



Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 5

WEDNESDAY 26 AUGUST, 2020

Vol. 100—Part 2

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

100 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

GENERAL ORDERS—

2020 WAIRC 00272

APPLICATION FOR COVID-19 JOBKEEPER PACKAGE GENERAL ORDER WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2020 WAIRC 00272
CORAM	:	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
HEARD	:	WRITTEN SUBMISSIONS
DELIVERED	:	THURSDAY, 14 MAY 2020
FILE NO.	:	APPL 19 OF 2020
BETWEEN	:	CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA LIMITED Applicant AND (NOT APPLICABLE) Respondent

CatchWords	:	Industrial law (WA) – Application for COVID-19 JobKeeper Package General Order pursuant to s 50 – Further flexibility to manage employment arrangements – Applicable to private sector employees – Finite operation period until review – Dispute resolution – Utilisation of s 44 for employee access – General Order issued
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 6(a), s 6(af), s 6(ag), s 6(c), s 7(1), s 29(1), s 44, s 50 <i>Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020</i> (Cth) <i>Fair Work Act 2009</i> (Cth) <i>Employment Disputes Resolution Act 2008</i> (WA) s 36
Result	:	General Order issued
Representation:		– Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited – Dr T Dymond on behalf of UnionsWA – Ms C Purcell for the Hon. Minister for Industrial Relations

Reasons for Decision

- 1 The Chamber of Commerce and Industry of Western Australia Limited applies for a General Order pursuant to s 50 of the *Industrial Relations Act 1979* (the Act) to make further provisions for private sector employers and employees in Western Australia in relation to the COVID-19 pandemic. The Commission has previously issued Reasons for decision (2020 WAIRC 00203) and a General Order (2020 WAIRC 00205) for flexibility of leave arrangements in the context of the COVID-19 pandemic.

- 2 The Chamber says that the purpose of this application is to provide employers with further flexibility to manage employment arrangements in a manner that supports the JobKeeper Scheme established under the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth). This package includes amendments to the *Fair Work Act 2009* (Cth).
- 3 The application seeks a General Order applicable to private sector employees, to operate until 28 September 2020, to provide:
 - (a) A requirement that where a JobKeeper payment is payable, the employer is to provide eligible employees the value of the JobKeeper payment or the amount owed for work performed;
 - (b) Ability for an employer to stand down employees (either fully or partially) because they cannot be usefully employed arising from the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19;
 - (c) Ability for an employer to alter the duties of work of an employee in order to continue the employment of one or more employees of the employer;
 - (d) Ability for an employer to alter the location of work in order to continue the employment of one or more employees of the employer; and
 - (e) Options for an employer and employee to agree to work being performed on different days and times, provided that the employee does not unreasonably refuse an employer's request.
- 4 The Commission published a notice of the application on the Commission's website and invited submissions from interested persons. Submissions were received from the Chamber, UnionsWA and the Minister. The Commission also convened conferences between those parties as they are recognised by s 50 of the Act.
- 5 The Commission expresses its appreciation to the Chamber, UnionsWA and the Minister for the constructive way that they have worked together to bring this matter to a largely agreed resolution.

Consideration

- 6 We note the circumstances facing industry generally and employers and employees arising from the COVID-19 pandemic and the restrictions which have affected businesses and employment. We noted some of those circumstances and restrictions in our Reasons for decision in relation to the General Order ([2020] WAIRC 00205) referred to earlier.
- 7 We note the various statements of the Commonwealth and Western Australian governments as well as by bodies such as the Reserve Bank of Australia (Statement of Monetary Policy – May 2020) as to the effects of the current situation. In particular, we have taken account of the amendments to the *Fair Work Act* to enable the Fair Work Commission to deal with disputes relating to the JobKeeper payment arrangements.
- 8 We consider that the General Order proposed by the Chamber and generally supported by UnionsWA and the Minister will assist in maintaining the employment of as many employees as possible and support businesses to continue to operate. We believe that it is appropriate in all of the circumstances.
- 9 It achieves the purposes sought by the application and is in conformity with the objects of the Act (s 6). The arrangements promote goodwill in industry and within enterprises as they set out arrangements to enable jobs to be retained (s 6(a)). They facilitate the efficient organisation and performance of work according to the needs of industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises (s 6(af)). They encourage employers, employees and organisations to reach agreement appropriate to the needs of enterprises within industry and the employees in those industries (s 6(ag)). The arrangements also provide means for preventing and settling industrial disputes (s 6(c)). Further, they provide a system of fair wages and conditions of employment in the circumstances of the crisis brought about by the COVID-19 pandemic. Accordingly, the Commission is of the view that the General Order ought to issue.
- 10 We also note that the General Order will provide more favourable conditions in respect of the calculation of continuous service than does the Termination, Change and Redundancy General Order. We are of the view that the benefits of consistency with the JobKeeper arrangements outweigh any other potential issues on this occasion, particularly given the limited circumstances and duration of the General Order.

Operation

- 11 The operation of the General Order will be for a finite period, from the date the General Order is issued until 28 September 2020, unless extended on application or at the initiative of the Commission.
- 12 Given that the circumstances and arrangements are yet to be tested, we will review the operation of this General Order after it has operated for a number of weeks. The Commission will initiate this review no later than 30 June 2020.

Dispute resolution

- 13 There is one issue that requires comment and that is provisions relating to dispute resolution. We note that individual employees have traditionally had limited access to the Commission and have no standing to make applications to the Commission to deal with disputes of this nature (see Ministerial Review of the State Industrial Relations Systems – Interim Report, pp 115 – 119). Unlike the *Fair Work Act* which provides a range of areas of jurisdiction accessible directly by individual employees in their own right, the Act provides only limited access to the Commission by individual employees for dispute resolution. They may refer only claims of unfair dismissal or that they have been denied a benefit arising under their contract of employment (s 29(1)(b)), or in respect of a dispute relating to an entitlement to long service leave (s 44(7)(b)). Otherwise access to the Commission for conciliation and arbitration of disputes is given to an organisation registered under Division 4 of Part II of the Act (that is, a union of employees or employers), an employer and the Minister.

- 14 An employee may request that the Commission mediate a dispute with their employer under the *Employment Disputes Resolution Act 2008* (WA) (EDR Act). However, this requires the consent of the other party (EDR Act s 6(2)). That consent is not always given. Therefore, if the employee seeks mediation and the employer does not agree to it, then the Commission cannot mediate.
- 15 Any employee may seek to enforce an award or order in the Industrial Magistrate's Court (Part III – Enforcement of Act, awards, industrial agreements and orders). However, this involves a different approach to that undertaken in conciliation and arbitration.
- 16 It is important that, in this case, disputes are resolved between employers and employees. There are real impediments to an individual employee seeking to have conciliation and arbitration of a dispute relating to this General Order under the State jurisdiction. Unlike the *Fair Work Act*, the Act has not been amended to deal specifically with this type of dispute. The Commission has worked with the s 50 parties to identify a range of options for various parties to refer disputes to the Commission for resolution, including employees. We have discussed with and received submissions from the Chamber, UnionsWA and the Minister about how this might be remedied.
- 17 One means would be through the Commission, on its own motion, summoning an employer and employee to attend a conference pursuant to s 44 of the Act as provided for by s 44(1). The Commission could do this only if the Commission forms the opinion that industrial action has occurred or is likely to occur. Industrial action is defined in s 7 of the Act. The circumstances of the particular case would need to be examined to determine if they do, in fact, meet that definition.
- 18 We note that this is not an orthodox use of s 44. As the Minister correctly points out, it may create a precedent and have unintended consequences. We recognise that this is in a time of crisis and exceptional circumstances and is for a finite period. However, it may create an avenue for access to the Commission well beyond this time and these circumstances. In the circumstances of employees otherwise having very limited access to the Commission to deal with disputes in relation to the General Order, and in these exceptional circumstances, we think it is worthy of inclusion and will monitor its use.
- 19 Minutes of the Proposed General Order will now issue. Any person wishing to speak to the Minutes is to do so in writing by no later than midday on Friday, 15 May 2020.

2020 WAIRC 00279

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA LIMITED

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 15 MAY 2020

FILE NO.

APPL 19 OF 2020

CITATION NO.

2020 WAIRC 00279

Result

General Order issued

Representation

- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited
- Ms C Purcell on behalf of the Hon. Minister for Industrial Relations
- Dr T Dymond on behalf of UnionsWA

General Order

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

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

NOTE: amended by corrigenda ([2020] WAIRC 00311)

SCHEDULE
COVID-19 GENERAL ORDER
PROVISIONS RELATING TO THE JOBKEEPER PAYMENTS

1. – APPLICATION

- (1) This General Order applies to each employee as defined in subsection 7(1) of the *Industrial Relations Act 1979* throughout the State of Western Australia, except for employees of a public sector body within the meaning of the *Public Sector Management Act 1994* and police officers, police auxiliary officers and Aboriginal police liaison officers.
- (2) This General Order shall operate on and from the date this General Order issues until 28 September 2020, unless extended on application or at the initiative of the Commission.
- (3) The provisions of this General Order shall be reviewed at the initiative of the Commission no later than 30 June 2020.
- (4) There shall be liberty to apply to amend this General Order to any party named in **s 50 – General Orders, nature of and making**, subsection 2 of the Act.

2. – DEFINITIONS

- (1) Base rate of pay is the amount payable to an employee for his or her ordinary hours of work, but not including any of the following:
 - (a) incentive-based payments and bonuses;
 - (b) loadings;
 - (c) monetary allowances;
 - (d) overtime or penalty rates;
 - (e) any other separately identifiable amounts.
- (2) Designated employment provision means a provision of:
 - (a) an award; or
 - (b) an industrial agreement or employer-employee agreement; or
 - (c) an order made by the Commission, other than this General Order; or
 - (d) a contract of employment.
- (3) Hourly rate of pay guarantee has the meaning given by subclause 3(3) or 3(4).
- (4) Jobkeeper enabling direction means a direction authorised by clause 4, 5 or 6.
- (5) Jobkeeper payment means a payment that:
 - (a) is payable by the Commonwealth in accordance with the jobkeeper payment rules; and
 - (b) is known as jobkeeper payment.
- (6) Jobkeeper payment rules means rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth).
- (7) Licence includes:
 - (a) registration; and
 - (b) permit.
- (8) Minimum payment guarantee has the meaning given by 3(2).
- (9) Qualifies for the jobkeeper scheme has the same meaning as in the jobkeeper payment rules.
- (10) Wage condition means the wage condition set out in the jobkeeper payment rules.
- (11) Industrial instrument means:
 - (a) an award; or
 - (b) an industrial agreement or employer-employee agreement; or
 - (c) an order made by the Commission, other than this General Order; or
 - (d) a contract of employment.

3. – EMPLOYER PAYMENT OBLIGATIONS

Obligation of employer to satisfy the wage condition

- (1) If:
 - (a) an employer qualifies for the jobkeeper scheme; and

- (b) the employer would be entitled to jobkeeper payment for an employee for a fortnight if (among other things) the employer satisfied the wage condition in respect of the employee for the fortnight;
- the employer must ensure that the wage condition has been satisfied in respect of the employee by the end of the fortnight.

Minimum payment guarantee

- (2) If a jobkeeper payment is payable to an employer for an employee for a fortnight, the employer must ensure that the total amount payable to the employee in respect of the fortnight is not less than the greater of the following:
- (a) the amount of jobkeeper payment payable to the employer for the employee for the fortnight;
- (b) the amounts payable to the employee in relation to the performance of work during the fortnight.
- Note – Amounts referred to in this subclause (other than paragraph (a) include the following, if they become payable in respect of the fortnight:*
- *incentive-based payments and bonuses;*
 - *loadings;*
 - *monetary allowances;*
 - *overtime or penalty rates;*
 - *leave payments.*

Minimum rate of pay – jobkeeper enabling stand down

- (3) If a jobkeeper enabling direction given by an employer under clause 4 (jobkeeper enabling stand down) applies to an employee of the employer, the employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee.

Minimum rate of pay – duties of work

- (4) If a jobkeeper enabling direction given by an employer under clause 5 (duties of work) applies to an employee of the employer, the employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the greater of the following:
- (a) the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee;
- (b) the base rate of pay (worked out on an hourly basis) that is applicable to the duties the employee is performing.

Base rate of pay for certain payment arrangements

- (5) If:
- (a) an employee is paid otherwise than:
- i. on an hourly basis; or
 - ii. by reference to an hourly rate of pay; and
- (b) an industrial instrument applicable to the employee:
- i. specifies the employee's base rate of pay; or
 - ii. sets out a method for working out the employee's base rate of pay;
- then, for the purposes of this clause, the employee's base rate of pay is:
- iii. the amount specified in the industrial instrument; or
 - iv. the amount worked out using the method set out in the industrial instrument.

4. – JOBKEEPER ENABLING STAND DOWN

- (1) An employer may give an employee a direction (the jobkeeper enabling stand down direction) to:
- (a) not work on a day or days on which the employee would usually work;
- (b) work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or
- (c) work a reduced number of hours (Compared with the employee's ordinary hours of work); during a period (the jobkeeper enabling stand down period).
- (2) For the purposes of subparagraph (1)(c), the reduced number of hours may be nil.
- (3) A jobkeeper enabling stand down direction is subject to:
- (a) when the direction was given, the employer qualified for the jobkeeper scheme;

- (b) the employee cannot be usefully employed for the employee's normal days or hours during the jobkeeper enabling stand down period because of changes to business attributable to:
 - i. the COVID-19 pandemic; or
 - ii. government initiatives to slow the transmission of COVID-19;
 - (c) the implementation of the jobkeeper enabling stand down direction is safe, having regard to (without limitation) the nature and spread of COVID-19; and
 - (d) the employer becomes entitled to one or more jobkeeper payments for the employee:
 - i. for a period that consists of or includes the jobkeeper enabling stand down period; or
 - ii. for periods that, when considered together, consist of or include the jobkeeper enabling stand down period.
- (4) If the jobkeeper enabling stand down direction applies to the employee, then, during the jobkeeper enabling stand down period, the employer:
- (a) is still required to comply with clause 3 (employer payment obligations);
 - (b) but is not otherwise required to make payments to the employee in respect of the jobkeeper enabling stand down period.
- (5) The jobkeeper enabling stand down direction does not apply to the employee during a period when the employee:
- (a) is taking paid or unpaid leave that is authorised by the employer; or
 - (b) is otherwise authorised to be absent from the employee's employment.
- Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the jobkeeper enabling stand down direction would otherwise apply to the employee.
- (6) This clause has effect despite a designated employment provision.

5. – DUTIES OF WORK

- (1) An employer may direct an employee to perform any duties during a period (the relevant period) that are within the employee's skill and competency.
- (2) The direction is subject to:
- (a) when the direction was given, the employer qualified for the jobkeeper scheme; and
 - (b) those duties are safe, having regard to (without limitation) the nature and spread of COVID-19; and
 - (c) in a case where the employee is required to have a licence or qualification in order to perform those duties, the employee had the licence or qualification; and
 - (d) those duties are reasonably within the scope of the employer's business operations; and
 - (e) the employer becomes entitled to one or more jobkeeper payments for the employee:
 - i. for a period that consists of or includes the relevant period;
 - ii. for periods that, when considered together, consist of or include the relevant period.
- (3) This clause has effect despite a designated employment provision.

6. – LOCATION OF WORK

- (1) An employer may direct an employee to perform duties during a period (the relevant period) at a place that is different from the employee's normal place of work, including the employee's home.
- (2) The direction is subject to:
- (a) when the direction was given, the employer qualified for the jobkeeper scheme;
 - (b) the place is suitable for the employee's duties;
 - (c) if the place is not the employee's home, the place does not require the employee to travel a distance that is unreasonable in all the circumstances, including the circumstances surrounding the COVID-19 pandemic;
 - (d) the performance of the employee's duties at the place is:
 - i. safe, having regard to (without limitation) the nature and spread of COVID-19; and
 - ii. reasonably within the scope of the employer's business operations; and
 - (e) the employer becomes entitled to one or more jobkeeper payments for the employee:
 - i. for a period that consists of or includes the relevant period; or
 - ii. for periods that, when considered together, consist of or include the relevant period.

- (3) This clause has effect despite a designated employment provision.

7. – DAYS AND TIMES OF WORK

- (1) An employer may request to make an agreement with an employee to perform duties during a period (the relevant period):
- (a) on different days; or
 - (b) at different times;
- compared with the employee's ordinary days or times of work.
- (2) Where an employer gives the employee a request to make an agreement with the employer under subclause (1), the employee:
- (a) must consider the request; and
 - (b) must not unreasonably refuse the request.
- (3) The agreement is subject to:
- (a) when the agreement was made, the employer qualified for the jobkeeper scheme;
 - (b) the performance of the employee's duties on those days or at those times is:
 - i. safe, having regard to (without limitation) the nature and spread of COVID-19; and
 - ii. reasonably within the scope of the employer's business operations;
 - (c) the agreement does not have the effect of reducing the employee's number of hours of work (compared with the employee's ordinary hours of work);
 - (d) the agreement is in writing; and
 - (e) the employer becomes entitled to one or more jobkeeper payments for the employee:
 - i. for a period that consists of or includes the relevant period; or
 - ii. for periods that, when considered together, consist of or include the relevant period;
- (4) This clause has effect despite a designated employment provision.

8. – RULES RELATING TO JOBKEEPER ENABLING DIRECTIONS

Misuse of jobkeeper enabling direction

- (1) An employer must not purport to give a jobkeeper enabling direction if:
- (a) the direction is not authorised by this General Order; and
 - (b) the employer knows, or ought to have reasonably known, that the direction is not authorised by this General Order.

Reasonableness

- (2) A jobkeeper enabling direction given by an employer to an employee does not apply to the employee if the direction is unreasonable in all of the circumstances.

Note: A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.

Continuing the employment of employees

- (3) A jobkeeper enabling direction given by an employer to an employee of the employer under clause 5 (duties of work) or 6 (location of work) has no effect unless the employer has information before the employer that leads the employer to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer.
- (4) In determining whether a jobkeeper enabling direction given by an employer to an employee (the relevant employee) is necessary to continue the employment of one or more employees of the employer, it is immaterial that a similar jobkeeper enabling direction could have been given by the employer to an employee other than the relevant employee.

Consultation

- (5) A jobkeeper enabling direction given by an employer to an employee does not apply to the employee unless:
- (a) the employer gave the employee written notice of the employer's intention to give the direction;
 - (b) the employer did so:
 - i. at least 3 days before the direction was given; or
 - ii. if the employee genuinely agreed to a lesser notice period – during that lesser notice period; and

- (c) before giving the direction, the employer consulted the employee (or a representative of the employee) about the direction.
- (6) Subclause (5) does not apply to a jobkeeper enabling direction (the relevant direction) given by an employer to an employee of the employer under a particular clause of this Order if:
 - (a) the employer previously complied with the requirements of subclause (5) in relation to a proposal to give the employee another direction under that clause; and
 - (b) in the course of consulting the employee (or a representative of the employee) about the proposal, the employee (or the representative of the employee) expressed views to the employer; and
 - (c) the employer considered those views in deciding to give the relevant direction.
- (7) An employer must keep a written record of the consultation.

Form of direction

- (8) A jobkeeper enabling direction must be in writing.

Duration

- (9) A jobkeeper enabling direction given by an employer to an employee continues in effect until:
 - (a) it is withdrawn or revoked by the employer; or
 - (b) it is replaced by a new jobkeeper enabling direction given by the employer to the employee under the relevant clause.
- (10) Provided that a jobkeeper enabling direction ceases to have effect at the start of 28 September 2020.
- (11) Subclause (9) has effect subject to an order made by the Commission under clause 11 (Disputes).

Compliance

- (12) If a jobkeeper enabling direction given by an employer applies to an employee of the employer, the employee must comply with the direction.

9. – SERVICE AND ACCRUAL

- (1) For the purposes of the *Minimum Conditions of Employment Act 1993* and any applicable industrial instrument, if an employee is subject to a jobkeeper enabling direction during a period, that period counts as service.
- (2) If a jobkeeper enabling direction under clause 4 (jobkeeper enabling stand down) applies to an employee, the employee accrues leave entitlements as if the direction had not been given.
- (3) If a jobkeeper enabling direction under clause 4 (jobkeeper enabling stand down) applies to an employee, the following are to be calculated as if the direction had not been given:
 - (a) redundancy pay;
 - (b) payment in lieu of notice of termination.

10. – EMPLOYEE REQUESTS FOR SECONDARY EMPLOYMENT, TRAINING ETC

- (1) If a jobkeeper enabling direction under clause 4 (jobkeeper enabling stand down) applies to an employee, the employee may request:
 - (a) to engage in reasonable secondary employment;
 - (b) training;
 - (c) professional development.
- (2) The employer must consider, and not unreasonably refuse, the request.

11. – DISPUTES

- (1) Where there is a question, dispute or difficulty arising under this General Order, the employer and the employee (or their representatives) must confer among themselves and make reasonable attempts to resolve the matter.
- (2) If the employer and employee are unable to resolve the matter within 24 hours of the question, dispute or difficulty being raised, the employer or an organisation of which the employee is a member of or is eligible to become a member of, may apply to the Commission for conciliation and if required, arbitration.
- (3) If the employer and employee are unable to resolve the matter within 48 hours of the question, dispute or difficulty being raised and the matter has not been referred to the Commission in accordance with (2):
 - (a) the employee may:
 - i. request mediation under the *Employment Dispute Resolution Act 2008* (WA), by lodging **Form 1 – Request for Mediation** with the Western Australian Industrial Relations Commission. It should be noted that for mediation to occur under this arrangement, the employer must consent to the mediation.

- ii. notify the Registrar of the Western Australian Industrial Relations Commission that the employer has or is, by some act, omission or circumstance, taking industrial action against them for the purpose of compelling them to accept terms or conditions of employment contrary to the terms of this General Order, and asking the Registrar to refer the notification to the Commission. The Commission will then consider whether to convene a conciliation conference.
- iii. make an application to the Industrial Magistrate's Court for enforcement of the General Order, by lodging Form 1.1.
- (b) the employer or organisation, including registered industrial organisations such as a union, may apply to the Commission for conciliation and, if necessary, arbitration, under s 44 of the *Industrial Relations Act 1979* (WA).

2020 WAIRC 00384

**APPLICATION FOR COVID-19 GENERAL ORDER THAT AIMS TO PROVIDE FURTHER FLEXIBILITY TO
MANAGE PRIVATE SECTOR EMPLOYMENT ARRANGEMENTS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA LIMITED

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT**CORAM**

CHIEF COMMISSIONER P E SCOTT
 SENIOR COMMISSIONER S J KENNER
 COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 1 JULY 2020

FILE NO/S

APPL 19 OF 2020

CITATION NO.

2020 WAIRC 00384

Result

Order made

Representation

- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited
- Ms M Hughie-Williams, and with her Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations
- Dr T Dymond on behalf of UnionsWA

Order

On 15 May 2020, the Commission in Court Session issued a General Order in this matter (2020 WAIRC 00279); and Clause 1. – APPLICATION, subclause (3) states that the General Order shall be reviewed at the initiative of the Commission no later than 30 June 2020; and

On 30 June 2020, the Commission reviewed the operation of the General Order of its own motion and sought responses from the Chamber of Commerce and Industry of Western Australia Limited, the Hon. Minister for Industrial Relations and UnionsWA; and Those parties reported that the General Order is operating as intended, and that no variations are considered necessary.

NOW THEREFORE, pursuant to the powers conferred under the *Industrial Relations Act 1979*, the Commission hereby orders:

THAT the General Order be reviewed again on 15 September 2020.

Sgd.) P E SCOTT,
 Chief Commissioner,
 Commission In Court Session.

[L.S.]

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2020 WAIRC 00675

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 13 OF 2018 GIVEN ON 19 SEPTEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	COLIN R DIXON	
		APPELLANT
	-v-	
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	
		RESPONDENT
CORAM	BUSS J, MURPHY J, LE MIERE J	
DATE	MONDAY, 3 AUGUST 2020	
FILE NO/S	IAC 1 OF 2019	
CITATION NO.	2020 WAIRC 00675	

Result	Order Issued
Representation	
Appellant	Mr C Dixon
Respondent	Mr A Sefton (of Counsel)

Order

1. The appellant have leave to amend his ground of appeal to read:
The decision is erroneous in law in that there has been an error by the Full Bench in the construction or interpretation of the *Teacher Registration Act 2012* (WA) or the *Public Sector Management Act 1994* (WA).
2. Decision reserved.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

FULL BENCH—Appeals against decision of Industrial Magistrate—

2020 WAIRC 00683

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 234/2018 GIVEN ON 12
DECEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2020 WAIRC 00683
CORAM	:	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	:	BY WRITTEN SUBMISSIONS MONDAY, 30 MARCH 2020, FRIDAY, 10 APRIL 2020, TUESDAY, 21 APRIL 2020
DELIVERED	:	THURSDAY, 6 AUGUST 2020
FILE NO.	:	FBA 1 OF 2020
BETWEEN	:	ADRIAN MANESCU
		Appellant
		AND
		BAKER HUGHES AUSTRALIA PTY. LIMITED
		Respondent

ON APPEAL FROM:

Jurisdiction	:	INDUSTRIAL MAGISTRATES COURT
Coram	:	INDUSTRIAL MAGISTRATE D SCADDEN
Citation	:	2019 WAIRC 00871
File No.	:	M 234 OF 2018

CatchWords	:	Industrial law (WA) – Appeal against decision of the Industrial Magistrate – Appellant claimed to be denied fair hearing – Jurisdiction of Full Bench to deal with entitlements from award under <i>Fair Work Act 2009</i> (Cth) and National Employment Standards – Commission not an eligible State or Territory court to exercise jurisdiction under <i>FW Act</i> – Full Bench has no power to review decision of IMC exercising jurisdiction under <i>FW Act</i> – Appeal dismissed – Respondent seeks costs – Appeal frivolously and vexatiously instituted – Not in public interest for matters to proceed merely because they commenced – Lay person – Application for costs dismissed
Legislation	:	Industrial Relations Act 1979 (WA), s 27 Part VID, s 84(5), s 86(2) Fair Work Act 2009 (Cth), s 12, s 565; Fair Work Regulations 2009 (Cth)
Result	:	Appeal dismissed. Application for costs dismissed
Representation:		
Appellant	:	Mr A Manescu (on his own behalf)
Respondent	:	Mr M Stutley (of counsel)

Case(s) referred to in reasons:

Commissioner of Police of Western Australia v AM [2011] WAIRC 00021; (2011) 91 WAIG 6

Ghimire v Karriview Management Pty Ltd (No 2) [2019] FCA 1627

Rogers v J-Corp Pty Ltd [2015] WAIRC 00862; (2015) 95 WAIG 1513

Case(s) also cited:

Attorney General v Wentworth (1988) 14 NSWLR 481

General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125

Hatchett v Bowater Tutt Industries Pty Ltd (No 2) [1991] FCA 188; (1991) 28 FCR 324

Heidt v Chrysler Australia Ltd (1976) 26 FLR 257

Hutchison v Bienvenu (Unreported, HCA, 19 October 1971) 11

Jones v Skyring [1992] HCA 39; (1992) ALJR 810

Mathews v Cool or Cosy Pty Ltd [2003] WASCA 136

Mudie v Gainriver Pty Ltd (No 2) [2002] QCA 546; [2003] 2 Qd R 271

Re Williams and Australian Electoral Commission (1995) 21 AAR 467

Re Vernazza [1960] 1 QB 197

Transport Workers' Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 58 IR 22

Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark (1995) 62 IR 334

*Reasons for Decision***THE FULL BENCH**

1 Adrian Manescu appeals to the Full Bench of the Western Australian Industrial Relations Commission against the decision of the Industrial Magistrates Court (IMC) of 13 December 2019, dismissing his claims. His ground of appeal asserts that during the course of the hearing, the Industrial Magistrate denied him a fair hearing.

Background

- Mr Manescu's claims before the IMC arose from his employment with a national system employer, and sought, at least in part, to enforce entitlements alleged to arise from an award issued under the *Fair Work Act 2009* (Cth) (FW Act) and entitlements said to arise under the National Employment Standards (NES), also set out under the FW Act.
- Mr Manescu also suggests in his submissions that one of the matters he pursued related to an employer-employee agreement and therefore fell under the *Industrial Relations Act 1979* (WA) (IR Act). However, Mr Manescu appears to use the term employer-employee agreement in a generic way to simply mean an agreement between himself and his employer, not one that meets the requirements of and is registered under Part VID of the IR Act.

- 4 Therefore, there is no element of the IMC's decision relating to matters within the Commission's jurisdiction.
- 5 Mr Manescu recognises that the Full Bench has no jurisdiction to deal with the substance of his claims that arise under the FW Act. However he says that the Full Bench has the characteristics of a court and therefore it can deal with his appeal as it relates to procedural fairness. If the Full Bench upholds the appeal, it can remit the matter to the IMC to deal with according to law.
- 6 Mr Manescu refers to the decision of the Full Bench in *Rogers v J-Corp Pty Ltd* [2015] WAIRC 00862; (2015) 95 WAIG 1513, where Smith AP (with whom Scott ASC and Harrison C agreed), set out the law regarding the characteristics of a court. Her Honour said at [21]:

Thus, it appears the clear characteristics of a court and thus performing judicial functions are:

- (a) impartiality and independence in decision-making;
- (b) a requirement to provide procedural fairness;
- (c) general principles of open hearings;
- (d) the provision of reasons for decision.

- 7 Her Honour went on to examine the jurisdiction and powers, and the procedures and processes of the Commission. Her Honour concluded at [45] that:

When all of these matters are considered it is clear that the Commission is a court of a state, as it has institutional integrity, it is an independent and impartial tribunal, conducts its hearing in public and has all of the defining characteristics of a court.

Consideration and conclusion regarding appeal

- 8 To understand the limits of the Full Bench's jurisdiction relating to matters under the FW Act, it is necessary to look at the scheme of that act. The FW Act provides that specified State and Territory courts have jurisdiction to deal with a claim of contravention of an award made under that act or of the NES. They are described as *eligible State and Territory courts*, and they are identified in s 12 - The Dictionary of the FW Act. They include "(b) a magistrates court" and "(d) any other State or Territory court that is prescribed by the regulations".
- 9 The *Fair Work Regulations 2009* (Cth) (the FW Regulations) define only one other "eligible State or Territory court" for the purposes of that definition in s 12(d) of the FW Act. It is the South Australian Employment Court.
- 10 The Western Australian Industrial Relations Commission is not mentioned in s 12 of the FW Act or in the FW Regulations.
- 11 When it comes to appeals against decisions of those eligible State or Territory courts, s 565(1) of the FW Act specifies that "an appeal lies to the Federal Court from a decision of an eligible State or Territory court exercising jurisdiction under this Act". This is the avenue of appeal described by Colvin J in *Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627 at [19].
- 12 Although Mr Manescu referred to A/President Smith's decision in *Rogers v J-Corp*, that the Commission has the characteristics of a court, her Honour used that as a step in finally determining that the Commission is not an eligible State or Territory court for the purposes of the FW Act (see paragraph [94]).
- 13 Therefore, although the Full Bench of the Commission has particular characteristics, its jurisdiction is excluded by the FW Act in respect of appeals against decisions of the IMC exercising jurisdiction under the FW Act.
- 14 The Full Bench does not have the power to review the decision of the IMC exercising jurisdiction under the FW Act, whether for the purpose of examining whether procedural fairness applied or for any other purpose.
- 15 Therefore, the appeal is to be dismissed for want of jurisdiction.

Costs

- 16 The respondent seeks costs in accordance with s 84(5) of the IR Act. The respondent says that the appeal was frivolously and vexatiously instituted when the Full Bench has no jurisdiction to deal with it. The respondent says it alerted Mr Manescu to the Full Bench's lack of jurisdiction, pointed him to the Federal Court of Australia and invited him to discontinue the appeal "to avoid the unnecessary costs, time and resources being deployed for the appeal which is unable to proceed". This information and invitation was provided to Mr Manescu in a letter dated soon after the appeal was filed. In the letter the respondent put him on notice that if Mr Manescu did not discontinue, it would seek to rely on the letter to seek costs, on an indemnity basis, from the date of the letter.
- 17 Mr Manescu submits that the "Full Bench of the Western Australian Industrial Relations Commission appeal process does not have [a] withdraw option" (Appellant's Submission in Reply) [88] and that "there is no way out without a Full Bench decision" (Appellant's Submission in Reply) [89].

Consideration and conclusion regarding costs

- 18 The Full Bench has the power to award costs set out in s 84(5) of the IR Act:

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

...

- (5) In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner, or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

- 19 In the *Commissioner of Police of Western Australia v AM* [2011] WAIRC 00021; (2011) 91 WAIG 6, the Industrial Appeal Court (IAC) examined the meaning of the phrase "frivolously or vexatiously" used in s 86(2) of the IR Act as it relates to the IAC's jurisdiction to award costs. Section 86(2) provides:

86. Jurisdiction of Court

...

- (2) In the exercise of its jurisdiction under this Act the Court may make such orders as it thinks just as to the costs and expenses (including the expenses of witnesses) of proceedings before the Court, including proceedings dismissed for want of jurisdiction, but costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the Court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.
- 20 In essence, in respect of the costs for the services of a legal practitioner or agent, the powers of the Full Bench and the IAC are the same.
- 21 In *Commissioner of Police v AM*, Buss J, with whom Pullin and Le Miere JJ agreed, set out the law regarding awarding costs under s 86(2) of the IR Act and the meaning of the terms frivolous and vexatious. His Honour said:
- 24 Three general observations may be made about this court's power under s 86(2) to order the unsuccessful party to an appeal to pay the costs of any other party for the services of, relevantly, any legal practitioner of that party.
- 25 First, the court has no power to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party unless, in the opinion of the court, 'the proceedings have been frivolously or vexatiously instituted or defended, as the case requires' by the unsuccessful party.
- 26 Secondly, if the court is of the opinion, in a particular case, that the proceedings were frivolously or vexatiously instituted or defended, as the case may be, the formation of this opinion enlivens the court's discretion to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party. It does not, however, follow that where the test for enlivening the court's discretion to award legal costs has been satisfied that an order for the payment of those costs will necessarily be made. Where the test is satisfied, the court may, nevertheless, having regard to the general policy of s 86(2) and all the circumstances of the case, decide, in the exercise of its discretion, to make no order as to costs. See *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 275 (Northrop J); *Hatchett v Bowater Tutt Industries Pty Ltd (No 2)* (1991) 28 FCR 324, 326 (von Doussa J).
- 27 Thirdly, the test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious. See *Re Vernazza* [1960] 1 QB 197, 208 (Ormerod LJ); *Hutchison v Bienvenu* (Unreported, HCA, 19 October 1971) 11 (Walsh J); *Jones v Skyring* (1992) 109 ALR 303, 309–310 (Toohey J).
- 28 The words 'frivolously' and 'vexatiously', in the expression 'the proceedings have been frivolously or vexatiously instituted or defended' in s 86(2), are adverbs. They relate to the verbs 'instituted' or 'defended'. The Act does not define 'frivolously' or 'vexatiously'.
- 29 The ordinary meaning of 'frivolous', in relation to a claim, is, relevantly, having no reasonable grounds for the claim. The ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party. See the *Shorter Oxford English Dictionary*, (5th ed) 1038, 3529; *Mudie v Gainriver Pty Ltd* [2002] QCA 546; [2003] 2 Qd R 271 [35] [37] (McMurdo P & Atkinson J), [59] [61] (Williams JA). It is apparent from the ordinary meaning of these words that 'frivolous' is, in substance, a subset of 'vexatious'.
- 30 The words 'frivolous' and 'vexatious' have been considered extensively in the context of the exercise by the courts of their summary powers to strike out a pleading, or an action or defence, on the ground that the pleading, action or defence is frivolous or vexatious. The word 'vexatious' has also received consideration on numerous occasions in the context of proceedings to restrain vexatious litigants.
- 22 His Honour went on to examine the terms by reference to their use in proceedings to strike out or dismiss matters. He referred to Barwick J's observations in *General Steel Industries v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125; to those of the Administrative Appeals Tribunal (Matthews J, Hill and Beaumont JJ) in *Re Williams and Australian Electoral Commission* (1995) 21 AAR 467, and of Roden J in *Attorney General v Wentworth* (1988) 14 NSWLR 481.
- 23 His Honour continued that:
- 34 In *Transport Workers' Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries* (1994) 58 IR 22, *Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark* (1995) 62 IR 334 and *Matthews v Cool or Cosy Pty Ltd* [2003] WASCA 136, this court adopted, in relation to the expression 'the proceedings have been frivolously or vexatiously instituted or defended' in s 86(2), the various expressions of the test referred to by Barwick CJ in *General Steel Industries* for deciding whether a claim or defence in pending proceedings should be summarily terminated on the

ground that it does not disclose a reasonable cause of action or defence. It was unnecessary in those cases for this court to consider the broader connotation of 'vexatiously' compared with 'frivolously'.

35 As Kennedy, Rowland & Nicholson JJ noted in *Tip Top Bakeries*, s 86(2) must be applied in the context of the Act as a whole and having regard to the relative informality of proceedings before the Commission and the general policy of not awarding costs (27). In *Clark*, Kennedy, Rowland and Franklyn JJ said that the policy envisaged within s 86(2) indicates that it will only be on 'very rare occasions' that the costs of a legal practitioner will be awarded (335).

36 It is plain from the earlier decisions of this court to which I have referred that something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be held to have frivolously or vexatiously instituted or defended, as the case may be, an appeal under s 90. So, relevantly to the present case, not every appeal which is determined to be without merit, either because this court does not have jurisdiction or otherwise, will necessarily have been instituted frivolously or vexatiously.

24 As to Mr Manescu's argument that having filed his appeal he had to see it through, that argument is not valid. The Full Bench has the powers set out in s 27 of the IR Act. These include that:

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...

25 As with all matters before the Commission and other tribunals and courts, there will be occasions when it is not appropriate for a matter to run the full course. That consideration might be raised by an applicant or appellant seeking to discontinue or a respondent seeking that the matter be dismissed before it has been substantively dealt with.

26 There was nothing preventing Mr Manescu from seeking leave of the Full Bench for the hearing to be discontinued or for the appeal to be withdrawn or dismissed. It is not in the interests of the parties, the Commission or the public for matters to proceed to their conclusion merely because the matter had been commenced.

27 Mr Manescu had the issue of the problem of the Full Bench's jurisdiction, along with guidance to the proper avenue of appeal, drawn to his attention early in the appeal process. To have continued on with no real prospect of success has put the respondent to unnecessary costs.

28 However, as Buss J noted in the *Commissioner of Police v AM*, the general policy in this area is against awarding costs for legal practitioners and that it will only be on very rare occasions that such costs are awarded in this field.

29 There is no suggestion that the appeal was instituted with the intention of troubling, annoying or embarrassing the respondent. Nor was it pursued for a collateral purpose. However, is it vexatious because it is "so obviously untenable or manifestly groundless as to be utterly hopeless"? It must be something substantially more than either a lack of success or the prospect of a lack of success. Not every appeal which is determined to be without merit, either because a court does not have jurisdiction or otherwise, will necessarily have been instituted or pursued frivolously or vexatiously.

30 Mr Manescu was advised by his opponent's lawyers that there was no jurisdiction and pointed him to the Federal Court. However, Mr Manescu says that he thought he was required to pursue the appeal to determination. He did so apparently as a lay person looking for an avenue to challenge what he says was an unfair process and to have the matter remitted to the IMC. With the benefit of an examination of the law, his case was hopeless from the start. However, the law creates a less than straightforward appeal arrangement, from a State court to a Commonwealth one, which may not be readily navigable for a lay person.

31 In all of the circumstances we conclude that, in the context of a "no costs" jurisdiction, this matter does not meet the tests for the awarding of costs for representation, even though the respondent has been put to costs for the sake of an appeal which has been unsuccessful and which had no prospect of success from the outset.

32 The application for costs will be dismissed.

2020 WAIRC 00684

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
FULL BENCH**

PARTIES	ADRIAN MANESCU	
	-and-	APPELLANT
	BAKER HUGHES AUSTRALIA PTY. LIMITED	
		RESPONDENT
CORAM	FULL BENCH	
	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	THURSDAY, 6 AUGUST 2020	
FILE NO/S	FBA 1 OF 2020	
CITATION NO.	2020 WAIRC 00684	

Result	Appeal dismissed. Application for costs dismissed
Appearances	
Appellant	Mr A Manescu (on his own behalf)
Respondent	Mr M Stutley (of counsel)

Order

Having heard Mr A Manescu on his own behalf, and Mr M Stutley, counsel on behalf of the respondent, and reasons for decision having been delivered on 6 August 2020, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

1. THAT this appeal be and is hereby dismissed.
2. THAT the application by the respondent for costs be and is hereby dismissed.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

COMMISSION IN COURT SESSION—Matters dealt with—

2020 WAIRC 00439

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION	
	-v-	APPLICANT
	(NOT APPLICABLE)	
		RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS COMMISSIONER T B WALKINGTON	
DATE	WEDNESDAY, 29 JULY 2020	
FILE NO/S	APPL 16A OF 2020	
CITATION NO.	2020 WAIRC 00439	

Result	Order issued
Representation	- Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations - Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited - Dr T Dymond on behalf of UnionsWA

Order

On 14 April 2020, the Commission in Court Session issued a General Order in this matter (2020 WAIRC 00205) to provide for flexible leave arrangements association with the COVID-19 pandemic; and

Clause 1. – Application, subclause (3) of the Schedule – Provisions Relating to the COVID-19 Pandemic states that the General Order operates from the date it issued until 31 July 2020, unless extended on application or at the initiative of the Commission; and

On 22 July 2020, the Commission reviewed the operation of the General Order of its own motion and received responses from the Hon. Minister for Industrial Relations, The Chamber of Commerce and Industry of Western Australia Limited and UnionsWA; and

Those parties agreed that, in the current circumstance of the COVID-19 Pandemic and its effects on business and employment, and the continuing uncertainty it has generated, the operation of the General Order should continue until 31 March 2021; and

In the circumstances, the Commission in Court Session has concluded that such an extension is necessary and appropriate.

NOW THEREFORE, the Commission in Court Session, pursuant to the powers conferred on it by section 50 of the *Industrial Relations Act 1979* (WA) hereby orders –

THAT clause 1. – Application, subclause (3), clause 2. – Unpaid Pandemic Leave, subclauses (5)(b) and (5)(d), and clause 3. – Annual Leave at Half Pay, subclause (4) be varied by removing '31 July 2020' and inserting '31 March 2021' in lieu thereof.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

PRESIDENT—Unions—Matters dealt with under Section 66—

2020 WAIRC 00391

ORDER PURSUANT TO S 66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2020 WAIRC 00391
CORAM	:	CHIEF COMMISSIONER P E SCOTT
HEARD ON THE PAPERS	:	FRIDAY, 3 JULY 2020
DELIVERED	:	FRIDAY, 3 JULY 2020
FILE NO.	:	PRES 2 OF 2020
BETWEEN	:	BRUCE MARTIN
		Applicant
		AND
		INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES
		Respondent

CatchWords	:	Industrial Law (WA) – Application under s 66 of the <i>Industrial Relations Act 1979</i> (WA) to permit non-observance of rules – Deferral of date of Annual General Meeting – Dismissal of Secretary and COVID-19 disruption caused delays – National body granted extension of time to hold Annual General Meeting – Reasons for delay beyond union’s control and unforeseeable.
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 66(2)
Result	:	Order Issued
Representation:		
Counsel:		
Applicant	:	Mr C Fordham (of counsel), and with him Mr D Stojanoski (of counsel)
Respondent	:	

Reasons for Decision

- 1 The applicant, Bruce Martin, is a member and the President of the Independent Education Union of Western Australia, Union of Employees (the Union). The Union is an organisation registered under Part II, Division 4 of the *Industrial Relations Act 1979* (WA) (the Act). The application seeks an order the effect of which would be to remove the requirement for strict compliance with r 13(1) of the Union's Rules to enable it to hold its Annual General Meeting (AGM) in July 2020. Rule 13(1) requires that the AGM be held no later than six months following the end of the Union's financial year (r(2)(b)). The financial year ended on 31 December 2019.
- 2 Mr Martin says that there are two reasons for the Union being unable to organise to hold the AGM within the required time. The first is the recent disruptions connected with the COVID-19 pandemic. The second is the sudden departure of the Union's Secretary, on 25 May 2020. The Secretary is the Chief Executive Officer and is responsible for the day to day operation of the Union. Neither of those circumstances nor their consequences for arranging the meeting was reasonably foreseeable. The parties have provided details of the circumstances and their effect on the Union.
- 3 Mr Martin is also the President of the State Branch of the federally registered organisation, the Independent Education Union of Australia, WA Branch. The parties agree that the State Branch is also required to hold its AGM no later than 30 June each calendar year. For reasons of efficiency, the practice has been that the Union and the State Branch have held their AGMs concurrently each year. The Registered Organisations Commission has granted an extension of time to the State Branch to hold its AGM before 31 July 2020, for the same reasons as the applicant puts to this Commission in respect of the Union.

Consideration

- 4 Section 66(2) of the Act provides that '[t]he Chief Commissioner may make such order or give such directions relating to the rules of the organisation, their observance or non-observance or the manner of their observance, either generally or in the particular case, as the Chief Commissioner considers to be appropriate'. The provision goes on to set out the matters which may be included but which do not limit the generality of that power.
- 5 I have considered the circumstances the parties have set out. Those circumstances have clearly made it difficult for the Union to meet its obligation under r 13(1). Those circumstances were not reasonably foreseeable and there is no suggestion that the failure of the Union to comply with r 13(1) was within its control.
- 6 I note that the WA Branch has received an extension of time in which to hold its own AGM, and that it is both normal practice and for good reason that the AGMs of the two organisations are held at around the same time
- 7 In all of the circumstances, I am satisfied that it is appropriate to authorise the Union to not observe r 13(1) by 30 June 2020 and to issue an order to allow it to conduct its AGM by the end of July 2020. I intend to order accordingly.

2020 WAIRC 00395

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	BRUCE MARTIN	
	-and-	
	INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES	APPLICANT
		RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	FRIDAY, 3 JULY 2020	
FILE NO/S	PRES 2 OF 2020	
CITATION NO.	2020 WAIRC 00395	

Result	Order issued
Appearances	
Applicant	Mr C Fordham (of counsel), and with him Mr D Stojanoski (of counsel)
Respondent	

Order

This matter having come on for hearing on the papers and having heard from Mr D Stojanoski and with him Mr C Fordham (both of counsel) on behalf of the applicant by written submissions and a statement of agreed facts filed on Friday, 3 July 2020, and by consent of the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (the Act), hereby orders pursuant to s 66(2) of the Act that –

1. The requirement for observance of Rule 13(1) of the Rules of the Independent Education Union of Western Australia, Union of Employees (Union) is waived insofar as it is necessary to enable the Union to conduct its Annual General Meeting for the financial year ended 31 December 2019 in July 2020.

2. The Annual General Meeting to be held in July 2020 be deemed to be a valid meeting for the purposes of Rule 13(1).

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2020 WAIRC 00430

INTERPRETATION OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2018 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00430
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : FRIDAY, 22 MAY 2020
DELIVERED : MONDAY, 27 JULY 2020
FILE NO. : APPL 20 OF 2020
BETWEEN : WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
 Applicant
 AND
 MINISTER FOR CORRECTIVE SERVICES
 Respondent

Catchwords : Industrial law (WA) - Interpretation of dispute resolution clauses of industrial agreement - General principles of interpretation applied - Agreement history and intent considered - Declaration issued

Legislation : *Industrial Relations Act 1979* (WA) ss 41(9); 44; 46;
Minimum Conditions of Employment Act 1993 (WA)

Result : Declaration issued

Representation:

Counsel:

Applicant : Ms H Harper

Respondent : Mr D Anderson of counsel

Case(s) referred to in reasons:

Civil Service Association of Western Australia Incorporated v Commissioner, Western Australia Police Department [2019] WAIRC 00142; (2019) 99 WAIG 358

Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v Roman Catholic Bishop of Bunbury Chancery Office and Others [2007] WAIRC 00559; (2007) 87 WAIG 1148

L Schuler AG v Wickman Machine Tools Sales Ltd [1974] AC 235

Printing & Kindred Industries Union & Anor v Davies Bros Ltd [1987] AILR 55; (1986) 18 IR 444

Re Security Officers (Waterfront) Award [1988] AILR 431

Seamen's Union of Australia v Adelaide Steamship Co Ltd (1976) 46 FLR 444

Case(s) also cited:

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

Lend Lease Real Estate Investments Ltd v GPT Re Ltd [2006] NSWCA 207

Reasons for Decision

Background

- 1 The applicant and the respondent are parties to the *Department of Justice Prison Officers' Industrial Agreement 2018*. Because of what the applicant says is a change by the respondent to his approach to resolving disputes with the applicant under the Agreement, the parties disagree in relation to the dispute resolution provisions under the Agreement. These matters initially came before the Commission under s 44 of the *Industrial Relations Act 1979* (WA). The dispute could not be resolved by conciliation. As the dispute raises the matter of a bare interpretation of the Agreement, the proper course was for an application to be made for an interpretation of the Agreement under s 46 of the Act: *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v Roman Catholic Bishop of Bunbury Chancery Office and Others* [2007] WAIRC 00559; (2007) 87 WAIG 1148.

The question posed

- 2 The applicant contends that the dispute resolution provisions of the 2018 Agreement should be construed broadly, and the respondent contends the opposite. The issue arising between the parties is whether the dispute resolution provisions of the 2018 Agreement apply to *all* questions or disputes arising between the parties or whether, as the respondent maintains, they are limited to those disputes about the meaning and effect of the Agreement or the *Minimum Conditions of Employment Act 1993* (WA).

The disputed clause

- 3 The provisions under the 2018 Agreement for dispute resolution are set out in cls 176 - 179. The key provision for present purposes is cl 176 and particularly cl 176.2 which is in these terms:

176.2 It is in the interests of all parties to manage the resolution of any issues or disputes in a manner that will not damage the business of the Employer. Any question or dispute that arises between the parties regarding the meaning and effect of this Agreement or the *Minimum Conditions of Employment Act 1993* (WA) will be resolved in accordance with this clause and clause 177 - Dispute Resolution Procedure for Individual Disputes, clause 178 - Dispute Resolution Procedure for Prison/Service Area Disputes and clause 179 - Dispute Resolution Procedure for Corporate Disputes, as applicable.

- 4 As cl 176.2 says, separate provisions apply to individual disputes, single prison level disputes and corporate disputes, the latter of which involve a dispute at more than one prison or a group of prisons. Each of cls 177, 178 and 179 set out the steps the parties must take in trying to resolve each type of dispute. If they cannot be resolved, then either party may refer the dispute to the Commission. The parties must complete forms, pro formas of which are annexed to the 2018 Agreement, at each stage of the dispute resolution process.

Principles to apply

- 5 In *Civil Service Association of Western Australia Incorporated v Commissioner, Western Australia Police Department* [2019] WAIRC 00142; (2019) 99 WAIG 358, I set out the principles in relation to interpreting industrial agreements. At pars 10 - 11 I said:

10 The relevant principles in relation to the interpretation of industrial instruments are well settled. A recent summary of these principles was set out in a decision of the Full Bench of the Commission in *Fedec v Minister for Corrective Services* [2017] WAIRC 00828; (2017) 97 WAIG 1595. At pars 21-23 Smith AP and Scott CC observed:

Interpreting an industrial agreement - general principles of interpretation

21 The approach that is to be applied when interpreting an industrial agreement is well established. This is:

- (a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.
- (b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362.
- (c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498; *City of Wanneroo v Holmes* (378 - 379) (French J).

22 The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement. In *Re Harrison; Ex parte Hames* [2015] WASC 247, Beech J said [50] - [51]:

The general principles relevant to the proper construction of instruments are well-known. In summary:

- (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
- (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
- (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
- (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
- (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and

- (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (*Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); *Kidd v The State of Western Australia* [2014] WASC 99 [122]; *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 [106] - [112]; *Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd* [2014] WASCA 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).

These general principles apply in the construction of an industrial agreement (*Director General, Department of Education v United Voice WA* [2013] WASCA 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (*Ancor Ltd v Construction, Forestry, Mining & Energy Applicant* [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); *Director General v United Voice* [81]; see also *Ancor v CFMEU* 66 (Kirby J), 129 - 130 (Callinan J)).

- 23 To these principles, the following observations made by Pullin J in *Director General, Department of Education v United Voice WA* [2013] WASCA 287; (2013) 94 WAIG 1 [18] - [19] should be added:

The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22].

Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 352; *McCourt v Cranston* [2012] WASCA 60 [23].

- 11 The generous rule of construction applies equally to an award, but even more so to an industrial agreement.

- 6 I adopt and apply this approach to the disposition of the present matter.

Agreement history

- 7 It was common ground between the parties that the Agreement had its origins in the *Department of Corrective Services Prison Officers' Enterprise Agreement 2010*. The dispute resolution provisions in the 2010 Agreement were carried over into the 2013 Agreement. The intent behind making the 2013 Agreement, as reflected in its cl 6, was to replace "in full" the *Prison Officers' Award*. Despite this, any inconsistency between the industrial agreement and the award, was to be resolved in favour of the industrial agreement. This also reflects the terms of s 41(9) of the Act, which is to the same effect. This intention has also been carried through to the successor industrial agreements, including the 2018 Agreement.
- 8 This intention was the subject of evidence of Mr Smith, the Secretary of the applicant. In a witness statement filed in these proceedings, Mr Smith outlined the broad history to making the 2013 industrial agreement as underpinned by a principle of "no loss, no gain". He said if the parties ran into difficulty in applying the industrial agreement, then they would refer to the relevant part of the award to assist. Mr Smith said that the respondent has adopted a broad approach to the dispute resolution provisions of the industrial agreements made since 2013, and the recent change, under the 2018 Agreement, is a new development. In relation to this evidence, whilst Mr Smith referred to the principle of "no loss, no gain" as guiding the negotiations for a new industrial agreement, and this did not seem disputed by the respondent, I note that the dispute settlement clause in cl 176 of the 2018 Agreement, was already in existence before 2013, in the 2010 Agreement.
- 9 In the bundle of documents filed by the applicant, documents headed "Management of Disputes Document - Active Disputes..." over various dates was included. These documents, which appear to have been prepared by the respondent, under both the 2018 Agreement and the 2016 Agreement, are a summary of disputes between the parties lodged and their status. The stated intention of the document is to assist in managing disputes promptly. These disputes range from August 2016 to July 2019. They record the prison or service area, the issue, the "stage" of the dispute i.e. stage 1 or stage 2, and its status. These stages of dispute resolution plainly refer to the staged process as set out in the dispute resolution procedure in the 2018 Agreement and its predecessor. It would appear from the face of the document, that runs to some 26 pages, that very many disputes are recorded. It would also appear that from these documents, several, including individual types of disputes, do not involve matters about the meaning and effect of the Agreement or staffing level issues.
- 10 There are also other documents in the applicant's bundle, dealing with various other disputes, such as those over uniforms, requests for long service leave and staff deployment issues, amongst other matters. These disputes appear to have also been dealt with under the dispute resolution provisions in the 2018 Agreement. This material suggests, as contended by the applicant, that a more restrictive view of matters to be dealt with under the dispute resolution provisions of the 2018 Agreement, is a relatively recent change in approach. However, the use that may be made of this material is something that I deal with further below.

Consideration

- 11 I have carefully considered the written outlines of submissions filed by the parties and the bundle of material submitted by the applicant to support its contention. On a strict interpretative basis, even applying a generous approach, taking the language used in cl 176 (subject to cl 151), the position adopted in the respondent's written outline of submissions is to be preferred. In its ordinary and natural meaning, the words "Any question or dispute that arises between the parties regarding the *meaning or*

effect of this Agreement...will be resolved..." are narrow in scope and seek to confine matters that may be the subject of formal dispute resolution processes, to only those specified. I do not consider there is any ambiguity in the language of the clause. This provision stands in contrast to the breadth of the preamble to cl 24 - Dispute Resolution Process in the Award, where at cl 24.1 it provides:

24.1 Preamble

Subject to the provisions of the *Industrial Relations Act, 1979*, any grievance, complaint or dispute, or any matter raised by the Applicant or the Department and its Officers, shall be settled in accordance with the procedures set out in subclause 24.2 of this clause.

The parties agree that no precipitate action will be taken prior to, or during the time this procedure is being followed.

- 12 This provision is not limited as is cl 176.2 of the 2018 Agreement. This is despite cl 177.1 of the 2018 Agreement, which refers to individual disputes being a "grievance or an issue which affects only one officer". This does not broaden the key provision in cl 176.2. Given the intended scheme of the dispute resolution provisions, it seems reasonably clear that all disputes, whether they be under cl 177, 178 or 179, are qualified by the terms of cl 176.2.
- 13 Despite this language, and my view as to the preferred interpretation, what is the effect of the approach of the parties as to how the dispute resolution provision terms of the 2018 Agreement have been applied in practice? Also, whatever may have been the intention of a party to the 2018 Agreement, ultimately, once having agreed, it is the language used in the document itself, as with any other contract or agreement, that must be the manifestation of the parties' common intention and not the subjective intention of one of them: *Printing & Kindred Industries Union & Anor v Davies Bros Ltd* [1987] AILR 55; (1986) 18 IR 444.
- 14 A lot of the material relied on by the applicant related to how the dispute resolution process clauses have been applied in practice. While not directly put it seems the purpose of this information was directed to the proposition that both parties have applied and interpreted the clause in the broader manner, as contended by the applicant.
- 15 There are difficulties in seeking to rely on the conduct of parties after an industrial agreement has been made. This stems from the contractual principle that the conduct of parties to a contract, after its making, may not be relied upon to interpret the contract: *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235. Consistent with this principle, similarly, the conduct of the parties to an industrial agreement, subsequent to its making, cannot generally be relied upon in interpreting the industrial agreement: *Printed and Kindred Industries Union; Seamen's Union of Australia v Adelaide Steamship Co Ltd* (1976) 46 FLR 444 at 445; *Re Security Officers (Waterfront) Award* [1988] AILR 431. There may be some limited exceptions to this rule, which are not without controversy, where for example, the parties to an award have knowingly historically adopted an interpretation of an award provision over a long time. This can only possibly apply in cases of ambiguity. I do not consider however, that this situation applies in the present circumstances.
- 16 Whilst the applicant has referred to cl 151 of the 2018 Agreement which deals with staffing shortfalls, and that such disputes are dealt with under the dispute resolution provisions in cl 176, this is an exception. By cl 151.5, it is provided that if the parties cannot agree on the employer's decision in relation to a staffing issue, then any dispute shall be resolved under cl 176. That there is express reference to cl 176 in cl 151.5 of the 2018 Agreement, tends against the broad approach to interpretation contended by the applicant. If, as submitted by the applicant, the dispute resolution procedures in cls 176 - 179 are as broad in scope as submitted, then a provision such as cl 151.5, expressly referring to the ability to have such disputes dealt with in this manner, would not be necessary.
- 17 My conclusions as to the dispute resolution provisions of the 2018 Agreement are also supported by there being detailed consultative processes set out in cls 171, 172, 173 and 174 of the 2018 Agreement. These are plainly intended to operate in a complementary fashion to the dispute resolution provisions in cls 176 - 179.
- 18 The approach to interpreting cl 176.2, advanced by the respondent, is correct and I will declare to this effect.

2020 WAIRC 00431

INTERPRETATION OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPLICANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER

DATE

MONDAY, 27 JULY 2020

FILE NO.

APPL 20 OF 2020

CITATION NO.

2020 WAIRC 00431

Result	Declaration issued
Representation	
Applicant	Ms H Harper
Respondent	Mr D Anderson of counsel

Declaration

HAVING heard from Ms H Harper on behalf of the applicant and Mr D Anderson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby declares –

THAT on its true interpretation the dispute resolution provisions contained in clauses 177 to 179 of the *Department of Justice Prison Officers Industrial Agreement 2018* are confined to any question or dispute in relation to the meaning and effect of the Agreement or the *Minimum Conditions of Employment Act 1993* (WA).

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

NOTICES—Award/Agreement matters—

2020 WAIRC 00436

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. APPL 35 OF 2020

APPLICATION TO VARY THE

“DENTAL TECHNICIANS' AND ATTENDANT/RECEPTIONISTS' AWARD, 1982”

NOTICE is given that an application has been made to the Commission, on 20 July 2020, to remove *Dr Anthony Fridian Poli* as a party to the above-named Award under the *Industrial Relations Act 1979* (WA).

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.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

29 July 2020

2020 WAIRC 00437

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. APPL 36 OF 2020

APPLICATION TO VARY THE

“DENTAL TECHNICIANS' AND ATTENDANT/RECEPTIONISTS' AWARD, 1982”

NOTICE is given that an application has been made to the Commission, on 21 July 2020, to remove *Dr Peter McKerracher* as a party to the above-named Award under the *Industrial Relations Act 1979* (WA).

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.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

29 July 2020

2020 WAIRC 00686

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. APPL 40 OF 2020

APPLICATION TO VARY THE**“DENTAL TECHNICIANS' AND ATTENDANT/RECEPTIONISTS' AWARD, 1982”**

NOTICE is given that an application has been made to the Commission, on 5 August 2020, to remove *Dr David McDonald* as a party to the above-named Award under the *Industrial Relations Act 1979* (WA).

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,
Registrar.

[L.S.]

10 August 2020

INDUSTRIAL MAGISTRATE—Claims before—

2020 WAIRC 00440

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00440
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : THURSDAY, 23 JULY 2020
DELIVERED : THURSDAY, 30 JULY 2020
FILE NO. : M 52 OF 2020
BETWEEN : JOSEPHINE JURAK

CLAIMANT

AND

CATHERINE ESTHER DOUST IN HER CAPACITY AS PRESIDENT OF THE
LEGISLATIVE COUNCIL OF WA

RESPONDENT

CatchWords : INDUSTRIAL LAW – Enforcement of State industrial instrument – Application for summary judgment – Whether there is a real issue to be tried – Turns on construction of award term and own facts – Application for costs – Whether the claim was vexatiously or frivolously instituted

Legislation : *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA)
Industrial Relations Act 1979 (WA)
Magistrates Court (Civil Proceedings) Act 2004 (WA)

Instruments : *Electorate Officers Award 1986* (WA)
Electorate and Research Employees CSA General Agreement 2019 (WA)

Case(s) referred to in reasons: : *United Voice WA v The Minister for Health* [2011] WAIRC 01065
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87
Mary v Schon [2015] WADC 92
Edenham Pty Ltd v Meares (No 2) [2016] WASC 302
Lewkowski v Bergalin Pty Ltd (Unreported, WASCA, Library No 7675, 26 May 1989)
Whitehall Holdings Pty Ltd v Ravi Nominees Pty Ltd (Unreported, WASCA, Library No 9189, 13 December 1991)
Dey v Victorian Railways Cmrs (1949) 78 CLR 62
Theseus Exploration NL v Foyster (1972) 126 CLR 507
Burton v Shire of Bairnsdale (1908) 7 CLR 76
Shilkin v Taylor [2011] WASCA 255
Commissioner of Police v AM [2010] WASCA 163 (S)

Matthews v Cool or Cosy Pty Ltd & Ors [2003] WASCA 136

Sammut v AVM Holdings Pty Ltd [No2] [2012] WASC 27

Fedec v The Minister for Corrective Services [2017] WAIRC 00828

City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union [2006] FCA 813

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd [2013] FCA 638

Result : Application granted in part

Representation:

Claimant : Mr P. Mullally (agent) from Workclaims Australia

Respondent : Ms J. Vincent (of Counsel) from State Solicitor's Office

REASONS FOR DECISION

- 1 Ms Josephine Jurak (Ms Jurak) was employed as an Electorate Officer to assist a member of the Legislative Council, Mr Robin Howard Chapple (Mr Chapple MLC).
- 2 The Respondent, Catherine Esther Doust as President of the Legislative Council of Western Australia, was Ms Jurak's employer and employed Ms Jurak from 21 October 2013 to 3 January 2020. On 7 March 2018, the Respondent signed an instrument of delegation, delegating any power or duty relating to electorate officers to the holder of the office of the Director General, Department of Premier and Cabinet (from time to time).
- 3 Ms Jurak's employment was governed by the *Electorate Officers Award 1986* (WA) (the Award) and the *Electorate and Research Employees CSA General Agreement 2019* (WA) (the Agreement).
- 4 Ms Jurak alleges that she was 'forced' to resign and was 'constructively dismissed' when she resigned from her employment on 6 December 2019, with her resignation to take effect on 3 January 2020.
- 5 Ms Jurak claims:
 - the irretrievable break down of her working relationship with Mr Chapple MLC is a circumstance covered by cl 8(2)(b)(iv) of the Award because her 'constructive dismissal' occurred through no fault of her own and her employment was 'deemed' to have expired;
 - upon the expiration of her employment contract she was entitled to benefits under cl 8(3)(a)(i) and cl 8(3)(a)(ii) of the Award, namely four weeks salary in lieu of notice and termination payment at two weeks salary for each year of service; and
 - a further entitlement of a week in lieu of notice under cl 20.3 of the Agreement.
 (the Claim)
- 6 The Respondent denies the Claim and on 19 June 2020 lodged an application seeking:
 - summary dismissal on the ground that the Claim has no real prospect of success; and
 - costs of the proceedings on the ground that the Claim was frivolously or vexatiously instituted.
 (the Application)
- 7 In support of the Application, the Respondent lodged:
 - an affidavit of Ms Regina Bolton, Executive Director of the Department of Premier and Cabinet, sworn on 9 July 2020 (the Bolton Affidavit);
 - an affidavit of Ms Joanna May Vincent, Legal Practitioner, sworn on 19 June 2020; and
 - submissions in support of the Application.
- 8 In opposing the Application, Ms Jurak lodged an affidavit sworn by her on 21 July 2020 (the Jurak Affidavit) and relies upon oral submissions regarding the application of cl 8(2)(b)(iv) of the Award.
- 9 Schedule I outlines the jurisdiction and practice and procedure relevant to the Industrial Magistrates Court of Western Australia (IMC).
- 10 Schedule II outlines the principles relevant to construction of an industrial instrument.

Issues For Determination

- 11 The following issues require determination:
 - (a) the proper construction and application of cl 8(2)(b)(iv) of the Award;
 - (b) whether summary judgment applies in the circumstances; and
 - (c) if the Application is successful, whether a costs order should be made?

Respondent's Contentions

12 The Respondent contends that:

- (a) cl 8 of the Award covers resignation, retirement, termination and severance;
- (b) the Claim relies upon the application of cl 8(2)(b)(iv) of the Award.¹ For the purposes of this clause the terms 'Employer' and 'Union' are defined in cl 6 of the Award;²
- (c) the requirement to pay entitlements under cl 8(3)(a) of the Award arises only where the employee's contract of employment expires in accordance with the provisions of cl 8(2)(b) of the Award;
- (d) cl 8(2)(b)(i) to cl 8(2)(b)(iii) of the Award have no application to the Claim, therefore, in relying on cl 8(2)(b)(iv) of the Award, Ms Jurak must demonstrate that her contract of employment has deemed to have expired:
 - (i) through no fault of her own or her services are no longer required; and
 - (ii) there are '*other circumstances as agreed between the employer and the Union*' (emphasis added) (where cl 8(2)(b)(i) to cl 8(2)(b)(iii) of the Award to do not apply);
- (e) even if Ms Jurak's contract of employment was deemed to have expired through no fault of her own, having regard to paragraphs [4] to [6] of the Bolton Affidavit, there are no *other circumstances* agreed between the Respondent (as the *employer*) and the Civil Services Association of Western Australia Incorporated (as the *Union*) that enliven cl 8(2)(b)(iv) of the Award;
- (f) the Claim particularises no *other circumstances* agreed between the Respondent and the Civil Services Association of Western Australia Incorporated, and pleads only the irretrievable breakdown of the working relationship between Ms Jurak and Mr Chapple and the Respondent's failure to provide a safe workplace; and
- (g) paragraph [5] of the Jurak Affidavit does not rebut the evidence in the Bolton Affidavit, it merely intends to draw an inference that a conversation with Ms Jane Meehan (Ms Meehan), an officer at the Department of Premier and Cabinet, is sufficient to demonstrate an agreement between the Respondent and the Union. The Respondent disputes that this is the case.

Ms Jurak's Contentions

13 Ms Jurak contends that:

- (a) an irretrievable breakdown of the working relationship is a circumstance covered by cl 8(2)(b)(iv) of the Award;
- (b) her constructive dismissal by the Respondent occurred through no fault of her own, and, therefore, her employment was deemed to have expired;
- (c) a 'promise' was made by Department officers that she would be paid a severance payment;
- (d) by inference such 'promise' was an *other circumstance* enlivening cl 8(2)(b)(iv) of the Award and the application of this clause was utilised to make a severance payment; and
- (e) there are matters of fact yet to be determined and the Claim ought not to be dismissed at this early stage.

Preferred Construction Of Clause 8(2)(b)(iv) Of The Award

- 14 Clause 8(2) of the Award concerns the expiration of an employee's contract of employment, having regard to the unique position held by Members of Parliament. In the first instance, '[a]n employee's contract of service terminates when the Member for whom the employee works ceases to hold office': cl 8(2)(a) of the Award.
- 15 Thereafter, there are four instances where *an employee's* contract of employment will be deemed to have terminated through no fault of the employee's or where the employee's services are no longer required. However, three of these instances are related to the Member for whom the employee works, including: (i) the Member's death, resignation and retirement; (ii) the Member 'is not re-elected for a second or subsequent term of office'; or (iii) the Member is not required following a change to electoral boundaries: cl 8(2)(b)(i) to cl 8(2)(b)(iii) of the Award.
- 16 These three instances clearly relate to the office held by the Member.
- 17 The fourth instance does not relate to the office held by the Member but provides for '*other* [unspecified] *circumstances as agreed between the employer and the Union*' (emphasis added): cl 8(2)(b)(iv) of the Award.
- 18 Where an employee's contract of employment terminates because of one of the instances in cl 8(2)(b) of the Award, the employee is entitled to a termination payment comprising of the entitlements provided in cl 8(3)(a)(i) to cl 8(3)(a)(iv) of the Award. An employee is not entitled to the termination payment for reasons specified in cl 8(3)(b)(i) to cl 8(3)(b)(iii) of the Award, which are not relevant to the Claim.
- 19 Further, cl 20.1 of the Agreement provides that the provisions of cl 20 needs to be read *in conjunction with* cl 8 of the Award. Clause 8(1)(b) of the Award provides that four weeks' notice shall be given by the employer to the employee *whose services are no longer required*. This period increases by one week where the employee is over 45 years of age and has completed two years of continuous service with the employer: cl 20.3 of the Agreement.
- 20 The *other circumstances* referred to in cl 8(2)(b)(iv) of the Award are not defined in the Award, but whatever they may be these *other circumstances* are those which are *agreed* between the *employer* and the *Union* regarding the expiry of *an employee's* contract of employment. Relevant to the Claim, the *employer* is the President, acting on recommendation of the Director-General (that being the Respondent), and the *Union* is the Civil Service Association of Western Australia Incorporated.

21 In my view, having regard to the ordinary meaning of the words of the instrument in the context in which they appear, and where there is no ambiguity in the words used, unless there is an agreement between the Respondent, as the *employer*, and the Civil Service Association of Western Australia Incorporated, as the *Union*, as to what *other circumstance* applies, cl 8(2)(b)(iv) of the Award has no operation relevant to *an employee's* termination (deemed or not).

Application For Summary Judgement

Principles relevant to summary judgment applications

22 The IMC has the power to summarily dispose of a claim on the basis that there is no reasonable prospect of success.³ The IMC's duties in dealing with cases are set out in reg 5 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (the Regulations). Regulation 7 of the Regulations sets out what the IMC may do for the purpose of controlling and managing cases and trials, including, at reg 7(1)(h) '*order that an issue not be tried*', and at reg 7(1)(r) '*take any other action or make any other order for the purpose of complying with regulation 5*'.

23 Therefore, the IMC has the power to make the orders sought by the Respondent if it concludes that Ms Jurak's claim is so clearly untenable that it could not possibly succeed and, if that circumstance exists, to dismiss the claim so as to deal with the case efficiently, economically and expeditiously and to ensure that the IMC's resources are used as efficiently as possible.⁴

24 The power to order summary judgment is one that should be exercised with great care.⁵ An application for summary judgment should be determined on the material before the Court, not based on the prospect that, given the opportunity, the other party might be able to remedy a deficiency.⁶ The persuasive onus rests on the applicant for summary judgment, but the respondent to the application bears an evidentiary onus.⁷ The claim or defence put forward should not contain bare allegations unsupported by material facts.⁸

25 The other party has an obligation to provide particulars of an arguable defence or claim (as the case may be) and to provide a statement of facts which go to show that it is arguable.⁹ The summary judgement procedure is not confined to cases which are immediately plain and obvious.¹⁰

26 While the Court may determine a difficult question of law on a summary judgment application, usually it is appropriate to leave the determination of such a question for trial.¹¹

27 Disposal of a claim or a defence summarily '*will never be exercised unless the [party's claim or defence] is so obviously untenable that it cannot possibly succeed*'.¹²

Should summary judgment apply to the Claim?

28 The principle dispute between the parties concerns the construction and application of cl 8(2)(b)(iv) of the Award.

29 While not expressly stated in the Claim, I infer that Ms Jurak is seeking to invoke the IMC's enforcement jurisdiction under s 83 of the *Industrial Relations Act 1979* (WA) (IR Act).

30 To invoke the IMC's enforcement jurisdiction, a claimant must first identify which instrument he or she says they are seeking to enforce. Thereafter, once the instrument is identified, consistent with the words in s 83(1) of the IR Act, the claimant must also identify the provision he or she says has been contravened or not complied with by the respondent.

31 It is only upon the claimant proving a contravention or failure to comply with a provision of an instrument that the IMC may make an order under s 83A(1) of the IR Act, where the employee has not been paid an amount to which they are entitled under the relevant instrument.

32 Noting the Claim seeks the payment of a monetary amount, to succeed under s 83 and s 83A(1) of the IR Act, Ms Jurak must prove on the balance of probabilities that the Respondent has contravened cl 8(3)(a) of the Award in failing to pay a termination payment.

33 However, in order to prove this contravention or failure to comply, Ms Jurak first needs to prove that her contract of employment expired in accordance with cl 8(2)(b) of the Award. Ms Jurak relies on cl 8(2)(b)(iv) of the Award as the basis for the deemed expiration of her contract of employment.

34 Having regard to the preferred construction of cl 8(2)(b)(iv) of the Award, Ms Jurak needs to prove there was an agreement between the Respondent and the Civil Service Association of Western Australia Incorporated regarding the deemed expiration of her contract of employment. It is not to the point what the agreement concerned (given *other circumstances* is likely to encompass a wide range of topics).

35 This is the case, notwithstanding there may be no fault on the part of Ms Jurak and she resigned from her employment (leaving aside whether her resignation could properly be characterised as 'constructive dismissal').

36 In respect of Ms Jurak's claim for an additional week in lieu of notice under cl 20.3 of the Agreement, again she would first need to establish a claim under cl 8(2)(b) of the Award.

37 According to the Bolton Affidavit no agreement exists between the Respondent and the Civil Service Association of Western Australia Incorporated regarding the deemed expiration of Ms Jurak's contract of employment.¹³ Nothing in the Claim or in the Jurak Affidavit challenges this evidence.

38 To the extent that the Jurak Affidavit refers to a conversation between Ms Jurak and Ms Meehan about paying a severance payment, nothing in the Jurak Affidavit or in the annexures demonstrate that this conversation in any way related to an agreement between the Respondent and the Civil Service Association of Western Australia Incorporated concerning the deemed expiry of Ms Jurak's contract of employment.¹⁴

- 39 At its highest, and if accepted, the conversation referred to by Ms Jurak was between her and Ms Meehan and is not asserted to be attributed to, or on behalf of, the Respondent. The only reference to the Respondent is in an email dated 27 February 2020 from Ms Sharon Basini informing Ms Jurak that the Respondent did not support a severance or irretrievable breakdown payment.¹⁵
- 40 In my view, no inference can be drawn from this evidence that an agreement existed between the Respondent and the Civil Service Association of Western Australia Incorporated regarding the deemed expiry of Ms Jurak's contract of employment. Where I am unable to draw this inference, the content of the Jurak Affidavit does not rebut the evidence in the Bolton Affidavit, notwithstanding the purported content of an earlier conversation between Ms Jurak and Ms Meehan indicating the payment of a 'redundancy'.
- 41 The aspect of the Claim relevant to the cl 20.3 of the Agreement also relies upon establishing a basis under cl 8(2)(b)(iv) of the Award. The Claim does not particularise that Ms Jurak's *services were no longer required*. To the contrary, Ms Jurak claims and asserts she was 'constructively dismissed' upon the 'irretrievable breakdown' of the employment relationship between her and Mr Chapple and relies upon a 'promise' of a payment of a severance payment.
- 42 Having regard to the Claim, the response to the Claim and to the affidavit evidence before the IMC, the Respondent has satisfied the persuasive onus that there is no issue or question in dispute, which ought to be tried or that there ought for some other reason be a trial of the Claim, where the entitlements and amount sought under cl 8(3)(a) of the Award and cl 20.3 of the Agreement rely upon the application of cl 8(2)(b)(iv) of the Award.
- 43 Therefore, judgment will be entered against Ms Jurak and the Claim is and be dismissed.

Application for Costs

- 44 The Respondent makes application for costs if summary judgement against the Claim is granted. Section 83C of the IR Act provides that '[i]n proceedings under section 83 ... costs shall not be given to any party to the proceedings ... unless, in the opinion of the [IMC], the proceedings have been frivolously or vexatiously instituted or defended ... by the other party'.
- 45 The Respondent contends the Claim was frivolously instituted and, in the alternative, vexatiously instituted.
- 46 In dealing with whether the Claim was vexatiously instituted, I note the Claim was commenced against the Respondent and not Mr Chapple. The Respondent was Ms Jurak's employer. There is no evidence, or any inference capable of being drawn from the evidence, before the IMC that enables a conclusion that the Claim was commenced 'without sufficient grounds for success purely to cause trouble or annoyance'¹⁶ to the Respondent.
- 47 Having regard to the contents of the Jurak Affidavit, Ms Jurak asserts an officer at Department of Premier and Cabinet said she would be paid a termination payment upon her resignation (which she refers to as her 'constructive dismissal') from her employment. Whether this representation was made or not was, in fact, immaterial to the application of cl 8(2)(b)(iv) of the Award based on the preferred construction of this clause adopted by the IMC.
- 48 However, of itself and without more, that the Claim was arguably misguided or misconceived based on the alleged representation made does not, in my view, lead to a conclusion that it was vexatiously instituted.
- 49 The Respondent's primary submission on why costs ought to be ordered is, in essence, it is axiomatic that if the Claim is dismissed because there is no reasonable prospects of success, the Claim is frivolous or has been frivolously instituted.
- 50 The Respondent refers to the Western Australian Industrial Appeal Court (IAC) decisions in *Matthews v Cool or Cosy Pty Ltd* [2003] WASCA 136 and *Commissioner of Police v AM* [2010] WASCA 163 (S)¹⁷ in support of its submission on the meaning of 'frivolous'. No issue is taken with this meaning.
- 51 Section 86(2) of the IR Act authorises the IAC to make a costs order, which is in similar terms to that of s 83C of the IR Act. The IAC in *Matthews* noted that the 'policy envisaged by s 86(2) is that will it be [only] on very rare occasions that a costs order will be made'. Accordingly, consistent with the policy behind s 86(2), it will only be on very rare occasions that a costs order will be made under s 83C of the IR Act. Notably, while the IAC determined the 'appeal was not frivolous or vexatious', it also stated that in light of the minor expenses claimed the Court would exercise its discretion not to award them. Thereby invoking its discretionary decision with respect to costs in any event.
- 52 In the *Commissioner of Police v AM*, the majority dismissed the respondent's application for costs, notwithstanding the deficiency in the appellant's grounds of appeal under s 90 of the IR Act. Buss J (with whom Le Miere J agreed) concluded that the appeal was not one of the rare occasions on which the costs of a legal practitioner should be awarded and did not characterise the appellant's grounds of appeal as 'so obviously untenable that they cannot possibly succeed', 'manifestly groundless' or 'so manifestly faulty that they do not admit of argument'.¹⁸
- 53 Ms Jurak notes that no costs order was made in any of the decisions referred to by the Respondent.
- 54 Notwithstanding I determined that the Claim has no reasonable prospect of success given there are no unresolved questions of fact or difficult questions of law that require a trial, I am not satisfied that this determination means that at all material times the Claim as instituted was so obviously untenable or manifestly groundless as to be utterly hopeless. Argument was required and, ultimately, it was a matter of construction and application of a term of the Award having regard to the evidence that lead to the outcome.

Orders

55 I make the following orders:

- 1 Pursuant to reg 5 and reg 7(1)(r) of the Regulations, the Respondent's application for summary judgment is granted and the Claim is dismissed.
- 2 There be no order as to costs.

D SCADDAN
INDUSTRIAL MAGISTRATE

¹ Clause 8(2)(b)(iv) of the Award states '*For the purposes of this clause, an employee's contract shall be deemed to have expired (terminated) if, through no fault of the employee, his or her services are no longer required and the Member for whom the employee works other circumstances as agreed between the employer and the Union*'.

² Relevantly 'Employer' means: (1) The President, acting on recommendation of the Director General, is the employer of each electorate employee appointed to assist: (a) a member of the Legislative Council in dealing with constituency matters. 'Union' means the Civil Service Association of Western Australia Incorporated.

³ *United Voice WA v The Minister for Health* [2011] WAIRC 01065.

⁴ Regulation 5(2)(a) and reg 5(2)(c) of the Regulations.

⁵ *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87.

⁶ *Mary v Schon* [2015] WADC 92 [43] - [44].

⁷ *Edenham Pty Ltd v Meares* (No 2) [2016] WASC 302 [18].

⁸ *Lewkowski v Bergalin Pty Ltd* (Unreported, WASCA, Library No 7675, 26 May 1989).

⁹ *Whitehall Holdings Pty Ltd v Ravi Nominees Pty Ltd* (Unreported, WASCA, Library No 9189, 13 December 1991).

¹⁰ *Dey v Victorian Railways Cmrs* (1949) 78 CLR 62, 91.

¹¹ *Theseus Exploration NL v Foyster* (1972) 126 CLR 507, 514 - 515.

¹² *Burton v Shire of Bairnsdale* (1908) 7 CLR 76, 92 (see also *Shilkin v Taylor* [2011] WASCA 255, 29).

¹³ Paragraph [4] - [6].

¹⁴ Paragraph [5] and [8].

¹⁵ Annexure 'JJ1' (email from Ms Sharon Basini dated 27 February 2020)

¹⁶ *Commissioner of Police v AM* [2010] WASCA 163 (S) [28] - [29].

¹⁷ *Matthews v Cool or Cosy Pty Ltd & Ors* [2003] WASCA 136 [9].

¹⁸ *Commissioner of Police v AM* [2010] WASCA 163 (S) [38].

Schedule I – Jurisdiction of the IMC

[1] The IMC has the jurisdiction conferred by the *Industrial Relations Act 1979* (WA) (IR Act) and other legislation. Section 83 and s 83A of the IR Act confer jurisdiction on the Court to make orders for the enforcement of a provision of an industrial agreement where a person has contravened or failed to comply with the agreement. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order, including an interim order, necessary for the purpose of preventing any further contravention. The IMC must order the payment of any unpaid entitlements due under an industrial agreement.

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

[T]he rules of evidence are [not] to be ignored ... After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth ...

The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.

Schedule II – Relevant Principles Of Construction

[1] This case involves construing industrial agreements and statutes. Similar principles apply to both. The relevant principles to be applied when interpreting an industrial instrument are set out by the Full Bench of the Western Australian Industrial Relations Commission in *Fedec v The Minister for Corrective Services* [2017] WAIRC 00828 [21] - [23]. In summary (omitting citations), the Full Bench stated:

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

- b. '[T]he primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument. [I]t is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean';
- c. '[T]he objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context. [T]he apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances';
- d. '[A]n instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ';
- e. '[A]n instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation'; and
- f. 'Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect'.

The following is also relevant:

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

2020 WAIRC 00407

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00407
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : WEDNESDAY, 13 MAY 2020
DELIVERED : THURSDAY, 16 JULY 2020
FILE NO. : M 70 OF 2019
BETWEEN : MATTHEW JUSTIN FAHIE

CLAIMANT

AND

MATAYA PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – Restaurant industry – Contravention of *Fair Work Act 2009* (Cth) – Contravention of modern award on annualised salary; payment of time in lieu; payment of public holiday in lieu – Construction of terms of modern award and computation of annualised salary

Legislation : *Fair Work Act 2009* (Cth)
Industrial Relations Act 1979 (WA)
Magistrates Court (Civil Proceedings) Act 2004 (WA)

Instrument : *Restaurant Industry 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
Ancor Ltd v CFMEU [2005] HCA 10
Becherelli v Mediterranean Pty Ltd trading as Lucioli [2017] WAIRC 65

Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate [2015] FCAFC 99

WorkPac Pty Ltd v Rossato [2020] FCAFC 84

James Turner Roofing Pty Ltd v Peters [2003] WASCA 28

Miller v Minister of Pensions [1947] 2 All ER 372

Sammut v AVM Holdings Pty Ltd [No2] [2012] WASC 27

Briginshaw v Briginshaw [1938] HCA 34

Result : Claim proven in part

Representation:

Claimant : Mr M. Fahie

Respondent : Ms N. Adams for the Respondent (Director)

REASONS FOR DECISION

- 1 Mr Matthew Fahie (Mr Fahie) was employed by Mataya Pty Ltd (Mataya) as a Level 6, Grade 5 Chef at Mataya Restaurant in Mandurah from 10 July 2017 to 25 January 2018.
- 2 Mr Fahie's employment was subject to the terms of the *Restaurant Industry Award 2010* (Cth) as varied from time to time (Award) and a contract of employment dated 7 July 2017 (the Employment Contract).¹
- 3 Mr Fahie claims Mataya contravened the Award and the *Fair Work Act 2009* (FWA) in failing to pay him:
 - an annualised salary in compliance with cl 28.1(b) of the Award;
 - the equivalent amount for time worked in lieu (TOIL) in excess of the contracted number of hours in compliance with cl 33.5 of the Award; and
 - public holiday payments on certain public holidays where annual leave was not credited in compliance with cl 38.2 of the Award.
- 4 Mr Fahie seeks orders for payment of the following amounts:
 - \$79.71 in annual salary;
 - \$5,222.05 in remaining balance for TOIL; and
 - \$1,131.06 in public holiday payments.
- 5 Mr Fahie elected the small claims procedure.
- 6 Mataya denies the claim and says Mr Fahie has been paid all his entitlements. Further, Mataya disputes how Mr Fahie characterised and calculated his entitlements under the Award contending that Mr Fahie has erroneously applied the terms of the Award. Mataya provided its own calculations of amounts paid to Mr Fahie. Mataya also disputes certain facts relevant to Mr Fahie's claim for TOIL.
- 7 As will be discussed, during the hearing Ms Natalie Adams (Ms Adams) agreed that certain discrepancies were identified as it related to TOIL, but an amount was paid to Mr Fahie in relation to these discrepancies. If the Industrial Magistrates Court of Western Australia (IMC) identifies any other amount owing to Mr Fahie, Mataya contends that this amount should be set-off against an alleged overpayment to Mr Fahie by Mataya.

Issues To Be Determined

- 8 At the commencement of the hearing, the IMC clarified Mr Fahie's claim. Consequently, the following issues are to be determined:
 - a. Relevant to cl 28.1(b) of the Award, how is an annualised salary to be calculated where an employee's employment is terminated prior to the completion of a year?
 - b. Relevant to cl 33.5 of the Award, what was the total amount of time worked by Mr Fahie in excess of 42 hours per week?
 - c. Is Mr Fahie entitled to any or any further amount in TOIL, and, if so, what amount?
 - d. Having regard to time worked, is Mr Fahie entitled to any payment, or further payment, in respect of public holidays either under cl 38.2 of the Award or otherwise, and, if so, what amount?
- 9 Determination of issue (a) is largely resolved by a construction of the identified sections of the Award.
- 10 Schedule 1 of this decision sets out the law relevant to the jurisdiction, practice and procedure of IMC in determining this case. Relevant to matters identified under the heading, 'Jurisdiction' in Schedule 1 of this decision, I am satisfied: Mataya is a corporation to which paragraph 51(XX) of the Constitution applies and it is a '*national system employer*'; Mr Fahie was an individual who was employed by Mataya and is a '*national system employee*'.
- 11 Schedule 2 of this decision contains the relevant clauses of the Award.
- 12 Schedule 3 of this decision contains the relevant rates of pay under the Award.
- 13 Schedule 4 of this decision contains a spreadsheet of the hours worked by Mr Fahie² and the comparison of the Award pay to time worked and an explanation of the rates of pay applied.

Background Facts

- 14 According to the Employment Contract,³ Mr Fahie was employed as Head Chef of Mataya Restaurant in Mandurah where the relevant terms of his employment were:
- Full time employment with an annualised salary of \$65,000 per annum.
 - Ordinary hours of work of 42 hours per week.
 - Clause 4.6 of the Employment Contract provides:
[a]ny payments or other entitlements we provide to you in excess of your minimum entitlements offset any liability, claim or entitlement that you may claim against us connected with your employment and we are entitled to set off those overpayments in the event of any claim by you.
 - Clause 4.7 of the Employment Contract provides:
[i]f your pay specified in Item 13 is expressed as annual salary and your Modern Award is the Restaurant Industry Award 2010, your gross pay as specified in Item 13 includes all payments and benefits that we are obliged to provide to you. Your pay is specifically offset against and absorbs any existing or newly introduced benefits to which you are, or may become, legally entitled (including but not limited to minimum weekly wages, allowances, penalty rates, premiums, pay period specifications, overtime, loadings and payments of a like nature) under any legislation, industrial instrument or award, unless we specify otherwise.
 - Clause 6 of the Employment Contract provides:
[w]e may deduct from your remuneration, during your employment or upon termination of your employment:
 - (a) *any overpaid money;*
 - (b) *any amount that we are lawfully obliged or allowed to deduct; and*
 - (c) *any amount which you have authorised us in writing to deduct.*
 - Clause 8.5 of the Employment Contract provides:
[i]f you are employed on a full-time basis and one of your rostered days off falls on a public holiday (or that public holiday's alternative or substitute public holiday), we will credit you an additional day's annual leave.
- 15 Mr Fahie commenced work on 10 July 2017 and his employment was terminated on 25 January 2018.⁴
- 16 Mr Fahie was rostered to work from 6.30 am to 3.00 pm Thursday to Monday inclusive. That is, Tuesday and Wednesday were his rostered days off. However, at times he worked in excess of, and less than, 42 hours per week and from time to time worked on his rostered days off.⁵
- 17 One of the facts in dispute is whether Mr Fahie took meal breaks and the contribution this makes to the TOIL calculation. Mr Fahie says that he was unable to take meal breaks because the restaurant was understaffed. Ms Adams says Mr Fahie did not use the 'Deputy' pay role system to record his meal breaks and had poor time management skills, and he was always able to take meal breaks.
- 18 There were four public holidays during Mr Fahie's period of employment: 25 September 2017, 25 December 2017, 26 December 2017 and 1 January 2018. The restaurant was closed on 25 December 2017 and 26 December 2017 and Mr Fahie did not work on 31 December 2017. The restaurant was open on 25 September 2017 and on 1 January 2018 and Mr Fahie worked on these days.
- 19 Following a pre-trial conference, Mataya paid an amount of \$1,444.02 to Mr Fahie for 45.33 hours of TOIL owed but denies that Mr Fahie is owed the remaining claimed 125 hours of TOIL. However, during the hearing Ms Adams agreed that according to Mataya's TOIL calculations⁶ an amount the equivalent of 8.53 hours of TOIL is owed to Mr Fahie, although Mataya claims this amount should be set off against an annual salary overpayment.

How The Annualised Salary Is To Be Calculated Where An Employee's Employment Is Terminated Prior To The Completion Of A Year?

- 20 Mr Fahie gave evidence on his behalf and tendered several documents into evidence in support of his claim. Ms Adams gave evidence on behalf of Mataya and tendered several documents into evidence in support of Mataya's defence to the claim.
- 21 The parties' dispute on this issue concerns the computation of the annualised salary in the context of cl 28.1(b) of the Award.
- 22 Mr Fahie calculates his annualised salary under cl 28.1(b) of the Award by using an example 42-hour week for a five-day week (Thursday to Monday), including penalty rates and public holidays for the whole of a calendar year, to obtain a weekly wage of \$1,252.79. He then multiplies this average weekly wage by 52 weeks and says that pursuant to cl 28.1 of the Award his correct annual salary is \$65,145.08, of which he is owed \$79.71.⁷
- 23 Mataya contends that Mr Fahie's method of calculation is flawed where Mr Fahie's ordinary hours is based on 8.4 hours per day, rather than 7.6 hours per day, resulting in a 'double account' of 0.8 hours at ordinary rate of pay and overtime rate of pay. In addition, Mataya further contends that any annualised salary calculation can only consider public holidays actually worked during the period of employment rather than averaging out what public holidays might be worked if Mr Fahie worked for a full year. Mataya similarly calculates an average weekly wage, but says this average weekly wage is \$1,168.47, which is then multiplied by 52 weeks for a total of \$60,760.39 (excluding public holidays) and divided by the actual days worked (200). Mataya then adds to this, total public holidays worked by Mr Fahie during the employment period with a deduction for ordinary rates paid for the same day.⁸

24 Mataya contends that under cl 28.1 of the Award, Mr Fahie was entitled to be paid \$33,480.96 (inclusive of \$204.42 deducted for ordinary pay for work on 25 September 2017). Mataya say that Mr Fahie was paid \$35,465.77 for 200 days worked and, thus, was 'overpaid' \$1,984.81.⁹

Clause 28 of the Award

- 25 Clause 28.1 of the Award deals with annualised salary arrangements. In summary, cl 28 of the Award provides for five things:
- by agreement, an employee can be paid at a rate of equivalent to an annual salary of at least 25% or more above the weekly rate prescribed in cl 20 of the Award multiplied by 52. This amount obviates the requirement to pay overtime and penalty rates provided the salary is sufficient to cover equivalent Award entitlements;¹⁰
 - if an employee's employment is terminated prior to the completion of a year, the salary paid during such period of employment must be sufficient to cover what the employee would have been entitled to if all of the Award obligations had been complied with;¹¹
 - the employee is entitled to a minimum of eight days off per four-week cycle;¹²
 - if an employee covered by cl 28 of the Award is required to work on a public holiday, the employee is 'entitled to a day off instead of public holidays or a day added to the annual leave entitlement';¹³ and
 - the employer must keep records to allow a reconciliation at the end of the year where if any comparison reveals a shortfall between wages paid and entitlements under the Award, the difference is paid to the employee.¹⁴
- 26 The interpretation of an award begins with consideration of the natural and ordinary meaning of the words used.¹⁵ 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.¹⁶ An award must make sense according to the basic conventions of English language.¹⁷ Narrow and pedantic approaches to the interpretation of an award are misplaced.¹⁸
- 27 Clause 28 of the Award is, arguably, an easier accounting mechanism for employers and employees provided the employer complies with the reconciliation process and makes good any deficit when compared to the entitlements under the Award.
- 28 For an employee who works less than a year, the computation of the equivalent salary under the Award relies on the construction of cl 28.1(b) of the Award. In my view, the proper construction of the computation of a salary for an employee who works less than a year turns on the meaning of the phrases '*the salary paid during such period of employment*' and '*what the employee would have been entitled to*' in cl 28.1(b) (emphasis added).
- 29 The use of the words '*such period of employment*' and '*would have been entitled to*' indicate that the comparator is between the annual salary paid for the time period actually worked versus the salary that would have been paid if the Award applied for the time period actually worked. The use of these words does not favour a construction where the comparator involves a hypothetical time period that might have been worked had the employee in fact worked an entire year.
- 30 The preferred construction involving a comparison of the time period worked is certain, whereas the alternative construction involves speculation having regard to an employee's average time worked.
- 31 Further, the preferred construction is also consistent with the employer's requirement to keep records for reconciliation. If the cl 28.1(b) of the Award computation was based on average weekly time worked, including time not worked, multiplied by 52, as suggested by Mr Fahie (and to a lesser extent by Ms Adams), the need for reconciliation is largely redundant. However, cl 28 of the Award is prescriptive indicating an intention to ensure that actual time worked is paid in accordance with the terms of the clause where a shortfall occurs.
- 32 Therefore, in my view, the proper construction of the cl 28.1(b) of the Award computation of an employee's equivalent Award salary where they work less than a year is by reference to the time period actually worked and not by reference to weekly averages for what might have been worked.
- 33 Schedule 4 of the reasons for decision detail the hours worked by Mr Fahie and the methodology used to calculate Mr Fahie's equivalent Award salary for the actual time worked by him. Paragraph 55 to 56 explains why the hours worked contained in Mataya's spreadsheet was accepted and preferred to the hours worked contained in Mr Fahie's spreadsheet.

Application of the Proper Construction to Mr Fahie's Employment

- 34 Having regard to this construction of cl 28.1(b) of the Award, Mr Fahie would have been paid \$34,288.74 for time worked from 10 July 2017 to 25 January 2018 if he were paid in accordance with the Award obligations.¹⁹
- 35 For the same period for the same time worked, Mataya paid Mr Fahie \$35,465.77.²⁰
- 36 The difference is \$1,177.03.

Determination

- 37 Mr Fahie claims \$79.71 as a 'deficit' in annualised salary. Mataya claims Mr Fahie was 'overpaid' for the same time period worked.
- 38 I find that had Mr Fahie has been paid in accordance with the Award obligations, he would have been paid less than the amount he was in fact paid for the same period worked, namely \$1,177.03 less.
- 39 Accordingly, I find the salary paid during the relevant period of employment was sufficient to cover what Mr Fahie would have been entitled to if all of the Award obligations had been complied with.
- 40 Based on the findings made, Mr Fahie has not established this aspect of his claim to the requisite standard and his claim as it relates to an alleged deficiency in annualised salary is not proven.

What Was The Total Amount Of Time Worked By Mr Fahie In Excess Of 42 Hours Per Week?

- 41 The parties prepared their own spreadsheets of time worked for the purposes of calculating TOIL.²¹ There is no dispute that hours worked in excess of 42 hours per week were TOIL, capable of being paid out to Mr Fahie. The dispute is whether Mr Fahie was owed TOIL and, if so, what were the number of hours and the amount (if any) owed.
- 42 I note Mr Fahie, in his witness statement and revised claim, referred to discussions in a pre-trial conference. These discussions are without prejudice to any evidence or submission that the party has adduced or made or may subsequently adduce or make.²² Further the pre-trial conference is private.²³ The purpose of the pre-trial conference is to attempt to affect a settlement between the parties without prejudice to the contested proceedings. Therefore, I disregard any comments by Mr Fahie referencing things said or done between the parties during any pre-trial conference.
- 43 Mr Fahie states in oral evidence that he was told to complete his own spreadsheet and he did so each day at the end of his shift. Mr Fahie also states that he asked Mataya to provide him with a copy of the Deputy pay roll system to compare against his own spreadsheet.²⁴
- 44 Ms Adams said that while Mr Fahie was advised to keep his own records, Mataya used the Deputy pay roll system to record all employee work times. The Deputy pay roll system required the employee to enter their work times, including meal breaks, in the system using the [web] application associated with Deputy. The information was then collated on Deputy. Ms Adams also said that Mr Fahie did not record his meal breaks, notwithstanding he was provided with meal breaks and that this was indicative of Mr Fahie's poor time management skills.²⁵
- 45 Mr Fahie disputes that he was provided with meal breaks or that he failed to record his meal breaks stating that he was not provided with a meal break due to staff shortages. Accordingly, Mr Fahie says his spreadsheet accurately reflects the time worked, although he could not accurately say what portion of remaining TOIL claimed was due to unpaid meal breaks. At best Mr Fahie estimated the claim for TOIL comprised approximately 20% of unpaid meal breaks.
- 46 Mr Fahie relies upon text messages and four emails sent between him and Ms Adams where he says Ms Adams told him to keep a record of his own hours and where he advised her of TOIL he had accumulated. Mr Fahie says that he did not receive any query to these emails or text messages and after he ceased employment, he received text messages from Ms Adams indicating meal breaks had been 'removed' from the TOIL records. Further, Mr Fahie says that issues about his time keeping, recording of TOIL and any inconsistencies in his recording of TOIL were not raised during management meetings.²⁶
- 47 Ms Adams says the Deputy pay roll system is more advanced at the time of the hearing than it was when Mr Fahie's employment was terminated, and Mr Fahie was provided with time sheets using the extracted data. In addition, Mr Fahie was provided with payslips showing time worked.²⁷
- 48 Ms Adams further stated that the extracted Deputy data was provided to Mr Fahie on 19 February 2018 (once it could be provided) and Mr Fahie used this data in his own spreadsheet provided to the IMC. Ms Adams says a meal break was provided to each employee and Mataya's spreadsheet of time worked and TOIL shows the correct times. On that basis, Ms Adams accepted that Mataya owed an additional 8 hours of TOIL to Mr Fahie in addition to the 45.66 hours paid.²⁸ However, she denied Mataya owed an additional 125 hours of TOIL as claimed by Mr Fahie.
- 49 Ms Adams explained Mataya used the Deputy pay roll system because it was efficient and extracted summaries were provided to Mataya's bookkeeper. She said TOIL was not logged on the Deputy pay roll system but was logged separately where the Deputy system was not responsible for TOIL worked in excess of 42 hours per week. Ms Adams further explained that Mr Fahie's hours were not 'removed' from the Deputy pay roll system but were removed from the total hours worked per day where the hours worked per day previously included meal breaks.
- 50 Ms Adams maintained Mr Fahie was provided with meal breaks but did not record these meals breaks on the Deputy pay roll system and that she had face to face meetings with Mr Fahie regarding his lack of time keeping. She maintained the Deputy system data was accurate. She agreed that she told Mr Fahie to keep a record of his hours, because it was appropriate that he did so but said that Mataya's information came from one set of agreed data, namely from the Deputy pay roll system.

Evidence

- 51 Example emails between Mr Fahie and Ms Adams dated 7 September 2017 do not greatly assist either party in the sense that it supports both parties' evidence.²⁹ That is, Mr Fahie's comments in his email refers to updated hours 'in lui' [sic], whereas Ms Adams' reply states '*I have all your OT hours logged with in my accounting software. It's updated each week. Preferably keep a record yourself as a check but we have them. They won't appear on your payslip unless we start manually entering them as notes but if you ever want a summary please ask*'.³⁰
- 52 Similarly, an earlier email from Mr Fahie dated 23 August 2017 refers to an attached spreadsheet of hour worked and hours 'in lui' [sic].³⁰
- 53 Text messages between the parties from 16 February 2018 to 23 February 2018 do not assist one party more than another with the content reflecting Mr Fahie's and Ms Adams' oral evidence of how they perceived the situation.
- 54 Ms Adams relied upon an example roster for the period 4 September 2017 to 10 September 2017 to demonstrate that Mataya had two people rostered in the kitchen to allow for meal breaks.³¹ Further, Ms Adams referred to the leave transaction record for Mr Fahie and various payslips demonstrating Mataya's recording of leave.³²
- 55 Resolution of the issue with respect to the taking or not taking of meal breaks principally relies upon accepting one party's recording system of hours worked where Mr Fahie's and Ms Adams' oral evidence diverged on whether a meal break was taken or not. Mataya's time recording system relied upon the employee entering their meal break on the Deputy pay roll system where Mataya otherwise demonstrate a reliable accounting system. Mr Fahie did not dispute using the information provided by Mataya, in part, to support his claim and otherwise relied upon Mataya's accounting systems. In addition, Mr Fahie's claim for

TOIL was, in part, an estimate where he said approximately 20% of the claim was due to not taking a meal break. Ultimately, a claimant is required to prove his or her claim, including the facts giving rise to the claim.

56 In this case, I find Mataya's system of time recording and other accounting systems more reliable than Mr Fahie's individual system of recording his time after work. On that basis, and where Mataya had a reliable system of recording time worked, including meal breaks, consistent with meal breaks being provided, I do not accept Mr Fahie's evidence that he was not provided with a meal break. In making this finding, I do not accept Mr Fahie's evidence contained in his spreadsheet³³ of time worked and TOIL owed, and I prefer Mataya's evidence contained in its spreadsheet³⁴ of time worked and TOIL owed.

Determination

57 Having regard to Mataya's spreadsheet of time worked and TOIL owed, I find:

- for the period worked between 10 July 2017 and 25 January 2018, Mr Fahie worked 82.62 hours in excess of 42 hours per week;
- during the same period, Mr Fahie took 28.76 in TOIL hours, leaving a balance of 53.86 hours of unpaid TOIL at the time of the termination of his employment; and
- on 23 July 2019, Mataya paid \$1,444.02 or 45.33 hours of TOIL with a remaining balance of 8.53 hours of TOIL to be paid to Mr Fahie.

58 The parties agreed that time worked in excess of 42 hours per week constituted TOIL. I note that the Employment Contract is silent on the issue of taking and payment of TOIL. Therefore, it is necessary to refer to the Award.

59 Pursuant to cl 33.5(h) of the Award, on termination of employment where TOIL has not been taken, '*the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked*'.

60 The principle difficulty in Mr Fahie's case is attributing 8.53 hours of TOIL to the applicable overtime rate. Neither parties' spreadsheet assists in that regard. Further, I note from Mr Fahie's claim, he calculates his entitlement for remaining TOIL owed based on an hourly rate of \$41.77 per hour irrespective of time worked.³⁵ Similarly, Mataya calculates \$1,615.80 payable for 53.86 hours of TOIL owed or \$30 per hour. Neither of these hourly amounts are referable to any amount under the Award or to cl 33.5(h) of the Award.

61 Given the difficulty in ascribing the remaining 8.53 hours of TOIL, I have determined that the appropriate way to ascribe this time is by dividing it over the course of Mr Fahie's working week. That is, Mr Fahie worked Thursday to Monday inclusive, or 1.712 hours of TOIL per day. Having regard to the relevant overtime rates under cl 33.2 of the Award based on the ordinary rate of pay³⁶ relevant to Mr Fahie during his employment, the following amounts apply:

	Hours	Rate	Total
Thursday	1.712	\$34.85	\$59.66
Friday	1.712	\$34.85	\$59.66
Saturday	1.712	\$40.65	\$69.59
Sunday	1.712	\$46.46	\$79.54
Monday	1.712	\$34.85	\$59.66
Total	8.53		\$328.11

62 Therefore, I find the amount owed to Mr Fahie with respect to unpaid TOIL is \$328.11.

Is Mr Fahie Entitled To Any Payment, Or Further Payment, With Respect Of Public Holidays, And, If So, What Amount?

63 Mr Fahie claims \$1,131.06 for public holidays during his employment where he was either on a rostered day off or worked on a rostered day off and says that this ought to have been added to his annual leave entitlement.

64 Mr Fahie claims cl 38.1 and cl 38.2 of the Award applies to his employment. Consistent with cl 38.2 of the Award, I note that cl 8.5 of the Employment Contract provides that as a full-time employee if a *rostered day off* was on a public holiday, he would be credited an additional day's annual leave. Further, Mr Fahie was paid an annualised salary pursuant to cl 28.1(a) of the Award and, therefore, pursuant to cl 28.1(c) of the Award if an employee is required to work on a public holiday, the employee is entitled to a day off instead of the public holiday or a day added to the annual leave entitlement.

65 The parties agree that the restaurant was closed for business on 25 December 2017 and 26 December 2017. It is also agreed that the restaurant was open on 27 December 2017 and that Mr Fahie attended work on what was his usual rostered day off (Wednesday). It is also agreed that Mr Fahie worked on 25 September 2017, which was a public holiday but also a rostered working day for Mr Fahie (Monday). Mataya's spreadsheet shows that Mr Fahie worked on 1 January 2018, also a rostered working day for Mr Fahie (Monday).

66 Mr Fahie says that he ought to have received annual leave or TOIL or an amount equivalent to annual leave or TOIL for 25 December 2017, 26 December 2017 and 27 December 2017 under cl 38 of the Award. He also says that he ought to have received annual leave or TOIL or an amount equivalent to annual leave or TOIL for working on 25 September 2017 and 1 January 2018.

67 Mr Fahie agreed that he had been paid for 25 December 2017 and 26 December 2017 as part of his usual pay but says that this was not in accordance with the Award. Similarly, he also agreed that he was paid for time worked on 25 September 2017 and 27 December 2017 but says that this was not in accordance with the Award.

- 68 Ms Adams says Mr Fahie worked one public holiday during his employment, namely on 25 September 2017 and he was paid his normal rate of pay for working on this day, and he was credited TOIL for working on a public holiday.³⁷ I note Mataya's spreadsheet also shows that Mr Fahie worked on 1 January 2018, also a public holiday.
- 69 Ms Adams says that the restaurant was closed on 25 December 2017 and 26 December 2017 and says that Mr Fahie was paid normal rates for those days.³⁸ Ms Adams denies that Mr Fahie is owed TOIL or annual leave or penalty rates for those days where the business was not trading, and he was otherwise paid in the usual way.
- 70 Ms Adams says 27 December 2017 was a normal trading day and that this was one of Mr Fahie's usual rostered days off but says that Mr Fahie agreed to work that day and it was a short working week. However, while Ms Adams stated that Mr Fahie was not paid additional monies to work on that day, upon reviewing the relevant payslip she observed that Mr Fahie had been credited TOIL for the week 25 December 2017 to 31 December 2017.³⁹
- 71 Ms Adams contends that Mr Fahie's annualised salary was in lieu of any additional days off for any public holidays worked.

Clause 38 of the Award

- 72 Mr Fahie was paid an annualised salary, and the annualised salary arrangements in cl 28.1 of the Award accounts for split shift allowance (cl 24.2), overtime (cl 33) and penalty rates (cl 34.1 and cl 34.2). However, it does not account for additional provisions for work on public holidays under cl 34.4 of the Award or additional arrangements for full time employees with respect to public holidays (cl 38).
- 73 Clause 34.4(c) of the Award provides that employees who work on a prescribed holiday may, by agreement, perform such work at a rate of 125% of the relevant minimum wage in cl 20 of the Award, rather than the penalty rate prescribed in cl 34.1 of the Award, provided equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided further that such holiday may be allowed to the employee within 28 days of such holiday falling due.⁴⁰
- 74 The parties did not refer to any agreement attracting consideration of cl 34.4(c) of the Award.
- 75 Clause 38.2 of the Award provides that a *'full-time employee whose rostered day off falls on a public holiday must, subject to cl 34.4:*
- (a) *be paid an extra day's pay;*
 - (b) *be provided with an alternative day off within 28 days; or*
 - (c) *receive an additional day's annual leave'.*

- 76 Therefore, pursuant to cl 38.2 of the Award, if Mr Fahie's *rostered days off* fell on a public holiday the options were to have:
- (a) paid him an extra day's pay;
 - (b) provide him with an alternative day off within 28 days; or
 - (c) provide him an additional day's annual leave.

- 77 According to cl 8.5 of the Employment Contract, the option elected by Mataya appears to be to provide Mr Fahie with an additional day's annual leave.

Evidence

- 78 Mataya's relevant payslips⁴¹ and spreadsheet⁴² shows the following:

- for the pay period 25 September 2017 to 1 October 2017 Mr Fahie was paid 40 ordinary hours, which included payment for working on the public holiday, and was credited 'time in lieu' (or TOIL) of 7.74 hours;
- for the pay period 25 December 2017 to 31 December 2017 Mr Fahie was paid 42 ordinary hours, which included not working on 25 December 2017 and 26 December 2017, and was credited 'time in lieu' of 7.99 hours;
- for the pay period 1 January 2018 to 7 January 2018 Mr Fahie was paid his ordinary hours and was credited 'time in lieu' of 4.42 hours;
- the TOIL spreadsheet credits 2.09 hours of TOIL for the week 25 September 2017 to 1 October 2017 and credits 9 hours of TOIL for the week 27 December 2017 to 31 December 2017 (with the notation *'Plus Xmas Day P/H'*); and
- the annual leave transactions show the accumulation of annual leave on a weekly basis.⁴³

- 79 25 September 2017⁴⁴ was a usual rostered day on for Mr Fahie, albeit he worked on a public holiday.

- 80 Similarly, 1 January 2018⁴⁵ was a usual rostered day on for Mr Fahie, albeit he worked on a public holiday.

- 81 25 December 2017⁴⁶ was a usual rostered day on for Mr Fahie, but he did not work because the restaurant was closed, and he was paid in the usual course.

- 82 26 December 2017⁴⁷ was a rostered day off for Mr Fahie and he did not work because the restaurant was closed, and he was paid in the usual course.

- 83 Mataya's spreadsheet shows that for the week 25 December 2017 to 31 December 2017, Mr Fahie worked 34.79 hours and was credited 9 hours of TOIL. The spread of work was over four days from 27 December 2017 to 30 December 2017, where 26 December 2017 and 27 December 2017 were usual rostered days off and 31 December 2017 was a usual rostered day on but was not worked. Mr Fahie did not dispute the circumstances of working on 27 December 2017.

Determination

25 September 2017

- 84 25 September 2017 was a usual rostered day on and a public holiday.
- 85 In accordance with cl 28.1(a) of the Award, when read with cl 34.1 of the Award, Mr Fahie was not entitled to any additional rate of pay for working on 25 September 2017. Further, as 25 September 2017 was a rostered day on, not a rostered day off, he was not entitled to any of the options under cl 38.2 of the Award (also provided for in cl 8.5 of the Employment Contract). Mr Fahie's annualised salary took into account work undertaken on rostered public holidays.
- 86 However, pursuant to cl 28.1(c) of the Award, as Mr Fahie was paid an annualised salary, if he was required to work on a public holiday, he was entitled to a day off instead of a public holiday or a day added to the annual leave entitlement.
- 87 Mr Fahie was required to work on 25 September 2017, which was a public holiday, therefore he was entitled to either a day off or a day added to the annual leave entitlement.
- 88 The pay slip for the week 25 September 2017 to 1 October 2017 Mr Fahie credited 'time in lieu' of 7.74 hours to Mr Fahie for presumably working on the public holiday, but nothing in the pay slips or the spreadsheet provided by Mataya shows that this time was either paid out or given as an additional day off. In fact, the payslips suggest that the time accumulated but was never paid out upon termination and the spreadsheet states '*No Lieu Day for Public Holiday – Usual RDO this day*' suggesting that it was not accounted for other than by Mataya's bookkeeper.
- 89 Further, Mataya's annual leave calculation does not credit the 'time in lieu' as annual leave, notwithstanding it appears on the relevant payslip (albeit as 'time in lieu').⁴⁸
- 90 I find that in relation to work performed on 25 September 2017, pursuant to cl 28.1(c) of the Award, Mr Fahie was entitled to an additional day off or a day added to annual leave. I find that this is 7.6 hours or payment of the equivalent amount based on the Award hours for a full-time employee.

25 December 2017

- 91 25 December 2017 was a usual rostered day on, but he did not work that day as the restaurant was closed and he was paid in the usual course. As this day was not a rostered day off, cl 38.2 of the Award and cl 8.5 of the Employment Contract do not apply. Further, Mr Fahie was not required to work on this day, and therefore cl 28.1(c) of the Award does not apply.
- 92 Therefore, no entitlement arises in relation to 25 December 2017.

26 December 2017

- 93 26 December 2017 was a usual rostered day off and a public holiday. Therefore, as his usual rostered day off was on a public holiday, pursuant to cl 38.2 of the Award and cl 8.5 of the Employment Contract, Mr Fahie was entitled to an additional annual leave day (or one of the other options in cl 38.2 of the Award).
- 94 For the week 25 December 2017 to 31 December 2017, Mr Fahie was paid as if he worked 42 hours for the week, when the number of hours he worked was 34.79 and he was credited 9 hours of TOIL on Mataya's spreadsheet. The 9 hours of TOIL is included in Mataya's calculation of total TOIL owed to Mr Fahie. I also note that the payslip for his week credits 7.99 hours of TOIL.
- 95 Therefore, Mr Fahie was paid 42 hours and credited 9 hours for TOIL totalling 51 hours, which he has been paid either as part of his usual pay or in the payment for TOIL in July 2019.
- 96 Accordingly, the requirement under cl 38.2 of the Award has been provided with respect to Mr Fahie's rostered day off on 26 December 2017, albeit that it was not credited to annual leave but credited to TOIL and was paid out in July 2019.
- 97 For this reason, Mr Fahie has not made out his claim for any additional payment or leave pursuant to cl 38.2 of the Award with respect to his claim relevant to 26 December 2017.

27 December 2017

- 98 27 December 2017 was not a public holiday and any agreement by Mr Fahie with respect to working on this day does not arise under cl 28.1(c) or cl 38.2 of the Award or cl 8.5 of the Employment Contract.

1 January 2018

- 99 1 January 2018 was a usual rostered day on and a public holiday.
- 100 For the same reasons that apply with respect to Mr Fahie working on 25 September 2017, pursuant to cl 28.1(c) of the Award, as Mr Fahie was paid an annualised salary and where he worked on 1 January 2018, he was entitled to either a day off or a day added to the annual leave entitlement.
- 101 Mr Fahie was not entitled to any additional rates of pay or any of the options under cl 38.2 of the Award.
- 102 The payslip for the week 1 January 2018 to 7 January 2018 shows Mr Fahie was paid for 42 hours of work and credited with 4.42 hours of TOIL. Mataya's spreadsheet shows that Mr Fahie was credited with 3.92 hours of TOIL, but this was because he worked in excess of 42 hours that week.
- 103 Similar to 25 September 2017, nothing in the payslips or the spreadsheet or the leave transaction shows that he was credited an additional day's annual leave or paid for the TOIL credited in the payslip.
- 104 I find that in relation to work performed on 1 January 2018, pursuant to cl 28.1(c) of the Award Mr Fahie was entitled to an additional day off or a day added to annual leave entitlement. I find that this is 7.6 hours or payment of the equivalent amount based on the Award hours for a full-time employee.

105 Therefore, I am satisfied that Mr Fahie has proven to the requisite standard that Mataya failed to credit him with an additional day's annual leave for work performed on 25 September 2017 and 1 January 2018 in compliance with cl 28.1(c) of the Award. The total number of hours of additional annual leave owed is 15.2 hours.

106 I note that Mataya paid annual leave at the rate of \$29,761.9 being the rate applied in respect of Mr Fahie's ordinary rates of pay.⁴⁹ Accordingly, had the additional annual leave entitlement for working on a public holiday been credited to the leave transaction, it is reasonable to infer it would have been paid at the same rate.

107 Therefore, I find that the equivalent amount for 15.2 hours of additional annual leave owed is \$452.38.

Applicable Contraventions Of The FWA

108 As a result of the findings made, Mataya contravened s 45 of the FWA where it breached:

- cl 33.5(h) of the Award in failing to pay TOIL owed at the time of Mr Fahie's termination of employment; and
- cl 28.1(c) of the Award in failing to credit a day to Mr Fahie's annual leave entitlement for working on 25 September 2017 and 1 January 2018.

109 A contravention of s 45 of the FWA is a civil remedy provision.

Summary

110 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.*

111 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.

112 I note further that Mr Fahie 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.

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

- Mataya failed to pay 8.53 hours of TOIL owed at the time of his termination of employment;
- Mataya failed to credit two days to his annual leave entitlement for working on 25 September 2017 and 1 January 2018; and
- in contravening cl 33.5(h) and cl 28.1(c) of the Award, Mataya 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.

114 In respect of the other aspects of Mr Fahie's claim, I find that he has not proven to the requisite standard that:

- (1) he was paid less than the Award obligations for the period worked;
- (2) he was owed 125 hours of TOIL at the time of his termination of employment; and
- (3) he was entitled to additional payment or TOIL or annual leave entitlement for 25 December 2017, 26 December 2017 or 27 December 2017.

Mataya's Submission On Set Off

115 Mataya contends that based on its calculations Mr Fahie was paid \$1,984.81 in excess of the Award entitlements for the period worked.

116 Having regard to the findings made by the IMC, Mr Fahie would have been paid \$34,288.74 for time worked from 10 July 2017 to 25 January 2018 if he were paid in accordance with the Award obligations. The difference between what Mr Fahie was paid pursuant to the Employment Contract and what we would have been paid under the Award entitlements was \$1,177.03.

117 Mataya submits that any finding by the IMC of an amount paid in excess of the Award entitlements should be set off against any amount found to be owed by Mataya to Mr Fahie.

118 Mataya relies upon cl 4.6 and cl 6 of the Employment Contract.

119 In a recent decision (*Becherelli v Mediterranean Pty Ltd trading as Lucioli* [2017] WAIRC 65 [23]) Industrial Magistrate Flynn noted that in *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [2015] FCAFC 99, the Full Court of the Federal Court reviewed the law on this issue. The review included an assessment of the decision of Industrial Appeal Court of Western Australia (Anderson, Scott and Parker JJ) in *James Turner Roofing Pty Ltd v Peters* [2003] WASCA 28. The judgment of North and Bromberg JJ placed emphasis on the following passage of the judgement of Anderson J from *James Turner Roofing*:

The payment of an amount as wages for hours worked in a period can be relied on by the employer in satisfaction of an award obligation to pay wages for that period whether in relation to wages for ordinary time, overtime, weekend penalty rates, holidays worked or any other like monetary entitlement under the award. This is so, whether the payment of the wages is made in contemplation of the obligations arising under the award or without regard for the award. However, if a payment is made expressly or impliedly to cover a particular obligation (whether for ordinary time, overtime, weekend penalty rates, fares, clothing or any other entitlement whether arising under the award or pursuant to the contract of employment) the payment cannot be claimed as a set off against monies payable to cover some other incident of employment. A payment made on account of say ordinary time worked cannot be used in discharge of an obligation arising on some other account such as a claim for overtime. Whether or not the payment was for a particular incident of employment will be a question of fact in every case [45].

120 In *Linkhill Pty Ltd* the joint judgment proceeds to state:

[W]hat is required is a close correlation between the award obligation and the contractual obligation in respect of which the payment was made. It is not the monetary nature of the payment made under the contract that must correlate with the award. It is the subject matter of the contractual obligations for which the payment was made that must be examined and be found to closely correlate with the obligations in the award said to be discharged by the payment [98].

121 On 20 May 2020, the Full Court of the Federal Court published its reason for decision in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84. His Honour White J at [818] to [864] reviewed the law as in related to claims for set-off and at [865] summarised the applicable principles into four propositions:

- (a) ... application of the parties [employment] contract ... [if the parties] agree that a sum of money is paid and received for a specific purpose which is over and above or extraneous to an award entitlement, the [employment] contract precludes the employer from later seeking to rely on the payment as satisfying an award obligation which is outside the agreed purpose of the payment ... [A]n employer cannot later reallocate an amount agreed to be paid to an employee in respect of [one purpose] ... (for example, ordinary hours of work) to meet a claim in respect of [another purpose] ... (for example, overtime pay) ... If [the purpose of the payment] arises out of the same purpose as the award obligation, it can be set off;
- (b) ... application of the common law principles ... [w]hen there are outstanding award or enterprise agreement entitlements, a payment designated by the employer as being for a purpose other than satisfaction of the award entitlement cannot be regarded as having satisfied the award or enterprise agreement’;
- (c) close regard must be had to the character of the payment on which the employer relies for the claimed set off and the purpose ... for which it was made; and
- (d) the purpose for which a payment was made will be a question of fact in each case. It may be express or ... implied from the parties’ agreement or from the employer’s conduct. (original emphasis)

122 Clause 4.6 of the Employment Contract refers to payments in excess of Mr Fahie’s ‘*minimum entitlements*’ capable of being set off in any claim by him. However, Mr Fahie’s ‘*minimum entitlements*’ are not defined in the Employment Contract.

123 If Mr Fahie’s ‘*minimum entitlement*’ is his annualised salary, then this is a term of the contract agreed to by the parties for work performed by him.

124 The Employment Contract provides that Mr Fahie would be paid \$65,000 per annum. The finding made with respect to Mr Fahie’s annualised salary for working less than one year, only goes to demonstrate the sufficiency of the annualised salary for the purposes of cl 28.1(c) of the Award.

125 The finding does not undermine the bargain the parties struck as to the amount of salary to be paid for work performed by Mr Fahie. It was always open to the parties to determine an amount for an annualised salary and provided that it was sufficient for the purposes of cl 28.1(c) of the Award, the fact that it might be more, even substantially more, does not make it an overpayment of an amount necessarily capable of being set off against other amounts found to be owed to Mr Fahie. It makes it a term of a contract.

126 The Employment Contract does not otherwise refer to Mr Fahie’s ‘*minimum entitlement*’ to be an amount he would have been paid under Award obligations. In the absence of any reference in the Employment Contract to ‘*minimum entitlement*’ meaning what he would have been paid under the Award obligations, I do not intend to, nor do I consider that I should, infer that such a term was implied into the agreement.

127 Had it been intended by the parties that any above Award wages be considered an ‘overpayment’ and recoverable, then I would have expected this to be an express term of the Employment Contract. However, such a term is, arguably, an anathema to the concept of an annualised salary and would in any event likely infringe the principles of set off referred to in *WorkPac Pty Ltd v Rossato*.

128 Clause 6 of the Employment Contract allows Mataya to make certain deductions from Mr Fahie’s remuneration, including any overpaid money. However, for reasons already given the contractual amount of money paid to Mr Fahie for work performed is not an overpayment, but a term of the Employment Contract.

129 The amounts found to be owed to Mr Fahie arose due to TOIL he worked in excess of agreed hours of work and annual leave entitlements where he worked on public holidays. Both of these entitlements arose ostensibly as result of Award entitlements. The purpose of these payments was significantly different to the purpose associated with the payment of a salary for work performed under contract.

130 Therefore, in my view, there is no amount owed by Mr Fahie to Mataya capable of being set off against the amounts found to be owed by Mataya to Mr Fahie.

131 Accordingly, I do not accept Mataya’s submission and I find that the amounts owing to Mr Fahie are not capable of being set off against any alleged ‘overpayment’ of wages paid pursuant to the Employment Contract.

Result and Order

132 I am satisfied that Mataya is to pay to Mr Fahie the following amounts:

- \$328.11 for outstanding TOIL owed at the time of termination of employment; and
- \$452.38 for two days' additional annual leave for work performed on 25 September 2017 and 1 January 2018.

133 I order Mataya pay to Mr Fahie the amount of \$780.49

D. SCADDAN**INDUSTRIAL MAGISTRATE**

¹ Mataya's Response dated 27 May 2019 attached at 'A'.

² See paragraph 41 to 56 for an explanation.

³ Exhibit 7 – Witness Statement of Natalie Adams dated 8 May 2020 at appendix 1.

⁴ Exhibit 7 – appendix 4.

⁵ Mr Fahie's oral evidence and exhibit 7 – appendix 10 (which in part is replicated in Exhibit 3 – Mr Fahie's TOIL calculation spreadsheet).

⁶ Exhibit 7 – appendix 10.

⁷ Exhibit 2 – Mr Fahie's weekly full time pay calculation. The amount of \$79.71 is obtained by subtracting \$65,000 from \$65,145.08 and dividing days actually worked in the year (200) by 365.

⁸ Exhibit 7 – appendix 13.

⁹ Exhibit 7 – appendix 13.

¹⁰ Clause 28.1(a) of the Award.

¹¹ Clause 28.1(b) of the Award.

¹² Clause 28.1(c) of the Award.

¹³ Clause 28.1(c) of the Award.

¹⁴ Clause 28.2 of the Award.

¹⁵ *City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union* (2006) 153 IR 426, 438.

¹⁶ *City of Wanneroo* (438 and 440).

¹⁷ *City of Wanneroo* (440).

¹⁸ *Kucks v CSR Ltd* (1996) 66 IR 182; *Ancor Ltd v CFMEU* [2005] HCA 10.

¹⁹ Schedule 5.

²⁰ Exhibit 7 – Appendix 19 (final pay slip).

²¹ Mr Fahie's spreadsheet is exhibit 3 and Mataya's spreadsheet is appendix 10 to Exhibit 7.

²² Regulation 23(2) of the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (IMC Regulations).

²³ Regulation 23(1) of the IMC Regulations.

²⁴ Exhibit 1 – Witness Statement of Matthew Fahie lodged 16 April 2020.

²⁵ Exhibit 7 at [3.2] and [3.3].

²⁶ Exhibit 1.

²⁷ Exhibit 7 at [3.3] and [4].

²⁸ Ms Adam's oral evidence.

²⁹ Exhibit 4 – email between the parties dated 7 September 2017.

³⁰ Exhibit 4.

³¹ Exhibit 7 – appendix 5.

³² Exhibit 7 – appendix 11; Exhibit 7 – appendix 14 to 19 (also referred to by Ms Adams in relation to the payment for public holidays).

³³ Exhibit 3.

³⁴ Exhibit 7 – appendix 10.

³⁵ Mr Fahie claims \$5222.05 for 125 hours of remaining TOIL.

³⁶ \$23.23 per hour for a Level 6 Cook Grade 5.

³⁷ Exhibit 7 at [1.2] and appendix 15.

³⁸ Exhibit 7 – appendix 17.

³⁹ Exhibit 7 – appendix 17.

⁴⁰ Clauses 34.4(a), (b) and (d) of the Award are not relevant to the claim.

⁴¹ Exhibit 7 – appendixes 15 and 17.

⁴² Exhibit 7 – appendix 10.

⁴³ Exhibit 7 – appendix 11.

⁴⁴ Monday.

⁴⁵ Monday.

⁴⁶ Monday.

⁴⁷ Tuesday.

⁴⁸ Exhibit 7 – appendix 11.

⁴⁹ Exhibit 7 – Appendix 18.

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court of Western Australia 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. IMC being a court constituted

by an industrial magistrate, is ‘*an eligible State or Territory court*’: s 12 of the FWA (see definitions of ‘*eligible State or Territory court*’ and ‘*magistrates court*’); the *Industrial Relations Act 1979* (WA) (IR Act), s 81, 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 FWA.
- [3] The civil penalty provisions are identified in s 539 of the FWA.
- [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, s 12 of the FWA. 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 FWA. It is not in dispute and it was found that the respondent company is a corporation to which paragraph 51(xx) of the Constitution applies and that the claimant was employed by the respondent company.
- [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 FWA. The application of a pecuniary penalty order does not apply to the small claims procedure: s 548(1)(a) of the FWA.

Burden and Standard Of Proof

- [6] In an application under the IR 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 IR 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.

Practice and Procedure of the Industrial Magistrates Court

- [9] The IR Act provides that, except as prescribed by or under the FWA, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): s 81CA. Relevantly, regulations prescribed under the IR Act provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: reg 35(4).
- [10] The FWA provides that the IMC is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities: s 548(3) of the FWA.
- [11] In *Sammut v AVM Holdings Pty Ltd [No2]* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation (omitting citations):

... The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence [40].

Schedule 2: Restaurant Industry Award 2010 (Cth)

Clause 28

28. Annualised salary arrangements

28.1 Alternative method of payment—annual salary

- (a) As an alternative to being paid by the week, by agreement between the employer and an individual employee, an employee other than a casual, can be paid at a rate equivalent to an annual salary of at least 25% or more above the weekly rate prescribed in clause 20—Minimum wages, multiplied by 52 for the work being performed. In such cases, there is no requirement under clauses 24.2, 33—Overtime, 34.1 and 34.2 to pay overtime and penalty rates in addition to the weekly wage, provided that the salary paid over a year was sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.

- (b) Provided further that in the event of termination of employment prior to completion of a year, the salary paid during such period of employment must be sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.
 - (c) An employee being paid according to this clause will be entitled to a minimum of eight days off per four week cycle. Further, if an employee covered by this clause is required to work on a public holiday, such employee will be entitled to a day off instead of public holidays or a day added to the annual leave entitlement.
- 28.2** The employer must keep all records relating to the starting and finishing times of employees to whom this clause applies. This record must be signed weekly by the employee. This is to enable the employer to carry out a reconciliation at the end of each year comparing the employee's ordinary wage under this award and the actual payment. Where such a comparison reveals a shortfall in the employee's wages, then the employee must be paid the difference between the wages earned under the award and the actual amount paid.

Clause 33.5

33.5 Time off instead of payment for overtime

[33.5 substituted by [PR585805](#) ppc 14 Dec 16]

- (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.
- (b) The period of time off that an employee is entitled to take is equivalent to the overtime payment that would have been made.

EXAMPLE: By making an agreement under clause 33.5 an employee who worked 2 overtime hours at the rate of time and a half is entitled to 3 hours' time off.
- (c) Time off must be taken:
 - (i) within the period of 6 months after the overtime is worked; and
 - (ii) at a time or times within that period of 6 months agreed by the employee and employer.
- (d) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 33.5 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.
- (e) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (c), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.
- (f) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.
- (g) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 33.5 will apply for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).
- (h) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 33.5 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 33.5.

Clause 38

38. Public holidays

38.1 Public holidays are provided for in the NES

By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday instead of any of the days prescribed in the NES.

38.2 Additional arrangements for full-time employees:

A full-time employee whose rostered day off falls on a public holiday must, subject to clause 34.4:

- (a) be paid an extra day's pay;
- (b) be provided with an alternative day off within 28 days; or
- (c) receive an additional day's annual leave.

38.3 A full-time employee who works on a public holiday which is subject to substitution as provided for in the NES will be entitled to the benefit of the substitute day.

Scheduled 3: Fair Work Pay Rate



Your pay rates summary

Pay rate as at: 27 July 2017

Level 6 - cook grade 5 (tradesperson) | Full-time | 20 years or over

Hourly Pay Rate:	\$23.23
Weekly Pay Rate:	\$882.80
Part-Time Rate:	\$23.23 per hour
Casual Rate:	\$29.04 per hour
Your award:	Restaurant Industry Award 2010 (MA000119)
Employment Status:	Full-time

Your selected penalty rates:

Penalty	Rate
Saturday	\$29.04 per hour
Sunday	\$34.85 per hour
Public holiday	\$52.27 per hour, with a minimum payment of 4 hours
Late night - Monday to Friday - 10pm to midnight	\$23.23 per hour plus \$2.13 per hour or part of an hour
Early morning - Monday to Friday - midnight to 6am	\$23.23 per hour plus \$3.19 per hour or part of an hour
No meal break - Monday to Friday - 6am to 10pm	\$34.85 per hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Saturday	\$40.65 per hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Sunday	\$46.46 per hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Public holiday	50% of the ordinary rate plus the appropriate public holiday rate per hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Late night - Monday to Friday - 10pm to midnight	\$34.85 per hour plus \$2.13 per hour or part of an hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Early morning - Monday to Friday - midnight to 6am	\$34.85 per hour plus \$3.19 per hour or part of an hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Overtime	50% of the ordinary rate plus the appropriate overtime rate per

	hour, from 6 hours after starting work until the meal break is given or the shift ends
No meal break - Other	50% of the ordinary rate plus the appropriate rate per hour, from 6 hours after starting work until the meal break is given or the shift ends
Overtime - Monday to Friday - first 2 hours	\$34.85 per hour
Overtime - Monday to Friday - after 2 hours	\$46.46 per hour
Overtime - Saturday - first 2 hours	\$40.65 per hour
Overtime - Saturday - after 2 hours	\$46.46 per hour
Overtime - Sunday	\$46.46 per hour
Overtime - RDO	\$46.46 per hour, with a minimum payment of 4 hours
Working through a meal break - Monday to Friday - 6am to 10pm	\$34.85 per hour, from the time the meal break was scheduled to start until it's given or the shift ends
Working through a meal break - Saturday	\$40.65 per hour, from the time the meal break was scheduled to start until it's given or the shift ends
Working through a meal break - Sunday	\$46.46 per hour, from the time the meal break was scheduled to start until it's given or the shift ends
Working through a meal break - Public holiday	50% of the ordinary rate plus the appropriate public holiday rate per hour, from the time the meal break was scheduled to start until it's given or the shift ends
Working through a meal break - Late night - Monday to Friday - 10pm to midnight	\$34.85 per hour plus \$2.13 per hour or part of an hour, from the time the meal break was scheduled to start until it's given or the shift ends
Working through a meal break - Early morning - Monday to Friday - midnight to 6am	\$34.85 per hour plus \$3.19 per hour or part of an hour, from the time the meal break was scheduled to start until it's given or the shift ends
Working through a meal break - Overtime	50% of the ordinary rate plus the appropriate overtime rate per hour, from the time the meal break was scheduled to start until it's given or the shift ends
Working through a meal break - Other	50% of the ordinary rate plus the appropriate rate per hour, from the time the meal break was scheduled to start until it's given or the shift ends
Minimum break after overtime	overtime rates until a break of 8 hours is given
Public holiday - additional day off	\$29.04 per hour and equivalent time taken off or added to annual leave balance
Public holiday - Christmas Day - Saturday	\$34.85 per hour, with the benefit of a substitute day
Public holiday - Christmas Day - Sunday	\$40.66 per hour, with the benefit of a substitute day

Common penalties for your award:

Penalty	Rate
Saturday	\$29.04 per hour

Schedule IV: Spreadsheet of the Hours Worked by Mr Fahie and Award Calculation

	Date	Start	End	Meal break	Total Hour	Break	Total	>42	Base hours (7.6) at base rate ⁵⁰		Overtime hours over 7.6 ⁵¹	Overtime Total ⁵²	Total
M	10/7/17	8:00	15:00	0:30	6.5		6.5		151.00				151.00
T	11/7/17	6:30	15:30	0:30	8.5		8.5		197.46				197.46
W	12/7/17	6:30	15:30	0:30	8.5		8.5		197.46				197.46
Th	13/7/17	6:30	15:00	0:30	8		8		185.84				185.84
S	16/7/17	6:30	10:30	0:30	3.5		3.5		121.98				121.98
							35	-7					853.72
M	17/7/17	6:30	15:30	0:30	8.5		8.5		176.55		0.9	31.365	207.91
T	18/7/17	6:30	15:00	0:15	8.25		8.25		383.30	RDO ⁵³			383.30
W	19/7/17	6:30	15:00	0:15	8.25		8.25		383.30	RDO ⁵⁴			383.30
Th	20/7/17	6:30	15:00	0:15	8.25		8.25		176.55		0.65	22.65	199.20
F	21/7/17	6:30	15:00	0:30	8		8		176.55		0.4	13.94	190.49
Sat	22/7/17	6:30	15:00	0:30	8		8		220.7		0.4	16.26	236.96
S	23/7/17	6:28	15:00	0:15	8.28		8.28		264.86		0.68	31.59	296.45
							57.53	15.53					1,897.61
M	24/7/17	6:31	15:52	0:00	9.35	-0.5	8.85		176.55		1.25	43.56	220.11
T	25/7/17	7:02	15:54	0:30	8.37		8.37		176.55		0.77	26.83	203.38
F	28/7/17	6:32	15:58	0:30	8.93		8.93		176.55		1.33	46.35	222.90
Sat	29/7/17	6:38	16:04	0:30	8.93		8.93		220.7		1.33	54.06	274.77
S	30/7/17	6:35	16:10	0:30	9.08		9.08		264.86		1.48	68.76	333.62
							44.16	2.16					1,254.78
M	31/7/17	6:34	15:38	0:30	8.57		8.57		176.55		0.97	33.8	210.35
T	3/8/17	18:45	20:30	0:00	1.75	-0.5	1.25				2	69.7	246.25
Th	3/8/17	6:46	15:46	0:30	8.5		8.5		176.55		0.15	6.97	6.97
F	4/8/17	6:31	15:42	0:30	8.68		8.68		176.55		1.08	37.64	214.19
Sat	5/8/17	7:00	15:20	0:30	7.83		7.83		220.7		0.23	9.35	230.05
S	6/8/17	6:56	15:21	0:30	7.92		7.92		264.86		0.32	14.87	279.73
							42.75	0.75					1,187.54
M	7/8/17	6:27	16:09	0:30	9.2		9.2		176.55		1.6	55.76	232.31
Th	10/8/17	6:30	16:01	0:30	9.02		9.02		176.55		1.42	49.49	226.04
F	11/8/17	6:27	16:12	0:30	9.25		9.25		176.55		1.65	57.5	234.05
Sat	12/8/17	6:28	16:02	0:30	9.07	9.07			220.7		1.47	59.76	280.46
S	13/8/17	6:59	15:27	0:30	7.97		7.97		264.86		0.37	17.19	282.05
							44.51	2.51					1,254.90
M	14/8/17	6:30	16:01	0:00	9.52	-0.5	9.02		176.55		1.42	49.49	226.04
Th	17/8/17	6:32	16:07	0:15	9.33		9.33		176.55		1.73	60.29	236.84
F	18/8/17	6:33	16:01	0:00	9.47	-0.5	8.97		176.55		1.37	47.75	224.29
Sat	19/8/17	7:00	16:07	0:15	8.87		8.87		220.7		1.27	51.63	272.33
S	20/8/17	6:59	16:19	0:15	9.08		9.08		264.86		1.48	68.76	333.62
							45.27	3.27					1,293.12
M	21/8/17	6:26	16:23	0:30	9.45		9.45		176.55		1.85	64.47	241.02
Th	24/8/17	6:27	16:02	0:30	9.08		9.08		176.55		1.48	51.58	228.13
F	25/8/17	6:30	16:04	0:30	9.07		9.07		176.55		1.47	51.23	227.78
Sat	26/8/17	6:59	15:57	0:30	8.47		8.47		220.7		0.87	35.3655	256.07
S	27/8/17	7:03	15:27	0:30	7.9		7.9		264.86		0.3	13.938	278.8
							43.97	1.97					1,231.79
M	28/8/17	6:40	16:46	0:00	10.1	-0.5	9.6		176.55		2	69.7	246.25
Th	31/8/17	6:30	16:18	0:30	9.3		9.3		176.55		1.7	59.25	235.79
F	1/9/17	6:27	16:00	0:30	9.05		9.05		176.55		1.45	50.53	227.08
Sat	2/9/17	7:00	16:08	0:30	8.63		8.63		220.7		1.03	41.87	262.57
S	3/9/17	6:41	15:45	0:30	8.57		8.57		264.86		0.97	45.06	309.93
							45.15	3.15					1,281.62
M	4/9/17	6:30	16:58	0:30	9.97		9.97		176.55		2	69.7	246.25
											0.37	17.19	17.19
Th	7/9/17	6:41	15:50	0:30	8.65		8.65		176.55		1.05	36.59	213.14
F	8/9/17	6:22	15:51	0:30	8.98		8.98		176.55		1.38	48.09	224.64
Sat	9/9/17	6:59	15:40	0:30	8.18		8.18		220.7		0.58	23.58	244.28
S	10/9/17	6:53	16:36	0:30	9.22		9.22		264.86		1.62	75.26	340.13
							45	3					1,285.63
M	11/9/17	6:41	16:55	0:30	9.73		9.73		176.55		2	69.7	246.25
											0.13	6.04	6.04
Th	14/9/17	6:34	15:59	0:30	8.92		8.92		176.55		1.32	46	222.55
F	15/9/17	6:36	16:03	0:00	9.45	-0.5	8.95		176.55		1.35	47.05	223.60
Sat	16/9/17	6:58	15:56	0:00	8.97	-0.5	8.47		220.7		1.52	61.79	282.49

Key:

M Monday T Tuesday W Sat
 Th Thursday F Friday Sat Saturday
 S Sunday

	Date	Start	End	Meal break	Total Hour	Break	Total	>42	Base hours (7.6) at base rate ⁵⁰	Overtime hours over 7.6 ⁵¹	Overtime Total ⁵²	Total	
S	19/11/17	6:50	16:05	0:30	8.75		8.75		264.86	1.15	53.43	318.29	
							44.94	2.94				1,276.39	
M	20/11/17	6:30	16:37	0:30	9.62		9.62		176.55	2	69.7	246.25	
										0.02	0.93	0.93	
Th	23/11/17	6:24	16:40	0:30	9.77		9.77		176.55	2	69.7	246.25	
										0.17	7.9	7.9	
F	24/11/17	6:23	16:20	0:30	9.45		9.45		176.55	1.85	64.47	241.02	
Sat	25/11/17	6:46	16:20	0:30	9.07		9.07		220.7	1.47	59.76	280.46	
S	26/11/17	5:55	16:06	0:30	9.68		9.68		264.86	2.08	96.64	361.5	
							47.59	5.59				1,384.30	
M	27/11/17	6:20	16:01	0:30	9.18		9.18		176.55	1.58	55.06	231.61	
Th	30/11/17	6:24	16:08	0:30	9.23		9.23		176.55	1.63	56.81	233.35	
F	1/12/17	6:22	16:21	0:30	9.48		9.48		176.55	1.88	65.51	242.07	
Sat	2/12/17	6:44	15:58	0:30	8.73		8.73		220.7	1.13	45.93	266.64	
S	3/12/17	6:27	15:39	0:30	8.7		8.7		264.86	1.1	51.11	315.97	
							45.32	3.32				1,289.64	
M	4/12/17	6:24	16:37	0:30	9.72		9.72		176.55	2	69.7	246.25	
										0.12	5.58	5.58	
Th	7/12/17	6:22	16:38	0:30	9.77		9.77		176.55	2	69.7	246.25	
										0.17	7.9	7.9	
F	8/12/17	6:25	15:44	0:30	8.82		8.82		176.55	1.22	42.52	219.07	
Sat	9/12/17	6:56	16:30	0:30	9.07		9.07		220.7	1.47	59.76	280.46	
S	10/12/17	6:54	15:30	0:30	8.1		8.1		264.86	0.5	23.23	288.09	
							45.48	3.48				1,293.58	
Th	14/12/17	6:35	14:36	0:30	7.52		7.52		174.69			174.69	
F	15/12/17	6:24	16:05	0:30	9.18		9.18		213.25			213.25	
Sat	16/12/17	6:57	15:51	0:30	8.4		8.4		243.94			243.94	
S	17/12/17	6:51	15:29	0:30	8.13		8.13		283.33			283.33	
							33.23			TOIL 8.77		915.21	
M	18/12/17	6:21	15:55	0:30	9.07		9.07		210.7			210.7	
Th	21/12/17	6:23	14:32	0:30	7.65		7.65		177.71			177.71	
F	22/12/17	6:29	16:25	0:21	9.58		9.58		222.54			222.54	
							26.3			TOIL 5.62 AL 8.08		610.95	
W	27/12/17	6:27	15:54	0:26	9.02		9.02		209.53			209.53	
Th	28/12/17	6:29	14:33	0:30	7.57		7.57		175.85			175.85	
F	29/12/17	6:27	16:05	0:15	9.38		9.38		217.9			217.9	
Sat	30/12/17	6:53	16:12	0:30	8.82		8.82		256.13			256.13	
PLUS XMAS DAY P/H (TUESDAY'S RDO ANYWAY)								9			TOIL 9		
							34.79					859.42	
M	1/1/18	7:00	17:00	0:30	9.5		9.5		496.57	PH ⁵⁷		496.57	
Th	4/1/18	6:36	14:51	0:28	7.78		7.78		176.55	0.18	6.27	182.82	
F	5/1/18	6:30	15:51	0:30	8.85		8.85		176.55	1.25	43.56	220.11	
Sat	6/1/18	6:28	16:17	0:30	9.32		9.32		220.7	1.72	69.92	290.62	
S	7/1/18	6:08	17:06	0:00	10.97	-0.5	10.47		264.86	2.87	133.34	398.2	
							45.92	3.92				1,588.32	
M	8/1/18	6:27	15:18	0:30	8.35		8.35		176.55	0.75	26.14	202.69	
Th	11/1/18	6:28	14:26	0:30	7.47		7.47		173.53			173.53	
F	12/1/18	6:27	16:13	0:22	9.4		9.4		176.55	1.8	62.73	239.28	
Sat	13/1/18	6:48	15:04	0:30	7.77		7.77		220.7	0.17	6.91	227.61	
S	14/1/18	6:50	15:06	0:29	7.78		7.78		264.86	0.18	8.36	273.22	
							40.77			TOIL 1.23		1,116.33	
M	15/1/18	6:27	15:33	0:31	8.58		8.58		176.55	0.98	34.153	210.70	
Th	18/1/18	6:26	14:36	0:22	7.8		7.8		176.55	0.2	6.97	183.52	
F	19/1/18	6:25	15:51	0:20	9.1		9.1		176.55	1.5	52.26	228.82	
Sat	20/1/18	6:47	15:45	0:30	8.47		8.47		220.7	0.87	35.37	256.07	

Key:

M Monday T Tuesday W Wednesday
 Th Thursday F Friday Sat Saturday
 S Sunday

	Date	Start	End	Meal break	Total Hour	Break	Total	>42	Base hours (7.6) at base rate ⁵⁰	Overtime hours over 7.6 ⁵¹	Overtime Total ⁵²	Total
S	21/1/18	6:47	15:46	0:09	8.83		8.83		264.86	1.23	57.15	322.01
							42.78	0.78				1,201.12
M	22/1/18	6:29	17:00	0:22	10.15		10.15		235.78			235.78
Th	25/1/18	6:30	12:00	0:00	5.5	-0.5	5		116.15			116.15
							15.15					351.93
								82.62				
								53.86				
								1615.8				34,558.3

Key:

M Monday T Tuesday W Wednesday
 Th Thursday F Friday Sat Saturday
 S Sunday

⁵⁰ Relevant base rate of pay for Monday to Friday is \$23.23, Saturday is \$29.04 and Sunday is \$34.85

⁵¹ Relevant overtime rate of pay for Monday to Friday is \$34.85 for first 2 hours and \$46.46 thereafter, Saturday is \$40.65 for first 2 hours and \$46.46 thereafter and Sunday is \$46.46 per hour

⁵² Overtime – Where there are two amounts, the first amount is applicable to the first 2 hours of work and the second figure is applicable for hours of work thereafter

⁵³ Rostered Day Off for which all time is paid at \$46.46 per hour

⁵⁴ Rostered Day Off for which all time is paid at \$46.46 per hour

⁵⁵ Rostered Day Off for which all time is paid at \$46.46 per hour

⁵⁶ Public Holiday for which all time is paid at \$52.27 per hour

⁵⁷ Public Holiday for which all time is paid at \$52.27 per hour

2020 WAIRC 00406

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00406
CORAM : INDUSTRIAL MAGISTRATE M. FLYNN
HEARD : THURSDAY, 2 JULY 2020, FRIDAY, 10 JULY 2020 (WRITTEN SUBMISSIONS)
DELIVERED : TUESDAY, 14 JULY 2020
FILE NO. : M 166 OF 2018
BETWEEN : RAYMOND MOATE

CLAIMANT

AND

I.P.C. PTY LTD (ACN 061 746 996)

RESPONDENT

CatchWords : INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Significance of *Workpac Pty Ltd v Rossato* [2020] FCAFC 84 – Principle of Finality – Whether employer entitled to set-off ‘over-Award’ payments
Legislation : *Fair Work Act 2009* (Cth)
Instrument : *Manufacturing and Associated Industries and Occupations Award 2010* (Cth)
Case(s) referred to in reasons: : *Workpac Pty Ltd v Rossato* [2020] FCAFC 84
DJL v Central Authority [2000] HCA 17; 201 CLR 226
Result : To be confirmed
Representation:
 Claimant : Mr A. White (of counsel) from Eureka Lawyers
 Respondent : Mr J. Raftos (of counsel) from Moray & Agnew Lawyers

ADDENDUM REASONS FOR DECISION

- 1 On 2 July 2020, Industrial Magistrates Court of Western Australia (the Court) published reasons for decision following a trial that concluded on 25 July 2019 (the First Liability Reasons). The issues addressed in the First Liability Reasons include those identified as the **Full-Time/Casual Issue**, the **Set-Off Issue**, the **FW Regulations Offset Issue** and the **Mistake and Unjust Enrichment Issue**. The First Liability Reasons include my provisional view on the significance of the decision of the Full Court of the Federal Court in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (*Rossato*), delivered on 20 May 2020, to those issues (**the Four Rossato Issues**). After hearing submissions on 2 July 2020, the Court made orders for the filing of written submissions on the effect of *Rossato* and also made orders for a timetable of steps culminating in the fixing of a date for a hearing on the issue of penalties (the 2 July 2020 Orders). Each party has filed written submissions on *Rossato*.¹ These reasons consider those submissions.

- 2 The Respondent's Written Submissions of 9 July 2020 do not make reference to any of the **Four Rossato Issues**, other than the **Set-Off Issue**. The Claimant's Written Submissions of 10 July 2020 state that my provisional views on the **Four Rossato Issues** are correct. I will address the **Set-Off Issue** (below). In the circumstances it is also appropriate to record that my provisional views on the significance of *Rossato* to the **Full-Time/Casual Issue**, the **FW Regulations Offset Issue** and the **Mistake and Unjust Enrichment Issue**, set out in the First Liability Reasons, are now my final views.
- 3 The argument made in the Respondent's Written Submissions of 9 July 2020 on the **Set-Off Issue** involves two steps.
- 4 First, 'the Respondent takes issue with [a statement at] [100] of the [First Reasons] ... that, the [Respondent] did not seek to set off payments in relation to overtime'. The fact that the statement is an error is said to be revealed by comparing the contents of columns in Tables A to F of the 'Outline of Submissions of the First Respondent Filed 17 July 2019' (**Tables A - F**) where a (notional) calculation of overtime and public holiday entitlements of the claimant under the *Manufacturing and Associated Industries Award 2010* (Cth) (the Award) (columns 14 - 26) is undertaken for the purpose of a calculation, in column 28 of those tables, of a 'set-off amount' for each week.
- 5 Secondly, the respondent compares a finding in the First Liability Reasons with an extract on the law of set-off from *Rossato* to contend that the set-off amounts referred to in the previous paragraph, may be brought to account against the claim for \$7,878 overtime entitlements under the Award. The finding in the First Liability Reasons relied upon by the respondent appears at [105] and is the effect that an agreed purpose of the respondent's weekly payments to the claimant was for each hour of *work* and, 'so characterised, correlates with the FW Act Obligation with respect to payment for hours worked and payment for overtime' (original emphasis). The extract on the law of set-off is from the judgment of White J and appears at [865]. The extract is quoted in full below.

Error And Principle Of Finality

- 6 The claimant rejects the respondent's contentions. He argues that the First Liability Reasons contain no error and that the principle of finality operates to preclude the respondent from making those submissions.
- 7 Regrettably, I have reached the view that the First Liability Reasons reveal that I have proceeded on an erroneous assumption, namely, that the respondent did not seek to set off payments that it made to the claimant against the claimant's overtime entitlements under the Award. The claimant's submission to the contrary, relying on the 'full context' of [104] - [105] of the First Liability Reasons is not persuasive.² The 'full context' must include the fact that the erroneous assumption is plainly stated in the second sentence of [100] of the First Liability Reasons. However, it is also apparent from the *absence* of references to overtime entitlements when applying the principles concerning set-off in:
- [103] (last sentence);
 - [105] (last and second last sentences);
 - [109] (last sentence);
 - [110] (last sentence);
 - [114] (first sentence);
 - [115] (last sentence); and
 - [116] (last sentence).
- 8 I also note that in its Amended Response filed on 5 April 2019, the respondent asserts a right to set-off payments it made to the claimant against *any* entitlements under the Award. The conclusions at [176] and [181] of the First Liability Reasons are flawed insofar as proper consideration has not been given to whether the respondent is entitled to set-off payments it made to the claimant against the claimant's overtime entitlements under the Award.
- 9 Fortunately, it is not too late to correct the error. In *DJL v Central Authority* [2000] HCA 17; 201 CLR 226 [90] - [91], Kirby J states by way of summary of relevant general principles (citations omitted):
- [90] *The law, for very good reason, places a high store on the finality of court judgments and orders. There would be little point in having courts to resolve disputes between parties according to law with settled remedies of judicial review and appeal, and within a hierarchical judicial system, if no ultimate finality could be reached. The judicial system would become discredited if 'final' orders were revealed as provisional or always subject to reconsideration and collateral challenge thus compounding costs, delays and the anxiety of submitting disputes to independent judicial determination. People caught up in litigation would not be able to order their affairs with certainty following its outcome. They could be subjected to repeated attempts by their opponents to engage them in fresh argumentation on issues they thought had been decided. Litigants with long purses, uncompromising certainty of their own rectitude or spiteful desire to win although they lose (by constantly running up the costs of reopenings) would defeat one of the chief objectives of any civilised legal system: the bringing of a litigated contest to an end.*
- [91] *On the other hand, because courts comprise decision-makers who are fallible human beings, not machines, occasionally errors and oversights will occur which can clearly be demonstrated and which produce a result that would be "manifestly unjust if the judgment were allowed to stand". Where the earlier decision has been announced but not yet "perfected" (in the sense of translated into a formal order entered in the records of the court) it is usually possible to repair the mistake and prevent the injustice by restraining (or securing agreement to withhold) the perfection of the order in question; relisting the matter before the court concerned; and attempting to persuade it to change its opinion and the orders which follow from it. In the course of judicial life it can happen that a party, receiving reasons for a decision pronounced in open court, notices a fundamental mistake, quickly calls it to the attention of the judge or judges involved and, before perfection of the orders, gains correction and even reversal of the previously announced decision. This has happened to most judges.*
- 10 Unless and until there has been the *entry* of judgment by the making of orders following the publication of reasons, this Court may revisit those reasons for the purpose of determining the appropriate order to make. If the reasons contain an error, the error

may be addressed. It is not necessary for the purposes of this case to determine whether the *entry* of judgment in this Court *must* take the form of a written order or may be done by an oral pronouncement.³ Neither step has been taken in this case.

- 11 A copy of the First Liability Reasons was supplied to the parties by the registry of the Court on 26 June 2020 for the purpose of enabling the parties to prepare submissions on the orders that ought to be made upon publication of the First Liability Reasons. I have noted that the orders made on 2 July 2020 concerned the filing of written submissions on *Rossato* and a timetable of steps for a hearing on the issue of penalties. It might be added that the ‘**Result**’ recorded in the heading of the First Liability Reasons is stated as, ‘to be confirmed’. In these circumstances, the principle of finality has no application.

Set-Off And Overtime Entitlements

- 12 The First Liability Reasons determined that, for the purposes of the Award, the claimant:

- was *not* a casual employee (see [85] - [91]);
- was entitled to be paid overtime in accordance with cl 40.1 of the Award (see [18]); and
- that the Award entitlement under that clause was \$7,878 (see [96] - [97]).

- 13 The principles to be applied on the respondent’s claim to set-off amounts paid to the claimant are not in dispute. It is convenient to quote from the judgment of White J (with whom Bromberg J agreed on this point) in *Rossato* at [865]:

865 *For the purposes of the resolution of the present case, the authorities reviewed above may be taken to stand for the following propositions concerning the entitlement of an employer to set off in analogous circumstances:*

- (a) *the issue may require the application of the parties’ contract: Poletti v Ecob at 332. If they agree that a sum of money is paid and received for a specific purpose which is over and above or extraneous to an award entitlement, the contract precludes the employer from later seeking to rely on the payment as satisfying an award obligation which is outside the agreed purpose of the payment: *ibid*. If the payment was made for the purpose of satisfying the kind of award obligation sought to be satisfied, it may be brought into account as satisfaction or part satisfaction of that obligation. If it was paid for some other purpose, then the employer cannot bring the payment into account: *Discount Lounge Centre* at [23]. Stated more generally, an employer cannot later reallocate an amount agreed to be paid to an employee in respect of subject A (for example, ordinary hours of work) to meet a claim in respect of subject B (for example, overtime): *Ray v Radano* at 478-9 (*Sheldon J*); *Pacific Publications* at 419; *Discount Lounge Centre* at [57]. The focus is on the purpose of the payment. If it arises out of the same purpose as the award obligation, it can be set off: *ANZ v FSU* at [48] - [52]. I will refer to this as the ‘Contractual Principle’;*
- (b) *the issue may involve application of the common law principles concerning payment by a debtor to a creditor: Poletti v Ecob at 332 - 3. When there are outstanding award or enterprise agreement entitlements, a payment designated by the employer as being for a purpose other than satisfaction of the award entitlement cannot be regarded as having satisfied the award or enterprise agreement: *ibid*. I will refer to this as the ‘Designation Principle’;*
- (c) *close regard must be had to the character of the payment on which the employer relies for the claimed set off and the purpose (usually, the agreed purpose) for which it was made; and*
- (d) *the purpose for which a payment was made will be a question of fact in each case. It may be express or may be implied from the parties’ agreement or from the employer’s conduct: James Turner at [21(3)]. The ‘designation and appropriation’ are matters to be determined by reference to the whole of the evidence: *ANZ v FSU* at [56]. (original emphasis)*

- 14 The claimant’s overtime Award entitlements of \$7,878 is the result of:

- two hours overtime each week over the 303 weeks of his employment being the thirty-ninth and fortieth hour of his usual working week;
- an overtime rate of time and a half as provided by cl 40.1 of the Award;
- a base rate of \$26 per hour being his rate of pay at the end of his employment; and
- ‘setting off the amount of \$26 per hour already paid’ by the respondent to the claimant for those thirty-ninth and fortieth hours.⁴

- 15 The respondent’s actual weekly payments to the claimant over the same 303 weeks are set out in **Tables A - F** (column 10). The claimant’s weekly overtime Award entitlement over the same 303 weeks, calculated by the respondent, is also set out in **Tables A - F** (column 26).

- 16 The respondent contends that the agreed purpose of the actual weekly payments was the discharge of all obligations with respect to ‘hours worked and overtime’ (see [105] First Liability Reasons) *for the week of payment*; any weekly amount in excess of the Award entitlement, paid to the claimant, was to be applied in satisfaction of the Award entitlement for that week.

- 17 The claimant replies that the agreed purpose of each payment, informed by an agreement between the parties providing for an *hourly* rate, was the discharge of all obligations with respect to work and overtime *for the hour* for which the payment is being made. It is not for the respondent to reallocate above-Award payments for ‘different’ hours to meet Award obligation to pay the respondent overtime for the thirty-ninth and fortieth hour of work.

- 18 The circumstance of the respondent’s actual weekly payments appears in the First Liability Reasons at [24] - [28], [31], [59], [63], [104] - [108], [112], and [113]. In dealings between the parties there was invariably a delineation between the entitlements of the claimant for hours worked up to 40 hours and for hours worked in excess of 40 hours. The delineation is inconsistent with an agreed purpose of an ‘all in’ weekly payment. The finding in the First Liability Reasons at [105] that payments correlate with the FW Act Obligation ‘with respect to payment for hours worked and payment for overtime’ follows an earlier observation in the same paragraph on a contractual obligation to pay an agreed higher rate for each hour worked *in excess of 40 hours*. Payments for those hours *in excess of 40 hours* at those rates may be applied in satisfaction of any Award

entitlement for those hours. Payments for those hours at those rates may *not* be applied in satisfaction of any Award entitlement for the thirty-ninth and fortieth hour. Further, the respondent had not done anything that might be construed as purporting to designate any actual weekly payments as being paid in discharge of any obligation under the Award.

Conclusion

19 The conclusions at [176] and [181] of the First Liability Reasons were flawed insofar as proper consideration was not been given to whether the respondent was entitled to set-off payments it made to the claimant against the claimant's overtime entitlements under the Award. However, upon considering the issue above, I have concluded that the respondent is not entitled to set-off payments. The conclusions at [176] and [181] of the First Liability Reasons do not require amendment.

M FLYNN
INDUSTRIAL MAGISTRATE

¹ Outline of Submissions of the Respondent in respect of the effect of the decision in *Rossato* filed 9 July 2020 (Respondent's Written Submissions of 9 July 2020); Claimant's Submissions on *Rossato* filed 10 July 2020 (Claimant's Written Submissions of 10 July 2020).

² Claimant's Written Submissions of 10 July 2020 [17] and [21].

³ I note that if a party proposes to take enforcement proceedings and money is to be paid under a judgment, s 81CB(2) of the *Industrial Relations Act 1979* (WA) requires the judgment to be in writing and certified by a clerk of the Court. I also note that reg 42 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) makes reference to the 'making' of a judgment without reference to writing.

⁴ Claimant's Written Submissions of 10 July 2020 [27] and Amended Claim filed on 7 March 2019 [45](e).

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2020 WAIRC 00083

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DAVID WEHR

APPLICANT

-v-

QUBE PORTS PTY LTD

RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER

DATE

WEDNESDAY, 5 FEBRUARY 2020

FILE NO.

B 9 OF 2020

CITATION NO.

2020 WAIRC 00083

Result Directions issued

Representation

Applicant Mr L Edmonds as agent

Respondent Ms J Flinn of counsel

Direction

HAVING heard Mr L Edmonds as agent on behalf of the applicant and Ms J Flinn of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the applicant file any amendments to his particulars of claim by no later than 12 February 2020.
- (2) THAT the respondent file any amended response to the amended particulars of claim by no later than 19 February 2020.
- (3) THAT the preliminary issue of the existence of an implied term as set out in the particulars of claim including any amended particulars of claim be dealt with on the papers.
- (4) THAT the applicant file his written submissions by no later than 4 March 2020.
- (5) THAT the respondent file its written submissions by no later than 18 March 2020.
- (6) THAT the applicant file any written submissions in reply by no later than 25 March 2020.
- (7) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2020 WAIRC 00402

CONTRACTUAL BENEFIT CLAIM
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00402
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 5 FEBRUARY 2020; WRITTEN SUBMISSIONS 9 MARCH, 18 MARCH, & 3 APRIL 2020
DELIVERED : THURSDAY, 9 JULY 2020
FILE NO. : B 9 OF 2020
BETWEEN : DAVID WEHR
 Applicant
 AND
 QUBE PORTS PTY LTD
 Respondent

Catchwords : Industrial Law (WA) - Employee stood down during safety investigation - Alleged breach by employer of implied terms of contract - Whether terms implied at common law based on law and fact - Principles applied - - No basis to imply terms contended - Application dismissed

Legislation : Industrial Relations Act 1979 (WA) s 29(1)(b)(ii)

Result : Application dismissed

Representation:

Applicant : Mr L Edmonds as agent

Respondent : Ms J Flinn of counsel

Case(s) referred to in reasons:

Avenia v Railway & Transport Health Fund Ltd [2017] FCA 859; (2017) 272 IR 151
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 52 ALJR 20
Byrne & Frew v Australian Airlines Ltd (1995) 131 ALR 422
Commonwealth Bank of Australia v Barker [2014] HCA 32; (2014) 253 CLR 169
Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Anor [2007] NSWSC 104
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596
Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357
State of New South Wales v Shaw [2015] NSWCA 97; (2015) 248 IR 206
Walker v Citigroup Global Markets Pty Ltd (2005) 226 ALR 114
Wesoky v Village Cinemas International Pty Ltd [2001] FCA 32
White v Australian and New Zealand Theatres Ltd (1943) 67 CLR 266

Case(s) also cited:

Collier v Sunday Referee Publishing Co Ltd [1940] 2 KB 647
Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR 337
Langston v Amalgamated Union of Engineering Workers [1974] 1 WLR 185
Mann v Capital Territory Health Commission (1981) 54 FLR 23
Marbe v George Edwardes (Daly's Theatre) Limited [1928] 1 KB 269
Montreal Public Service Co v Champagne (1917) 33 DLR 49
Turner v Sawdon & Co [1901] 2 KB 653
William Hill Organisation Ltd v Tucker [1999] ICR 291

Reasons for Decision

- 1 The applicant is an employee of the respondent employed in the position of a Guaranteed Wage employee under the *Qube Ports Pty Ltd Port of Dampier Enterprise Agreement 2016*. The respondent engages in stevedoring operations at various port locations around Australia. The location for present purposes is the Port of Dampier.
- 2 The applicant commenced his employment on 20 September 2017 as a Supplementary Employee under a written contract of employment of the same date. The applicant then commenced employment as a Guaranteed Wage employee on 21 May 2018 under a contract of employment dated 9 May 2018. The terms of the applicant's contract of employment provided that, under the Agreement, he would be offered work on a "totally irregular basis" (Monday to Sunday, day evening or night shift) according to the company's requirements which varied each day; the applicant had to make himself available under the Agreement; and his ongoing employment was conditional on work being available, his availability to work and meeting the

Company's performance standards. In return, the applicant was paid a minimum guarantee of 28 hours of work per fortnight at the rate of \$49.23. Additional remuneration payable to the applicant depended upon him being offered and accepting work beyond the minimum guarantee per fortnight.

- 3 On 1 April 2019, the applicant was stood down from work following a safety incident and was subject to a workplace investigation at the respondent's Dampier port operations. On 17 May 2019, the applicant returned to work and resumed allocation of work under his contract of employment. During the time of the stand-down, the applicant continued to receive his minimum guarantee payment under the Agreement.
- 4 The applicant maintains that it was an implied term of his contract of employment that the respondent would provide the applicant with the opportunity to work and earn remuneration and would not act in a manner to deprive him of the benefit of his contract of employment. The applicant contended that from him being stood down and/or the respondent refusing to allocate him work between 1 April and 17 May 2019, the respondent breached the implied terms of the applicant's contract of employment and is liable for any loss or damage suffered by him. The respondent objects to and opposes the applicant's claim and maintains that no such terms can be implied into the applicant's contract of employment.
- 5 By the agreement of the parties, the Commission has been invited to determine as a preliminary issue, whether the terms asserted by the applicant constituted implied terms of employment.

Contentions of the parties

- 6 The applicant made several submissions. It was contended that three implications could be made into his contract of employment as a matter of common law. The first is that he contended it was an implied term of his contract that the respondent had to cooperate with him. This duty included further duties not to prevent him from performing his contract; to do all things necessary to facilitate the performance of his contract; to do all things necessary for him to have the benefit of his contract; and that the respondent would not do anything that may deprive the applicant of his contractual benefits.
- 7 The applicant maintained that the respondent had a general duty of good faith towards him, as did the applicant to the respondent. Finally, the applicant contended that it was an implied term of his contract that the respondent would provide him with the opportunity to work in order that he receive remuneration under his contract of employment and under that implied term, the respondent would not act in a way to deprive him of his contractual entitlements.
- 8 The first two implied terms were said by the applicant to be implied by law. The final implied term claimed was said to be implied as a matter of fact.
- 9 As to the duty to cooperate, the applicant relied upon the general duty to cooperate which applies in all contracts. The applicant submitted that the implied duty to cooperate has been held to apply under employment contracts: *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32 per Merkel J at par 29; *Avenia v Railway & Transport Health Fund Ltd* [2017] FCA 859; (2017) 272 IR 151 per Lee J at pars 145-146. It was contended in reliance upon these cases, that the opportunity for the applicant to work and earn income was fundamental to the contract as was held by Lee J in *Avenia*. In standing the applicant down, it was submitted that the respondent breached the applicant's contract of employment.
- 10 As to the implied duty of good faith, the applicant submitted there has been some suggestion on the cases that courts are prepared to extend the good faith obligation that applies under commercial contracts, to employment contracts also. Reliance was placed on remarks of Rothman J in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Anor* [2007] NSWSC 104 at par 106. Reliance was also placed on a decision of the Federal Court in *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 per Allsop J at pars 5-6 where the court held that in relation to a bonus clause of a contract of employment, the provisions of the contract should not be interpreted to enable the employer to withhold a bonus payment "capriciously or arbitrarily or unreasonably".
- 11 Finally, the applicant submitted that a term implied by fact, under the well-known principles discussed in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 52 ALJR 20 may be found to apply. The term contended was to the effect that the applicant would be given the opportunity under his contract of employment to work to earn remuneration and the respondent would not behave in such a manner to deprive him of this benefit. Having regard to the terms of the applicant's contract of employment, and the provisions of the Agreement requiring him to live in Dampier; to make himself available to work for the respondent over others; to "repay" his minimum guarantee amount under the Agreement based on future earnings; where he would only accrue annual leave where work was allocated; and he would not receive compensation for remote living costs by payment of various allowances under the Agreement, all supported the implication of a term to satisfy the *BP Refinery* test. It was also contended that the situation was like those in *Wesoky*.
- 12 For the respondent it was contended that there was no substance to the assertions by the applicant that the implied terms could be held to exist on any basis. The respondent firstly noted the express terms of the applicant's contract of employment in particular at cl 7 to the effect that "You will be offered work on a totally irregular basis (Monday to Sunday, day evening or night shift) according to the Company requirements which vary each day". The respondent also referred to cl 9 of the contract in relation to the minimum fortnightly payment guarantee.
- 13 In relation to the implied duty to cooperate, the respondent submitted that such a duty can be implied into an employment contract on a mutual basis. However, this is subject to the terms of the contract and specifically, what is necessary to enable the other party to it to obtain the benefits of the contract. What is necessary to be done by each party to a contract will depend upon the circumstances of the case: *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169 at par 30 per French CJ, Bell and Keane JJ; *Byrne & Frew v Australian Airlines Ltd* (1995) 131 ALR 422 at par 70.
- 14 The respondent distinguished the cases relied upon by the applicant, in particular *Wesoky* and *Avenia*, because those cases involved employees performing specialist tasks or having particular contract terms, in circumstances where continued performance of work was required to maintain status and skills and additionally, with *Avenia*, the opportunity to work and earn commission was held to be fundamental to the particular contract in issue. Here, the terms of the contract in particular at cl 7, clarify that there is no obligation on the employer to provide work to an employee and the express terms of cl 7 mean that the implication contended by the applicant would be contrary to it.

- 15 The respondent accepted that the implied duty of good faith will apply in relation to commercial contracts but is generally not one that will apply in an employment setting: *Walker v Citigroup Global Markets Pty Ltd* (2005) 226 ALR 114 per Kenny J at pars 204-205.
- 16 Despite this line of authority, having regard to the principles governing implication of terms generally, it would need to be demonstrated on the respondent's submissions, that the duty of good faith would be necessary to imply into the applicant's contract of employment, in the sense that to not do so, would render the rights conferred by the contract "nugatory, worthless, or, perhaps, be seriously undermined": *Byrne* at 453. Applying this line of reasoning, the respondent contended that it could not be said that it was necessary to imply such a term as the standing down of the applicant did not deprive the applicant of the substance of the contract or render it nugatory or worthless. This is particularly so given the express terms conferring an entitlement to work only on an irregular basis and despite this, the payment of the minimum guarantee under the terms. Nor was loss suffered by the applicant because of the stand-down, according to the respondent.
- 17 Further, it was submitted by the respondent that notwithstanding these contentions, even if the good faith obligation was implied into the applicant's contract, the standing down of the applicant because of an investigation into a safety breach, establishes no basis for the conclusion there had been a breach of that implied term.
- 18 In relation to the implied obligation to provide an opportunity to work contended by the applicant, the respondent submitted that the implication of such an alleged term fails the test in *BP Refinery*. The respondent submitted that such a purported implication would contradict cl 7 of the contract in relation to work being offered on a "totally irregular basis". It was submitted that such a term would not be so obvious that it went without saying. In this respect, the respondent contended that the terms of the contract itself contemplate that the applicant may not be offered more work than the 28 hours compensated for under the guarantee payment structure and there would be a remuneration adjustment under the terms of the employment and the Agreement.
- 19 Finally, were the assertions of the applicant that the term would be implied because of the location of work at Dampier, that he had to prioritise work for the respondent, and had to repay his minimum guarantee during the stand-down period. The respondent referred to and relied upon various provisions of the Agreement, as being inconsistent with the applicant's submissions. This also applied to the contentions regarding accrual of annual leave and payment of the northwest allowance or northwest expense reimbursement allowance.

Consideration

- 20 The applicant faces several difficulties in establishing the existence of the claimed implied terms. Before dealing with the individual claims made, I will make some general observations.
- 21 In *Barker*, the High Court considered the ways a term may be implied into contracts. When commenting on terms implied by common law it was said that they "may be displaced by the express terms or by statute": par 21. Further, the Court also observed that terms implied by law may result from repeated implications in fact and that the term the subject of consideration in *Barker*, the trust and confidence term, "still needed to be 'necessary' ": par 28. "Necessity", in this sense, was expressed by McHugh and Gummow JJ in *Byrne* as being where "the enjoyment of rights conferred by the contract would or could be rendered nugatory, worthless, or perhaps, seriously undermined", or the contract would be "deprived of its substance, seriously undermined or drastically devalued" (cited in *Barker* at par 29). The Court in *Barker* further concluded at par 29, that such terms can also be characterised as rules applicable to the construction of contracts (citing *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607 per Mason J).
- 22 Thus, the focus must be on the contract terms in each case. Here, the most relevant terms are cls 7, 8 and 9. The terms of cl 7 have been set out above. By cl 8, the applicant had to make himself available "in accordance with the Agreement". The Agreement was not incorporated into the contract but governed the applicant's employment. As I have mentioned, the applicant was to receive a "fortnightly guaranteed payment" in cl 9 of the contract. Whilst both parties made reference to the terms of the Agreement to either support or oppose the implication arguments, it is not at all clear the extent to which this may legitimately be done in a case where implication of terms into a contract of employment is contended, as a matter of common law. As was held in *Byrne*, award or industrial agreement terms are not taken to be generally incorporated into a contract of employment, unless by the express intention of the parties, or in the more limited case of implication through custom and usage, not relevant in this matter. Whilst awards and agreements assume the existence of a contract of employment, and operate upon them, they are statutory instruments and the rights and obligations under them are the subject of statutory enforcement regimes, and not damages at common law. As the matter has not been raised in argument, however, I will assume without the need to decide the matter on this occasion, that some regard to the provisions of the Agreement is permissible.
- 23 It is tolerably clear from the terms, that the contract was not of a kind where the applicant was to be afforded the opportunity to work, as in the case of an actor or an entertainer, separate to the obligation on the employer to pay wages and entitlements, as for example, in *White v Australian and New Zealand Theatres Ltd* (1943) 67 CLR 266. This distinction, which is important, was discussed by the Full Court of the Federal Court in *Ramsey Butchering Services Pty Ltd v Blackadder* [2003] FCFCA 20; (2003) 127 FCR 381, where Tamberlin and Goldberg JJ observed at pars 65-70:

65 At common law there is no obligation upon an employer under a contract of employment to provide work to an employee unless the contract specifically requires that such work be provided, or unless it is necessary for the employee to continue to be employed in order to maintain a particular profile, such as an actor, or unless the nature of the work for which the employee is employed is such that the employee's career and future prospects depend upon the employee working in a particular way, or unless the level of the employee's remuneration depends upon the extent of the work the employee is able to undertake. There is nothing in the legislation, nor in the accompanying Explanatory Memorandum or Second Reading Speech, which suggests that s 170CH(3)(a) is intended to furnish employees with a right to work which, prior to instituting a proceeding in respect of an unlawful termination of employment, they would not have.

- 66 The common law position was explained in *Turner v Sawdon* [1901] 2 KB 653. AL Smith MR said at 657:
 “It is within the province of the master to say that he will go on paying the wages, but that he is under no obligation to provide work. The obligation suggested is said to arise out of the undertaking to engage and employ the plaintiff as their representative salesman. It is said that if the salesman is not given employment which allows him to go on the market his hand is not kept in practice, and he will not be so efficient a salesman at the end of the term. To read in an obligation of that sort would be to convert the retainer at fixed wages into a contract to keep the servant in the service of his employer in such a manner as to enable the former to become au fait at his work.”
- 67 In *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647 Asquith J said at 650:
 “It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out. In some exceptional cases there is an obligation to provide work. For instance, where the servant is remunerated by commission, or where (as in the case of an actor or singer) the servant bargains, among other things, for publicity, and the master, by withholding work, also withholds the stipulated publicity.”
- 68 The distinction between the two classes of employment contract, those which impose a duty to provide work and those that do not, was explained by Lawrence LJ in *Marbe v George Edwardes (Daly's Theatre) Limited* [1928] 1 KB 269 at 288 in the following terms:
 “Contracts of employment fall under two categories; first those in which the only obligation imposed upon the employer is the payment of the agreed remuneration, and no duty is cast upon the employer to give active occupation - this no doubt is the more usual form of contract; and secondly those in which the employer engages not only to pay the agreed remuneration but also to afford to the employee an opportunity of doing the work for which he is engaged. Whether a given contract falls within the first or second category depends primarily on the express words of the contract, but may also depend upon the character of the employment, and possibly upon the amount and nature of the remuneration.”
- 69 An example of a contract of employment in which there was an express obligation imposed on the employer to provide the employee with work is found in *Montreal Public Service Co v Champagne* (1917) 33 DLR 49. There the employee was given the power under the contract to engage and dismiss all employees of the company and it provided that all the administration of the company's business was, subject to the direction and control of the directors, to be under the control of the employee.
- 70 There have been a number of cases in which courts have found that employers have an obligation to provide an employee with work where the employee has particular skills or talents which the employee needs to keep in regular activity, or where the employee occupies a particular unique position, or where an aspect of the employee's remuneration depends upon work being performed: *White v Australian and New Zealand Theatres Ltd* (1943) 67 CLR 266 at 273-274; *Langston v Amalgamated Union of Engineering Workers* [1974] 1 WLR 185 at 192; *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 342-343; *William Hill Organisation Ltd v Tucker* [1999] ICR 291. Such an approach was taken in *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32 in which Merkel J found that a significant aspect of the promised remuneration depended on the employer providing the opportunity, or not depriving the employee of the opportunity, to earn it and that the employee had undertaken a specific and unique overseas posting. For a different approach in which the court refused to find an obligation to provide a specialist surgeon with work, see *Mann v Capital Territory Health Commission* (1981) 54 FLR 23 at 29-30.
- 24 Whilst the applicant submitted in reply that the terms of cl 7 of the contract should not be construed as enabling the employer to not offer work totally at its discretion, this is with respect, a distinction without a difference regarding the implied term asserted. This is because, to establish a breach of the duty to cooperate, the applicant must establish that the contract afforded him a benefit, such that the respondent was obliged to provide him with work, from the nature of the employment or some particular feature of it.
- 25 For example in the cases relied on by the applicant, such as *Wesoky*, cited by the Full Court in *Blackadder* above, a significant factor was the employee's remuneration package, which contained an entitlement to an equity interest, that could only be earned by the employee taking up a specific position overseas. There is no such situation here. In the other case cited, *Avenia*, the court found that the contract contained a commission payment clause, the operation of which depended on the employee in question being given work on an ongoing basis.
- 26 These cases differ on their facts to the present matter. Here, there is nothing in the applicant's contract to suggest that the employer would be under any contractual duty to do other than pay the employee under the contract and the Agreement. Whilst it is unnecessary to do so for the purposes of this conclusion, the language used in cl 7 also tends against any such implied term. However, this is not decisive as even with a full time salaried employee under the Agreement, unless an employee's contract of employment contained a term supporting the necessity for the opportunity to work, in addition to the obligation on the employer to pay wages and entitlements, the same result would follow.
- 27 The difficulty facing the applicant in relation to the alleged breach of an implied duty of good faith by the respondent temporarily standing him down is more fundamental. It is the case that as submitted by the applicant, the High Court in *Barker* left open whether there may be a general implied obligation to act in good faith under contracts: *Barker* at par 42. There has not been further consideration of this issue by the High Court since then. Even as to commercial contracts, where there seems to be a greater willingness to imply such a term, resulting from decisions of superior courts, the issue has not yet been finally resolved by the High Court.

- 28 Given the approach of the High Court in *Barker* to the rejection of the implied term of trust and confidence, it would seem that for a term of good faith to be implied in law in an employment contract, it would still need to pass the test of "necessity": *Barker* at pars 28-29. In *Walker*, Kenney J expressed the view that no such term may be implied into contracts of employment at common law: at pars 204-205. More recently, the New South Wales Court of Appeal in *State of New South Wales v Shaw* [2015] NSWCA 97; (2015) 248 IR 206, did not accept the implication of an implied term of good faith by law, as a matter of necessity, in the case before it: per Ward JA at pars 128-136 (Beazley P and Gleeson JA agreeing).
- 29 It is not at all clear how such an obligation would be necessary to imply in this case. There is nothing evident in the terms of the applicant's contract that would be rendered "nugatory or worthless" without such a term. As pointed out by the respondent, on its construction of the clause, which approach to cl 7 I agree with, the respondent did not have to provide regular work to the applicant and he was not rostered under the Agreement, reflecting his position as a "GWE" employee. The applicant was able under the Agreement, to work for another employer, when not required by the respondent. The applicant was paid under his contract and the Agreement over the period of his stand-down. Therefore, it is difficult to see the basis upon which such a term would be implied. Even if an implied obligation of good faith did apply to the applicant's contract, it is not evident how a stand-down (on pay) whilst the employer investigated a workplace safety incident, would breach such a term.
- 30 One of the cases relied on by the applicant under this head of claim, *Silverbrook Research*, involved a specific situation where a remuneration arrangement involving the payment of a bonus under a contract of employment, was considered. In its decision, the court (Allsop P) did not rely on any general notion of good faith as an implied term, rather confined the issue to whether the non-payment of a bonus under the contract, where it was apparently discretionary, but where the applicant met the criteria for its payment, would be "arbitrary, capricious or unreasonable": at pars 5-6. The focus of the court's judgment was on the employer's refusal to pay the bonus in these circumstances as being "a denial of the very clause that had been agreed": par 6. Several similar cases dealing with discretionary pay schemes have adopted the same approach (See generally C Sappideen, P O'Grady and J Riley *Macken's Law of Employment* Eighth Edition par [5.230]). Not only are these cases distinguishable on their facts to the present case before the Commission, but also in my view, they do not stand for the proposition of the existence of a general duty of good faith being a feature of employment contracts as a matter of law.
- 31 The asserted implied term in fact is based on the *BP Refinery* test. The criteria are well known and include that the proposed term "(1) must be reasonable and equitable; (2) must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) must be so obvious that "it goes without saying"; (4) must be capable of clear expression; (5) must not contradict any express term of the contract": *BP Refinery* at p 376.
- 32 The term sought to be implied by the applicant is as follows:
The Respondent would provide the Applicant with the opportunity to work in order to obtain remuneration and the Respondent would not act in (sic) manner to deprive the Applicant of the benefit of his contract of employment.
- 33 The applicant's position as a "GWE" classification under the applicant's contract, read with the Agreement, means he is not placed on the respondent's roster for the allocation of work. Thus, in this position, the applicant could not, under his contract with the respondent, expect to be allocated work on a regular basis. The fact that cl 7 of the contract refers to the applicant as a GWE employee being offered work on a "totally irregular basis", subject to the respondent's business needs (my emphasis), combined with the applicant's ability to work elsewhere, when not working for the respondent, conflicts with the term sought to be implied. The right to offer work rests with the employer, in accordance with its business needs. The ongoing employment of the applicant by the respondent, as set out in cl 8 of the contract, "is conditional on work being available..." The implied term would place an inconsistent gloss on the terms of cl 7 and arguably cl 8 too.
- 34 In my view, the term sought to be implied is contrary to the express terms. It is also difficult to see how such a term, given the engagement of a GWE employee, would be necessary to give business efficacy to the contract. It is not evident how the contract may not operate effectively without such a term. Where work is allocated to the applicant, he will receive the benefits set out in the contract and the Agreement. The benefits set out in the Agreement, include those specifically for GWE employees. The entitlements under the Agreement flow with a GWE employee being allocated work under its terms. Nor, for the same reasons, is it apparent how such a term would be so obvious as to go without saying.
- 35 The provisions of the Agreement relied on by the applicant to support the implication of the term in fact, as I have just mentioned, all operate on the footing of the limitations and the particular circumstances of GWE employment under the applicant's contract. They are all governed by the essentially sporadic nature of GWE employment and will only confer a benefit on the applicant where the applicant is allocated work by the respondent, under cl 7 of the contract.

Conclusions

- 36 The Commission is not persuaded that the applicant has established the existence of the implied terms as contended. The application must be dismissed.

2020 WAIRC 00401

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DAVID WEHR

APPLICANT

-v-

QUBE PORTS PTY LTD

RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER

DATE

THURSDAY, 9 JULY 2020

FILE NO/S

B 9 OF 2020

CITATION NO.

2020 WAIRC 00401

Result	Application dismissed
Representation	
Applicant	Mr L Edmonds as agent
Respondent	Ms J Flinn of counsel

Order

HAVING heard Mr L Edmonds as agent on behalf of the applicant and Ms J Flinn of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00271

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	DEBORAH ANN STOCKTON	APPLICANT
	-v-	
	EPIS INCORPORATED	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 13 MAY 2020	
FILE NO.	B 160 OF 2019	
CITATION NO.	2020 WAIRC 00271	

Result	Direction issued
Representation	
Applicant	Mr G Butler as agent
Respondent	Mr A Talbert of counsel

Directions

HAVING HEARD Mr G Butler as agent for the applicant and Mr A Talbert of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) 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 three days prior to the date of hearing.
- (2) THAT evidence-in-chief in this matter be adduced by way of signed witness statements which will stand as the evidence-in-chief of the maker. Evidence-in-chief other than that contained in the witness statements may only be adduced by leave of the Commission. Copies of documents referred to in the witness statements should be annexed.
- (3) THAT the parties file electronically any signed witness statements upon which they intend to rely no later than 14 days prior to the date of hearing.
- (4) 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.
- (5) THAT the applicant 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.
- (6) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00349

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DEBORAH ANN STOCKTON

APPLICANT

-v-

EPIS INCORPORATED

RESPONDENT**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** TUESDAY, 23 JUNE 2020**FILE NO/S** B 160 OF 2019**CITATION NO.** 2020 WAIRC 00349**Result** Order issued**Representation****Applicant** Mr G Butler as agent**Respondent** Mr A Talbert of counsel*Order*

HAVING HEARD Mr G Butler as agent for the applicant and Mr A Talbert of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the applicant's claim be amended in the terms of the application filed on 8 June 2020 as to items 1 to 8 excluding the claim for interest.
- (2) THAT the respondent file an amended response to the amended claim, including particulars of the days and dates the respondent contends that the applicant was absent without leave from Newman over the period 2015 to 2019 by no later than 7 July 2020.
- (3) THAT the respondent provide to the applicant copies of the following documents by no later than 30 June 2020:
 - (a) if in existence, the final version of minutes of meetings of the respondent's Board on 12 November 2018 and 19 February 2019;
 - (b) a copy of the respondent's work instructions and variations created and used for the respondent's payroll and financial processes over the period 2017 to 2019 inclusive; and
 - (c) copies of emails over the period 27 March to 30 June 2017 between the applicant and the Chair of the respondent's Board, Board member Ms Darling and other Board members in relation to revisions of the applicant's contract of employment.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00413

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DEBORAH ANN STOCKTON

APPLICANT

-v-

EPIS INCORPORATED

RESPONDENT**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** FRIDAY, 17 JULY 2020**FILE NO/S** B 160 OF 2019**CITATION NO.** 2020 WAIRC 00413

Result	Order issued
Representation	
Applicant	Mr G Butler as agent
Respondent	Mr A Talbert of counsel

Order

HAVING HEARD Mr G Butler as agent for the applicant and Mr A Talbert of counsel for the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the applicant be and is hereby permitted to appear, make submissions and give evidence by video-link in accordance with regulation 44 of the Industrial Relations Commission Regulations 2005 (WA).

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00429

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2020 WAIRC 00429
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	THURSDAY, 30 JANUARY 2020, WEDNESDAY, 25 MARCH 2020, WEDNESDAY, 13 MAY 2020, TUESDAY, 23 JUNE 2020, MONDAY, 20 JULY 2020
DELIVERED	:	MONDAY, 27 JULY 2020
FILE NO.	:	B 160 OF 2019
BETWEEN	:	DEBORAH ANN STOCKTON
		Applicant
		AND
		EPIS INCORPORATED
		Respondent

Catchwords	:	Industrial Relations Law (WA) – Denied contractual benefits – Claims admitted and paid – No longer any industrial matter – Application discontinued
Legislation	:	<i>Industrial Relations Act 1979 (WA) s 29(1)(b)(ii)</i>
Result	:	Discontinued by order
Representation:		
Applicant	:	Mr G Butler as agent
Respondent	:	Mr A Talbert of counsel

Case(s) referred to in reasons:

Hotcopper Australia Ltd v David Saab [2001] WAIRC 03827; (2001) 81 WAIG 2704

Reasons for Decision

- 1 The applicant originally claimed denied contractual benefits against the respondent under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) regarding unpaid annual leave for \$41,228.64; an airfare reimbursement of \$4,000; health insurance premium reimbursement of \$3,500; a claim for time off in lieu of \$6,346.15; an education allowance claim of \$10,000 and a superannuation claim of \$5,263.19.
- 2 The respondent initially denied the applicant's claims.
- 3 Because of several interlocutory proceedings the applicant's claim was amended on several occasions and the respondent filed amended notices of response. The upshot of these amendments is that in an interlocutory hearing before the Commission on 20 July 2020, counsel for the respondent informed the Commission that the remaining denied contractual benefits claimed, not otherwise earlier admitted by it, were admitted. A late "informal" claim, one not the subject of the applicant's amended claim, being \$8,511 regarding four weeks' pay in lieu of notice, was also subsequently agreed.
- 4 The applicant's agent confirmed on 22 July 2020, that the respondent had paid to the applicant all outstanding contractual benefits claimed by her against the respondent, including the additional matter of four weeks' pay in lieu of notice. Thus, there were no longer any denied contractual benefits owed by the respondent to the applicant, the subject of the applicant's claim.

- 5 At the interlocutory hearing on 20 July 2020, I informed the parties that as the applicant's amended claims had been admitted, when paid by the respondent, there would no longer be any denied contractual benefits owed and no industrial matter for the Commission to enquire into and deal with under the Act. The application would be discontinued by order and the dates listed for hearing of the applicant's claims, on 27-30 July 2020, would be vacated.
- 6 Surprisingly, after the interlocutory hearing, the applicant's agent filed bundles of material and what were described as the applicant's outline of submissions "on the Commission's general jurisdiction and powers in relation to denied contractual benefits and more generally industrial matters". Despite acknowledging that the respondent has now satisfied the applicant's amended denied contractual benefits claims, the applicant maintains that because of assertions made by the respondent in the notices of response in relation to allegations against the applicant as to her conduct whilst an employee of the respondent, and also from the respondent allegedly contravening directions or orders of the Commission in relation to discovery of documents, that the matter ought proceed for hearing and determination.
- 7 With due respect, those contentions reflect a misconception of the Commission's jurisdiction in relation to matters of the present kind. The Commission's jurisdiction under s 29(1)(b)(ii) of the Act is narrow and defined. It only extends to enquiring into and dealing with an industrial matter in relation to whether an employer has denied contractual benefits to an employee. That requires that an applicant be an employee; be employed under a contract of service; the claimed benefits must be benefits which arise under the contract of employment; the claimed benefit must not arise under an award or order of the Commission; and the benefit must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704. If an applicant establishes that a contractual benefit(s) has been denied, the Commission has the power to order an employer to provide to the employee the benefits found to have been denied.
- 8 Here, there are no longer before the Commission, any claimed contractual benefits, allegedly denied. The applicant's claims have been admitted and have been satisfied in full, by payment made by the respondent, as acknowledged by the applicant. The Commission has no jurisdiction or power to enquire into or deal with any further matters, within the proceedings, of the kind identified by the applicant's agent and referred to above. Any such proceedings, had they continued, would be beyond the jurisdiction and powers of the Commission.
- 9 Accordingly, the application was discontinued by order of the Commission.

2020 WAIRC 00423

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DEBORAH ANN STOCKTON

APPLICANT

-v-

EPIS INCORPORATED

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

THURSDAY, 23 JULY 2020

FILE NO/S

B 160 OF 2019

CITATION NO.

2020 WAIRC 00423

Result

Discontinued by leave

Representation**Applicant**

Mr G Butler as agent

Respondent

Mr A Talbert of counsel

Order

HAVING heard Mr G Butler as agent on behalf of the applicant and Mr A Talbert of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2019 WAIRC 00841

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DONALD ANDREW PARNELL

APPLICANT

-v-

THE ROMAN CATHOLIC ARCHBISHOP OF PERTH

RESPONDENT**CORAM** SENIOR COMMISSIONER S J KENNER**DATE** WEDNESDAY, 4 DECEMBER 2019**FILE NO.** U 132 OF 2019**CITATION NO.** 2019 WAIRC 00841

Result	Direction issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr I Curlewis of counsel

Direction

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

- (1) THAT 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 Commission.
- (2) THAT the parties file any signed witness statements and annexures upon which they intend to rely no later than 24 January 2020.
- (3) 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.
- (4) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00420

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2020 WAIRC 00420
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	MONDAY, 10 FEBRUARY, TUESDAY, 11 FEBRUARY, WEDNESDAY, 12 FEBRUARY, FRIDAY, 14 FEBRUARY 2020; WRITTEN CLOSING SUBMISSIONS 21 FEBRUARY 2020; SUPPLEMENTARY WRITTEN SUBMISSIONS 23 MARCH 2020; FURTHER SUPPLEMENTARY WRITTEN SUBMISSIONS 17 JULY 2020
DELIVERED	:	TUESDAY, 21 JULY 2020
FILE NO.	:	U 132 OF 2019
BETWEEN	:	DONALD ANDREW PARNELL
		Applicant
		AND
		THE ROMAN CATHOLIC ARCHBISHOP OF PERTH
		Respondent

Catchwords	:	Industrial Law (WA) - Termination of employment of Deputy Principal - Claim of harsh, oppressive or unfair dismissal - Remedy of reinstatement sought - Alleged denied procedural fairness - Historical sexual assault allegations - Serious misconduct - Allegation of flawed investigation process - Application for suppression - Open court principle fundamental - Principles applied - Evidentiary onus - Briginshaw principles and balance of convenience - Circumstantial evidence - Counsellor confidentiality - Principles applied - Employer had genuine and honest belief based on reasonable grounds - Misconduct established - Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) ss 6, 27(1a), 29(1)(b)(i) <i>Children's Court of Western Australia Act 1988</i> (WA) s 35 <i>Evidence Act 1906</i> (WA) ss 19A, 19E, 19G, 19H, 36C
Result	:	Application dismissed
Representation:		
Applicant	:	Mr P Mullally as agent
Respondent	:	Mr I Curlewis of counsel
"The West Australian"	:	Mr A McCarthy of counsel - suppression application only

Case(s) referred to in reasons:

Australian Workers' Union WA Branch Industrial Union of Workers v Hamersley Iron Pty Limited (1986) 66 WAIG 322
Baron v George Weston Foods Ltd (1984) 64 WAIG 590
Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224
Briginshaw v Briginshaw (1938) 60 CLR 336
Crampton v The Queen (2000) 206 CLR 161
Cubillo v Commonwealth of Australia (2000) 174 ALR 97
Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893
Hogan v Hinch (2011) 243 CLR 506
John Fairfax Group Pty Ltd v Local Court of NSW (1991) 26 NSWLR 131
Longman v The Queen (1989) 168 CLR 79
Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 67 ALJR 170
Newmont Australia Ltd v The Australian Workers Union, Western Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677
NU v NSW Secretary of Family and Community Services [2017] NSWCA 221; (2017) 95 NSWLR 577
Palmer v Dolman [2005] NSWCA 361
R v Deputy Industrial Injuries Commissioner; Ex parte Moore [1965] 1 QB 456
Rayney v Western Australia [No. 8] [2017] WASC 66
Re Her Honour Chief Judge Kennedy; Ex parte West Australian Newspapers Ltd [2006] WASCA 172
Re Hogan; Ex parte WA Newspapers (2009) 41 WAR 288
Re Robins SM; Ex parte West Australian Newspapers Ltd (1999) 20 WAR 511
Sangwin v Imogen Pty Ltd [1996] IRCA 100
Scott v Scott [1913] AC 417
"TK" v Australian Red Cross Society (1989) 1 WAR 335
Winkless v Bell (1986) 66 WAIG 847

Case(s) also cited:

Amin v Burswood Resort Casino (1998) 78 WAIG 2441
Attorney-General v Leveller Magazine Ltd [1979] AC 440
Braganza v BP Shipping Ltd [2015] UKSC 17
Bromfield, Re; Ex parte West Australian Newspapers Ltd (1991) 6 WAR 153
David Syme & Co Ltd v General Motors-Holden's Ltd [1984] 2 NSWLR 294
Director General of Community Services; Re Sophie [2008] NSWCA 250
Gregory v Philip Morris 80 ALR 455
Heard v Monash Medical Centre (1996) 39 AILR ¶3-203
Hogan v Australian Crime Commission [2010] HCA 21; (2010) 240 CLR 651
John Fairfax & Sons Ltd v Police Tribunal of New South Wales (1986) 5 NSWLR 465
John Fairfax Publications Pty Ltd v Attorney-General (NSW) (2000) 181 ALR 694
John Fairfax Publications Pty Ltd v District Court of New South Wales [2004] NSWCA 324

Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8
Lovell v Lovell (1950) 81 CLR 513
Mallet v Mallet (1989) 156 CLR 605
M v M (1988) 166 CLR 69; [1988] HCA 68
Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service & Miscellaneous WA Branch 65 WAIG 385
Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47
R v Chief Registrar of Friendly Societies; Ex parte Newcross Building Society [1984] QB 227
R v Kwok (2005) 64 NSWLR 335
Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47
Rockett v Smith; Ex parte Smith [1992] 1 Qd R 660; (199) 55 A Crim R 79
Russell v Russell (1976) 134 CLR 495
Schaale v Hoescht Australia Ltd (1993) 47 IR 249
SDA v Jewel Food Stores (1987) 22 IR 1
Stearnes v Myer S.A. Stores (Unreported, SAIC Print No. 9A/1973)

Reasons for Decision

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Background

- 1 This is a sad case layered with complexity. It has been a traumatic one for family members of a former student of MacKillop Catholic College in Busselton who attended the College from 1997 to 1998. The applicant, a teacher employed by the respondent in Catholic schools since 1989 and who worked as a Deputy Principal over the last 10 years, most recently at Lumen Christi College from January 2018 to August 2019, was dismissed for misconduct. His dismissal resulted from

historical sexual assault allegations made against him by the former student, arising from a school trip to Indonesia between Term 3 and Term 4 in 1997.

- 2 The applicant not only proclaims his innocence of what he described as the most abhorrent allegations that could be made against him, but he also maintained that his dismissal was unfair on several other grounds including that the respondent's investigation into the allegations, which occurred 22 years after the alleged sexual assault, was fatally flawed; that the Investigators had insufficient expertise to conduct such an investigation; that evidence assembled and relied upon by the Investigators was contaminated; that the investigation was not independent of the Catholic Church, as the applicant maintains that it should have been; and that the applicant could not properly respond to the allegations; and that an expert psychologist report obtained by the respondent in relation to the allegations themselves, did not support substantiation of them.
- 3 The applicant seeks an order of the Commission that he be reinstated to his former position as Deputy Principal of the College without loss.

Application for suppression

- 4 At the commencement of the proceedings, the applicant made an application under s 27(1a) of the Act, that the Commission make an order for the proceedings to be heard in camera, alternatively that the identity of the applicant be suppressed. This application was made because the case concerned a claim by the applicant, a teacher of some 30 years' good standing, with an otherwise unblemished employment record, being dismissed from his position as Deputy Principal of the College, because he allegedly raped a male student 22 years ago. The applicant submitted this is one of the most serious allegations that could be made against a teacher. Also, the allegations made against the applicant contended that the offending took place in circumstances of aggravation, both as to the actual alleged sexual assault, and alleged threats made by the applicant to the former student to harm his family if he disclosed the alleged offending.
- 5 The applicant submitted that in these circumstances, the allegations will be ruinous to his reputation. Notably, according to the applicant, never was a complaint made as to the allegations, either to the police or to education authorities. The applicant contended that even if the Commission found in favour of his claim, given the significance of an historical sexual abuse claim, regarding a student under the applicant's care, this will profoundly affect the applicant's future, whether as a teacher or in any other occupation.
- 6 The respondent neither consented to nor opposed the application and submitted that it was a matter for the Commission to determine. And as the proceedings had attracted some media interest, the application for the proceedings to be heard in camera or for making suppression orders, was opposed by the "West Australian" newspaper, which had a journalist present on the first day of the proceedings. As counsel for the "West Australian" was not available at the time of the application being made by the applicant, the proceedings were adjourned until the commencement of the afternoon session, to enable the newspaper's counsel to appear and to be heard.

Relevant principles

- 7 Without hopefully doing an injustice to the detailed and helpful submissions made by counsel for the "West Australian", it was contended that, after referring to the common law authorities, there was no basis for making a suppression order, let alone an order that the proceedings be heard in closed court. Counsel submitted that no doubt under s 27 of the Act, the Commission has the power to order a matter be heard in camera, having regard to the objects of the Act in s 6 and the common law principles. It was submitted that the paramount principle to apply is that of open justice, so it is only in exceptional cases that a suppression order or a closed court order would be made: *Hogan v Hinch* (2011) 243 CLR 506; *Rayney v Western Australia [No. 8]* [2017] WASC 66.
- 8 Counsel for the "West Australian" set out in his written submissions, some examples regarded as exceptional circumstances, however, importantly for present purposes given the grounds of the application, embarrassment, distress, invasions of privacy or damage are not exceptional circumstances and do not justify making suppression orders in relation to the identification of parties or a witness (see written submissions par 13).
- 9 Importantly also, counsel submitted that even though the Commission has the statutory power under the Act to make suppression or closed court orders, such statutory powers must be considered and applied consistent with the common law principles: *Hogan* at par 27.
- 10 In a brief reply, the agent for the applicant also submitted that the Commission could have regard to restrictions, by analogy, applying under s 35 of the *Children's Court of Western Australia Act 1988* (WA) that, had criminal proceedings been brought some time after 1997 against the applicant, under that legislation there would be prohibition of publication of the applicant's name because it may have led to the identification of the name of the child. By analogy, the submission was made that in s 27 of the Act, a similar approach could apply. Some reference was also made in response to this issue, by counsel for the West Australian, to s 36C of the *Evidence Act 1906* (WA) in relation to non-publication of names of victims of alleged sexual offences, in criminal proceedings. However, this is not the case and those circumstances have no application.
- 11 After adjourning for a short time to consider the application and the submissions made, I refused the application for suppression or for the proceedings to be heard in camera so as not to disclose the applicant's identity, with my reasons to be published in due course. These are my reasons for so deciding.

Decision on suppression application

- 12 The Commission, as a specialist industrial tribunal and as a court of record under s 12 of the Act, has an obligation, subject to the Act, to conduct its proceedings in public. The exception to this is set out in s 27(1a) which provides:

27. Powers of Commission

...

- (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.

13 This statutory provision, and the powers of the Commission to conduct proceedings in private, also encompasses the power of the Commission to issue orders under s 27(1)(v) of the Act, falling short of in camera proceedings. This includes making procedural orders in relation to the suppression of the identity of names of parties or witnesses or to suppress the identity of the applicant. However, this statutory power must be construed and applied consistent with the common law principle of “open justice”, so proceedings before courts and tribunals should be in public, unless there exist very good reasons why not. In *Hogan*, in this respect, French CJ said at par 20:

The open-court principle

20. An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the *Constitution* courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard. However, it is not absolute.

(Footnotes omitted)

14 (See too: *Re Hogan; Ex parte WA Newspapers* (2009) 41 WAR 288 per McLure P at pars 30 to 33). This principle has variously been called “fundamental”; “[laying] at the heart of our system of justice” and “vital to the ... maintenance of public confidence in the administration of justice”: *Re Robins SM; Ex parte West Australian Newspapers Ltd* (1999) 20 WAR 511 at 514 and 516. Whilst ss 27(1)(v) and (1a) of the Act permit the Commission to make suppression orders or closed court orders, these statutory provisions must be applied against the background of the common law and with minimum intrusion into it. In this respect, also in *Hogan*, French CJ said at par 27:

Beyond the common law, it lies within the power of parliaments, by statute, to authorise courts to exclude the public from some part of a hearing or to make orders preventing or restricting publication of parts of the proceeding or of the evidence adduced. An example of such a law in the federal context is s 50 of the *Federal Court of Australia Act 1976* (Cth), recently considered by this Court in *Hogan v Australian Crime Commission*. Specific powers to make suppression orders or orders for the exclusion of the public, where such orders are in the interest of security or defence of the Commonwealth, can be found in the *Crimes Act 1914* (Cth) and the *Criminal Code* (Cth). There are many other examples of such provisions enacted by State parliaments. Where it is left by statute to a court's discretion to determine whether or not to make an order closing part of a hearing or restricting the publication of evidence or the names of parties or witnesses, such provisions are unlikely to be characterised as depriving the court of an essential characteristic of a court and thereby rendering it an unfit repository for federal jurisdiction. Nevertheless, a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle...

15 Thus, the Commission, consistent with the above, should only depart from the open justice principle, when there exist exceptional circumstances that justify such a course: *Re Chief Judge Kennedy* [2006] WASCA 172. In *Re Chief Judge Kennedy*, the principles were discussed and Steytler P (Roberts-Smith and McLure JJA agreeing) said at pars 36 – 38:

- 36 The fundamental importance of openness in the administration of justice has repeatedly been stressed. In this State, the more pertinent authorities have been collected in *Bromfield* at 179 - 183 per Rowland J, and at 193 per Nicholson J, and in *Re Robins* at [5] - [9] per Ipp J. I will not repeat what has there been said, other than by quoting what was said by Gibbs J in *Russell v Russell* (1976) 134 CLR 495 at 520, where he identified the basis for the principle as follows:

"It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' ... This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character."

- 37 I should also repeat what was said by Samuels JA in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 61, as follows:

"The inquiry must start with the proposition, central to our notions of forensic procedure, that the courts customarily conduct their business in public in order that the integrity, fairness and efficiency of the system, and its administrators, may be maintained by its exposure to public scrutiny. One corollary is the freedom to publish to the public fair reports of the court's proceedings."

(See also, in this last respect, *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476 - 477; and *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324 at [20]).

- 38 Of course, the principle of open justice is not absolute. There are exceptions to it, albeit these are few and strictly defined: *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694 at 707 per Spigelman CJ; and see *R v Kwok* (2005) 64 NSWLR 335. In this State, at the time of the orders made by the primary Judge, s 635(2) of the *Criminal Code* (WA) provided that, if satisfied that it is necessary for the proper administration of justice to do so, a court may, amongst other things, exclude persons from the court-room

during a criminal proceeding and make an order prohibiting publication outside the court-room of the whole or any part of the proceedings (see, now, s 171 of the *Criminal Procedure Act 2004* (WA)).

- 16 As stated by his Honour above, there can be several circumstances of an exceptional nature justifying a departure from the open hearing rule. However, embarrassment and damage to reputation is not one of them. In *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131, in discussing the open justice principle, Kirby P observed at pp 142 – 143:

It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms: see, eg, *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 (at 307); *Raybos Australia Pty Ltd v Jones* (at 58); *R v Chief Registrar of Friendly Societies*; *Ex parte Newcross Building Society* [1984] QB 227 at 235; *R v Bromfield* Malcolm CJ (at 22); *Rockett v Smith*, per Derrington J (at 7). A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

- 17 Here, the applicant sought an order for the proceedings to be heard in camera or for the suppression of his name, because his reputation as a teacher of 30 years' standing will be damaged. The gravity of the allegations leading to his dismissal, which must be acknowledged, even though arising in employment proceedings and not in criminal proceedings, will have the potential to be very damaging. So much may be accepted. However, it is to be borne in mind that the applicant has commenced these proceedings, of his initiative, to challenge his employer's decision to dismiss him. Aside from the embarrassment and possible reputational damage that may arise, no other grounds were relied upon by the applicant to support the seeking of orders. For example, there was no submission made that the failure to make an order for suppression or the holding of in camera proceedings, would deter the applicant from proceeding with his claim, or may affect the manner in which he exercises any rights in these proceedings: *Scott v Scott* [1913] AC 417; *"TK" v Australian Red Cross Society* (1989) 1 WAR 335.
- 18 In applying the principles discussed above, the considerations advanced by the applicant do not outweigh the public interest in the open justice principle applying and there being the ability for the public reporting of these proceedings in the media. Accordingly, it was for these reasons that I did not grant the orders sought by the applicant.
- 19 However, out of due deference and respect to the deceased student, who was a child at the material time, and his family, the student will be identified in these reasons as "A" and those family members who gave evidence will be identified by their relationship to him. I will adopt the same approach to other students, who were interviewed as part of the investigation into the allegations against the applicant. Also, having regard to doctor and patient confidentiality, where reference has been made in documents in evidence before the Commission, to medical practitioners who treated A at various times, their names have been omitted. I consider that in accordance with the above principles, this approach to each of these matters is consistent with the due administration of justice.

School trip to Indonesia Term 3 – Term 4, 1997

- 20 A school trip in the September – October school holidays was organised in 1997, for five students at Mackillop College to travel to Indonesia, to study Indonesian culture and language. The organiser of the trip was another teacher, Ms Hunter. Of the five students who went on the trip, the only male student was A. As there was a male student participating in the tour, the applicant was also requested and agreed to accompany the tour group.
- 21 The tour was mainly to the Central Java region and took place over two weeks. According to Ms Hunter, the tour was generally uneventful except for the final day, when due to a problem with the tour group's return flight from Denpasar to Perth, the group had to stay an additional night. Accommodation was arranged by the airline and the group stayed at the Kartika Plaza Hotel. It is on that final night at the hotel that events the subject of these proceedings are said to have taken place. I will return to the detail of these matters later in these reasons.

Return to Perth

- 22 The day after the final night in Denpasar, the tour group returned to Perth and arrived late at night. Students were met by their parents and A, in company with his parents, returned home to Busselton. The applicant stayed in Perth overnight with his then girlfriend at his mother's house. On the return of the tour group, no mention or report was made to the Principal of the College or anyone else, of any inappropriate conduct by the applicant or anyone else, on the tour.
- 23 After the return from the Indonesian tour, A's parents said they noticed A becoming withdrawn and he had some problems at school in completing work on time, which they said was unusual. Both spoke to A and he revealed no difficulties to them. However, by the end of Term 1 in 1998, which was A's Year 12, his parents said that he told them he wanted to leave the College. No explanation was provided for this. Despite attempts by his parents to persuade him to the contrary, A left the College and he was enrolled at another secondary school. However, this did not last more than a few weeks. A did not complete his Year 12 and did not sit the TEE examination. He enrolled in a short TAFE course; however, this was not completed.
- 24 Then A developed some significant mental health problems and engaged in alcohol and drug abuse. His parents said A's behaviour became erratic and he ceased participating in many of his prior interests and become socially isolated.

20 years pass – disclosures made to family

- 25 In March 2017, A's parents said they had contact from him and described him as in a distressed state. They said this contact led to A disclosing to them he had been experiencing the return of memories suppressed for many years. During a couple of weeks, A told his parents that while he was on the Indonesian tour, on the last night whilst staying at the hotel, he had been raped by the applicant.
- 26 A's parents said that in discussing the disclosures with him, A did not wish to formally progress the matter through legal avenues. However, with the encouragement of his parents, A sought counselling and support from an organisation providing such services. Apparently, part of the therapy, engaged in by A, was to write out his memories of the events. These disclosures were recorded in a letter from A's parents to Ms Jones at the Catholic Education Office dated 6 February 2019.
- 27 A's sister received a text message from him on or about 18 March 2017 which said that he had been raped by the applicant. She rang him immediately on getting the message. In this conversation, A's sister said he told her in detail what had occurred on the final night in Bali. A and the applicant had to share a room at the hotel, due to how the rooms at the hotel had to be allocated. A told his sister that the applicant took him and other students to a bar and he bought alcohol for them. This included "B52 shots" which A told his sister he recalled specifically. Some of the conversation and comments said to have been made by the applicant made A feel uneasy. His sister said that A told her he then left the applicant's company and re-joined the other students.
- 28 His sister recounted the detail of A's disclosures to her. This described how the applicant had, on their return to the hotel room, sexually assaulted him. He recounted to his sister he was crying after the assault. The applicant had showered and seemed proud of himself. A told his sister of all the blood in the shower and how the applicant told him he had done it before. A also told his sister that the applicant had told him that the applicant had been raped himself by his own brother.
- 29 A's sister said that A told her that to cover things up, the applicant had yelled out of the window of the hotel room to make it sound like an argument had occurred, to account for some commotion in the room earlier. A told her that the applicant had said to A he knew where he lived as he regularly rode his pushbike past his house. This was said to be to threaten him.
- 30 The following morning, A said to his sister he was spoken to by either the other students or Ms Hunter, who said that they had heard a noise coming from the room he and the applicant had shared the previous night. They thought they heard crying. There was some suggestion that the applicant had told the other students that A had tried to hit him. A also told his sister that the applicant had been angry with him on the plane on the way back to Perth. Both A's parents and his sister said that once he had spoken to them about the events on the Indonesian tour, his behaviour improved considerably. They said that he visited them more often and played music again. In October 2018, A died.

Allegations made February 2019

- 31 By letter of 6 February 2019 A's parents wrote to the Catholic Education Office in relation to the disclosures made by their son. On 12 February 2019, a meeting took place between A's parents and Ms Jones and Mr Wong of the Catholic Education Office. Whilst the letter was written on 6 February 2019, it was given to Ms Jones in that meeting. The purpose of the meeting was to discuss the allegations made against the applicant, who was then a Deputy Principal at Lumen Christi College, in relation to conduct which had occurred over 20 years prior. At the same meeting, A's parents also showed to Ms Jones and Mr Wong a copy of typewritten notes found after A's death. These notes were said to be A's description of what occurred on the Indonesian tour, which were made by him in therapeutic sessions with the counselling service he had been receiving help from. The upshot of the meeting was that A's parents asked Ms Jones and Mr Wong what they would do, and they were told that given the seriousness of the allegations, there would have to be an investigation.
- 32 On 14 February 2019 at Lumen Christi College, a meeting took place between the applicant, the Principal of the College Ms Prendergast, Ms Jones and another Catholic Education Office employee, Ms Taylor. The applicant was informed of the allegations and he was given a copy of a letter of the same date, from Ms Sayce, the Executive Director of the Catholic Education Office. Materially, the letter, formal parts omitted, provided:

I write to confirm the matters discussed with you during today's meeting which was attended by Ms Karen Prendergast, Principal of Lumen Christi College, Ms Carmen Jones, Team Leader Employment Relations at Catholic Education Western Australia (CEWA) and Jayne Taylor, Employment Relations Consultant at CEWA.

I confirm that CEWA is in receipt of allegations of a very serious nature regarding your conduct with a former student of St Mary Mackillop College (formerly known as Mackillop Catholic College) in Busselton in 1997. On the basis of the information available, I have decided it is necessary to conduct a formal investigation into the allegations, in accordance with CECWA Policy Unsatisfactory Performance and Misconduct (the Policy). I confirm a copy of the Policy has been provided to you alongside this letter.

Specifically, it alleged that while you were employed at Mackillop Catholic College, you attended a tour to Indonesia with a group of five students and one other supervising staff member in the school holidays between Term 3 and Term 4 of 1997. Following a flight delay that led to the tour group staying in Bali for an additional night, you shared a hotel room with a Year 11 student, [A]. It is alleged that during dinner at the Hardrock Hotel that evening, you bought alcoholic drinks for [A], then back in the hotel room, you:

- a) Climbed naked into A's bed;
- b) Forced yourself on top of A and pushed his face into the pillow;
- c) Said words to the effect of "*I am going to hold you down until you pass out. I am not gay. I am a rapist and an opportunist. I fuck men that are queer*";
- d) Sexually assaulted A by penetrating him anally;

- e) Threatened A with words to the effect of *"Try escape or make any noise and I will knock you out and do it to you again"* and *"If you tell anyone about this, no one will believe you. I know where you live. I swear to God, if you say anything I will kill you and I will kill your parents"*.

If substantiated, these allegations may constitute serious misconduct as set out in the Policy, in breach of:

- Your duty of care obligations to As in your care; and
- Your contract of employment.

This in turn could lead to disciplinary action being taken against you, up to and including the termination of your employment.

- 33 Whilst the letter initially sought a response from the applicant by 21 February 2019, after taking legal advice, and his then solicitor writing to the Catholic Education Office, the applicant was given an extension of time to respond to 14 March 2019. In his letter of response of 14 March 2019 (see Attachment E to the Final Investigation Report, exhibit R5) the applicant repeated his denial of the allegations against him communicated by his then solicitor on 21 February 2019 and said:

I am not sure what I can add. The allegations are heinous and sickening. The words and actions listed in these allegations are inconceivable and did not happen. They are utterly offensive and false. I have never engaged in any conduct which is remotely close to that alleged in your letter. My exemplary record with CEWA since 1990 has been centered on my total commitment to the dignity of the individual and so has my broader life. Everything about these allegations is the antithesis to how I have consistently behaved.

Other relevant information:

- I first became aware of these allegations at our meeting. They are, and remain, extremely distressing to me. My distress has been compounded because, whilst I recognise that in carrying out your investigations there was no obligation to share the information that A (name omitted) was deceased, finding this information out that evening had the effect of compounding my distrust and disbelief in the transparency of the process.
- I generally had positive interactions with A (name omitted) on the Indonesian Trip but had two occasions- once at the beginning of the trip and once on the last morning- to speak to him about smoking cigarettes.
- From the end of 1998 (when he finished Year 12) to March 2017 I had no contact whatever with A (name omitted). In March 2017 I received a series of tweets from A (name omitted). I could not make any sense of the tweets. I did not know what they meant or to what they were referring. I did not respond to the tweets and blocked A (name omitted) from my twitter account. Screen shots of these tweets are attached. Other than the tweets I had no communications or contact with A (name omitted) post Year 12 and limited contact only in Year 12.
- I remained at Mackillop Catholic College through to the end of 1999 before returning to Perth and working at St Norbert College. I applied for the position of Principal of St Mary Mackillop College in 2016 and was interviewed for the role.

The investigation

- 34 The investigation into the allegations is set out in the Final Investigation Report annexed to the witness statement of Ms Jones, the Employment Relations Team Leader for the Catholic Education Office. Those conducting the investigation were Ms Jones, Ms Taylor, an Employee Relations Consultant, and Mr Wong, the Coordinator Child Safe Team for the Catholic Education Office. The investigation started in February and concluded in August 2019. The process adopted by the investigation involved consideration of various policies of the Catholic Education Office including the "Child Protection Policy", the "Child Protection Procedures – Dealing with Allegations of Misconduct and Serious Misconduct against Staff in Catholic Schools" and the "CECWA Policy Unsatisfactory Performance and Misconduct".
- 35 As the investigation raised allegations of serious misconduct against the applicant as a teacher and a Deputy Principal, the latter policy was important. The standard of proof adopted by the Investigators was on the balance of probabilities. Documentary evidence considered by the investigation included the letter of complaint from A's parents and the two typewritten statements (erroneously described as handwritten in the report, which I will refer to as "the Statements") that A's parents found amongst his belongings. Contact was initially made with WA Police concerning the allegations. A copy of an Incident Report from WA Police, recording the contact made by Ms Taylor, was obtained under summons issued by the Registrar. It was tendered as confidential exhibit C1. It records the contact made by Ms Taylor reporting the incident and that WA Police have no jurisdiction over the matter as the victim was deceased and the alleged assault took place overseas. I note the supplementary written submissions made by Mr Mullally on 17 July 2020, in relation this document.
- 36 Several persons were interviewed in connection with the allegations. These included A's parents; the applicant; Ms Hunter; two other students who participated in the Indonesian tour in 1997; A's sister; and one of his close friends. A written record of all the interviews were made, with interviews conducted either in person or by telephone. In the investigation, observations were made in relation to the difficulties associated with the time since the alleged conduct took place; some credibility issues with one or two witnesses; and importantly, that much of the evidence gathered was hearsay.
- 37 The applicant was interviewed on 15 March 2019. He responded to the allegations and answered questions as follows. After asking about the trip before arriving in Bali, amongst others, the applicant told the Investigators that:
- (a) they went straight to Bali for two nights. It was supposed to be one night but ended up being two nights after a flight delay. He had no distinct memories of Bali. He recalled going on a big walk through Kuta but the students did not enjoy it as they got harassed.

- (b) the group went to the airport the next day and waited for several hours before finding out that the flight had been delayed. They then went to a hotel. He was unsure if it was the same hotel they were in the night before but would lean towards them being in the same hotel.
- (c) when asked about the room set up and where everyone was staying he was not sure how many rooms they had, but they were in the same location. He said he believed it was the same room set up on both nights and he could not recall any different set-ups. He said he recalled the hotel being a flat or low-level hotel, and it wasn't a skyscraper.
- (d) he said that when they got back to the hotel from the airport there were still some logistics to arrange in terms of informing families of the delay. He didn't remember the group going anywhere for dinner but that would normally happen. When he was asked if it was a nice hotel the applicant recalled it being a comfortable hotel and it had a beautiful pool.
- (e) when asked whether the group went to dinner at the Hard Rock Hotel and the applicant buying drinks for A he said that he never purchased alcoholic drinks, and certainly not for A. He was asked if he had his own room in the hotel and the applicant stated yes and he did for the whole trip.
- (f) when asked about the rest of the allegations that the applicant sexually assaulted and threatened A the applicant denied them. He said none of that happened. They were not in the same room.
- (g) the applicant was asked if he remembered who else was on the tour and he recalled the five students: A, T, B, S, and another although he was not certain about this student's first name.
- (h) the Investigators referred to the applicant's written response where he did not dispute staying at the Hard Rock Hotel. The applicant said he had no memory of the Hard Rock Hotel as distinct from staying at the hotel. He did not recall having dinner there, but it is likely they had dinner at the hotel they were staying at. They had agreed on the second day/night in Bali just to stay at the hotel as it had not been a pleasant experience on the first day. The hotel was comfortable and had a nice pool.
- (i) he was asked to clarify that he believed they stayed at the same hotel on both nights and he confirmed that he had no memory of two distinct locations. The applicant was asked to clarify that he had no memory of the Hard Rock Hotel to stay, eat or drink at. He stated he did not dispute that they stayed at the Hard Rock Hotel but he could not recall it.
- (j) the applicant was asked to clarify his memory that dinner on the last night was at the hotel restaurant and he stated that his memory was that they were all tired and didn't want to leave the hotel and they still had some logistics to organize.
- (k) he was asked if he had any memories of the trip home to Perth and he stated that he did not recall anything which means it must have been a smooth trip. The applicant was asked if he remembered anything from the plane trip back to Perth such as who sat where and he said he could not recall.
- (l) when he was asked what happened when they reached Perth Airport the applicant said he had no recollection of what was arranged regarding transport from Perth to Busselton as this would have been organized by Ms Hunter. He could not recall anything significant happening at Perth Airport.
- (m) the Investigators returned to the issue of accommodation in Bali. The applicant was asked to clarify what he meant when he used the term "strongly believe" in relation to not sharing a room with A and did this mean there was a chance he did share a room with A? The applicant stated that "no, he was being cautious with language." He added that he has been on many tours, trips and camps and has never shared a room with a student. He said he recalled having to make some phone calls to sort out logistics and did not remember a student being present when he did this. He said he spent a lot of time in the room so would recall if A was there too.
- (n) the Investigators referred to the applicant's written response where he spoke to A twice about smoking on the trip and asked the applicant to explain those interactions? He said he found cigarette butts on a table in the student area outside their rooms. He said they were smoked by A. He said he could not recall whether he found them outside or inside.
- (o) the applicant was asked if he had any recollection of the student rooms and replied he did not recall, only that they were all together. He said there was a shared or common area. He did not recall it being five single rooms, it might have been a house with separate rooms but they did not have a room each. He could not say definitively. When asked on a scale of 0% to 100%, where did he sit with his memory of sharing a room with A he confirmed he was 100% sure he did not share a room with A.
- (p) the Investigators asked the applicant to clarify what happened when he found the students had been smoking? He recalled the students were A and T. He had already spoken to them re smoking cigarettes at the start of the tour. He was sharp with them, recalls trying to use the discussion as a chance to try to get them back on track for the rest of the trip. The applicant said he told A and T he was disappointed and asked them not to spoil what was left of the trip. On the first day of the tour he had physically seen A and T smoking. He had a constructive conversation with them after that and made it clear the trip wouldn't work if they couldn't trust them. He discussed consequences. He said he talked to them both about the breach of trust but tried to focus on getting through the last day.

- (q) when asked to describe his general interactions with A before and after the tour the applicant said he had virtually no interactions with A outside the tour. He typically taught a lot of students, but had no real knowledge of A before the tour. Had a fair bit to do with A in 'S' (Solo). They were positive interactions. He did not recall much about their interactions other than the smoking situation. He did not have much to do with A after the tour either.
- (r) when asked if he ever caught up with A after the tour the applicant said no, it wasn't a close relationship.
- (s) the Investigators asked the applicant to discuss the tweets he received from A and why he was confused by them. The applicant said they came out of nowhere. He does not normally access Twitter a lot and he only saw the messages on two occasions, even though there was a long string of messages. He said they didn't make any sense. They just start off with a string of emoji's then go into words like "I've got a bone to pick with you". He said he found it very unsettling and he did not know what they were about.
- (t) he was asked to clarify whether he knew they were from A and he confirmed that he did because they had his name on them. He said that after he saw the tweets he tried to reflect on the Indonesian trip and whether he might have said something untoward to upset A but he was sure he hadn't. As the messages continued he blocked A. The applicant said he may have mentioned the messages to his wife. He did consider taking it somewhere but he was not sure where he would have taken it. He said if he had his time again he would have reported it. The applicant said that once he had blocked A he could have found another way to get in contact with him but he did not do so.

38 A's parents were interviewed on 12 February 2019. In summary, the interview notes are as follows:

- (a) A's father explained that the document (the Statement) was his son's account of what happened to him and made in a therapeutic intervention through the counselling service (name omitted), where he was told not to use the name of his abuser so he called them/him the Elephant. The Elephant was Don Parnell, current Deputy Principal at Lumen Christi College.
- (b) A's father said he had no doubt that what was outlined in Part 2 of my soul occurred because the boy who went away (to Indonesia) was not the boy who came back. He said that within the first week of A coming back (his wife) said to him that A had changed. Previously he was a happy mischievous boy, and a hero to his sister. But there was an insidious deterioration in his behaviour.
- (c) He said that the event occurred when A was in Year 11, between Term 3 and 4. The applicant was A's English Teacher in Year 12, and for no reason, A left the school in Term One Year 12. Previously he was a straight A student. A's father said that Ms Hunter, A's Indonesian teacher, also noticed a difference in A. They had tried to contact her to inform her of A's death and she was very upset.
- (d) A's father told the Investigators that Ms Hunter clarified the arrangements, and that the return flights from Indonesia were changed. That there were two girls in a room, Ms Hunter and two others perhaps in the other room, and A in a room with the applicant.
- (e) He said that A had sat on this for 20 years. Then he had a revelation and was able to talk about it. A's father said he worked in mental health for 40 years. A talked about leaving his body while this (the assault) happened and looked at pictures on the wall, and after a while he could recall that picture in detail - this is dissociation.
- (f) A's father talked about A having self-destructive behaviours, alcohol, drugs, and low self-esteem. He said that when A revealed this to us (his family) his behaviour with the family greatly improved. A also got back into his music and joined a band which had all waned over the past 10 years. He described it as a textbook response to what had happened to A.
- (g) He claimed that Ms Hunter told him that she recalled the two girls who were also on the tour coming to her and saying there were horrible noises coming from A and the applicant's room, but she did not go to the room. A told them (his parents) that he was crying like a baby on the night, and the girls said that the next day they asked the applicant and A what had happened the night before, and that they had heard a baby crying.
- (h) A's father said they had done some investigating and they knew that the applicant lived around the corner from them at the time of the incident. (when asked how he knew this, he said they had lived in the town for 30 years so they spoke to some people they knew involved in Catholic Education and found out his exact address).
- (i) He confirmed that A told them, his parents, 18 months before he died, and told them it was the applicant, around March 2016. He was 36 years old when the revelation happened. He said that a psychiatrist gave A psychiatric help, and he did not agree with his diagnosis. He treated A for depression and bipolar, and he gave him anti-depressants.
- (j) A's father confirmed the timeline, that A was in Year 11 in 1997, and that the incident happened between Term 3 and Term 4 in the holidays, and that in 1998 A was in Year 12. A's mother said she had asked A at the time if he was alright, she thought/assumed that he may have had a knock back from one of the girls who was on the trip who she thought he liked. His mood became withdrawn, quiet, he used to be everyone's friend, and was an A student in History and Science. He wanted to go to university to study science. Then they started getting notes home from the school saying he wasn't doing his homework. As to A's academic decline, they just thought it was adolescence, they did recall the school calling them about A not doing his work.

- (k) A's father said that A left school at the end of Term 1, Year 12 in 1998. He thinks this was because the applicant was A's English teacher. Around week 4 of Term 1 A turned up at his mate's place and said he wouldn't be going back to school. His parents talked him into going to the State school, mid Term 1, but he did not last long, so he went to TAFE to do a land care course. He also advised that A had done 6 years of guitar lessons with Taj Burrows father, the commitment was there, then he had a total change when he got back from Indonesia.
- (l) When he was asked whether A had considered going to the Police, A's father advised that A chose not to do anything himself with this, he felt he wasn't strong enough, and couldn't handle cross-examination, if there was a court case, and he could not relive it all. He was 36 at the time and he chose not to. And they both supported him in that. If they'd known more at the time they feel they could have done more. They trusted the teachers.
- (m) A's father said that A told him that the applicant spoke about previously doing this before, and that his older brother did it to him and that's why he did it to A. He has confirmed that the applicant has an older brother who is a rugby player.
- (n) He said his memory was that the counselling service went to the Police, to see if the applicant was on the "list". Detectives interviewed them in Busselton, January 2019, around the 3rd, and they indicated that as A was deceased there wasn't anything they could do. He also said that the counselling service told them to contact Catholic Education, the Police said they wouldn't give advice but that as parents, they would contact Catholic Ed too.
- (o) When asked what they would like to see happen he thinks it should be investigated, in an open, honest, and transparent manner, and for us parents to be included in that process.
- (p) A's father gave a document to the Investigators titled "Part 4 of My Soul the next step" and explained this was another piece written by A as part of his treatment at the counselling service. In it, A says he'd like to sit down in a room with "The Elephant" and his parents and his parents would like to meet with the applicant. A's father said that he had thought about confronting the applicant, just waiting after school in the car park and walking up to him and saying, "you've been waiting for me for 20 years haven't you".
- (q) The Investigators asked A's parents for clarity around the documents they had handed to them, titled "Parts 2 and 4". His father said they had found them in A's belongings after he passed away. That was the first time they had read them.
- (r) The Investigators asked A's father about the girls on the trip, and he said they were S and B, both inaugural students of the College like A. At the 20-year reunion, he went to that, spoke to the previous Principal Peter Glasson and Clive Johnson. B was a teacher in Germany. The two other girls, one was Chinese or Vietnamese and her name was J. They said they heard she died in Perth last year. The other girl was T, they have spoken to her and she had nothing to add. She confirmed she remembered the night at the Hard Rock Cafe, swimming in the pool, they live around the corner from her family.
- (s) A's father was asked whether he was sure A was referring to the applicant. He said he was absolutely sure. There were only five students and two teachers on the excursion and it was the applicant.
- (t) He talked about what happened to A in the years after the incident, that they took him to get counselling help, for depression, he went to the GP, a few years after. When they took him to the GP they got him antidepressants. A tried them but they did not agree with him. A's father did not agree with the diagnosis of depression, or the diagnosis of bi-polar, he thinks he had PTSD. In 2010 A was diagnosed with bi-polar and given lithium, he did not like it at first but then it stabilized him so he kept with it.
- (u) He told the Investigators that A's psychiatrist was (name omitted) but for the bi-polar diagnosis he was admitted to Sir Charles Gardner Hospital for three weeks on a voluntary hold. Then he went to see (name omitted). He started out at a Clinic with (name omitted), he left, then (name omitted) took over. They were not frequent visits though. They tried to get A to meet with other people but he didn't go.
- (v) A's father said that A lived with them for most of the time. He moved out in 2010, but he would go and come back, as he couldn't settle. He had insomnia, he would walk the streets and wouldn't take anything for sleeping. He said that in 2016 A rang his parents to tell them he'd gone to the counselling service and about the incident, and they went straight to him, he was around home a lot. They said they would support him 100% in what he wanted to do. They told him the counselling service are the specialists, go to them, and they got some information for parents dealing with it.
- (w) He said that A had his own place for the last two years, they assisted him in getting a place. He had a stable base, and maybe that's why he disclosed at that time. A also had a friend, Scott, who he told about the incident. A didn't tell anyone else, he told no-one from the time of the incident to 2016, and then only told his parents and Scott after that.
- (x) The Investigators asked A's father if A ever tried to contact the applicant and he said he thought he did via Twitter, but he only used emojis, and the tweets had since been removed.

39 Ms Hunter was interviewed by the Investigators on 15 March 2019. In summary, her responses on relevant matters were as follows:

- (a) When asked about the tour group's accommodation generally, about the rooms, Ms Hunter said that the whole trip the applicant and A had their own rooms, so did she. Only the girls shared.

- (b) She also commented that the applicant was always going off having a smoke. The kids knew he was doing that, but he tried to hide it. Ms Hunter said she spoke to him about it, said it was stupid because the kids knew what he was doing, and he started drilling her, talking to her about mentorship, saying you cannot be friends with these kids. Ms Hunter said her counsellor has since told her that this was the applicant grooming her.
- (c) Ms Hunter said they stayed in Solo for a week. They then got the train from Solo to Surabaya, then a boat to Bali, then to Denpasar. When they got to Bali, they stayed overnight. She said they stayed at the Adhi Dharma hotel in Bali, she remembers that was the hotel as that was where police caught the Bali Nine. They had their own rooms. That was the end of the trip. Ms Hunter reconfirmed their trips home, called the Principal Peter Glasson, and used the phone at the hotel. They left for the airport and the parents left from Busselton. They were flying Sempati Air.
- (d) When they got to the airport a western woman came out in a Sempati Air uniform and Ms Hunter realised that there was a problem. The woman said they have had to put 75 people off the flight as the plane was not a 747. Ms Hunter protested and told her the student's parents were on their way to the airport to meet them and they had to get on the flight. She said she "lost her battle" with the Sempati Air woman, and they had to find accommodation. They got a three-bedroom villa.
- (e) The applicant suggested that he and A would share a room. The girls all shared and we had a lounge room. The hotel was called the Kartika Plaza. It was a villa connected to the hotel, and at the front of the hotel near the road so not ideal, but they had no choice. As it was school holidays there were not many places available.
- (f) Ms Hunter said that the next day everything was fine, when they were leaving that Sempati Air woman tried to charge them for the night and Ms Hunter refused and left in the taxi. Ms Hunter said that "Roxanne", the Sempati Air woman, might have been the one who suggested the Kartika Plaza.
- (g) She said after they got home, A started to not hand in his schoolwork. She would see him around the place, walking around during classes, there are some kids who go to a third world country and when they come back they appreciate everything more, not A, which was unusual, then the next year he left school.
- (h) The Investigators asked Ms Hunter about that last night in Bali and what happened. She said she was mainly in the foyer of the hotel, ringing parents, ringing Peter Glasson the Principal, as he had to go to the airport to let the parents know the flight was delayed.
- (i) She was asked to clarify when they got to the villa, how did they divide the rooms? Ms Hunter said she didn't remember, but she knew she and the applicant couldn't be in a room together, or either of them in with the girls, "so there was no other option."
- (j) Ms Hunter was asked whether they ever went to the Hard Rock Cafe. She said that the night before, the last night, the applicant took the students to the Hard Rock Cafe and bought them drinks. She only found this out when she got back to Perth, as one of the girls told her.
- (k) She said on the last night the girls were in the lounge room, up watching the movie "Scream" and A was in the bedroom with the applicant. Ms Hunter asked where A was, and why wasn't he watching the movie with the girls. The girls said he had gone to bed and was in the room with the applicant. Student S said to her why don't you go and knock on the door. Ms Hunter had been in the foyer making phone calls.
- (l) Ms Hunter again made the comment that she never even thought, at the time, but A's disposition changed so much, she always wondering what had happened. When his father contacted her, it was no surprise. She knew something had happened because she knew A so well, from teaching him and the trip to Indonesia. When asked if she ever spoke to A or anyone about his change in behaviour, Ms Hunter said she thinks she spoke to A's mother about him losing languages and levels. She clarified that before the trip, A was handing in his work, but then he became really jittery. Before the trip A was personable and polite. She was asked if he had any friends, and Ms Hunter said he didn't have a group of boys he hung around with, no-one stood out. He was the type of student who was friendly with girls and boys. Ms Hunter said she had an office facing the quadrangle and she would see him wandering around and she would go out and ask him what he was doing.
- (m) Ms Hunter was asked about the setup at the Kartika Plaza Hotel and did they all share a bathroom. She said no that each bedroom had its own ensuite. She said that one night the students were in the pool, drinking cocktails, and that was the first time she caught them drinking cocktails. When asked for clarification of when this occurred, she said that on the first night (the first night in Bali) the students went for a walk with the applicant and they went to the Hard Rock Cafe, and Ms Hunter stayed at the hotel. The second night (in Bali) they got room service. The students were keen on not eating more rice so they all had different things they wanted. She did not remember where they ate. She said that they possibly took food to their rooms.
- (n) She told the Investigators that the girls then watched "Scream", and she did remember the applicant and A going to bed earlier. And S wanted her to knock on the door. Ms Hunter did not know why and didn't knock on the door. She said if they were asleep she did not want to wake them. S did not expand on why, she might have said that she heard banging noises, but did not seem worried. She just said maybe you should go and check on them.
- (o) The Investigators asked Ms Hunter to clarify what happened the night the students were in the pool drinking, and who was in the pool. She said that Jack, their 19-year old Indonesian gopher, was there, he accompanied them from Java, it was inappropriate for unaccompanied females to be walking around. Jack had left, the first night in Bali he was there but then he left. She said all the students were in the pool, she wasn't sure if they were all drinking though. The drinks were coloured, she had thought maybe they were just soft drinks. The applicant and all the kids were in the pool the first night.

- (p) Ms Hunter said she thought on the last morning in Bali the flights were at about 9 or 10 am. She did not remember anything specific about the applicant on the morning of A as she was organizing, and reconfirming flights beforehand. With the experience of the day before she went and did all that. She had to go to the Sempati Air office to reconfirm. It wasn't far from the Kartika Plaza Hotel. She said she left the applicant to organize the students. She did not specifically remember seeing anything that morning. She said she thought they were all sitting together on the flight back to Perth.
- (q) In relation to her conversations with A's father, Ms Hunter said that he did not give her the statements that A wrote. They just spoke over the phone, and she couldn't go to A's funeral. He telephoned her in 2017, then rang back to tell her that A had died. Ms Hunter said A died when he was in his thirties. From the research she has read that's the age people have the courage to come forward. She said she did not have any contact with A after he left school. The last she heard he left school and she always wondered what happened. Ms Hunter said A declined in term 4, stopped handing in work and when she asked him he was very cagey and quiet. He was the opposite of the others who knuckled down. It was an opposite effect, and she wondered what happened to him.
- (r) She said initially she thought the applicant had just touched him up, now she knows it was full rape. Ms Hunter clarified that she got the first impression from the first call from A's father in 2017, and that he disclosed the information regarding A's alleged rape in the more recent telephone call with her.
- (s) Ms Hunter was asked about her contact with A's sister. She said she was in contact with her from 2010 to 2015, as she worked at the chemist in Margaret River. Ms Hunter had spoken to her recently and A's sister had told her that A had drug issues. Ms Hunter said she has no doubt the sexual assault occurred. She knew the applicant was at Lumen Christi College in pastoral care.
- (t) She clarified the differences she observed in A after the trip. She said it was flightiness and he was jittery. Ms Hunter said she noticed, after the event, he was at school dashing about behind poles, avoiding you it was so stark and a total departure from his personality before. She said that for 20 years she had wondered what happened. She said A was not avoiding her.
- (u) Ms Hunter commented that from the way A wrote his statements coupled with her research and experience now, in hindsight she thinks that the applicant was grooming her as well, so that she would not doubt him. She said that if she had any doubts about the applicant at the time she never would have put them in a room together. As to grooming, Ms Hunter said she meant the way the applicant tried to mentor her when she did not want to be mentored.
- (v) She said on their return to Perth Airport her boyfriend picked her up. She spoke to all the parents, and then it was all over. It was the weekend, and then school went back the next week.
- 40 Two students who went on the Indonesian tour were also interviewed by the Investigators. One of them, B, was interviewed by telephone on 4 April 2019 as she was then living in Germany. B confirmed her attendance on the Indonesian tour in 1997 and recalled the names of the other students and that two teachers led the tour group, Ms Hunter and the applicant. She remembered the applicant being present as a chaperone as there was also a male student on the tour. B's recollection of events on the tour was not particularly good, apart from confirming the locations they went to. In relation to the last two nights in Bali, B did recall the flight delay and the need to stay an extra night but could not recollect the hotel location on the last night. She did say she shared a room with another student, S, most of the time and that two of the other girls shared a room. B recollected that on the last two nights the group did stay in a hotel and not in homestay accommodation, as in Java. She did recollect that the hotel had a pool.
- 41 In relation to what occurred on the last two nights of the trip, B did not think the students consumed alcohol but possibly the Indonesian teacher did. She remembered a student smoking in Java. B did not recollect the sleeping arrangements whilst the tour group was in Bali. She said that she could not recall where the teachers slept, did not recall A and the applicant sharing a room, but did recall he did not share a room with the girl students. B did recollect going to the Hard Rock Café, however.
- 42 Another student on the trip, S, was also interviewed on 4 April 2019. S recalled there were five students and two teachers on the tour. S had a limited recollection of the applicant but had some recollection of calling him "Parnie" and she thought he was an English teacher. S appeared to have some recollection of the locations that the tour group visited but not in any detail. She referred to the flight delay on the return trip back to Perth from Bali. She referred to the airline putting the group up in a hotel. She described it as a big hotel with two villas and they were self-contained with kitchens and a bedroom up on the top. S thought that the students had their own rooms and that they were in two villas. She said that she generally roomed with student B for most of the time and she seemed to think there were three bedrooms in each villa so, rooms for the group.
- 43 When she was reminded there were seven people on the trip, five students and two teachers, S was a little less clear. She seemed to think on the final two nights in Bali the group stayed at different hotels. She referred to the first hotel being just rooms. S described there being villas in the second hotel and said she had a photo of three of the girls sitting outside one room which were tiled and recalled tiling and steps up to the rooms. She said that no teacher roomed with her, and if she did share a room it would have been with B or another student, T. She did remember a grand resort with a pool. S said that they had dinner by the pool.
- 44 In relation to the second night, S said she could not recall who shared with who. But she did say as a 16-year old girl she would not have stayed in a room by herself. She also said that the teachers were not around much for those last two nights.
- 45 As to the accommodation arrangements generally, S said that A never shared with girls on the trip. The group did not have their own rooms at other locations so occasionally they did have to share with the teacher. As for the last night, given that the airline had paid for the accommodation, it was what she described as a "bunk in" situation. Whilst S was initially asked whether on the trip, she drank any alcohol and she said no, given that most teenagers around the group in Indonesia were

Muslims and they did not drink. However, S was later asked whether she went to the Hard Rock Café and she said yes, the group did go there and they had karaoke on at the time and she did think that they were drinking alcohol there. S recalled that cocktails came in huge glasses and she assumed that they ordered it. She described it as being dark and loud like a nightclub, but she could not recollect whether the teachers were present.

- 46 When asked whether at some point, she remembered being in a room with the other girl students watching a movie, she said yes, highly likely. She said that when spending time together on the last night the students stayed in, had room service or food in the room and they watched a movie. When asked whether the students had their own bathrooms, S said that each room had its own bathroom. But she could have been sharing with B. S seemed quite sure that they (presumably the airline) gave the group two villas next to each other and that they all shared a bathroom upstairs. She thought maybe A stayed in her villa. Either that, or he was in the other villa, because she recalled him being upstairs and he either stayed there or was looking about and stayed in the other villa. But she could not be sure.
- 47 A friend of A's, Mr Bardowski, was also interviewed by telephone on 12 April 2019. He was a friend of A's and had known him since working together at a petrol station in 2002. He said that in late 2017 or early 2018 (he could not be sure of the timing), A told him what happened on the school trip in Indonesia. He told him what he had gone through and how he had processed it. Mr Bardowski said A told him it had been buried in a dark corner of his mind and he had dreams and was remembering what happened to him. Mr Bardowski confirmed that A had difficulties with drugs and depression and was diagnosed with bipolar and ADD. He was on various medications for these conditions.
- 48 Mr Bardowski's memory was not good, but he said as far as he recollected, A told him that a teacher was in the same room with him on the trip and raped him. A described what had happened near his bed and the noises he heard and after he had been assaulted, the teacher threatened him. Mr Bardowski referred to A telling him he was about 19 and had difficulties with drugs. He also mentioned that he had spoken to A's father at A's funeral, and that Mr Bardowski, in conversation with A's father, informed him of what A had told him. A's father told Mr Bardowski that the Investigators may be in contact with him to speak with him about the matter.

Referral to expert

- 49 In May 2019, the Investigators concluded that based on the materials obtained to that point, it was decided to obtain expert advice on aspects of the investigation. The person identified was Dr Chamarette, a psychologist with extensive experience and qualifications in cases of adult victims of child sexual abuse. Dr Chamarette was asked to advise on the reliability of the Statements that A made. This was also sought given A's history of alcohol and drug abuse, and that A also disclosed in his counselling, another but unrelated sexual assault on him several years after the Indonesian tour in 1997. Dr Chamarette was asked if these factors may have influenced the credibility of A's version of events.
- 50 Dr Chamarette's opinion was also sought on the credibility of the applicant's responses to the allegations. The applicant was afforded the opportunity to meet with Dr Chamarette, but he declined to do so.

Expert report

- 51 In her report to the investigation team, dated 24 July 2019, Dr Chamarette concluded in relation to the Statements made by A that:

There doesn't seem to be any doubt that A believed himself to have been a victim of sexual assault from Mr Don Parnell (even though he had blocked it out for 20 years) and that this appeared to have substantially altered his behaviour, school attendance and adjustment and may have contributed to his alcohol/drug addiction and depression (PTSD). The literature on delayed recall and disclosure of sexual assault in childhood supports the patterns of behaviour and the way in which A brought out the allegations around the incident occurring in 1997.

- 52 As to the therapeutic context in which the Statements were said to have been made, Dr Chamarette observed:

It is understood that [A] wrote two undated statements which are the basis for the allegations of historical child abuse in the course of counselling with (name omitted), a specialist sexual assault/abuse counselling service based in (location omitted). There is no indication of the context in which he provided this. If documents were made in the course of therapy they may contain emotional truth of the experiences being worked through but not necessarily strictly factual or accurate accounts of what occurred and which people may have been involved even though he named Mr Parnell as one of the two people from whom he told his sister that he had experienced sexual assault. There is also uncertainty as to intent of the writing as he had stated to his parents that he did not want to pursue the matters through the Police. [A] told his sister in 2016 that he had forgotten or repressed all memory of the incident in Indonesia for 20 years and also a subsequent unrelated rape experience which he was reminded of by meeting the person involved which had apparently re-activated his memories and recall of both instances. This pattern of receiving a "trigger" which recalls historical material is very frequent and a characteristic of disclosure of historical abuse.

- 53 Overall, as to the Statements, Dr Chamarette concluded that:

In summary, I find A's accounts credible and compelling with regard to his belief that it occurred but would not support his written statements as being totally accurate and factual in all aspects because of the therapeutic context in which they are written as opposed to affidavits or official or formal complaints. I do not regard his drug use as a sufficient explanation that his memories are drug-induced or delusional though I could see the possibility of conflation with other sexual trauma as a question which it is not possible to resolve.

- 54 In terms of considering the applicant's response to the allegations against him, Dr Chamarette said:

Basing my response to this question upon the applicant's denial and shock in the face of the allegations rather than a face to face interview makes clinical judgement difficult. The main challenges to his credibility in response to the allegations revolve around his vagueness or inaccuracy in relation to the events. e.g. 1) his lack of definite memories and his

apparently inaccurate denial that he shared a room with the only other male in the party when it was in a 3 bedroom villa. e.g. 2) his inability to recall that he had then had [A] in his English class and that he had dropped out after 1 term in 1998.

Some people might see his lack of accurate memories or any memories as consistent with his denial that anything untoward occurred. However it can also support the idea that just as [A] blocked out his memory, that Don Parnell may also have been appalled or traumatised by the events and blocked the entire period out of his mind. This is more credible to me than that he is lying as he would not have become so distressed.

- 55 Finally, in terms of two of the three possible options identified by the Investigators in their interim report, that being that "Allegations Substantiated" and "Allegations unable to be substantiated or disproven", Dr Chamarette expressed the following opinion:

"Option One: Allegations Substantiated.

While this is cogently presented in the Preliminary Investigation Report, the comments made above regarding the possibility that while something may have occurred and that [A] sincerely believed and recalled the sexual assault in great detail, the material which presents the evidence is significantly flawed in that it did not come from his intent to pursue the complaint himself but to make it known to his parents and to seek resolution and occurred in a therapeutic context which remains unclear. You may need legal advice as to whether "on the balance of probabilities" this would be considered sufficient in an Australian context.

Option Two: Allegations Unable to be Substantiated or Disproven.

The arguments for this finding are well outlined in the Preliminary Investigation Report and I find them more persuasive than those for substantiation. While I don't find the evidence for substantiation of the allegations convincing neither do I see any strong support for disproving the allegations and providing sufficient grounds for exoneration of the applicant simply on the basis of his strong denial."

- 56 I should note that members of the investigation team suggested, when called to give evidence by the respondent, that Dr Chamarette went outside of her brief when making the above observations in relation to options one and two.

The investigation outcome

- 57 The Final Investigation Report was dated 2 August 2019. The Report summarised the procedure adopted, the allegations, and other matters, including the documents provided and a summary of interviews with witnesses and the referral to Dr Chamarette for an expert opinion. It referred to her conclusions on the two statements from A and the applicant's credibility, but not her comments on the two outcome options canvassed in her report.

- 58 Under the heading "Findings and Outcomes" (parts were redacted dealing with material in the nature of legal advice and options), the following is stated:

8. Findings and Outcomes

As it appears there are no longer any viable lines of enquiry in this investigation process, findings must now be reached on the "balance of probabilities", based on the information currently available.

REDACTED

* It is noted that one element of the allegations as put to Don Parnell is likely incorrect- A's statements indicate that the alleged assault occurred on the final night in Bali after the group had dinner and drinks at the Hardrock Cafe. Witness evidence appears to indicate that the group had dinner at the Hardrock Cafe on the preceding night. This is not considered to be fundamental to the veracity of the allegation of assault but has been taken into consideration.

a. Option One: Allegations Substantiated

The first option is to reach a determination that the allegations are substantiated. This can be justified as the standard of proof for a workplace investigation is "on the balance of probabilities"- this means the determination must be reasonable but is also somewhat subjective. In other words, "is it reasonable to determine based on all the information currently available to us that this incident is likely to have occurred?". While witness evidence was largely unhelpful and in some instances, unreliable, there are a number of factors that would support this as a reasonable determination:

1. The level of detail with which A described the alleged assault is very compelling, and his version of events as outlined in his written statements remained consistent with each person he recounted the incident to including [A's parents], [A's sister] and Scott Bardowski.
2. A's statement outlined the sequence of events during the trip to Indonesia in great detail and by all other accounts, his recollection of the trip is accurate. The question then remains, if he had such a clear and accurate recollection of the trip (when they went, who was there, where they visited, the activities they participated in, the flight delay in Bali etc.) , why would the alleged assault as recounted in his statement be fabricated or incorrect?
3. It could be argued that A had a personal issue with Don Parnell which compelled him to fabricate this allegation against him, however this would make little sense. If A had a personal vendetta against Don Parnell and fabricated the alleged assault for the purpose of tarnishing his reputation , one can only conclude that he would have openly told many others about the alleged assault in an attempt to disparage him long before 2016/2017 when he finally disclosed it to his family.
4. A's "tweets" to Don Parnell in March 2017 demonstrate that he was trying to communicate with Don Parnell about something that happened or they discussed in the past. It remains unclear why A would send these "tweets" to Don Parnell if they had no history other than both attending the trip to Indonesia.

5. A sought counselling support from (name omitted), a service specialising in counselling for victims of sexual abuse. It is highly unlikely that unless the alleged assault did occur (or at the very least A himself truly believed it happened), that he would have sought this type of help.
6. A's pattern of disclosure is consistent with statistics for adult survivors of child sexual abuse in that he disclosed some twenty years after the alleged incident. Further, A was reticent to report the incident to the Police for fear of having to relive it.
7. Witness evidence from Clarissa Hunter and A's family regarding the change in A's behaviour following the trip to Indonesia would further support the likelihood that the alleged assault occurred as the reported change in A's behaviours are consistent with those typically demonstrated by survivors of sexual abuse, including becoming withdrawn and antisocial.
8. Witness evidence from Clarissa Hunter does serve to support the allegation that A and Don shared a hotel room in Bali.
9. Don Parnell has denied the allegations but has failed to provide any compelling evidence to suggest that he did not in fact share a room with A in Bali (i.e. he was unable to say what the hotel sleeping arrangements were on that final night in Bali) and has also demonstrated a tendency to respond dishonestly to questions asked of him. For example, he categorically denied that he purchased or drank alcohol with students on the trip, however it was confirmed by witness evidence that this did in fact occur.
10. Each of the above arguments has been supported by the expert opinion of Christabel Chamarette, although it is noted that A's statements were written in a therapeutic context and cannot be taken as statements of fact.

For the reasons outlined above, it is reasonable to conclude that on the balance of probabilities, the allegations are substantiated. The recommended outcome for Karen Prendergast to consider in this instance would be a finding of serious misconduct and the termination of Don Parnell's employment.

REDACTED

- 59 In terms of recommended steps, the Final Investigation Report refers to Ms Prendergast, the Principal at Lumen Christi College, writing to the applicant informing him of the outcome of the investigation and that the substantiation of the allegations amounts to serious misconduct, warranting summary dismissal. This occurred and the applicant was summarily dismissed for misconduct by letter dated 20 August 2019.

The applicant's challenge and the employer's response

- 60 On behalf of the applicant, several submissions were made as to the attack on the findings reached by the respondent, following the investigation and its outcomes. This was all in the context of the applicant's steadfast denials of the allegations against him.
- 61 First, the applicant maintained there was no direct evidence against him to substantiate the allegations that he sexually assaulted the student. As A had died in October 2018, much of the evidence arising from the investigation, and as given in these proceedings, was hearsay. Some of it was circumstantial. Second, the applicant contended that aspects of the investigation and subsequent findings were flawed. Several significant findings of the investigation were not supported by any evidence, let alone only hearsay evidence, as the submission went. Third, several persons spoken to and interviewed by the Investigators, had, it transpired, been contacted by A's father in the months before the investigation. This included Ms Hunter, the Indonesian teacher who was the school tour organiser. The submission was this evidence had been tainted.
- 62 Fourthly, the applicant submitted in effect that the Investigators had reversed the onus of proof, so it seemed in relation to aspects of the Final Investigation Report, it was for the applicant to disprove the allegations made against him. Fifthly, it was contended that simple facts were not checked by the Investigators. For example, the allegation that the applicant admitted to A in the hotel room he had been sexually assaulted by his older brother. The applicant submitted that he did not have an older brother, and this was never checked with him. However, the evidence in these proceedings was that the applicant did have a younger brother. Also was the allegation that the applicant told A he knew where he lived as he rode his pushbike past their house. The applicant submitted that he did not have a pushbike in 1997 and could not have done what was alleged. It was not denied however, that the applicant lived close to A's parents' house at the material time.
- 63 Sixthly, the applicant contended that allegations about having dinner on the last night at the Hard Rock Café was not supported by any evidence. The assertion that the applicant purchased alcohol for the students was said by the applicant to be based on third-hand hearsay as reported by one female student only, and not any other. Finally, the applicant maintained that the Investigators, as reflected in the Final Investigation Report, did not turn their minds to the appropriate level of proof required, given the seriousness of the allegations. The applicant contended that the civil standard of proof, as discussed and applied by the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336 should have been applied. This meant there would have needed to be a level of certainty on the evidence, consistent with the gravity of the allegations made. This was especially as one of the Investigators, Ms Taylor, is a legal practitioner.
- 64 Overall, the submission was made by the applicant that the investigation and its outcome was hopelessly flawed. The applicant's summary dismissal based upon it was harsh, oppressive, and unfair. There was no valid reason for his dismissal. The applicant also submitted that he cooperated with the investigation and his employer, despite legal advice to the contrary.
- 65 For the respondent it was contended that based on the totality of the evidence, including the oral interviews and documents, the Investigators could come to the conclusion on the balance of probabilities that the applicant's misconduct had been established. The conclusions reached by the Investigators were substantially based on disclosures made by A to his parents and to his sister. This evidence according to the respondent was "consistent and compelling". The submission was also made these conclusions

were consistent with the evidence called in these proceedings from the counsellor, to whom A made the disclosures in his therapy sessions.

- 66 And, the respondent contended, particularly given the Royal Commission into Institutional Responses to Child Sexual Abuse, that the approach to the civil standard of proof set out in *Briginshaw* should not be adopted by the Commission. Rather, given the highly unusual circumstances, the standard of proof should be that applicable to the National Redress Scheme, which is a “reasonable likelihood” threshold.
- 67 The respondent contended that despite the seriousness of the allegations, the respondent conducted as thorough an investigation as it could, absent the police doing so, given that the conduct took place outside of Australia. It was submitted that the applicant was given a fair go in the investigation and that the respondent followed its relevant policies in its investigation of allegations of serious misconduct. It was therefore submitted that the respondent had a valid reason for the dismissal of the applicant and his dismissal was not, in the circumstances, unfair.

Some issues arising and the standard of proof

Briginshaw approach

- 68 Commission proceedings, being civil, the standard of proof to be applied is that applicable to civil proceedings generally, that being on the balance of probabilities. In cases of misconduct, for example involving serious allegations by an employer, depending on the gravity, the civil standard still applies, but consistent with the principles in *Briginshaw*, whereby a higher level of satisfaction of proof is required. As Dixon J said in *Briginshaw* at 361 – 363:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed.

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. 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. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

...

This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues ... But consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.

- 69 This situation most often arises in civil cases where a central issue is whether the facts in question also amount to the commission of a crime. As the learned author in *Cross on Evidence* Australian Edition (loose-leaf) expresses it at par [9050]:

[9050] Civil Standard

Special considerations apply when the question of whether facts amounting to a crime have been proved arises in other proceedings. The difficulty is that the court in those proceedings is placed in a dilemma in which it must abandon either consistency of standard of proof as between two different proceedings relating to the same issue, or abandon it as between two different issues arising in the same proceeding. Such a dilemma can arise in administrative proceedings for the recovery of compensation for criminal injury. It can also arise in an ordinary civil case. Damages are claimed by A for a libel in which B referred to A as a bigamist; the insurers defence to an action on a policy of fire insurance is that the insured was guilty of arson; or the plaintiff simply claims damages for a conspiracy to defraud. Although in England there are some cases supporting the application of the criminal standard, in Australia (and in other English cases) the law is that the civil standard applies, though the gravity of the issues must be borne in mind. That approach is commonly employed where civil proceedings are brought in relationship to contraventions of those parts of the Competition and Consumer Act 2010 (Cth) which can be the subject of criminal prosecutions, and where civil proceedings are brought under that Act for a penalty. The approach does not change the civil standard of proof. It merely reflects the perception that members of the community do not ordinarily engage in serious misconduct. “Some things are inherently a great deal less likely than others. The more likely something is, the more cogent must be the evidence required to persuade the decision maker that it has indeed happened” (citing *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 4 All ER 639.

(Footnotes omitted)

- 70 (See also: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170; *Cubillo v Commonwealth of Australia* (2000) 174 ALR 97).

- 71 It has been held this principle applies in proceedings not subject to the rules of evidence where an allegation of child sexual abuse has been made: *NU v NSW Secretary of Family and Community Services* [2017] NSWCA 221; (2017) 95 NSWLR 577. In *NU*, the issue arising was making protection orders under the *Children and Young Persons Care and Protection Act 1998* (NSW), which are civil proceedings. However, under that legislation, the rules of evidence do not apply, unless the court makes an order that they do. Section 140 of the *Evidence Act 1995* (NSW) refers to the civil standard of proof in civil matters, but this is subject to the nature of the subject and the gravity of the matters alleged (i.e. the *Briginshaw* approach). In deciding the appeal and the standard of proof in *NU*, even though the court at first instance was not bound by the rules of evidence, after setting out s 140, Beazley P (McColl JA and Schmidt J agreeing) said:
50. The parties made no reference to s 140 in their submissions. Whilst proceedings under the Care and Protection Act are civil, the general position is that the rules of evidence do not apply unless the court makes an order that they are to apply to the proceedings or to part thereof: s 93(3). It would follow, in my opinion, that the *Evidence Act*, s 140 would not apply to the assessment of evidence in a legislative framework where the rules of evidence do not apply.
 51. It was suggested that the decision of this Court in *Director General of Community Services; Re Sophie* [2008] NSWCA 250 at [48] was authority that the *Briginshaw* standard applied to a case such as the present and, accordingly, that his Honour was correct in considering that he was required to determine whether the allegations of sexual abuse had been made out on the *Briginshaw* standard.
 52. In *M v M*, the High Court considered that the Family Court should not make a positive finding as to the truth of an allegation of sexual abuse unless satisfied according to the civil standard of proof, having regard to the factors mentioned in *Briginshaw v Briginshaw*, per Dixon J at 362:

“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.”
 53. The *Briginshaw* standard, like the principle in *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8, is often misunderstood. Correctly applied, as the Court stated in *Re Sophie* at [50]:

“... The requirement stated in *Briginshaw v Briginshaw*, that there should be clear and cogent proof of serious allegations, does not change the standard of proof, but merely reflects the perception that members of the community do not ordinarily engage in serious misconduct: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, per Mason CJ, Brennan, Deane and Gaudron JJ; *Palmer v Dolman* [2005] NSWCA 361 at [41]-[47] per Ipp JA (with whom Tobias and Basten JJA agreed).”
 54. I accept that where there is an allegation such as of sexual abuse in circumstances such as arise in this case, it is appropriate and necessary to apply the *Briginshaw* standard, as properly understood. Indeed, it is generally accepted that there is no underlying conceptual difference in the application of the *Briginshaw* standard and the *Evidence Act*, s 140.
- 72 Given the gravity of the allegations in this case, the *Briginshaw* approach should be adopted.

Nature of the evidentiary onus – misconduct cases

- 73 Another matter that arises, is the approach to be taken to assessing the actions of the respondent, as the applicant’s dismissal was summary for misconduct. This is in the context of the overall burden to establish unfairness, still resting on the applicant. In his written opening submissions, the applicant referred to “the evidentiary onus” on the respondent to establish on the evidence, that the alleged sexual assault, providing the basis for the applicant’s summary dismissal, took place. Reliance was placed on a decision of the Full Bench of the Commission in *Winkless v Bell* (1986) 66 WAIG 847. The applicant also submitted that whether the alleged misconduct occurred is a conclusion of fact, and the decisions of the Full Bench in *Minister for Health v Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203 and the Industrial Appeal Court in *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 893 were cited in support.
- 74 The respondent contended that as the police could not investigate the allegations, and it involved a teacher in its school system, the respondent had to investigate under its relevant policies. It did so to the best of its ability and in all the circumstances it was as thorough as it could be. The respondent submitted that this did not and could not be to the standards of the police, given this was an industrial matter.
- 75 Given the disparity in the submissions of the parties on this important point, I directed my Associate to write to the parties on 9 March 2020, after the hearing and the reserving of the Commission’s decision, to raise two questions. Formal parts omitted the letter relevantly provides:

In the written summary of submissions of the applicant it is contended at par 9 that the respondent carries an evidentiary onus of establishing that the conduct of the applicant took place and cites a decision of the Full Bench of the Commission in *Winkless v Bell* (1986) 66 WAIG 847. Furthermore, it is submitted at par 10 of the outline that whether the alleged misconduct of the applicant occurred is a conclusion of fact to be reached by the Commission and the cases cited in support are *Garbett v Midland Brick* [2003] WASCA 36 and *Minister for Health v Drake-Brockman* [2012] WAIRC 00150.

In *Drake-Brockman*, an issue arose on an appeal to the Full Bench as to the Commission’s conclusions at first instance in relation to the evidentiary onus in the case of a summary dismissal for misconduct. The Full Bench observed that there was some disparity in approach to the obligations on an employer in cases such as *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224; *SDA v Jewel Food Stores* (1987) 22 IR 1 and *Sangwin v Imogen Pty Ltd* [1996] IRCA 100 on the one hand and in

Newmont Australia Ltd v The Australian Workers Union, Western Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677 on the other. These matters were discussed by the Full Bench at pars 49 - 62.

In particular, the Full Bench in *Drake-Brockman* appears to have distinguished cases where allegations of dishonesty, personal safety and issues of public interest arise, where the approach in *Bi-Lo* is appropriate, and other factual circumstances, such as where abusive language is used in the workplace, where the approach in *Newmont* is appropriate.

Given this apparent factual distinction drawn by the Full Bench in *Drake-Brockman*, the Senior Commissioner requests further written submissions from the parties on this point. In particular, reference is made to par 59 of the reasons of the Full Bench in *Drake-Brockman* (at p 90 of the appellant's Book), where reference is made to *Sangwin* to factual examples of health care workers or childcare providers, where allegations of serious physical abuse are made and where the approach in *Bi-Lo* would be appropriate.

- 76 In his supplementary written submissions, the applicant contended that the observations by von Doussa J in *Sangwin v Imogen Pty Ltd* [1996] IRCA 100 were obiter and are not binding on the Commission. That in *Drake-Brockman*, the Full Bench commented at par 58 that sometimes it may still be appropriate for the Commission to be satisfied that the misconduct occurred. As to the second aspect of *Drake-Brockman* raised in the letter, that being the nature of the investigation to be conducted, the applicant submitted that even accepting the industrial and employment environment of the investigation, the test of a "full and extensive investigation" requirement was not met. Reliance by the respondent on hearsay evidence, a witness described by the Investigators as "erratic and unreliable" and failing to properly check facts, meant that the investigation was compromised.
- 77 But the respondent submitted that the present case was on all fours with the factual examples postulated in *Sangwin*, and as referred to by the Full Bench in *Drake-Brockman*. The factual scenario postulated in *Sangwin* was a health worker or childcare provider accused of serious physical abuse. There, the court held that the employer, after a sufficient inquiry, if it held an honest belief on reasonable grounds, then it was bound to dismiss the employee as a part of its duty of care. On this basis, the respondent contended that the approach in *Sangwin* and in *Bi-Lo* is appropriate, as endorsed by the Full Bench in *Drake-Brockman*. In this context, the respondent submitted that child sexual abuse is a serious public interest issue.
- 78 In *Drake-Brockman*, an issue for consideration was the divergent approaches between decisions of the Commission in summary dismissal for misconduct cases. An approach, referred to often by the Commission in its decisions, is that of the Full Bench of the South Australian Industrial Relations Commission in *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224. Here, which involved the dismissal of an employee for dishonesty in stealing the employer's property, in considering the approach to adopt in such cases, the Full Bench said at 229 - 230:

An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.

Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

If a fact or facts come to light subsequent to the dismissal which cast a different light on the commission of the alleged misconduct, such fact or facts will not necessarily or automatically render the dismissal harsh, unjust or unreasonable. In our view in such circumstances what will need to be considered is whether the employer, if it had acted reasonably and with all due diligence, could have ascertained those facts before the dismissal occurred.

The Commission is required to objectively assess the subjective actions and beliefs of the employer as at the time of dismissal and not at some subsequent time. See *Gregory v. Philip Morris* 80 A.L.R. 455 at 471; see also *Stearnes v. Myer S.A. Stores* Print No. 9A/1973 at p.5.

Whether the employer will satisfy that objective test will depend upon the facts of each case. The gravity of the alleged offence will dictate the nature and extent of the enquiry which the employer must conduct. An employer must ensure that an employee is given as detailed particulars of the allegations against him/her as is possible, an opportunity to be heard in respect of such allegations, and a chance to bring forward any witnesses he/she may wish to answer those allegations.

- 79 This contrasted with the approach taken by this Commission in cases such as *Newmont Australia Ltd v The Australian Workers Union, Western Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677. In *Newmont*, which was a Full Bench appeal where an employee was dismissed for using abusive language twice, besides poor work performance, O'Dea P said at 679:

At this point it is convenient to recall that in cases of this kind the question to be investigated by the Commissioner is not a question as to the respective legal rights of the employer and employee but whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right. (*Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service & Miscellaneous WA Branch* 65 WAIG 385 (*The Undercliffe Nursing Home Case*)). The termination was exercised in the present case by notice of summary dismissal in such a case there is an obligation upon the employer to show on balance that the misconduct had in fact occurred. That obligation may conveniently be regarded as an evidentiary onus, as distinct from the obligation which

- remains with the party who alleges that there has been oppression injustice or unfair dealing on the part of the employer towards the employee.
- 80 The Full Bench in *Drake-Brockman* reconciled these two approaches having regard to the factual circumstances. At par 61 the Full Bench distinguished *Newmont*, because it involved no "issue of personal safety, protection of an enterprise from dishonesty or any issue going to the public interest". However, at par 58, referred to above in the applicant's submissions, the Full Bench also said:
- "Even when the test in *Bi-Lo* is applied, it may still be appropriate in some matters for the Commission to draw a conclusion as to whether or not misconduct had occurred".
- 81 It is not clear with respect, what the Full Bench was referring to in the above paragraph, as it appears to be inconsistent with the discussion immediately preceding it. Given the analysis by the Full Bench of the authorities, and the basis of the distinction drawn between them, then it seems unless this issue is revisited by the Full Bench on another occasion, it is, depending on the facts, the *Newmont* or the *Bi-Lo* approach, but not a mixture of both. I am of the view that as discussed in *Drake-Brockman*, in situations such as the present, where serious allegations of sexual assault or physical assault are made against an employee, as postulated in *Sangwin*, the approach in *Bi-Lo* is appropriate.
- 82 A related issue is whether there is any conflict between applying the approach to the balance of probabilities test, as applied in *Briginshaw*, and the approach to cases of summary dismissal for misconduct in *Bi-Lo*. I do not consider there is. In *Bi-Lo*, the Full Bench of the South Australian Industrial Relations Commission in the passage set out above at par 81, commented that "the gravity of the alleged offence will dictate the nature and extent of the inquiry which the employer must conduct." Thus, in a case such as the present, where allegations are most serious, the nature and extent of the inquiry needs to reflect this. I see no reason to not apply the approach that those investigating in such a matter, would need to feel an "actual persuasion" of the affirmative conclusion on the material before them, which should not be based on "inexact proofs, indefinite testimony of indirect inferences".
- 83 As to the standards to apply in any investigation for misconduct, the Full Bench in *Drake-Brockman* observed at pars 107 - 109:
- The principles enunciated in *Bi-Lo* and in *Sangwin* establish that a 'full and extensive investigation' by an employer is to be conducted. Such an investigation is one that entails an investigation of relevant matters surrounding the alleged misconduct that is reasonable in the circumstances. An employer is not required to investigate alleged misconduct 'at large'. What should drive an investigation that meets this duty is the gathering of any information that is available that is centrally relevant to whether the employee in question has engaged in conduct that can be characterised as misconduct.
- When conducting an investigation, employers are not required to have the skills of police Investigators or lawyers, but instead should only be expected to operate in a practical way in a commercial and industrial environment: *Schaale v Hoescht Australia Ltd* (1993) 47 IR 249, 252; *Heard v Monash Medical Centre* (1996) 39 AILR ¶3-203 and *Amin v Burswood Resort Casino* (1998) 78 WAIG 2441, 2442.
- Whilst an employer must ensure that an employee is given detailed particulars of the allegations, an opportunity to be heard in respect of the allegations and an opportunity to bring forward any witnesses he or she may wish to answer, an employer is not bound to investigate every avenue that may be suggested to him or her. An employer is only required to act fairly and reasonably in the circumstances and gather relevant information that is critical to the issue whether the alleged conduct occurred.
- 84 The applicant submitted, as noted above, that the investigation undertaken by the respondent did not meet the standard. Whilst not objecting to the proposition that the investigation must be "full and extensive", earlier the applicant maintained this standard was not met. Even though the investigation took place in an employment setting, the applicant contended that the investigation lacked the required care, accuracy, reliability, and integrity.
- 85 The respondent contended this is the appropriate test and that the investigation conducted by the Investigators satisfied it. It submitted that the investigation obtained what information was reasonably available and conducted their inquiries thoroughly and responsibly in the circumstances. Whilst the standards of the police cannot be reasonably expected in a workplace investigation, being undertaken in an employment and commercial environment, an investigation in circumstances such as the present, still needs to satisfy the *Bi-Lo* test of rigor, as I have mentioned above in par 85.

Circumstantial evidence

- 86 Many of the contentions advanced by the parties also involve circumstantial evidence, with the only direct evidence being from the applicant himself and Ms Hunter. Circumstantial evidence is indirect evidence, from which inferences may be drawn as to the existence or non-existence of facts in issue. There is a distinction between criminal and civil proceedings. The principles applicable in civil proceedings were set out by the Court of Appeal of New South Wales in *Palmer v Dolman; Dolman v Palmer* [2005] NSWCA 361. Here Ipp JA (Tobias and Bastian JJA agreeing) said at pars 35-39:
- 35 The relevant principle in regard to civil cases was expressed by the High Court in the case of *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5, in a passage that has been repeated many times. The passage is:

"Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture: (see per

Lord Robson, *Richard Evans & Co Ltd v Astley* [1911] AC 674, at 687). But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as mere conjecture or surmise ...”

36 This statement in *Bradshaw* was adopted in *Luxton v Vines* (1952) 85 CLR 352 at 358; *Holloway v McFeeters* (1956) 94 CLR 470 at 480 to 481; *Jones v Dunkel* (1959) 101 CLR 298 at 304; and *Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155 at 161 and 168.

37 In *Chamberlain v R (No 2)* (1984) 153 CLR 521 Gibbs CJ and Mason J said at 536:

“When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged ...”

38 In *Doney v R* (1990) 171 CLR 207 Deane, Dawson, Toohey, Gaudron and McHugh JJ said at 211 that when a lesser standard of proof than beyond reasonable doubt will suffice, “the existence of other reasonable hypotheses is simply a matter to be taken into account in determining whether the fact in issue should be inferred from the facts proved”.

39 On these authorities, it is sufficient in a civil case that the circumstances raise a more probable inference in favour of what is alleged. (See also *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125).

87 I will adopt and apply the above approaches in determining this matter. Importantly, in these proceedings, the issue to decide is not whether the applicant was guilty of the alleged conduct, in a criminal liability sense. Rather is it whether the respondent, after as proper and as thorough an inquiry as was necessary in the circumstances, had an honest and genuine belief, based upon reasonable grounds, that the misconduct alleged occurred.

The evidence

The applicant

88 The applicant testified that he was not involved in the planning of the Indonesian tour. Ms Hunter, who was then the School's Indonesian teacher, was responsible for this. The applicant said that as there was a male student on the trip, which was A, the School Principal, Mr Glasson, asked him to go too. The purpose of the trip appeared to be to develop the students' Indonesian language skills for their TEE Indonesian language studies.

89 The trip commenced in Yogyakarta. The applicant had no real memory of this first part of the trip. He did recall however, that he caught both A and another student smoking. The group then travelled to Solo for several days. The applicant testified that he and the girl students stayed in a homestay. The girls stayed downstairs and he had a room upstairs. The applicant said he could not recall if A was staying in the same home or had a room in a home next door. Apparently, Ms Hunter was staying elsewhere. On the Solo portion of the trip, it was the applicant's evidence there had been little structure planned for that portion of the trip and this concerned him. He said that Ms Hunter was often not around with the students and was elsewhere with friends. He said he had to make plans for the students' activities.

90 From Solo the tour group travelled to Surabaya by train. Then they caught a plane to Bali. According to the applicant, the group did not travel by boat to Bali as Ms Hunter claimed in her witness statement. Whilst in Bali the group spent three nights and three days, although in his interview with the Investigators, the applicant said that he initially thought the group stayed in Bali for two days. He obtained this information from the Mackillop Catholic College 1997 Yearbook which contained an article about the trip.

91 On the first day the applicant said the group travelled into Kuta either late in the afternoon or the early evening. The experience was not a comfortable one and the group were harassed. That evening the group had dinner at a café which may have been the Hard Rock Café as it had a western feel. It was not the case, according to the applicant, as asserted by Ms Hunter in her witness statement, that she remained at the hotel whilst the applicant and the students went to dinner at the café. He testified that he had never been to Bali previously and found the initial experience at Kuta quite an ordeal. His evidence was that he never would have taken a group of students through this area whilst the trip leader, with experience in the region, remained back at the hotel. The applicant strongly denied that he ever purchased alcohol for students on the trip as referred to in the Final Investigation Report.

92 On the following day, the group were preparing to leave to return to Perth. The applicant testified there was a problem with the airline overbooking their flight home, which required the tour group to stay on for a further night at a hotel. The applicant did not recall the name of the hotel where the group stayed for the final night but accepted that it was the Kartika Plaza Hotel. According to the applicant's best recollection, he believed that the students were accommodated in a three-bedroom villa and he and Ms Hunter had a separate villa each, which would be three villas. The applicant testified that he recollected having to walk a short distance over to see the students and it was easier to speak with the students as a group that way. The applicant strongly denied the assertion made by Ms Hunter in her witness statement, that he said because of the accommodation arrangements, he and A could share a room. The applicant said that he had never done this before, and it would be highly irregular for a teacher to share accommodation with a student.

93 The applicant testified that in Ms Hunter's statement to the Investigators, it was not clarified by her where she slept. The applicant testified that he was cautious when responding to questions by the Investigators in relation to the accommodation arrangements by using the words "strongly believed" and "to the best of my recollection" as he said he was cautious about expressing unequivocally anything that he could not prove. The applicant said he had taken advice from his then lawyer in relation to the difficulties of proving a negative.

94 As to recollections generally, the applicant said that he had had only a vivid recall of matters that were exceptional, given the passage of 22 years since the events. The applicant gave an example of Ms Hunter's assertion that the tour group travelled by boat from Java to Bali rather than by plane, saying that had this occurred it would have been an exceptional event he would

- have remembered. The applicant, when questioned by the Investigators, said that he was ultimately 100% sure that he did not share a room with A because during the interview, he had just discussed making telephone calls from his room and then walking over to where the student accommodation was to speak with them. It was on the next morning that the applicant saw an ashtray and discovered that A and the same other student had been smoking once again.
- 95 When asked in cross-examination about catching both A and the other student smoking twice, and why he did not report this to the Principal, Mr Glasson, on their return from the trip, the applicant testified that having caught them twice, once at the beginning of the trip and once when the trip ended he wanted to end the tour on a good note. The applicant described catching both A and the other student smoking twice was exceptional and that was why he specifically recollected it. This did not ever occur on school trips away that he had participated in previously.
- 96 The applicant gave evidence that on the final evening Ms Hunter telephoned Mr Glasson to inform him of the group's delayed departure and the applicant telephoned his then girlfriend to inform her of the same thing. He said that he had checked with the students that they had also contacted their parents and informed them of the changes. According to the applicant, the group did not leave the hotel on that last night. The applicant believed that the tour group may have had a banquet meal together at the hotel but accepted that the students may have also eaten in their rooms. The applicant said that his recollection and the recollection of the students interviewed by the Investigators was important because it contradicted A's Statements that on the last evening the group went to the Hard Rock Café, which was where he said that the applicant purchased alcoholic drinks for him. The applicant said that he did not go near where the students were staying and did not go into any student's rooms and strongly denied that he shared a room with A. The fact that when he caught A and the other student smoking again, and found the ashtray with cigarette butts in it in a central living area, led him to believe that his view that the students were accommodated in a three-bedroom villa, which would have included a central living area, was correct.
- 97 The applicant had little recollection of the return flight back to Perth. He strongly denied there was any confrontation on the flight as asserted by A in his Statements, to the effect there were harsh words exchanged between he and A including threats and swearing, witnessed by other students and involving a discussion with Ms Hunter. The applicant said if this had occurred it would have been reported back to the School Principal.
- 98 The applicant recollected that A left the School early in Year 12. He said he did not recall him in his English class in the first term of that year and commented that it was not unusual for some students to drop out of Year 12 given the demands of Year 12 study, and that the School planned for about a 10% withdrawal rate in that year.
- 99 After 1998 the applicant testified that he had no contact with A until March 2017. In this respect he said that he received several "tweets" from A. The applicant could not make sense of them and did not know what they meant or to what they were referring. Ultimately the applicant said that he blocked them from his account. He did say that the tweets concerned him but did not respond or do anything about them. He denied that he brushed this contact under the carpet but said he was annoyed to receive them. These tweets were received by the applicant between 23 March 2017 and 1 April 2017. There were several. Some tweets contained messages. A tweet dated 23 March 2017 contained the message *"I have a bone to pick with you"*. A tweet dated 1 April 2017 said, *"Was it something I said"*. Two tweets on 31 March 2017 said, *"I remember what we spoke about"* and second, *"I believe I will be okay. I'm sorry for being so understanding about something you have to go back to"*. A further tweet on 1 April 2017 contained the message *"You fly back to school now, deputy principal Parnell. Fly, fly, fly..."*.
- 100 In relation to the smoking issue on the tour and the tweets received by him many years later, the applicant denied that he deliberately did not report the smoking or receiving the tweets, to shield himself from A's allegations.
- 101 On 14 February 2019, the applicant testified that he was walking past the office of the Principal at Lumen Christi College, Ms Prendergast. He was called into the office and he saw that both Ms Taylor and Ms Jones from the Catholic Education Office were present. He said that he noticed there was a "serious atmosphere" in the room and Ms Taylor described to him the allegations made by A, set out earlier in these reasons. He said she "launched" straight into them with no real introduction. He was given a letter setting them out. The applicant said that he took legal advice but contrary to advice, he replied to the allegations in his letter of 14 March 2019. He also participated in an interview with the Investigators on 15 March 2019. Whilst the applicant was initially critical that his interview with the Investigators was not recorded, rather Ms Jones asked questions and Ms Taylor took notes, he later accepted this did not impact on the interview itself.
- 102 The applicant also said that after his initial interview, he discovered, contrary to the allegations against him, that the Hard Rock Hotel did not exist in 1997 as it was not built until 1998. He contacted the Investigators and informed them of this and changed his statement. And the applicant testified that by about April 2019, he learned the allegations against him had been made public by A's father who had told members of the MacKillop College community and others in the local area about it. And he learned A's father had also spoken to one student (who was not interviewed) and Ms Hunter, and that Ms Hunter had read A's Statements. Whilst the applicant was critical of aspects of the investigation including these matters, he did accept that he knew the allegations against him, maintained his denial and understood that he had a case to answer. Whilst the applicant said he was shocked to learn that A had died in October 2018, and had not been told this by the Investigators, he did accept that it was not strictly material to his denial of the allegations.
- 103 The applicant said that given the circumstances, and the imposition of conditions on his registration by the Teachers Registration Board, he has not sought alternative employment since his dismissal.

Character evidence

- 104 Several character witnesses gave evidence on the applicant's behalf. Their witness statements were tendered by consent and they were not cross-examined. These included Mr Holt, a teacher in the Catholic Education system for 19 years at various schools. He knew the applicant when he was employed as a teacher at Mackillop Catholic College for several years and testified as to the applicant's exemplary performance as a teacher and sports coach. He testified the applicant was highly respected and valued by his students, colleagues, and the parent body. Mr Holt said that he recalled the Indonesian tour in

1997 taking place, and on the tour's return to the College, said he noticed no change in the applicant's behaviour and nor was anything untoward said about what occurred during the trip.

- 105 Mr Holt recalled A as a student at the College. He described him as an average science student and whilst enjoyed the subject, was introverted. He recalled that A enjoyed music and football. Mr Holt mentioned that he ran into A in 2002 when he was working at a Caltex petrol station and spoke with him. Mr Holt said that he seemed anxious, skittish, and somewhat vague. A told him he was not enjoying his work and "was not in a good space". Mr Holt concluded from this discussion that A might have been using drugs.
- 106 Mr Holt also referred to A's father and recited an incident in relation to a school football match when A had missed the transport to the game and Mr Holt was confronted by A's father, who became aggressive and verging on physical with him, as A had been left behind. Mr Holt described the allegations against the applicant as "tumultuous" and that he was flabbergasted that such allegations had been made against the applicant who he regarded as a long serving, effective and loyal educator in the catholic system, whose integrity was beyond reproach.
- 107 Ms Kim O'Brien is another teacher who also worked with the applicant at Mackillop Catholic College in Busselton from 1997 to 1999 and shared an office with him. Ms O'Brien said that she always found the applicant a dedicated teacher who was hard working and committed. Ms O'Brien recollected the Indonesian trip and noticed no change in the applicant's temperament or behaviour on his return, nor any tension between the applicant and A. Both Ms O'Brien and the applicant were co-ordinators of pastoral care at the school. Ms O'Brien said that the applicant was very engaged in this role assisting students and parents. In 1999, Ms O'Brien said that the applicant lived close by to her and her husband and they got to know him well and socialised.
- 108 Mr Greaves is a qualified teacher and works for the Clontarf Foundation. Previously between 1995 and 1999 Mr Greaves was a teacher at Mackillop Catholic College in Busselton. He said that he got to know the applicant well as a part of the English department at the school. Mr Greaves said that he found the applicant to be diligent, dedicated and a professional teacher and was always loyal to the values and principles of the school and to his fellow staff members.
- 109 Mr Greaves recollected A as a student at the school. He was in some of his classes whilst he was a teacher there. Mr Greaves described A as a quiet student, affable and quite intelligent. He also described him as "a little quirky" and said that A had a different group of friends all similar. Mr Greaves said that A did lack some confidence.
- 110 Mr Greaves recollected the Indonesian tour taking place, involving the applicant, Ms Hunter and a group of Indonesian language students. On the return of the tour group, Mr Greaves said that he had not, to the best of his recollection, noticed any change in A's behaviour or academic performance at school. Mr Greaves said that the College had a good system of pastoral care and the staff knew of problems with students. He said that had A displayed to him any noticeable change, he would have contacted A's parents. Mr Greaves also said that he knew A's father quite well, as A's father was involved in school activities as a parent. He described A's father as approachable and Mr Greaves was confident that if there had been difficulties experienced by A, then his father would have brought them to his attention but nothing was ever said to him while he was a teacher at the College.
- 111 Mr Greaves said that he recalled meeting A's father at a social function in 2014. He recollected A's father telling him that A's time at the College was not a good one and that he was dealing with his "demons" and was having difficulties, which A's father did not elaborate upon. A's father referred to A's life as being "messed up" and Mr Greaves had the impression from his conversation with A's father that A may have been involved with drugs.
- 112 Finally, is the character evidence of Mr Melton. Mr Melton has been a Principal for 25 years and a Deputy Principal for 14 years at Catholic schools in the State. Mr Melton referred to the applicant's employment as Deputy Principal (Pastoral Care) at Seton Catholic College from 2010 where Mr Melton worked as the applicant's principal for five years. Mr Melton said he worked closely with the applicant and mentioned the applicant's sound educational beliefs based upon respecting the worth and integrity of everyone. He said that the applicant commanded the respect of students and staff and had a strong sense of social justice.
- 113 In 2015 on Mr Melton's encouragement the applicant moved to the position of Deputy Principal (Curriculum) as he considered the applicant to be "Principal material" but needed to broaden his experience. Besides his schoolwork, Mr Melton referred to the applicant's involvement in school camps and retreats including student trips to schools in Thailand. Mr Melton said these trips were always highly sought after and regarded by students and were designed to encourage attitudes of volunteering and to heighten an awareness of world poverty.
- 114 Mr Melton said that he placed trust in the applicant often and has only encountered honesty and commitment. He described the applicant as very much a family man who treats his teaching as a vocation and one who sets himself the highest of standards.

Ms Parnell

- 115 As I have said earlier in these reasons, it was a central plank of the applicant's case that the investigation by CEWA was flawed. Part of the attack on the investigation came from the applicant. Some came from evidence given by the applicant's wife, whose evidence was admitted over the objection of the respondent. Ms Parnell is a solicitor with some expertise in sexual abuse cases. Although plainly not a disinterested witness, on this basis I was prepared to receive the evidence on a limited footing, subject to some of Ms Parnell's witness statement being struck out on other grounds.
- 116 Ms Parnell gave some general character evidence on behalf of the applicant, to whom she has been married since December 2009. Ms Parnell and the applicant separated in January 2019. Ms Parnell gave evidence of the applicant's commitment to his work as a teacher and his contribution to school communities where he worked.
- 117 Ms Parnell works as a researcher at the University of Western Australia Law School. She has worked in private practice as a solicitor dealing with Redress WA claims and criminal injuries compensation claims and between January 2010 and January 2011, as a legal officer for the Department of Communities Redress Scheme. In this position, Ms Parnell assessed redress

scheme applications; reviewing evidence; historical and criminal records; medical records; and accounts of sexual abuse survivors from overseas including studying literature in relation to sexual abuse offending, especially that committed in an institutional or residential care setting.

- 118 Having reviewed the Final Investigation Report, Ms Parnell was critical of it in relation to several matters, including a lack of basic fact checking. These criticisms included obtaining relevant documentary evidence such as A's death certificate; any coroner's report following his death; his medical records especially psychiatric treatment history; relevant records from the counselling service that A attended in 2017; and copies of his academic records at school in relation to his school performance both before and after the Indonesian tour.
- 119 Criticism was also made by Ms Parnell of the failure by the Investigators to speak to any persons as to the applicant's character and that the Investigators' observations as to the applicant's honesty were without foundation. Ms Parnell criticised the Investigators' reliance on statements from Ms Hunter, who was described in the Final Investigation Report as erratic and not coherent, along with placing any weight on statements by A's close friend, Mr Bardowski, with a history of drug abuse and who was also described by the Investigators in the Final Investigation Report as "somewhat erratic... and admitted his memory was poor" (exhibit R5 p 11). And Ms Parnell observed that the expert retained by CEWA to advise on A's Statements was not appropriately qualified in forensic psychology skills nor relevant expertise in assessing the impact of drug-induced psychosis or delusional or historic thinking. Ms Parnell was also highly critical of the Investigators' apparent disregard of Dr Chamarette's opinion as to the lack of substantiation of the allegations, based on the material she had been provided by the Investigators.

Mr Glasson

- 120 Mr Glasson was the Principal at MacKillop College at the time of the trip to Indonesia. He was the Principal from August 1993 until December 1998. He referred to Ms Hunter who initiated the trip, as being then inexperienced and was pleased that the applicant also went, as a senior male staff member. Mr Glasson said that he would not have approved of a teacher sharing accommodation with a student and was not asked to give such approval on the Indonesian trip. He said he did not receive any reports of problems with the applicant's behaviour while on the trip.
- 121 Mr Glasson also recalled speaking to A's father at a school reunion at the end of 2018. He mentioned to Mr Glasson that A's life had "spiralled out of control" and he subsequently died. A's father referred to "an incident" but did not elaborate and Mr Glasson did not ask about it. Mr Glasson said he did not recall A's parents bringing to his attention a decline in A's school performance. Mr Glasson also testified he had been shocked when heard of the allegations against the applicant but had not spoken to him at all and described him as a highly respected staff member. Mr Glasson also said that whilst on the trip, if a student was caught smoking this could be regarded as a disciplinary matter, and if there was consistent behaviour like that, he would expect a teacher to report it to him.

Ms Hunter

- 122 Ms Hunter was the school Indonesian teacher at Mackillop Catholic College in Busselton. She was the sole organiser of the 1997 school trip to Indonesia which involved five students, with A being the only male student. As he was the only male student on the trip, a male teacher had to travel with the group. Ms Hunter recalled A as one of her Indonesian students. She said as far as her recollection goes, at the time of the trip in 1997 she described him as a "capable, hard-working student who had good results in his Indonesian studies with me".
- 123 Ms Hunter said that the Indonesian trip went well until the last day. The flight home to Perth had been overbooked by the airline and the group had to stay an extra night at a hotel in Bali. She said that she protested with the airline that the students had to get back to Perth as parents were travelling to meet them at the airport. Ms Hunter described the Sempati airline person as a western woman named "Roxanne". She told the Investigators she "lost the battle" with the airline and the group had to stay an extra night. Ms Hunter recalled the hotel being the Kartika Plaza. As it was the school holidays, this was the only accommodation available. The hotel was close to the airport.
- 124 Ms Hunter testified that when the group arrived at the hotel, she initially stayed in her room to telephone parents to let them know of the delay. She testified that while she was busy contacting parents, the applicant took the students out to the Hard Rock Café. Although later in cross-examination she was unsure whether this took place on the first or second night. She informed the Investigators she had been told by one student when they got back to Perth, she thought S, that the applicant had bought the students drinks at the café. Ms Hunter said that the Kartika Plaza accommodation which the airline had arranged, presented a problem given the number of rooms allocated. Ms Hunter said that it was Sempati Air that had arranged the group's accommodation. Each ticket holder got accommodation and not separate rooms.
- 125 She testified that it was the provision of a bed for the night for each ticket holder which meant she had to make an executive decision about who was going into what room in the three-bedroom villa. The applicant offered to share a room with A because they were the two males. She stayed in a room with other girls and she thought two of the other girls stayed in the third room. Ms Hunter said she could not share a room with the applicant and nor could he with the girl students on the trip. Her evidence was this problem was solved when the applicant said that he would share a room with A. Ms Hunter said once the room allocation was sorted out the others went out for the evening. When cross-examined about this, Ms Hunter said that either the airline or she got the group a three-bedroom villa. The airline paid for a bed for each person on the trip. She had to work out room allocations and it was her decision to put the applicant and A in the same room. It was Ms Hunter's evidence this was not planned or approved by the School Principal, as the change of arrangements forced this situation on the group. Ms Hunter was emphatic this was the arrangement and took umbrage when it was suggested to her that she was wrong, and that the applicant had said this did not occur.
- 126 Ms Hunter testified that later that evening she spoke to the girl students watching a movie in their hotel villa lounge. Neither the applicant nor A were present. She was told by the girls they had gone to bed. She recalled that one student asked her to knock on the door where the applicant and A were staying, but she did not do so and did not ask why. She said that her

decision resulted in the applicant and A sharing a room in the villa. Ms Hunter was cross-examined about A's Statements. She said that she had not seen or read them before her interview with the Investigators but had known the Statements had been made. She said that she had seen the Statements only about two weeks before the hearing. Her evidence was that when she read the Statements, and how detailed they were about what the group had done on the tour, while she may have had doubts before, having read the Statements, it gave her no doubt about the allegations made by A.

127 As to the return trip to Perth, Ms Hunter testified there were strong words spoken between the applicant and A. She said she could not hear what was said as she was sitting in a window seat on the plane not close to where A was sitting. She testified that she felt manipulated by the applicant as he had arranged for the return flight seating so she could not be close to A and speak with him. Whilst she said that she could not hear what was said between the two, she said it did not look comfortable. Ms Hunter said that she did ask what was going on between the two during the flight but received no response and the matter did not seem to go any further. Ms Hunter was emphatic this altercation did occur on the return flight however she did not tell the Principal, Mr Glasson, about it. She also said that the other students had also seen it. When it was put to her in cross-examination why she had not mentioned this to the Investigators, she said they did not question her about it.

128 Finally, Ms Hunter testified that after the return from the Indonesian tour, she noticed a significant change in A's behavior. He started not handing in work and socially and academically he deteriorated. He started to not go to his classes. Ms Hunter did speak to him about this and she said she did not get an answer. She reported this to the Principal. She knew A left the College soon after but did not know why.

A's mother

129 A's mother gave evidence. She described him in late 1997 as a good student. She said that he was receiving "A" marks in science and history and wanted to go to university to study science. She referred to the Indonesian tour in 1997 and that all seemed to go well.

130 However, she testified that she saw a change in A's behaviour on his return after the end of the tour. She described him as becoming more withdrawn and spent time in his room at home. She said that she spoke with her husband about this and they also received notes from school, that A was not completing assignments. Both she and her husband thought this was just normal adolescent behaviour.

131 By Term 1 1998, A's mother said his behaviour had become worse. He told them he wanted to leave the College. Both she and her husband discussed this with A. The applicant was A's English teacher in the first term of 1998. A left the College and went straight to Busselton Senior High School. However, A stayed only for a few weeks at his new school and did not complete Year 12. She said that he started a short TAFE course, but she was not sure if he finished it.

132 After A left school, his mother described his psychological problems with depression, anxiety, and insomnia. He also experienced alcohol and substance abuse. A's mother described A's drug and alcohol as causing strain in his relationship with his family.

133 Moving forward to March 2017, specifically 17 March, A's mother said that he telephoned his parents in an agitated state. She said that he told them of the assault on him by the applicant. She described visiting A at his house the next day on 18 March. Over regular subsequent visits A's mother said that he described to them the details of the sexual assault. She said that when he had described to them the detail of the sexual assault, he told them he did not want to take the matter up with the authorities and she said that as an adult they had to respect his wishes. However, when A died in October 2018, they felt the need to pursue the matter to honour their son. A's mother said that of course had they known at the time of the incident they would have pursued it. She described the relationship between A and his family as improving after he had told them about the sexual assault.

134 After A's death, she said that they found the typewritten notes with A's handwriting on it amongst his things. She assumed this was done by the counselling service, as it was not something that he would have done alone.

A's father

135 A's father also gave evidence. He also described A as a good student before the Indonesian trip. However, once he had returned, he noticed a change in A's demeanour and he became more withdrawn and would not tell him or his wife why. Both he and his wife spoke to A. They knew there was a problem but he would not give them any reasons. In cross-examination A's father said that he did not raise these issues with the School. He said that he did notice that A's performance in assignments had slipped. A's father said that subsequently, A experienced psychological problems, and began self-medicating.

136 A's father described the contact A made with himself and his wife in March 2017. He described the telephone call where A rang in a distressed state. This was set out in the letter from A's parents to CEWA dated 6 February 2019, raising the complaint which led to the subsequent investigation. The letter, signed by both of A's parents, sets out in their words their story and formal parts omitted, it is:

I have chosen to place in writing the allegations, made by our son A, we wish to discuss with you at our meeting, not to replace official minutes of the meeting, but more so we can take our time to ensure we provide you with the full extent of the information we have on this issue.

Our son, A, was a student at McKillop[sic] Catholic College in Busselton in 1997 when his Indonesian language class was offered the opportunity to accompany their Indonesian language teacher, Chrissy Hunter, on a class excursion to Indonesia during the break between third and fourth term. We were happy that we were in the position to allow our son this wonderful opportunity to consolidate a subject that he obviously enjoyed.

A was the only male student in the group of five students to accompany Miss Hunter on that trip. We were later informed that Catholic Education policy dictated that a male teacher would have to and ultimately did, accompany the group due to A's presence as the sole male student in the group.

Throughout the stay in Indonesia, the students stayed in host family homes, and the feedback we had from A was all positive.

The itinerary of the trip included a flight to Bali to catch a flight from Denpasar to Perth. The flight to Perth on Merpati Airlines was cancelled, and the Airlines arranged overnight hotel accommodation for the group in Kuta, Bali, that saw two of the girls in a room by themselves, we cannot confirm, but we think the other two girls were in a room with Miss Hunter, but may have been in a separate room, and A in a room with the accompanying male teacher, Don Parnell.

The group arrived in Perth twenty-four hours later than initially expected.

Within the first week of A being home, [my wife] discussed with me her observation that something was wrong with A, she had noticed he was quieter and tended to withdraw to his room. This needs to be taken in the context of prior to this, A had been a very happy, jovial and mischievous young man. After discussing this with me, she approached A in his room and asked him if he was okay, was there anything troubling him. Despite A's response in the negative, we knew something was wrong, something had changed.

It is both noticeable and significant that this was the clear starting point in the deterioration in A's behaviour and attitude, initially at an insidious pace, but later at a rather rapid pace.

[My wife] and I saw our "A" grade student lose interest in schooling to the point he left McKillop and transferred to the local high school mid first term of his year 12, ultimately leaving the high school by the end of first term.

In later contact with Chrissy Hunter, she informed us she too had noticed the marked deterioration in A's behaviour and attitude following their return from Indonesia.

A's risk taking and self-destructive behaviours, self-medicating, insomnia, evidence of a poor self-esteem, restlessness and generally erratic behaviour became increasingly evident and it is an understatement that it had a massively detrimental impact on his life.

Approximately eighteen months prior to his death, A rang us in an agitated and distressed state, and revealed he had been experiencing the return of memories he had suppressed for the past twenty years. Over the course of the next two to three weeks, A's recall became more detailed, revealing intricate details of the event. He described to me reacting to the event as it was occurring by removing himself from his own body and what was happening to it at the time, and closely studying the painting on the wall of the hotel room, a phenomenon that is known in Psychiatric terminology as Disassociation. A described that painting to me in minute detail.

The Perpetrator of that alleged anal rape of our son was the male teacher accompanying the group, Don Parnell, who I believe currently holds the position of Deputy Principal, (Learning and Teaching), at Lumen Christi College in Martin.

With our encouragement, A sought and received counselling from the (name omitted), and as one of the therapeutic interventions employed, A was encouraged to write out his memories of that event. By now you will have read that personal account.

As A was thirty-six years of age when he revealed his allegation to both himself and us, his parents, we informed him that due to his age he had to be the driver of how he responded to this issue, he had to make the ultimate decision as to how he was going to deal with this issue, did he wish to pursue legal avenues etc, but whatever he chose to do, he would have our full support. A chose not to pursue this issue through legal avenues, stating clearly that he didn't consider that he had the strength to withstand the inevitable grilling/cross examination the legal process would entail, and he definitely did not wish to have to re-live the events in the public forum of a courthouse. He stated he did not wish to experience the scenario of "Yes you did", "No I didn't", "Yes you did", etc.

There are several specific issues that A refers to in his writings on the alleged event, or that he had discussed with us, that in our opinion add weight and credibility to his allegation, and that we have already discussed with detectives who have interviewed us recently. We feel these specific points also need to be drawn to your attention.

Firstly, at the time we phoned Chrissy Hunter to inform her of A's death, she was in tears as she stated to us she was recollecting that on the night of the alleged rape of A, two of the girls approaching her expressing concern about the noise they were hearing emanating from the room where A and Don Parnell were staying, and asking her to go to that room, knock on the door and find out what was happening. She did not do this.

Secondly, A described to us that following the alleged rape, he was "Crying like a baby", and how Don Parnell had responded to that in a very disparaging manner. In the same phone conversation with Chrissy Hunter referred to above, Chrissy Hunter also revealed recollecting the two girls who may have been sharing the room with her, but definitely the same two girls who had approached her the evening before requesting she investigate the noises referred to above, speaking to A and Don Parnell the next morning, and her overhearing the girls asking A and Don Parnell, "What was that noise coming from your room last night, at one stage it sounded like a baby crying?" You will have noted that A refers to this same conversation in his writing therapy for (name omitted).

Thirdly, you will have noted A's reference to the thinly veiled threats he alleges Don Parnell levelled against him, "I know where you live ", etc. We have subsequently, since A's death, discovered that Don Parnell had lived just around the corner from us in Busselton when he first moved to Busselton to teach. I can recall A elaborating on this point and claiming that Don Parnell had told him, at the time of the alleged incident, that he used to ride his bike past our house on his way to school and had seen us, A's parents, at the front of our house, and that is how he knew where we lived. I reiterate that no-one in our family knew this information prior to A recalling it twenty years after being informed of this fact, and this information was not confirmed until after A's death.

Fourthly, in another separate conversation with me concerning his allegations, A stated to me that Don Parnell had informed him at the time of the alleged incident, that his older brother had sexually molested him when they were younger, and that was a significant reason why he now sexually assaulted younger boys. A also stated Don Parnell had clearly stated, "I've done this before". Again, the information that Don Parnell had an older brother, was recalled by A twenty years after having been informed of it, and it was only investigated and confirmed subsequent to A's death.

Following the revelation of his allegations to both himself and us, (A's mother) and I and others close to A, can categorically attest to the fact that A's behaviour and attitude began to improve, his relationship with us significantly improved, he was more settled within himself, he wanted and began to play a bigger part in his sister's and nephew's lives, he re-invigorated his passion for music and his guitar playing, he had joined a band as the lead guitarist and was rehearsing twice weekly with resultant gigs at local eateries and wineries occurring.

This somewhat dramatic change and improvement in behaviour is a well-documented response to the revelation of, and dealing with, the emergence of suppressed memories such as sexual assault. In our opinion this is a further example of the non-specific type of evidence which has led us to give credence to the allegations A has levelled against Don Parnell.

137 A's father also described finding the typewritten Statements in A's things after he died. These Statements, running to some five typewritten pages, were headed "Part 2 of my soul: start" and a second, "Part 4 of my soul: The Next Step". A copy of the Statements, which also contained some handwritten annotations identified by A's parents as his handwriting, were annexed to the witness statement of Ms Jones, the Employment Relations Team Leader at CEWA. As these are the only words expressed by A in relation to the incident in evidence, and as much other evidence has been given in these proceedings as to their content, I propose to set out the passages of these Statements. Whilst they may be distressing to some readers, they provide some insight into A's description given around the time that the disclosures were made. In the copy in evidence, there are letters missing at the beginning of many of these sentences on the first page, due it seems to the margin being cut off on the original document. The documents read:

rt 2 of my soul:

tart

is all very raw.

ave remembered so much, too much.

ave had to put myself together again.

nd by no means am I together .

t here goes.

was 16 years old

was in Indonesia.

chool trip for a cultural Indonesian class.

group of 7 people.

here were 4 girls - were all in the same year.

y Indonesian teacher (female).

nd me. I was the only guy in my class to go.

he group was also accompanied by my English teacher (male) - who wasn't part of the Indo class but there to

ervise, basically.

e did more than supervise.

or ease of getting this on paper let's just call him "Elephant".

fter two weeks of a great holiday in Indo we finished up in Bali for our flight home.

pon trying to board, check-in informed us the flight had been overbooked.

We would have to wait until a flight the next day. The airline covered our accommodation expenses and we

ettled into a hotel close to the airport.

My indo teacher shared a triple with 2 girls, the other 2 shared a twin and I shared a twin room with Elephant.

We all had dinner at the Hard Rock Cafe that evening.

fter dinner, whilst the .girls were downstairs dancing, the Elephant bought me a few beers and shots like B52s. He shouldn't have done this but ... he said it was the end of the trip, I'll buy you a few drinks. Innocent enough.

At one stage he looked across at me and says you know you look cute in this light?

Uncomfortable! Had I heard correctly? Loud music blared.

asked him what did you just say?

He didn't answer me and I asked him again.

o which he turned and said you heard me.

The answer that I didn't want to hear and immediately responded with what do you mean by that? Thinking he was joking.

He turned it back on me and became confrontational slyly saying to me I knew exactly what he was talking about. thought fuck this dude. I walked off. I had a really bad feeling.

He yelled after me, ah yeah leave me all by myself.

sat on my own just needing to have my own space. I didn't know what to do and all sorts of things were going
[Handwritten notes] *I wasn't about to run up to the chicks + start into a conversation about something that could have just been the booze talking.*

We left in a group back to the hotel and I put it out of my mind. I ignored what had happened because I wanted to be just part of the group again.

Our group went to the pool and I remember just wanting to be together with everyone else. We swam around for an hour and everything was cool because it was back to normal and I totally dismissed what had happened putting it down to me misunderstanding. A teenager just wanting inclusion and safety in the group activities. It was a wicked pool, it had been a great holiday, I was focusing on ending everything on a good note.

Once up in our twin room I remember drying myself and Elephant telling me that he wanted the bed closest to the door. He reckoned he wanted to sleep in his jocks and he wanted to face away towards the door.

I was putting pants on and he commented you're not wearing pants are you? It's boiling in here you're sweating like a pig. The air con had been off the whole evening and it was indeed stifling. He reassured me he was facing towards the door and made me feel almost silly then added in a joking way I'm not queer You didn't take me seriously at the bar did ya?
[Handwritten note] *I was On edge.*

He knew I was apprehensive. Nonetheless he made me feel that there was no big deal and I was silly. I relaxed and let my guard down thinking I am a fucking idiot he was joking. **[Handwritten note]** *I had a gut feeling at the bar.*

Not sure how long I had been dozing off or sleeping before startled awake by a noise. It sounded like he was taking his jocks off ... and then he was doing other things that my brain was struggling to compute or believe. I didn't want to face him or tum around or move at all. My head was swirling.

Without warning he had suddenly crossed over to my bed and was right up against me spooning me. I totally froze. I was petrified. I remember being frightened was my initial reaction. The next was trying to calculate what to do. I tried to get off the side of the bed away from him. I could not escape and he forced himself on top of me, forcing my face into the pillow aggressively pinning me down with all his body weight.

I am making a noise but hardly any sound is coming out. I am struggling to breath. Chocking in terror. He takes this opportunity to tell me what is going to happen to me.

Listen, I am going to hold you down until you pass out he says into my ear. I am not gay. I am a rapist and an opportunist. I fuck men that are queer (or I reckon are queer).

I am going to hold you down until you pass out is the last thing I can remember and a whole lot of red. I felt like I was suddenly out of my body. Blacking out. Hyperventilating. Blocking it. Coming to. Blanking out again ...

When I became conscious again, reality hit. I lost consciousness again. I didn't know what the fuck was happening, I was in pain, I felt like I couldn't breathe. There was nothing that I could do. I couldn't fight back. I was shaking like a leaf. Someone could have thrown a live grenade next to me and I would not have been able to do anything about it.

He went to shower and returned whistling. Like he was a stud.

Out he came and dragged me out of bed saying get in there.

Pushing me into the shower telling me to clean myself up. You're not coming out until you have cleaned yourself up. I was hunched in the comer with him looking at me from the open shower door, tears streaming down my face.

[Handwritten note] *Crying but no Sound. Screaming but no sound.*

The thing that terrified me - the worst part - was the blood.

Blood everywhere.

The shower floor filled with red. I thought I was going to die. I thought my insides were coming out and all I could see was red red.]. **[Handwritten note]** *I was pissing blood in terror screaming but no sound.*

He instructed coolly clean all that up. Piss all of that out. Make sure you do it properly.

He showed panic suddenly - he said he had never seen this much blood when he'd done it before. He asked me if I was okay. Was I going to be alright?

He was clearly worried and said I needed to pull myself together. If I needed medical help he would be the one to deal with it and he made this very clear. He changed tactics. He said I can help you if you need me to. Softer voice.

Completely setting up the next step - my exiting the shower and being told to get changed.

He did something unpredictable again - walked over to the flyscreen gap above the toilet window - and yelled out loudly something to the effect of

Well A I hope you learnt your lesson!

You have a few drinks and take a swipe at me ...

Well I had to teach you a lesson!

His words echoed down the hallway.

Then more softly ... further talking to me. Try and escape or make any noise I will knock you out and do it to you again.

[Handwritten note] *I managed to scream Fuck You! He attacked me again + said Sorry I did that to you A, you're a good kid, I just can't escape what I*

The following morning before leaving to the airport he reminded me again where I stood. He spoke softly If you say anything about this no one will believe you. I know where you live. I swear to god if you say anything I will kill you. And I will kill your parents.

Followed with "do you want me to do it to you again?"

I was exhausted and shut down **[Handwritten note]** *Went into shock again.*

He carried on like this. .

Prior to boarding our plane I recall someone (my Indonesian teacher?) commenting that they had heard a racket. They thought they could hear someone crying.

He stepped in and said A was being smart with me. Can you believe he took a swing at me? He was thinking he was a hero at the bar. Had to teach him a lesson.

Shocked she looked at me and asked with absolute concern are you okay?! To him she asked concerned, did you hit him?

I couldn't look up. Couldn't talk. **[Handwritten note]** *Went into shock again.*

Elephant stepped in between and downplayed the whole thing. We've sorted it out. he made it to be no big deal.

[Handwritten note] *On the bus to the airport, she says He's still snakey about it. Look (indistinct) got the time to talk about it.*

On the plane he made an issue. He didn't want everyone getting up and swapping seats. He wanted to sleep. From across the aisle I was watching him fall asleep wondering what to do. I was waiting to be sure he was asleep because I felt so much rage I wanted to attack him or somehow get my Indonesian teacher's attention and tell her what had happened. But she was in the window seat right next to him. That's why he had not wanted the swapping of seats - to avoid any chance of her sitting near me or visa versa.

He opened his eyes and stared straight at me watching every move.

I was struggling to think about what I could do. I was thinking more clearly than before and watching him constantly for any change in behaviour. It was blocked out at the same time. Nothing was there. Nothing had happened. It couldn't have happened. Staring at him trying to make sense of it all.

then he broke out, "what are you fucking looking at me like that for?"

artling the other teacher. She questioned him what was going on. Don't talk to him like that! What is with you boys?

h look he is being a smartass! He is really pissing me off now.

hen to me again Get out of my face.

he girls on my side was flabbergasted I can't believe the way he spoke to you! Are you okay?

ot a peep from me. Paralytic with fear.

hocked, closed my eyes trying to escape and rocking myself until the plane landed.

otal helplessness. Couldn't tell anyone what had happened. My biggest fears had been confirmed. What had

appened had happened. So angry. So confused.

Everyone was thinking what I had done to piss him off so much and there I was thinking I hadn't done anything wrong at all. Why was this happening to me. I went into shut down mode. Why was this happening to me. I

hink that I slept through exhaustion .

anding in Perth, how I got home, the events after that are like little pieces that I cannot clearly remember. Autopilot.

Block. Still this feeling but do not want to go there. Trapped. Now there is my parents ... Block. Just want to get to the car and away and starting to remember bits and blocking bits and remembering bits ...barely functioning.

watched him go around to all the parents and make light small talk about the trip as if nothing had happened. He didn't speak with my parents though. He waited until they were distracted by my other teacher to say, look do you mind getting a lift home now with A and his parents. **[Handwritten note]** *Knew they'd be distracted with my Indo teacher all the way home.*

The original plan was that the teachers had arrived together and were going to leave together but it had changed. His girlfriend had arrived, apparently double parked, and they had to quickly get out the door. She headed out first with the luggage, he said he was following in a minute and just going to say goodbye to me and my parents. But my parents were talking to my excited Indo teacher still about the trip. Leaving me by myself. In that airport.

Hey A remember what we talked about?

Then after a pause and punctuation with his head Yeahhhh you remember don't you?

Everything surging back again. Head pounding. Tasting puke. Reality.

He turned on his heel and took off.

And that was that

Part 4 of my soul:

The Next Step

What do I Dream of?

Transcendence.

Deeper level of understanding of where everything fits.

Actions

Good support network (good friends, keeping communication channels open)

Chat with a (name omitted) - taking comfort from professional therapeutic intervention, counselling and support

Realising the importance of this chapter!

It is a growing list of constructive things I can add to.

Reflecting back on past chapters and recognising/ celebrating how far I have come

Closure and understanding

Sitting down with The Elephant in the room with my parents

Hearing it from him. Not just from me.

old hard facts.

Evidence

But so what?

My parents now more able to accept it?

Putting a stop to it.

The Elephant gaining atonement.

What closure will this give me?

Exposing him and the truth.

Dealing with the conflict of anger.

Finding a path of forgiveness.

Showing courage to do what feels right and just.

Not putting undue pressure on self.

This so called Deputy Principal-Pastoral Care, Deputy Principal-Curriculum, Head of House, Head of English -cunt for want of a better word - will be judged and served. One way or another there is justice.

I will be happy.

- 138 A's father testified that after A's revelations to them he contacted Ms Hunter. He could not recall how that contact was made. Suggesting nothing to her specifically, he said that he asked her how the trip to Indonesia went and could she recall anything about it. He said that he did not tell Ms Hunter of the allegations made by A against the applicant. It was his evidence he did not think that at any stage he had told Ms Hunter about these matters. However, sometime later, A's father testified that he did give Ms Hunter a copy of the Statements about one month before this hearing commenced. He also said that he gave a copy of the notes to A's sister.

A's sister

- 139 A's sister also gave evidence in these proceedings. She said that on or about 18 March 2017 she received a text message from her brother. It said that he had been "raped by Don Parnell". As she read the message she was alarmed and said that she telephoned A straight away. In that telephone call, A informed her that the applicant raped him whilst they shared a hotel room in Bali on the final night of the Year 11 school trip to Indonesia. She said that he explained to her that their return flight to Perth had been delayed. This meant they had to stay an extra night in Bali and last-minute arrangements had to be made for overnight accommodation, which meant that he and the applicant had to share a twin room in a hotel. He informed her this was the only time on the trip they had shared a room. Earlier in the evening the applicant and the students went to a bar and he told his sister that the applicant bought him alcoholic drinks including "B52 shots" particularly. She testified that she particularly remembered him telling her that. While they were in the bar, he told her that the applicant commented "You look cute in this light" which made A feel very uneasy. When he asked the applicant what he meant by this, the applicant replied, "You know what I mean". He told her he then went downstairs and joined the other students, as he felt uncomfortable.
- 140 A's sister then said he began to recount what happened after being in the bar later that evening. She testified that he told her that both he and the applicant went to the hotel room to sleep. He told her it was hot inside the room and the applicant questioned him why he would wear pants to bed and that he should take them off, which he did. A described to her that shortly

after getting into their beds he heard a noise. He was unsure what it was but reflecting on it later he realised that it was the sound of the applicant opening a condom packet. A then told his sister how the applicant then got out of his own bed and quickly slid into his bed and "spooned" him. At that point A told his sister he was too frightened to move. A told her that the applicant said to him at that point "I am an opportunist and a rapist" and that he would hold him down until he passed out. A's sister testified that A described how the applicant had climbed on top of his back and held him down by his neck while pushing his face into the pillow and then began to rape him. A said that he felt terrible pain and was terrified at that moment. He told her that the applicant was pushing his face so hard into the pillow he was struggling to breathe and felt like he was falling in and out of consciousness.

- 141 She then recounted how he told her that when he had finished, the applicant went to the bathroom and had a shower. A told her that the applicant was whistling in the shower and thought he was a "stud". When he returned to the room the applicant then told A to shower and clean himself up as he was bleeding. A told his sister that at that point he was "crying like a baby" and got into the shower and was horrified as the shower floor turned bright red with his own blood. A's sister said that at this point in the telephone conversation she had a distinct memory of A telling her that the applicant, who watched him have a shower, was ridiculing him for crying and is alleged to have said "I've never seen so much blood when I've done it before".
- 142 The conversation continued and she testified that A then said, once out of the shower, the applicant told him he had flushed his used condom down the toilet so it could not be used as evidence. She also said that A told her that the applicant told A he regularly rode past his house and "said he knew where I lived", which A took as a threat to keep his silence. And his sister said she recalled A telling her that the applicant then yelled at him, out of a window, to make it sound as if they were having an argument lest any passers-by may have heard any noise.
- 143 A told her that once they had returned to their beds he had been told by the applicant that "You're a good kid" and that the applicant had allegedly confessed to him it wasn't the first time he had done this and that he had been raped by his own brother.
- 144 Next in the conversation, she said that A told her that the next morning he was approached by either some of the other students or the Indonesian teacher, who said they had heard some noise coming from his and the applicant's room the night before. They thought they could hear some crying and wanted to knock on the door. A told her that the applicant had then said that he (A) had tried to hit him. Further, she said that A described the trip home on the plane and that the applicant was in an angry mood and snapped at him about the students swapping seats on the plane. He felt that the applicant had seated himself next to Ms Hunter, which A thought was to prevent his access to her on the flight back.
- 145 When they arrived back in Perth, she said that A told her that the applicant had, before leaving the airport, said to him "Remember what we talked about?" She testified that he then started to hypothetically talk about telling their parents and how distressing that would be for them and Ms Hunter and that he did not want to upset them with such shocking news.
- 146 A's sister said that she had known her brother for 35 years and she knew he was telling the truth. She testified that when speaking to him in this telephone call he was rational and calm, although he had an upset undertone in his voice. It was his sister's evidence also that once A had told her and her parents what had happened, that A and his family had a better relationship and he also played music again.
- 147 A's sister was cross-examined about his drug use after he left school and she confirmed that he had issues with drugs and alcohol and that he told her at one point that he had also used heroin. In relation to the Statements found in A's things after he died, his sister testified that she had not seen these notes until she was at her parents' house but did not get a copy. She just read them and confirmed she had seen them before her interview with the Investigators.

Attempts to get counselling records

Sexual assault communications privilege

- 148 The Investigators contacted the counselling service that A attended in 2017 after his disclosures to his family. The Investigators requested information about his attendance and sought the release of documents. Due to confidentiality reasons, this material could not be provided. Once these proceedings had been commenced and for the hearing, the respondent's counsel issued a summons to the Chief Executive Officer of the counselling service for production of documents, that being the organisation's counselling file in relation to A's attendance at the service. Those documents were produced under cover of a letter dated 28 January 2020, which were tendered as a restricted confidential exhibit R9. The representatives of the parties were given access to the file to inspect it. Consistent with my ruling earlier in the proceedings, the identity of the counselling service was not to be disclosed. The respondent also called as a witness the counsellor who provided counselling services to A in 2017. The counsellor's identity was also the subject of my confidentiality order made during an earlier part of the proceedings.
- 149 Before the counsellor was called as a witness, I raised with both parties the issue of counsellor-client confidentiality in sexual assault cases, which is referred to as the "sexual assault communications privilege" in the evidence statutes of several State jurisdictions including in Western Australia. However, those statutory provisions only apply in circumstances where there have been criminal proceedings in relation to a sexual assault. That is not the case here. The purpose in my raising this issue with the parties was whether the principles underlying those statutory provisions ought guide the Commission's exercise of discretion in hearing from the counsellor as a witness, as plainly, this would involve the giving of evidence in relation to confidential communications between a counsellor and a victim of sexual assault.
- 150 The respondent submitted that the evidence of the counsellor should be admitted as the substance of the disclosures have already been the subject of evidence through other witnesses including A's sister and his parents. Thus, in effect, any confidentiality between the counsellor and A in relation to the alleged sexual assault had already been lost. It would therefore not be appropriate for the Commission to decline to receive the evidence from the counsellor. When I raised with counsel for the respondent the assertion that A's Statements may have been produced in a therapeutic context, at least that being the

assumption by Dr Chamarette in her expert report on the Statements, counsel submitted that there was no clear evidence to establish that the Statements were in fact made in that context, and it would be a "stretch too far" to reach that conclusion.

- 151 The applicant opposed the counsellor being called to give evidence. It was submitted by the applicant's agent that whilst the Commission is not bound by the rules of evidence, ss 19A to 19M of the *Evidence Act 1906* (WA) should guide the Commission as to whether to receive the evidence or not, acknowledging that the Commission proceedings are civil in nature and that no criminal proceedings have taken place. Mr Mullally identified the underlying principles why such communications should remain confidential. These included dangers associated with disclosure and the unrestricted use of information that is communicated by a victim of a sexual assault, in the context of a therapeutic relationship. Secondly, is the general infringement of privacy and confidentiality.
- 152 Thirdly, is the issue of a threat to the recovery process and psychological harm. Fourthly, is the issue of retribution and safety. Finally, is the potential conflict between the seeking of counselling and the reporting of or proceeding with a case. Within those broad principles, Mr Mullally contended that when it comes to the underlying principles set out in ss 19A to 19M of the *Evidence Act*, there is a prohibition on the disclosure of a protected communication in criminal proceedings, except with the leave of the court. It was submitted that the communications in this case clearly fall within the meaning of a protected communication in s 19A. In his submissions, Mr Mullally contended that the principles underlying s 19E, requiring a legitimate forensic purpose for disclosure of a protected communication and s 19G, setting out requirements for a public interest test to be met, have not been adequately addressed.
- 153 In response, Mr Curlewis submitted that the evidence of the counsellor could have great probative value which may either confirm the respondent's case or support the applicant's case. Additionally, Mr Curlewis submitted that the consent provision of the *Evidence Act* in s 19H is relevant. This provides that if the complainant consents to disclosure of a protected provision, then the exclusions do not apply. As in this case the complainant is deceased, he submitted that on his instructions, the parents of A consent to the disclosure and moreover, have given their evidence, as has A's sister, in open court willingly and for the matters in issue to be placed in the public domain. In these circumstances, Mr Curlewis submitted that it would be completely at odds with their approach to participating in these proceedings, for the evidence of the counsellor and the counselling file to not be admitted.
- 154 After an adjournment over the lunch interval, I returned and delivered my reasons to the effect that the counselling file should be admitted into evidence and that evidence should be received from the counsellor. My oral reasons from the transcript of the proceedings at 202-203T were as follows:

I've considered the submissions that have been made in relation to the documents produced under summons issued by the respondent and under cover of a letter of 28 January 2020 from the Counselling Service and the proposal by the respondent to call a counsellor from that service for the purposes of these proceedings and it seems to be common ground that [A] did attend a particular service and that doesn't seem to be in dispute.

The Commission has already ruled that the identification of the service and the counsellor not be published in any way and that remains, of course, the view of the Commission. The respondent now proposes to call evidence from the counsellor. The Commission of its own motion raised with the parties before the lunch adjournment today whether the principles underlying the sexual assault communications privilege as set out in the Evidence Act 1906 in this State has some application to these proceedings and I should note that a similar regime exists in all other states across Australia and in part in the Commonwealth.

It's accepted that, and in my view, there can be no doubt that the particular communications in this particular case on the evidence thus far would meet the definition of a protected communication for the purposes of that legislation and there can be no doubt about that in my opinion. It's also accepted that such protected communications cannot be disclosed in criminal proceedings without the leave of the court. An exception to this is if the court considers there is a legitimate forensic purpose and it's in the public interest for there to be disclosure and that is set out in a number of prescribed grounds.

In New South Wales, but not apparently in this state, there is also privilege in the evidence legislation that if there is - if such material, rather, is found to be privileged in criminal proceedings, then it is also subject to the same privilege in civil proceedings. In this case, of course, there are no criminal proceedings on foot or have occurred, but however, by their nature, the communications that I've (indistinct)2.59.05 between the former student [A] and The Counsellor and the Counselling Services would be highly personal in nature and generally confidential.

Therefore, on my view, it's a matter of discretion for the Commission and the Commission should have regard to these circumstances when considering whether (a) the materials, that is, the documents produced under summons should be admitted into evidence or (b) evidence should be led from the particular counsellor concerned, having regard to section 26(1) of the Act.

In this respect, I am guided by, but of course not bound by, the tests set out in section 19G of the Evidence Act and also the provisions of the Act in relation to legitimate forensic purpose, in other words, whether the material is relevant and will either advance or be adverse to a case of one party or the other. And that seems to me to be a common sense test in any event.

Having regard to those principles, in my view, on balance in particular having regard to the evidence given thus far, evidence of the counsellor from the Counselling Service would serve a legitimate forensic purpose at least in relation to the impact on the evidence of disclosures made thus far in these proceedings.

In relation to the question of public interest, as I've said, I'm guided by the provisions of section 19G(2) in that regard in relation to the making of a full defence that really is obviously tailored towards criminal proceedings and doesn't apply in this case.

In relation to whether the communications may have a substantial probative value, given that the complainant, as he was at the time, is now deceased, of course, sadly and the other evidence is mostly hearsay, then in my view this material may have probative value but I do not know the answer completely for that issue, of course, until the evidence is given.

Further, in relation to the likelihood that evidence of the disclosures and protected communication may have an impact on the outcome of the proceedings, it may well do and therefore, in my view, that sort of criterion would be satisfied. I'm mindful, of course, also of evidence being given in relation to disclosures and confidential communications persuading complainants in other cases from seeking counselling or diminishing the effectiveness of that counselling.

But in my opinion, that factor is outweighed by the two I've just referred to but also the directions I made in relation to the protection of the identity of the counsellor and of the particular service. I don't think there is any issue in relation to ensuring in the public interest adequate records are kept. Finally, sadly, there's no impact on the complainant in this case for the reasons I've already indicated and for those fairly short reasons, the evidence in my view ought be led.

The counselling file

155 I do not propose to consider the detail of the content of the counselling file. Suffice to say that its content is consistent with much of the evidence given on behalf of the respondent in these proceedings in relation to the incident occurring; A's mental health problems; his drug and alcohol abuse; and his naming of the perpetrator as the applicant. It paints the picture of A as a deeply troubled individual. Reference is also made to two later incidents of sexual assault against A, which were also disclosed during counselling. There is also reference to a report by the counsellor to the police, in relation to A's assault. The note also records a conversation between the counsellor and a Detective in Bunbury, to the effect that A filed a complaint with the Police in relation to the assault, however, as the incident was alleged to have occurred overseas, it was beyond the jurisdiction of the West Australia Police to investigate.

The counsellor's evidence

156 The counsellor has qualifications in trauma, sexual assault, and domestic assault counselling. The counsellor testified that A attended six to seven counselling sessions in 2017. During the counselling sessions he disclosed the sexual abuse. The counsellor said that A had described how he had run into a person in the local area who had sexually assaulted him on another, later occasion. This had set off panic attacks and triggered memories, which led to A disclosing to the counsellor what occurred on the Indonesian trip. The counsellor described that whilst on the school trip when he was 16, a male teacher was sent on the tour as his chaperone, as A was the only male student on the trip, and something had happened between them. The teacher slid into his bed and A told the counsellor he was scared and fearful and the teacher told him to stop yelling and calling out. His head was forced into the pillow, he was struggling, and he was told he had to keep quiet. A told the counsellor he felt like he was suffocating and then he was raped.

157 The counsellor testified that during the sessions with A, they got to know each other somewhat and the counsellor commented on his authenticity and his fluid, calm and detailed account of what had occurred. The counsellor said that A felt relieved to have been able to have said what he did. When asked about A's use of drugs and alcohol, the counsellor said that at no stage did he present under the influence and was always well groomed, paid attention to himself and other staff members, was well mannered and polite. The counsellor said that A had been threatened that the perpetrator knew his parents and family and where he lived and that he would get him and kill them which made him very fearful and despairing, as it was described. He also told the counsellor that after the teacher concerned was working at another college, that A had telephoned him several times at work to aggravate him to see if he was at all remorseful and whether he had done the same thing to anyone else.

158 The counsellor said that A wrote down the name of the teacher on a piece of paper which appears in the counselling file and the teacher's name was the applicant. A told the counsellor that the teacher had informed him he only f...d guys that were gay and that A was trying to tell him he was not gay and that it was important for people to know that and that he liked someone at school. The counsellor testified that A had disclosed that he had been sexually assaulted sometime later when older, one evening after being out at a hotel in his local area. He had been attacked and raped on the way home. When asked whether there was any prospect that in the counsellor's opinion, A could have confused these incidents, the counsellor referred to A's description as to what state he was in after the assault in the hotel room in Bali and the triggers he described arising from that incident when he was 16 being "smell and condoms and pain and blood, and like, he was very descriptive and detailed about it. So no, it was nothing like it at all": 208T.

159 In cross-examination the counsellor was asked about the last session with A in July of 2017 where it was recorded that A did not present too well and the counsellor observed that he had been asked to see another psychiatrist and he did not want to repeat all of his prior trauma. In relation to any subsequent assault, the counsellor referred to at least one, possibly two, further occasions when A had been sexually assaulted, making possibly three in total.

Ms Jones

160 Evidence was also given by the three Investigators from CEWA. Ms Jones is the Employment Relations Team Leader. She confirmed that herself, Ms Taylor, an Employment Relations Consultant, and Mr Wong, the Coordinator Child Safe Team, were assigned to investigate the allegations set out in the letter from A's parents. The investigation took place over the period from February to August 2019.

161 Consistent with the case as put by the applicant, Ms Jones was subject to criticisms that the Investigators were not sufficiently qualified or experienced to investigate allegations of this kind. Ms Jones said that once the allegations had been made by A's parents, contact was made with the police, however, they were told that as the alleged assault took place overseas, that the police could not investigate the matter. Whilst Ms Jones said that CEWA had conducted several investigations into similar complaints, including rape allegations, consideration may well have been given to engaging external assistance.

- 162 Ms Jones accepted for the investigation, that a lot of the evidence gathered was hearsay. Whilst the Investigators did not tell the applicant that A had died in October 2018, she said they did not deliberately withhold such information from him. Ms Jones also said that she understood at the time that A's death was common knowledge in his local community. In relation to the Investigator's interview with Ms Hunter in March 2019, Ms Jones accepted, as noted in the Final Investigation Report on p 9, that Ms Hunter lacked clarity and appeared somewhat erratic in some of her responses to questions. It was also acknowledged in the Final Investigation Report that Ms Hunter had informed the Investigators she had been contacted by the applicant's father and had discussed issues with him.
- 163 The Investigators took these matters into account in assessing the credibility of Ms Hunter as a witness. However, despite this, Ms Jones said that the Investigators still found Ms Hunter a reliable witness and one with a good recollection of events on the trip, in particular the identification of the hotel, the airline, accommodation arrangements and what occurred on the last night before returning to Perth. Ms Jones said that it was clear during the interview with Ms Hunter that many things she said were from her own recollection, such as the detail of the trip etc, and not from anything that she may have been told by someone else.
- 164 Similarly, in relation to A's friend, Mr Bardowski, the Investigators also accepted, as acknowledged in the Final Investigation Report at p 11, that he too appeared to be somewhat erratic and had a poor memory. These matters were also considered and taken into account.
- 165 In relation to A's Statements, it was accepted these were not formal signed complaints and were seemingly made in a therapeutic context. However, Ms Jones said that the Statements were not taken in isolation, but also in the context of what A had also told others as to the assault. Ms Jones also commented that the applicant appeared to change his responses when questioned on whether he shared a room with A on the final night of the trip.
- 166 In relation to the expert report prepared by Dr Chamarette, Ms Jones accepted that at the time of seeking her opinion on the material given to her, the Investigators had not at that point been able to conclude that the allegations were substantiated or not. Once the Investigators had received Dr Chamarette's report, they considered the material collectively and reached the conclusions that they did. As to whether the applicant had an older brother or whether he lived close to the applicant's house Ms Jones said that the Investigators did not focus on these matters, rather the focus was on the specific allegations themselves. In relation to the applicant's criticism of the investigation that no attempt was made to interview character witnesses on behalf of the applicant, Ms Jones testified that the applicant's good character was assumed for their investigation.

Mr Wong

- 167 Mr Wong was asked to join the investigation team. He is a registered psychologist. He accepted that the Investigators should probably have spoken to the Principal of the College, Mr Glasson, but they did not. He agreed that the Final Investigation Report's reference to a "handwritten statement" of A was inaccurate, as it was a typewritten statement with A's handwriting on it. As to the Statements themselves, Mr Wong testified that for the investigation the Investigators took them as a statement of fact and that the Investigators believed them. They were taken at face value, despite their therapeutic context. However, Mr Wong clarified this evidence and said that the assessment of A's Statements were also taken in the context of the corroboration of others, who were spoken to by the Investigators.
- 168 In relation to observations of Ms Hunter in her interview with the Investigators in March 2020, to the effect she spoke with A's father before the interview, Mr Wong accepted this may have somewhat tainted her views, but he had to consider this when assessing her credibility. Mr Wong agreed with the proposition when put to him, that he approached this case as influenced by the Royal Commission into Institutional Responses to Child Sexual Abuse.

Ms Taylor

- 169 Ms Taylor has been a legal practitioner for about eight years. She was the author of the Final Investigation Report and the other two members of the investigation team endorsed it. Ms Taylor said she appreciated the seriousness of the allegations and the need for the Investigators to be sure in the conclusions they reached. Whilst she had not investigated a rape allegation previously, Ms Taylor said she has been involved in many other workplace investigations. She testified that she did discuss within the investigation the "Briginshaw" approach to the balance of probability standard of proof, and that given the seriousness of the allegations against the applicant, that the Investigators needed to be sure in the conclusions reached. Especially in relation to A's Statements, Ms Taylor said that she had to acknowledge that it may not necessarily have been a statement of fact, as it was made in a therapeutic context. Therefore, she testified that she had to look at other evidence through other witnesses, to place reliance upon them.
- 170 At the time of the referral of the draft report to the expert Dr Chamarette, Ms Taylor said that at that time no conclusions had been reached by the Investigators. Whilst some options were mentioned in the brief to Dr Chamarette, her expert opinion was sought on A's Statements and the statements made by the applicant in his responses, in the context of Dr Chamarette's expertise. The veracity of the applicant's Statements was important to the investigation. Ms Taylor agreed that Dr Chamarette concluded that given the therapeutic context of A's Statements, it may not strictly speaking be a statement of fact, but it was credible. Whilst Dr Chamarette did express views on the options set out in her brief, in relation to whether the allegations were substantiated or not, Ms Taylor observed that Dr Chamarette's conclusions involved some "fence sitting" but in any event, expressing those views went beyond the brief given to Dr Chamarette for her expert opinion.
- 171 As to the conclusions reached by the Investigators, Ms Taylor observed that the investigation would not have been satisfied if only a borderline decision was available. She said that at the end of the investigation, the conclusion reached was reached with a "level of conviction":190T.

Ms Prendergast

Ms Prendergast is the Principal at Lumen Christi College. She said that she met with the applicant informally three times during the investigation. Ms Prendergast said the applicant expressed his frustration and anger towards CEWA, due to the time the investigation was taking. As the employer of the applicant, she said that based on the findings of the Final Investigation Report of 8 August 2019 and the applicant's responses, she concluded that the applicant had to be dismissed for serious misconduct. Additionally, Ms Prendergast said she had lost confidence in the applicant as a member of her executive leadership team at the College.

Consideration

- 172 It is undoubtedly the case that because of the historical nature of the allegations against the applicant, that he was at a forensic disadvantage. In criminal proceedings involving historical sexual assault cases, a trial judge will inform the jury of the delay in commencing a prosecution; the possibility of human recollection being distorted; the age of a complainant; whether the prosecution case is confined to the evidence of a complainant; and any other unusual features. The principles relevant to delay and the danger of conviction on the uncorroborated evidence of a complainant were established in the decision of the High Court in *Longman v The Queen* (1989) 168 CLR 79 as discussed and applied in *Crampton v The Queen* (2000) 206 CLR 161 at par 45 per Gaudron, Gummow and Callinan JJ.
- 173 This necessitates an acknowledgement of the forensic disadvantage suffered by an accused in cases of lengthy delay in a complaint. This involves testing a complaint; the opportunity to locate other witnesses; and not having available "the forensic weapons that reasonable contemporaneity provides constitutes a significant disadvantage which a judge must recognise and to which an unmistakable and firm voice must be given by appropriate directions": *Crampton* at par 45. While the investigation and these proceedings arise from a workplace incident, and are to be approached with the principles discussed earlier in these reasons in mind, it is still necessary to have regard to the lengthy delay in the complaint being made and to take this into consideration. This is particularly so as the complainant is now deceased.
- 174 I am satisfied that the Investigators were cognisant of the substantial lapse of time involved from the alleged assault and the time that A disclosed the events to his family, his close friend, and to the counsellor. In her evidence, Ms Jones referred to the long delay involved. Importantly, in the Final Investigation Report in section "(e) Credibility of Witnesses" the report states at p 11:
- In considering the evidence of each of the witnesses, the investigators have taken into account:
1. The lapse of time since the alleged assault and the impact this has had on the ability of the witnesses to recall the incident or any other relevant surrounding circumstances;...
- 175 All the witnesses called, including A's sister and parents and Ms Hunter, were cross-examined by the applicant at some length and the opportunity was given to test their evidence. The applicant was also tested on his evidence and statements he gave to the Investigators.
- 176 Second, I am satisfied that the Investigators knew of the fact that a considerable amount of the material gathered by them was technically hearsay. This was acknowledged by the Investigators called to give evidence in these proceedings and was specifically noted in the Final Investigation Report under the section dealing with the credibility of witnesses. Much evidence was also circumstantial in nature. Whilst that was so, it was incumbent on the Investigators to weigh up all of the material, including that which was of a hearsay nature, and form a view whether the misconduct occurred on balance, having regard to the gravity of the allegations.
- 177 In these proceedings, whilst the Commission is not bound by the rules of evidence, the accepted approach over many years is that hearsay evidence is not inadmissible, but is to be accorded the appropriate weight, depending on the totality of evidence before the Commission. This includes circumstantial evidence, which, depending on the nature of the case, may be most important. It is the evidence in its totality that must be considered: *Baron v George Weston Foods Ltd* (1984) 64 WAIG 590; *Australian Workers' Union WA Branch v Hamersley Iron Pty Ltd* (1986) 66 WAIG 322. Where, as in s 26(1)(b) of the Act, the rules of evidence do not apply, facts can be fairly found, without the strictures of the rules of evidence, as long as the tribunal refrains from "spinning a coin" and bases its conclusions on material that has probative value, with the weight to be given to such material, being a matter for the tribunal (and in this case the Investigators): *Reg v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456 at 488 per Diplock LJ.
- 178 Third, I am satisfied that the Investigators did have regard to the appropriate principles in approaching the workplace investigation. It was stated in the Final Investigation Report that the investigation proceeded under the CEWA policy "Unsatisfactory Performance and Misconduct Policy". A copy of this policy was attached to the applicant's witness statement at annexure W. The policy refers to various definitions on p 1. There can be no question, that an allegation of sexual assault during the employment would constitute misconduct of the most serious kind.
- 179 Under the heading "Principles" on p 2 of the policy, is recognition of the principles of procedural fairness. There is also expressed in the policy the need for "sound evidence" and the duty of a Principal, no doubt based on duty of care considerations, to take formal action which may lead to dismissal in the case of established misconduct. In relation to misconduct/serious misconduct the process is set out on pp 4 - 6 of the policy. Here the allegations were put to the applicant and he had an opportunity to respond to them. The allegations were vigorously denied. The investigation then commenced. I am otherwise satisfied that the respondent complied with the policy. I am also satisfied that the Investigators were independent. It was not, and it would not be appropriate, to conduct such an investigation at the school level. None of the Investigators were associated with the matter the subject of the investigation.
- 180 As to the composition of the investigation, it comprised three persons; a legal practitioner; a psychologist; and the team leader for the employee relations department of CEWA. Despite criticism by the applicant of the level of experience of the Investigators, in not having investigated an allegation of this present kind, I do not consider this to be a fair criticism. They

- had undertaken many workplace investigations, some including allegations of a sexual nature. Given the circumstances confronting the respondent, that first, the conduct occurred overseas and outside of the jurisdiction and second, the complainant was deceased, this placed the respondent in a very difficult position. The circumstances were unique. As a provider of education in Western Australia, the respondent had to investigate allegations consistent with its duty of care, especially as the allegations concerned a senior educator still working in the system. It is important to return to the earlier discussion above, in relation to the standard to be achieved in workplace investigations not expected to be that of the police. Here, the police could not investigate. The context of the investigation was to enquire into whether the applicant had engaged in serious misconduct in breach of his contract of employment, not whether the applicant had committed the offence of sexual assault under the criminal law. The standards and approaches to enquiries in both contexts are different.
- 181 Despite this however, I am satisfied that the Investigators were aware of the seriousness of the allegations. Whilst a reference is made to the balance of probabilities test in the "Investigation Principles" section of the Final Investigation Report, I am satisfied in particular, on the evidence of Ms Taylor, that the investigation knew the need for an "actual persuasion" to the affirmative case, that serious misconduct had occurred, consistent with the principles in *Briginshaw*. In this context too, I am not persuaded that the Investigators commenced with a "presumption of guilt" as put by the applicant. The fact that they sought expert opinion from Dr Chamarette, and the context in which that opinion was sought, is inconsistent with such a presumption.
- 182 Having considered these general issues, I now turn to some of the more particular criticisms of the investigation advanced by the applicant. I will then turn to consider the evidence, and whether, based on that material, it was open for the respondent, after as full and extensive an investigation as required in the circumstances, to hold an honest and genuine belief, based on reasonable grounds, that the misconduct took place.
- 183 I acknowledge some criticisms made by Ms Parnell of the investigation process. It is the case that the Investigators did not obtain a death certificate or copy of the coroner's report into A's death. However, I do not consider the possession of such would have had any material impact on the outcome of the investigation. It was not clear, but it appears on the evidence available, that A's death was because of an overdose of prescription medication. It was also not controversial that A did engage in substance abuse, involving alcohol and drugs. That much is clear from the evidence of A's family and his friend, Mr Bardowski. The Investigators knew of this. The question of alcohol and substance abuse was specifically referred to in the Investigators' brief to Dr Chamarette as set out on p 1 of her expert opinion of 24 July 2019, annexed to the Final Investigation Report at annexure UV. Dr Chamarette did not consider that A's drug use meant that his recall and writings were delusional, or drug induced.
- 184 As to records from the counselling service, as I have mentioned earlier in these reasons, attempts were made by the Investigators to obtain information from the counselling service, however, for confidentiality reasons, that material could not be obtained. As for school records, the evidence was that the school did not keep all reports, however A's parents had some, but both gave evidence of how their son's school performance did decline and how they responded to this. Any school reports in the possession of A's parents, and his mother said they had some at home, were able to be obtained by summons in these proceedings but the applicant did not do this. It was open for the Investigators to have due regard to A's parents' evidence. Similarly, too, was the important evidence of Ms Hunter, A's Indonesian teacher who plainly said that his schoolwork deteriorated on his return from the Indonesian trip. Despite the criticisms of Ms Hunter's interview with the Investigators, and aspects of her evidence in these proceedings, which I will come to later in these reasons, it was open for the Investigators to conclude on this material, that something was amiss in A's school performance from this time.
- 185 As to the applicant's character, I refer to the evidence of Ms Jones, who said for the investigation, the applicant's good character was assumed. Nor was the applicant's service record with the respondent in issue. As to the referral of some matters to Dr Chamarette for her expert opinion, I do not accept that Dr Chamarette was not an appropriate person to consult on such matters. Dr Chamarette's background, experience, and qualifications in dealing with adult victims of child sexual abuse are set out in an appendix to her expert opinion, as attachment UV to the Final Investigation Report. Dr Chamarette is highly qualified and experienced in this field. I consider she was well qualified to provide the opinion sought by the respondent. There was no objection by the applicant to the tender of Dr Chamarette's report, as part of the Final Investigation Report. It was open to the applicant to call Dr Chamarette and to cross-examine her on the opinion she expressed in her expert report, but this course was not taken.
- 186 As to the assertion that the respondent ignored Dr Chamarette's comments on the "options" as to substantiation etc, I do not consider this to be a fair criticism. A balanced reading of Dr Chamarette's conclusions reflect some ambivalence and she did not express a clear view either way. Her qualification of A's Statements, as not having the force of, for example, an affidavit, is understandable. However, importantly, the Investigators said that they considered Dr Chamarette's views as part of all the material they had before them, and just not what was referred to Dr Chamarette for her opinion. I therefore do not think it fair to say that Dr Chamarette's opinion was disregarded in this context. I note the evidence of both Ms Jones and Ms Taylor, that at the point that Dr Chamarette's opinion was sought, they had not reached any firm conclusions about the outcome of the investigation. Overall, the Investigators approached their task thoroughly in the context of a workplace investigation. The chronology of the investigation is set out at pp 2 - 5 of the Final Investigation Report. The Investigators interviewed those persons most directly involved in the allegations. Two were deceased, being A and another student who also went on the Indonesian tour, "J". Repeated attempts were made to contact the fifth student on the tour, "T", but this failed, and the Investigators could not speak with her.
- 187 There was also criticism that the Investigators did not interview Mr Glasson, the former Principal at MacKillop College. Whilst he gave evidence in these proceedings, it is not clear how he could have assisted the Investigators. He said that he would not have approved a teacher sharing a room with a student and he was not informed of this afterwards when the group returned to Perth. He also said that in relation to students caught smoking on the trip, he would have expected this to be reported to him as it would be regarded as a serious matter. The applicant's evidence was this was not reported to Mr Glasson.

These matters, whilst they may now be considered in hindsight, would not have materially impacted on the outcome of the investigation in my view.

- 188 The interviews with the witnesses, as set out in the Final Investigation Report, were conducted fairly and properly. An open-ended questioning technique was used. The interviews were comprehensive. Although the interviews themselves did not seem to be audio recorded, detailed interview notes were taken, and no suggestion was advanced by the applicant that anything of substance was left out. He accepted that his statement was accurate in correspondence to the Investigators dated 28 March 2019 (see annexure Q exhibit A2).
- 189 I turn first to consider the evidence of the disclosure. I observe at this point that despite the views expressed by Dr Chamarette and the Investigators, there is no firm evidence that both of A's Statements were made in his therapy with the counselling service. This was an assumption. It was not the subject of comment in the evidence of the counsellor because, importantly, as to both the veracity of the disclosures by A to the counsellor and the counsellor's evidence generally, there was no evidence that the counsellor was aware of the Statements. Nor is specific reference made to such Statements in the counselling file in exhibit R9. The evidence before the Investigators, and before the Commission, is that the Statements were found in A's things after he died. They are undated. A copy of them is not on the file in exhibit R9. However, for the second document "Part 4 of my soul: The Next Step" under the heading "Actions" is reference to the counselling service and "therapeutic intervention, counselling and support".
- 190 As the Statements refer to "Part 2" and "Part 4", it may be open to assume there may have been other writings produced by A, not located. Given the reference to the counselling service in the Statement headed "Part 4", it appears the assumption of the therapeutic context of the writing, at least in relation to this document, may be sound, but only as to the second document and not the first. Importantly, it is the first Statement, "Part 2", which is the document setting out the detail of the trip to Indonesia and the detailed allegations as to the assault on A. It is this first document, that sets out A's description of the incident. There is no basis for a finding on the evidence in my view, that this first document was created in a therapeutic context.
- 191 However, even of this is not correct, and both Statements were made in a therapeutic context, it is important to recognise, as a matter of the sequence of the events, that the Statements were not the first step in A's disclosure. The first step in A's disclosure was to his sister and his parents in March 2017. It was only after his disclosures to his family members, that A was encouraged by his parents to seek professional help. The disclosure to A's sister was made because of triggers from a chance meeting with a perpetrator of a subsequent assault, well after the Indonesian trip. As the outcome of A's sister's interview with the Investigators and her evidence in these proceedings reveals, A's disclosure to her was detailed, graphic and emphatic. I found A's sister a very credible witness. A also contacted his parents and disclosed to them, over separate visits, on the evidence of A's parents and their interview with the Investigators.
- 192 I find the essence of the Statements made by A compelling and credible, as did Dr Chamarette. They are detailed, although not as to all aspects of the trip, as suggested in the Final Investigation Report. They were also not handwritten but had handwriting on them, contrary to the description in the Final Investigation Report. I do not regard this error in the Report as being of any significance, however. The detail of the first Statement related to events once the tour group got to Bali and not before then. The Statement correctly identified the number of students and two teachers on the trip. However, the subsequent description, starting with the delay, the overbooked flight, the airline having to arrange hotel accommodation and that it was close to the airport, was very accurate and consistent with other evidence.
- 193 Whilst I accept that both in her interview with the Investigators and in her evidence in these proceedings, Ms Hunter did go off on tangents on occasions, her recollection of the trip, accounting for the long lapse of time, was detailed. For the reasons identified by the Investigators in the Final Investigation Report, when dealing with credibility issues, I paid close attention to Ms Hunter when she was giving her evidence. Ms Hunter, in both her interview with the Investigators and in her testimony, identified the interaction with the airline, Sempati Air, in detail. She recalled the name of the Sempati Air representative as "Roxanne".
- 194 Ms Hunter described the situation with accommodation generally throughout the trip and that they had their own rooms when staying in "losman" type accommodation. She said she had a "battle" with the airline representative, but she lost it. It is understandable that Ms Hunter may have had such a battle as she was the tour organiser. As she said in her evidence, she knew the parents of the students were travelling from Busselton to Perth to collect their children from the airport and urgent arrangements had to be made. Contact had to be made with the Principal of the School, Mr Glasson, to inform him of the last-minute changes.
- 195 Ms Hunter recalled the first hotel on the first night as the Adhi Dhama. All the tour group members had their own rooms. Ms Hunter narrated the steps she took to reconfirm the flight home and her contact with Mr Glasson. In relation to the Kartika Plaza Hotel, she said they had a three-bedroom villa.
- 196 But the applicant's recollection on the hotel accommodation was not clear. He told the Investigators he did not have a distinct memory of Bali. He could not recall whether the tour group stayed at the same hotel on the last two nights, but he leant towards it being the same. He thought there was the same setup in the types of room. It is highly unlikely that the group would have stayed at the same hotel. The first night in Bali was the planned last night of the school tour. This hotel would obviously have been booked in advance. The group were scheduled to leave the next day and fly back to Perth, but the delay became a major problem. The flight was overbooked, and the airline had to find somewhere for the group to stay another night. It was the end of the school holiday period. Ms Hunter said that because of this there was little choice in finding unplanned accommodation in Bali. This is an entirely logical conclusion. It also finds some support in the interview of student S with the Investigators, that the hotels were separate and different on each of the nights. Although I note that S in her statement to the Investigators, said that she thought there may have been more than one villa on the final night, but there was uncertainty in her recollections too.

- 197 Ms Hunter told the Investigators that either the airline or she obtained a three-bedroom villa at the Kartika Plaza Hotel. Her description of the villa as attached to the hotel and close to the road and the airport was detailed. She said to the Investigators that the applicant offered to share a room with A. Later when asked as to how she divided the rooms, she referred to her and the applicant not being in a room together, and nor could either of them share with the girls. The reference to there being "no other option" in her statement to the Investigators was plainly in the context there being no other option but for the applicant and A to share a room in the villa, as there was no other accommodation available.
- 198 In terms of her evidence in these proceedings, Ms Hunter was cross-examined extensively. She said the airline gave each ticket holder a bed, not separate rooms. It was her decision to work out the room allocation. This problem was resolved when she put the applicant and A in the same room. This meant no male had to share with a female, which would have been the least appropriate option. In terms of competing likelihoods, I am satisfied this would have been the most likely combination of accommodation arrangements, if the villa had only three bedrooms. I have already mentioned that I paid very close attention to Ms Hunter's evidence, in terms of not just its content but her demeanour when she was in the witness box. When it was put to her by Mr Mullally in cross-examination that she did not put the applicant and A in a room together, the following exchange took place at 148 - 149T:
- You did not put Mr Parnell in a room with a student, did you?---That is completely untrue.
- ...
- HUNTER, MS:** Completely untrue.
- ...
- HUNTER, MS:** And he's perjuring himself by saying that.
- KENNER SC:** No, Ms Hunter, just - I think you might have misunderstood?---If he's saying - - -
- The evidence you've given is that the airline provided accommodation for each individual ticket holder?---I understand that.
- ...
- And therefore - - -?---Beds - beds.
- - - that means - does that - - -?---Beds.
- - - mean individual rooms?---No, it means beds. So therefore, I had to make decisions about who was going into what room with whom.
- All right. So was - - -?---And there - - -
- - - that your - - -?--- - - - was three bedrooms.
- - - decision?---Pardon?
- Was that your decision?---No, it was because we were only given three bedrooms in the villa.
- All right?---So I had to make an executive decision, um, and Don, um, offered to - as far as I remember, Don offered to stay in the room with [A], because they were the two males. I slept in a room with the, um, other girls and I think the, um, two other girls slept in another room.
- MULLALLY, MR:** So the end result was that you say you put them together in a room?---Yes.
- 199 Ms Hunter's reaction to the question put to her by Mr Mullally was telling on this point.
- 200 Whilst the applicant could not recall much of the Bali arrangements, he remained emphatic that he and A did not share a room. However, as identified by the Investigators in the Final Investigation Report, there was some change in the applicant's position. Initially, in his response to the allegations at attachment E to the Final Investigation Report, the applicant said that he said that "I strongly believe that I did not share a hotel room with A". When this was put to him in his interview, the applicant said that he was being cautious with his language in his response and said he was "100% sure that he did not do so."
- 201 I note too, that despite saying he had little recollection of the stay in Bali, or whether it was the same hotel or not on both nights in Bali, and saying he would only recall exceptional matters given the passage of time, despite this, the applicant maintained that the accommodation was in three separate villas provided by the airline. Both he and Ms Hunter had one villa each and a separate three-bedroom villa was provided for the students. The applicant did not say how this was an exceptional matter, so he could recall it and for Ms Hunter to be so wrong, when he had little independent recollection of many other matters.
- 202 Also too, I note that a portion of the applicant's interview with the Investigators and also in his evidence in these proceedings, was devoted to criticism of Ms Hunter because she had not properly planned the trip; she lacked leadership; and that she spent a lot of time away from the group with her friends etc. None of these matters were at all relevant to the central allegations and it is open to infer, and I do infer, these matters were raised by the applicant to impugn Ms Hunter's credibility. This is despite Ms Hunter acknowledging at the outset, that when the Indonesian tour was undertaken, she was only a relatively junior teacher.
- 203 Whilst I have reservations as to aspects of what Ms Hunter told the Investigators, for example the assertions of the applicant "grooming" her not being in the sinister sense, rather mentoring her, and some confusion as to whether she had done "research" about historical sexual assault, and whether this was told to the Investigators and/or whether it was accurately recorded by them, in all other respects, and in particular on the core issue of the accommodation arrangements on the final night at the Kartika Plaza Hotel at Bali, I accept Ms Hunter's evidence. I regard her as a witness of truth. It was open for the Investigators on the same basis, to accept Ms Hunter's version of events.
- 204 It would, with passing time, be unusual for there not to be inconsistencies in recollections. The applicant and the students did go to the Hard Rock Café but on the first and not the second night it seems. As to the allegation of the drinking of alcohol on that evening, it would appear from the interview of at least student S, that when they did go to the Hard Rock Café she did think that they were consuming alcohol and referred to cocktails in large glasses. She also described the atmosphere as being

- dark and like a nightclub, which was consistent with at least in part, A's description in his Part 2 Statement, of the group having dinner at the Hard Rock Café. Also, whilst the counsellor referred to A being given alcohol in the room by the applicant on the last night immediately before the assault, this was not mentioned in A's Part 2 Statement.
- 205 Ms Hunter said that it was not until she returned to Perth that one of the students told her that the applicant took the group to the Hard Rock Café and bought them drinks. This was denied by the applicant. On this issue I have doubts whether the investigation could conclude on balance, that it was established that the applicant had purchased drinks for the students. There was no direct evidence to this effect. In all other respects however, the general consistency in the essential narrative was striking.
- 206 Ms Hunter's evidence was also consistent with at least the interview of student S, that the students were watching a movie on the final night. I have no reason to doubt Ms Hunter's evidence that neither the applicant nor A were present and her being told by the students they had gone to bed some time earlier. Ms Hunter referred to student S asking her to knock on their door as noises were heard. I also accept Ms Hunter's evidence there was some form of altercation on the flight home involving the applicant and A, but Ms Hunter did not know what this was about.
- 207 As to the contention that Ms Hunter's evidence was entirely contaminated because she had spoken to A's father before her interview with the Investigators and had seen the Statements, I do not accept that is the case. Ms Hunter's evidence was that she had not seen the Statements until two weeks before the hearing in these proceedings. She agreed that she had spoken to A's father on two occasions, the first time briefly and on a second occasion in more detail. He told her about A's complaint.
- 208 Overall, I found the consistency between the disclosures made by A to his sister, to his parents, their evidence as to what A told them and the manner in which it was told, taken with A's Statements, to be compelling. There was also A's disclosure to his friend Mr Bardowski, to a similar effect.
- 209 As to the disclosure, I refer to the evidence of the counsellor. The counsellor was independent and had spoken to no one except A. I found the counsellor's evidence to be highly credible and compelling. Taken with the evidence of A's sister, his parents and the content of the Statements made by A, the evidence of the counsellor is strongly corroborative in relation to the events, even though it was given after the conclusion of the investigation.
- 210 There is, as I have said earlier in these reasons, a substantial body of circumstantial evidence. First, is the evidence given to the Investigators and in these proceedings as to A's decline in schoolwork standards and his behaviour. Evidence of this came from home through his parents and from his then Indonesian teacher, Ms Hunter. Second, A became increasingly withdrawn and his parents noticed a substantial change in him. Third, A left Mackillop College with no explanation. He then left school altogether after a brief period at another school. This is despite evidence of his family that A had been to that time, generally a diligent student before the Indonesian trip. Balanced against this is the evidence of both Mr Greaves and Mr Holt, called as character witnesses by the applicant, that as former teachers at Mackillop College they noticed no substantial change in A's behaviour and performance after the Indonesian tour. However, they could not have been as close to A as A's parents, or Ms Hunter, as one of his teachers at the time.
- 211 Fourth, is A's descent into alcohol and drug abuse and his destructive behaviour generally. Fifth, is the uncontroversial evidence of his family and of the counsellor, that once A had disclosed the assault, he seemed to have a sense of relief.
- 212 Sixth, and importantly, is the series of "tweets" sent by A to the applicant in March and April 2017. I have set these out above. These were sent to the applicant at about the same time as A's disclosures to his family and before he attended the counselling service in early May 2017. There can be no reasonable explanation, as a matter of logic, given the timing and content of some messages, other than something of significance had occurred between the applicant and A sometime in the past. It just makes no sense to see them in any other light. The applicant did nothing about the tweets and blocked them. He did not report them to anyone, if he had any concerns as to the welfare of A, as a former student at Mackillop College, given his pastoral care role. Such a failure to act on the tweets is also consistent with the applicant not wanting to call attention to A in his past, and to prompt the asking of questions.
- 213 Seventh, is the evidence in the counselling file in exhibit R9 of a report made by the counsellor of the assault of A on the Indonesian, tour to the police. The counsellor clearly felt seriously concerned enough to do so. The note records that the police could not deal with the matter because it took place outside of the jurisdiction. The note, as mentioned above, also records a conversation between the counsellor and a police Detective to the effect that A made a complaint to the Bunbury police in relation to the assault. However, as noted by Mr Mullally in his supplementary written submission mentioned above, no formal police record of that is in evidence. This does not alter the fact however, of the contact made by the counsellor with the police, nor that a file note was made on the counselling file to the effect that the counsellor was told something by a Detective. It cannot of course, stand as the truth of what is asserted in the file note.
- 214 Eighth, is the evidence of the counsellor that at some undisclosed time, A made telephone calls to the applicant at work when he was at another school. The notes made by the counsellor in the file suggest that A did so to see if the applicant had done to anyone else, what A said he had done to him. I note this appears to have been a consistent theme in A's narrative.
- 215 Ninth, is the complete lack of any possible ulterior motive for A to make a malicious complaint against the applicant of such seriousness. The applicant maintained that he had no contact with A after A left Mackillop College in early 1998. It is inconceivable that an occasion of being caught smoking on a school trip, and nothing more, would cause such resentment, to lead to allegations of the present kind, twenty years later. If it was the case, as the Investigators observed in the Final Investigation Report at p 14, that A had a "personal vendetta" against the applicant for some unknown reason, it is highly improbable that A would wait so long to make such an allegation. If damage to the applicant's reputation and career was A's motivation for such a disclosure, then it is far more likely it would have surfaced long ago.
- 216 Tenth, is the disclosure made by A to his family and the counsellor of a subsequent sexual assault(s) and meeting one perpetrator, which triggered the revival of repressed memories of what occurred on the Indonesian tour. As discussed by Dr Chamarette in her report, "the literature on delayed recall and disclosure of sexual assault in childhood, supports the patterns of behaviour and the way in which A brought out the allegations around the incident occurring in 1997" (see Final Investigation Report annexure UV p 2).

- 217 In this context, I also refer to an academic article referred to by Mr Mullally in his closing submissions, titled *Cognitive Mechanisms Underlying Recovered-Memory Experiences of Childhood Sexual Abuse* Psychological Science, Volume 20, Number 1, pp 92-98. In this article, the authors engaged in various experiments in relation to repressed memory in childhood sexual assault cases. The upshot of the article being a suggestion from the research that recovered memories in relation to those made in a therapeutic context, are less reliable than those made spontaneously, where the individual encounters a reminder of the abuse episode. Whilst I do not place much weight upon the article, given my conclusions as to the context of the Statements, and the timing of the disclosures of A *prior* to therapy, and what A told his sister and his family how his memories were triggered, the conclusions reached in the article tend to support, rather than undermine, the reliability of A's allegations.
- 218 Eleventh, on my acceptance of Ms Hunter's evidence as to the tour group having a three-bedroom villa on the final night of the tour, and such an acceptance being well open to the Investigators, the logical consistency of A and the applicant sharing a room as the only two males on the trip, as opposed to either of them sharing a room with a female(s), is of itself, compelling. This is notwithstanding Ms Hunter's evidence, which I have said I accept, that she did put them both in the same room.
- 219 Twelfth, that A's attendance at the counselling service for some time between early May and late July 2017, shortly after the time of his disclosure to his family, is consistent with the legitimacy of A's grievance and the need for therapeutic assistance.

Conclusion

- 220 Having regard to all of these surrounding circumstances, in my view, looked at in the totality of what was before the Investigators and what is before the Commission, including the direct evidence of the applicant and Ms Hunter, it is open to draw inferences more probable than not, which support the holding by the employer of an honest and genuine belief, based on reasonable grounds, that the most serious allegation of misconduct complained of, occurred. These inferences, open on the material assessed as a whole, go beyond mere conjecture or surmise. I am not satisfied however, that it was reasonably open on the material before the Investigators, or in these proceedings, to sustain the allegation that the applicant purchased drinks for the students at the Hard Rock Café. However, this conclusion does not detract from the principal allegation. All the material, including the circumstantial evidence, supports the primary conclusion reached by the Investigators in the Final Investigation Report, as said by Ms Taylor in her evidence, "with some conviction".
- 221 For the foregoing reasons, the dismissal of the applicant for misconduct was not harsh, oppressive, or unfair. The application must be dismissed.

2020 WAIRC 00419

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DONALD ANDREW PARNELL

APPLICANT

-v-

THE ROMAN CATHOLIC ARCHBISHOP OF PERTH

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE TUESDAY, 21 JULY 2020
FILE NO/S U 132 OF 2019
CITATION NO. 2020 WAIRC 00419

Result Application dismissed
Representation
Applicant Mr P Mullally as agent
Respondent Mr I Curlewis of counsel

Order

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

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
 Senior Commissioner.

2020 WAIRC 00427

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00427
CORAM : COMMISSIONER T EMMANUEL
HEARD : FRIDAY, 24 JULY 2020
DELIVERED : FRIDAY, 24 JULY 2020
FILE NO. : U 24 OF 2020
BETWEEN : MARY JENNIFER MEUNIER
 Applicant
 AND
 DEPARTMENT OF COMMUNITIES
 Respondent

CatchWords : Unfair dismissal claim - Applicant's lack of communication - Application dismissed for want of prosecution
Legislation : *Industrial Relations Act 1979 (WA) s 27(1)*
 Industrial Relations Commission Regulations 2005 (WA) reg 24(2)(d) & reg 25(3)
Result : Application dismissed for want of prosecution
Representation:
Applicant : No appearance
Respondent : Ms J Vincent (of counsel)

Cases cited:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barmenco Pty Ltd – Plutonic Project (2000) 80 WAIG 3162

*Reasons for Decision***Background**

- 1 The applicant has filed an unfair dismissal claim. She says that the Department of Communities (**Department**) refuses to return her to the workplace.
- 2 The applicant filed an interlocutory application asking that the Commission order a pseudonym be used instead of her name (**Interlocutory Application**). After the Commission considered the documents filed by the parties, the Commission gave the applicant the opportunity to provide further evidence in support of the Interlocutory Application. In response, the applicant asked for more time to 'consider my options one of which to withdraw application (sic).'
- 3 The applicant was given more time to provide further evidence in support of the Interlocutory Application. She did not provide further evidence.
- 4 On 25 June 2020, the applicant emailed my Associate and said:
 - Sorry for late response.
 - I am writing to confirm, I will be withdrawing my application.
 - I will forward confirmation outlining my reasons.
- 5 It was not clear from the applicant's email whether the applicant meant that she wanted to withdraw her unfair dismissal application or the Interlocutory Application. Accordingly my Associate wrote to the applicant and said:
 - Thank you for your **below** email. I understand that you would like to discontinue your application U 24/2020. To do this, please either:
 1. reply to this email, copying in the respondent, and confirm that you would like to discontinue U 24/2020; or
 2. fill in and submit this form online. (hyperlink removed, original emphasis)
- 6 The applicant did not respond.
- 7 My Associate wrote to the applicant again on 13 July 2020 telling her that application U 24/2020 would be listed for mention to deal with her email set out at [4]. The applicant was told that if she updated the Commission about whether she intended to proceed with her unfair dismissal application and the Interlocutory Application then it may not be necessary to have the for mention hearing. My Associate asked the parties for their unavailable dates for the for mention hearing. The respondent said it was unavailable on 31 July 2020. The applicant then replied and asked 'Is 31st July available?'
- 8 On 15 July 2020, my Associate wrote to the parties to let them know that the for mention hearing was listed on 24 July 2020.

- 9 My Associate wrote again to the applicant on 15 July 2020, saying:

Following your **below** email dated 25 June 2020, the Commission has written to you three times about whether you wish to discontinue your claim U 24/2020, or whether in your email of 25 June 2020 you only intended to discontinue your interlocutory application for a pseudonym name. You have not answered the Commission.

The Commission directs you to confirm by email, copying in the respondent, **by 4pm on Friday 17 July 2020** whether you wish to discontinue your claim U 24/2020, or to discontinue your interlocutory application for a pseudonym name. (original emphasis)

- 10 The applicant replied the next day saying:

The process will have to proceed without me present, at the point a decision will be made without me.

I gather you will write to me to advise the case will be closed.

- 11 My Associate replied to the applicant by email that same day, saying:

I refer to your email to me dated Thursday 16 July 2020.

It is not clear to the Commission why you say “The process will have to proceed without me present, at the point a decision will be made without me. I gather you will write to me to advise the case will be closed.”

As you know, your application U 24/2020 has been listed for a hearing for mention **at 10am, Friday 24 July 2020**. The Commission tries to accommodate parties’ availability, although it is not always possible to do so. In any event, you were asked for your unavailable dates before the hearing was listed and you did not say you were unavailable on 24 July 2020.

In circumstances where:

- you seem to have indicated that you do not want to proceed with your application U 24/2020;
- the Commission has asked you three times in writing to confirm whether you wish to discontinue application U 24/2020;
- you have not answered the Commission about whether you wish to discontinue your application U 24/2020; and
- it now appears that you do not intend to attend the hearing for mention (the purpose of which is to enable the Commission to hear from you about whether you intend to discontinue your application),

the Commissioner has instructed me to instead list this matter for a ‘show cause hearing’.

A ‘show cause hearing’ is a hearing at which you must show cause why your application U 24/2020 should not be dismissed for want of prosecution. This means if you wish to continue with your unfair dismissal application U 24/2020, you must persuade the Commission that it should not be dismissed, in circumstances where you have not been properly engaging with the Commission as it tries to deal with your application.

You must attend the show cause hearing. **If you do not show cause why your application U 24/2020 should not be dismissed, application U 24/2020 will be dismissed.**

You must also comply with the direction to confirm by email, copying in the respondent, **by 4pm on Friday 17 July 2020** whether you wish to discontinue your claim U 24/2020, or to discontinue your interlocutory application for a pseudonym name.

I **enclose** notices of hearing for the show cause hearing listed at **10am, Friday 24 July 2020**, and I will post the originals.

Please contact me on (08) 9420 4470 if you have any questions about this letter or if there is anything you have not understood. (original emphasis)

The law

- 12 The Commission can dismiss a matter under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**):

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

- 13 In *The Australian Workers’ Union, West Australian Branch, Industrial Union of Workers v Barmenco Pty Ltd – Plutonic Project* (2000) 80 WAIG 3162, the Full Bench set out the principles to consider when deciding whether to dismiss an application for want of prosecution. They include the length of the delay, the explanation for the delay, the hardship to the applicant if the application is dismissed, the prejudice to the respondent if the action is allowed to proceed, and the conduct of the respondent in the litigation: Barmenco (3162).

Consideration

- 14 In my view the applicant has failed to prosecute her case.

- 15 This matter has been programmed to deal with the preliminary jurisdictional issue of whether, given the applicant agrees that she is a public service officer, the Commission in its general jurisdiction can hear and determine application U 24/2020.

- 16 The Commission requested that the Registry’s pro bono scheme consider providing the applicant pro bono assistance but the applicant was ineligible for assistance.

- 17 Having heard from the parties, directions were made in early May 2020 requiring the parties to file written submissions about the jurisdictional issue. The respondent complied with the directions. My Associate reminded the applicant twice in writing about when her written submissions were due. On the day her written submissions were due, the applicant asked for an extension of time. She was given an extension of one month. The applicant did not comply with the amended direction and still has not filed any written submissions.
- 18 The applicant has indicated several times in email that she wishes to discontinue an application at the Commission. She has not done so. The Commission has written to the applicant at least five times asking her to confirm whether she wishes to discontinue her application U 24/2020 or to discontinue the Interlocutory Application. She has been directed twice to confirm whether she wishes to discontinue her application U 24/2020 or to discontinue the Interlocutory Application. The applicant has not complied with those directions or the requests that she confirm her intentions.
- 19 The applicant did not appear at the show cause hearing. The Commission has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings: s 27(1)(d) of the IR Act. Service on the applicant in this matter may be effected by leaving the notice at, or sending it by pre-paid post to, the applicant’s usual or last known place of abode: reg 24(2)(d) *Industrial Relations Commission Regulations 2005* (WA) (**IR Regulations**). Alternatively, service can be effected on the applicant by sending the notice of hearing as an attachment to an email sent to the email address that the applicant has provided to the Commission: reg 25(3) of the IR Regulations. In circumstances where my Associate:
 - 1. emailed the notice of hearing to the email address the applicant provided to the Commission (and received a successful delivery receipt); and
 - 2. posted the notice of hearing to the postal address that the applicant provided to the Commission,
 I am satisfied that the applicant has been duly served with notice of these proceedings and the Commission may proceed with the hearing in her absence in the circumstances.
- 20 My Associate also clearly explained in writing to the applicant by email that application U 24/2020 would be listed for a show cause hearing on 24 July 2020, and that at that hearing she must show cause why her application should not be dismissed and if she did not do so application U 24/2020 would be dismissed.
- 21 For the past month the applicant has failed to comply with directions and generally been unresponsive or evasive in dealing with the Commission. Although she has been served with notice of today’s hearing and given a clear explanation of what she must do at the hearing, the applicant has failed to appear. The applicant has not arranged for anyone else to appear on her behalf. The applicant has not asked that this matter be listed on a different day, something she has done previously. The applicant has not contacted the Commission to say that she wishes to proceed with application U 24/2020.
- 22 I consider that the applicant has had ample opportunity to show that she wants to continue with her unfair dismissal application. She has not done so. There have been numerous failures to comply with directions causing unreasonable delay in the conduct of application U 24/2020. The applicant has not provided any reason for failing to comply with the Commission’s directions and requests. There is no evidence before the Commission about the hardship to the applicant if her application is dismissed, nor about the prejudice to the respondent if the application is allowed to proceed. I consider the respondent’s conduct in these proceedings has been appropriate at all times. In the circumstances, I find the applicant has failed to prosecute her case and it should be dismissed.
- 23 For these reasons, an order under s 27(1)(a) of the IR Act dismissing this matter will issue.

2020 WAIRC 00426

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MARY JENNIFER MEUNIER

APPLICANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

COMMISSIONER T EMMANUEL

DATE

FRIDAY, 24 JULY 2020

FILE NO/S

U 24 OF 2020

CITATION NO.

2020 WAIRC 00426

Result Application dismissed for want of prosecution

Representation

Applicant No appearance

Respondent Ms J Vincent

Order

WHEREAS this is an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) that was listed for a show cause hearing on 24 July 2020;

AND WHEREAS at the hearing on 24 July 2020 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;

AND HAVING given reasons for the decision following the hearing on 24 July 2020;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –
 THAT application U 24 of 2020 be, and hereby is, dismissed.

(Sgd.) T EMMANUEL,
 Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2020 WAIRC 00438

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT
 SENIOR COMMISSIONER S J KENNER
 COMMISSIONER T EMMANUEL
 COMMISSIONER D J MATTHEWS
 COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 29 JULY 2020

FILE NO/S

APPL 16 OF 2020

CITATION NO.

2020 WAIRC 00438

Result

Order issued

Representation

- Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations
- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited
- Dr T Dymond on behalf of UnionsWA

Order

Having heard from Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations, Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia (Inc) and Dr T Dymond on behalf of UnionsWA, the Commission in Court Session, pursuant to the powers conferred on it by section 27 of the *Industrial Relations Act 1979* (WA) hereby orders –

THAT this application be divided into –

APPL 16A of 2020 being, the review of the existing COVID-19 Leave Flexibility General Order issued on 14 April 2020 (2020 WAIRC 00205).

APPL 16B of 2020 being, all matters related to variations to the General Order proposed by UnionsWA in its submission dated 21 July 2020.

(Sgd.) P E SCOTT,
 Chief Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

2020 WAIRC 00425

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 16 APRIL 2020

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MEAGAN WEST APPELLANT
-v- WA COUNTRY HEALTH SERVICES - SOUTH WEST RESPONDENT
CORAM PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MR D HILL - BOARD MEMBER MS J NICOLSON - BOARD MEMBER
DATE THURSDAY, 23 JULY 2020
FILE NO. PSAB 9 OF 2020
CITATION NO. 2020 WAIRC 00425

Result Direction issued
Representation
Appellant Mr K Trainer (as agent)
Respondent Ms R Sinton (as agent)

Direction

HAVING heard from Mr K Trainer (as agent) on behalf of the appellant and Ms R Sinton (as agent) on behalf of the respondent about programming this matter, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act 1979 (WA), directs –

- 1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 11 August 2020;
2. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which she intends to rely by 25 August 2020;
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 8 September 2020;
4. THAT the appellant file a written outline of her submissions by 22 September 2020;
5. THAT the respondent file a written outline of its submissions by 7 October 2020;
6. THAT discovery be informal; and
7. THAT the parties have liberty to apply.

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

[L.S.]

2020 WAIRC 00428

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 4 MAY 2020

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CHRISTINE GAYE WHITE APPELLANT
-v- SIR CHARLES GAIRDNER HOSPITAL RESPONDENT
CORAM PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MR D HILL - BOARD MEMBER MR M AULFREY - BOARD MEMBER
DATE FRIDAY, 24 JULY 2020
FILE NO. PSAB 12 OF 2020
CITATION NO. 2020 WAIRC 00428

Result	Directions issued
Representation	
Appellant	In person
Respondent	Mr C Cameron (as agent)

Direction

HAVING heard from the appellant in person and Mr C Cameron (as agent) on behalf of the respondent about programming this matter, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 13 August 2020;
2. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which she intends to rely by 3 September 2020;
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 24 September 2020;
4. THAT the appellant file a written outline of her submissions by 16 October 2020;
5. THAT the respondent file a written outline of its submissions by 6 November 2020;
6. THAT discovery be informal; and
7. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00435

APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 4 MAY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CHRISTINE GAYE WHITE

PARTIES

APPELLANT

-v-

SIR CHARLES GAIRDNER HOSPITAL

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MR M AULFREY - BOARD MEMBER

DATE

TUESDAY, 28 JULY 2020

FILE NO

PSAB 12 OF 2020

CITATION NO.

2020 WAIRC 00435

Result	Order issued
Representation	
Appellant	In person
Respondent	Mr C Cameron (as agent)

Order

WHEREAS this is an appeal to the Public Service Appeal Board under the *Industrial Relations Act 1979* (WA);

AND WHEREAS at a directions hearing on 23 July 2020 the parties asked the Public Service Appeal Board to amend the name of the respondent;

AND HAVING heard from the parties, the Public Service Appeal Board considers the name of the respondent should be amended;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT the name of the respondent be amended to ‘North Metropolitan Health Service’.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00417

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PONNURAJAH (PON) RATNASINGHAM

APPELLANT

-v-

DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY

RESPONDENT

CORAM

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

DATE

TUESDAY, 21 JULY 2020

FILE NO

PSAB 22 OF 2019

CITATION NO.

2020 WAIRC 00417

Result	Order issued
Representation (by correspondence)	
Appellant	Mr M Amati (as agent)
Respondent	Ms J Vincent (of counsel)

Order

HAVING heard from Mr M Amati, as agent, for the appellant and Ms J Vincent, of counsel, for the respondent via correspondence, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and by consent, hereby orders that:

the respondent disclose to the appellant, the appellant's agent and, where admitted into evidence, members of the Public Service Appeal Board the following complaint files held by the respondent numbered by complaint ID:

- 138828;
- 144002;
- 145217;
- 146328;
- 147001;
- 148632;
- 150167;
- 150062;
- 150063;
- 150167;
- 150710;
- 150951;
- 152449;
- 153427;
- 153528;
- 153427;
- 164689;
- 180704;
- 180710;
- 181000; and
- 181010.

Comprising, as applicable:

- (a) complaint form;

- (b) evidence;
- (c) correspondence between the complainant and officers of the respondent;
- (d) correspondence between the accused and officers of the respondent;
- (e) correspondence between officers of the respondent; and
- (f) drafts and final versions of formal documentation including requests for information, investigation reports and outcome letters.

(Sgd.) D J MATTHEWS,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shire of Ravensthorpe Enterprise Bargaining Agreement 2020 AG 14/2020	08/06/2020	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Ravensthorpe	Commissioner D J Matthews	Agreement Registered
Western Australian Tafe Lecturers' General Agreement 2019 AG 15/2020	08/06/2020	Department of Training & Workforce Development, The State School Teachers' Union of W.A. (Inc)	(Not applicable)	Commissioner T Emmanuel	Order issued

PUBLIC SERVICE APPEAL BOARD—

2020 WAIRC 00309

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 FEBRUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CAROL ELENA HUTCHINSON

APPELLANT

-v-

DEPARTMENT OF HEALTH, WA COUNTRY HEALTH SERVICE, SOUTH WEST REGION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR G LEE - BOARD MEMBER
MR P HESLEWOOD - BOARD MEMBER

DATE

THURSDAY, 4 JUNE 2020

FILE NO.

PSAB 3 OF 2020

CITATION NO.

2020 WAIRC 00309

Result	Directions issued
Representation (on the papers)	
Appellant	On her own behalf
Respondent	Ms R Sinton (as agent)

Direction

HAVING heard from the appellant on her own behalf and Ms R Sinton (as agent) on behalf of the respondent about programming the appellant's discovery application filed on 22 May 2020 (**Discovery Application**), the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

- THAT the respondent file a response and written submissions in relation to the Discovery Application by Friday, 12 June 2020;

- THAT the appellant file any written submissions in reply by Friday 19 June 2020; and
- THAT the Board deal with the Discovery Application on the papers.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00392

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 FEBRUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00392
CORAM : PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T EMMANUEL - CHAIR
 MR G LEE - BOARD MEMBER
 MR P HESLEWOOD - BOARD MEMBER
HEARD : FRIDAY 19 JUNE 2020 (ON THE PAPERS)
DELIVERED : FRIDAY, 3 JULY 2020
FILE NO. : PSAB 3 OF 2020
BETWEEN : CAROL ELENA HUTCHINSON
 Appellant
 AND
 DEPARTMENT OF HEALTH, WA COUNTRY HEALTH SERVICE, SOUTH WEST
 REGION
 Respondent

CatchWords : PSAB – Discovery – Documents sought are not relevant to preliminary issues
 Legislation : Section 27(1)(o) *Industrial Relations Act 1979* (WA)
 Result : Application for discovery dismissed
Representation:
 Appellant : On her own behalf
 Respondent : Ms R Sinton (as agent)

Cases referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

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

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

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

Nicholas v Department of Education and Training [2008] WAIRC 01645; (2009) 89 WAIG 817

Reasons for Decision

- 1 These are the unanimous reasons of the Board.
- 2 Ms Hutchinson was a Regional Patient Assisted Travel Scheme Officer (**PATS Regional Officer**). She is appealing the Department of Health, WA Country Health Service, South West Region's (**Health Department**) decision to dismiss her on 5 February 2020.
- 3 The Health Department says it did not dismiss Ms Hutchinson and, even if it did, her appeal should not be accepted out of time.
- 4 Before the Board can hear Ms Hutchinson's substantive appeal, it must deal with the preliminary issues of whether Ms Hutchinson was dismissed, and if she was, whether her appeal should be accepted out of time.
- 5 Ms Hutchinson has filed an application for discovery. She asks that the Board order that the Health Department provide to her:
 1. a complete list of new fixed term or extended contracts for all PATS Regional Officers from 4 November 2019 to 1 March 2020, and the length of each new contract or contract extension; and
 2. 'the termination/cessation of short-term fixed term contract T1 termination/cessation form or M6 Contract Variation form (whichever applies) completed by Team Leader, Renee Whyatt for PATS Officer Lee Merrick when her 3-month Fixed Term contract with the PATS Office ended in December, 2019'.

- 6 The Health Department says the Board should dismiss the discovery application because the documents sought are not relevant to the preliminary issues to be decided.

Relevant principles

- 7 Discovery is confined to what is in issue on the pleadings. The Board can only make an order for discovery under s 27(1)(o) of the *Industrial Relations Act 1979* (WA) if it is just to do so and necessary for the fair disposal of the case. ‘Just’ means ‘right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right’: *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801, 1805.
- 8 The parties consented to the discovery application being heard and determined on the papers.

Are the documents necessary to resolve the preliminary issues in dispute?

- 9 At this stage, there are two preliminary issues in dispute before the Board.
- 10 To resolve the two preliminary issues, the Board will need to consider the following:
- a. was Ms Hutchinson sent away or removed from her office, employment or position, in accordance with *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611; *Gallotti v Argyle Diamond Mines Pty Ltd trading as Argyle Diamonds* [2002] WAIRC 06828; (2002) 82 WAIG 3011, at [55] – [62]. If she was, then:
 - b. should Ms Hutchinson’s appeal be accepted out of time, taking into account the considerations set out in *Nicholas v Department of Education and Training* [2008] WAIRC 01645; (2009) 89 WAIG 817:
 - i. the length of the delay;
 - ii. the reason for the delay;
 - iii. whether Ms Hutchinson has an arguable case; and
 - iv. whether there would be any prejudice to the Health Department if the appeal is accepted out of time.
- 11 Ms Hutchinson must therefore persuade the Board that the documents she seeks are necessary to resolve the matters set out in [10].

Ms Hutchinson’s submissions

- 12 Ms Hutchinson says that the documents she seeks will show that the fixed term contracts of other employees were extended before and after the date that she says she was dismissed. These documents will show that two 3-month fixed term contracts were given to her colleagues specifically to assist with clearing a document backlog. Those employment contracts were renewed and hers was not. Ms Hutchinson says this shows that she was replaced by another employee as part of the bullying she had been experiencing at the Health Service.
- 13 Ms Hutchinson says the documents set out in point two of [5] above will show that Ms Whyatt had experience completing the T1 Termination/Cessation form and ‘would not have put “dismissed” on the appellant’s T1 form unless that was her expressed intent.’

Health Department’s submissions

- 14 The Health Department says the documents Ms Hutchinson seeks are not relevant to the preliminary issues nor necessary for her to have a fair hearing on the preliminary issues.

Ms Hutchinson’s submissions in reply

- 15 In reply Ms Hutchinson says evidence is relevant and admissible if it has probative value. Facts in issue include facts relevant to ultimate issues, which in this case includes:
- a. just two days after a formal complaint was made by Ms Hutchinson, she was told her contract would not be extended, constituting ‘a case of retaliation’;
 - b. there is evidence that other employees’ employment contracts were extended or issued;
 - c. Ms Hutchinson was not dismissed for performance reasons or operational requirements; and
 - d. the Health Department’s administrative officer had sufficient experience filling out T1 forms because she had filled out several just before Ms Hutchinson’s termination.

The gist of Ms Hutchinson’s submission in reply is that the documents she seeks are relevant to those issues.

- 16 Finally, Ms Hutchinson says her request for documents cannot be described as a fishing expedition because it is defined by dates and includes reference to documents that relate to particular individuals. It does not place a burden on the Health Department because it likely involves few documents and those documents are readily accessible. Ms Hutchinson will keep the documents confidential, only using them for the hearing of the preliminary issues and her substantive appeal.

Conclusion

- 17 Having heard from the parties, the Board is not persuaded that the documents Ms Hutchinson seeks to discover are necessary to resolve the preliminary issues.
- 18 The first question for the Board will be whether Ms Hutchinson was sent away or removed from employment. To answer that question, it will not be necessary for the Board to consider the Health Department’s use of fixed term contracts for other employees, whether other employees had fixed term contracts extended or how T1 or M6 documents were filled out in relation to other employees. The Board will need to examine the relevant evidence as it relates to Ms Hutchinson and the circumstances of her employment, not that of other employees.

- 19 Ms Hutchinson argues that ‘it is an *implied and expressed understanding between the parties*, at the time of hiring that should operational requirements warrant an extension of contract, the contract terms will be extended (until such time that the employee be converted to *permanent* as the case may be).’ [original emphasis] In an appeal of this type, the Board is not considering an employer’s broader employment practices. Rather the Board must consider the conduct of the employer and the particular employee, in order to decide whether as a matter of fact and law the employee was dismissed.
- 20 The Board is bound by *Gallotti v Argyle Diamond Mines Pty Ltd* [2003] WASCA 166; (2003) 83 WAIG 3053 and EM Heenan J’s reasoning at [5]: ‘There is ample authority for the proposition that the cessation of the relationship of employer and employee by the effluxion of an agreed term of employment is not a “dismissal”’ and at [7]: ‘There will not be a dismissal where the term of a contract of employment expires’.
- 21 The Board will need to decide whether Ms Hutchinson was sent away or removed from employment, or whether her employment simply ended by the effluxion of time. It would not be sufficient for Ms Hutchinson to establish that there were no performance reasons or operational requirements that justified dismissing Ms Hutchinson. She will need to prove that her employment ended because of some action on the part of the Health Department, that it amounted to sending her away or removing her from her employment.
- 22 The documents sought are also not relevant to the considerations set out at [10] that the Board must take into account in deciding whether to accept the appeal out of time.
- 23 The documents Ms Hutchinson seeks are not relevant to resolving the preliminary issues. They are not necessary for the fair disposal of the case and it would not be just for the Board to order that the Health Department provide them. For these reasons, Ms Hutchinson’s discovery application is dismissed.

Note: [2] and [15] amended by correcting order [2020] WAIRC 00432.

2020 WAIRC 00394

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 FEBRUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CAROL ELENA HUTCHINSON

APPELLANT

-v-

DEPARTMENT OF HEALTH, WA COUNTRY HEALTH SERVICE, SOUTH WEST REGION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T EMMANUEL - CHAIR
 MR G LEE - BOARD MEMBER
 MR P HESLEWOOD - BOARD MEMBER

DATE

FRIDAY, 3 JULY 2020

FILE NO/S

PSAB 3 OF 2020

CITATION NO.

2020 WAIRC 00394

Result Application for discovery dismissed

Representation (on the papers)

Appellant On her own behalf

Respondent Ms R Sinton (as agent)

Order

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

THAT the discovery application filed by the appellant on 22 May 2020 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
 Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00424

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 FEBRUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CAROL ELENA HUTCHINSON

APPELLANT**-v-**

DEPARTMENT OF HEALTH, WA COUNTRY HEALTH SERVICE, SOUTH WEST REGION

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR G LEE - BOARD MEMBER
MR P HESLEWOOD - BOARD MEMBER**DATE**

THURSDAY, 23 JULY 2020

FILE NO.

PSAB 3 OF 2020

CITATION NO.

2020 WAIRC 00424

Result	Directions issued
Representation	
Appellant	In person
Respondent	Ms R Sinton (as agent)

Direction

HAVING heard from the appellant on her own behalf and Ms R Sinton (as agent) on behalf of the respondent about programming this matter in relation to the preliminary matters of whether the appellant was dismissed and whether the Board should extend the time limit for the appellant to make her appeal, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the respondent file its outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 24 July 2020.
2. THAT the appellant file a written outline of submissions by 14 August 2020.
3. THAT the respondent file a written outline of submissions by 4 September 2020.
4. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00432

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 FEBRUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CAROL ELENA HUTCHINSON

APPELLANT**-v-**

WA COUNTRY HEALTH SERVICE

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR G LEE - BOARD MEMBER
MR P HESLEWOOD - BOARD MEMBER**DATE**

TUESDAY, 28 JULY 2020

FILE NO.

PSAB 3 OF 2020

CITATION NO.

2020 WAIRC 00432

Result	Correcting order issued
Representation	
Appellant	In person
Respondent	Ms R Sinton (as agent)

Correcting Order

WHEREAS on 22 May 2020, the appellant filed an interlocutory application for discovery in relation to her appeal PSAB 3 of 2020 (**Discovery Application**);

AND WHEREAS on 3 July 2020 the Public Service Appeal Board issued an order and reasons for decision in relation to the Discovery Application;

AND WHEREAS at a hearing on 21 July 2020, the parties informed the Public Service Appeal Board that there are two typographical errors in the reasons for decision about the Discovery Application that they would like corrected;

AND WHEREAS the Public Service Appeal Board is satisfied that the errors are typographical and do not affect its decision about the Discovery Application;

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

1. THAT in the reasons for decision [2020] WAIRC 00392, in [2] on line 3, delete ‘12 February’ and insert ‘5 February’ in lieu thereof; and
2. THAT in the reasons for decision [2020] WAIRC 00392, in [15] in list item (a), delete ‘about’ and insert ‘by’ in lieu thereof.

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2020 WAIRC 00433

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 FEBRUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CAROL ELENA HUTCHINSON

APPELLANT

-v-

DEPARTMENT OF HEALTH, WA COUNTRY HEALTH SERVICE, SOUTH WEST REGION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR G LEE - BOARD MEMBER
MR P HESLEWOOD - BOARD MEMBER

DATE

TUESDAY, 28 JULY 2020

FILE NO

PSAB 3 OF 2020

CITATION NO.

2020 WAIRC 00433

Result	Order issued
Representation	
Appellant	In person
Respondent	Ms R Sinton (as agent)

Order

WHEREAS this is an appeal to the Public Service Appeal Board under the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 7 July 2020 the respondent made a written application to the Public Service Appeal Board to amend the name of the respondent;

AND HAVING heard from the parties, the Public Service Appeal Board considers that the name of the respondent should be amended;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT the name of the respondent be amended to ‘WA Country Health Service’.

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2020 WAIRC 00412

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JARRAD MURDOCK

APPELLANT

-v-

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T EMMANUEL - CHAIR
 MS A KACZMAREK - BOARD MEMBER
 MR M AULFREY - BOARD MEMBER

DATE

FRIDAY, 17 JULY 2020

FILE NO

PSAB 24 OF 2019

CITATION NO.

2020 WAIRC 00412

Result Appeal discontinued

Representation (by correspondence)**Appellant** On his own behalf**Respondent** N/A*Order*

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to s 80I of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 5 June 2020 the appellant informed the Public Service Appeal Board by email, without copying in the respondent, that 'due to recent events including the COVID pandemic, I have decided not to proceed with my claim against NMHS';

AND WHEREAS on that day that Board's Associate wrote to the appellant (copying in the respondent) and informed the appellant that if he wished to discontinue his application, he must reply to her email, copying in the respondent, and confirm that he would like to discontinue his application PSAB 24/2019;

AND WHEREAS on 15 June 2020 the appellant again informed the Public Service Appeal Board by email, without copying in the respondent, that he 'would like to discontinue application PSAB 24/2019';

AND WHEREAS on 16 June 2020 the Board's Associate wrote to the appellant again and informed him that 'under Regulation 16 of the *Industrial Relations Commissions Regulations 2005*, for your application to be discontinued by email you need to copy in the respondent. Please could you reply to this email, **copying in the respondent**, and again confirm that you ask for your application to be discontinued' [original emphasis];

AND WHEREAS the appellant has not responded to the Board's Associate's email;

AND WHEREAS the Board is satisfied that the appellant does not wish to continue his appeal and in the circumstances it should be discontinued;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT this appeal be, and hereby is, discontinued.

[L.S.]

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

2020 WAIRC 00175

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 16 SEPTEMBER 2019

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JARRAD PARSONS	APPELLANT
	-v-	
	MAIN ROADS WESTERN AUSTRALIA	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MR G LEE - BOARD MEMBER MR J CHAPMAN - BOARD MEMBER	
DATE	MONDAY, 16 MARCH 2020	
FILE NO	PSAB 18 OF 2019	
CITATION NO.	2020 WAIRC 00175	

Result	Appeal discontinued
Representation	
Appellant	Mr J Parsons
Respondent	Mr J Carroll 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,

On behalf of the Public Service Appeal Board.

[L.S.]

2020 WAIRC 00415

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 18 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2020 WAIRC 00415
CORAM	:	PUBLIC SERVICE APPEAL BOARD COMMISSIONER D J MATTHEWS - CHAIRMAN MS H REDMOND - BOARD MEMBER MR J LAMB - BOARD MEMBER
HEARD	:	BY SUBMISSIONS
DELIVERED	:	MONDAY, 20 JULY 2020
FILE NO.	:	PSAB 4 OF 2020
BETWEEN	:	TREVOR WALLEY
		Appellant
		AND
		DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIONS
		Respondent

CatchWords	:	Industrial Law (WA) - Appeal against employer's decision to terminate appellant's employment - Appeal filed outside of time limit - Principles applied - Extension of time to institute proceedings granted
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Legislation	:	
Result	:	Extension of time granted

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

Case(s) referred to in reasons:

Nicholas v. Department of Education and Training (2009) 89 WAIG 817

Reasons for Decision

- 1 This is the would-be appellant's application to extend time for the filing of his Notice of Appeal.
- 2 The power of the Public Service Appeal Board to extend time exists for the sole purpose of enabling the Public Service Appeal Board to do justice between the parties. It is incumbent upon the would-be appellant to demonstrate that if the Public Service Appeal Board were to take the, prima facie, uncontroversial approach of applying the clear rules relating to the time within which an appeal must be initiated, this would work a real injustice against him.
- 3 In *Nicholas v. Department of Education and Training* (2009) 89 WAIG 817 a Public Service Appeal Board, in a decision which is now considered to be the leading one on the matter, set out the four main considerations which illuminate the decision maker's path in deciding where justice lies on an application such as this. They are the length of the delay, the reason for the delay, the strength of the appeal grounds and the prejudice to the potential respondent to the appeal if an extension of time were granted. Regard for those factors cannot replace the overarching duty to consider whether the rules work an injustice upon a would-be appellant, but it is hard to go wrong, at least in terms of approach, if parties address these issues and the Public Service Appeal Board considers them.
- 4 The would-be appellant was dismissed on 6 January 2020. He filed a Notice of Appeal against the decision on 26 March 2020, that is two months after the deadline for the regular filing of an appeal.
- 5 The would-be appellant says that he was unwell and points to medical certificates of Dr Bradley Price dated 16 December 2019 and 16 January 2020 which, together, certify him as having no capacity for work from 16 December 2019 to 16 April 2020.
- 6 The medical certificates were given in the context of a workers' compensation claim and state the would-be appellant is suffering from a post-traumatic stress disorder related to an incident on 18 October 2000.
- 7 As at 16 January 2020 it must be accepted, without more, that the would-be appellant had been suffering from a post-traumatic stress disorder and had been unable to work as a result since 16 December 2019. It must be accepted, given there is no competing evidence and nothing about the certificate which calls its contents into question, that the would-be appellant was, on that date, suffering from a post-traumatic stress disorder. It must also be accepted, without more, that the opinion of Dr Price was that the would-be appellant would not be capable of working before 16 April 2020.
- 8 The second certificate says nothing about the would-be appellant's ability to complete and file a Notice of Appeal against a decision to dismiss him from his employment. We are, however, prepared to accept that suffering from a post-traumatic stress disorder would affect the taking of such a step and would be a good reason for not completing and filing a Notice of Appeal.
- 9 The alternative is that we find that the opinion of Dr Price was that the would-be appellant was, and would be, unable to work but could complete and file a Notice of Appeal. We do not see how we could fairly make such a finding. The far more reasonable conclusion is that a medical condition which led to an inability to do something with which the would-be appellant was familiar with and experienced in, his work, would also render the appellant unable to do something with which he was less familiar and had no experience in relation to, that being the completion and filing of a Notice of Appeal.
- 10 We consider the would-be appellant has established that there is a reason for the delay and that the reason is a good one.
- 11 The potential respondent says that medical issues are not a good reason for the delay. The potential respondent appeals to our logic. The potential respondent points to some things the would-be appellant did during the period of time covered by the medical certificates. The potential respondent says that because the would-be appellant was capable of doing those things, we cannot possibly accept that he was medically incapable of completing and lodging a Notice of Appeal.
- 12 The potential respondent points to the would-be appellant giving instructions to a union, some communications he had, and apparently had, with Parliamentarians and, remarkably, to the Notice of Appeal.
- 13 The potential respondent says the would-be appellant has offered no explanation as to how he had the capacity to do these things but did not have capacity to file a Notice of Appeal within 21 days of the date of dismissal and that, as a matter of logic, we ought deduce that if the would be-appellant could do these things then he could have equally completed and filed a Notice of Appeal.
- 14 We reject the argument for a number of reasons.
- 15 The invocation of the filing of the Notice of Appeal takes us nowhere given that there is no evidence the would-be appellant was incapable of completing and filing a Notice of Appeal as a result of a post-traumatic stress disorder for the entire period up until 16 April 2020, and that doing this on 26 March 2020 puts to the lie the assertion that illness explains his delay in taking this step.
- 16 Dr Price thought the would-be appellant would be unable to work until 16 April 2020 and opined as much on 16 January 2020. However, this does not mean as a matter of fact, or as a matter of logic, that the would-be appellant was suffering from a post-traumatic stress disorder and unable to complete and file a Notice of Appeal on 26 March 2020, a date that was about three weeks before the outer limit of Dr Price's opinion.
- 17 The would-be appellant could have relied upon the medical certificate to excuse him from working, and filing a Notice of Appeal, until 16 April 2020. This does not mean that filing a Notice of Appeal before this date is fatal to his explanation that illness is the reason for his delay. The would-be appellant may have recovered sufficiently from the post-traumatic stress disorder by 26 March 2020 to take this step. As a matter of logic that conclusion is as open as that he was suffering a post-

traumatic stress disorder on that date and so his filing of the Notice of Appeal puts to the lie that the post-traumatic stress disorder prevented him from taking this step earlier.

- 18 The potential respondent's argument must be that, for the sake of consistency and logic, the would-be appellant should have waited until 17 April 2020 to file the Notice of Appeal even if he felt better beforehand. We do not think this is a good argument.
- 19 The would-be appellant should have filed the Notice of Appeal as soon as he was able. We have no evidence before us that he did not do this. In fact, we have an opinion from a doctor that the would-be appellant would have no capacity to work until at least 16 April 2020. We have found this means he was predicted to have no capacity to complete and file a Notice of Appeal until that date. The filing of the Notice of Appeal before that date is a good thing all round, not something that can, as matter of logic, or should, as matter of fairness, be relied upon against the would-be appellant. It is odd to suggest that the filing of a Notice of Appeal on a certain date proves that the would-be appellant could have filed the Notice of Appeal on an earlier date.
- 20 In relation to the other matters referred to in [12] above, the potential respondent's argument must be that either the would-be appellant was not really suffering from a post-traumatic stress disorder at the times he did these things, or that it did not prevent him from doing things that were, all in all, like filing a Notice of Appeal.
- 21 We do not think the potential respondent is saying the would-be appellant did not suffer from a post-traumatic stress disorder. If it is, there is no basis for the assertion.
- 22 If the potential respondent is saying that the would-be appellant did things that equate to, or are in the same ball park as, the completion and filing of a Notice of Appeal we must look at the evidence of what the would-be appellant did and turn our minds to whether these establish that the would-be appellant could have completed and filed a Notice of Appeal despite having a post-traumatic stress disorder.
- 23 In relation to the meeting with his union, we do not know what happened at the meeting and we are unable to decide whether the would-be appellant conducted himself in such a way that proves he was capable of doing things like completing and filing a Notice of Appeal despite suffering from a post-traumatic stress disorder.
- 24 In relation to the email dated 9 January 2020, it is the last email of an exchange about the would-be appellant seeking a meeting with the potential respondent's human resources branch about his work situation.

It says:

“Good morning

As advised I made to meet with employee relations

And the response below

Thank you”

- 25 We do not understand how the potential respondent says this is anything like completing a Notice of Appeal. In the email the would-be appellant informed the Minister for Environment that, as the Minister suggested he do in his letter dated 3 January 2020, he had tried to arrange a meeting with the human resources branch of the potential respondent and had received the response he forwarded.
- 26 The potential respondent seeks to characterise this in written submissions as a ‘step’. We are not sure how simply informing the Minister that you have failed in your attempt to have a meeting with your ex-employer, while asking nothing at all of the Minister, is a ‘step’. It is a very brief update or report back, not a ‘step’.
- 27 In any event, it is nothing like the completion of a Notice of Appeal. If the would-be appellant had filed a Notice of Appeal that was as vague and brief as the email to the Minister, the potential respondent would have been entitled to complain about it being deficient.
- 28 In relation to the letter to the Minister for Environment dated 9 March 2020, we have not seen it.
- 29 The would-be appellant provided evidence upon which we may comfortably rely that he was suffering from a post-traumatic stress disorder and unable to work until 16 April 2020.
- 30 We are prepared to accept that suffering a post-traumatic stress disorder excuses one from turning their mind to the completion and filing of a Notice of Appeal. That the would-be appellant found it within himself to complete and file the Notice of Appeal on 26 March 2020, that is a date within his doctor's opinion as to his unfitness for work, does not establish that the would-be appellant had capacity to file the document prior to 26 March 2020 and inappropriately sat on his hands.
- 31 Looking at the other relevant factors, the period of delay is not so short as to be of no concern. As the potential respondent says, the rules are there for a reason and, prima facie, should be obeyed. There will be occasions where the length of delay is so great that other factors become almost irrelevant. This is not such a case. A delay of two months goes into the mix but is not, on its own, a determinative factor.
- 32 The potential respondent does not point to any particular prejudice. We note on this aspect that the potential respondent, on the materials we have before us, knew that the would-be appellant was unhappy about what was happening to him and exploring, in an admittedly ineffectual way, what he could do about it from December 2019.
- 33 In relation to the merits of the appeal we have, after considering them in a rough and ready way, come to the conclusion that it cannot be said that the grounds are so inarguable as to have this factor loom large in our considerations.
- 34 In our view, in this case, we have a long, but not excessively long, period of delay adequately explained, a potential respondent who has suffered no particular prejudice and appeal grounds that are worth hearing.

- 35 We are of the view that we would not be doing justice as between the parties if we effectively concluded this appeal against the would-be appellant at this time. We are satisfied strict compliance with the rules would work an injustice upon him.
- 36 We will grant an extension of time and treat the documents filed as being regular.
- 37 A further issue needs to be dealt with.
- 38 Our reasons for decision were delivered to the parties in the above terms before any orders in this matter were perfected.
- 39 Counsel for the potential respondent subsequently pointed out that we had in fact had the opportunity to look at the communication which at [28] above we said we had not seen.
- 40 [18(c)] of the written submissions filed by the potential respondent says:
- “18. Even taking those [medical] certificates at their highest, they do not provide evidence to support an assertion that the appellant was unable to commence an appeal within 21 days in circumstances where:
- ...
- (c) it appears that the appellant wrote to Hon Stephen Dawson MLC in relation to his dismissal,”
- 41 Footnote 9 says:
- “See the attachment to the notice of appeal, which appears to be an email from the appellant to Minister Dawson, and appears to be dated 9 March 2020.”
- 42 We interpreted the reference to “appears” in [18(c)] above to mean that the potential respondent’s knowledge had been gathered from a secondary source. It is apparent from footnote 9, to which we did not have sufficient regard, that this is incorrect.
- 43 It is necessary for us to review what we have written above, taking into account the communication, a letter in email form from the would-be appellant to the Hon Stephen Dawson MLC, and the reliance the potential respondent placed upon it in its submissions.
- 44 The significance of the communication from the potential respondent’s point of view is said to be that it proves that the would-be appellant had the capacity to draft and file a Notice of Appeal earlier than 26 March 2020.
- 45 One argument is that it is a matter of logical deduction that if the would-be appellant could draft such a communication on 9 March 2020, despite having a post-traumatic stress disorder, then he equally could have drafted and filed a Notice of Appeal.
- 46 Alternatively, the would-be appellant clearly had capacity to take that step on 9 March 2020 and sat on his hands from 9 March 2020 until 26 March 2020.
- 47 The communication is certainly more detailed in terms of history and complaint than other documents referred to. It contains references to the kind of things one would expect to see in a Notice of Appeal.
- 48 However, the question is whether it undoes the would-be appellant’s contention that he had a good reason for delay in not filing the Notice of Appeal until 26 March 2020, being that he was suffering from a post-traumatic stress disorder.
- 49 We are of the view that, as a matter of logic, evidence or fairness, it cannot work this result.
- 50 The drafting of a letter to the Hon Stephen Dawson MLC is just not the same thing as commencing a legal action. The former can be viewed as an informal approach rather than the formal approach represented by the latter.
- 51 It is plain from the terms of the letter that the would-be appellant knew about the possibility of commencing legal action and wanted it to happen but wanted others to take the step on his behalf. Wanting someone to represent you in legal proceedings is normal and readily understandable.
- 52 An inability to take a step in which you must represent yourself may be something that a person suffering from a post-traumatic stress disorder finds a step too far. It is, after all, a big step, and perhaps it is one that is, from a medical point of view, reasonably understood as being too big for someone suffering from a post-traumatic stress disorder.
- 53 We just do not know. At the end of the day, in terms of medical evidence, what we have before us is the opinion of a doctor that the would-be appellant would be suffering from a post-traumatic stress disorder that would prevent him from working until 16 April 2020. We simply do not see how, unassisted by any other medical evidence, we could say ‘Yes, but the communication on 9 March 2020 proves that the would-be appellant had capacity to commence legal action on a date earlier than 26 March 2020’.
- 54 The syllogism would have to be:
- (1) The commencement of legal action requires the same level of health and wellbeing as writing the letter dated 9 March 2020.
 - (2) The would-be appellant wrote the letter dated 9 March 2020.
 - (3) Therefore, the would-be appellant was well enough and healthy enough to commence legal action on or about 9 March 2020.
- 55 Looked at this way it is surely clear that the process of deductive reasoning breaks down at (1) in the previous paragraph. Where is the evidence in support of the premise? There is none. It may be completely wrong. The potential respondent’s argument is a flawed syllogism.
- 56 In any event, the Notice of Appeal was filed 17 days after 9 March 2020. Let us accept, because the medical evidence says as much, that the would-be appellant had a post-traumatic stress disorder that prevented him working until at least 9 March 2020 (on the potential respondent’s argument) and that, as the potential respondent says, on that date the communication proves he

the capacity to do “work-like” things and that drafting and filing a Notice of Appeal is a “work-like” thing. All this would mean is that the clock would start to run, as a matter of fairness to the would-be appellant, on 9 March 2020. If so, why would he not have 21 days from that date to file his appeal?

- 57 Of course, we accept immediately that that approach is not fair to the potential respondent who is entitled to expect a would-be appellant to stick to the rules, but that is a separate matter. That sounds in the potential respondent’s submissions on prejudice.
- 58 In terms of explaining a delay, the would-be appellant’s delay until 9 March 2020 would be explained and from that point the would-be appellant took no longer than someone who had full capacity would take, that is, less than 21 days.
- 59 Finally, the would-be appellant tells the Hon Stephen Dawson MLC in the 9 March 2020 communication that he is unhappy about the termination of his employment and wants to take it further. I do not see how the potential respondent could be surprised in any way when this happened. They should have been expecting it.
- 60 We have reviewed the document that was overlooked earlier. We apologise for any inconvenience, but it makes no difference to the outcome of the application for an extension of time.

2020 WAIRC 00422

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 18 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TREVOR WALLEY

APPELLANT

-v-

DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIONS

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER D J MATTHEWS - CHAIRMAN
 MS H REDMOND - BOARD MEMBER
 MR J LAMB - BOARD MEMBER

DATE

WEDNESDAY, 22 JULY 2020

FILE NO

PSAB 4 OF 2020

CITATION NO.

2020 WAIRC 00422

Result Orders issued**Representation****Appellant** In person**Respondent** Mr J Carroll (of counsel)*Orders*

HAVING heard from the appellant in person and Mr J Carroll, of counsel, for the respondent, by written submissions filed 11 May 2020 and 18 May 2020 and by email correspondence received 9 July 2020, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

- (1) THAT the time for filing the appeal be, and is hereby, extended to 26 March 2020;
- (2) THAT the Notice of Appeal filed on 26 March 2020 stand as the Notice of Appeal in this matter;
- (3) THAT the Response filed on 17 April 2020 stand as the Response in this matter; and
- (4) THAT the matter be listed for directions hearing on a date to be fixed.

(Sgd.) D J MATTHEWS,
 Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.