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FULL BENCH—Appeals against decision of Industrial Magistrate—

2020 WAIRC 00178

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 76/2018 GIVEN ON 28 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2020 WAIRC 00178
CORAM	:	SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	:	WEDNESDAY, 26 FEBRUARY 2020
DELIVERED	:	TUESDAY, 17 MARCH 2020
FILE NO.	:	FBA 2 OF 2020
BETWEEN	:	DR OLUMUYIWA SORUNMU Appellant AND DIRECTOR-GENERAL OF HEALTH First Respondent NORTH METROPOLITAN HEALTH SERVICE BOARD Second Respondent

ON APPEAL FROM:		
Jurisdiction	:	**Industrial Magistrate's Court**
Coram	:	**Industrial Magistrate D Scaddan**
Citation	:	**2019 WAIRC 00840**
File No	:	**M 76 of 2018**

Catchwords	:	Industrial Law (WA) – Appeal against decision of Industrial Magistrate to dismiss appellant's claim at first instance – Seeking Contract Completion Payment under cl 20(5) of the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* - Delay in filing Notice of Appeal - Extension of time sought to file Notice of Appeal – Notice of Appeal did not identify grounds – Appeal book not filed – Extension of time granted – Appeal book to be filed within seven days
Legislation	:	*Industrial Relations Act 1979* (WA) ss s 27(1)(n); 84(3) *Industrial Relations Commission Regulations 2005* regs 102(1), (2), (3), (10) *Health Practitioners Regulation National Law (WA) Act 2010* *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* reg 7(1)(h)
Result	:	Extension of time granted

Representation:

Counsel:		
Appellant	:	In person
Respondent	:	Mr R Andretich (of counsel)
Solicitors:		
Respondent	:	State Solicitors Office of Western Australia

Case(s) referred to in reasons:

Arpad Security Agency Pty Ltd v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1989) 69 WAIG 1287

Simonsen v Legge [2010] WASCA 238

Reasons for Decision

KENNER SC:

Background

1 On 28 November 2019 the Industrial Magistrates Court dismissed the appellant's claim that the respondent had failed to comply with cl 20(5) of the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013 in relation to a contract completion payment.

2 It was common ground before the court that the appellant was employed by the respondent as a medical practitioner on a series of fixed term contracts of employment from May 2003. The appellant's final fixed term contract of employment came to an end on 30 June 2016. It was also common ground that the appellant's registration as a medical practitioner with the Australian Health Practitioners Regulation Agency expired on 20 November 2015. The appellant was not successful in applying for registration in a limited area of need. From the time of the appellant's registration expiry to the cessation of his contract of employment on 30 June 2016, the appellant did not work for the respondent and he took both annual leave and later unpaid leave.

3 In the proceedings at first instance the respondent brought an application under reg 7(1)(h) of the Industrial Magistrates Court (General Jurisdiction) Regulations 2005, effectively seeking an order that the appellant's claim be dismissed. The learned Industrial Magistrate granted the respondent's application and dismissed the appellant's claim. The learned Industrial Magistrate considered the terms of cl 20(5) of the Agreement and concluded that on its proper construction, in accordance with the definitions set out in cl 8 of the Agreement a "medical practitioner" (as defined) must, in order to meet the requirements of cl 20(5) of the Agreement, be registered under the *Health Practitioners Regulation National Law (WA) Act 2010*. This was because a medical practitioner could not "seek" a new contract of employment on the expiry of a fixed term contract with the respondent, if the practitioner was not able to work as a medical practitioner by reason of not being registered under the *Health Practitioners Act*. By their nature, the proceedings before the court did not involve a full hearing of the issues in dispute.

4 Accordingly, as the reasoning went, given at the time of the cessation of the appellant's fixed term contract on 30 June 2016 the appellant was not so registered, he was not ready, willing and able to seek a new contract of employment with the respondent and therefore the appellant did not qualify for a Contract Completion Payment under cl 20(5) of the Agreement.

5 On 22 December 2019, three days outside of the time limit of 21 days under s 84(3) of the Act, the appellant lodged a Notice of Appeal against the decision of the court, dismissing his substantive claim. The Notice of Appeal was defective. It was not accepted for filing by the Registry until 9 January 2020, some 18 days outside of the 21 day time limit. Such an appeal "shall be instituted within 21 days from the date of the decision against which the appeal is brought": s 84(3) Act. By reg 102(1) of the *Industrial Relations Commission Regulations 2005*, which applies with any necessary modifications, to appeals from decisions of the Industrial Magistrates Court, an appeal to the Full Bench "may be commenced by filing a notice of appeal in the approved form". By the combined effect of s 84(3) of the Act and reg 102(1) of the Regulations, an appeal to a Full Bench from a decision of the Industrial Magistrates Court is "instituted" when it is filed in the Registry. In this case, this was on 9 January 2020.

6 As the Notice of Appeal was filed outside of the time limit prescribed by s 84(3) of the Act, for the Full Bench to entertain the appeal, the appellant must persuade the Full Bench that it should extend the prescribed 21 day time limit, under s 27(1)(n) of the Act, and the Full Bench has the power to do so: *Arpad Security Agency Pty Ltd v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1989) 69 WAIG 1287.

7 Additionally, the appellant has also failed to file appeal books, as required by reg 102(10) of the Regulations, in accordance with the requirements set out in reg 102(11A).

8 On 24 January 2020, the appellant filed a Form 1A - Multipurpose Form in which he sought an "extension of time". It is not entirely clear from the form itself what it is that the appellant seeks an extension of time for, although I note from Registry records that the appellant was given substantial assistance in the preparation of appeal books on 23 and 24 January 2020. The last day for the filing of the appeal books was 23 January 2020. I note from Registry records that on 23 January 2020 the appellant was given a copy of a Form 1A and a further copy again on 24 January 2020 and was informed by Registry staff that if he wished to seek an extension of time to file the appeal books, he would need to lodge the Form 1A, which the appellant then did. In the section of the form for reasons setting out the reasons for the request, the appellant referred to medical reasons and him undergoing eye treatment; blurred vision and required assistance to complete forms as he could not afford a lawyer.

In the hearing on the present issue of an extension of time, the appellant informed the Full Bench that the Form 1A was filed in order to seek an extension of time for both the Notice of Appeal and to file the appeal books.

Extension of time to file the appeal

9 The principles applicable to extensions of time to appeal were set out by the Court of Appeal (WA) in *Simonsen v Legge* [2010] WASCA 238. At par 8 of the judgment, Pullin, Newnes and Murphy JJA said:

> 8. The relevant matters to consider when a party seeks to extend the time for filing its notice of appeal include the following:
>
> (a) on the expiry of the time for appealing, the respondent has a vested right to retain the judgment unless the application for an extension of time is granted: *Gallo v Dawson* [1990] HCA 30; (1990) 64 ALJR 458, 459;
>
> (b) the grant of an extension of time under the rule is not automatic; the object of the rule permitting extensions of time is to ensure that the rules which fix time for the doing of acts do not become instruments of injustice; and the discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties: *Gallo v Dawson* (459);
>
> (c) nevertheless, the rules of court must, prima facie, be obeyed, and in order to justify a court in extending the time, there must be some material upon which the court can exercise its discretion: *Gallo v Dawson* (459);
>
> (d) there are, generally, at least four major factors to be considered, although they are not necessarily exhaustive in each case:
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) the prospects of the applicant succeeding in the appeal; and
>
> (iv) the extent of any prejudice to the respondent: *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, 198; *In de Braekt v Powell* [2007] WASCA 55 [11]; (2007) 33 WAR 389;
>
> (e) other factors may include whether the delay was intentional, or contumelious, or merely the result of a bona fide mistake or blunder, and whether the delay is that of the litigant or of its lawyers with which the litigant should not be saddled: *City of Canning v Avon Capital Estates (Australia) Ltd* [2009] WASCA 120 [33];
>
> (f) the length and reasons for the delay must be addressed by the applicant and the cogency of the explanation increases as the period of the extension sought increases: *Girando v Girando* (1997) 18 WAR 450, 454;
>
> (g) in relation to the third matter referred to in subpar (d) above, the time for appealing will not be extended unless the proposed appeal has some prospect of success; the converse of that proposition is not that time must be extended if an appeal has any prospect of success, but rather, the fact that an appeal has some prospect of success is a factor which is to be taken into account, together with all other relevant factors: *City of Canning v Avon Capital Estates (Australia) Ltd* [17]; and
>
> (h) similarly, it is not the law that, whenever an applicant demonstrates an arguable case, or even a strongly arguable case, in the absence of significant prejudice suffered by the respondent, an extension of time should be granted: *City of Canning v Avon Capital Estates (Australia) Ltd [16]*.

10 I adopt and apply this approach for the purposes of the present matter. In particular, the four factors to consider as set out at par 8(d) of the Court's judgment. Given that the respondent has a vested right to retain the decision at first instance, it is for the appellant to persuade the Full Bench that it should extend the time for filing the appeal.

11 As to the length of the delay, in this case the delay in filing the Notice of Appeal is some 18 days, which although not excessive, is not insignificant.

12 As to the reasons for the delay, the appellant says he experienced technical difficulties in filing the Notice of Appeal online, he says that the online version was completed within time, but he had to attend the Registry to file a Notice of Appeal in person.

13 The next issue to consider is the prospects of success of the appeal. This requires the Full Bench to reach a view that the appeal has some prospect of success, but as the Court of Appeal observed in *Simonsen* at par 8(g), this does not mean if this view is reached, time to appeal must be extended. It is a factor to be considered, along with the other matters.

14 An important factor in this respect is the grounds of appeal. It is the grounds of appeal that mark out the issues for determination by the Full Bench. As mentioned by the Court in *Simonsen* at par 9, albeit in the context of the requirements of the Court of Appeal Rules, the task of an appeal court is to identify error in the decision at first instance. Proper grounds of appeal guide the process of error identification.

15 The requirement for proper grounds of appeal in this jurisdiction is set out in regs 102(2) and (3) of the Regulations, which require an appellant to set out clearly and concisely the grounds of appeal and what alternative decision is sought. This needs to be done with some particularity. In this case, the Notice of Appeal in relation to what would otherwise be grounds of appeal says:

> Errors in law and facts were made in reaching this decision . the code of good faith as specified by the western Australian industrial relationst act(*sic)* of 1979 clause 42 C and essential facts of the situation with respect to my qualifications and experience, were ignored in reaching the decision.
>
> The two issues brought before the industrial magistrate court were the contract completion payment and accrued long service leave, both of which are provions (*sic)* under the AMA industrial agreement of 2013 clause 20, however, the smaller amount was paid in part and the other payment refused. Under the industrial agreement, both parties are subject to all not part of the agreement.
>
> Finally, my experience and qualifications, were adequate for registration but the empoyer (*sic)* decline to provide the administrative support that is mandatory under the contract signed with me. If employers are allowed to get away with this behaviour, it can be used to deny employees their legal entitlements.

16 These are not grounds of appeal. There is no attempt to identify any such alleged "errors in law and facts" asserted in the Notice. No attempt has been made to state how it was that the Industrial Magistrates Court made errors, for example in the interpretation of the Agreement or the requirements imposed by the *Health Practitioners Act* or any other matter. There is no indication how, if at all, the Industrial Magistrates Court mistook the facts as asserted in the appeal grounds. Simply put, from the Notice of Appeal, the Full Bench has no real idea what the appellant's complaint is about, concerning the learned Industrial Magistrate's decision.

17 However, at the hearing of the extension of time to appeal, the appellant was given an opportunity to explain what errors were alleged to have been made by the court, despite the grounds of appeal not elucidating the issues. Firstly, the appellant submitted to the Full Bench that he was treated unfairly and the respondent did not show good faith because the respondent would not give him a letter that he needed that contained an offer of a further contract for at least 12 months, that AHPRA required to progress his registration under the *Health Practitioners Act*. Without it the process could not be concluded. Secondly, the appellant contended that his contract did not end in June 2016 but earlier in February 2016, when he was unable to continue working as his registration had not been renewed, and he was forced to take leave from this time until 30 June 2016. As a result of this, the appellant said that under cl 20(10) and (11) of the Agreement, he was entitled to the Contract Completion Payment on his effective dismissal. Furthermore, this constituted the end of his contract, given the circumstances.

18 The relevant provisions of the Agreement are annexed as Schedule III to her Honour's reasons. Additionally, the relevant sections of the *Health Practitioners Act* are referred to also in her Honour's reasons. I am mindful that a key consideration in her Honour's decision was the proper construction of cl 20(5) of the Agreement, about which reasonable minds may differ. Constructional choices need to be made in cases of the present kind. It would be pre-emptive to dispose of the appeal, without the further opportunity for argument, especially as the proceedings at first instance were effectively summarily determined without a full trial on the merits. It may also be the case that with the opportunity to formulate argument on the appeal proper, the appellant may be able to persuade the Full Bench to reach an alternative view on the construction of cl 20(5), despite the apparent attraction of the conclusions reached by her Honour at first instance.

19 Having regard to the relatively short period of the delay in filing the Notice of Appeal, the reasons for the delay and that there may be an argument as to the proper construction of cl 20(5) of the Agreement, and in the absence of any identified prejudice to the respondent, other than having to respond to the appeal in due course, I am minded to grant an extension in this case. Given that the appellant has still not filed the appeal books, he will be required to do so within seven days. Orders now issue.

EMMANUEL C:

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

MATTHEWS C:

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

2020 WAIRC 00179

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR OLUMUYIWA SORUNMU
	APPELLANT
	-and-
	DIRECTOR-GENERAL OF HEALTH NORTH METROPOLITAN HEALTH SERVICE BOARD
	RESPONDENTS
CORAM	FULL BENCH SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 17 MARCH 2020
FILE NO/S	FBA 2 OF 2020
CITATION NO.	2020 WAIRC 00179

Result	Extension of time granted
Appearances	
Appellant	In person
Respondent	Mr R Andretich of counsel

Order

This appeal having come on for hearing before the Full Bench on 26 February 2020, and having heard the appellant on his own behalf and Mr R Andretich of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

1. THAT the time for filing the hearing appeal be and is hereby extended to 9 January 2020.
2. THAT the appellant file appeal books in accordance with regulation 102(10) of the Industrial Relations Commission Regulations 2005 by 4 pm on 24 March 2020.

By the Full Bench

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00198

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR OLUMUYIWA SORUNMU
	APPELLANT
	-v-
	DIRECTOR-GENERAL OF HEALTH NORTH METROPOLITAN HEALTH SERVICE BOARD
	RESPONDENTS
CORAM	SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 8 APRIL 2020
FILE NO.	FBA 2 OF 2020
CITATION NO.	2020 WAIRC 00198

Result	Directions issued
Representation	
Appellant	In person
Respondent	Mr R Andretich of counsel

Direction

Having heard the appellant in person, and Mr R Andretich of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act* 1979, hereby directs -

(1) THAT this appeal before the Full Bench be conducted on the papers.

(2) THAT by no later than 21 April 2020 the appellant file his full written submissions.

(3) THAT by no later than 5 May 2020 the respondent file its full written submissions.

(4) THAT by no later than 12 May 2020 the appellant file any written submissions in reply to those filed by the respondent.

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

By the Full Bench

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

2020 WAIRC 00288

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 76/2018 GIVEN ON 28 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00288
CORAM	**:**	SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 26 FEBRUARY 2020, TUESDAY, 17 MARCH 2020; WRITTEN SUBMISSIONS 21 APRIL 2020, 5 MAY 2020 AND 15 MAY 2020
DELIVERED	**:**	THURSDAY, 21 MAY 2020
FILE NO.	**:**	FBA 2 OF 2020
BETWEEN	**:**	DR OLUMUYIWA SORUNMU Appellant AND DIRECTOR-GENERAL OF HEALTH First Respondent NORTH METROPOLITAN HEALTH SERVICE BOARD Second Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Industrial Magistrate's Court**
Coram	**:**	**Industrial Magistrate D Scaddan**
Citation	**:**	**2019 WAIRC 00840**
File No	**:**	**M 76 OF 2018**

Catchwords	**:**	Industrial Law (WA) – Appeal against decision of Industrial Magistrate to dismiss appellant's claim at first instance – Seeking Contract Completion Payment under cl 20(5) of the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* – No error in reasoning of Industrial Magistrate – Appeal dismissed
Legislation	**:**	*Health Practitioners Regulation National Law (WA) Act 2010*
Result	**:**	*Appeal dismissed*
Representation:		
Appellant	**:**	In person
Respondent	**:**	Mr R Andretich of counsel

Reasons for Decision

1 An extension for time for the appellant to file the present appeal was granted by the Full Bench on 17 March 2020: *Dr Sorunmu v Director-General Department of Health and Anor* [2020] WAIRC 00178. The claim at first instance before the Industrial Magistrates Court was that the respondent had contravened or failed to comply with the terms of cl 20(5) of the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013*, in relation to a Contract Completion Payment.

Brief background

2 The brief background to the claim before the Industrial Magistrates Court is set out in my reasons in the extension of time application (Emmanuel and Matthews CC agreeing) where I observed:

> 2. It was common ground before the court that the appellant was employed by the respondent as a medical practitioner on a series of fixed term contracts of employment from May 2003. The appellant's final fixed term contract of employment came to an end on 30 June 2016. It was also common ground that the appellant's registration as a medical practitioner with the Australian Health Practitioners Regulation Agency expired on 20 November 2015. The appellant was not successful in applying for registration in a limited area of need. From the time of the appellant's registration expiry to the cessation of his contract of employment on 30 June 2016, the appellant did not work for the respondent and he took both annual leave and later unpaid leave.
>
> 3. In the proceedings at first instance the respondent brought an application under reg 7(1)(h) of the Industrial Magistrates Court (General Jurisdiction) Regulations 2005, effectively seeking an order that the appellant's claim be dismissed. The learned Industrial Magistrate granted the respondent's application and dismissed the appellant's claim. The learned Industrial Magistrate considered the terms of cl 20(5) of the Agreement and concluded that on its proper construction, in accordance with the definitions set out in cl 8 of the Agreement a "medical practitioner" (as defined) must, in order to meet the requirements of cl 20(5) of the Agreement, be registered under the Health Practitioners Regulation National Law (WA) Act 2010. This was because a medical practitioner could not "seek" a new contract of employment on the expiry of a fixed term contract with the respondent, if the practitioner was not able to work as a medical practitioner by reason of not being registered under the Health Practitioners Act. By their nature, the proceedings before the court did not involve a full hearing of the issues in dispute.
>
> 4. Accordingly, as the reasoning went, given at the time of the cessation of the appellant's fixed term contract on 30 June 2016 the appellant was not so registered, he was not ready, willing and able to seek a new contract of employment with the respondent and therefore the appellant did not qualify for a Contract Completion Payment under cl 20(5) of the Agreement.

Findings and conclusions at first instance

3 In considering the claim by the appellant that the respondent had contravened or failed to comply with cl 20(5) of the Agreement, the learned Industrial Magistrate relevantly found and concluded:

> (a) The court should proceed with caution before concluding that a claim (or part of a claim) should be dismissed at an interlocutory stage;
>
> (b) That the court should only do so where however the facts are found, there is no legal basis for the conclusion contended by a party;
>
> (c) A key fact, that being that the appellant was not registered with AHPRA as of 30 June 2016, was not in dispute;
>
> (d) By cl 8 of the Agreement "Medical practitioner' means a medical practitioner as defined under the *Health Practitioner Regulation National Law (WA) 2010* and "practitioner" means a medical practitioner employed under the Agreement;
>
> (e) That the *National Law* includes definitions of "medical practitioner" as a person registered under the *National Law* in the medical profession;
>
> (f) As the appellant was not registered as a registered health practitioner under the *National Law* in the medical profession, he was no longer entitled to practice in the profession from 20 November 2015 to 30 June 2016;
>
> (g) The purpose of a Contract Completion Payment under cl 20(5) of the Agreement was to compensate a practitioner who genuinely wished to and was able to be further employed in the public health service, by the health service, but is not able to do so;
>
> (h) The meaning of "practitioner" in the Agreement having regard to the terms of the *National Law* means a "*medical practitioner registered under the Health Practitioner Regulation National Law (WA) Act 2010";*
>
> (i) If a practitioner is, at the time of seeking a new fixed term contract with the respondent, not able to work as a medical practitioner because they are not registered under the *National Law*, then they cannot do that which the Agreement provides for i.e. to work as a medical practitioner in the public health system; and
>
> (j) Based on the foregoing, as an unregistered practitioner at the time of the expiry of his fixed term contract on 30 June 2016, the appellant was not eligible for a Contract Completion Payment under cl 20(5) of the Agreement.

4 There is no challenge to the findings and conclusions of the learned Industrial Magistrate as set out above.

5 The material in relation to the cessation of the appellant's final fixed term contract of employment is at AB33 - 34. The Australian Health Practitioner Health Regulation Agency certified on 19 October 2016 that the appellant's registration under the *National Law* had the status of "unregistered" as at 20 November 2015. This "Certification of Registration Status" was

before the court: AB47 - 48. Additionally, the Certificate records that in the period of registration from 21 November 2014 to 20 November 2015 the appellant was required to meet several conditions, one of which was that he had to pass several examinations.

6 In connection with these matters, by letter of 27 May 2016 the AHPRA set out the appellant's registration history and its reasons for refusing to grant the appellant further registration under the *National Law*. In the main, this was due to the appellant's failure to pass the required examinations in the period allowed: AB50 - 51.

Grounds of appeal

7 The appellant's grounds of appeal as set out in the notice of appeal accepted for filing in the Registry on 9 January 2020 are restated and they are as follows:

> Errors in law and facts were made in reaching this decision . the code of good faith as specified by the western Australian industrial relationst act(*sic)* of 1979 clause 42 C and essential facts of the situation with respect to my qualifications and experience, were ignored in reaching the decision.
>
> The two issues brought before the industrial magistrate court were the contract completion payment and accrued long service leave, both of which are provions(*sic)* under the AMA industrial agreement of 2013 clause 20, however, the smaller amount was paid in part and the other payment refused. Under the industrial agreement, both parties are subject to all not part of the agreement.
>
> Finally, my experience and qualifications, were adequate for registration but the empoyer (*sic)* decline*(sic)* to provide the administrative support that is mandatory under the contract signed with me. If employers are allowed to get away with this behaviour, it can be used to deny employees their legal entitlements.

8 At par 16 of the extension of time decision, as to the grounds of appeal, I said:

> These are not grounds of appeal. There is no attempt to identify any such alleged "errors in law and facts" asserted in the Notice. No attempt has been made to state how it was that the Industrial Magistrates Court made errors, for example in the interpretation of the Agreement or the requirements imposed by the *Health Practitioners Act* or any other matter. There is no indication how, if at all, the Industrial Magistrates Court mistook the facts as asserted in the appeal grounds. Simply put, from the Notice of Appeal, the Full Bench has no real idea what the appellant's complaint is about, concerning the learned Industrial Magistrate's decision.

9 I further observed at par 17 that in the course of the extension of time proceedings, the appellant was given an opportunity to explain what he contended were the errors in the decision of the Industrial Magistrate, those being that he was treated unfairly by the respondent; that the respondent failed to demonstrate good faith; and that when forced to take leave in February 2016, this constituted the end of his contract. No application has been made by the appellant to amend his grounds of appeal and they stand for the purposes of the disposition of the appeal.

Relevant provisions of the Agreement

10 It is convenient at this point to set out relevant provisions of the Agreement, considered by the court. Clause 20(5) provided:

> **20. Contract of Service**
>
> …
>
> (5) A practitioner, who upon expiry of a fixed term contract, is unsuccessful in seeking a new contract shall be paid a Contract Completion Payment equal to 10% of their final base salary, for each year of continuous service, or part thereof paid on a proportionate basis, calculated on completed months' of service up to a maximum of 5 years. No other termination, redundancy or severance payment shall be made except as provided for in this Agreement.
>
> …

11 Additionally, under cl 8 of the Agreement, definitions of "Medical Practitioner" and "Practitioner" were as follows:

> *"Medical Practitioner"* means a medical practitioner as defined under the Health Practitioner Regulation National Law (WA) Act 2010 as amended from time to time
>
> *"Practitioner"* means a medical practitioner employed under this Agreement

Contentions on the appeal

12 In his written submissions, as in the extension of time proceedings referred to above, the appellant maintained that the actions of the respondent were not fair in that in a manner not specified in his submissions, the respondent contravened its duty of good faith under s 42C of the Act. Furthermore, the appellant contended that the respondent deliberately decided to avoid responsibilities it had under the appellant's contract of employment. It was not said what those deliberate decisions were. The appellant also referred to various provisions of the Agreement, other than those providing for a Contract Completion Payment, none of which, however, are relevant for present purposes. The appellant also maintained, as he did in the extension of time proceedings, that whilst he was at the material time taking steps to obtain his specialist registration, he could not continue to do so because the respondent had not provided relevant documents.

13 The respondent contended that the appellant has not maintained any arguable grounds of appeal. The reference to good faith and s 42C of the Act are not relevant to the issues arising in this matter but are only relevant to bargaining for an industrial agreement under the legislation. The respondent further submitted that the other provisions of the Agreement referred to by the appellant were not relevant to his claim before the court.

14 As to the final reference to the supposed failure by the respondent to assist the appellant with the provision of documents, the respondent contended that there was no such obligation on the respondent under the appellant's contract of employment, whether express or implied. And such matters, were not in any event, relevant to his claim for a Contract Completion Payment under cl 20(5) of the Agreement. Also, the respondent pointed to the letter to the appellant from AHPRA of 27 May 2016 (AB50 - 51) which set out that the appellant had sufficient time to meet registration requirements and there was no mention in the letter of anything the respondent could or should have done.

15 In submissions in reply, albeit filed later than the Full Bench's directions permitted, the appellant reasserted his view as to the unfairness of the respondent's actions and that it did not provide relevant documents to enable him to complete the registration process. The appellant also referred to what he described as "administrative requirements for registration" by AHPRA under the *National Law* and that the failure of the respondent to provide him with a further 12 month contract was a reason that he was not able to complete his registration. The appellant also again referred to other provisions of the Agreement especially that relating to pro rata long service leave and added that the Agreement, as to a Contract Completion Payment, did not distinguish between a former or current practitioner.

Consideration

16 Having now given the appellant the opportunity to put his case, I am not persuaded that the appeal has any merit. The appellant has not ultimately challenged findings of fact made by the learned Industrial Magistrate or the conclusions that she reached in the interpretation of cl 20(5) of the Agreement, read with the relevant provisions of the *National Law*. The appellant has not attempted to do so. Matters raised by the appellant in his grounds of appeal and in his submissions, including those in the extension of time proceedings, are not relevant to the refusal of his claim for a Contract Completion Payment under cl 20(5) of the Agreement.

17 I consider that her Honour's reasoning as to the interpretation of the relevant provisions of the *National Law* and cl 20(5) of the Agreement, on the undisputed facts of this case, to be entirely correct. Her Honour made no error of principle and engaged in orthodox interpretation of both the relevant provisions of the legislation and the Agreement. As I have already said, it was not contended to the contrary by the appellant. Put simply, the appellant was not registered as a medical practitioner under the *National Law* on the expiry of his fixed term contract on 30 June 2016, under the Agreement. He had to be, under cls 8 and 20(5) of the Agreement, to be considered "A 'practitioner' who, upon expiry of a fixed term contract, is unsuccessful in seeking a new contract…". A person cannot seek a new fixed term contract under the Agreement, if they cannot work as a "practitioner" (as defined in the Agreement), due to not being registered. It was also plainly not the case that a former practitioner may have been eligible for a Contract Completion Payment. The eligibility was and could only have been a person who was a registered practitioner and who was able to practice in the health system in this State.

18 Whilst the appellant has maintained in these and the extension of time proceedings that the respondent acted unfairly towards him, which, I might add, was strongly denied by the respondent, these are not considerations relevant to whether the appellant was, as at the time of the cessation of his fixed term contract, entitled to a Contract Completion Payment under the Agreement. The entitlement to such a payment under the Agreement was the only matter the court was dealing with and the only matter that we can consider on this appeal from the decision of the court.

Conclusion

19 The appeal should be dismissed.

EMMANUEL C:

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

MATTHEWS C:

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

2020 WAIRC 00289

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR OLUMUYIWA SORUNMU
	APPELLANT
	-and-
	DIRECTOR-GENERAL OF HEALTH, NORTH METROPOLITAN HEALTH SERVICE BOARD
	RESPONDENTS
CORAM	FULL BENCH
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 21 MAY 2020
FILE NO/S	FBA 2 OF 2020
CITATION NO.	2020 WAIRC 00289

Result	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr R Andretich of counsel

Order

The appeal having come on for hearing before the Full Bench by written submissions filed on 22 April and 5 May 2020, and having heard the appellant in person, and Mr R Andretich of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

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

NOTICES—Award/Agreement matters—

2020 WAIRC 00310

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. APPL 25 OF 2020

APPLICATION FOR JOINDER OF PARTY TO THE

"DENTAL TECHNICIANS' AND ATTENDANT/RECEPTIONISTS' AWARD, 1982"

NOTICE is given that an application has been made to the Commission, on 25 May 2020, by the *Health Services Union Of Western Australia* and *David Bailey And Others* under the *Industrial Relations Act 1979* for it to be joined as a party to the above named Award.

The Application may be inspected at my office by appointment at 111 St Georges Terrace, Perth by any interested person without charge and any such person may, by giving written notice of objection to the Commission and to the applicant within 28 days of this notice, appear and be heard on the hearing of this application.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

15 June 2020

INDUSTRIAL MAGISTRATE—Claims before—

2020 WAIRC 00307

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00307
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 23 APRIL 2020
DELIVERED	**:**	THURSDAY, 4 JUNE 2020
FILE NO.	**:**	M 86 OF 2019
BETWEEN	**:**	DINI YUSDIANINGSIH

CLAIMANT

AND

ASHANI HOLDINGS PTY LTD

RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Small Claim under the *Fair Work Act 2009* (Cth) – Contravention of modern award – Claim for unpaid wages alleged to be owed under *Children's Services Award 2010* (Cth) – Construction of a term of an award – Deduction of one week's wages
Legislation	:	*Fair Work Act 2009* (Cth)
		Corporation Act 2001 (Cth)
		Taxation Administration Act 1953 (Cth)
		Industrial Relations Act 1979 (WA)
Instruments	:	*Children's Services Award 2010* (Cth)
Case(s) referred		
to in reasons:	:	***City of Wanneroo v Australian Municipal, Administrative, Clerical***
		Services Union (2006) 153 IR 426
		Kucks v CSR Ltd (1996) 66 IR 182
		Amcor Ltd v CFMEU [2005] HCA 10
		Mildren v Gabbusch [2014] SAIRC 15
		Miller v Minister of Pensions [1947] 2 All ER 372
		Briginshaw v Briginshaw [1938] HCA 34
Result	:	Claim is proven
Representation:		
Claimant	:	Self-represented
Respondent	:	Ms D. Parbat on behalf of the Respondent (as a director)

REASONS FOR DECISION

1 The Claimant, Ms Dini Yusdiantingshi, was employed as a Child Educator (Certificate III) by the Respondent, Ashani Holdings Pty Ltd, from 10 September 2018 to 8 November 2018 and she worked at the Ellenbrook Montessori Childcare Centre.

2 Both parties agree that the *Children's Services Award 2010* (Cth) (the Award) applies to the Claimant's employment by the Respondent.

3 The Claimant alleges the Respondent contravened the *Fair Work Act 2009* (Cth) (FWA) and the Award in failing to pay her ordinary wages from 22 October 2018 to 8 November 2018 contrary to the terms of the Award and the Claimant claims $954.99 in unpaid wages.

4 The Claimant elected the small claims procedure under s 548 of the FWA.

5 Schedule 1 of these reasons for decision outline the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC).

Background

6 The Respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operates a childcare business known as Ellenbrook Montessori Childcare Centre. The Respondent is a '***constitutional corporation***' within the meaning of that term in s 12 of the FWA, and is a '***national system employer***' within the meaning of that term in s 14(1)(a) of the FWA. The Claimant is an individual who was employed by the Respondent and is a '***national system employee***' within the meaning of that term in s 13 of the FWA.

7 The Claimant commenced employment with the Respondent on or around 10 September 2018 pursuant to a contract of employment[1] and the Award applied to her employment. I note the Claimant's first day of employment was 19 September 2018.[2]

8 Relevant to the Claimant's claim the contract of employment contained the following terms:

- the salary she was paid was at the rate of $22.04 per hour set under the Award and was to be paid fortnightly on a Friday week proceeding that fortnight; and
- the Respondent could terminate the Claimant's employment by giving notice or payment in lieu of notice of one week, where the Claimant was employed for less than one year, and the Claimant could be summarily dismissed if she was guilty of serious misconduct, violation of privacy or confidentiality.

9 The Claimant's employment was terminated on 8 November 2018. The Claimant was paid wages as follows:[3]

- for the week ending 21 September 2018 – $573.04 at $22.04 per hour;
- for the fortnight ending 5 October 2018 – $961.38 at $22.04 per hour; and
- for the fortnight ending 19 October 2018 – $1,206.69 at $22.04 per hour.

10 The Claimant worked the following hours and says that she was not paid wages for the work undertaken:[4]

- for the week ending 28 October 2018 – 10.75 hours;
- for the week ending 2 November 2018 – 17 hours; and
- for the week ending 9 November 2018 – 14.2 hours.

11 The Respondent did not provide a final pay slip upon the Claimant's termination of employment and only did so when it was ordered by the IMC.[5]

12 The Respondent agrees that it did not pay the Claimant for the hours worked between 22 October 2018 and 8 November 2018, but says that it was entitled to withhold $826.50 (and other amounts) in wages because the Claimant failed to give one week's notice prior to the termination of her employment in accordance with the FWA and cl 11 of the Award.

13 The Claimant denies that she failed to give notice of termination of employment, but says that upon her indicating to the Respondent that she intended to leave her employment with two weeks' notice, Ms Dhana Parbat (Ms Parbat), the director of the Respondent, terminated her employment on 8 November 2018.

Did The Claimant Give Notice Of Termination Of Employment?

14 The most significant factual issue in dispute is the circumstances surrounding the termination of the Claimant's employment on 8 November 2018.

Evidence

15 The Claimant states she indicated to Ms Parbat on 7 November 2018 that she wished to leave her employment after Ms Parbat was upset with her when a child broke a toy. She was supervising 12 children at the time. The Claimant said she told Ms Parbat that she would provide two weeks' notice and Ms Parbat told her to '*think about it*'. However, the Claimant says that Ms Parbat agreed the Claimant would provide a letter of resignation on 9 November 2018, as the Claimant was unable to get to a library to use a printer to print off the letter of resignation.[6]

16 On 8 November 2018, the Claimant attended work as rostered and at the completion of the day's work she was asked to attend Ms Parbat's office along with a supervisor, Ms Vimla Patel (Ms Patel). Ms Parbat was unhappy because the Claimant had told other staff members that she was leaving work, and Ms Parbat told her that they did not need her to work the next day. The Claimant says Ms Parbat forced her to sign a blue book to say that she was not giving notice.[7]

17 The Claimant says that she felt intimidated by Ms Parbat and Ms Patel to sign the blue book, because at the time they were standing either side of her and she was crying. Ms Parbat said to her that if she wanted to quit, then she was to go now and write this in the blue book. The Claimant says that she still thought she would be paid her salary. Ms Parbat said to her '*you need to be strong to be in childcare*' and Ms Patel said to her '*childcare not good for you*'.

18 The Claimant said the next day, 9 November 2018, was pay day and she believes that she was terminated at the end of her shift on 8 November 2018 because the Respondent never intended to pay her for the work she did. She understands that other employees were paid on 9 November 2018. Further, on 9 November 2018, she returned to the Respondent uniforms and a hat she paid for as a gesture of goodwill.

19 The Claimant says she made several attempts to demand payment of her wages, but Ms Parbat told her that because she did not provide notice of termination of employment her wages would not be paid. In addition, the Claimant says that she never received a final payslip and did not receive a copy of the contract of employment until she commenced the claim.

20 The Claimant posed the question of why would she walk out when she was due to be paid the following day and had not been paid for the previous fortnight's work.

21 The Claimant relied upon evidence of Ms Ruby Choudhary (Ms Choudhary) in support of the termination of her employment by the Respondent on 8 November 2018.[8]

22 The relevance of Ms Choudhary's evidence is that, consistent with the Claimant's evidence, the Respondent was late paying the staff for time worked from 22 October 2018 to 2 November 2018. Further, on 8 November 2018, Ms Choudhary worked with the Claimant in the kindy room of the childcare centre, and she said the Claimant was in a happy mood at work during the shift.

23 At about 4.30 pm on 8 November 2018, Ms Choudhary said she saw the Claimant in the Claimant's car in the carpark and the Claimant looked upset. Later that day she telephoned the Claimant and the Claimant told her what happened. Ms Choudhary maintained that she could see the Claimant from the small window in the nursery and maintained the Claimant looked upset.

24 The Claimant also relied upon a series a text messages between her and other work colleagues.[9] As explained during the hearing, the relevance of these text messages was the timing of the text messages rather than the truth of their content. That is, the timing of the text messages demonstrates shortly after the termination of her employment, the Claimant sent text messages to her work colleagues saying that her employment had been terminated.

25 Ms Parbat says the Claimant came to her on 7 November 2018 and said that she was going to quit, and she was not going to work her notice period. On 8 November 2018, the Claimant said the same thing and that was when Ms Parbat asked the Claimant to sign the blue book stating:[10]

> *To Ellenbrook Montessori,*
>
> *Today, 8 November 2018 It's My Last day today as I am not giving notice.*

26 Ms Parbat says the Claimant was given the chance to work her notice period, but she did not and she had no intention of doing so. Ms Parbat clarified that on 7 November 2018 the Claimant told Ms Parbat she was quitting and was not going to work her notice period and Ms Parbat said she told the Claimant to think about it. Ms Parbat says that she does not want to keep employees who do not want to work at the childcare centre, so she asked the Claimant to write it on paper.

27 Ms Parbat said that if an employee leaves without notice, the Respondent is entitled to withhold one week's pay and did so in the Claimant's case. Ms Parbat agreed the Respondent did not provide a final payslip until ordered by the IMC to do so,[11] and the Respondent withheld $826.50 in wages.

28 Ms Parbat said the Respondent did not pay the Claimant because she left without notice. Ms Parbat said she had no idea why the Claimant came to work on 8 November 2018, because the Claimant was determined to quit, and she did not want to work her notice period. Ms Parbat said the Claimant came to her on 8 November 2018, but then agreed she asked the Claimant to come to her office on the same day because the Claimant was saying that she was quitting.

29 In response to the question why Ms Parbat asked the Claimant to come to her office at the end of the shift, Ms Parbat said it was because the Claimant did not come to see her in the morning on 8 November 2018, so she waited. Ms Parbat denied waiting until the end of the shift to, in essence, extract a further day's unpaid work from the Claimant.

Determination

30 In terms of my assessment of the witness evidence, I do not consider Ms Parbat's evidence credible or truthful. Her evidence lacked consistency, and additionally I found it incredible that having had a conversation with the Claimant on 7 November 2018 about the Claimant leaving her employment that she would wait for the Claimant to come to her on 8 November 2018. Further to that, Ms Parbat conveniently waited until the end of the shift on 8 November 2018 when, on her evidence, the Claimant was determined to leave and leave without notice.

31 Further, the Respondent having not paid the Claimant for three weeks' work, on Ms Parbat's evidence, proceeds to deduct the whole of the Claimant's wages purportedly for one week's notice period. Thereafter, when the final payslip is produced it shows the amount sought by the Claimant, but varies the amount owed and claims other amounts, which when various deductions are made results in a zero-net balance to the Claimant. I have grave doubts about the authenticity of the final payslip.

32 Contrary to this, I consider the Claimant's evidence credible and truthful. While limited weight can be given to the content of the text messages and Ms Choudhary's evidence, this evidence is consistent with the Claimant's evidence that something happened at the end of the shift on 8 November 2018, which greatly upset the Claimant.

33 In addition, the Claimant's evidence concerning the Respondent's failure to pay her wages for the preceding period, unrelated to any notice period, and Ms Parbat waiting until the day before usual payment was due before invoking the termination of the Claimant's employment is compelling. In my view, it demonstrates questionable intent on the part of Ms Parbat on behalf of the Respondent.

34 Accordingly, I find Ms Parbat, on behalf of the Respondent, terminated the Claimant's employment on 8 November 2018 after the Claimant finished her shift, and after the Claimant had informed her on 7 November 2018 that she *intended* to resign by giving two weeks' notice with the resignation to take effect from 9 November 2018. I do not accept that on 8 November 2018 the Claimant terminated her employment with the Respondent.

35 Further, I find that the Claimant felt compelled to write a prejudicial note in Ms Parbat's blue book,[12] but the content of the note did not reflect the circumstances of her termination of employment and was written at the behest of Ms Parbat.

The Award

36 Ms Parbat stated the Respondent was entitled to withhold the Claimant's wages pursuant to cl 11 of the Award.

37 Relevant to the Claimant, cl 11.1(b) of the Award provides that an employee whose period of continuous service is less than one year, is to give one week's notice of termination of employment. Clause 11.1(d) of the Award provides that if an employee aged 18 years and over does not give the notice period required under cl 11.1(b), '*the employer may deduct from wages due to the employee under* [the Award] *an amount that is no more than one week's wages for the employee*'. Clause 11.1(e) of the Award provides that if the employer agrees to a short period of notice, '*then no deduction can be made*' under cl 11.1(d), and any deduction made under cl 11.1(d) '*must not be unreasonable in the circumstances*': cl 11.1(f) of the Award.

38 On the found facts, the Claimant did not terminate her employment with the Respondent, but Ms Parbat, on behalf of the Respondent, terminated the Claimant's employment on 8 November 2018. Prior to that the Claimant did no more than evince an intention to terminate her employment and did so intending to provide two weeks' notice to the Respondent from 9 November 2018 (which from the Claimant's perspective was a logical date given the fortnightly pay cycle).

39 Therefore, cl 11.1 of the Award has no application in the Claimant's circumstances.

40 However, had I found the Claimant terminated her employment on 8 November 2018, what would this mean in terms of the deduction made by the Respondent in the Claimant's final payslip?

41 Answering this question involves consideration of cl 11.1 of the Award.

42 The interpretation of an award begins with consideration of the natural and ordinary meaning of the words used.[13] An award is to be interpreted in light of its industrial context and purpose, and must not be interpreted in a vacuum divorced from industrial realities.[14] An award must make sense according to the basic conventions of English language.[15] Narrow and pedantic approaches to the interpretation of an award are misplaced.[16]

43 The deduction of wages by an employer provided in cl 11.1(d) of the Award is discretionary and must not be unreasonable, but even then it is limited to '*one week's wages <u>for the employee</u>*' (emphasis added). That is, to the extent that wages are deducted, the deduction is referrable to the particular employee, rather than to an average week's wage over a number of employees or to the minimum or maximum wage attributable to a class of employees of which the particular employee is a member.

44 As previously identified, the Claimant's final payslip purported to deduct $826.50 from the Claimant's wages where Ms Parbat said this was one week's wages for the Claimant. Yet, Ms Parbat agreed the Claimant had not been paid for three week's work, from 22 October 2018 to 9 November 2018 and the amount reflected in the final payslip was $927.44 for that time.

45 Therefore, on any view, and leaving aside the disingenuous attempt to conflate the final payslip, the amount of $826.50 deducted by the Respondent was in excess of one week's pay for the Claimant.

46 At best, having regard to the fortnightly pay cycle from 29 October 2018 to 9 November 2018, the Respondent, if it was entitled to do so, may have deducted $343.82[17] (15.6 hours at $22.04 per hour) or $312.97[18] (14.2 hours at $22.04 per hour) from wages due to the Claimant under the Award. Instead, the Respondent, in what can only be described as an egregious act of creative accounting, deducted all of the unpaid wages owed to the Claimant.

Outcome

47 Section 545(3) of the FWA enables an eligible State court (of which the IMC is an eligible State court) to '*order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:*

(a) the employer was required to pay the amount under this Act or a fair work instrument; and

(b) the employer has contravened a civil remedy provision by failing to pay the amount'.

48 Therefore, there are three preconditions to an order by the IMC under s 545(3) of the FWA:

(1) an amount payable by the employer to the employee;

(2) a requirement to pay the amount by reference to an obligation under the FWA or a fair work instrument; and

(3) the failure to pay constitutes a civil remedy provision under s 539(1) and s 539(2) of the FWA.

49 I note further that the Claimant elected the small claim procedure. Thus, the amount referred to in s 548(1)(a) and s 548(1A) of the FWA refers to '*an amount that an employer was required to pay to … an employee:*

(i) under [the FWA] *or a fair work instrument; or*

(ii) because of a safety net contractual entitlement; or

(iii) because of an entitlement of the employee arising under subsection 542(1)' of the FWA.

50 Pursuant to cl 19.3(a) of the Award the Respondent was required to pay to the Claimant '*no later than 7 days after the day on which the employee's employment terminates:*

(i) the employee's wages under [the Award] *for any complete or incomplete pay period up to the end of the day of termination*'.

51 I note the Claimant has forgone any other entitlements she may have otherwise been entitled to under the Award, where she was most concerned about being paid for work undertaken.

52 Having regard to the findings of fact made and to the application of those facts to the law, I am satisfied the Claimant has proven to the requisite standard the following:

- the Respondent failed to pay the Claimant for work undertaken from 22 October 2018 to the end of the day of termination, 8 November 2018, seven days after termination, and I am satisfied the amount owed remains outstanding;
- the Claimant worked 41.95 hours during this same period and the Respondent is required to pay to the Claimant the amount of $924.58 pursuant to cl 19.3(a) of the Award, and the Respondent contravened cl 19.3(a) of the Award in failing to pay this amount no later than seven days after the day of termination; and
- in contravening cl 19.3(a) of the Award, the Respondent has contravened a term of a modern award: s 45 of the FWA. Contravening a term of a modern award is a civil remedy provision: s 539(2) of the FWA, pt 2-1 item 1.

Result

53 I make the following order:

- Pursuant to s 545(3) of the FWA and subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), the Respondent is to pay to the Claimant the amount of $924.58 within 30 days of the date of this order.

D. SCADDAN
INDUSTRIAL MAGISTRATE

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[1] Exhibit 8 – Contract of employment.

[2] Exhibit 10 – Claimant's roster.

[3] Exhibit 3 – Payslips.

[4] Exhibit 10 and Claimant's evidence.

[5] Exhibit 7 – Final payslip.

[6] Exhibit 2 – Claimant's Chronology of Events and the Claimant's oral evidence.

[7] Exhibit 11 – Handwritten note date 8 November 2018.

[8] Exhibit 6 – Witness Statement of Ruby Choudhary dated 4 March 2020 and oral evidence.

[9] Exhibit 5 – Series of text messages on 8 November 2018.

[10] Exhibit 11.

[11] Exhibit 7.

[12] Exhibit 11.

[13] ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** (2006) 153 IR 426, 438.

[14] ***City of Wanneroo***, 438 and 440.

[15] ***City of Wanneroo***, 440.

[16] ***Kucks v CSR Ltd*** (1996) 66 IR 182; ***Amcor Ltd v CFMEU*** [2005] HCA 10.

[17] The Claimant worked 17 hours in the week 29 October 2018 to 2 November 2018 and 14.2 hours in the week 5 to 9 November 2018. This methodology averages the hours worked over two weeks.

[18] This methodology uses the hours worked from 5 to 9 November 2018.

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The *Fair Work Act 2009* (Cth)

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory Court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.

[2] The Industrial Magistrates Court (WA) (IMC), being a court constituted by an industrial magistrate, is '***an eligible State or Territory court***': FWA, s 12 (see definitions of '***eligible State or Territory court***' and '***magistrates court***'); *Industrial Relations Act 1979* (WA), s 81 and s 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.

[4] The civil penalty provisions identified in s 539 of the FWA include contravening a term of a modern award: FWA, s 44(1).

[5] An obligation upon an '***employer'*** is an obligation upon a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 12, s 14, s 42 and s 47. A National Employment Standard entitlement of an employee is an entitlement of an '***employee'*** who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed by a national system employer*': FWA, s 13, s 42 and s 47.

Contravention

[6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for an *employer* to pay to an employee an amount that the employer was required to pay under the modern award: FWA, s 545(3)(a).

[7] The civil penalty provisions identified in s 539 of the FWA include:

- The Core Provisions (including a Modern Award) set out in pt 2-1 of the FWA: FWA, s 61(2) and s 539.
- An '***employer'*** has the statutory obligations noted above if the employer is a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 12 and s 14. The obligation is to an '***employee'*** who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed … by a national system employer*': FWA, s 13.

[8] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:

- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3).

[9] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible state or territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: ***Mildren v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

[10] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

> *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

[11] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336:

> *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences* [362].

2020 WAIRC 00316

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00316
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 11 JUNE 2020, ON THE PAPERS
DELIVERED	**:**	THURSDAY, 11 JUNE 2020
FILE NO.	**:**	M 130 OF 2018
BETWEEN	**:**	GAVIN SMITH

CLAIMANT

AND

SILKWOOD HOLDINGS (WA) PTY LTD AS TRUSTEE FOR THE DIABLO DISCRETIONARY TRUST T/A DOUGLAS JONES FINANCIAL SERVICES

RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of *Fair Work Act 2009* (Cth)
Legislation	**:**	*Fair Work Act 2009* (Cth)
		Fair Work Regulations 2019 (Cth)
		Industrial Relations Act 1979 (WA)
		Crimes Act 1914 (Cth)
Instrument	**:**	*Clerks – Private Sector Award 2010* (Cth)
Case(s) referred to in reasons	**:**	***Smith v Silkwood Holdings (WA) Pty Ltd*** [2020] WAIRC 00275
		Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd [2019] FCA 1960
		Stratton Finance Ltd v Webb [2014] FCAFC 110
		Ambrosini v Grandbridge & Anor [2019] WAIRC 00210
		Fair Work Ombudsman v Maritime Union of Australia (No 2) [2015] FCA 814
		Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate [2015] HCA 46
		Trade Practices Commission v CSR Ltd [1990] FCA 521
		Miller v Minister of Pensions [1947] 2 All ER 372
		Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
		Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2) [2017] FCA 557
		Kelly v Fitzpatrick [2007] FCA 1080; 166 IR 14
		Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
		Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008)165 FCR 560
		Rocky Holdings Pty Ltd v Fair Work Ombudsman [2014] FCAFC 62; (2014) 221 FCR 153
		Fair Work Ombudsman v South Jin Pty Ltd (No 2) [2016] FCA 832
		Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2) [2016] FCA 244
		Sayed v Construction, Forestry, Mining and Energy Union [2016] FCAFC 4
		Gibbs v The Mayor, Councillors and Citizens of City of Altona [1992] FCA 553
Result	**:**	Pecuniary penalty to be paid
Representation:		
Claimant	**:**	Mr P. Mullally (Industrial Agent)
Respondent	**:**	Mr D. Jones (Director) on behalf of the Respondent

SUPPLEMENTARY REASONS FOR DECISION

1 On 15 May 2020, the Respondent was found to have contravened s 44 of the *Fair Work Act 2009* (Cth) (the Act) in that the Respondent failed to pay Mr Gavin Smith (the Claimant) untaken paid annual leave upon termination of employment,[1] and in doing so failed to comply with the National Employment Standards (NES) and contravened a civil remedy provision.

2 The Respondent was ordered to pay $33,244 in accrued untaken annual leave.[2]

3 Further, the Respondent was found to have contravened s 535(1) and s 536(1) of the Act in failing to keep and maintain certain prescribed records of employment and failing to provide pay slips during the course of the Claimant's employment,[3] and contravened a civil remedy provision.

4 In ***Smith v Silkwood Holdings (WA) Pty Ltd*** [2020] WAIRC 00275 the Industrial Magistrates Court of Western Australia (IMC) provided its reasons for decision in respect of the claim under the Act, the Respondent's contraventions and the court's construction of the *Clerks – Private Sector Award 2010* (which was found not to apply to the Claimant). In addition, the court determined the Claimant's entitlement under the *Long Service Leave Act 1958 (WA)* (LSL Act), exercising its state jurisdiction.

5 These supplementary reasons are in relation to an application by the Claimant for a pecuniary penalty pursuant to s 546(1) of the Act.

6 The parties each provided an outline of written submissions on the payment of a pecuniary penalty.

7 Schedule I of these supplementary reasons outline the jurisdiction, standard of proof and practice and procedure of the IMC.

8 Schedule II of these supplementary reasons outline the provisions of the Act and principles relevant in determining an appropriate pecuniary penalty (if any) for the Respondent's contraventions.

Payment Of A Civil Penalty

9 The effect of s 557(1) of the Act is that two or more contraventions of the Act are taken to constitute a single contravention if they are committed by the same person and arose out of a course of conduct by that person.

10 I am satisfied having regard to the findings made in the substantive decision that there was a single course of conduct by the Respondent in failing to pay untaken paid annual leave, and this failure will be treated as one single contravention.

11 I intend to deal with the other contraventions relating to failing to keep and maintain employment records and failing to provide pay slips as two separate single contraventions.

12 The maximum penalty with respect to a contravention of s 44 of the Act by the Respondent is 60 penalty units which equates to a maximum penalty $63,000 given the Respondent is a body corporate.[4]

13 The maximum penalty with respect to each contravention of s 535 and s 536 of the Act by the Respondent is 60 penalty units which equates to a maximum penalty $63,000 given the Respondent is a body corporate.[5] A '***serious contravention***' attracts a maximum penalty of 600 penalty units or $630,000 where the Respondent is a body corporate.

The Claimant's Submissions

14 In summary, the Claimant submits that:

- the amount of untaken paid annual leave and long service leave has been outstanding for over two years;
- the employment relationship was a lengthy one;
- the failure to keep and maintain certain employment records and to provide payslips when to the heart of the failure to regulate employment contemplated by the NES;
- the absence of record keeping over a long period of time is serious and shows a cavalier disregard of the Respondent's obligation noting the Respondent's business is in financial services;
- however, the lack of record keeping and provision of pay slips shows a systemic failure on the Respondent's part;
- the Respondent's business is owned and operated by the Respondent's director and the Respondent's director admitted not providing pay slips to other previous employees;
- therefore, the Respondent's failure to provide pay slips extends beyond the individual and is a matter of public policy and public interest and supports a finding that it was a '***serious contravention***';
- the non-payment of long service leave is a contravention of s 323(1) of the Act where it is an entitlement payable in relation to work and a finding ought to be made that it was a '***serious contravention***' where it was deliberate conduct on the part of the employer; and
- the Claimant has been put to the time and expense of a hearing to determine his entitlements.

15 The Claimant characterises the Respondent's conduct as between the low-mid to mid-range in seriousness and suggests penalties as follows:

- failing to pay untaken paid annual leave upon termination of employment - $5,000;
- contravention of s 535(1) of the Act - $6,000;
- contravention of s 536(1) of the Act - $45,000 (as a '***serious contravention***'); and
- contravention of s 323 (1) of the Act (for failing to pay long service leave) - $45,000 (as a '***serious contravention***').

16 Principles of totality ought to apply with a suggested reduction but no global reduction.

The Respondent's Submissions

17 In response and in summary, the Respondent submits:

- the Respondent has no previous records of contravening any award or other industrial law;
- during the Claimant's employment period, the Claimant was predominantly the only employee;
- the first time the Respondent was made aware that there was an issue with respect to the Claimant's employment was when the Respondent was presented with a letter of demand in December 2017;
- the Respondent does not currently employ any employees and, accordingly, personal deterrence is less relevant;
- while the IMC found otherwise, the Respondent genuinely believed there was no issue related to annual leave or the provision of employment records during the course of the Claimant's employment where the issue was never raised by the Claimant and where the Respondent genuine believed it had provided all entitlements;
- while the Respondent did not provide the Claimant with pay slips, in all other respects the Respondent provided annual and other regular records to the Claimant, including gross salary, income tax deductions, superannuation, bonus report sheets and annual leave closure periods;
- at no time did the Respondent seek to exploit the Claimant or exploit the employer's position over an employee;
- the Respondent's conduct should be characterised as a single course of conduct;
- the Respondent is a small business, akin to a sole trader, with a turnover of $160,000 per annum;
- the contraventions were not deliberate but arose as a lack of understanding and appreciation of certain obligations under the Act. However, the Respondent did provide the Claimant with other records and documents relevant to his wages and deductions;
- the Respondent should not be prejudiced for defending the Claimant's claim and, in doing so, did not unnecessarily waste the IMC's or the Claimant's time. The Respondent complied with the IMC processes. Further, the Respondent made several offers to settle the Claimant's claim. I also note that part of the Claimant's claim was unsuccessful;
- the Respondent does not hold a high community profile, nor does it conduct trade and commerce, nor were the breaches intention, and therefore general deterrence has limited relevance in this case;
- the nature and extent of the contraventions overall were at the lower end of the spectrum and any penalty should be similarly at the low or non-existent end of the scale; and
- the Respondent is already crushed.

Relevance Of The Claimant's Submission On S 323 Of The Act As It Relates To Long Service Leave

18 The Claimant seeks a civil penalty under the Act in relation to the Respondent's failure to pay pro rata long service leave under the LSL Act. The Claimant submits that s 323(1) of the Act was contravened by the Respondent by failing to pay in full to the Claimant 'amounts payable … in relation to the performance of work' concerning the non-payment of pro rata long service leave.

19 There are a number of difficulties with respect to the Claimant's submission:

- the Claimant's claim never alleged a contravention of s 323 of the Act because of the Respondent's failure to pay in full the Claimant's pro rata long service leave;
- thus, there is no finding that there has been a contravention of s 323 of the Act. The only finding made relevant to long service leave was that the Claimant was entitled to the payment of pro rata long service leave upon termination of his employment and the amount he was owed;
- further, the finding as to the amount owed in relation to long service leave was made under the LSL Act,[6] rather than an amount owed under the Act or a fair work instrument;[7]
- therefore, leaving aside the arguable lack of procedural fairness to the Respondent in now introducing a new cause of action and contravention under the Act, the IMC cannot order the payment of a pecuniary penalty under s 546(1) of the Act in relation to the non-payment of long service leave under the LSL Act; and
- in addition, an order for the payment of a pecuniary penalty is a discretionary order. Even if I was satisfied that the non-payment of state long service leave under the LSL Act was capable of being considered a contravention of s 323 of the Act, I would decline to exercise my discretion in ordering the payment of a pecuniary penalty where the Claimant never litigated his claim alleging a contravention of s 323 of the Act.

20 In that respect, I note by way of comment only that, in my view, there exists considerable doubt whether s 323 of the Act applies to the non-payment of a state based entitlement such as that under the LSL Act. To the extent there is some other commentary on this issue, s 323 of the Act was considered in the context of a long service leave entitlement under other Commonwealth legislation[8] or in the context of an unpaid annual leave entitlement under the Act[9] or in the context of an unsuccessful claim where the state entitlement did not appear to be fully argued.[10] In any event, in the Claimant's claim the application of s 323 of the Act to a state entitlement, such as long service leave under the LSL Act, was not argued at all.

Determination

21 The following considerations are significant in assessing penalties in this case:

- the determination of the claim, in part, required consideration and construction of the Award and its applicability to the Claimant (the IMC found that the Award did not apply);
- there was a fundamental disagreement between the parties of various issues determined by the IMC;
- the Respondent's lack of record keeping contributed to outcome of the Claimant's claim. This was underscored primarily by ignorance of the Act and its requirements and complacency most likely because, for the relevant time period, the Respondent employed one employee who worked from home. Of course, any underpayment or non-payment has serious consequences for the Claimant and must be treated accordingly by the IMC;
- however, the more sinister character attributed by the Claimant to the Respondent in terms of the conduct being deliberate and, in some way, designed to foil the Claimant is not borne out;
- the lack of contrition is not an aggravating circumstance which might increase the penalty;[11]
- there is no evidence the Respondent either 'exploited' the Claimant or 'profited' from its 'exploitation' of the Claimant;
- the Respondent has not been found to have previously contravened the Act;
- the Respondent operates a small business and no longer employs employees. Therefore, the need for specific deterrence is low; and
- while there was a course of conduct because of the failure of the Respondent's to keep records and provide pay slips, the Respondent otherwise paid wages and maintained other records associated with the Claimant's employment. Therefore, in that sense the Respondent did not attempt to 'hide' any contraventions.

22 While criminal penalties import notions of retribution and rehabilitation, the primary purpose of a civil penalty is to promote the public interest in compliance with the law and not as an additional award of compensation for financial or emotional stress, hurt feelings, inconvenience or legal fees.[12]

23 Considering the above, while considerations of punishment and specific deterrence are of importance, it is perhaps of less importance in this case than the need to ensure employers maintain and provide proper records, thus adhering to the requirements of the Act. There is benefits for both employer and employer if the employer does so.

24 Notwithstanding this, I do not accept that the Respondent's contravention of s 536(1) of the Act is a '***serious contravention***', albeit the Respondent did not provide the Claimant with any pay slips over the course of the Claimant's employment.

25 In my view, the Respondent's conduct in all the circumstances is properly categorised in the low range. Further, I have regard to the size of the Respondent's business and capacity to pay.

26 For these reasons, and having regard to principles of totality, penalties fixed in the sum of:

- $5,000 for the failure to pay untaken paid annual leave upon termination of employment in accordance with the terms of the NES and the Act;
- $4,000 for failing to provide pay slips; and
- $2,000 for failing to keep and maintain the prescribed employment records,

is a proportionate reflection of the gravity of the contravening conduct by the Respondent.

27 The Claimant seeks an order pursuant to s 546(3)(c) of the Act that the penalties be paid to him and an order is made that the Respondent pay a pecuniary penalty of $11,000 to the Claimant.

Orders

28 Having heard from the parties, the Respondent is ordered to pay to the Claimant a pecuniary penalty of $11,000 in respect of the contraventions of the Act.

D SCADDAN

INDUSTRIAL MAGISTRATE

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[1] Contravening s 90(2) of the Act.

[2] Contravening s 44 of the Act by failing to comply with s 61 of the Act (NES) – item 2 of the Civil Remedy Provisions in s 539(2) of the FWA.

[3] Regulation 3.32, reg 3.33 and reg 3.34 of the *Fair Work Regulations 2009* (Cth) (the Regulations).

[4] Section 546(2)(b) of the Act.

[5] Section 546(2)(b) of the Act.

[6] ***Smith v Silkwood*** [146].

[7] Section 545(3) of the Act.

[8] ***Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd*** [2019] FCA 1960.

[9] ***Stratton Finance Ltd v Webb*** [2014] FCAFC 110.

[10] ***Ambrosini v Grandbridge & Anor*** [2019] WAIRC 00210.

[11] ***Fair Work Ombudsman v Maritime Union of Australia*** (No 2) [2015] FCA 814.

[12] ***Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate*** [2015] HCA 46 [55] (referring to ***Trade Practices Commission v CSR Ltd*** [1990] FCA 521).

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The Fair Work Act 2009 (Cth)

Jurisdiction

1. An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the Act. The Industrial Magistrates Court (WA) ('IMC' or 'the Court'), being a court constituted by an industrial magistrate, is '***an eligible State or Territory court***': s 12 of the Act (see definitions of '***eligible State or Territory court***' and '***magistrates court***'); *Industrial Relations Act 1979* (WA), s 81 and s 81B.

2. The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the Act.

3. The civil penalty provisions identified in s 539 of the Act include:

   - Section 44 of the Act;
   - Section 535 of the Act; and
   - Section 536 of the Act.

4. An '***employer***' has the statutory obligations noted above if the employer is a '***national system employer***' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': s 14 and s 12 of the Act. The obligation is to an 'employee' who is a '***national system employee***' and that term, relevantly, is defined to include 'an individual so far as he or she is employed by a national system employer': s 13 of the Act. It is not in dispute and it was found that the Respondent is a corporation to which paragraph 51(xx) of the Constitution applies and that the Claimant was employed by the Respondent.

5. Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:

   - A person to pay a pecuniary penalty: s 546 of the Act.

Burden and standard of proof

6. In an application under the Act, the Claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

   > *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

7. In the context of an allegation of the breach of a civil penalty provision of the Act it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336:

   > *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.* [362]

8. Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

Schedule II: Pecuniary Penalty Orders under the Fair Work Act 2009 (Cth)

Pecuniary Penalty Orders

9. The Act provides that the Court may order a person to pay an appropriate pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision: s 546(1). The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the Act: s 546(2) of the Act. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the Act.

10. The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the Act. The relevant rate is that applicable at the date of the contravening conduct:

Before 28 December 2012	$110
Commencing 28 December 2012	$170
Commencing 31 July 2015	$180
Commencing 1 July 2017	$210

11. The purpose served by penalties was described by Katzmann J in ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557 [338] in the following terms (omitting citations):

> *In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose.*

12. In ***Kelly v Fitzpatrick*** [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following 'non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty' which had been set out by Mowbray FM in ***Mason v Harrington Corporation Pty Ltd*** [2007] FMCA 7:

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*
- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*
- *Whether the party committing the breach had cooperated with the enforcement authorities.*
- *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
- *The need for specific and general deterrence.*

13. The list is not 'a rigid catalogue of matters for attention. At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations'. (Buchanan J in ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; (2008)165 FCR 560 [91]).

14. 'Multiple contraventions' may occur because the contravening conduct done an employer:

(a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;

(b) was done once only or was repeated; and

(c) was done with respect to a single employee or was done with respect to multiple employees.

15. The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the Act. It provides that two or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on s 323 on the payments) by an employer are taken be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a 'course of conduct', the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: ***Rocky Holdings Pty Ltd v Fair Work Ombudsman*** [2014] FCAFC 62; (2014) 221 FCR 153; ***Fair Work Ombudsman v South Jin Pty Ltd (No 2)*** [2016] FCA 832 [22] (White J) The section does not to apply to case where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557 [411] (Katzmann J).

16. The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions: ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; (2008) 165 FCR 560; 246 ALR 35 [47] - [52].

17. Section 546(3) of the Act also provides:

> Payment of penalty
>
> *(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:*
>
> *(a) the Commonwealth; or*
>
> *(b) a particular organisation; or*
>
> *(c) a particular person.*

18. In ***Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)*** [2016] FCA 244 [40] - [44], Mortimer J summarised the law (omitting citations and quotations) on this provision in light of ***Sayed v Construction, Forestry, Mining and Energy Union*** [2016] FCAFC 4:

> [T]*he power conveyed by s 546(3) is* ***ordinarily to be exercised by awarding any penalty to the successful applicant*** … [T]*he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons … in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the* 'Gibbs' [***Gibbs v The Mayor, Councillors and Citizens of City of Altona*** [1992] FCA 553] … *exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.*

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2020 WAIRC 00293

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00293
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	TUESDAY, 10 MARCH 2020
DELIVERED	**:**	TUESDAY, 26 MAY 2020
FILE NO.	**:**	U 131 OF 2019
BETWEEN	**:**	FERNANDO DE ANDRADE Applicant AND PEPPERMINT GROVE JEWELLERS Respondent

CatchWords	**:**	Termination of employment - Claim of harsh, oppressive or unfair dismissal
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr G Algeri

Case(s) referred to in reasons:

Re Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95

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

Reasons for Decision

1 Mr Fernando De Andrade's employment with Peppermint Grove Jewellers was terminated on 2 September 2019 following ten years of employment. Mr De Andrade claims that his dismissal was unfair. Mr De Andrade claims that his employment was terminated as a result of his claim for workers' compensation relating to a loss of hearing he believes he incurred as a result of his work. In his application to the Western Australian Industrial Relations Commission (**Commission**) Mr De Andrade sought reinstatement. At the hearing Mr De Andrade submitted he sought orders for payment of an unspecified amount as compensation for his unfair treatment.

2 Peppermint Grove Jewellers submits that Mr De Andrade was terminated because of his failure to follow lawful and reasonable directions. In particular, Peppermint Grove Jewellers contend that Mr De Andrade was repeatedly late and absent from work without providing any evidence for his absence and that on one occasion he deliberately misled them in his reasons for his absence.

Question to be decided

3 The question to be decided is whether or not Peppermint Grove Jewellers unfairly dismissed Mr De Andrade.

The Principles Concerning Claims of Unfair Dismissal

4 The test in a claim of harsh, oppressive or unfair dismissal is whether the employer has exercised its legal right to dismiss so harshly or oppressively against the employee as to amount to an abuse of that right: ***The Undercliffe Nursing Home v the Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385, 386 (Brinsden J). It involves a consideration of whether the employee has received 'less than a fair deal': ***Re Loty and Holloway v Australian Workers' Union*** [1971] AR (NSW) 95, 99 (Sheldon J). The test is objective, and the onus of proof is on the employee.

The Evidence

5 Mr De Andrade gave evidence and tendered a copy of his letter of termination of employment.

6 During the hearing Mr De Andrade referred to a number of documents related to his hearing loss and health. Mr De Andrade was provided with several opportunities, including adjournments, during the hearing to provide these documents. However, he did not provide the documents. Mr De Andrade also referred to a video recording of interactions at the workplace that had not been submitted into evidence by him nor his employer. Mr De Andrade declined an opportunity, including an adjournment to another day, to obtain and submit the documents and/or video.

7 Following the hearing an email from an unknown email address was found in the 'Junk' inbox of the Commission's chambers' email system. Attached to the email was a PDF file that may have contained the documents referred to by Mr De Andrade. Given Mr De Andrade had declined the opportunity to adjourn the hearing to provide the documents and for those documents to be considered by the Commission, the documents were not received into evidence.

8 Mr Giuseppe Algeri, on behalf of Peppermint Grove Jewellers, made submissions, gave oral evidence and tendered a number of documents.

9 On 7 August 2019, Mr Algeri wrote to Mr De Andrade expressing his concern with Mr De Andrade's regular lateness for work during March and his absences in July which exhausted his sick leave and annual leave entitlements. Mr Algeri confirmed he had spoken with Mr De Andrade two weeks prior about his work ethic and reliability. Mr Algeri also expressed concern with Mr De Andrade's capacities and performance resulting in his loss of confidence in Mr De Andrade. Mr Algeri warned Mr De Andrade that the work allocated to him may need to change and consequently his hours may be reduced. Mr Algeri advised that Mr De Andrade's work position and options would be reviewed at the end of August.

10 On 21 August 2019 Mr Algeri confirmed in writing a discussion with Mr De Andrade on 20 August 2019. Mr De Andrade had informed Mr Algeri about a buzzing noise in his ears and matters associated with medical tests for hearing loss and workers' compensation. Mr Algeri confirmed that they had discussed Mr De Andrade's return to work, the need to be at work on time and his hours of work. The discussion was concluded with Mr De Andrade to obtain advice and consider making a workers' compensation claim.

11 In a letter dated 27 August 2019, but from the contents was probably sent to Mr De Andrade on 22 August 2019, Mr Algeri stated that any time away from work would be without pay. Mr De Andrade would be required to make a request in writing for unpaid leave with advance notice and the request would need to be fair and reasonable. Mr De Andrade's working hours were confirmed. Mr Algeri stated that on the day of the letter, being 22 August 2019, Mr De Andrade had failed to attend the workplace and had not responded to his text enquiry until 12:30 pm resulting in him being on unpaid leave without notice. Mr Algeri confirmed that taking unpaid leave without approval may result in termination of employment.

12 On 26 August 2019 Mr Algeri advised Mr De Andrade that he wished to meet with him the following day to discuss his work and that he could have someone attend the meeting with him if he wished.

13 On 27 August 2019 Mr Algeri met with Mr De Andrade however he did not complete the discussion because Mr De Andrade became agitated and aggressive.

14 On 28 August 2019 Mr Algeri notified Mr De Andrade that he was directed to work as set out in the letter dated 27 August 2019, that unpaid leave is to be requested in writing and approved before the leave is taken, and that he is required to provide 24 hours' notice and valid reasons in writing for not attending work. Mr Algeri advised that a failure to follow these directions may lead to disciplinary action including termination of employment.

15 On the morning of 28 August 2019 Mr De Andrade informed Mr Algeri that he needed to attend court the following day to follow up on his ex-girlfriend's case. Later that day Mr De Andrade emailed his employer requesting permission to leave the workplace immediately because he was not in a position to work. In his email Mr De Andrade stated that he had acquired Tinnitus and this was adversely affecting him. Mr De Andrade referred to a meeting with Mr Algeri on 27 August 2019 and states he recorded the meeting with Mr Algeri's permission. Mr De Andrade stated that he received a letter from Mr Algeri about his work and it referred to termination of employment. Mr De Andrade stated that he would be leaving the premises to attend at his doctors. Mr De Andrade initially read the contents of the email to Mr Algeri's sister at the workplace and emailed the statement to Mr Algeri at her request. Mr De Andrade then left the workplace.

16 On 29 August 2019 Mr Algeri wrote to Mr De Andrade stating that he was granted unpaid leave for 29 August 2019 to attend court and that the leave was granted on the basis that Mr De Andrade would produce a letter of attendance at the court. Mr Algeri requested a copy be forwarded to him by email or in person by 2 September 2019. Mr Algeri also requested a copy of a medical certificate for Mr De Andrade's absence from work on 28 August 2019. Mr Algeri confirmed that requests for unpaid leave must be in writing with 24 hours' notice. Mr De Andrade was advised that he was expected at work at 9:00 am on 2 September 2019.

17 On 2 September 2019 Mr De Andrade did not attend at work. At about 11:00 am an unknown person submitted Mr De Andrade's workers' compensation claim forms to Mr Algeri. The forms were scanned and emailed to the insurer. Later that day Mr Algeri emailed Mr De Andrade and notified him that his employment was terminated with four weeks' notice. In the email Mr Algeri advised that he had become aware that Mr De Andrade had attended court in relation to drug charges against him. Mr Algeri referred to an incident at the workplace earlier in the year which had caused him to ask Mr De Andrade whether he was involved with drugs, which Mr De Andrade denied. Mr Algeri expressed concern that Mr De Andrade had not been honest and that his presence in the workplace posed a risk to the business, customers and employees. Mr Algeri referred to the failure to provide a medical certificate and court document for Mr De Andrade's absences requested the prior week.

18 Mr De Andrade agreed that he attended court in relation to charges that drugs had been found at his home by Police Officers. Mr De Andrade denies that he was taking drugs at work or took drugs to the workplace. Mr De Andrade did not refute Mr Algeri's evidence that he had misled him on the reasons for his attendance at court or his earlier denial that he had an involvement with drugs.

19 Mr De Andrade complained that Mr Algeri had submitted a document that was his contemporaneous notes of their communications concerning Mr De Andrade's conduct during May, June, July and August 2019. Mr De Andrade submitted that Mr Algeri could have fabricated the notes. Despite this Mr De Andrade did not challenge nor deny any of the statements made in the notes. Many of the statements in the notes were supported by other documents submitted into evidence.

Was Mr De Andrade Dismissed as a Result of Claiming Workers' Compensation?

20 Mr De Andrade strongly contended that the reason for his dismissal was the fact that he had made a claim for workers' compensation and he made a number of statements in support of his claim.

21 Mr De Andrade may have an injury however he did not produce any evidence that this is the case. It is not disputed that Mr De Andrade made a workers' compensation claim related to hearing loss. However mere coincidence of the timing of the claim and his dismissal is not sufficient.

22 Mr De Andrade must show that his dismissal was, at least in part, as a result of his employer's views of his making a workers' compensation claim or his raising issues associated with safety at the workplace. Mr De Andrade did not substantiate his claim with any independent evidence.

23 I do not find that Mr De Andrade was dismissed because he made a workers' compensation claim or raised issues concerning safety at the workplace.

Was Mr De Andrade's Dismissal Harsh, Oppressive or Unfair?

24 Mr De Andrade says that he was summarily dismissed although he agrees that he was given four weeks' notice, albeit he was not required to work during this period.

25 I find that Mr De Andrade was not summarily dismissed. Mr De Andrade was provided with verbal and written warnings about the concerns for his conduct and the consequences should he not address his lateness for work and his failure to attend work without evidence of reasonable cause.

26 Mr De Andrade did not dispute Mr Algeri's evidence concerning Mr De Andrade's absences and the warnings he had been provided. Mr De Andrade stated that he had obtained a medical certificate for 28 August 2019 however he did not submit a copy of the medical certificate.

27 Where an employee is to be dismissed for his conduct or inadequate performance the employee must be given a fair warning that unless he improves, he is at risk of being dismissed. I find that happened here. Mr De Andrade received both verbal and written warnings about being late to work and his increasingly frequent absences and he failed to address his conduct.

28 On the evidence before me, I find that there was no express term of the employment contract in relation to notice. As a result, Mr De Andrade's employment could be terminated by either party giving reasonable notice.

29 The Commission will only intervene with the exercise of the right of the employer to terminate an employment contract if it is satisfied that the dismissal is harsh, oppressive or unfair. That has not been established here.

30 Whilst Mr De Andrade's absences may have in part, at least, been as a result of illness or injury, some absences on the evidence were for unidentified reasons. The employer could not reasonably be expected to continue in employment an employee who is not able to attend the workplace consistently and reliably. Mr De Andrade was on notice to address his unreliability and he did not do so.

31 Mr De Andrade was also not truthful when he advised his employer of the reasons for his request for absence to attend a court hearing. Mr De Andrade contended that Mr Algeri needed to prove that he was 'on drugs' at work or had brought drugs to the workplace. Mr De Andrade has failed to identify that the issue is his honesty with his employer. Mr Algeri contends that Mr De Andrade was not honest when asked the reason for his absence to attend court on 29 August 2019 and that this dishonesty, amongst other behaviours, had caused him to lose confidence in Mr De Andrade.

32 Having considered the evidence of Mr Algeri and Mr De Andrade, I find that Mr Algeri had genuine empathy for Mr De Andrade. Mr De Andrade's failure to attend at work on time and frequent absences commences sometime in May and continued with increasing frequency through June, July and August 2019. There are certainly circumstances in which it would be harsh to dismiss an employee for lateness or absences. However, in all of the circumstances of this matter, I do not consider that Mr Algeri exercised his legal right to dismiss Mr De Andrade so harshly or oppressively as to amount to an abuse of that right. Mr De Andrade did not receive less than a fair deal.

Conclusion

33 In my view, it has not been established on balance by Mr De Andrade, on whom the onus falls, that his contract of employment was terminated by the employer in circumstances which were harsh, oppressive or unfair such as to constitute an abuse of the employer's lawful right to dismiss. The application is dismissed.

2020 WAIRC 00294

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FERNANDO DE ANDRADE
	APPLICANT
	-v-
	PEPPERMINT GROVE JEWELLERS
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 26 MAY 2020
FILE NO/S	U 131 OF 2019
CITATION NO.	2020 WAIRC 00294

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr G Algeri

Order

HAVING HEARD the applicant on his own behalf and Mr G Algeri on behalf of the respondent; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (*WA), hereby orders:

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

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

CONFERENCES—Matters referred—

2020 WAIRC 00292

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00292
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 25 JULY 2018, FRIDAY, 7 FEBRUARY 2020, WEDNESDAY, 26 FEBRUARY 2020
DELIVERED	**:**	TUESDAY, 26 MAY 2020
FILE NO.	**:**	CR 15 OF 2018
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
		Applicant
		AND
		DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION
		Respondent

CatchWords	:	Industrial law (WA) – Unfair dismissal claim made on behalf of applicant's member – Dismissal on medical grounds found to be unfair by decision published 28 August 2018 – Return to work found to be impracticable by decision published 28 August 2018 – Money award ordered 30 August 2018 – Appeal to Full Bench of Western Australian Industrial Relations Commission against decision that a return to work impracticable successful – Remedy at first instance quashed - Remitted by Full Bench of the Western Australian Industrial Relations Commission for further hearing and determination as to remedy – Cannot revisit whether dismissal unfair as remittal only in relation to remedy – Parties agree return to work to be addressed in relation to schools other than Busselton Senior High School - Applicant's member medically fit for employment at school other than Busselton Senior High School – Order made in relation to financial loss resulting from dismissal made - Money award reduced due to applicant's member's failure to make efforts to mitigate loss - Money award reduced due to applicant failing to disclose document at first instance hearing – Application for matter to be dismissed pursuant to s 27 *Industrial Relations Act 1979* dismissed
Legislation	:	*Industrial Relations Act 1979* s 27, s 44
Result	:	Order that the applicant's member be returned to work at a school other than Busselton Senior High School; Money award made
Representation:		
Counsel:		
Applicant	:	Ms R Cosentino (of counsel)
Respondent	:	Mr J Carroll (of counsel)
Solicitors:		
Applicant	:	Fogliani.Lawyer
Respondent	:	State Solicitor's Office

Reasons for Decision

1 By a decision published on 28 August 2018 I found that the applicant's member had been unfairly dismissed but that his return to work would be impracticable. By order made 30 August 2018 I awarded the applicant's member 20 weeks of his salary as a form of compensation for the financial loss suffered by him as a result of his dismissal.

2 The applicant successfully appealed my decision that the return to work of its member was impracticable.

3 The respondent's appeal against the award of compensation was dismissed.

4 The Full Bench of the Western Australian Industrial Relations Commission suspended my decision and remitted the matter to me to further hear and determine it according to law, that is, in accordance with its decision.

5 I have proceeded on the basis that the Full Bench of the Western Australian Industrial Relations Commission suspended the *whole* of my decision. That is both my decision that the applicant's member not be returned to work and my decision that the applicant's member be awarded money. This seems logical to me given the relationship between the two decisions.

6 I consider that the Full Bench of the Western Australian Industrial Relations Commission requires me to revisit the question of remedy. In relation to the question of the applicant's member being returned to work the Full Bench of the Western Australian Industrial Relations Commission expressly requires me to consider "Mr Kilner's capacity to return to work, the practicability of being reinstated or alternatively re-employed at a school other than Busselton SHS."

7 The matter was further heard before me on the remittal on 7 February 2020 and 26 February 2020.

8 The applicant and respondent agreed that I should consider the practicability of the applicant's member being "re-employed at a school other than Busselton Senior High School." That is, the parties did not require me to consider whether or not the applicant's member should be returned to work at Busselton Senior High School.

9 In relation to the capacity of the applicant's member to return to work the applicant called evidence from a psychiatrist, Prof Aleksandar Janca. Prof Janca's evidence was the applicant's member is fit for work at a school other than Busselton Senior High School. As the respondent informed me that she did not intend to return the applicant's member to that school Prof Janca's evidence becomes evidence that the applicant's member is fit for work.

10 Prof Janca's evidence was given in a calm and considered manner. Upon review it is cogent and credible and was not undermined in any way by cross-examination nor competing evidence. I have no reason to not believe it and no reason to not accept it.

11 The only expert evidence I have is that the applicant's member is fit for work. That evidence was not impugned.

12 I find the applicant's member is fit to return to work, with work meaning work as a teacher at a school other than Busselton Senior High School.

13 I expressly reject any argument that the applicant's member is unfit to return to work, or that a return to work would be impracticable, because the applicant's member may suffer a relapse of a medical condition at work because he cannot be quarantined from stressors like those that led to the development of a medical condition when he worked at Busselton Senior High School.

14 I am not obliged to simply accept everything a witness says, even one as well credentialled and well presented as Prof Janca. However, Prof Janca's analyses that the problems of the applicant's member were to some extent related to issues peculiar to Busselton Senior High School was compelling. Further, I note that Prof Janca gave his expert opinion that the applicant's member is fit to work while accepting that stressors may impact upon the applicant's member at another school.

15 The respondent asks me to speculate about what might happen at a school other than Busselton Senior High School. I do not consider it useful or appropriate to do so. I have no evidence upon which to conclude that the applicant's member is not fit for work and credible expert evidence that he is fit for work. There is only one possible conclusion left open on this matter.

16 I note that the respondent opposed Prof Janca giving his evidence, and his report going into evidence, on the basis that the applicant had not run a case at first instance that contended it's member was fit for work so long as that work was not at Busselton Senior High School and so should not, on the remittal, be allowed to run such a case.

17 If the applicant may not fairly run such a case, the argument goes, it cannot lead the evidence of Prof Janca because it is irrelevant.

18 The respondent says that the applicant made a 'strategic decision' to not lead evidence similar to that of Prof Janca at first instance, being a report of Dr Ng referred to in more detail later in these reasons, and is therefore, as matter of fairness to the respondent, locked into a position where it cannot lead such evidence on the remittal.

19 I rejected the argument at the further hearing and allowed the evidence of Prof Janca to be given and admitted his report into evidence.

20 The matter has been remitted to me for further hearing and determination. The Full Bench of the Western Australian Industrial Relations Commission requires me to consider the matters I have referred to at [6] above. If the applicant had not called a witness such as Prof Janca I think I would have had to have acted under section 27(1)(i) *Industrial Relations Act 1979* to comply with the direction of the Full Bench of the Western Australian Industrial Relations Commission. I thank the applicant for obviating the need for me to do this.

21 The evidence of Prof Janca was plainly relevant and admissible given the nature of the remittal. I do not see how I could have possibly complied with the requirement upon me to consider the applicant's member's capacity to return to work without evidence like it.

22 The respondent also argues that the return of the applicant's member to work is impracticable because "Mr Kilner has a deep-seated lack of trust for the Department, and that deep-seated lack of trust is such that it would be impracticable for Mr Kilner to be reinstated or re-employed."

23 In this regard, the respondent relies upon some documents the applicant's member produced and some communications from the applicant's member to parliamentarians and office holders within the Department of Education.

24 I have read the documents closely. In number, context, content and tone they do not come anywhere near demonstrating what the respondent contends they demonstrate.

25 There are not many documents or communications at all, especially given the time period they straddle.

26 The context of the documents and communications are that they relate to concerns that, whether ultimately found to be correct, were not unreasonable for the applicant's member to hold.

27 The concerns were all expressed to relevant people. It is not as if the documents in question are letters to the editor or social media posts or group emails to everyone the applicant's member could think of to try and maximise pressure on the powers that be.

28 The contents of the documents relate to real events and real concerns in relation to those events. None of the content reads like the work of someone who is paranoid or who has become an unhinged conspiracy theorist.

29 The tone of the documents and communications is, in my view, fine. There is no abuse or offensive language.

30 The applicant's member could have been far more straight forward about what he meant by some of the things written in the documents when giving his evidence. His refusal to accept what were plainly the messages contained in his communications reflects badly upon him. For instance, his insistence that Exhibit 12 contained only 'facts' and not complaints was ridiculous and wholly unbelievable. There were other examples. Nonetheless, reading the documents as a reasonable person would, unaffected by the puerile efforts of the applicant's member to have me read them otherwise, they do not sustain the respondent's argument that they reveal such a loss of trust of the applicant's member in his employer as to make his return to work problematic.

31 There is nothing upon which to reasonably base a finding that it is impracticable for the applicant's member to work in a school other than Busselton Senior High School.

32 In relation to the money to be awarded to the applicant's member as part of the remedy for what happened to him, he admitted that he had made no effort to mitigate his loss. He had not done things that he could reasonably have tried, like private tutoring or obtaining work in the private education system or even obtaining work outside of the education sector. This will result in a discount.

33 The respondent says that there should also be a discount because the applicant did not fully comply with the requirement upon it to provide discovery prior to the conclusion of the hearing at first instance.

34 In particular, the respondent says that the applicant failed to discover an email from its member to an industrial officer of the applicant attaching a medical certificate from a Dr Buckeridge dated 1 March 2018 and also did not volunteer the existence of a medical report of Dr Ng dated 29 June 2018, while accepting that the applicant could have resisted disclosure of the latter document on the basis of legal professional privilege.

35 The respondent says that if the first document had been provided to her it would have made it difficult for the applicant to argue at the hearing at first instance, as it did, that it's member was not suffering from a medical condition and was fit for work. The respondent says if she had the first document before the hearing concluded she could have, relying upon it, run an argument that it was impracticable to return the applicant's member to work with her because he was not medically fit to work as a teacher.

36 It is now, of course, impossible to know what course the proceedings would have taken if both or either of the documents had been in the respondent's hands prior to the hearing concluding. Certainly, they could have been relied upon in support of an argument that the applicant's member was unfit to work at Busselton Senior High School. That would have brought into sharp focus whether I could order a return to work at another school or not and, if so, whether he was fit to work at another school.

37 On these matters I note that the matter came before me through section 44 *Industrial Relations Act 1979* and not section 23A *Industrial Relations Act 1979*. For this reason, I am not sure that the reinstatement versus re-employment distinction clearly made in section 23A *Industrial Relations Act 1979* would have become material here.

38 The memorandum of matters seeks "an order that the respondent redeploy Mr Kilner to a school other than Busselton Senior High School in consultation with the applicant and Mr Kilner."

39 Without needing to decide the matter of whether I would have needed to step through the reinstatement and re-employment issues, and whether a return to work at another school is reinstatement or re-employment, I think what may be said is that a lot would have had to have gone right for the respondent for reliance upon the documents not discovered to have had a material impact on the outcome of the matter.

40 Without having to decide the issue, I think that if the documents had been discovered they may have led to a finding that the applicant's member could not be returned to work at Busselton Senior High School but could be returned to work at another school.

41 I think the likely result would have been, going back and pretending that I had decided to return the applicant's member to work, I would have simply ordered his return to work at a school other than Busselton Senior High School. It was, after all, a remedy squarely sought by the memorandum of matters.

42 It is also what the Full Bench of the Western Australian Industrial Relations Commission has ultimately asked me to consider and I must assume that this is because it is of the opinion that it would be in accordance with the law for me to so place the applicant's member.

43 Nonetheless, the respondent's argument that the applicant's failure to do the right thing should sound in a discount in the monetary award has some force. It is really the only way, putting to one side the respondent's unsuccessful argument relying on section 27 *Industrial Relations Act 1979,* that the failure can sound somewhere.

44 The applicant does not strongly oppose the argument on this, saying that the award of money to the applicant's member is "a discretionary matter and we would say it is within the Commission's power to [discount]."

45 I will make an order that the applicant's member be paid the money to which he would have been entitled had he been employed since the date of his dismissal to today's date to be discounted by 50%, 25% because of the failure of its member to mitigate his loss and 25% because of the document issue at first instance.

46 There are a couple of other matters that I need to deal with.

47 The first is the respondent's submission, elaborated upon in written submissions filed 24 October 2019, that I should, upon the remittal of the matter, decide whether the dismissal was unfair.

48 I did not hear from the applicant on the matter and informed the parties by letter signed by my associate dated 29 October 2019 that I would only consider remedy, and not the fairness or otherwise of the dismissal, upon the remittal, and that I would give reasons as part of my reasons on remedy.

49 The matter was remitted to me with the status of the matter, at law, being that the applicant's member had been unfairly dismissed but that I had erred in relation to remedy. I was directed to hear more on that matter and then decide it, taking into account what the Full Bench of the Western Australian Industrial Relations Commission said in its decision. I could not possibly, if my decision is to accord with the law, come up with a result that the dismissal was fair.

50 The fairness of the dismissal was not remitted to me for further hearing and determination. I am not really sure how it could have been given that my finding in that regard was not the subject of appeal. In any event, it was not.

51 The respondent's argument that it is necessary to revisit fairness as part of a further hearing on the question of remedy cannot succeed.

52 All of what the respondent asked me to consider and accept in her submissions lodged 24 October 2019 were matters the respondent needed to address before the Full Bench of the Western Australian Industrial Relations Commission so that, if it wanted to do so, it could make comment for my benefit in further hearing and determining the matter.

53 The final matter is the respondent's application that I dismiss the matter pursuant to my power under section 27 *Industrial Relations Act 1979*.

54 The respondent says that the documents issue discussed above had the result that she suffered a prejudice that cannot now be remedied, the applicant has abused the Western Australian Industrial Relations Commission's processes and wasted the Western Australian Industrial Relations Commission's time and resources and the applicant does not have clean hands in seeking a remedy.

55 The documents issue argument, as I understand it, is slightly different, or more elaborate, on the section 27 *Industrial Relations Act 1979* application than on the money award issue. The respondent seeks that the applicant suffer a consequence of running a case that was different from that which the documents allowed, whether or not both documents were discovered (or indeed discoverable).

56 The respondent says the applicant argued that its member was not suffering from a medical condition at the time of his dismissal or at the time of the original hearing and says the applicant was wrong to have run such an argument given the contents of the documents in its possession.

57 On the section 27 *Industrial Relations Act 1979* application the respondent says that not only has it been prejudiced by its inability to make use of the Dr Buckeridge medical certificate but that the applicant should also suffer a consequence for its conduct in running a case that was contradicted, or at the very least affected, by both that document and the report of Dr Ng, both of which were in its possession.

58 In relation to the lost opportunity said to relate to Dr Buckeridge's medical certificate, I have above held that it was not much of an opportunity to lose. The respondent has not demonstrated sufficient prejudice to have me dismiss the matter altogether.

59 In relation to the proper characterisation of the applicant's conduct, I find it very difficult to undertake such a task on the basis of what I know.

60 The respondent says that her "submissions are not intended to, nor should they be taken to be, a criticism in any way of the legal representatives for the applicant or the conduct of those representatives".

61 I find myself confused as to where the alleged conduct of the applicant is said to start and finish and where the conduct of others might take over or be relevant.

62 I am not sure how to deal with a submission that the applicant's legal representatives at the original hearing were beyond reproach yet the applicant ran its case in such a way as to amount to an abuse of process and so contumeliously that I should dismiss it with all the prejudice to the applicant's member this would entail.

63 Further, the respondent would have to demonstrate something extremely serious on the part of the applicant for it to be appropriate for me, in the public interest or some other interest, to deny its blameless member a remedy to which he is otherwise entitled as a result.

64 In my view, despite the respondent's submissions in writing and orally on the point, it has not really undertaken the task of demonstrating who did what and when in such a way as to demonstrate some serious ethical failure on the part of the applicant or its officers.

65 There is an issue about the disclosure of one document, a short medical certificate from a general practitioner. I do not know why it was not disclosed and I do not know who made the decision not to disclose it.

66 There is also an issue about the making of certain submissions by the applicant's counsel where the applicant held two documents, the medical certificate referred to in the previous paragraph and the report of Dr Ng.

67 I have no idea how, if it is the case that there is an inconsistency, how the inconsistent submissions came to be made. The respondent tells me she does not blame counsel. That is unhelpful to me in determining whether anyone was at fault and, if so, who and why.

68 The dismissal of a matter where a person has been found after hearing to have been unfairly dismissed and deserving of a remedy likely, after success on appeal, to be that sought, even where the person is not a party to those proceedings, would be an extraordinary event. It could only occur in extreme circumstances.

69 The respondent has not come anywhere near demonstrating that those circumstances are present here. The application under section 27 *Industrial Relations Act 1979* will be dismissed.

2020 WAIRC 00300

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 29 MAY 2020
FILE NO/S	CR 15 OF 2018
CITATION NO.	2020 WAIRC 00300

Result	Respondent application pursuant to section 27(1)(a) *Industrial Relations Act 1979* dismissed
Representation	
Applicant respondent	Ms R Cosentino (of counsel)
Respondent applicant	Mr J Carroll (of counsel)

Order

WHEREAS on 30 April 2018 the respondent to this application, an application that the substantive matter be dismissed under section 27(1)(a) *Industrial Relations Act 1979*, made an application pursuant to section 44 *Industrial Relations Act 1979* to the Western Australian Industrial Relations Commission alleging that its member's dismissal was harsh, oppressive or unfair;

AND WHEREAS the matter was referred for hearing and determination pursuant to section 44 *Industrial Relations Act 1979* as per the Memorandum of Matters issued 28 May 2018.

AND WHEREAS by reasons for decision published 28 August 2018 I found that the dismissal of the member of the respondent to this application was unfair, but that his return to work was impracticable;

AND WHEREAS by order dated 30 August 2018 a money award was made in favour of the member by way of remedy;

AND WHEREAS the remedy decision was successfully appealed to the Full Bench of the Western Australian Industrial Relations Commission and the matter was remitted back for further hearing and determination in relation to the remedy decision;

AND WHEREAS following the remittal for further hearing and determination the respondent to the original application filed this application, an application that the matter be dismissed pursuant to section 27(1)(a) *Industrial Relations Act 1979*, on 20 January 2020;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* order that the application pursuant to section 27(1)(a) *Industrial Relations Act 1979* filed 20 January 2020 be, and is hereby, dismissed.

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

2020 WAIRC 00301

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 29 MAY 2020
FILE NO/S	CR 15 OF 2018
CITATION NO.	2020 WAIRC 00301

Result	Order that the applicant's member be returned to work at a school other than Busselton Senior High School; Money award made
Representation	
Applicant	Ms R Cosentino (of counsel)
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard Ms R Cosentino, of counsel, for the applicant and Mr J Carroll, of counsel, for the respondent on Friday, 7 February 2020 and Wednesday, 26 February 2020 upon the remittal of the matter from the Full Bench of the Western Australian Industrial Relations Commission I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* order that:

(1) the applicant's member be returned to employment with the respondent within 21 days of the date of this order and, as soon as is practicable, be returned to work at a school other than Busselton Senior High School;

(2) the service of the applicant's member with the respondent be deemed continuous for all relevant purposes; and

(3) the respondent pay to the applicant's member a sum equating to 50% of the remuneration he would have earned from the date of his dismissal to the date of this order but for his dismissal.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2020 WAIRC 00317

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EUGENE MALATYNSKI
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 11 JUNE 2020
FILE NO.	OSHT 1 OF 2020
CITATION NO.	2020 WAIRC 00317

Result	Direction issued
Representation	
Applicant	Mr Eugene Malatynski
Respondent	Ms Michelle Lord (of counsel)

Direction

HAVING heard from the applicant in person and Ms M Lord (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT all matters requiring to be served on either party or the Tribunal may be served by email on each parties' nominated email address and proof of service is by the email sent notification;
2. THAT any request for production of documents or materials for either party be by letter of request served no later than 25 June 2020;
3. THAT each party to provide documents or materials requested by the other party by no later than 9 July 2020;
4. THAT the applicant file and serve upon the respondent his witness statements or outline of evidence of each witness by no later than 10 September 2020;
5. THAT the respondent file and serve upon the applicant its witness statements or outline of evidence of each witness by no later than 24 September 2020;
6. THAT the applicant file and serve upon the respondent written outline of submissions 14 days before the date listed for hearing;
7. THAT the respondent file and serve upon the applicant written outline of submissions seven days before the date listed for hearing;
8. THAT the matter be listed for a two-day hearing on a date to be fixed, and
9. THAT the parties have liberty to apply at short notice

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

2020 WAIRC 00318

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NORTH METROPOLITAN HEALTH SERVICE
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 11 JUNE 2020
FILE NO.	OSHT 5 OF 2020, OSHT 6 OF 2020
CITATION NO.	2020 WAIRC 00318

Result	Direction issued
Representation	
Applicant	Ms Fiona Seaward (of counsel)
Respondent	Mr Jospeh Lloyd (of counsel)

Direction

HAVING HEARD Ms F Seaward (of counsel) on behalf of the applicant and Mr J Lloyd (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979*, hereby orders:

1. THAT the proceedings, OSHT 5 of 2020 and OSHT 6 of 2020, be heard together pursuant to section 27(1)(s) of the *Industrial Relations Act 1979* (WA);
2. THAT all matters requiring to be served on either party or the Tribunal may be served by email on each parties' nominated email address, or in electronic form stored on a USB/flash drive;
3. THAT the matters be listed for further directions hearing on 30 July 2020; and
4. THAT the parties have liberty to apply on short notice.

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

2020 WAIRC 00320

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR DANNY RAWLINSON-SHELTON
	APPLICANT
	-v-
	WORKSAFE
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 12 JUNE 2020
FILE NO.	OSHT 9 OF 2019
CITATION NO.	2020 WAIRC 00320

Result	Direction issued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Ms C Stamp (of counsel) Ms T Hollaway (of counsel)

Direction

HAVING heard from Mr P Mullally (as agent) on behalf of the applicant and Ms C Stamp (of counsel) and with her Ms T Hollaway (of counsel) on behalf of the respondent, The Commission, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979*, hereby directs the Directions 5 and 9 ([2020) WAIRC 00103) issued on 14 February 2020 be amended as follows and directs:

1. THAT the applicant file and serve upon the respondent any witness statements upon which he intends to rely and his outline of submissions by 6 July 2020;
2. THAT the respondent be at liberty to apply to adduce further evidence in chief if required as a result of Direction 1, but with such application to be made by 20 July 2020;
3. THAT Direction 7 issued on 14 February 2020 be rescinded;
4. THAT the respondent file and serve upon the applicant its submissions by 27 July 2020;
5. THAT the parties shall give notice to each other of any witnesses required to attend the hearing for cross-examination by 3 August 2020;

6. THAT the application be listed for hearing for one day on 27 August 2020; and
7. THAT the parties have liberty to apply at short notice

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

2020 WAIRC 00286

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 03 MARCH 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICOLE MITCHELL
	APPELLANT
	-v-
	DEPARTMENT OF COMMUNITIES - CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER D J MATTHEWS - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR R DAVENPORT - BOARD MEMBER
DATE	TUESDAY, 19 MAY 2020
FILE NO	PSAB 2 OF 2020
CITATION NO.	2020 WAIRC 00286

Result	Orders issued
Representation	
Appellant	Mr S Maré (of counsel)
Respondent	Ms J Vincent (of counsel)

Order

HAVING heard from Mr S Maré, of counsel, for the appellant Ms J Vincent, of counsel, for the respondent, on Monday, 18 May 2020, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that:

1. The respondent's Form 4 Response and Schedule to the Response filed on 8 May 2020 constitute the respondent's response to the appellant's appeal;
2. The appeal be adjourned sine die; and
3. The parties have liberty to apply on short notice.

(Sgd.) D J MATTHEWS,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2020 WAIRC 00297

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 7 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD PICKS
	APPELLANT
	-v-
	WA COUNTRY HEALTH SERVICE BOARD
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR D HILL - BOARD MEMBER
	MR M GOLESWORTHY - BOARD MEMBER
DATE	WEDNESDAY, 27 MAY 2020
FILE NO.	PSAB 23 OF 2019
CITATION NO.	2020 WAIRC 00297

Result	Direction issued
Representation (on the papers)	
Appellant	Mr C Studsor (as agent)
Respondent	Ms S Waterton (as agent)

Direction

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

1. THAT the appellant file a written outline of his submissions by 5 June 2020.
2. THAT the respondent file a written outline of its submissions by 19 June 2020.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2020 WAIRC 00287

DISPUTE RE COMMISSIONER'S INSTRUCTION NO. 23

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WA INCORPORATED
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION, AND ATTRACTIONS
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 20 MAY 2020
FILE NO.	PSACR 3 OF 2020, PSACR 4 OF 2020
CITATION NO.	2020 WAIRC 00287

Result	Direction issued
Representation (on the papers)	
Applicant	Mr M Amati (as agent)
Respondent	Mr J Carroll (of counsel)

Direction

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

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 4 June 2020.
2. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 18 June 2020.
3. THAT the respondent file its outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 2 July 2020.
4. THAT the appellant file written submissions by 16 July 2020.
5. THAT the respondent file written submissions by 30 July 2020.
6. THAT discovery be informal.
7. THAT this matter be listed for a two-day hearing.
8. THAT the parties have liberty to apply.

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

2020 WAIRC 00295

DISPUTE RE COMMISSIONER'S INSTRUCTION NO. 23

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WA INCORPORATED
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION, AND ATTRACTIONS
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 27 MAY 2020
FILE NO	PSACR 3 OF 2020, PSACR 4 OF 2020
CITATION NO.	2020 WAIRC 00295

Result	Order issued
Representation (on the papers)	
Applicant	Mr M Amati (as agent)
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Mr M Amati (as agent) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT applications PSACR 3 and PSACR 4 of 2020 be heard and determined together.

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

2020 WAIRC 00296

DISPUTE RE COMMISSIONER'S INSTRUCTION NO. 23

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WA INCORPORATED
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION, AND ATTRACTIONS
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 27 MAY 2020
FILE NO.	PSACR 3 OF 2020, PSACR 4 OF 2020
CITATION NO.	2020 WAIRC 00296

Result	Direction issued
Representation (on the papers)	
Applicant	Mr M Amati (as agent)
Respondent	Mr J Carroll (of counsel)

Direction

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

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 10 July 2020.

2. THAT the applicant file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 23 July 2020.
3. THAT the respondent file its outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 6 August 2020.
4. THAT the applicant file written submissions by 20 August 2020.
5. THAT the respondent file written submissions by 3 September 2020.
6. THAT discovery be informal.
7. THAT this matter be listed for a three-day hearing.
8. THAT the parties have liberty to apply.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Kalamunda Operational Workforce Agreement 2019 AG 7/2020	06/11/2020	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	City of Kalamunda	Commissioner D J Matthews	Agreement registered
Dental Health Services - Dental Technicians - CSA Industrial Agreement 2020 PSAAG 6/2020	06/12/2020	North Metropolitan Health Service	The Civil Service Association of Western Australia Incorporated	Commissioner T Emmanuel	Agreement registered
Main Roads APEA Enterprise Bargaining Agreement 2020 PSAAG 4/2020	06/03/2020	Main Roads Western Australia	The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees	Commissioner T Emmanuel	Agreement registered
Rangers (National Parks) General Agreement 2020 AG 1/2020	05/29/2020	Department of Biodiversity, Conservation and Attractions, United Voice - WA Branch	(Not applicable)	Commissioner T B Walkington	Agreement registered
School Education Act Employees' (Teachers and Administrators) General Agreement 2019 AG 10/2020	06/11/2020	Department of Education	State School Teachers' Union of Western Australia, Principals' Federation of Western Australia	Commissioner D J Matthews	Agreement registered
Shire of Murray (Administration Staff) Enterprise Bargaining Agreement 2020 AG 9/2020	06/11/2020	Shire of Murray	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Commissioner D J Matthews	Agreement registered
Shire of Murray (Outside Workforce) Enterprise Bargaining Agreement 2020 AG 8/2020	06/11/2020	Shire of Murray	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 00212

DISPUTE RE DECISION TO TAKE DISCIPLINARY ACTION ON 29 MARCH 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALISON BRAID
	APPELLANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
	MS B CONWAY - BOARD MEMBER
	MS K CARTER - BOARD MEMBER
DATE	WEDNESDAY, 15 APRIL 2020
FILE NO.	PSAB 1 OF 2020
CITATION NO.	2020 WAIRC 00212

Result	Direction issued
Representation	
Appellant	Ms K Ausden of counsel
Respondent	Ms J Vincent of counsel

Direction

HAVING heard Ms K Ausden of counsel on behalf of the appellant and Ms J Vincent counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT in accordance with the Commission's COVID-19 Special Procedures Note the herein appeal be heard by video-link.

(2) THAT each party shall give an informal discovery by serving its list of documents by no later than 22 April 2020.

(3) THAT inspection of documents shall be completed by 29 April 2020.

(4) THAT the parties prepare and file electronically a bundle of those documents which they will seek to have tendered into evidence. The bundle should be indexed and paginated and be filed no later than seven days prior to the date of hearing.

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

(6) THAT the parties file electronically any signed witness statements upon which they intend to rely no later than seven days prior to the date of hearing.

(7) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than three days prior to the date of hearing.

(8) THAT the appellant and respondent file electronically an agreed statement of facts (if any) no later than three days prior to the date of hearing.

(9) THAT the appellant and respondent file electronically an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.

(10) THAT the matter be listed for hearing on a date(s) to be fixed by the Appeal Board.

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

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2020 WAIRC 00235

DISPUTE RE DECISION TO TAKE DISCIPLINARY ACTION ON 29 MARCH 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALISON BRAID
	APPELLANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER S J KENNER - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MS K CARTER - BOARD MEMBER
DATE	MONDAY, 4 MAY 2020
FILE NO	PSAB 1 OF 2020
CITATION NO.	2020 WAIRC 00235

Result	Appeal Discontinued
Representation	
Appellant	Ms K Ausden
Respondent	Ms J Vincent of counsel

Order

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

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2020 WAIRC 00141

REVIEW OF IMPROVEMENT NOTICES

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	**:**	2020 WAIRC 00141
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	TUESDAY, 16 JULY 2019
DELIVERED	**:**	FRIDAY, 28 FEBRUARY 2020
FILE NO.	**:**	OSHT 2 OF 2018, OSHT 3 OF 2018, OSHT 4 OF 2018, OSHT 3 OF 2019
BETWEEN	**:**	HANSSEN PTY LTD
		Applicant
		AND
		WORKSAFE WESTERN AUSTRALIA COMMISSIONER
		Respondent

CatchWords	**:**	Review of Improvement Notices - application to review decision of the Worksafe Western Australia Commissioner to not grant an exemption from compliance with reg 3.54(1)(b) of the *Occupational Safety and Health Regulations 1996* (WA) - substantial compliance - whether compliance is unnecessary - hierarchy of hazard controls
Legislation	**:**	*Industrial Relations Act 1979* (WA)
		Occupational Safety and Health Act 1984 (WA)
		Occupational Safety and Health Regulations 1996 (WA)

Result	:	In OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 Improvement Notices 40500117, 42500544 and 10600595 are revoked and exemption applications dismissed. In OSHT 3 of 2019 Improvement Notice 39800134 affirmed with modification and the Worksafe Western Australia Commissioner's decision to not grant exemption affirmed.
Representation:		
Applicant	:	Mr J Raftos (of counsel) and with him Mr L Swanson (of counsel)
Respondent	:	Mr D McDonnell (of counsel)

Cases referred to in reasons:

ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18; (2014) 254 CLR 1

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

Argyle Diamonds Limited v Fluor Australia Pty Ltd [2018] WASC 356

Dandy Power Equipment Pty Ltd* v *Mercury Marine Pty Ltd (1982) 44 ALR 173

Eclipse Resources Pty Ltd v The State of Western Australia (No. 4) [2016] WASC 62; (2016) 307 FLR 221

Fox v Percy [2003] HCA 22; (2003) 214 CLR 118

Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner [2017] WAIRC 00823; (2017) 97 WAIG 1888

Green v Mabey (Unreported, WASC, Library No 940711, 7 December 1994),

Montero v Minister for Immigration and Border Protection [2014] FCAFC 170; (2014) 229 FCR 144

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1988) 194 CLR 355

Re Asset Risk Management Ltd (1995) 59 FCR 254; (1995) 130 ALR 605

Shepherd v Murray [2000] WASCA 281; (2000) 105 IR 465

The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd [2007] WAIRC 01273; (2008) 88 WAIG 22

Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1994) 74 WAIG 2

Reasons for Decision

1 This matter comprises four applications referred by Hanssen Pty Ltd to the Occupational Safety and Health Tribunal (**Tribunal**). Three applications were submitted in 2018 for review of improvement notices issued by Worksafe Inspectors at three different construction sites. A further application referred in 2019 concerns a review of an improvement notice issued by a Worksafe Inspector at a fourth construction site and a review of the decision by the Western Australian Worksafe Commissioner (**Worksafe Commissioner**) to decline Hanssen Pty Ltd's request to be exempted from the requirement to comply with reg 3.54 of the *Occupational Safety and Health Regulations 1996* (WA) (**OSH Regulations**) at that site.

2 The first application, OSHT 2 of 2018 is a request for a review of Improvement Notice 40500117 issued to Hanssen Pty Ltd in relation to a construction site at 63 Adelaide Terrace, Perth (**Vue Notice**).

3 On 20 April 2018 a Worksafe Inspector issued the Vue Notice to Hanssen Pty Ltd in relation to a breach of reg 3.54(1)(b)(i) of the OSH Regulations at 63 Adelaide Terrace, Perth.

4 On 20 April 2018, Hanssen Pty Ltd applied to the Worksafe Commissioner for a review of the Vue Notice under s 51 of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**). On 13 August 2018 the Acting Deputy Director General, under delegation of the Worksafe Commissioner, affirmed the Vue Notice.

5 On 16 August 2018 Hanssen Pty Ltd referred a request for a review of the Vue Notice by the Tribunal under s 51A of the OSH Act.

6 The second application, OSHT 3 of 2018, is a request for a review of Improvement Notice 42500544 issued to Hanssen Pty Ltd in relation to the construction site at 5 Harper Terrace, South Perth (**Reva Notice**).

7 On 26 July 2018 a Worksafe Inspector issued to Hanssen Pty Ltd the Reva Notice in relation to a breach of reg 3.54(1)(b)(i) of the OSH Regulations at 5 Harper Terrace, South Perth, another of Hanssen Pty Ltd's construction sites.

8 On 27 July 2018 Hanssen Pty Ltd applied for a review of the Reva Notice under s 51 of the OSH Act. On 13 August 2018 the Acting Deputy Director General, under delegation of the Worksafe Commissioner, affirmed the Reva Notice.

9 On 16 August 2018 Hanssen Pty Ltd referred a request for review of the Reva Notice to the Tribunal under s 51A of the OSH Act.

10 The third application, OSHT 4 of 2018, is a request for a review of Improvement Notice 10600595 issued to Hanssen Pty Ltd in relation to the construction site at 43 McGregor Road, Palmyra (**Palmyra East Notice**).

11 On 30 August 2018 a Worksafe Inspector issued the Palmyra East Notice to Hanssen Pty Ltd in relation to a breach of reg 3.54(1)(b)(i) of the OSH Regulations at 43 McGregor Road, Palmyra another of Hanssen Pty Ltd's construction sites.

12 On 31 August 2018, Hanssen Pty Ltd applied to the Worksafe Commissioner for a review of the Palmyra East Notice under s 51 of the OSH Act. On 4 October 2018 the Worksafe Commissioner affirmed the Palmyra East Notice.

13 On 5 October 2018, Hanssen Pty Ltd referred a request for review of the Palmyra East Notice to the Tribunal under s 51 A of the OSH Act.

14 On 29 October 2018 Hanssen Pty Ltd wrote to the Tribunal seeking leave to amend the notice of referral to the Tribunal in each of OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018, to add applications for exemption from the requirement to comply with reg 3.54(1)(b)(i) at the Vue, Reva and Palmyra East sites.

15 On 1 November 2018 the Tribunal issued an order that OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 be joined, heard and determined together. The Tribunal also granted leave to Hanssen Pty Ltd to amend its application in accordance with its request of 29 October 2018.

16 On 16 November 2018 Hanssen Pty Ltd filed and served an amended notice of referral for a review of the improvement notices issued at the Vue, Reva and Palmyra East sites and to the extent that the Tribunal finds Hanssen Pty Ltd is not compliant with reg 3.54(1)(b) an exemption from the requirement to comply with the regulation on the basis that there is substantial compliance or compliance is unnecessary or impracticable.

17 The fourth application, OSHT 3 of 2019, is a request for a review of Improvement Notice number 39800134 (**Sabina Notice**) issued in relation to a construction site at 3-5 Kintail Road, Applecross (**Sabina Site**).

18 On 21 February 2019 a Worksafe Inspector issued the Sabina Notice for a breach of reg 3.54(1)(b)(i) at the Sabina Site.

19 On 1 March 2019 Hanssen Pty Ltd applied to the Worksafe Commissioner for:

a) review of the Sabina Notice under s 51 of the OSH Act; or

b) alternatively, exemption from reg 3.54(1)(b), under reg 2.12 and 2.13.

20 On 13 March 2019 the Worksafe Commissioner affirmed the Sabina Notice and refused the request for exemption from compliance with the requirements of reg 3.54(1)(b).

21 On 19 March 2019, Hanssen Pty Ltd referred a request to the Tribunal for review of the Sabina Notice under s 51A of the OSH Act and a review of the decision of the Worksafe Commissioner to refuse an exemption under s 61A of the OSH Act.

22 In relation to OSHT 3 of 2019 Hanssen Pty Ltd informed the Tribunal that it no longer presses its application for the Tribunal to review the Worksafe Commissioner's decision, under s 51(1) of the OSH Act, to affirm the Sabina Notice on the grounds that it was 'impracticable' to install wire mesh in four divided penetrations because the wire mesh, even if cut away, would prevent the wall or walls from being constructed.

23 Hanssen Pty Ltd submits its case in OSHT 3 of 2019 is confined to an application for exemption from the requirements of compliance with reg 3.52(1)(b) on the grounds that it substantially complies with the regulations or that compliance is unnecessary. (**Exemption Application**).

Background

24 Hanssen Pty Ltd is a builder of multi-level apartments. Hanssen Pty Ltd constructs each level of its high-rise apartment buildings using prefabricated BubbleDeck panels, which are fabricated off-site at its Hazelmere Concrete Prefabrication yard and trucked to the construction site. The BubbleDeck is a precast concrete floor system upon which hollow plastic balls are placed within a lattice of steel.

25 There are holes in the concrete floors, referred to as 'penetrations', for services to be installed through and holes are formed at the time the concrete floor panels are landed in the process of constructing the levels of the building.

26 Some of the holes or penetrations are covered at the Hazelmere Concrete Prefabrication yard where the BubbleDeck and penetrations are formed and the penetration covers are affixed with standard hexagonal screws and two ProLok safety screws at the yard.

27 When constructing each level at the site, crane operators land individual BubbleDeck panels onto a falsework frame. While each BubbleDeck is being landed, riggers are harnessed to a BubbleDeck panel and are exposed to an open penetration formed during the process of landing the BubbleDeck panels and prior to the penetration being covered.

28 During the construction of levels 6 to 29 at the Sabina Site there are as many as 16 penetrations that require covers. Seven are pre-fabricated with a penetration cover before arriving at the construction site. The other nine penetrations are formed onsite when three or four BubbleDeck panels are craned and landed onto the false deck.

29 There are two occasions at the Sabina Site when the penetrations are not covered and there is a risk that workers will fall: firstly the 'landing period' when the BubbleDeck panels are being landed and secondly the 'installation period' when covers are removed to install services or dividing walls.

30 Hanssen Pty Ltd has devised a system called the Hanssen Penetration System (**HPS**) to cover the holes and manage the risks of falls through the holes when the holes are not covered.

31 At the landing period, the HPS prescribes the following process, as detailed in the documentation for the Sabina Site.

- once the BubbleDeck panels are craned into place and a penetration is formed between three or more panels, a rigger places an edge protection around the penetration;
- a steel box-like structure is placed inside the newly formed penetration. The height of this box structure is the same as the height that the panel will be when the concrete is poured into the BubbleDeck on-site, and prevents the concrete from falling through the penetration when poured into the panel;
- the 'angles' or 'tags' or 'edges' are then welded into place within the box-like structure and the penetration is covered with a pre-cut penetration cover (unless the angles have been pre-welded off-site);

- the plywood penetration cover is then screwed into place with normal hex screws and two ProLok safety screws. The penetration cover is contained within the perimeter of the steel box-like and silicone is then applied to all sides of the plywood cover to fill in any gaps;
- 'DANGER HOLE BENEATH' is then spray painted onto the penetration cover (if it has not been pre-sprayed onto the pre-cut cover already prefabricated offsite);
- once the cover is secured in place it is safe to walk over;
- if the HPS cover is installed over a larger penetration (eg. a ventilation shaft), a worker will stand underneath the penetration, above an already covered penetration, and install timber joists (to avoid any warping of the plywood cover). The plywood penetration cover is then placed onto the timber joint and angles from below the opening. If an edge protection is yet to be installed around the penetration, the riggers working above the penetration are required to have harnesses fitted;
- concrete is then poured into the BubbleDeck panel to form the remainder of that panel. When that concrete is poured, the weight of the concrete against the walls of the shutter further secures the plywood cover by wedging it against the sides of the box-like structure.

32 At the Sabina Site, according to the drawings of level 15 there are nine penetrations which are to be formed and covered at the construction site. These penetrations require edge protection to be put in place, the penetration covers are fitted from underneath and the lid screwed from the top. As submitted by the respondent at this time the penetration is not secured with a cover and the edge of the panel that does not have edge protection forms a risk. Hanssen Pty Ltd say the risk of a fall is managed by the workers and the riggers, wearing harnesses that are secured to an anchor capable of withstanding a person's fall.

33 Hanssen Pty Ltd concedes that the HPS does not fully comply with reg 3.54(1)(b)(ii) in that it does not install wire mesh if practicable. However, Hanssen Pty Ltd say that an exemption from the regulations ought to be granted because the HPS 'substantially complies' with the regulation and utilisation of the HPS is consistent with the detailed instructions means full compliance is 'unnecessary'.

34 Hanssen Pty Ltd contends that the HPS system provides an equal or greater protection as it does not expose workers to an open edge during installation of services and speedwalls or risk of injury when the wire mesh is cut away. Hanssen Pty Ltd say any risks or hazards associated with not having the wire mesh under the fixed cover are addressed by alternate safety measures of the HPS.

35 The Worksafe Commissioner, opposes the exemption and submits that the HPS does not achieve substantial compliance with reg 3.54(1)(b) because it only complies with two of the three requirements of that regulation and the implementation of the HPS on the Sabina Site does not render compliance with the regulations unnecessary.

Evidence

36 The HPS was outlined in the evidence of Mr Palomar who is engaged by Hanssen Pty Ltd to provide consulting services to Hanssen Pty Ltd, prepare the documentation of the HPS for each project including the Sabina Site and is responsible for implementing the HPS for the Sabina Site. Mr Palomar included detailed instructions along with photographs of the procedures of the HPS to be undertaken on the Sabina Site.

37 Mr de-Vries, Director of Applecross Safety Solutions Pty Ltd, provides safety, quality and environment consulting, training and auditing services and was engaged by Hanssen Pty Ltd to give expert evidence in these matters. Mr de-Vries adopted the State Administrative Tribunal's 'A Guide for Experts Giving Evidence in the State Administrative Tribunal' in preparing his evidence.

38 Mr Airey, Managing Director of Airey Taylor Consulting Pty Ltd, provides design, documentation and contract administration services in structural and civil projects that vary in scale and complexities. As a forensic engineer Mr Airey provides analytical studies of structures, materials and components to clients. Mr Airey was engaged by Worksafe Commissioner to provide expert evidence in these matters. Mr Airey adopted the 'Expert witnesses in proceedings in the Federal Court of Australia' in preparing his evidence.

39 Mr de-Vries and Mr Airey provided a Joint Statement of Experts document which contains their assessments of particular elements of the HPS and notes whether they are in agreement or otherwise.

40 At times Mr de-Vries and Mr Palomar provided their views and opinions of the HPS in comparison to processes or practices they described as 'traditional'. Each appears to use the term 'traditional' to equate to the requirements of the OSH Regulations for mesh and at other times this term describes their observances of practices adopted at other sites. In Mr Palomar's case these were other sites operated by Hanssen Pty Ltd.

41 The Tribunal must assess whether any alternate system to that prescribed by the OSH Regulations complies with those OSH Regulations and not with practices adopted on other sites. Comparisons of the HPS as practiced on the Sabina Site with practices that are different to or less than that required by the regulations are not a relevant consideration.

42 Worksafe Inspector Mr Graeme White provided evidence of photographs of the 14 holes at the Sabina Site on 21 February 2019.

43 Mr Tony Poulton, a Worksafe Inspector, gave evidence of his inspection of Sabina Site on 21 February 2019 and the issuance of the Sabina Notice along with an affidavit describing an alternate method of construction using BubbleDeck panels that incorporates wire mesh.

Questions to be Answered

44 The first question to be determined is whether the improvement notices issued ought be affirmed, modified or revoked.

45 The second question to be determined is does the use of the HPS on the Sabina Site constitute substantial compliance with reg 3.54(1)(b) or make compliance with reg 3.54(1)(b) unnecessary.

Improvement Notices – Principles

46 In respect of the applications for review of the improvement notices, s 51A of the OSH Act provides:

> **51A. Review of notices by Tribunal**
>
> (1) A person issued with a notice of a decision under section 51(6) may, if not satisfied with the Commissioner's decision, refer the matter in accordance with subsection (2) to the Tribunal for further review.
>
> (2) A reference under subsection (1) may be made within 7 days of the issue of the notice under section 51(6).
>
> (3) A review of a decision made under section 51 shall be in the nature of a rehearing.
>
> (4) The Tribunal shall act as quickly as is practicable in determining a matter referred under this section.
>
> (5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may –
>
> (a) affirm the decision of the Commissioner; or
>
> (b) affirm the decision of the Commissioner with such modifications as seem appropriate; or
>
> (c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,
>
> and the notice shall have effect or, as the case may be, cease to have effect accordingly.
>
> *[(6) deleted]*
>
> (7) Pending the decision on a reference under this section, irrespective of the decision of the Commissioner under section 51, the operation of the notice in respect of which the reference is made shall –
>
> (a) in the case of an improvement notice, be suspended; and
>
> (b) in the case of a prohibition notice, continue, subject to any decision of the contrary made by the Tribunal.

47 The Full Bench of the Western Australian Industrial Relations Commission in ***The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd*** [2007] WAIRC 01273 [93]; (2008) 88 WAIG 22, held that s 51A(5) of the OSH Act requires that that the Tribunal inquire into the circumstances relating to the improvement notice. Having inquired into the circumstances the Tribunal may affirm the decision of the Worksafe Commissioner, affirm the decision of the Worksafe Commissioner with such modifications as are appropriate, or revoke the decision of the Worksafe Commissioner and make such other decision with respect to the notice as seems fit.

48 Section 27(1) of the *Industrial Relations Act 1979* (WA) (**the IR Act**) provides:

> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;
>
> and
>
> (b) take evidence on oath or affirmation; and
>
> (c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent; and
>
> (d) proceed to hear and determine the matter or any part thereof in the absence of any party thereto who has been duly summoned to appear or duly served with notice of the proceedings; and
>
> (e) sit at any time and place; and
>
> (f) adjourn to any time and place; and
>
> *[(g) deleted]*

(h) direct any person, whether a witness or intending witness or not, to leave the place wherein the proceedings are being conducted; and

(ha) determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to the proceedings and require that the cases be presented within the respective periods; and

(hb) require evidence or argument to be presented in writing, and decide the matters on which it will hear oral evidence or argument; and

(i) refer any matter to an expert and accept his report as evidence; and

(j) direct parties to be struck out or persons to be joined; and

(k) permit the intervention, on such terms as it thinks fit, of any person who, in the opinion of the Commission has a sufficient interest in the matter; and

(l) allow the amendment of any proceedings on such terms as it thinks fit; and

(m) correct, amend, or waive any error, defect, or irregularity whether in substance or in form; and

(n) extend any prescribed time or any time fixed by an order of the Commission; and

(o) make such orders as may be just with respect to any interlocutory proceedings to be taken before the hearing of any matter, the costs of those proceedings, the issues to be submitted to the Commission, the persons to be served with notice of proceedings, delivery of particulars of the claims of all parties, admissions, discovery, inspection, or production of documents, inspection or production of property, examination of witnesses, and the place and mode of hearing; and

(p) enter upon any manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place, or premises of any kind whatsoever, wherein or in respect of which any industry is or is reputed to be carried on, or any work is being or has been done or commenced, or any matter or thing is taking or has taken place, which is the subject of a matter before the Commission or is related thereto; and

(q) inspect and view any work, material machinery, appliance, article, book, record, document, matter, or thing whatsoever being in any manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place or premises of a kind referred to in paragraph (p); and

(r) question any person who may be in or upon any such manufactory, building, workshop, factory, mine, mine-working, ship or vessel, shed, place or premises in respect or in relation to any such matter or thing; and

(s) consolidate or divide proceedings relating to the same industry and all or any matters before the Commission; and

(t) with the consent of the Chief Commissioner refer the matter or any part of the matter, including any question of interpretation of the rules of an organisation arising in the matter, to the Commission in Court Session for hearing and determination by the Commission in Court Session; and

(u) with the consent of the Chief Commissioner refer to the Full Bench for hearing and determination by the Full Bench any question of law arising in the matter, other than a question of interpretation of the rules of an organisation; and

(v) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter.

(1a) Except as otherwise provided in this Act, the Commission shall, in relation to any matter before it, conduct its proceedings in public unless the Commission, at any stage of the proceedings, is of the opinion that the objects of the Act will be better served by conducting the proceedings in private.

(2) The powers contained in subsection (1)(p), (q) and (r) may, if the Commission so directs in any case, be exercised by an officer of the Commission or by an expert to whom any matter has been referred by the Commission.

Improvement Notices - Consideration

49 In OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018, the sites concerned have reached the point where there are no longer any holes or openings to which reg 3.54(1)(b) applies. An affirmation of the respective Improvement Notices in these matters cannot be given effect.

50 In relation to the Sabina Notice, OSHT 3 of 2019, Hanssen Pty Ltd submits that it is not practicable to install wire mesh into four of the fourteen penetrations as two of the penetrations are pressurised shafts to be divided by a speedwall to create two shafts. The other two penetrations are air release shafts one of which is to be divided by a speedwall to create two shafts and the other to be divided by two speedwalls to create three shafts. The evidence in support of this contention is that of Mr Palomar's second affidavit which Hanssen Pty Ltd has not relied on.

51 Mr de-Vries and Mr Airey both state that it is practicable for mesh to be imbedded in penetrations that are planned to have dividing walls constructed.

52 At the time of the hearing Worksafe Commissioner submitted that it is not practicable to retrofit wire mesh into the penetrations referred to in the Sabina Notice as they are all within floor panels that are fully formed by concrete and retro-fitting wire mesh is not practicable and proposed that the Tribunal require Hanssen Pty Ltd to ensure it remedies any contravention of the regulations.

Improvement Notices – Conclusion

53 In OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 an affirmation of the improvement notices cannot be given practical effect and or are hereby revoked under s.51(5)(c) of the OSH Act and the applications to exempt each matter pursuant to s 27(1)(a)(ii) of the IR Act are dismissed as further proceedings are not necessary.

54 At the respective time of the issuance of Improvement Notices 40500117, 42500544 and 10600595, the sites were operational and the revocation of the notices as a result of the completion the construction and the passage of time should not infer that these notices were not appropriate nor justified.

55 In OSHT 3 of 2019 the Tribunal proposes to issue orders that:

> Affirm and modify the Sabina Notice to direct Hanssen Pty Ltd to ensure that all holes measuring more than 200mm x 200mm but less than 2 metres x 2 metres in a concrete floor at the above-mentioned workplace meet the requirements of reg 3.54(1)(b), including the requirement to, if practicable, embed wire mesh that meets the requirements of reg 3.54(2), by installing such wire mesh into the penetration prior to pouring the topping concrete in any such concrete floor within one week of the order being issued.

Exemption Application - Principles

56 In respect of the Exemption Application, s 61A of the OSH Act provides:

> **61A. Review of Commissioner's decisions under regulations**
>
> (1) In this section –
>
> ***reviewable decision*** means –
>
> (a) a decision made under the regulations by the Commissioner himself or herself; and
>
> (b) a determination of the Commissioner on the review, under the regulations, of a decision made under the regulations by a person other than the Commissioner, whether or not the decision was made by that person as a delegate of the Commissioner,
>
> but does not include a decision made by a person acting as a delegate of the Commissioner.
>
> (2) A person who is not satisfied with a reviewable decision may, within 14 days of receiving notice of the decision, refer the decision to the Tribunal for review.
>
> (3) On reference of a decision under subsection (2), the Tribunal is to inquire into the circumstances relevant to the decision and may –
>
> (a) affirm the decision; or
>
> (b) set aside the decision: or
>
> (c) substitute for the decision any decision that the Tribunal considers the Commissioner should have made in the first instance.
>
> (4) Pending the decision on a reference under this section, the operation of the reviewable decision is to continue, subject to any decision to the contrary made by the Tribunal.

57 In accordance with s 61A(3) of the OSH Act, the Tribunal inquires into the circumstances relevant to the decision of the Worksafe Commissioner. This involves assessing whether, on the basis of the material before the Tribunal, the Worksafe Commissioner was justified in making the decision he did. As established in ***Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare*** (1994) 74 WAIG 2 and ***The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd***, this requires the Tribunal to investigate the circumstances giving rise to the decision and the validity of the conclusions.

58 The nature of the review under s 61A(3) of the OSH Act, is by way of a rehearing. That is, the powers of the Tribunal are exercisable without having to find error in a decision made by the respondent, and the Tribunal may have regard to material that was not before the respondent: ***Fox v Percy*** [2003] HCA 22; (2003) 214 CLR 118 [20] and ***Allesch v Maunz*** [2000] HCA 40; (2000) 203 CLR 172 [23].

59 A decision of the Worksafe Commissioner includes a decision to exempt a person or workplace from the requirements of the OSH Regulations. The authority of the Worksafe Commissioner to exempt a person or workplace is prescribed by regs 2.12 and 2.13.

60 Regulations concerning the prevention of falls are prescribed by Part 3 Division 5 of the OSH Regulations and the regulation specifically concerned with holes in floors is reg 3.54:

> **3.54. Holes etc. in floors, duties of employer etc. as to**
>
> (1) A person who, at a workplace, is an employer, the main contractor, a self-employed person or a person having control of the workplace must ensure that any hole or opening (other than a lift well, stairwell or vehicle inspection pit) with dimensions of more than 200 mm x 200 mm but less than 2 metres x 2 metres or with a diameter greater than 200 mm but less than 2 metres —

(a) in a floor, other than a concrete floor, of a building or structure at the workplace is covered with a material that is —

(i) strong enough to prevent persons or things entering or falling through or into the hole or opening; and

(ii) securely fixed to the floor;

or

(b) in a concrete floor of a building or structure at the workplace —

(i) has, if practicable, wire mesh that meets the requirements of subregulation (2); and

(ii) is covered with a material that is —

(I) strong enough to prevent persons or things entering or falling through or into the hole or opening; and

(II) securely fixed to the floor.

(2) The wire in the wire mesh referred to in subregulation (1)(b)(i) is required to —

(a) be at least 4 mm in diameter; and

(b) have maximum apertures of 75 mm x 75 mm; and

(c) be embedded, at least 200 mm in the edges of the surrounding concrete; and

(d) be embedded either —

(i) in the upper half of the slab with a minimum concrete cover of 20 mm; or

(ii) in the lower half of the slab with a minimum cover of 30 mm.

(3) A person to whom subregulation (1) applies must ensure that —

(a) wire mesh referred to in subregulation (1)(b)(i) —

(i) is not used as a working platform; and

(ii) is only removed for the purposes of installing services in circumstances where the removal takes place immediately before the installation of a service and the only portion removed is the minimum portion required to be removed for the installation;

and

(b) any cover referred to in subregulation (1)(a) or (b)(ii) —

(i) is marked in clearly legible lettering with the words 'DANGER — HOLE BENEATH'; and

(ii) is only removed for the purposes of installing services in circumstances where the removal takes place immediately before the installation of a service.

Penalty applicable to subregulations (1) and (3): the regulation 1.16 penalty.

61 The OSH Regulations give effect to the purposes of the OSH Act as prescribed by s 60(1) of the OSH Act. The purposes of the OSH Act are set out in s 5:

5. Objects

The objects of this Act are —

(a) to promote and secure the safety and health of persons at work;

(b) to protect persons at work against hazards;

(c) to assist in securing safe and hygienic work environments;

(d) to reduce, eliminate and control the hazards to which persons are exposed at work;

(e) to foster cooperation and consultation between and to provide for the participation of employers and employees and associations representing employers and employees in the formulation and implementation of safety and health standards to current levels of technical knowledge and development;

(f) to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health;

(g) to promote education and community awareness on matters relating to occupational safety and health.

62 The High Court of Australia set out the principles to be used when interpreting the construction of statutes, legislative instruments and other documents that may have legislative or regulatory effect the principles in ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1988) 194 CLR 355 [78]:

> However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical

construction, the purpose of the statute or the canons of construction [(56)] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

63 These principles apply to the regulations and their construction should serve the statutory purpose as established in ***ADCO Constructions Pty Ltd v Goudappel*** [2014] HCA 18; (2014) 254 CLR 1 and ***Eclipse Resources Pty Ltd v The State of Western Australia (No. 4)*** [2016] WASC 62; (2016) 307 FLR 221

64 The Supreme Court of Western Australia has held in ***Shepherd v Murray*** [2000] WASCA 281; (2000) 105 IR 465 and ***Green v Mabey*** (Unreported, WASC, Library No 940711, 7 December 1994), that the objects of the OSH Act are to secure the safety of persons at the workplace and creates obligations on the employer to protect against risks to health and safety.

Exemption Application – 'Substantially Complies' - Principles

65 Regulation 2.12 provides for exemption on the basis of substantial compliance:

> **2.12. Exemption from regulation where substantial compliance**
>
> (1) A person may apply to the Commissioner for a person who, or a workplace which, does not fully comply with a requirement of these regulations to be exempted from the requirement and the application is to be in an approved form.
>
> (2) If, on an application under subregulation (1), the Commissioner is satisfied that there is substantial compliance with the relevant requirements of these regulations then the Commissioner may exempt the person or workplace from the requirement and the exemption is to be in writing and may be made subject to such conditions as are specified by the Commissioner.
>
> (3) If the Commissioner imposes a condition in relation to an exemption granted under subregulation (2) then a person having the benefit of the exemption must comply with the condition.
>
> Penalty for a person who commits the offence as an employee:
>
> the regulation 1.15 penalty.
>
> Penalty in any other case: the regulation 1.16 penalty.
>
> (4) The Commissioner may, at any time, revoke an exemption granted under subregulation (2) and the revocation takes effect on the day on which notice of the revocation posted to the person's last known address would have been delivered in the ordinary course of post.

66 The Worksafe Commissioner may exempt a person or workplace from the requirements of reg 3.54 if he is satisfied that there is 'substantial compliance'. The meaning of 'substantial compliance' is not defined in neither the regulations nor the legislation.

67 In ***Re Asset Risk Management Ltd*** (1995) 59 FCR 254; (1995) 130 ALR 605, the meaning of substantial compliance was considered, and the Federal Court held that it is a matter of degree and concerns the practical effect of what is done compared to the practical effect the legislature seeks to achieve (607).

68 The Federal Court considered the meaning of 'substantially' in ***Dandy Power Equipment Pty Ltd* v *Mercury Marine Pty Ltd*** (1982) 44 ALR 173 (192-193) and observed there is no precise scale by which to measure substantial and it is a matter of judgement.

69 The Federal Court in ***Montero v Minister for Immigration and Border Protection*** [2014] FCAFC 170; (2014) 229 FCR 144, held that substantial compliance with each and every condition of the regulations concerning the granting of a visa was required. The Court reasoned that each condition imposed serves a different purpose from each of the other conditions [32]; the construction of the regulations in question was consistent with a purposive approach to the construction of the clause [33]; and that 'each of the "conditions" was imposed by virtue of the operation of the *Migration Regulations* themselves' [39]. The Court reasoned it is not left to the minister or his delegate to determine whether or not non-compliance with one or other of the 'conditions' could be 'overlooked' or 'excused' and that each of the 'conditions' was presumably considered by the legislature to serve a separate and discrete objective [39]. The word 'substantial' simply identified the extent of the compliance; it did not affect the identification of the 'conditions' which must be complied with. The Court acknowledged that the decision maker is entrusted with the power to determine that there may not have been strict compliance with any one condition but there had nevertheless been 'substantial compliance' [39]. In the circumstances Flick J states [40]:

> A contrary conclusion would place a decision maker in an invidious position. He would be forced to weigh the comparative importance of one condition with the comparative importance of other conditions. This requires value judgements about the relative importance of the objectives that those conditions are imposed to achieve…

70 In ***Argyle Diamonds Limited v Fluor Australia Pty Ltd*** [2018] WASC 356, a matter concerning substantial compliance with the requirements set out in an approved form under the *Service and Execution of Process Regulations 1993* (Cth), the Supreme Court of Western Australia held that the question of 'substantial compliance' is a question of fact and requires comparison between the form used and the requirements of the approved form at the time of its use and in determining the factual question of the purpose of the form, it is necessary to identify the purpose of the particular form as required by the legislature.

71 In ***Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner*** [2017] WAIRC 00823; (2017) 97 WAIG 1888 (**Concerto Case**), this Tribunal considered the question of substantial compliance. Hanssen Pty Ltd says that the Concerto Case [30] is authority for the Tribunal to find that the HPS substantially complies with the requirements of the regulations if the standard of safety of the HPS falls '*not far short*' of full compliance. Worksafe Commissioner says the Tribunal held that compliance with two of three elements of reg 3.54(1)(b) in the absence of substantial compliance with the other elements of reg 3.54(1)(b) does not constitute substantial compliance. In the Concerto Case, when

comparing the practical effect of the HPS with the intended practical effect of the regulations the requirements were specifically and separately considered by the Tribunal [55] to [56].

Exemption Application - Substantially Complies - Consideration

72 Hanssen Pty Ltd acknowledges that the HPS does not strictly comply with reg 3.54(1)(b) because it does not embed wire mesh in penetrations if practicable. However, Hanssen Pty Ltd contends that the HPS is 'substantially compliant' with reg 3.54(1)(b) because the practical effect, in safety terms is that it is safer or equally as safe. Hanssen Pty Ltd refers to the decision of this Tribunal constituted by Kenner SC in the Concerto Case and says that if it is found that the HPS falls *'not far short'* of the standard of the safety required it substantially complies. Worksafe Commissioner say that an overall standard of safety does not establish 'substantial compliance' with reg 2.12.

73 As established in ***Project Blue Sky Inc v Australian Broadcasting Authority*** and ***ADCO Constructions Pty Ltd v Goudappel***, reg 2.12 is to be construed by giving the words the meaning the legislature is taken to have intended them to have. The elements or requirements of the sub-regulations each serve a discrete purpose. That is, concrete floors have an additional requirement for embedding wire mesh if practicable.

74 As in ***Argyle Diamonds Limited v Fluor Australia Pty Ltd***, the question of substantial compliance is a question of fact and requires a comparison between the requirements of the regulation and risk controls of the HPS. Similar to the reasoning in ***Montero v Minister for Immigration and Border Protection***, it is not appropriate for the Tribunal to determine the weight of each of the requirements and to balance each against the other, particularly to completely excuse compliance from one element altogether. The task is to assess the HPS for an element equivalent or nearly equivalent to the requirement or purpose of wire mesh.

75 Hanssen Pty Ltd says the ProLok system is a secondary system equivalent to the secondary system of the wire mesh. Hanssen Pty Ltd contends that the ProLok system ensures the cover cannot be inadvertently removed and this removes the necessity to have wire mesh as a secondary protection measure. Mr de-Vries describes the use of ProLok screws to affix the cover as a 'secondary' system of protection … 'which should be considered an equivalent secondary measure to that of the traditional system – being mesh'.

76 There is nothing in reg 3.54 to support the notion that the requirement for mesh is 'secondary'. The Macquarie Dictionary defines 'secondary' as 'next after the first in order, place, time, importance, etc'; 'belonging or relating to a second order, division, stage, period, rank, or the like'; 'derived or derivative; not primary or original'; and 'of minor importance; subordinate; auxiliary'.

77 Regulation 3.54(1) distinguishes between floors other than concrete [reg 2.54(1)(a)] and concrete floors [reg 3.54(1)(b)]. The floors of the Sabina Site are concrete and reg 3.54(1)(b)(i) and reg 3.54(1)(b)(ii) both apply. There are two requirements set out in the regulations. Firstly, where practicable wire mesh must be embedded. Secondly the hole is covered. The requirement for mesh is a second measure however it is not a secondary measure. The ProLok screws may provide an additional element of protection against the cover being removed inappropriately and this element may be described as a 'secondary' or 'not primary or original' measure to reg 3.54(1)(b)(ii)(II) which requires the cover to be 'securely fixed to the floor'.

78 Hanssen Pty Ltd contends that the use of edge protection in the HPS results in the overall safety of the HPS being superior to that required by the regulations and means the HPS substantially complies with the regulations. The use of edge protection where there is a risk a person may fall two or more metres is mandated by reg 3.55. The use of edge protection required under reg 3.55 does not add a second measure such that a requirement under reg 3.54(1)(b)(i) can be said to substantially comply.

79 The purpose of the mesh is to provide a second measure to that of the cover and/or edge protection. The risk of serious injury or fatality from a fall requires a high threshold be exercised by a decision maker. The HPS does not incorporate a second measure. If one of the processes of the HPS fails, for example where a worker works near an edge without a harness and edge protection has not been installed or has been removed to install services, there is not a second measure to provide protection.

80 I find that 'substantial compliance' requires that each of the requirements of the regulations need to be substantially complied with and the HPS fails to adequately comply with the requirement of reg 3.554(1)(b)(i).

Exemption Application -Substantially Complies - Conclusion

81 For the reasons set out above I find that the HPS does not substantially comply with reg 3.54(1)(b)(i) and I affirm the decision of the Worksafe Commissioner.

Is Requirement of Compliance Unnecessary?

82 The second question to be determined is whether an exemption from the requirements of reg 34(1)(b) should be granted because compliance is unnecessary.

Exemption Application – Compliance Unnecessary – Principles

83 Regulation 2.13 provides for exemption on the basis that compliance is unnecessary or impracticable:

> **2.13. Exemption from regulation where compliance is unnecessary or impracticable**
>
> (1) A person may apply to the Commissioner for a person or a workplace to be exempted from complying with a requirement of these regulations and the application is to be in an approved form.
>
> (2) If, on an application under subregulation (1), the Commissioner is satisfied that compliance with any requirement of these regulations would be unnecessary or impracticable then the Commissioner may exempt the person or workplace from the requirement and the exemption is to be in writing and may be made subject to such conditions as are specified by the Commissioner.

(3) If the Commissioner imposes a condition in relation to an exemption granted under subregulation (2), a person having the benefit of the exemption must comply with the condition.

Penalty for a person who commits the offence as an employee:

the regulation 1.15 penalty.

Penalty in any other case: the regulation 1.16 penalty.

(4) The Commissioner may, at any time, revoke an exemption granted under subregulation (2) and the revocation takes effect on the day on which notice of the revocation posted to the person's last known address would have been delivered in the ordinary course of post.

84 The legislation and regulations do not define 'unnecessary'. The Macquarie Dictionary defines 'unnecessary' as 'not necessary, superfluous, needless'.

85 To find that compliance with the requirements of the regulations is not necessary I must be convinced that the HPS is safer or as safe as compliance with those requirements set out in the regulation such that it is not necessary to require compliance.

86 In ***Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner***, this Tribunal, Kenner SC, considered an exemption on the grounds that compliance is 'not necessary' and held that:

[60] Finally, is the ground of exemption based on necessity. The situations where there may be an exemption granted because compliance with a regulation would be unnecessary could be variable. It may be conceivable that a person with an obligation to otherwise comply, adopts an accepted, more efficient and modern system, to achieve compliance with a standard or a requirement of the Regulations, making strict compliance unnecessary, to address the specific hazard. I do not accept the WorkSafe submission that this is a matter beyond the Tribunal's jurisdiction: *ECI.*

[61] To be unnecessary, it must be established that a person seeking an exemption that the object or purpose of the regulation can be met for example, by other means which adequately take account of the relevant hazard and the risk of harm or injury. Given the requirements of reg 3.54(1)(b), the fact that the Tribunal is not satisfied that Hanssen has substantially complied with the Regulations and the continued presence on future projects of the major hazard of falls from height and the risk of serious injury, in my view, Hanssen has not been able to establish that compliance with reg 3.54(1)(b) is unnecessary

87 Worksafe Commissioner refers to the hierarchy of hazard controls and its application to the comparisons between the requirements of the OSH regulations and the HPS. Worksafe Commissioner's contention is that the hierarchy of hazard controls is a system widely accepted as best practice for minimising or eliminating exposure to hazards. The components, or types of hazard control, in the hierarchy are, in order of decreasing effectiveness:

a. elimination - i.e. physically removing the hazard. For example, if employees are working high off the ground, the falls hazard can be eliminated by moving the item that the employees are working on down to ground level to eliminate their need to work at height;

b. substitution - i.e. replacing something that produces a hazard with an alternative that does not produce a hazard. For example, replacing lead-based paint with the much less toxic titanium white;

c. engineering controls - i.e. creating a physical change to the workplace to protect workers from hazardous conditions by placing a fixed barrier between the worker and the hazard, or by removing a hazardous substance through air ventilation. For example, installing a permanent guard over a piece of plant with dangerous moving parts, or installing a fume hood to remove dangerous airborne contaminants;

d. administrative controls - i.e. implementing changes to the way people work through procedure, training, temporary barriers, warning signs. policy, or shift designs that lessen the threat of a hazard to an individual. For example, completing road construction at night when fewer cars are on the road;

e. Personal Protective Equipment - i.e. a final barrier of protection to workers regularly exposed to a hazard. For example, protective clothing, helmets, goggles.

Exemption Application – Compliance Unnecessary – Application

88 Hanssen Pty Ltd and Worksafe Commissioner agree that if the practical effect of the HPS is that it is equally safe or safer than full compliance with the requirements of the regulations then compliance with the requirement of 3.54(1)(b) is unnecessary. If the standard of safety provided by the HPS falls short then full compliance would be necessary.

89 Hanssen Pty Ltd says the HPS has the practical objective of the OSH Regulations and is safer than the requirements of the OSH Regulations as a result of the use of edge protection, the reduction of trip hazards as the cover is in line with the surface, the use of ProLok screws and the reduction of risks of injuries from cuts from wire mesh when it is cut away.

90 During the landing period, Hanssen Pty Ltd acknowledges that it is not possible to install edge protection prior to the BubbleDeck panels being craned into place. The risk of a fall at this time is managed by the anchoring the rigger to the truss that is used to lift the BubbleDeck panel off a truck to the required height. Mr Palomar gave evidence that the truss is capable of withstanding the lifting process when used as a lift point for the entire BubbleDeck and is therefore capable of withstanding the force applied as a result of a worker's fall. Worksafe Commissioner says that the photographic evidence shows the rigger is anchored to the lattice on top of the BubbleDeck panel and that Hanssen Pty Ltd has not demonstrated that the lattice is capable of withstanding the force of a person's fall. Worksafe Commissioner says Hanssen Pty Ltd has not demonstrated that the lattice complies with reg 3.53. Hanssen Pty Ltd did not provide any evidence concerning compliance with reg 3.53 which requires inspection by a competent person, and I make no finding concerning this.

91 During the landing period and prior to the installation of edge protection the joint statement of experts identified that there is a period in which, in addition to the riggers, other people may be working near the exposed edge. Mr de-Vries and Mr Airey also say the HPS results in there being more open edges for a worker to fall from. Mr de-Vries and Mr Airey agree that reg 3.54(1) does not address this risk and they suggest a further section ought to be adopted to address the use of pre-cast concrete flooring. Mr Poulton gave evidence that the HPS does not incorporate a formwork deck that mitigates the severity of a fall during this period.

92 Worksafe Commissioner refers to the hierarchy of controls and contends that the HPS is an 'administrative' hazard control whereas incorporating wire mesh into penetrations is an 'engineering' hazard control. The use of mesh is more effective because it does not rely on the behaviour of workers or their adherence to certain procedures. The Tribunal accepts the application of the Hierarchy of Control as a useful tool to evaluate the options to eliminate or reduce risk along with consideration of the level of risks. That is, higher consequence risks need to have demonstrably more reliable controls than lower consequence risk.

93 The HPS relies on edge protection to manage risks of falls and Mr de-Vries' evidence is that this is satisfactory because it ensures that no person can fall through the open penetrations. The evidence of Mr de-Vries is that the edge protection adequately mitigates the risk of a fall and the application of the hierarchy of controls results in the HPS providing a higher standard of safety. Mr de Vries says the requirement for mesh is then, unnecessary. The edge protection is made up of two horizontal rails, one approximately one metre from the slab and the other approximately 400 metres from the slab. Worksafe Commissioner contends that a worker may easily remove the edge protection, to undertake a task, and an average sized adult may comfortably fit their body through the rails of the edge protection, for example to insert joists, it is easily removed. The requirement for edge protection is set out in reg 3.55 which requires edge protection to be provided and kept in place whenever there is a risk that a person could fall two or more metres from the edge of a scaffold, a fixed stair, a landing or suspended slab. It is not, therefore, an additional feature of the HPS. The installation of edge protection does not render the need for mesh to be embedded unnecessary. The additional requirement of mesh provides an additional protective measure should the edge protection measure fail.

94 The OSH Regulations require the cover to be securely affixed and the use of hexagonal screws and the ProLok screws, along with the procedures for removal of these screws in accordance with the HPS instructions meets this requirement of reg 3.54(1)(b)(ii). However, reg 3.54(1)(b)(i) requires a further protective measure for concrete floors and that is wire mesh. Mr de-Vries subsequently stated during his oral evidence that his view that the HPS rendered the requirement for mesh unnecessary was not on the limited basis of the ProLok system only but on the basis of the implementation of the whole system.

95 The classification of the requirement for mesh as an 'engineering control' within the hierarchy of controls as set out in [86] above is not disputed. The HPS relies on administrative controls that require workers to actively think or comply with procedures and its classification as an 'administrative control' is also not disputed. The HPS relies on the Prolok system being followed and temporary edge protection being placed around the penetrations. These measures are both 'administrative controls'. Administrative controls are lower down on the hierarchy because, as acknowledged by Mr Palomar and both experts in their evidence, even the most safety conscious workers can act with due regard to their own safety.

96 Mr Airey's conclusion in his report provides a good summary of the comparison between the requirements of the regulations and the HPS.

> At the heart of the present provisions is an engineering solution which provides a mesh over the opening at all times, other than when the wire mesh required has been either partially or fully removed. The mesh stays in place until all arrangements for passing services through the opening are complete.
>
> The [HPS] has a significant administrative requirement and it is vulnerable to administrative breakdown. If administration of the procedures required fail, so does the provision of safety. This is exampled by the need to screen off the area around the lid yet to be removed. The lid could still be removed if the screening off is not present. The requirement that the workmen removing the lid be anchored to the floor is a requirement which would require administration, whereas the present compliant requirement is essentially safe at all times until the service opening is formed through the mesh.
>
> It is concluded that the [HPS] has a high level of administrative requirement to ensure safety is achieved and as a consequence is not directly comparable to the provision of wire mesh in the opening.

97 Mr Palomar's evidence included comprehensive and detailed instructions on implementing the HPS. Mr de-Viers evidence compares the detailed instructions with the 'traditional system' and concluded that the HPS is a superior system to that of the regulations. However, there is evidence these instructions are not always followed:

a) there was a disagreement between the site manager and Mr Palomar about the removal of a penetration cover at the Sabina Site;

b) Mr Airey, an expert witness, identified that at the Sabina site where the angles on which the penetration covers are welded on site the seatings are irregular and not compliant;

c) Installation of services – on Sabina Site being done from above and not below HPS instruction is from below – Mr Airey says the Sabina Site manager said he would remove from above – Mr Airey cannot see how this can be done given the installation of services would need to happen long before they got to the top;

d) Mr Airey states that at a visit to the Sabina Site he was advised that the usual procedure followed by workers was that joists and penetration covers were installed from above and not below as detailed in the documented instructions. Mr Airey observed that the worker tasked with removing the penetration covers informed him that he had not seen the joists secured by a fixing from below before and was unsure of how he was going to deal with that issue.

98 These examples demonstrate a significant weakness in the administration of the HPS and I am not convinced that the detailed instructions will be followed. Therefore, I am not convinced the implementation of the HPS at the Sabina Site renders compliance with reg 3.54(1)(b) unnecessary.

99 Mr de-Vries and Mr Airey agree that 'If the HPS System is administered and implemented in its entirety as per developed procedures, there is no risk to personnel'. This statement needs to be considered along with their agreed further statement 'If an administrative process fails during the HPS system, there can be potential significant risk to personnel'. Given the HPS significantly relies on administrative controls and the consequences of failure of the processes is high I am not convinced the requirement for the engineering control required in the regulations is unnecessary.

100 Hanssen Pty Ltd say the HPS is a safer system than that provided by the regulations because it results in a reduction in injuries from trips as the penetration cover is even with the floor and the absence of mesh means there is no risk of a person being cut from exposed mesh that has been cut away. The difference between the consequences of cuts and that of a fall through a hole are significant and a reduction in injuries from a trip or cut does not establish the HPS is safer than the requirement of the regulations.

Exemption Application – Compliance Unnecessary – Conclusion

101 For the reasons set out above I am not convinced that the HPS is as safe or safer than the measures required by the OSH Regulations.

Orders to be Issued

102 A Minute of Proposed orders will now issue in the following terms:

1) Referrals OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 are revoked under s 51(5)(c) of the OSH Act and the applications to exempt each matter are dismissed pursuant to s 27 (1)(a)(ii) of the IR Act as further proceedings are not necessary;

2) At the respective time of the issuance of Improvement Notices 40500117, 42500544 and 10600595 the sites were operational and the revocation of the notices as a result of the completion the construction and the passage of time should not infer that these notices were not appropriate nor justified;

3) The Tribunal affirms Improvement Notice 39800134 in OSHT 3 of 2019 with the following modification that Hanssen Pty Ltd is directed to ensure that all holes measuring more than 200mm x 200mm but less than 2 metres x 2 metres in a concrete floor at the above-mentioned workplace meet the requirements of reg 3.54(1)(b), including the requirement to, if practicable, embed wire mesh that meets the requirements of reg 3.54(2), by installing such wire mesh into the penetration prior to pouring the topping concrete in any such concrete floor within one week of the order being issued; and

4) The Tribunal affirms the Worksafe Commissioner's decision to not grant Hanssen Pty Ltd an exemption from the requirements of reg 2.12 and 2.13.

2020 WAIRC 00290

REVIEW OF IMPROVEMENT NOTICES

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	**:**	2020 WAIRC 00290
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	TUESDAY, 16 JULY 2019 AND ON PAPERS TUESDAY, 31 MARCH 2020
DELIVERED	**:**	MONDAY, 25 MAY 2020
FILE NO.	**:**	OSHT 2 OF 2018, OSHT 3 OF 2018, OSHT 4 OF 2018, OSHT 3 OF 2019
BETWEEN	**:**	HANSSEN PTY LTD
		Applicant
		AND
		WORKSAFE WESTERN AUSTRALIA COMMISSIONER
		Respondent

CatchWords	:	Review of Improvement Notices - Application to review decision of the Worksafe Western Australia Commissioner to not grant an exemption from compliance with reg 3.54(1)(b) of the *Occupational Safety and Health Regulations 1996* (WA) - Substantial compliance - Whether compliance is unnecessary - Hierarchy of hazard controls
Legislation	:	*Industrial Relations Act 1979* (WA)
		Occupational Safety and Health Act 1984 (WA)
		Occupational Safety and Health Regulations 1996 (WA)
Result	:	In OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 Improvement Notices 40500117, 42500544 and 10600595 are revoked and exemption applications dismissed.
		In OSHT 3 of 2019 Improvement Notice 39800134 is revoked and exemption application dismised.

Representation:

Applicant	:	Mr L Swanson (of counsel)
Respondent	:	Mr D McDonnell (of counsel)

Cases referred to in reasons:

Denise Brailey v Mendex Pty Ltd t/a Mair & Co Maylands [1993] WAIRC 10026; (1993) 73 WAIG 26

Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner [2017] WAIRC 00823; (2017) 97 WAIG 1888

Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 75 WAIG 9; (1994) 58 IR 22

Supplementary Reasons for Decision

1 On 28 February 2020, the Tribunal issued Reasons for Decision in OSHT 2 of 2018, OSHT 3 of 2018, OSHT 4 of 2018 and OSHT 3 of 2019 ([2020] WAIRC 00141) and a Minute of Proposed Order to the parties to these referrals. These Reasons set out the amendments necessary following subsequent submissions from the parties.

2 In addition, the Worksafe Western Australia Commissioner (**Worksafe Commissioner**) applied for costs relating to the engagement of an expert witness in these proceedings.

Proposed Orders to be Issued

3 On 28 February 2020, the parties were provided with a Minute of Proposed Order in the following terms:

1) THAT Referrals in OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 are revoked under s 51(5)(c) of the *Occupational Safety and Health Act 1984* and the applications to exempt each matter are dismissed pursuant to s 27 (1)(a)(ii) of the *Industrial Relations Act 1979* (WA) as further proceedings are not necessary;

2) THAT at the respective time of the issuance of Improvement Notices 40500117, 42500544 and 10600595 the sites were operational and the revocation of the notices as a result of the completion the construction and the passage of time should not infer that these notices were not appropriate nor justified;

3) THAT the Tribunal affirms Improvement Notice 39800134 in OSHT 3 of 2019 with the following modification that Hanssen Pty Ltd is directed to ensure that all holes measuring more than 200mm x 200mm but less than 2 metres x 2 metres in a concrete floor at the above-mentioned workplace meet the requirements of reg 3.54(1)(b) of the *Occupational Safety and Health Regulations 1996* (OSH Regulations), including the requirement to, if practicable, embed wire mesh that meets the requirements of reg 3.54(2) of the OSH Regulations, by installing such wire mesh into the penetration prior to pouring the topping concrete in any such concrete floor within one week of the order being issued; and

4) THAT the Tribunal affirms the Commissioner's decision to not grant Hanssen Pty Ltd an exemption from the requirements of reg 2.12 and 2.13 of the OSH Regulations.

Orders to be Issued

4 At the speaking to the minutes, conducted on the papers, the parties submitted that it was not practical to implement Order 3 as the construction on the relevant site was near completion. The orders to be issued will be amended to be in the following terms:

1) THAT referrals in OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 are revoked under s 51(5)(c) of the *Occupational Safety and Health Act 1984* (WA) and the applications to exempt each matter are dismissed pursuant to s 27(1)(a)(ii) of the *Industrial Relations Act 1979* (WA) as further proceedings are not necessary;

2) THAT at the respective time of the issuance of Improvement Notices 40500117, 42500544 and 10600595 the sites were operational and the revocation of the notices as a result of the completion of the construction and the passage of time should not infer that these notices were not appropriate nor justified;

3) THAT referral in OSHT 3 of 2019 is revoked under s 51(5)(c) of the *Occupational Safety and Health Act 1984* (WA) noting that site was operational and the revocation of the notice as a result of the completion the construction and the passage of time should not infer that the notice was not appropriate nor justified;

4) THAT the Tribunal affirms the Worksafe Commissioner's decision to not grant Hanssen Pty Ltd an exemption from the requirements of reg 2.12 and 2.13 of the *Occupational Safety and Health Act 1984* (WA).

Costs Application

5 On 6 March 2020, the Worksafe Commissioner applied pursuant to s 27(1)(c) of the *Industrial Relations Act 1979* (WA) **(IR Act)** for an order that Hansen Pty Ltd pay $14,192.75, the costs for the preparation of reports and attendance at the hearing of an expert witness, for the Worksafe Commissioner. Hanssen Pty Ltd opposes the costs order.

6 Both the Worksafe Commissioner and Hanssen Pty Ltd agreed that the application for costs be dealt with by way of written submissions.

7 Worksafe Commissioner submits that costs ought be determined in accordance with s 26 of the IR Act which provides the Tribunal to act according to equity and good conscience and cites the case of ***Denise Brailey v Mendex Pty Ltd t/a Mair & Co Maylands*** [1993] WAIRC 10026; (1993) 73 WAIG 26 ***(Brailey),*** as an example of the test to be applied where the Commission considered whether or not 'proceedings have been instituted without reasonable cause'.

8 Worksafe Commissioner contend that the applications brought by Hanssen Pty Ltd in these matters were at all times without merit and were instituted without reasonable cause on the basis of the following:

(a) there was no dispute between the parties that it was practicable for the wire mesh to imbedded into penetrations;

(b) the "substantially complies" issue was already determined in an earlier Tribunal matter;

(c) the applicant's contention that edge protection in the HPS resulted in an overall safety of the HPS being superior was a nonsensical assertion;

(d) there was no dispute that the classification of the wire mesh requirement was an engineering control measure; and

(e) the applicant's categorisation of the ProLok screws as an additional safety measure equivalent to the embedded wire mesh was untenable.

9 Hanssen Pty Ltd submits that costs ought to be awarded only where the Tribunal is satisfied that to do so would be consistent with overriding duty to act in accordance with equity and good conscience.

10 In response to the Worksafe Commissioner's contention that the referrals to the Tribunal were instituted without reasonable cause, Hanssen Pty Ltd says that;

(a) Prior to the hearing they had advised the Worksafe Commissioner that it no longer pressed the impracticability application and that their case was confined to the exemption applications;

(b) There were two issues to be determined which required the consideration of both expert and lay evidence from both parties. Hanssen Pty Ltd contends that if the referrals were fundamentally flawed the Worksafe Commissioner had the opportunity to make an application to dismiss the amended notices of referral. Given that the Worksafe Commissioner did not make such an application it would now be inconsistent with s 26 of the IR Act to rely on this ground for an order for costs. In addition, Hanssen Pty Ltd submit that the subsequent programming orders, providing for the parties' experts to prepare a joint statement, were made by consent and on issues that required an assessment of expert evidence. Hanssen Pty Ltd submit that following the Tribunal's decision in ***Gerry Hanssen, Hanssen Pty Ltd Director v Lex McCulloch, Worksafe Western Australia Commissioner*** [2017] WAIRC 00823; (2017) 97 WAIG 1888 (***Concerto***) they had made improvements to the Hanssen Penetration System (**HPS**) which given Kenner's C's statements at [60] and [61] meant it was open for the Tribunal to determine that the improved system did not fall 'far short of full compliance' and substantially complied with the Regulations;

(c) They argued the edge protection is one of several measures included in the HPS which when considered as a whole mitigates against fall risks and that Worksafe Commissioner's submissions misrepresent their contentions;

(d) There is a difference of view with the Worksafe Commissioner concerning whether the complete HPS system incorporating the ProLock screws, when fully administered provided an equivalent measure to the wire mesh or whether embedded wire mesh is a superior safety control. The determination in favour of one contention does not mean there was no dispute and it does not entitle the party to costs; and

(e) Joint views of the parties' experts, it was open for the Tribunal to conclude that the improved HPS meant that compliance with the requirement to install wire mesh was unnecessary.

The Principles Concerning Costs

11 Pursuant to s 27(1)(c) of the IR Act the Tribunal is empowered to make an order for costs. In ***Brailey***, the Full Bench of the Commission established the principles to be applied (27) finding it is well settled in industrial law that an order for costs ought not be made except in extreme cases, such as when proceedings are instituted without reasonable cause.

12 Costs may also be awarded against a party where an application has no merit and is 'manifestly groundless' as per ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 75 WAIG 9 (11); (1994) IR 22 (26).

Were the Referrals Instituted by Hanssen Pty Ltd Without Reasonable Cause?

13 I am not persuaded that there are extreme circumstances in the conduct of the applicant in bringing the referral nor that the referral was manifestly groundless. The issues to be determined required the assessment of expert evidence and the preparation of a joint statement by the expert witnesses engaged by each party. The conduct of this process was by consent of both parties.

14 As observed in ***Concerto*** the situations where an exemption may be granted on the basis that compliance is unnecessary could be variable [60]. In particular, the issue of whether an exemption ought to be granted because the HPS provides a system that is safer than that provided in the regulations required the consideration of evidence from a number of witnesses, including expert witnesses. Ultimately the contentions and evidence of the Worksafe Commissioner were favoured, however this does not mean the referrals on this occasion were instituted without reasonable cause or were manifestly groundless.

15 Hanssen Pty Ltd submit that the Worksafe Commissioner ought not be awarded costs as the Worksafe Commissioner did not take the early opportunity to apply for the matter to be dismissed. An application for the dismissal of OSHT 2 of 2018 and OSHT 3 of 2018 had been made by the Worksafe Commissioner on 11 September 2018. On 1 November 2018 the Tribunal, as then constituted, issued an Order that included an order that the application to dismiss the notices of referral dated 11 September 2018 be adjourned to the final hearing of this proceeding. A further Order that on or before 16 November 2018 the Worksafe Commissioner did not make any application to dismiss the amended notices of referral (second application to dismiss); and a further Order that the second application to dismiss, if made, be listed for hearing at the final hearing of this proceeding. Given these Orders the application to dismiss the referrals was ultimately incorporated into the hearing and determination of the four referrals joined together. It therefore cannot be said that the Worksafe Commissioner did not make such an application. However, the making of such an application does not change my overall assessment that the conduct of this matter is not an extreme circumstance nor one in which the referrals were manifestly groundless.

Conclusion

16 For the foregoing reasons the application for costs is dismissed.

2020 WAIRC 00291

REVIEW OF IMPROVEMENT NOTICES

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	HANSSEN PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	MONDAY, 25 MAY 2020
FILE NO/S	OSHT 2 OF 2018, OSHT 3 OF 2018, OSHT 4 OF 2018, OSHT 3 OF 2019
CITATION NO.	2020 WAIRC 00291

Result	In OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 Improvement Notices 40500117, 42500544 and 10600595 are revoked and exemption applications dismissed.
	In OSHT 3 of 2019 Improvement Notice 39800134 is revoked and exemption application dismised.
Representation	
Applicant	Mr L Swanson (of counsel)
Respondent	Mr D McDonnell (of counsel)

Order

HAVING HEARD Mr L Swanson (of counsel) on behalf of the applicant and Mr D McDonnell (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), the *Occupational Safety and Health Act 1984* (WA) and the *Occupational Safety and Health Regulations 1996* (WA), hereby orders:

1. THAT referrals in OSHT 2 of 2018, OSHT 3 of 2018 and OSHT 4 of 2018 are revoked under s 51(5)(c) of the *Occupational Safety and Health Act 1984* (WA) and the applications to exempt each matter are dismissed pursuant to s 27(1)(a)(ii) of the *Industrial Relations Act 1979* (WA) as further proceedings are not necessary;
2. THAT at the respective time of the issuance of Improvement Notices 40500117, 42500544 and 10600595 the sites were operational and the revocation of the notices as a result of the completion of the construction and the passage of time should not infer that these notices were not appropriate nor justified;

3. THAT referral in OSHT 3 of 2019 is revoked under s 51(5)(c) of the *Occupational Safety and Health Act 1984* (WA) noting that site was operational and the revocation of the notice as a result of the completion the construction and the passage of time should not infer that the notice was not appropriate nor justified;

4. THAT the Tribunal affirms the Worksafe Commissioner's decision to not grant Hanssen Pty Ltd an exemption from the requirements of reg 2.12 and 2.13 of the *Occupational Safety and Health Act 1984* (WA); and

5. THAT the Respondent's application for costs be and is hereby dismissed.

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