliation and Arbitration Commission dealt with appeals from discretionary decisions under s 35 of the then federal

legislation, the *Conciliation and Arbitration Act 1904* (Cth). Brinsden J adopted the approach of the Australian Commission in *AWU v Poon Bros (WA) Pty Ltd* (1983) 4 IR 394. It was held that the appeal provisions of both the State and federal statutes were very similar. This required the establishment of error, in accordance with principles established in *House v The King* (1936) 55 CLR 499. In the conduct of an appeal under s 49, the Full Bench conducts as full a review of the evidence and materials as the circumstances of the case require. This includes the ability of the Full Bench to draw its own inferences from facts established on the evidence or those not in dispute.

- 16 In *Hamersley Iron*, the Court did not appear to expressly conclude that an appeal under s 49 is a strict appeal or a rehearing. Brinsden J at p 853, noted that the nature of the proceedings is an appeal and no reference is made to a rehearing in s 49 itself. In *Poon Bros*, the Australian Commission considered that consistent with a long line of cases, under the then and predecessor legislation, an appeal to the Full Bench was not a hearing de novo but a reconsideration of the Commission's decision at first instance, and in the case of a discretionary decision, error was necessary to establish. It was not open for the Full Bench of the Australian Commission to simply substitute its view for the Commission at first instance. Brinsden J also referred to an earlier decision of the Full Bench of the Australian Commission in *Re Rates of Pay for Engineers: and CSIRO Technical Association* 167 CAR 497 at 500, cited in *Poon Bros*, where the Commission observed it was not sitting at first instance and that error was required to be established.
- 17 Kennedy J at 855, also referred to *House v The King* and other later decisions of the High Court, in relation to appeals from the exercise of discretion, and concluded the same should apply to the Full Bench of the Commission under s 49 of the Act. Notably his Honour drew a distinction between an "appeal" under s 49 of the Act as established by the Parliament and the Full Bench dealing with a matter as if sitting at first instance, hearing a matter de novo. Olney J approached the matter somewhat differently but came to the same conclusion that the broad approach in *Poon Bros* was appropriate to adopt in this jurisdiction. Additionally, his Honour commented at 857 that, whilst because of s 49(4) of the Act, except for s 26(1)(b), all the other obligations on the Commission under ss 26(1) and (2) did apply to the Full Bench on an appeal. Olney J therefore considered that this required the Full Bench on an appeal from a discretionary judgment, to make up its own mind, based on the evidence and matters raised at first instance, having regard to these statutory requirements.
- 18 Despite s 49(4)(a) of the Act, requiring an appeal to be heard on the evidence and matters raised at first instance, the Full Bench has held that it may, in certain very limited circumstances, admit further evidence: *Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Limited* (1990) 70 WAIG 3040. In *George Moss*, the Full Bench had regard to the earlier decision of the Commission in Court Session in *Sunny West*. However, it was held that the conclusion in *Sunny West*, that the then s 108C(5)(a) of the *Industrial Arbitration Act 1912-1963*, which was in the same terms as s 49(4)(a), to the effect that fresh evidence could not be adduced, was overly restrictive. The Full Bench reasoned at 3042, that for example, matters of jurisdiction must always be able to be raised on an appeal, despite not being a matter raised in the original proceedings below. In a similar vein, fundamental matters of law, within the limits of the principle that new points not taken below cannot generally be raised for the first time on appeal, especially if able to be met by evidence, are not precluded by the reference to "matters" in s 49(4)(a) of the Act. I note too however, the observations of the plurality in *Lacey*, in particular at par 58, that where an appeal court is confined to the material at first instance, this is indicative of an appeal by way of rehearing, with the requirement for error to be established.
- 19 In terms of practice and procedure, whilst it cannot be determinative, the Full Bench on an appeal from the Commission under s 49 of the Act, undertakes for itself as full a review of all of the evidence, oral and documentary, and submissions on the law and principle, as the grounds of appeal require in a particular case. This proceeds on a transcript of the proceedings and all relevant documents tendered into evidence. A full review of the case at first instance may be required. On the disposition of the appeal, under s 49(5) of the Act, the Full Bench may do a number of things, including dismissing the appeal; upholding it and quashing the decision or varying it as required by s 49(6); suspending the decision and remitting the matter to the Commission for further hearing and determination. In the latter case, the Full Bench is not to remit a matter, unless it considers that it is not able to decide the matter for itself.
- 20 In *Director General, Department of Education v United Voice WA* [2015] WASCA 195; (2015) 95 WAIG 1600, the issue before the Industrial Appeal Court was whether s 27(1)(n) of the Act, in relation to the extension of prescribed times, applied to an appeal to the Full Bench under s 49. In the course of considering this issue, Le Miere J (Buss and Murphy JJ agreeing) referred to aspects of the legislation and in relation to s 49 appeals, stated at par 16 that "an appeal under s 49 is an appeal by way of rehearing" and compared it to the very limited appeal to the Court under s 90 of the Act.
- 21 To the extent that the Commission in *Sunny West* and in *Drake-Brockman* reached the conclusion that an appeal under s 49 of the Act is a strict appeal, with respect, I disagree. Whilst not expressed as such in the statute, I consider that an appeal to the Full Bench under s 49 involves a rehearing. The Full Bench is to reach its own view on all of the evidence and the materials before the Commission, subject to error at first instance being established. The principles in relation to such a rehearing were set out by Buss JA in *Lackovic v Insurance Commission (WA)* (2006) 31 WAR 460 477-478; [2006] WASCA 38, citing *Fox v Percy* (2003) 214 CLR 118 and *CSR Ltd v Delle Maddalena* (2006) 80 ALJR 458.

Consideration of s 84 of the Act

- 22 Section 84 of the Act, set out above, does not contain the equivalent of s 49(4)(a). Nor does it say anything about the ability of the Full Bench to receive, or not receive, further evidence, whether it be fresh or new. This contrasts to the predecessor of s 84 in s 103A of the *Industrial Arbitration Act 1912-1973*. In this section, as it then was, s 103A(4)(a) provided that an appeal was to proceed, like s 49(4)(a), on the evidence and proceedings before the Industrial Magistrate. It contained an additional provision that the Industrial Appeal Court, then with jurisdiction over such appeals, could also call or admit any further evidence in its discretion. The powers of the Court, on the disposition of the appeal in s 103A(4)(e), were the same as the current s 84(4)(a) of the Act. That is, on the disposition of an appeal, as now, the Industrial Appeal Court had a range of powers, including confirming, reversing, varying, amending, rescinding, setting aside or quashing the decision appealed against. This included the further power, expressed conjunctively, to remit a matter to an Industrial Magistrate for further

hearing and determination. Currently under s 84 of the Act, whilst there is nothing to suggest, as with s 49, that such an appeal is by way of a rehearing de novo, on their face, these provisions do not seem to limit the Full Bench to only giving the decision that should have been given at first instance and are broad in scope.

- 23 Appeals to the Full Bench under s 84 of the Act from decisions of the Industrial Magistrates Court proceed largely in the same manner as do appeals from the Commission. They are generally heard based on a transcript of the evidence, the relevant documentary materials tendered in evidence and the submissions of the parties on the relevant law and principle. Again, as with appeals from the Commission, the Full Bench is to undertake as full a review of the case at first instance as the grounds of appeal to it may require. Whilst in the main, an appeal from the Court will not involve reconsideration of discretionary decisions as is the case with many appeals from the Commission, given the Court's primary role in relation to the enforcement of industrial instruments in its general jurisdiction under Part III of the Act, this does not mean that the Full Bench is unable to draw its own inferences from facts as found or those not in dispute. In such cases, the approach as set out in *Warren v Coombes* (1979) 142 CLR 531 at 536-549 applies: *Transport Workers' Union of Australia WA Branch v Arrow Holdings Pty Ltd* (1989) 69 WAIG 1050.
- 24 An appeal to the Full Bench from a decision of the Court under s 84 of the Act is not limited to matters of law or jurisdiction. As with s 49 appeals, they are not confined as are appeals to the Industrial Appeal Court under s 90 of the Act. It is open to the Full Bench to make its own findings of fact based on the evidence before an Industrial Magistrate and it has been held that such findings are not able to be questioned on appeal to the Industrial Appeal Court, as long as there is some evidence to support them: *WA Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union v Izzo* (1984) 64 WAIG 411.
- 25 In terms of the disposition of an appeal under s 84(4) of the Act, as set out above, the Full Bench has broad powers available to it, as it does on an appeal from the Commission under s 49 of the Act. However, on a comparison between the powers of the Full Bench under s 49(5) and under s 84(4), the latter appears to be broader than the former. In the case of an appeal from an Industrial Magistrate, the Full Bench is not limited to quashing or varying a decision, but also may, in addition, "confirm, reverse, amend, rescind, or set it aside". This is in addition to the power of the Full Bench to also remit a matter to the Industrial Magistrate "for further hearing and determination".
- 26 In consideration of the foregoing, as with appeals to the Full Bench under s 49 of the Act, I incline to the view that an appeal to the Full Bench under s 84 is also to proceed by way of a rehearing. As with s 49, on an appeal under s 84, error, of either law or fact or both, must be established for the Full Bench to invoke its powers under s 84(4). It is not sufficient for an appellant to invite the Full Bench to come to its own conclusions on the evidence and materials before the Industrial Magistrate and to simply substitute its own decision, in the absence of error being established. This is of course, subject to the general principle that matters of jurisdiction may be raised on appeal for the first time, either by the parties or by the appeal court itself: *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 1760.

Effect of the declaration

- 27 The relevant current law, in terms of the application of the Award to the retail pharmacy industry, must now be taken to be in accordance with the declaration made by the Full Bench and to operate in accordance with its terms. Because of this, in my view, this Full Bench is bound to have regard to and apply the declaration to the effect that the Award does not extend to the retail pharmacy industry. This would appear to be the effect of s 46(3) of the Act in any event.
- 28 Furthermore, the Full Bench, in the declaration proceedings, possessing jurisdiction over the Industrial Magistrates Court on appeal, has found that the Commission's declaration should not have been made and has reversed it. Accordingly, in addition to the matters raised above as to the nature of an appeal under s 84 of the Act, with the authority relied on by the Court at first instance being overruled by the subsequent Full Bench declaration, the original decision of the Court in this matter must be regarded as having been given as a result of legal and jurisdictional error and must be overturned: *Duralla Pty Ltd v Plant* (1984) 54 ALR 29 per Northrop J at 55.

Conclusion

- 29 The Full Bench must now conclude that the Award did not apply to the appellant and the respondent at the material times. Thus, the appellant had no standing to seek to enforce the Award under s 83(1)(e) of the Act as a person bound by the Award or to whom it applied. The Industrial Magistrates Court had no jurisdiction to enforce the Award. To the extent that the order made did enforce the Award, by making an order for the payment of monies for a late-night trading loading, the order should be varied.

EMMANUEL C:

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

WALKINGTON C:

- 31 I too have had the benefit of reading the draft reasons of the Senior Commissioner. I also agree with those reasons and have nothing to add.
-

2019 WAIRC 00890

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SHERYL REARDON	APPELLANT
	-and- GAETANO ANTHONY LAGANA (ABN 85 867 757 829) T/A STRATTON PARK PHARMACY	RESPONDENT
CORAM	FULL BENCH SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	FRIDAY, 20 DECEMBER 2019	
FILE NO/S	FBA 5 OF 2019	
CITATION NO.	2019 WAIRC 00890	

Result	Order issued
Appearances	
Appellant	Mr D Rafferty of counsel
Respondent	Mr R Jones as agent

Order

The appeal having come on for hearing before the Full Bench on 12 July 2019, with written submissions filed on 30 November and 9 December 2019, and having heard Mr D Rafferty of counsel on behalf of the appellant, and Mr R Jones as agent for the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the determination and order of the Industrial Magistrates Court dated 28 February 2019 be varied by deleting the amount of \$2,512.89 plus interest and inserting in lieu thereof the amount of \$2,309.54 for pro rata long service leave plus interest.

By the Full Bench

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2019 WAIRC 00756

	INTERPRETATION OF PUBLIC SERVICE AWARD 1992 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CIVIL SERVICE ASSOCIATION OF WA INCORPORATED	
PARTIES		APPLICANT
	-v- CHEMISTRY CENTRE (WA) (CHEMCENTRE), COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE, COMMISSIONER FOR EQUAL OPPORTUNITY (EQUAL OPPORTUNITY COMMISSION) AND OTHERS	RESPONDENTS
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	THURSDAY, 17 OCTOBER 2019	
FILE NO.	P 12 OF 2019	
CITATION NO.	2019 WAIRC 00756	

Result	Directions issued
Representation	
Applicant	Mr M Amati
Respondent	Ms J Vincent of counsel

Directions

HAVING heard Mr M Amati on behalf of the applicant and Ms J Vincent of counsel on behalf of the respondent the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the parties confer and file a statement of agreed facts by no later than five days prior to the date of hearing.
- (2) THAT the applicant and respondent file and serve an outline of submissions upon which they intend to rely no later than three days prior to the date of hearing.
- (3) THAT the application be listed for hearing on a date to be fixed.
- (4) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00050

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CIVIL SERVICE ASSOCIATION OF WA INCORPORATED

APPLICANT

-v-

CHEMISTRY CENTRE (WA) (CHEMCENTRE), COMMISSIONER FOR CHILDREN AND
YOUNG PEOPLE, COMMISSIONER FOR EQUAL OPPORTUNITY (EQUAL OPPORTUNITY
COMMISSION)

RESPONDENTS**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** FRIDAY, 24 JANUARY 2020**FILE NO.** P 12 OF 2019**CITATION NO.** 2020 WAIRC 00050

Result	Directions issued
Representation	
Applicant	Mr B Cusack
Respondent	Ms J Vincent of counsel and with her Ms C Pickering

Direction

HAVING heard Mr B Cusack on behalf of the applicant and Ms J Vincent of counsel on behalf of the respondent the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT by 31 January 2020 those respondent employers identified in the document entitled “List of industrial instruments impacted by District Allowance (Government Officers) General Agreement 2010 which are not currently subject to P 12 of 2019” be notified by Public Sector Labour Relations of these proceedings and of this direction.
- (2) THAT by 31 January 2020 those respondent employers named in the District Allowance (Government Officers) General Agreement 2010 and the District Allowance (Government Wages Employees) General Agreement 2010 as set out in the documents entitled “Respondent employers named in District Allowance (Government Officers) General Agreement 2010 but not in P 12 of 2019” and “District Allowance (Government Wages Employees) General Agreement 2010 Schedule A-Responsendency List-Agencies” be notified by Public Sector Labour Relations of these proceedings and this direction.
- (3) THAT by 31 January 2020 any organisations of employees listed in the documents referred to in pars 1 and 2 above be served by the applicant with a copy of application P 12 of 2019 and this direction.
- (4) THAT if any employer or organisation of employees referred to in pars 1, 2 and 3 above wishes to seek leave to intervene in these proceedings under s 27(1)(k) of the *Industrial Relations Act 1979* (WA) that they make an application to do so by no later than 21 February 2020.
- (5) THAT otherwise these proceedings be and are hereby adjourned to a date to be fixed.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00160

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 CIVIL SERVICE ASSOCIATION OF WA INCORPORATED

PARTIES**APPLICANT**

-v-

CHEMISTRY CENTRE (WA) (CHEMCENTRE), COMMISSIONER FOR CHILDREN AND
 YOUNG PEOPLE, COMMISSIONER FOR EQUAL OPPORTUNITY (EQUAL OPPORTUNITY
 COMMISSION)

RESPONDENTS**CORAM**

PUBLIC SERVICE ARBITRATOR
 SENIOR COMMISSIONER S J KENNER

DATE

WEDNESDAY, 4 MARCH 2020

FILE NO

P 12 OF 2019

CITATION NO.

2020 WAIRC 00160

Result

Discontinued by leave

Representation**Applicant**

Mr B Cusack

Respondent

Ms J Vincent of counsel

Order

WHEREAS the applicant sought leave to discontinue the application, and the respondents advised they have no objection, the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

[L.S.]

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2020 WAIRC 00194

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 FRANK KHAN

PARTIES**APPLICANT**

-v-

THOMAS BUILDING PTY

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

MONDAY, 6 APRIL 2020

FILE NO/S

U 10 OF 2020

CITATION NO.

2020 WAIRC 00194

Result

Application dismissed

Representation**Applicant**

In person

Respondent

Ms G Coleman

Order

HAVING heard from the applicant in person and Ms G Coleman for the respondent during a conference on 9 March 2020;

WHEREAS the parties settled the matter at the conference on 9 March 2020 on the basis that the respondent pay to the applicant the sum of \$5,000 within seven days and the applicant would then discontinue the application;

AND WHEREAS following the conference on 9 March 2020 the parties signed a settlement agreement which included, among others, the terms as set out in the previous paragraph;

AND WHEREAS the respondent has provided evidence that the payment of \$5,000 to the applicant has been made;

AND WHEREAS the Commission has unsuccessfully attempted to contact the applicant on numerous occasions;

AND WHEREAS the Commission has no reason to believe that the application ought remain on foot;

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

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2020 WAIRC 00191

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION VENKATESH MURTHY MUNIREDDY	APPLICANT
	-v-	
	PRESSFORM ENGINEERING PTY LTD	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	THURSDAY, 2 APRIL 2020	
FILE NO/S	B 18 OF 2019	
CITATION NO.	2020 WAIRC 00191	

Result	Orders issued
Representation	
Applicant	In person
Respondent	Mr A Sinanovic (of counsel)

Order

HAVING heard from the applicant in person and Mr A Sinanovic, of counsel, for the respondent during a conference on 1 April 2020;

WHEREAS a conference was previously held in this matter on 25 March 2019 and, the matter having not settled at that conference, was set down for hearing on 27 August 2019;

AND WHEREAS the applicant's lawyer, Ms Claudia Lewin from Croftbridge Lawyers, told the Commission by email on 26 August 2019 that the 'parties have reached an in-principle agreement, with a Deed of Settlement to be finalised and signed in the coming days' and sought that the hearing date be vacated, which was done;

AND WHEREAS the Commission, not having received a Notice of Discontinuance, asked the parties for updates on the matter on 25 September 2019, 10 October 2019, 16 October 2019 and 2 December 2019;

AND WHEREAS the Commission was informed that there was disagreement between the parties as to whether the matter was settled and the matter was consequently listed for a further conference on 1 April 2020;

AND WHEREAS, prior to the conference on 1 April 2020, the respondent provided documentation evidencing that the applicant's lawyer had agreed to settle the matter on 23 August 2019 if the respondent paid to the applicant the sum of \$18,500;

AND WHEREAS the applicant was unable at the conference, or in subsequent written submissions, to present a good reason why the settlement deal ought not be enforced; and

AND WHEREAS the respondent agreed to honour the deal if some time to pay were granted, on the basis that its financial circumstances have been affected by the various impacts of what is known as the "COVID-19 crisis";

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

1. By close of business on 1 June 2020, the respondent pay to the applicant the sum of \$18,500; and
2. Upon confirmation that the sum has been paid the matter will be dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2020 WAIRC 00184

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 THIERRY LIEBGOTT

PARTIES**APPLICANT**

-v-

NORTH METROPOLITAN TAFE

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE FRIDAY, 27 MARCH 2020
FILE NO/S U 39 OF 2020
CITATION NO. 2020 WAIRC 00184

Result Orders issued
Representation
Applicant Mr S Kemp (of counsel)
Respondent Ms J McCulloch (as agent)

Order

HAVING heard from Mr S Kemp, of counsel, for the applicant Ms J McCulloch, as agent, for the respondent during conference on 24 March 2020 in application APPL 9 of 2020;

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

1. Application U 39 of 2020 is accepted out of time pursuant to s 29(3) *Industrial Relations Act 1979*;
2. The Response filed 4 March 2020 in APPL 9 of 2020 stand as the Response in U 39 of 2020 unless a Response to U 39 of 2020 is filed by close of business, Wednesday 31 March 2020; and
3. The respondent provide informal discovery to the applicant by close of business, Tuesday, 7 April 2020.

(Sgd.) D J MATTHEWS,
 Commissioner.

[L.S.]

2020 WAIRC 00172

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 ELEESHA COOTE

PARTIES**APPLICANT**

-v-

SHIRE OF BROOKTON

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE MONDAY, 16 MARCH 2020
FILE NO. U 126 OF 2019
CITATION NO. 2020 WAIRC 00172

Result Direction Issued
Representation
Applicant Ms Michelle McDiarmid (of counsel)
Respondent Ms J McKenzie (of counsel)

Direction

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

1. THAT pursuant to direction 1 of Directions issued 28 February 2020, ([2020] WAIRC 00140) the respondent to resubmit and serve the affidavit by 4:00 pm on 25 March 2020;
2. THAT pursuant to direction 2 of Directions issued 28 February 2020, ([2020] WAIRC 00140) the respondent to file and serve its supplementary affidavit by 4:00 pm on 1 April 2020;
3. THAT the applicant file and serve submissions in response by 4:00 pm on 6 April 2020.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00177

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELEESHA COOTE

APPLICANT

-v-

SHIRE OF BROOKTON

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

TUESDAY, 17 MARCH 2020

FILE NO.

U 126 OF 2019

CITATION NO.

2020 WAIRC 00177

Result

Direction Issued

Representation**Applicant**

Ms Michelle McDiarmid (of counsel)

Respondent

Ms J McKenzie (of counsel)

Direction

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

1. THAT pursuant to direction 1 of Directions issued 28 February 2020, ([2020] WAIRC 00140) the respondent to resubmit and serve the affidavit by 4:00 pm on 25 March 2020;
2. THAT pursuant to direction 2 of Directions issued 28 February 2020, ([2020] WAIRC 00140) the respondent to file and serve its supplementary affidavit by 4:00 pm on 1 April 2020.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00192

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRADLEY JOHN WHITE

APPLICANT

-v-

CITY OF KALAMUNDA

RESPONDENT

CORAM

COMMISSIONER D J MATTHEWS

DATE

MONDAY, 6 APRIL 2020

FILE NO/S

U 168 OF 2019

CITATION NO.

2020 WAIRC 00192

Result	Orders issued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr V Kakara Atchamah (of counsel)

Order

HAVING heard from Mr K Trainer, as agent, for the applicant and Mr V Kakara Atchamah, of counsel, for the respondent by correspondence on Friday, 3 April 2020 and by consent;

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

- (1) The applicant file submissions in support of the Interlocutory Application, filed 25 March 2020, by close of business 30 April 2020;
- (2) The respondent file submissions in response to the Interlocutory Application, filed 25 March 2020, by close of business 28 May 2020;
- (3) The four-day hearing commencing 11 May 2020 is vacated;
- (4) The matter be listed for a four-day hearing not before 13 July 2020;
- (5) Costs, if any, be reserved; and
- (6) The parties have liberty to apply.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Metropolitan Cemeteries Board (Western Australia) Cemetery Employees Industrial Agreement 2020 AG 5/2020	03/27/2020	Metropolitan Cemeteries Board	The Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Commissioner D J Matthews	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2020 WAIRC 00188

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 30 APRIL 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00188
CORAM : PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T EMMANUEL - CHAIR
 MR D HILL - BOARD MEMBER
 MS L BRICK - BOARD MEMBER
HEARD : MONDAY, 24 FEBRUARY 2020
DELIVERED : TUESDAY, 31 MARCH 2020
FILE NO. : PSAB 10 OF 2019
BETWEEN : RACHEL CATHERINE TOWNES-VIGH
 Appellant
 AND
 NORTH METROPOLITAN HEALTH SERVICE
 Respondent

CatchWords	:	Public Service Appeal Board – Jurisdiction of the Public Service Appeal Board – Commissioner’s Instruction 23 – Fixed term contract – Appellant was not dismissed
Legislation	:	Section 80I(d) of the <i>Industrial Relations Act 1979</i> (WA) Part 11 Div 4 of the <i>Health Services Act 2016</i> (WA)
Result	:	Appeal dismissed
Representation:		
Appellant	:	In person
Respondent	:	Ms G Rosendorff (as agent)

Cases referred to in reasons:

Brocklehurst v Director General, Ministry of Justice (1994) 74 WAIG 2024

Civil Service Association of Western Australia Incorporated v Public Service Commission (1993) 73 WAIG 3003

Department of Justice v Lunn (2006) 158 IR 410

Thabano v CEO, Chemcentre Resources and Chemistry Precinct [2014] WAIRC 00537

Gallotti v Argyle Diamond Mines Pty Ltd [2003] WASCA 166; (2003) 83 WAIG 3053

Gallotti v Argyle Diamond Mines Pty Ltd Trading as Argyle Diamonds [2002] WAIRC 06828; (2002) 82 WAIG 3011

Jacobs v Commissioner of Police [2018] WAIRC 00375

Khayam v Navitas English Pty Ltd t/a Navitas English [2017] FWCFB 5162

Loh v Ms Elizabeth Macleod Chief Executive East Metropolitan Health Service [2017] WAIRC 00991; (2017) 97 WAIG 1871

Metropolitan (Perth) Passenger Transport Trust v Gersdorf (1981) 61 WAIG 611

Oliver v Malcolm Goff, Managing Director, Challenger TAFE [2006] WAIRC 05224

Reasons for Decision

- 1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).
- 2 Ms Townes-Vigh was employed by North Metropolitan Health Service (**Health Service**) on a series of fixed term contracts to work in contracts management.
- 3 After her final contract ended on 30 April 2019, Ms Townes-Vigh filed an appeal under s 80I(d) of the *Industrial Relations Act 1979* (WA) (**IR Act**) against what she says is the Health Service’s decision to dismiss her. In essence, Ms Townes-Vigh believes she was unfairly dismissed because the Health Service did not offer her a further fixed term contract or offer her a permanent position.
- 4 The Health Service says Ms Townes-Vigh was not dismissed. It argues she was employed on a fixed term contract that came to an end by the effluxion of time. Accordingly, there was no dismissal and the Board does not have jurisdiction to hear and determine Ms Townes-Vigh’s appeal.

What must the Board decide?

- 5 The Board must decide whether it has jurisdiction to hear and determine Ms Townes-Vigh’s appeal. To do this, the Board must decide whether Ms Townes-Vigh was dismissed.

Agreed background

- 6 In this matter, there are few facts in dispute between the parties. All material facts are agreed. The parties differ about what they say the Board should make of those facts.
- 7 Ms Townes-Vigh was employed as a government officer by the Health Service on a series of contracts from 4 August 2014 to 30 April 2019. There was no break in employment between any of the contracts.
- 8 Although the parties, the contracts themselves and the relevant industrial agreement refer to ‘fixed term contracts’, the parties agree that in fact the contracts were ‘outer limit’ contracts which provided for a maximum term of employment, with an ability for either party to end the contract by giving notice. For the parties’ ease of reference, the Board will refer to Ms Townes-Vigh’s contracts as fixed term contracts.
- 9 In September 2018, Ms Townes-Vigh wrote to the Health Service and requested that she be converted to a permanent employee under *Commissioner’s Instruction No. 23 – Conversion and appointment of fixed term contract and casual employees to permanency* (**Commissioner’s Instruction**). In March 2019, the Health Service agreed to review Ms Townes-Vigh’s fixed term employment and informed her that it ‘anticipates a decision will be made by 31 December 2019’.
- 10 Ms Townes-Vigh’s final fixed term contract came to an end on 30 April 2019. She was told by letter dated 29 April 2019 that she would not be offered a further contract because ‘a registrable employee has commenced a placement in the position and it is anticipated that consistent with Public Sector requirements that this employee will be permanently placed in the Senior Contract Manager role if the role is identified as being affordable and permanent as a result of the restructure that is occurring across NMHS Corporate.’

Evidence and submissions

Ms Townes-Vigh's evidence and submissions

11 Ms Townes-Vigh gave evidence that she hoped the Health Service would offer her permanent employment or a further fixed term contract. When she started work with the Health Service, she was told that the role she was doing would likely be made permanent in future. At one point in 2018, the role was advertised as a permanent role but the recruitment process was stopped before anyone was appointed to the role.

12 Ms Townes-Vigh referred to a letter she received dated 11 March 2019. It states:

COMMISSIONER'S INSTRUCTION NO 23: CONVERSION AND APPOINTMENT OF FIXED TERM CONTRACT AND CASUAL EMPLOYEES TO PERMANENCY – COMMENCEMENT OF REVIEW

The Public Sector Commissioner issued *Commissioner's Instruction No. 23: Conversion and appointment of fixed term contract and casual employees to permanency* (Instruction) which was effective on 10 August 2018. The Instruction requires North Metropolitan Health Service (NMHS) to review the fixed term contract and casual employment arrangements of employees employed on and from the date the Instruction took effect.

In accordance with clause 1.4 of the Instruction, NMHS notify [sic] you of the intention to commence this review on 11 April 2019. NMHS will undertake the review in accordance with the Instruction which is available on-line at the Public Sector Commission website (www.publicsector.wa.gov.au) and on the NMHS "HealthPoint" intranet site under Working@NMHS / Information for Managers & Employees / NMHS Permanency Review.

Paper copies of the Instruction will be made available on request and at presentations. You may also request an electronic version by emailing CI23.NMHS@health.wa.gov.au.

You will be advised of the interim findings and a proposed determination as soon as the review of your circumstances has been undertaken. Updates will be provided as information becomes available. Across NMHS these reviews will be undertaken on a rolling schedule of work units. An indicative timetable will be provided highlighting when your work area will be reviewed.

NMHS anticipates that a decision will be made by 31 December 2019.

You have the right to make a submission to support the review at the beginning of the process. You will have the opportunity to make a submission to support your claim for permanency following the review. It is our recommendation that you await advice of the interim findings.

Should you choose to make an early submission to support our review of your fixed term employment, you or your representative may do so within 30 working days of receiving this letter. Your submission should address the criteria in clause 2.1 of the Instruction and be sent to CI23.NMHS@health.wa.gov.au or via post addressed to CI 23 Project Team, QEII Medical Centre, R Block, Level 4 Nedlands WA 6009.

13 Ms Townes-Vigh says this letter gave her the impression that she would remain employed until the review was finished.

14 Ms Townes-Vigh gave evidence that because she did not agree to the end of the employment relationship, she was therefore dismissed. Ms Townes-Vigh also gave evidence about her length of service without any performance issues. When pressed by the Board about why she says she was dismissed, and asked to explain when and how her employment ended, Ms Townes-Vigh gave evidence that the letter she received on 29 April 2019 amounted to a dismissal.

15 In cross-examination, Ms Townes-Vigh conceded that there was no guarantee of employment beyond the expiry date of her fixed term contract but she said 'there was an obligation.' At various times during her testimony, Ms Townes-Vigh agreed that she had hope, rather than an expectation, about ongoing employment. While she was never promised or told that she would be permanently appointed to the role, she thought she would have a chance to apply.

16 Finally, Ms Townes-Vigh said she believes she was dismissed because the role involved working on a project that would continue until 2037. The extension of her argument seems to be that her employment could not end with effluxion of time because the project she worked on was ongoing.

Health Service's evidence and submissions

17 Ms Rose Richardson is a Human Resources Consultant for the Health Service. She gave evidence about Ms Townes-Vigh's fixed term contracts. Ten contracts were tendered into evidence. Ms Townes-Vigh confirmed that they were copies of her employment contracts.

18 All of the contracts refer several times to the contract being for a fixed period. They all include this acknowledgment: 'In signing this agreement you acknowledge that you have been contracted to this position for the above period only. Upon expiration of this fixed term contract there is no obligation on either party to enter into any further employment arrangement.'

19 Ms Richardson gave evidence that Ms Townes-Vigh had various fixed term contracts, the last two of which were at a lower pay level.

20 The Health Service argued that in every contract the parties expressly agreed that employment would end on a set date. The letter that it sent to Ms Townes-Vigh on 29 April 2019 did no more than confirm that Ms Townes-Vigh's employment would end on 30 April 2019 because of the parties' prior agreement. The content of the letter dated 11 March 2019 was sent to every employee. The Health Service was not required to keep Ms Townes-Vigh employed until the review was complete. After 30 April 2019, the Health Service had no obligation to offer Ms Townes-Vigh a new contract, and it did not.

21 The Health Service relies on *Oliver v Malcolm Goff, Managing Director, Challenger TAFE* [2006] WAIRC 05224, *Gallotti v Argyle Diamond Mines Pty Ltd* [2002] WAIRC 06828; (2002) 82 WAIG 3011 (*Gallotti (1)*); and *Gallotti v Argyle Diamond Mines Pty Ltd* [2003] WASCA 166; (2003) 83 WAIG 3053 (*Gallotti (2)*). It says these decisions confirm that the failure to offer a subsequent fixed term contract does not constitute a dismissal and that a contract coming to an end by the effluxion of time cannot be characterised as a dismissal.

Consideration

Jurisdiction of the Board

22 The Board does not have general jurisdiction to enquire into and deal with all industrial matters on application by an individual. For government officers employed by health services, generally the Board's jurisdiction is conferred by 80I of the IR Act and Part 11 Div 4 of the *Health Services Act 2016* (WA), as discussed in *Loh v Ms Elizabeth Macleod Chief Executive East Metropolitan Health Service* [2017] WAIRC 00991; (2017) 97 WAIG 1871 from [79] to [91].

23 Section 80I(1)(d) of the IR Act refers to the Board's jurisdiction to adjust an employer's decision to dismiss a government officer. It says:

80I. Board's jurisdiction

Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —

...

- (d) an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed,

...

and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).

24 The Board is not considering whether Ms Townes-Vigh should be made or should have been made permanent. To invoke the Board's jurisdiction, Ms Townes-Vigh must show that she has been dismissed.

What constitutes a dismissal?

25 It is clear from the authorities that a dismissal involves being sent away or removed from office, employment or position: *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611; *Gallotti (1)* at [55] – [62].

26 The Board is bound by *Gallotti (2)* and EM Heenan J's reasoning at [5]: 'There is ample authority for the proposition that the cessation of the relationship of employer and employee by the effluxion of an agreed term of employment is not a "dismissal" and at [7]: 'There will not be a dismissal where the term of a contract of employment expires'.

27 In *Jacobs v Commissioner of Police* [2018] WAIRC 00375 at [9], Commissioner Matthews considered that the Commission is not bound by *Gallotti (2)* where there are factors which genuinely and on their face reasonably invite consideration of circumstances beyond the four corners of the contract of employment.

28 In *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162, Mr Khayam argued that he was dismissed because although his fixed term employment contract came to end by the effluxion of time, the employer ended the employment relationship by choosing not to offer him a further contract of employment. The Fair Work Commission Full Bench considered that to determine whether a dismissal had occurred, the language of *Fair Work Act 2009* (Cth) required consideration of whether the employer terminated the employment relationship, not just the employment contract. This departed from the earlier reasoning in *Department of Justice v Lunn* (2006) 158 IR 410.

29 The Fair Work Commission Full Bench in *Khayam v Navitas English Pty Ltd t/a Navitas English* concluded:

[135] Considering all of the circumstances in this appeal, the evidence before the Commission simply does not establish that Navitas terminated the employment relationship between it and Mr Khayam. It did something altogether different; it decided not to enter into a new employment relationship. What brought the employment relationship between Mr Khayam and Navitas to an end was the expiry of the last outer limit contract by the effluxion of time, as the parties had agreed.

30 In *Jacobs v Commissioner of Police*, Matthews C considered at [15] that the meanings of 'dismissal' in WAIRC and Fair Work Commission contexts are similar enough that the Commission can have regard to *Khayam v Navitas English Pty Ltd t/a Navitas English*. He considered that in both jurisdictions, a key question is whether the actions of the employer resulted in the termination of the employment relationship. So, in the case of an employment relationship made up of a series of time limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts, the circumstances of the entire employment relationship (not just the employment contract) may be considered 'where there are factors which genuinely, and on their face, reasonably invite consideration of factors beyond the four corners of the contract of employment' (at [9]).

Are there factors that reasonably invite the Board to look beyond Ms Townes-Vigh's contracts of employment?

31 Ms Townes-Vigh asks that the Board look beyond the four corners of her contracts of employment because she had a reasonable expectation of ongoing employment. She says this is because she had been employed on a series of fixed term contracts, she had been told by the Health Service that her position would be advertised as a permanent position, and the Health Service was in the process of reviewing her request for permanency under the Commissioner's Instruction.

32 The Health Service says there is no ambiguity in the provisions in Ms Townes-Vigh's contracts of employment. The wording of the contracts does not give rise to an expectation of ongoing employment beyond the end date.

33 In *Civil Service Association of Western Australia Incorporated v Public Service Commission* (1993) 73 WAIG 3003, the Public Service Arbitrator considered the question of whether Ms Archer had been dismissed in circumstances where her fixed term contract was not renewed, and her request to be made a permanent employee in accordance with a Public Service Commission circular to Chief Executive Officers was not granted.

34 Fielding C concluded that:

I have already indicated in previous proceedings that neither the Applicant nor Ms Archer can claim that she was dismissed, let alone unfairly dismissed, by the Respondent from her employment. She was not dismissed. Rather, her contract of employment came to an end by the effluxion of time. It was not terminated by the Respondent or, indeed, by

anyone else. The Applicant may claim that she was unfairly refused further employment by the Respondent (see: Section 7(1) definition of "industrial matter" paragraph (c); and see too: *The Board of Management, Princess Margaret Hospital for Children v. The Hospital Salaried Officers Association of Western Australia (Union of Workers)* (1975) 55 WAIG 543 at 545 and *Terrigal Memorial Country Club Ltd v. The Federated Liquor and Allied Industries Employees' Union of Australia (NSW Branch)* (1993) AILR 61). However, apart from reliance on the provisions of the Circular, it is difficult to see how there is any merit in such a claim. From the outset she was informed that her position was a temporary one. Although the Chief Executive Officer of the Department was prepared to give her permanent status at Level 1, but not at Level 5, I accept that at no time did he or anyone else represent to Ms Archer that she would in fact be granted permanency. Rather, I find the position to be that she was at all material times aware that there were difficulties with her claim for permanency. Moreover, she was unequivocally engaged for a period of three years only and that was reconfirmed when she took up duties as an Industrial Officer. I am satisfied that nothing was said or done by or on behalf of the Respondent, apart from publishing the Circular to suggest to Ms Archer that her employment would be ongoing once her permanent, or otherwise, contract had expired. (3004)

35 In *Brocklehurst v Director General, Ministry of Justice* (1994) 74 WAIG 2024, where the appellant had conceded this point and the parties do not appear to have argued it, the Board commented at 2026:

We observe also that a failure to offer re-employment does not amount to a dismissal. When an employee accepts employment for a fixed term the employee must be taken to have consented to the position that the contract comes to an end on a specified day (see *Ex Parte Wurth; re Tully* (1954) NSW(SR) 47 at pp 59-60, 62-63; and see also *Ex Parte; Public Service Commissioner*; Unreported; Full Court of the Supreme Court of WA; 24/5/94; Rowland J at p 8). A decision not to offer a contract of employment does not constitute a "decision" that can be reviewed by the Public Service Appeal Board. (See *Ex Parte; Public Service Commissioner*; Unreported; Full Court of the Supreme Court of WA; 24/5/94 and see also *CSA v Public Service Commission* (1993) 73 WAIG 3003.

36 In *Thabano v CEO, Chemcentre Resources and Chemistry Precinct* [2014] WAIRC 00537, the Board, relying on *Brocklehurst v Director General, Ministry of Justice* and *Gallotti (2)* concluded that a failure or refusal to permanently appoint is not a decision to dismiss [26]. The Board stated at [28]:

'there was a decision not to renew the contract, however that is not a matter within the Board's jurisdiction.'

37 In this matter, the Board considers that the following factors weigh against Ms Townes-Vigh's argument that she was dismissed:

- every one of the contracts clearly stated that it was for a fixed term and the parties agreed that 'upon expiration of this fixed term contract there is no obligation on either party to enter into any further employment arrangement';
- no one promised Ms Townes-Vigh that she would be permanently appointed;
- Ms Townes-Vigh thought that she would need to apply for the permanent position when it was advertised and there was no guarantee she would be the successful candidate;
- Ms Townes-Vigh was being reviewed for permanency, but that process was not expected to finish during the term of her final contract; and
- there was no evidence that the Health Service had said or done anything that could reasonably lead to an expectation of ongoing employment.

38 In the circumstances of this matter, the failure to offer a subsequent contract is not a dismissal and nor is the contract coming to an end by effluxion of time. Unlike in *Jacobs v Commissioner of Police*, in this matter, even going beyond the four corners of the final fixed term contract, the Board is not persuaded that Ms Townes-Vigh was dismissed. Here, the failure to offer a subsequent contract is not a dismissal and nor is the contract coming to an end by effluxion of time.

39 Ms Townes-Vigh was employed on a series of fixed term contracts, with four different position numbers, five different position names and two different salary levels. Every contract was clear that employment was for a fixed term only. In every contract, the parties expressly agreed that the employment would end when the term came to an end. The letter dated 29 April 2019 did not remove or send Ms Townes-Vigh away from her office, employment or position. It merely confirmed that employment would end on 30 April 2019 in accordance with the parties' agreement, and that the Health Service would not offer Ms Townes-Vigh a further contract, as it was entitled to do.

40 Even though Ms Townes-Vigh wanted her employment to continue beyond the end of the final fixed term contract, on the evidence the Board cannot find that Ms Townes-Vigh was removed or sent away from employment. Rather, the Board finds that employment ended in accordance with what Ms Townes-Vigh and the Health Service agreed in February 2019 when they entered into the final fixed term contract. It was the effluxion of time in accordance with the parties' agreement, and not any action on the part of the Health Service, that resulted in the contract and the employment relationship ending. The Board must find that Ms Townes-Vigh was not dismissed.

Conclusion

41 The Board must dismiss this appeal for want of jurisdiction.

2020 WAIRC 00187

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 30 APRIL 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RACHEL CATHERINE TOWNES-VIGH

APPELLANT

-v-

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MS L BRICK - BOARD MEMBER**DATE**

TUESDAY, 31 MARCH 2020

FILE NO

PSAB 10 OF 2019

CITATION NO.

2020 WAIRC 00187

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Ms G Rosendorff

Order

HAVING heard from the appellant in person and Ms G Rosendorff (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

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

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2019 WAIRC 00306

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

CITATION	:	2019 WAIRC 00306
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	THURSDAY, 20 JUNE 2019
DELIVERED	:	FRIDAY, 21 JUNE 2019
FILE NO.	:	RFT 2 OF 2019
BETWEEN	:	T&H WILKES PTY LTD
		Applicant
		AND
		M.A. BUILDERS
		Respondent

Catchwords	:	<i>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 - Enforcement proceedings upheld – Undertaking accepted</i>
Legislation	:	<i>Industrial Relations Act 1917 (WA) ss 40A, 84A Owner Drivers (Contracts and Disputes) Act 2007 (WA) ss 45, 46(4)</i>
Result	:	Enforcement proceedings upheld
Representation		
Applicant	:	No appearance required
Respondent	:	Mr M Daqui

Reasons for decision

- 1 The Tribunal has of its own motion commenced these proceedings under s 45 of the *Owner-Drivers (Contracts and Disputes) Act 2007* (OD Act). The proceedings are in relation to the enforcement of a summons issued to the respondent to appear at a compulsory conference before the Tribunal on 11 June 2019.
- 2 An affidavit has been filed by Ms Lisbon, my Associate, on 19 June 2019. Ms Lisbon's affidavit sets out the background to the listing of the compulsory conference and the circumstances of the failure of Mr Daqui, a Director of the respondent, to appear at the compulsory conference. A copy of Ms Lisbon's affidavit has been provided to Mr Daqui and he took no issue with its content. In short, Mr Daqui submitted to the Tribunal that whilst he had recently suffered some health issues, he simply forgot the conference date and that was the reason he did not appear before the Tribunal in response to the summons. Mr Daqui was apologetic for his conduct and undertook to ensure that he complies with any further summonses issued by the Tribunal.
- 3 Based on Ms Lisbon's evidence the Tribunal is satisfied that the respondent was duly notified of the compulsory conference and without a reasonable cause, failed to appear. The Tribunal has, by s 46(4) of the OD Act, all of the powers and duties of the Full Bench of the Commission under ss 84A(4) to (8) of the *Industrial Relations Act 1979* (IR Act) for the purposes of enforcement. Under s 84A(4) of the IR Act, the Tribunal can have regard to the seriousness of any contravention or failure to comply, any undertakings that may be given by a person as to future conduct, and any mitigating circumstances.
- 4 As I have already mentioned, Mr Daqui on behalf of the respondent accepted his failure to appear as an oversight and was apologetic. He has undertaken to ensure that a summons will be complied with on any future occasion.
- 5 By s 40A of the IR Act, the Tribunal is empowered to do a number of things in the event that a contravention or failure to comply is proved. On the facts as stated in Ms Lisbon's affidavit as I have found them to be, and on the basis of Mr Daqui's submissions, the Tribunal is satisfied the contravention or failure to comply is proved. Where such is the case, the Tribunal may accept any undertakings given or, in the alternative, issue a caution or impose a penalty. In this case the Tribunal has decided to accept Mr Daqui's undertaking that he will comply with any future summonses issued by the Tribunal.

2019 WAIRC 00305

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

T&H WILKES PTY LTD

APPLICANT

-v-

M.A. BUILDERS

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE THURSDAY, 21 JUNE 2019
FILE NO/S RFT 2 OF 2019
CITATION NO. 2019 WAIRC 00305

Result	Order issued
Representation	
Applicant	No appearance required
Respondent	Mr M Daqui

Order

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

THAT the Tribunal accepts an undertaking from the respondent that it will comply with any future summonses issued by the Tribunal.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2019 WAIRC 00347

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

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION : 2019 WAIRC 00347
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : THURSDAY, 20 JUNE 2019
DELIVERED : FRIDAY, 5 JULY 2019
FILE NO. : RFT 2 OF 2019
BETWEEN : T&H WILKES PTY LTD
Applicant
AND
M.A. BUILDERS
Respondent

Catchwords : *Industrial Law (WA) – Owner-driver contract – Referral of dispute regarding outstanding payments – Principles applied – Order issued*

Legislation : *Civil Judgments Enforcement Act 2004*
Corporations Act 2001 (Cth)
Owner-Drivers (Contracts and Disputes) Act 2007, ss 3, 4(2), 5(2), 40(a)(i)
Owner Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010

Result : Declaration and order issued

Appearances:

Applicant : Mr A Dzieciol of counsel
Respondent : Mr M Daqui

Case(s) referred to in reasons:

Ram Holdings Pty Ltd v Kelair Holdings Pty Ltd [2018] WAIRC 00156; (2018) 99 WAIG 389

Reasons for Decision

- 1 A dispute exists between the applicant and the respondent in relation to the failure by the respondent to pay the balance of monies alleged to be owed under an owner-driver contract made in accordance with the terms of the *Owner-Drivers (Contracts and Disputes) Act 2007* (OD Act). The applicant maintains that the total contract sum for work to be performed was in the amount of \$3,135. An amount of \$2,000 was paid by the respondent to the applicant on or about 4 October 2018. The applicant claims the balance of the contract sum in the amount of \$1,135.
- 2 Mr Wilkes is the owner/Director of the applicant. The applicant is engaged in cartage contracting, mainly carting sand for the use in building construction. The business runs five trucks. The trucks vary in capacity from 24 to 33 tonnes. Mr Wilkes, as a Director, and therefore an officer of a body corporate for the purposes of the *Corporations Act 2001 (Cth)* gave evidence that his principal occupation is to drive one of the trucks for the applicant and to generally direct the work to be performed on behalf of customers. I am therefore satisfied that the applicant is an owner-driver for the purposes of s 4(2) of the OD Act.
- 3 I am also satisfied that in accordance with the decision of the Tribunal in *Ram Holdings Pty Ltd v Kelair Holdings Pty Ltd* [2018] WAIRC 00156; (2018) 99 WAIG 389, that despite the referral to the Tribunal under s 40(a)(i) of the OD Act being made after the termination of the owner-driver contract, the Tribunal has jurisdiction to deal with the applicant's claim.
- 4 Mr Wilkes further testified that in about July 2017 on the basis of a referral from another customer, A Plus Limestone, Mr Daqui of the respondent contacted him to supply sand for a building job in Darlington. (Mr Paul Smith from A Plus Limestone was also working on this particular job undertaking brickwork and the construction of a retaining wall). Mr Wilkes' evidence

- was that Mr Daqui contacted him by telephone and ordered building sand for the job. Mr Wilkes said that he quoted a price of \$17 per cubic metre, \$5 per cubic metre of which was for the sand and the balance, was for cartage.
- 5 It was Mr Wilkes' evidence that in accordance with the order placed by Mr Daqui, the applicant delivered building sand to the building site. Copies of invoices were tendered as exhibit A2. These tax invoices numbered 18515, 18516 and 18519 refer to the Darlington job address and record three deliveries of sand in the total amount of 190 square metres. Mr Wilkes testified that despite demanding payment, in accordance with a tax invoice dated 6 July 2017 tendered as exhibit A3, the respondent has only paid the sum of \$2,000. This amount was paid on about 4 October 2018.
- 6 Mr Daqui did not dispute the fact that he placed orders over the telephone for the applicant to deliver sand at the building site. It was Mr Daqui's contention, however, that Mr Smith of A Plus Limestone, who also ordered a finer sand from the applicant used for bricklaying, also used some of the sand ordered by the respondent to backfill the work performed in constructing the retaining wall. It was therefore Mr Daqui's view that his share of the purchase of the building sand of \$2,000 was a fair share and that Mr Smith of A Plus Limestone should be responsible for the balance.
- 7 Mr Smith also gave evidence. He said that he recalled the job in Darlington in July 2017. He was contracted to build a retaining wall. His evidence was that he did order 'brickie sand' from the applicant who he had used in the past for sand deliveries. His evidence also was he did not think that he ordered any other sand but was aware that Mr Daqui did pay for sand for his use on the building works. It was Mr Smith's evidence that he referred the respondent to the applicant and recommended the applicant as a supplier of sand. Mr Smith did say in his evidence that he used some of the sand that was delivered to the respondent on site. Mr Smith said that he received no contact from Mr Daqui about making any contribution towards the purchase price of the sand. This was confirmed by Mr Daqui, who said that he took no steps to contact Mr Smith either.
- 8 This case turns on the existence of an owner-driver contract, the parties to that contract and whether a debt under that contract is owing to the applicant. I am satisfied on the evidence that in or about July 2017 an oral owner-driver contract was entered into between the applicant and the respondent for the supply of building sand at the rate of \$17 per cubic metre. Furthermore, I am satisfied that the vehicles operated by the applicant were heavy vehicles for the purposes of s 3 of the OD Act and that whilst the contract entered into between the applicant and the respondent was for the supply of builders' sand, the services to be performed under the owner-driver contract predominantly related to the transportation of the sand for the purposes of s 5(2) of the OD Act. This is so given that of the total cost of \$17 per cubic metre, only \$5 per cubic metre of that amount was for the purchase of sand, with the balance being for cartage.
- 9 I am satisfied that the terms of exhibit A2 are evidence that the sand as ordered and transported to the Darlington building site were so delivered and the total value of the owner-driver contract was the sum of \$3,135. I am also satisfied on the evidence that on or about 4 October 2018, Mr Daqui paid to the applicant the sum of \$2,000, thus giving rise to an outstanding debt under the contract in the sum of \$1,135, as claimed by the applicant.
- 10 I appreciate that Mr Daqui felt somewhat aggrieved, given that it would appear on the evidence, that Mr Smith of A Plus Limestone did in fact use some of the builders' sand that was delivered to the site and that was ordered by the respondent for the respondent's purposes. However, despite this, the Tribunal's jurisdiction is limited to enforcing owner-driver contracts entered into between owner-drivers and hirers. There is no capacity under the OD Act or the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* for the institution of third party proceedings to cover monies that may be owed by others in the present circumstances. There could be no argument that there was no owner-driver contract between the respondent and A Plus Limestone.
- 11 Therefore, despite some sympathy I have for Mr Daqui's position and that he feels aggrieved that Mr Smith ought to have made some contribution towards the cost of the purchase of the sand and its transport to the building site, I am only able to enforce the owner-driver contract I have found to have existed on the evidence. I am satisfied that the respondent does owe the applicant the outstanding sum of \$1,135 plus interest. Accordingly, the Tribunal will order the respondent to pay the applicant the sum of \$1,135 plus interest at the rate of six per cent in accordance with the *Civil Judgments Enforcement Act 2004*, from the due date of the tax invoice dated 6 July 2017 being 5 August 2017, to the date of the hearing in the sum of \$125.

2019 WAIRC 00348

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

T&H WILKES PTY LTD

APPLICANT

-v-

M.A. BUILDERS

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

FRIDAY, 5 JULY 2019

FILE NO/S

RFT 2 OF 2019

CITATION NO.

2019 WAIRC 00348

Result	Declaration and order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr M Daqui

Declaration and Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr M Daqui 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 the respondent is indebted to the applicant in the sum of \$1,135.00
- (2) ORDERS the respondent to pay to the applicant the debt due plus interest in the total sum of \$1,260.00 within 14 days of the date of this order.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2019 WAIRC 00876

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

T&H WILKES PTY LTD

APPLICANT

-v-

M.A. BUILDERS

RESPONDENT

CORAM	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 17 DECEMBER 2019
FILE NO/S	RFT 2 OF 2019
CITATION NO.	2019 WAIRC 00876

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr M Daqui

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.