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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2020] WASCA 176

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	DIXON -v- DIRECTOR GENERAL, DEPARTMENT OF EDUCATION [2020] WASCA 176
CORAM	:	BUSS J MURPHY J LE MIERE J
HEARD	:	3 AUGUST 2020
DELIVERED	:	29 OCTOBER 2020
FILE NO/S	:	IAC 1 of 2019
BETWEEN	:	COLIN R DIXON Appellant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	P E SCOTT CC S J KENNER SC T B WALKINGTON C
Citation	:	[2019] WAIRC 00716
File Number	:	FBA 13 of 2018

Catchwords:

Industrial relations - Appeal from the Full Bench of the WA Industrial Relations Commission - *Industrial Relations Act 1979* (WA) s 90(1) - Whether the Full Bench erred in the construction or interpretation of any Act - Full Bench made no error in the construction or interpretation of the *Teacher Registration Act 2012* (WA) or the *Public Sector Management Act 1984* (WA) - Appeal dismissed

Legislation:

Industrial Relations Act 1979 (WA), s 90

Public Sector Management Act 1984 (WA), s 79

Teacher Registration Act 2012 (WA), s 3, s 6, s 7, s 10, s 15, s 16, s 20, s 23

Result:

Appeal dismissed

Category: B

Representation:*Counsel:*

Appellant : In person
Respondent : Mr A Sefton

Solicitors:

Appellant : In person
Respondent : State Solicitor for Western Australia

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

Colin R Dixon v Director General, Department of Education [2018] WAIRC 795

Colin R Dixon v Director General, Department of Education [2019] WAIRC 716

JUDGMENT OF THE COURT:**Summary**

1 The appellant was dismissed from his employment as a teacher by the respondent, the Director General of the Department of Education, on the ground that his performance as a teacher was substandard. The appellant applied to the Western Australian Industrial Relations Commission (Commission) claiming that his dismissal was harsh, oppressive or unfair. His application was dismissed by Commissioner Matthews.

2 The appellant appealed to the Full Bench of the Western Australian Industrial Relations Commission against the decision of Matthews C on a number of grounds. The Full Bench dismissed the appeal: *Colin R Dixon v Director General, Department of Education*¹ (Full Bench Decision).

3 The appellant has appealed to this court on the ground that the Full Bench erred in the construction or interpretation of the *Teacher Registration Act 2012* (WA) or the *Public Sector Management Act 1984* (WA) (PSM Act). For the reasons which follow, the appeal should be dismissed on the ground that the Full Bench made no error in the construction or interpretation of either Act.

Appellant's teaching history

4 The appellant qualified as a teacher in around 1980 and taught for almost seven years before he resigned in September 1986. He then ran a business for 23 years.

5 In 2009 the appellant returned to teaching in Western Australia. He was employed under a number of fixed term contracts for a total of 219 days. On 18 July 2016, the appellant's employment with the respondent became permanent with a placement at a district high school.

6 During his employment with the respondent the appellant was provisionally registered as a teacher with the Teacher Registration Board of Western Australia (Board) under the *Teacher Registration Act*.

Teacher Registration Act

7 A person must not teach in an educational venue unless the person is a registered teacher.²

8 The Board is not an employing authority. The respondent is the relevant employing authority. A person must not appoint or employ another person to teach in an educational venue unless the other person is a registered teacher.³

9 A person may apply to the Board for registration as a teacher in one of four categories: full registration; provisional registration; limited registration; or non-practising registration.⁴ A person is eligible for provisional registration if the person: has an appropriate teaching qualification; meets the professional standards approved by the Board for provisional registration; and meets other requirements.⁵ The period of provisional registration is three years or such shorter period as is approved by the Board.⁶ A person is eligible for full registration if the person: has an appropriate teaching qualification; meets the professional standards approved by the Board for registration; and meets other specified requirements.⁷

10 The term 'professional standards' in the *Teacher Registration Act* refers to the professional standards developed by the Board and approved by the Minister under s 20 of the *Teacher Registration Act*.⁸ Professional standards are to be

¹ *Colin R Dixon v Director General, Department of Education* [2019] WAIRC 716 [32].

² *Teacher Registration Act 2012* (WA) s 6.

³ *Teacher Registration Act 2012* (WA) s 7(1).

⁴ *Teacher Registration Act 2012* (WA) s 10(1).

⁵ *Teacher Registration Act 2012* (WA) s 16.

⁶ *Teacher Registration Act 2012* (WA) s 23(2).

⁷ *Teacher Registration Act 2012* (WA) s 15.

⁸ *Teacher Registration Act 2012* (WA) s 3.

developed by the Board and approved by the Minister.⁹ The purpose of the professional standards is to detail the abilities, experience, knowledge or skills expected of registered teachers.¹⁰

11 During his employment with the respondent, the appellant was still provisionally registered with the Board. The appellant contended, and it was not in dispute, that he had attained the 'graduate level' and not the 'proficient level' for the purposes of registration.

Public Sector Management Act

12 The respondent is an employing authority for the purposes of the PSM Act.

13 Part 5 div 2 of the PSM Act deals with substandard performance. Section 79(1) provides that the performance of an employee is substandard if and only if the employee does not, in the performance of the functions that he is required to perform, attain or sustain a standard that a person may reasonably be expected to attain or sustain in the performance of those functions.

14 PSM Act s 79(2) provides:

(2) Without limiting the generality of the matters to which regard may be had for the purpose of determining whether or not the performance of an employee is substandard, regard -

(a) shall be had -

(i) to any written selection criteria or job specifications applicable to; and

(ii) to any duty statement describing; and

(iii) to any written work standards or instructions relating to the manner of performance of,

the functions the employee is required to perform; and

(b) may be had -

(i) to any written selection criteria or job specifications applicable to; and

(ii) to any duty statement describing; and

(iii) to any written work standards or instructions relating to the manner of performance of,

functions similar to those functions.

15 Section 79(3)(c) provides, relevantly, that an employing authority may, in respect of its employee whose performance is, in the opinion of the employing authority substandard, terminate his employment.

Appellant's employment terminated

16 The appellant had difficulty managing the behaviour of students at school. The school's deputy principal commenced a process of examining and attempting to assist the appellant with difficulties in managing classroom behaviour. Subsequently, a formal process, including an investigation, was established to determine whether the appellant's performance was substandard. An investigation report was prepared.

17 The Full Bench found that the respondent measures performance of teachers against the Australian Professional Standards for Teachers administered by the Australian Institute for Teaching and School Leadership (AITSL standards). The AITSL standards set out grades by which to classify teachers at the various stages of their careers, relevantly graduate or proficient. The appellant was assessed against the proficient level. His performance measured against that standard was found to be substandard. His employment was terminated.¹¹

Unfair dismissal application

18 The appellant applied to the Commission for reinstatement or compensation. He claimed that he had been harshly, oppressively or unfairly dismissed. The appellant claimed that the process followed to determine that the appellant was performing at a substandard level was flawed and that, in any event, he is not a substandard teacher.¹²

19 Matthews C made the following key findings:¹³

(1) the applicant may have 'known his stuff' but his preferred method of teaching, being to set work and have students work things out for themselves, was totally ineffective;

(2) the applicant was unable or unwilling to closely monitor the spread of abilities within a class and to tailor work to cater to those different abilities;

(3) the applicant was a poor communicator with students;

⁹ *Teacher Registration Act 2012* (WA) s 20(1).

¹⁰ *Teacher Registration Act 2012* (WA) s 20(2). The respondent contended (and it appeared not to be in dispute) that these standards refer to 'graduate' and 'proficient' levels, and that their contents were not materially different from the standards referred to in [17] below: respondent's written submissions [25].

¹¹ Full Bench Decision [7].

¹² *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [2] (Matthews C).

¹³ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [34] (Matthews C).

- (4) related to (1), (2) and (3) above the applicant was incapable of setting a 'tone' of respect in his classroom where he commanded proper authority;
- (5) the applicant blamed others for the problems he encountered in the classroom, or expected others to fix them, rather than confronting them himself; and
- (6) perhaps most tellingly, and this fell from the applicant's own lips, the applicant had a tendency to bunker down and become stubborn and argumentative when things were not going his way rather than being flexible and proactive in tackling problems and, in at least one case, he gave up on trying to teach some students altogether.

20 Matthews C summarised the evidence which led him to each of those findings. The Commissioner then stated:¹⁴

The areas in which the applicant was a bad teacher seem to correspond clearly with those parts of the Australian Professional Standards for Teachers which were identified to the applicant during the substandard performance process undertaken in relation to him, namely standards 1.5, 3.1, 3.2, 3.5, 4.1, 4.2 and 4.3 (with standards 4.4 and 4.5 falling away following the opinion of Mr Purcell that the applicant had met these standards), not that they need do so for me to come to the conclusion that the applicant was a substandard teacher.

21 Matthews C said that the appellant did not 'forensically pursue an argument about the appropriate level to apply in the proceedings'¹⁵ - apparently a reference to the appellant not raising in the course of evidence an issue about whether the appropriate level was the proficient level or graduate level. Matthews C nevertheless referred to the appellant's complaint raised in his closing submissions that he was incorrectly assessed against the proficient level in the standards rather than the graduate level. The Commissioner made the following findings in relation to that submission:¹⁶

... while I have had regard to the Standards (as section 79(2)(iii) *Public Sector Management Act 1994* contemplates) the conclusion to which I have come that the applicant is a substandard teacher relies on all of the matters about which I have made reference in these reasons and my conclusion is not in any way limited only to cross referencing those matters to the Standards. *So as to be clear, I find the applicant to be substandard regardless of whether I had considered him to be a 'proficient' or 'graduate' teacher so far as the Standards are concerned. I rely on the evidence which supports my findings (1) to (6) above and find that a person displaying those deficiencies is substandard.* (emphasis added)

Appeal to Full Bench

22 Chief Commissioner Scott summarised the appellant's grounds of appeal to the Full Bench. It is only necessary to refer to Scott CC's summary of the appellant's first ground of appeal:

Mr Dixon's performance was incorrectly assessed against the level of a 'Proficient' teacher in accordance with the AITSL Standards, rather than the lower level of 'Graduate', which he says applied to him[.]

23 Scott CC observed that the appellant had not raised an objection to being assessed at the proficient level in his performance review or in the course of the evidence before Matthews C.¹⁷

24 After referring to the AITSL standards, Scott CC concluded that the Board's levels of provisional registration and full registration are directly linked to the graduate standard and the proficient standard respectively. The Chief Commissioner then made the following finding:¹⁸

... it was open to the learned Commissioner to conclude that [the appellant's] performance was substandard, whether he was assessed at the Graduate or Proficient level.

25 The Chief Commissioner referred to the evidence before the Commissioner and the Commissioner's findings. The Chief Commissioner said that the evidence was, as the learned Commissioner had noted 'all one way' and the evidence was sufficient to enable the Commissioner to draw the conclusion he did.¹⁹

26 The Chief Commissioner went on to make observations to the following effect. First, the appellant had been a teacher for a number of years and believed himself to be proficient. Secondly, the appellant presented himself as being an experienced and competent teacher. Thirdly, (as noted above) the appellant did not during the assessment process object to being assessed at the proficient level. However, those observations were not expressly or by implication a finding that on its proper construction PSM Act s 79(2)(a)(iii) entitled the respondent to assess the appellant at the higher level of proficient under the standards relating to the manner of the appellant's performance rather than at the lower level of graduate.

27 Properly construed, Scott CC found, relevantly for present purposes:²⁰

1. Matthews C had identified the correct statutory requirements under s 79(2)(iii) of the PSM Act.²¹

¹⁴ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [99] (Matthews C).

¹⁵ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [101].

¹⁶ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [100].

¹⁷ Full Bench Decision [45].

¹⁸ *Colin R Dixon v Director General, Department of Education* [2019] WAIRC 716 [32].

¹⁹ *Colin R Dixon v Director General, Department of Education* [2018] WAIRC 795 [38].

²⁰ Full Bench Decision [32].

2. In the application of s 79(2)(iii) of the PSM Act, Matthews C had considered the appellant's performance in terms of both the proficient standards and the graduate standards.
3. On either level of standard, the appellant's performance was assessed to be substandard, and it was open to Matthews C so to find.
- 28 Scott CC found that none of the appellant's grounds of appeal were made out and the appeal should be dismissed.
- 29 Senior Commissioner Kenner agreed with the reasons for decision of the Chief Commissioner and added:²²
The appellant has not made out his grounds of appeal. The decision of the learned Commissioner that the appellant was a substandard teacher was plainly open on the evidence and matters raised before the Commission at first instance. No error in the exercise of the Commission's discretion has been demonstrated. The appeal should be dismissed.
- 30 Commissioner Walkington agreed with the reasons of the Chief Commissioner that the appeal should be dismissed.

Ground of appeal to this court

- 31 Section 90(1) of the *Industrial Relations Act 1979* (WA) (the IR Act) provides that an appeal to this court from any decision of the Full Bench lies on one or more of three grounds only. The ground relied upon by the appellant, and the only relevant ground, is that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, Regulation, award, industrial agreement or order in the course of making the decision appealed against.
- 32 The appellant's ground of appeal is that in the course of making its decision the Full Bench erred in the construction or interpretation of the *Teacher Registration Act* or the PSM Act.
- 33 The appellant's case is that the Full Bench erred by finding that the appellant was correctly assessed at the proficient career stage when he should have been assessed at the graduate career stage.

Full Bench made no error of construction or interpretation

- 34 The appellant contends that the Full Bench ruled that the appellant could be assessed at the proficient level, a career level he had not reached, and this involved an error in the construction or interpretation of PSM Act s 79(2) read with the *Teacher Registration Act*.
- 35 The appellant did not elaborate upon the erroneous construction of the PSM Act or the *Teacher Registration Act* adopted by the Full Bench and the proper construction which the Full Bench should have adopted. The appellant's contentions appear to proceed in two steps. The first step is that PSM Act s 79(2)(a)(iii) requires the respondent, for the purpose of determining whether or not the appellant's performance is substandard, to have regard to the standards relating to the manner of performance of the functions the appellant is required to perform. The second step is that having regard to those standards, the respondent must assess the appellant at the career level he had attained for the purposes of registration under the *Teacher Registration Act*, that is, the graduate level. The appellant appears to contend that the Full Bench ruled that the appellant could be assessed at the proficient level, a level he had not reached for the purpose of the *Teacher Registration Act*.
- 36 In our opinion it is not necessary to consider whether or not PSM Act s 79(2)(a)(iii) has the effect contended for by the appellant. That is because the Full Bench did not rule that the appellant could be assessed at the proficient level. Matthews C made findings based on the whole of the evidence that the appellant was a bad teacher, that the areas in which he was a bad teacher corresponded to the standards which were identified to the appellant during the substandard performance process, and that the appellant was substandard regardless of whether he was assessed against the proficient or graduate level. The Chief Commissioner found that it was open to Matthews C to conclude that the appellant's performance was substandard whether he was assessed at the graduate or proficient level. It was unnecessary for the Chief Commissioner to decide whether PSM Act s 79(2)(a)(iii) required the respondent to assess the appellant's performance at the graduate level in the standards and the Chief Commissioner did not do so.
- 37 The appellant is dissatisfied with the findings of Matthews C and the Full Bench that the appellant's performance was substandard when measured at the level of graduate in the standards. However, the relevant finding of the Full Bench does not disclose an error in the construction or interpretation of the *Teacher Registration Act* or the PSM Act and does not give rise to a ground on which an appeal lies to this court under s 90(1) of the IR Act.
- 38 The Full Bench made no error in the construction or interpretation of the *Teacher Registration Act* or the PSM Act. We would dismiss the appeal.

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

JM

Research Associate to the Honourable Justice Buss

29 OCTOBER 2020

²¹ Full Bench Decision [15].

²² Full Bench Decision [92].

2020 WAIRC 00876

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	THURSDAY, 29 OCTOBER 2020	
FILE NO/S	IAC 1 OF 2019	
CITATION NO.	2020 WAIRC 00876	

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

Order

1. Appeal dismissed.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.**PRESIDENT—Unions—Matters dealt with under Section 66—**

2020 WAIRC 00857

ORDER PURSUANT TO S.66**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION	:	2020 WAIRC 00857
CORAM	:	CHIEF COMMISSIONER P E SCOTT
HEARD ON THE PAPERS	:	MONDAY, 19 OCTOBER 2020
DELIVERED	:	WEDNESDAY, 21 OCTOBER 2020
FILE NO. BETWEEN	:	PRES 6 OF 2020
	:	NAOMI MCCRAE
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	:	Industrial law (WA) – Elections for registered industrial organisation – Delay in conducting election – Order regarding non-observance of Rules of the organisation
Legislation	:	<i>Electoral Act 1987</i> (WA) <i>Industrial Relations Act 1979</i> (WA) s 66, s 69(4)
Result	:	Order issued
Representation:		
Applicant	:	Ms N McCrae on her own behalf

Reasons for Decision

- 1 According to Rule 7 - Returning Officer, sub-rule (3) of the Rules of the Health Services Union of Western Australia (Union of Workers) (HSUWA) nominations for positions of members of the Committee of Management are required to be posted to the Returning Officer so as to be in the hands of the Returning Officer not later than 5.00 pm on 31 October 2020.
- 2 The applicant, Naomi McCrae, seeks an order to extend that time to no later than 5.00 pm on 11 November 2020. Ms McCrae has sworn an affidavit in which she says that she is a member of the HSUWA and is also its Secretary. She has set out circumstances in which she wrote to the Registrar of the Western Australian Industrial Relations Commission requesting the conduct of an election for the vacant positions in the Committee of Management. By decision dated 30 September 2020, Susan Bastian, the Registrar, recorded that the request had been received for the conduct of the election, declared that the request had been duly made and that she would make arrangements with the Electoral Commissioner appointed under the *Electoral Act 1987 (WA)*, for an election to be held as prescribed in s 69(4) of the *Industrial Relations Act 1979 (WA)*.
- 3 However, on 12 October 2020, the Western Australian Electoral Commission informed the HSUWA that it was not able to meet the deadline of nominations being received no later than 31 October 2020 as there would need to be at least 14 days between the advertising and nominations opening. On that basis, the HSUWA would not be able to conduct the elections in accordance with the timeframe set out in the Rule.
- 4 Having considered Ms McCrae's affidavit and the documents attached to it, I am satisfied that in accordance with s 66 of the *Industrial Relations Act 1979 (WA)* it is appropriate for me to make an order relating to the observance of the Rules of the organisation to enable the proper conduct of elections in the manner contemplated by the Rules and in accordance with the democratic control of the union. The issue preventing that to occur is the practicability of the Western Australian Electoral Commission to meet the timeframes required by the HSUWA's Rules. Nonetheless, the elections must take place and must take place in accordance with proper procedure.
- 5 Therefore, I am persuaded to issue an order relating to the observance of the HSUWA's Rules to enable the nominations to be posted to the Returning Officer so as to be in the Returning Officer's hands no later than 5.00 pm on 11 November 2020. An order will issue accordingly.

2020 WAIRC 00858

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NAOMI MCCRAE

APPLICANT**-and-**

(NOT APPLICABLE)

RESPONDENT**CORAM**

CHIEF COMMISSIONER P E SCOTT

DATE

WEDNESDAY, 21 OCTOBER 2020

FILE NO/S

PRES 6 OF 2020

CITATION NO.

2020 WAIRC 00858

Result

Order issued

Appearances**Applicant**

Ms N McCrae on her own behalf

Order

This matter having come on for hearing on the papers, and having heard from the applicant by way of affidavit, and reasons for decision having been delivered on Wednesday, 21 October 2020, the Chief Commissioner, pursuant to the powers conferred under s 66(2) of the *Industrial Relations Act 1979 (WA)*, hereby orders –

THAT for the purposes of the 2020 election of members of the Committee of Management of the Health Services Union of Western Australia (Union of Workers), observance of the requirement in Rule 7 - Returning Officer, sub-rule (3) of the Rules of the organisation be waived insofar as it is necessary to enable nominations to be posted to the Returning Officer so as to be in the Returning Officer's hands no later than 5.00 pm on 11 November 2020.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2020 WAIRC 00880

DENTAL TECHNICIANS' AND ATTENDANT/RECEPTIONISTS' AWARD, 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HEALTH SERVICES UNION OF WESTERN AUSTRALIA;
 DR ANTHONY FRIDIAN POLI;
 DR PETER MCKERRACHER;
 DR DAVID FRANCIS MCDONALD

APPLICANT

-v-

THE W.A. DENTAL TECHNICIANS' AND EMPLOYEES' UNION OF WORKERS, DR DAVID
 BAILEY AND OTHERS

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

THURSDAY, 29 OCTOBER 2020

FILE NO/S

APPL 25 OF 2020, APPL 35 OF 2020, APPL 36 OF 2020, APPL 40 OF 2020

CITATION NO.

2020 WAIRC 00880

Result Award varied

Order

WHEREAS the Health Services Union of Western Australia applied pursuant to section 62(2) *Industrial Relations Act 1979* to authorise registration of alterations to the Health Services Union of Western Australia's registered rules by application FBM 3 of 2013 filed 30 May 2013;

AND WHEREAS the Full Bench of the Western Australian Industrial Relations Commission granted the application (see reasons for decision 93 WAIG 1499) to extend the coverage of the Health Services Union of Western Australia to persons who were eligible to be members of the W.A. Dental Technician's and Employees' Union of Workers, Perth due to the fact that the W.A. Dental Technician's and Employees' Union of Workers, Perth had ceased to function;

AND WHEREAS the Registrar of the Western Australian Industrial Relations Commission applied to cancel the registration of the W.A. Dental Technician's and Employees' Union of Workers, Perth by application FBM 1 of 2015 filed 5 January 2015;

AND WHEREAS the Full Bench of the Western Australian Industrial Relations Commission granted the application and cancelled the registration of the W.A. Dental Technician's and Employees' Union of Workers, Perth by order dated 16 April 2015 (95 WAIG 522);

AND WHEREAS the Health Services Union of Western Australia applies pursuant to section 38(2) *Industrial Relations Act 1979* and regulation 51 *Industrial Relations Commission Regulations 2005* to be joined as a named union party to the Dental Technicians' and Attendant Receptionists' Award, 1982 by application APPL 25 of 2020 filed 20 May 2020;

AND WHEREAS Dr Anthony Poli applies pursuant to section 40 *Industrial Relations Act 1979* and regulation 50 *Industrial Relations Commission Regulations 2005* to be removed as a party to the Dental Technicians' and Attendant Receptionists' Award, 1982 by application APPL 35 of 2020 filed 20 July 2020;

AND WHEREAS Dr Peter McKerracher applies pursuant to section 40 *Industrial Relations Act 1979* and regulation 50 *Industrial Relations Commission Regulations 2005* to be removed as a party to the Dental Technicians' and Attendant Receptionists' Award, 1982 by application APPL 36 of 2020 filed 21 July 2020;

AND WHEREAS Dr David McDonald applies pursuant to section 40 *Industrial Relations Act 1979* and regulation 50 *Industrial Relations Commission Regulations 2005* to be removed as a party to the Dental Technicians' and Attendant Receptionists' Award, 1982 by application APPL 40 of 2020 filed 5 August 2020;

AND HAVING sent a minute of proposed order to the Health Services Union of Western Australia, all respondent's named in Schedule B of the *Dental Technicians' and Attendant/Receptionists' Award, 1982* and the parties named in section 29A(2)(a)(i) *Industrial Relations Act 1979* by letter on Wednesday, 14 October 2020 inviting submissions to be filed by Monday, 26 October 2020;

AND HAVING received no submissions from the Health Services Union of Western Australia, the respondent's named in Schedule B of the *Dental Technicians' and Attendant/Receptionists' Award, 1982* or the parties named in section 29A(2)(a)(i) *Industrial Relations Act 1979* by Monday, 26 October 2020, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and by consent, hereby orders –

THAT the *Dental Technicians' and Attendant/Receptionists' Award, 1982* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after Monday, 2 November 2020.

(Sgd.) D J MATTHEWS,
 Commissioner.

[L.S.]

SCHEDULE

1. **Clause 6. – Definitions: Delete subclause (9) of this clause and insert the following in lieu thereof**
(9) “Union” means the Health Services Union of Western Australia.
2. **Schedule A. – Named Union Party: Delete this title and schedule and insert the following in lieu thereof:**

SCHEDULE A. – NAMED UNION PARTY

Health Services Union of Western Australia

3. **Schedule B. – Delete this title and schedule and insert the following in lieu thereof:**

SCHEDULE B. – RESPONDENTS

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Cnr S/Beach Road and Oswald Street

INNALOO WA 6018

Dr. Ross Bailey

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MANDURAH WA 6210

Dr. Richard Cook AM

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Dr. John Davies

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MT LAWLEY WA 6929

Dr. Mark Davis

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Dr. Colin O'Brien
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 CNR Ilkeston Place and Yirrigan Drive
 MIRRABOOKA WA 6061

Dr. Albert Tan
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 WEST PERTH WA 6000

2020 WAIRC 00848

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

APPLICANT

-v-

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

RESPONDENT

CORAM

COMMISSIONER T EMMANUEL

DATE

TUESDAY, 13 OCTOBER 2020

FILE NO/S

APPL 45 OF 2020

CITATION NO.

2020 WAIRC 00848

Result	Award varied
Representation	
Applicant	Ms J Allen-Rana (as agent)
Respondent	Mr J Dekuyer (as agent)

Order

HAVING heard from Ms J Allen-Rana as agent on behalf of the applicant and from Mr J Dekuyer as agent on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, orders –

THAT the *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after 1 January 2021.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

SCHEDULE

1. **Clause 3.3 – Meal and Rest Breaks: Delete paragraph (b) of subclause 3.3.2 of this clause and insert the following in lieu thereof:**
 - (b) The employer shall provide such employee a meal allowance of \$13.20 to cover the cost associated with the purchase of foods associated with the taking of a second crib.
The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.
2. **Clause 4.3 – Suburban Electric Railcar Allowance: Delete paragraph (a) of subclause 4.3.1 of this clause and insert the following in lieu thereof:**
 - 4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.

	Rate per week
(1) First Year	\$43.50
(2) Thereafter	\$43.90
(3) Special Case	\$44.70
3. **Clause 5.1 – Shift Work: Delete subclause 5.1.1 of this clause and insert the following in lieu thereof:**
 - 5.1.1 The employer may, if the employer so desires, work any part of its business on shifts in accordance with the following provisions:
 - (a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of \$2.99 an hour on all time paid at ordinary rate.
 - (b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of \$3.47 an hour on all time paid at ordinary rate.
 - (c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of \$2.99 an hour on all time paid at ordinary rate.
 - (d) In addition to the hourly shift work allowance, an employee will be paid an allowance of \$3.47 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
 - (e) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.
 - (f) The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
4. **Clause 5.2 – Temporary Transfer Allowance: Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:**
 - 5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:
 - (a) When the distance the employee is required to travel from the employee’s usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employee’s home depot, the employee shall be paid an allowance of \$1.72 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled.

The rates referred to in this subclause shall be adjusted by the Employer from time to time by reference to changes to the median of the Perth metropolitan Tariff 1 weekday pay rates per kilometre charged by all

licensed taxis in Perth. The adjustment shall take effect from the date nominated by the employer, which shall be no later than 28 days after being notified in writing by the Union of a change to the median weekly rate.

- (b) When the period of relief is for one week or less the allowance of \$8.00 per shift shall be paid in recognition of the disruption to the employee's normal roster.

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

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

- 5.3.1 Employees on call outside the ordinary hours of duty will be paid an allowance of \$4.45 per hour for all time on call.

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

2020 WAIRC 00849

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

APPLICANT

-v-

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

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE TUESDAY, 13 OCTOBER 2020

FILE NO/S APPL 47 OF 2020

CITATION NO. 2020 WAIRC 00849

Result Award varied

Representation

Applicant Ms J Allen-Rana (as agent)

Respondent Mr J Dekuyer (as agent)

Order

HAVING heard from Ms J Allen-Rana as agent on behalf of the applicant and from Mr J Dekuyer as agent on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT the *Public Transport Authority (Transwa) Award 2006* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after 1 January 2021.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

SCHEDULE

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

5.1 - SHIFT WORK

- 5.1.1 On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of \$2.92 an hour on all time paid at ordinary rate.
- 5.1.2 On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of \$3.36 an hour on all time paid at ordinary rate.
- 5.1.3 On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of \$2.92 an hour on all time paid at ordinary rate.
- 5.1.4 In addition to the hourly shift work allowance, an employee will be paid an allowance of \$3.36 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
- 5.1.5 In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

- 5.1.6 The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
- 2. Clause 5.2 - Temporary Transfer Allowance: Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:**
- 5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:
- (a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of \$1.72 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled, and in addition:
- (b) When the period of relief is for one week or less the allowance of \$8.00 per shift shall be paid in recognition of the disruption to the employee's normal roster.
- 3. Clause 5.3 - On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:**
- 5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of \$4.83 per hour for all time on call.
- That allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).
- 4. Clause 5.5 - Away From Home And Meal Allowances: Delete subclause 5.5.2 of this clause and insert the following in lieu thereof:**
- 5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of \$31.90 for each 8 hour period and, where less than 8 hours is worked, at the rate of \$7.90 for each 2 hour period or part thereof worked.

2020 WAIRC 00882

WA GOVERNMENT HEALTH SERVICES ENGINEERING AND BUILDING SERVICES AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ELECTRICAL TRADES UNION WA

APPLICANT

-v-

THE MINISTER FOR HEALTH IN HIS/HER INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICE ACT 1927 AS THE HOSPITALS FORMALLY COMPROMISED IN THE METROPOLITAN HEALTH SERVICES BOARD, SOUTH WEST HEALTH BOARD, PEEL HEALTH SERVICES BOARD AND WA COUNTRY HEALTH SERVICES, AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS WESTERN AUSTRALIAN BRANCH, THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS, CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

RESPONDENTS

CORAM COMMISSIONER T EMMANUEL
DATE FRIDAY, 30 OCTOBER 2020
FILE NO/S APPL 30 OF 2020
CITATION NO. 2020 WAIRC 00882

Result	Award varied
Representation	
Applicant	Ms A Ambihaipahar (of counsel)
First respondent	Ms C Holmes & Mr J Sun (as agents)
Second respondent	Ms C Holmes & Mr J Sun (as agents)
Third respondent	Ms C Holmes & Mr J Sun (as agents)
Fourth respondent	Ms C Holmes & Mr J Sun (as agents)
Fifth respondent	No appearance
Sixth respondent	No appearance
Seventh respondent	No appearance

Order

WHEREAS this is an application filed by the Electrical Trades Union WA to vary the *WA Government Health Services Engineering and Building Services Award 2004*;

AND WHEREAS the Department of Health as the System Manager exercising functions under s 20 of the *Health Services Act 2016* (WA) (**Department of Health**) filed a response to this application on behalf of the first, second, third and fourth respondents (the Minister for Health incorporated as the Board of the Hospitals formerly comprised in the Metropolitan Health Service Board, the WA Country Health Service, the South West Health Board and the Peel Health Services Board, under s 7 of the *Hospitals and Health Services Act 1927* (WA));

AND WHEREAS in its response, the Department of Health proposed a different process for varying the award, which it said was in line with how previous variations were made;

AND WHEREAS in its response, the Department of Health also proposed to update the names of the employer parties to the award to reflect the names those parties are now known by under s 32(1) of the *Health Services Act 2016* (WA);

AND WHEREAS the Department of Health does not consider that updating the names of the employer parties will vary the existing area and scope of the award;

AND WHEREAS the Electrical Trades Union WA and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch consented to the variations proposed by the Department of Health;

AND WHEREAS after being emailed the minute of proposed order, the Construction, Forestry, Mining and Energy Union of Workers confirmed that it ‘consents to the application’;

AND WHEREAS The Plumbers and Gasfitters Employees’ Union of Australia, Western Australian Branch, Industrial Union of Workers did not respond to the Commission and did not appear at the hearing;

AND WHEREAS on 15 October 2020 this application was set down for hearing and I am satisfied that a notice of hearing was served on all parties in accordance with regulation 24 of the *Industrial Relations Commission Regulations 2005* (WA) by email (successful delivery receipts were received) and by post on 15 October 2020;

AND HAVING heard from Ms A Ambihaipahar of counsel on behalf of the applicant and from Ms C Holmes and Mr J Sun as agents on behalf of the first, second, third and fourth respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) hereby orders –

THAT the *WA Government Health Services Engineering and Building Services Award 2004* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period on or after the date of this order.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 4. – Application & Parties Bound: delete this clause and insert in lieu thereof the following:

4. - APPLICATION & PARTIES BOUND

- (1) The following are parties to and bound by this Award;
- (a) all health service providers established pursuant to section 32(1)(b) of the *Health Services Act 2016* (WA), including the Child and Adolescent Health Service, East Metropolitan Health Service, Health Support Services, North Metropolitan Health Service, PathWest Laboratory Medicine WA, South Metropolitan Health Service and WA Country Health Service.
 - (b) Electrical Trades Union WA.
 - (c) The Plumbers and Gasfitters Employees’ Union of Australia, Western Australian Branch, Industrial Union of Workers.
 - (d) Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch.
 - (e) The Construction, Forestry, Mining and Energy Union of Workers.
- 2. Clause 6. – Definitions: delete subclause (7) of this Clause and insert in lieu thereof the following:**
- (7) “Employer” means the parties detailed in subclause (1)(a) of Clause 4 – Application and Parties Bound, of this Award.
- 3. Clause 19. – Leading Hand Allowance: Delete subclause (1) of this clause and insert in lieu thereof the following:**
- (1) An employee placed in charge of 3 or more other employees shall, in addition to the employee’s ordinary salary, be paid –
- (a) Not less than 3 and not more than 10 other employees - \$50.00 per week;
 - (b) More than 10 and not more than 20 other employees - \$67.00 per week;
 - (c) More than 20 other employees - \$83.80 per week.

4. Clause 23. – Special Rates and Provisions:

A. Delete subclause (1) of this Clause and insert in lieu thereof the following:

(1) Disability Allowances

- (a) Except as otherwise provided in this clause, the annual base salaries prescribed in this Award incorporate a commuted allowance which is in full substitution for all disability allowances and other special rates and provisions which are contained in any of the awards named in Clause 1. – Title, as at the date of registration of this Award.
- (b) Polychlorinated Biphenyls: Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs), for which protective clothing must be worn, shall be paid an allowance of \$2.52 for each hour or part thereof whilst so engaged.
- (c) Asbestos:
 - (i) Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority.
 - (ii) Employees engaged in a work process involving asbestos who are required to wear protective equipment, i.e. respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, shall be paid an allowance of \$0.84 per hour for each hour or part thereof whilst so engaged.
- (d) Furnace Work
Employees engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles, steam generators, heat exchangers and similar refractory work or on underpinning shall be paid \$1.83 per hour or part thereof whilst so engaged.
- (e) Construction Allowance
 - (i) In addition to the appropriate rate of pay prescribed in Appendix A. – Salaries of this Award, an employee shall be paid –
 - (aa) \$55.20 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;
 - (bb) \$49.90 per week if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A “multi-storey building” is a building which, when completed, shall consist of at least five stories.
 - (cc) \$29.30 per week if engaged otherwise on Construction Work.
 - (ii) The rates specified in paragraph (1)(e)(i) shall be discounted by \$22.70 per week, the amount of the commuted allowance granted under paragraph (1)(a) of this subclause.
- (f) Asbestos Eradication
 - (i) This subclause shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.
 - (ii) For the purposes of this clause “asbestos eradication” means work on or about buildings, involving the removal or any other method of neutralisation of any materials which consist of, or contain asbestos.
 - (iii) All aspects of asbestos work shall meet as a minimum standard the provisions of the National Health and Medical Research Council codes, as varied from time to time, for the safe demolition/removal of asbestos based materials.

Without limiting the effect of the above provision, any person who carried out asbestos eradication work shall do so in accordance with the legislation/regulations prescribed by the appropriate authorities.
 - (iv) An employee engaged in asbestos eradication (as defined) shall receive an allowance of \$1.82 per hour worked in lieu of rates prescribed in paragraph (1)(c) of Clause 23. – Special Rates and Provisions.
 - (v) Respiratory protective equipment, conforming to the relevant parts of the appropriate Australian Standard (i.e. 1716 “Specification of Respiratory Protective Devices”) shall be worn by all personnel during work involving eradication of asbestos.
- (g) Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employee shall be paid only the highest rate for the disabilities so prevailing.

B. Delete paragraph (b) of subclause (3) of this clause and insert in lieu thereof the following:

(b) Permit Work

Any licensed plumber called upon by the Employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid \$21.60 for that week in addition to the rates otherwise prescribed.

C. Delete paragraphs (d), (e) and (f) of subclause (3) of this clause and insert in lieu thereof the following:**(d) Scaffolding Certificate Allowance**

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by an accredited training provider and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid \$0.67 per hour or part thereof, in addition to the rates otherwise prescribed in this Award.

(e) Nominee Allowance

A licensed electrical fitter or mechanic who acts as nominee for the Employer shall be paid an allowance of \$21.60 per week.

(f) Setter Out

A setter out (other than a leading hand) in a joiner's shop shall be paid \$6.50 per day in addition to the rates otherwise prescribed.

5. Clause 25. – Overtime: Delete paragraph (a) of subclause (7) of this clause and insert in lieu thereof the following:**(a) An employee required to work 2 hours or more overtime continuous with their rostered hours, which necessitates taking a meal break, shall be paid a meal allowance of \$14.95 for each meal so required or may be provided with a meal ticket.**

Provided that this sub-clause shall not apply to an employee notified on the previous day of the previous day of the requirement to work such overtime.

6. Appendix A – Salaries: Delete subclause (1) of this Appendix and insert in lieu thereof the following:**(1) Rates of Pay**

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

	Level	Percentage Relativity to C10 Trades- person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple- mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade- offs in award safety net of conditions)	Salary
Carpenter	Building Tradesperson Level 04	100	365.20	52.00	433.70	850.90	12.40	114.60	12.00	51639
	Building Tradesperson Level 05	105	383.50	54.60	436.00	874.10	13.04	115.00	12.00	52904
	Building Tradesperson Level 06	110	401.70	57.20	438.20	897.10	13.68	115.30	12.00	54152
	Building Tradesperson Level 07	115	420.00	59.80	438.40	918.20	14.22	115.50	12.00	55292
	Building Tradesperson Level 08	120	438.20	62.40	440.70	941.30	14.86	95.90	12.00	55508
	Building Tradesperson Level 09	125	456.50	65.00	442.90	964.40	15.50	96.40	12.00	56772
	Building Tradesperson Level 04	100	365.20	52.00	433.70	850.90	12.40	88.90	12.00	50298
	Building Tradesperson Level 05	105	383.50	54.60	436.00	874.10	13.04	89.20	12.00	51558
	Building Tradesperson Level 06	110	401.70	57.20	438.20	897.20	13.68	89.40	12.00	52801
Painter	Building Tradesperson Level 07	115	420.00	59.80	438.40	918.20	14.22	89.70	12.00	53946

	Level	Percentage Relativity to C10 Trades- person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple- mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade- offs in award safety net of conditions)	Salary	
Plasterer	Building Tradesperson Level 08	120	438.20	62.40	438.30	938.90	14.86	70.10	12.00	54037	
	Building Tradesperson Level 09	125	456.50	65.00	442.90	964.40	15.50	70.60	12.00	55426	
	Building Tradesperson Level 04	100	365.20	52.00	433.70	850.90	12.40	108.40	12.00	51316	
	Building Tradesperson Level 05	105	383.50	54.60	436.00	874.10	13.04	108.70	12.00	52575	
	Building Tradesperson Level 06	110	401.70	57.20	438.20	897.10	13.68	109.20	12.00	53834	
	Building Tradesperson Level 07	115	420.00	59.80	438.40	918.20	14.22	109.50	12.00	54979	
	Building Tradesperson Level 08	120	438.20	62.40	440.70	941.30	14.86	89.80	12.00	55190	
	Building Tradesperson Level 09	125	456.50	65.00	442.90	964.40	15.50	90.10	12.00	56444	
	Building Tradesperson Level 04	100	365.20	52.00	433.70	850.90	12.40	139.30	12.00	52928	
	Building Tradesperson Level 05	105	383.50	54.60	436.00	874.10	13.04	139.60	12.00	54187	
Plumber	Building Tradesperson Level 06	110	401.70	57.20	438.20	897.10	13.68	139.90	12.00	55436	
	Building Tradesperson Level 07	115	420.00	59.80	438.40	918.20	14.22	140.30	12.00	56586	
	Building Tradesperson Level 08	120	438.20	62.40	440.70	941.30	14.86	120.70	12.00	56801	
	Building Tradesperson Level 09	125	456.50	65.00	442.90	964.40	15.50	121.10	12.00	58061	
	Building Employee Entrant Level	78	284.86	40.56	421.48	746.90	9.68	79.00	14.00	44319	
	employees	Building Employee Level 1	82	299.46	42.64	422.90	765.00	10.20	79.20	14.00	45301
	not elsewhere	Building Employee Level 2	87	319.18	45.45	424.77	789.40	10.87	79.40	14.00	46619
	classified	Building Employee Level 3	92	337.44	48.05	426.61	812.10	11.51	79.70	14.00	47852

	Level	Percentage Relativity to C10 Trades- person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple- mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade- offs in award safety net of conditions)	Salary
	Building Employee Level 4	100	365.20	52.00	433.70	850.90	12.40	80.10	14.00	49944
Mechanical Fitter,	Engineering Employee Level 14	78	284.86	40.56	421.48	746.90	14.68	77.70	14.00	44512
Motor Mechanic,	Engineering Employee Level 13	82	299.46	42.64	422.90	765.00	15.40	77.90	14.00	45504
Refrigeratio n	Engineering Employee Level 12	87.4	319.18	45.45	424.77	789.40	16.47	78.20	14.00	46849
Fitter & other	Engineering Employee Level 11	92.4	337.44	48.05	426.61	812.10	17.41	78.50	14.00	48098
engineering	Engineering Tradesperson Level 10	100	365.20	52.00	433.70	850.90	18.80	96.90	12.00	51050
trades	Engineering Tradesperson Level 09	105	383.50	54.60	436.00	874.10	19.70	97.30	12.00	52328
employees not	Engineering Tradesperson Level 08	110	401.70	57.20	438.20	897.10	20.70	97.50	12.00	53590
elsewhere	Engineering Tradesperson Level 07	115	420.00	59.80	438.40	918.20	21.60	97.80	12.00	54753
classified	Engineering Tradesperson Level 06	125	456.50	65.00	445.20	966.70	23.50	78.60	12.00	56381
	Engineering Tradesperson Level 05	130	474.80	67.60	445.20	987.60	24.40	78.90	10.00	57430
Electrical Fitter/ Mechanic	Engineering Tradesperson Level 10	100	365.20	52.00	433.70	850.90	18.80	122.60	12.00	52390
	Engineering Tradesperson Level 09	105	383.50	54.60	436.00	874.10	19.70	122.90	12.00	53663
	Engineering Tradesperson Level 08	110	401.70	57.20	438.20	897.10	20.70	123.30	12.00	54936
	Engineering Tradesperson Level 07	115	420.00	59.80	438.40	918.20	21.60	123.50	12.00	56094
	Engineering Tradesperson Level 06	125	456.50	65.00	442.90	964.40	23.50	104.10	12.00	57591
	Engineering Tradesperson Level 05	130	474.80	67.60	445.20	987.60	24.40	104.50	10.00	58765

AGREEMENTS—Industrial—Retirement from—

2020 WAIRC 00886

NOTICE**AG 1 OF 2014****COMBINED METAL INDUSTRIES INDUSTRIAL AGREEMENT 2013****WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

No. APPL 55 of 2020

IN THE MATTER of the filing in the Office of the Registrar a Notice of Retirement from an Industrial Agreement in accordance with section 41(7) of the *Industrial Relations Act 1979*.

David Keith Elsegood, Sunny May Elsegood, Bradley Keith Elsegood, Darren Steven Elsegood, Elsegood Holdings Pty Ltd (ACN 009 338 023) and Falconcrest Holdings Pty Ltd (ACN 060 047 038) T/As Combined Metal Industries, will cease to be a party to the *Combined Metal Industries Industrial Agreement 2013*, on and from the 26th day of November 2020.

DATED at Perth this 28th day of October 2020.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2020 WAIRC 00875

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00875
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : WEDNESDAY, 9 SEPTEMBER 2020
DELIVERED : THURSDAY, 29 OCTOBER 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 – Assessment of pecuniary penalties for contraventions of <i>Fair Work Act 2009</i> (Cth)
Legislation	:	<i>Fair Work Act 2009</i> (Cth) <i>Taxation Administration Act</i> (Cth) <i>Industrial Relations Act 1979</i> (WA) <i>Magistrates Court (Civil Proceedings) Act 2004</i> (WA) <i>Crimes Act 1914</i> (Cth)
Instrument	:	<i>Manufacturing and Associated Industries and Occupations Award 2020</i> (Cth)
Case(s) referred to in reasons	:	<i>Moate v I.P.C. Pty Ltd</i> [2020] WAIRC 00406 <i>Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)</i> [2020] FCCA 901 <i>WorkPac Pty Ltd v Skene</i> [2018] FCAFC 131 <i>Sayed v Construction, Forestry, Mining and Energy Union</i> [2016] FCAFC 4 <i>Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate</i> [2015] HCA 46; 258 CLR 482 <i>Miller v Minister of Pensions</i> [1947] 2 All ER 372 <i>Briginshaw v Briginshaw</i> [1938] HCA 34; (1938) 60 CLR 336 <i>Sammut v AVM Holdings Pty Ltd [No2]</i> [2012] WASC 27 <i>Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)</i> [2017] FCA 557 <i>Kelly v Fitzpatrick</i> [2007] FCA 1080; 166 IR 14 <i>Mason v Harrington Corporation Pty Ltd</i> [2007] FMCA 7

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Rocky Holdings Pty Ltd v Fair Work Ombudsman [2014] FCAFC 62
Fair Work Ombudsman v South Jin Pty Ltd (No 2) [2016] FCA 832
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; 165 FCR 560;
 246 ALR 35
Milardovic v Vemco Services Pty Ltd (No 2) [2016] FCA 244

Result : Pecuniary penalty to be paid

Representation:

Claimant : Mr D. Scaife (of counsel) from Eureka Lawyers

Respondent : Mr J. Raftos (of counsel) from Moray & Agnew Lawyers

SUPPLEMENTARY REASONS FOR DECISION (PENALTY)

- 1 On 2 July 2020, IPC Pty Ltd (the Respondent) was found to have contravened the following civil remedy provisions of the *Fair Work Act 2009* (Cth) (FWA):
 - Section 44 of the FWA – Contraventions of the National Employment Standards (NES)
 - o accrual of annual leave – s 87(2) of the FWA.
 - o payment of untaken accrued annual leave upon termination of employment – s 90(2) of the FWA.
 - o personal leave – s 96(2) of the FWA.
 - o payment on public holidays – s 116 of the FWA.
 - o supply of the Fair Work Information Statement – s 125 of the FWA.
 - Section 45 of the FWA – Contraventions of the *Manufacturing and Associated Industries and Occupations Award 2020 (Award)*
 - o access to copies of the Award – cl 5 of the Award.
 - o contributions to a superannuation fund – cl 35.2 of the Award.
 - o payment of overtime – cl 40.1 of the Award.
 - o payment of leave loading – cl 42.5 of the Award.
 - Section 323 of the FWA – Contravention of Payment in Full
 - o accrued long service leave (State).
 - Section 535 of the FWA – Employee Records
 - o failed to make and keep employee records.
 - Section 536 of the FWA – Pay Slips
 - o failed to provide pay slips.
- 2 In *Moate v I.P.C. Pty Ltd (ACN 061 746 996)* [2020] WAIRC 00406, the Industrial Magistrates Court of Western Australia (IMC), constituted by a different Industrial Magistrate (IM), provided its reasons for decision in respect of the contraventions (Liability Decision).
- 3 These supplementary reasons are in relation to an application by Mr Raymond Moate (the Claimant) for a pecuniary penalty pursuant to s 546(1) of the FWA and to determine (if necessary) the quantum of the claim.
- 4 The parties each provided an outline of written submissions on the payment of a pecuniary penalty.
- 5 Schedule I of these supplementary reasons outline the jurisdiction, standard of proof and practice and procedure of the IMC in determining this case.
- 6 Schedule II of these supplementary reasons outline the provisions of the FWA and principles relevant in determining an appropriate pecuniary penalty (if any) for the Respondent’s contraventions.

Quantum And Interest

- 7 The Liability Decision found the following amounts are owed to the Claimant:

	Amount owed (\$)
Overtime	7,878
Annual leave	22,961.12
Annual leave loading	4,018.20
Public holidays	11,700
Long service leave (State)	20,550.40
Total	\$67,107.72

8 Interest on the relevant amounts owed are calculated as follows:¹

Period	Rate	Daily Rate	Days	Total
18 July 2018 – 30 June 2019	5.5%	\$10.11	347	\$3,508.17
1 July 2019 – 31 December 2019	5.25%	\$9.65	183	\$1,765.95
1 January 2020 – 30 June 2020	4.75%	\$8.73	181	\$1,580.13
1 July 2020 – 29 October 2020	4.25%	\$7.81	103	\$804.43
Total				\$7,658.68

9 Before turning to penalty, I note recent comments by Driver J in *Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)* [2020] FCCA 901 (*Priority Matters*) at [6]:

... after such long running litigation is that the parties put forward completely different narratives said to bear upon the penalty issues for the Court to decide, to the extent ... of speaking, in effect, different languages.

10 These comments are apposite in this case, where one of the few points of agreement was the use of percentages as a guide to determine penalty, but even that resulted in vastly different suggested amounts for contraventions. For my part, the over-emphasis of the percentage value of a penalty did nothing more than detract from the application of the principles relevant to the imposition of civil penalties.

11 Unlike in criminal sentencing, parties in FWA matters may suggest actual amounts in respect of civil penalties. One of the disadvantages of this is that it invites wildly disparate views, which hinders, rather than helps, in the imposition of a penalty.

12 I am, however, reminded that the court has a broad discretion to assess the appropriate penalty and, amongst other things, 'consider the overall penalties arrived at, including by reference to those which may be proposed by the FWO and what is proposed by the respondents, and apply the totality principle, to ensure that the penalties for each respondent are appropriate and proportionate to the conduct viewed as a whole, making such adjustments as are necessary'.²

The Claimant's Submissions On Penalty

13 In summary, the Claimant submits:

- while resolution of the Claimant's claim required resolution of the principles in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (*Skene*), the Respondent's conduct substantially differed from the conduct considered in *Skene*;
- this is not a case where the parties mistakenly thought they were in a casual employment; the Respondent engaged the Claimant as a sham contractor from September 2012 to June 2015;
- the Respondent deliberately misrepresented to the Claimant he was a sham contractor when he was an employee; the February 2013 Waiver Document was a deliberate misrepresentation *prima facie* contravening s 357(1) of the FWA;
- the Respondent applied illegitimate pressure to the Claimant to sign the July 2015 Waiver Document; the circumstances surrounding the Claimant's signing of the July 2015 Waiver Document is *prima facie* a contravention of s 340, s 343 and s 344 of the FWA;
- the IMC can infer the Respondent knew, or at least suspected, that it was a sham contracting arrangement prior to 1 July 2015;
- he was an entirely passive party in his relationship with the Respondent and he relied upon the Respondent's advice; and
- the Respondent's conduct can be characterised as:
 - o not the worst case imaginable, but is a gross failure to comply with the FWA; and
 - o deliberate or at the very least recklessly indifferent to the true nature of the relationship.

14 The Respondent is a 'substantial business'.

15 The Claimant was a long serving and loyal employee, and the Respondent took advantage of the Claimant's passivity to induce him to sign documents that misrepresented the character, and underlying facts, of his relationship with the Respondent. The contraventions are many and varied, and do not solely arise out of the mischaracterisation of the employment relationship.

16 The Claimant was an unskilled older worker and is unlikely to work again.

17 Therefore, the need for general deterrence is great.

18 A substantial personal deterrent penalty is also called for as the Respondent expressed no contrition and failed to make payment of monies due at the cessation of the Claimant's employment without a reasonable excuse.

19 The Claimant proposes a cumulative penalty of \$141,000 where the maximum total penalty is \$606,000.

20 The Claimant submits that a totality principle discount of 25% is appropriate to be applied and the appropriate total of penalties to be imposed should be \$105,000.

21 The penalties should be awarded to the Claimant in accordance with decision in *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4.

22 The Respondent should be ordered to pay to the Claimant and the Claimant's superannuation fund the amounts specified.

The Respondent's Submissions On Penalty

23 In summary, the Respondent submits:

- the penalties imposed should be an appropriate response to what the Respondent did;
- this is not a matter in which an imposition of penalties is necessary to encourage general or specific deterrence;
- if the court is minded imposing a penalty, the appropriate amount is \$23,121, considering the Respondent's conduct and the totality principle;
- it has been found to have contravened a number of provisions of the FWA, although in relation to one employee and essentially from the same type of error made twice;
- regard must be had for the separate legal quality of the obligations it has failed to observe;
- *Skene* is applicable in considering an appropriate penalty in this case;
- it made an honest mistake mischaracterising the nature of the Claimant's arrangement where there was no suggestion of a 'take it or leave it' approach or fraud to induce the Claimant to work as a contractor;
- while the court found [in the Liability Decision] in relation to the casual arrangement (only) it had used 'illegitimate pressure' and 'economic duress', the behaviour was isolated and occurred once, and there is no evidence that it deliberately set out to evade the law or 'short-change' the Claimant;
- it paid weekly amounts in excess of the minimum wage prescribed by the Award (including '25% casual loading'), and, while these amounts cannot be set off, they may be taken into consideration when determining penalty;
- it is otherwise a law-abiding corporate citizen from which it can be concluded that there is a culture of compliance and the evidence does not demonstrate any systemic, wilful or deliberate contravention of the FWA;
- the various breaches arose out of the same essential course of conduct, being an honest mistake as to the nature of the legal relationship;
- a smaller quantum may be imposed in circumstances if a party who has inadvertently breached its obligations rather than engaged in a deliberate and calculated breach;
- this was not a sham arrangement, but rather an incorrect characterisation of what the court found to be a 'permanent' employment relationship. Nothing in the evidence demonstrates it was avoiding, by using illegitimate means, its obligations under the FWA;
- it has taken corrective action;
- asserting its legal rights is not being uncooperative, and it genuinely thought it was acting within the law; and
- there is no evidence it profited from its contraventions.

24 The Respondent relies upon the oral evidence of Mr David Carr (Mr Carr), Managing Director of the Respondent.

25 Having regard to Mr Carr's evidence, the Respondent is a medium sized business and does not have dedicated human resources personnel. It is not a business of 'vast resources' and its current financial position is less secure than it was prior to the COVID-19 pandemic.

26 Mr Carr regrets the whole experience.

27 Further, the Respondent has learnt from the experience of these proceedings and has taken additional steps to ensure mistakes previously made are not repeated.

28 The Respondent rejects the Claimant's submissions that it deliberately set out to evade the law or otherwise deliberately misrepresented the arrangement to the Claimant. No evidence or finding was made in that regard. Further, the Respondent takes issue with the Claimant introducing references to other alleged contraventions never advanced by the Claimant.

Determination On Penalty

29 The maximum penalty with respect to a contravention of s 44, s 45 and s 323 of the FWA by the Respondent is 300 penalty units, given the Respondent is a body corporate.³

30 The maximum penalty with respect to a contravention of s 535 and s 546 of the FWA by the Respondent is 150 penalty units, given the Respondent is a body corporate.⁴

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

32 In addition to the statutory course of conduct provision, it is open to consider the application of common law course of conduct principles where the contraventions contain common elements or can be said to overlap with each other. It may be appropriate to group contraventions together where, if they were treated separately, this would potentially penalise a respondent twice.⁵

33 I have had regard to the parties' submissions and to the findings in the Liability Decision. I find that certain contraventions by the Respondent are properly characterised as a single contravention where there is commonality in the conduct or the contravention flows from a course of conduct. Grouping of the contraventions are as follows:

- overtime contravention – cl 40.1 of the Award;
- public holiday contravention – s 116 of the FWA;

- superannuation contravention – cl 35.2 of the Award;
 - accrued annual leave contravention – s 87(2) of the FWA;
 - annual leave contraventions (including annual leave loading) – s 90(2) of the FWA and cl 42.5 of the Award;
 - personal leave contravention – s 96(2) of the FWA;
 - access contraventions (the Award, NES and Fair Work Statement) – cl 5 of the Award and s 125 of the FWA;
 - records contraventions – s 535 and s 536 of the FWA; and
 - payment in full contravention (relevant to long service leave) – s 323 of the FWA.
- 34 Before outlining the specific considerations in assessing penalties, the following observations are relevant.
- 35 Counsel for the Claimant made submissions which, in my view, have limited application when regard is had to the findings in the Liability Decision. In particular, the Respondent deliberately misrepresented to the Claimant he was a sham contractor when he was an employee, and the circumstances surrounding the Claimant’s signing of the July 2015 Waiver Document is *prima facie* a contravention of s 340, s 343 and s 344 of the FWA.
- 36 The Liability Decision made the following relevant findings in relation to the Employee/Contractor Issue and the February 2013 Waiver Document:
- The state of the evidence does not enable me to make any findings on the circumstances of Mr Moate’s signing of the document. The Company has not satisfied me that Mr Moate was made aware of the contents or significance of the document before he signed it. Mr Moate has not adduced evidence of any conduct of the Company that would constitute fraud or would be a basis for a remedy in equity.*⁶ (emphasis added)
- ... the Company, motivated by concern about any payroll tax obligations, were arranging for contractors to execute documents to confirm the status of the worker as a contractor. The evidence of Mr Carr may be accepted; it is plausible and uncontradicted.*⁷
- Mr Moate’s passivity ... is striking. This is not a case where Mr Moate’s financial and taxation arrangements were a consequence of a decision by Mr Moate to set up a business. They were a consequence of Mr Moate following advice of the Company. The ‘hallmarks of a person in business’, in the circumstances of this case, may equally be viewed as a consequence of the Company and Mr Moate erroneously self-categorising Mr Moate as a person in business on his account.*⁸ (emphasis added)
- Although I am not satisfied that Mr Moate had turned his mind to the contents of the document, the inference to be drawn from Mr Moate’s years of experience of being paid upon delivery of his invoice and not being paid when taking leave because of illness or holidays is that he considered himself to be an independent contractor.*⁹
- 37 While the ultimate conclusion reached in the Liability Decision was that the Claimant was an employee under the FWA for the whole of the claim period before 1 July 2015, my reading of the Liability Decision did not reveal IM Flynn (as he was then) to find, or draw an inference consistent with, the Respondent *misrepresenting* the arrangement between the parties (giving rise to consideration of a sham arrangement).
- 38 It was open to the Claimant to pursue a claim under s 357(1) of the FWA. However, such a claim cannot be pursued in the IMC. Further, had the Claimant decided to pursue a claim under s 357(1) of the FWA, it would have enabled the Respondent an opportunity to prove to the contrary any alleged representation or its effect.
- 39 The Claimant now attempts to import into the penalty assessment, via submission, an aggravating feature of the Respondent’s conduct:
- which is a separate civil remedy provision that was not litigated;
 - where there is no finding made upon which it is open to the court to impose a penalty reflecting such an aggravating feature. Ordinarily in sentencing (which I note the principles relevant to the imposition of civil penalties often replicate), a party who seeks to rely upon an aggravating circumstance that is not the subject of any findings or admissions must prove that aggravating circumstance; and
 - which if relied upon by the court fundamentally denies procedural fairness to the Respondent and, arguably, subverts the proper court process.
- 40 For these reasons I place little reliance on the Claimant’s submissions in relation to any alleged sham arrangement.
- 41 The Liability Decision made the following relevant finding in relation to the Full Time/Casual Issue and the 2015 Waiver Document:
- First, my finding that Mr Moate signed the July 2015 Waiver Document after Ms Norton told him that without his written agreement to becoming a ‘casual employee’, the Company would cease to offer him further work, is evidence of illegitimate pressure applied by the Company to Mr Moate. Ms Norton’s statement was not a threat of an unlawful act; the Company was free to (lawfully) terminate any legal arrangement by which it engaged Mr Moate to work for the Company ... The illegitimate pressure applied by Ms Norton induced Mr Moate to sign the July 2015 Waiver Document.*¹⁰ (emphasis added)
- 42 However, the use to which that finding was made was in relation to whether the Claimant was bound by the terms of the 2015 Waiver Document having signed the document and irrespective of whether he had read it. IM Flynn determined that the finding amounted to a finding of ‘*economic duress on the part of the Company*’, and, consequentially, the Claimant was denied a reasonable opportunity to properly consider the 2015 Waiver Document.¹¹

- 43 The effect of the finding was that the Respondent's case, as it related to reliance on the 2015 Waiver Document and associated documents, was diminished.
- 44 For similar reasons given above, it was open to the Claimant to pursue a claim under s 340 or s 344 of the FWA. Again, such a claim cannot be pursued in the IMC, and if the Claimant decided to do so, the Respondent would have had an opportunity to defend the claim. As it currently stands, albeit not on the exact basis as set out above, reliance on the finding in the manner suggested by the Claimant necessarily denies procedural fairness to the Respondent where the Claimant has chosen to litigate his claim in one manner and not another.
- 45 For these reasons, the finding by IM Flynn as it related to illegitimate pressure applied by Ms Lisa Norton (Ms Norton) inducing the Claimant to sign the 2015 Waiver Document and the economic duress on the part of the Respondent needs to be seen in context, and not improperly conflated with another civil remedy provision.
- 46 Therefore, the following considerations are significant in assessing penalties in this case:
- the determination of the claim required consideration of the circumstances surrounding '*the characterisation of the legal relationship*' between the Claimant and the Respondent;
 - the Respondent failed in that context to pay the Claimant certain entitlements with the court determining the Claimant's status as an employee (rather than an independent contractor) and a full time employee (rather than a casual employee);
 - the Respondent has not been found to have previously contravened the FWA;
 - while there was a course of conduct because of the failure of the Respondent to account for and pay relevant entitlements, the Respondent accounted to the Claimant for time worked by either paying each invoice rendered and paying his hourly rate. The Respondent also paid the Claimant in accordance with its erroneous belief that he was a casual employee (that is, paid a premium, albeit the amount was not properly conveyed to the Claimant). Therefore, in that sense, the Respondent did not attempt to 'hide' any contraventions;
 - further, the course of conduct arose because the Respondent erroneously characterised the relationship between it and the Claimant as an independent contractor and a casual employee (notably, the Claimant erroneously characterised himself in the same way). No finding was made that the Respondent engaged in deceitful conduct designed to dupe the Claimant. In fact, it was accepted that in 2013 the Respondent was motivated by concern about payroll taxation obligations in respect of the February 2013 Waiver Document;¹²
 - the Respondent has taken steps to ensure future compliance with the Award and the FWA;
 - together this demonstrates, if not contrition, a willingness to learn from the proceedings and a commitment not to repeat the conduct;
 - the Respondent is a medium sized business employing 60 people. It is not a company of 'vast resources';
 - the Claimant was an unskilled worker and relied upon the Respondent's advice as it related to financial and taxation arrangements;
 - the Claimant's consequential 'loss' (being the actual entitlements as found in the Liability Decision) is reasonably significant;
 - while Ms Norton, on behalf of the Respondent, was found to have used illegitimate pressure to induce signing of the July 2015 Waiver Document, there was no finding that any other person on behalf of the Respondent was involved or that this was a course of conduct by the Respondent; and
 - a degree of proportionality is required when regard is had to each contravention.
- 47 In light of the above, considerations of punishment and specific deterrence are less important in this case than the need to deter employers more generally in contraventions of the FWA. The conduct in all the circumstances is properly categorised in the low range.
- 48 While criminal penalties import notions of retribution and rehabilitation, the primary purpose of a civil penalty is to promote the public interest in compliance with the law and not as an additional award of compensation for financial or emotional stress, hurt feelings, inconvenience or legal fees.¹³
- 49 For these reasons, the penalties to be applied are:

	Maximum	Penalty applied
Overtime contravention	\$33,000 - \$63,000	\$6,000
Personal leave contraventions	\$33,000 - \$63,000	\$10,000
Accrued annual leave contravention	\$33,000 - \$63,000	\$15,000
Annual leave contraventions (including annual leave loading)	\$33,000 - \$63,000	\$20,000
Public holiday contravention	\$33,000 - \$63,000	\$8,000
Superannuation contravention	\$33,000 - \$63,000	\$5,000

	Maximum	Penalty applied
Access contraventions (Award and NES and Fair Work Statement)	\$33,000 - \$63,000 ¹⁴	\$6,000
Records contraventions	\$16,500 - \$25,500	\$8,000
Payment in full contravention (LSL)	\$63,000	\$7,500
Total		\$85,500

- 50 Taking into account principles of totality, a reduction of 30% is applied with the resultant amount to be paid is \$59,850.
- 51 The Claimant seeks an order pursuant to s 546(3)(c) of the FWA that the penalties be paid to him and an order is made that the Respondent pay the penalty of \$59,850 to the Claimant.

Orders

- 52 Subject to any liability (if any) to the Commissioner of Taxation pursuant to the *Taxation Administration Act* (Cth), the Respondent is to pay to the Claimant within 56 days of the date of this order:
- \$67,107.72 on account of underpayments as identified; and
 - a pecuniary penalty of \$59,850.
- 53 The Respondent is further ordered to pay within 56 days of the date of this order:
- \$1,111.50 in superannuation contribution to the relevant superannuation fund for the benefit of the Claimant;¹⁵ and
 - interest on the judgment amount of \$67,107.72 fixed in the amount of \$7,658.68.

D. SCADDAN

INDUSTRIAL MAGISTRATE

- ¹ Applying the relevant cash rates referred to by the Claimant in his submissions and having regard to s 547(2) of the FWA.
- ² *Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)* [2020] FCCA 901 (other citations omitted).
- ³ The relevant penalty unit amount is \$110 to \$210 where the contraventions occurred between 2012 and 2018. The relevant penalty unit amount for the contravention relevant to the failure to provide a Fair Work Statement (s 125) is \$170 where the contravention occurred in July 2015.
- ⁴ The relevant penalty unit amount is \$110 to \$170 where the contraventions occurred between 2012 and 2015.
- ⁵ *Priority Matters* at [28] (other citations omitted).
- ⁶ Liability Decision at [34].
- ⁷ Liability Decision at [35].
- ⁸ Liability Decision at [42].
- ⁹ Liability Decision at [46].
- ¹⁰ Liability Decision at [73].
- ¹¹ Liability Decision at [73].
- ¹² Liability Decision at [35].
- ¹³ *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 [55] (referring to *Trade Practices Commission v CSR Ltd* [1990] FCA 521).
- ¹⁴ The maximum penalty for failing to provide Fair Work Statement is \$51,000.
- ¹⁵ The Respondent did not take issue with the Claimant's calculation of 9.5% applied to public holiday pay as the ordinary time earnings attracting superannuation guarantee charge. The Liability Decision did not otherwise calculate the amount of underpaid superannuation.

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. The Industrial Magistrates Court of Western Australia (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*'); *Industrial Relations Act 1979* (WA) 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 identified in s 539 of the FWA include:
- Section 44 – contravention of the NES.
 - Section 45 – contravention of a modern award.

- Section 323 – failing to make payments in full.
- Section 535 – failing to keep prescribed records of employment.
- Section 536 – failing to provide payslips.

- [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.
- [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.

Burden and Standard of Proof

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

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

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

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

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

Practice and Procedure of the Industrial Magistrates Court of Western Australia

- [9] The *Industrial Relations Act 1979* (WA) 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 of *Industrial Relations Act 1979* (WA). Relevantly, regulations prescribed under the *Industrial Relations Act 1979* (WA) 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] 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 (citations omitted):

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 II: Pecuniary Penalty Orders Under The Fair Work Act 2009 (Cth)

Pecuniary Penalty Orders

- [1] The FWA provides that the IMC may order a person to pay an appropriate pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision: s 546(1) of FWA. The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the FWA: s 546(2) of the FWA. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the FWA.
- [2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the FWA. The relevant rate is that applicable at the date of the contravening conduct:
- | | |
|-----------------------------|-------|
| Before 28 December 2012 | \$110 |
| Commencing 28 December 2012 | \$170 |
| Commencing 31 July 2015 | \$180 |
| Commencing 1 July 2017 | \$210 |
- [3] The purpose served by penalties was described by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 [338] in the following terms (omitting citations):

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

- [4] In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following ‘non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty’ which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:
- *The nature and extent of the conduct which led to the breaches.*
 - *The circumstances in which that conduct took place.*
 - *The nature and extent of any loss or damage sustained as a result of the breaches.*
 - *Whether there had been similar previous conduct by the respondent.*
 - *Whether the breaches were properly distinct or arose out of the one course of conduct.*
 - *The size of the business enterprise involved.*
 - *Whether or not the breaches were deliberate.*
 - *Whether senior management was involved in the breaches.*
 - *Whether the party committing the breach had exhibited contrition.*
 - *Whether the party committing the breach had taken corrective action.*
 - *Whether the party committing the breach had cooperated with the enforcement authorities.*
 - *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements.*
 - *The need for specific and general deterrence.*
- [5] The list is not ‘a rigid catalogue of matters for attention. At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.’ (Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560 [91]).
- [6] ‘Multiple contraventions’ may occur because the contravening conduct done an employer:
- (a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;
 - (b) was done once only or was repeated; and
 - (c) was done with respect to a single employee or was done with respect to multiple employees.
- [7] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the FWA. It provides that two or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on s 323 of the FWA on the payments) by an employer are taken be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a ‘course of conduct’, the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153; *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 [22] (White J) The section does not apply to cases where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): *Grouped Property Services Pty Ltd (No 2)* [411] (Katzmann J).
- [8] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; 246 ALR 35; [2008] FCAFC 8 [47] - [52].
- [9] Section 546(3) of the FWA also provides:
- Payment of penalty**
- (3) *The court may order that the pecuniary penalty, or a part of the penalty, be paid to:*
- (a) *the Commonwealth; or*
 - (b) *a particular organisation; or*
 - (c) *a particular person.*
- [10] In *Milardovic v Vemco Services Pty Ltd (No 2)* [2016] FCA 244 [40] - [44], Mortimer J summarised the law (omitting citations and quotations) on this provision in light of *Sayed*:
- ... [T]he power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant.
- ... [T]he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the Gibbs ... exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted. (original emphasis)

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2019 WAIRC 00758

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00758
CORAM : CHIEF COMMISSIONER P E SCOTT
 SENIOR COMMISSIONER S J KENNER
 COMMISSIONER D J MATTHEWS
HEARD : THURSDAY, 17 OCTOBER 2019
DELIVERED : TUESDAY, 22 OCTOBER 2019
FILE NO. : APPL 42 OF 2016
BETWEEN : ADIB ABDENNABI
 Appellant
 AND
 THE COMMISSIONER OF POLICE, WA POLICE
 Respondent

Catchwords : Industrial law (WA) – Removal of Police Officer – Loss of confidence by Commissioner of Police - Application to tender new evidence – Police Act 1892 (WA) s 33R(3), s 33R(4), s 33R(11) – Material does not constitute new evidence – Submission that it would be in the interests of justice to receive material not made out – Application dismissed

Legislation : *Industrial Relations Act 1979*
Criminal Code Act Compilation Act 1913, s 378
Police Act 1892, s 33R(3), s 33R(4), s 33R(11)

Result : Application dismissed

Representation:
Counsel:
Appellant : Mr R Yates of counsel
Respondent : Ms C Chapman of counsel

Case(s) referred to in reasons:

Laurent v Commissioner of Police [2009] WAIRC 839

Case(s) also cited:

Carlyon v Commissioner of Police [2004] WAIRC 11428

Marshall v Metropolitan Redevelopment Authority [2015] WASC 226

Moran v The Commissioner of Police [2015] WAIRC 00464

R v Hunt; Ex Parte Sean Investments Pty Ltd [1979] HCA 32

Tobacco Institute of Australia Ltd & Ors v National Health & Medical Research Council & Ors [1996] FCA 1150

Reasons for Decision

CHIEF COMMISSIONER SCOTT:

Introduction

1 The appellant seeks leave to tender new evidence in his appeal against the decision of the Commissioner of Police to take removal action, pursuant to s 33R(3) of the *Police Act 1892*.

Background

2 On 9 March 2016, the appellant was charged with stealing bakery production line equipment to the value of \$50,000 pursuant to s 378 of the Criminal Code.

3 On 2 May 2016, the Commissioner of Police issued a Notice of Intention to Remove from the Police Force of Western Australia (NOITR) to the appellant. The NOITR set out that the Commissioner intended to take this action because he was not satisfied that the appellant's honesty, integrity, performance and conduct were of a standard expected and required of a member and of a standard necessary to maintain public confidence in the WA Police. Accordingly, the Commissioner advised, he had lost confidence in the appellant's suitability to continue as a member of WA Police. This loss of confidence was said to

be based on the matters set out in a summary of investigation, and related allegations, that between 9 April 2015 and 3 March 2016 the appellant had done a number of things. They were that he:

- (a) wilfully lied to Detectives and was deceptive when they challenged him in relation to the theft of bakery equipment;
 - (b) stole bakery equipment valued at between \$50,000 and \$265,000;
 - (c) disobeyed a lawful order by continuing his secondary employment;
 - (d) on a number of occasions whilst on-duty and in police uniform, attended business premises in Northbridge and collected monies owed to him through his secondary employment; and
 - (e) lied to internal investigators during his managerial interview.
- 4 The Commissioner attached to the NOITR a list of the documents and materials that he had examined and taken into account in making his decision and the documents themselves, including the summary of investigation. The appellant was invited to respond to the NOITR within 21 days.
- 5 On 23 May 2016, the appellant responded to the NOITR. He denied and disputed each of the allegations. He noted that he was facing a trial of the criminal charge and indicated his intention to plead not guilty and defend himself. He said that any submission he would make to the Commissioner may prejudice him in his defence, and that to require him to respond would therefore be unfair, and would require that he waive his right to silence. Therefore, he said, he could not appropriately or comprehensively respond to the allegations at that time. He requested that the Commissioner cease the then process of removal until the criminal charge had been resolved and he was able to respond to the allegations. Beyond those responses, the appellant did not address any of the issues in the NOITR or the summary of investigation.
- 6 By letter dated 14 June 2016, the Commissioner notified the appellant that he had considered the appellant's response and continued to have lost confidence in the appellant's suitability to remain a member of WA Police. He had sought the approval of the Minister for Police to remove the appellant.
- 7 The Minister approved the appellant's removal on 20 June 2016.
- 8 On 13 July 2016, the appellant appealed to the WAIRC against the decision to take removal action. The only ground for the appeal is that the appellant is not guilty of the wrongdoing alleged of him.
- 9 The charge was first heard in the District Court of Western Australia commencing on 23 April 2018. The jury was unable to reach a verdict. The charge was re-tried before the District Court commencing on 5 March 2019, after which the appellant was found not guilty.

Application to Tender New Evidence

- 10 The transcripts of the trials before the District Court of the criminal charge against the appellant are before us by consent.
- 11 The appellant also seeks to tender new evidence which is a statement by him dated 7 June 2019. It is said to support his appeal against removal.

Grounds for the Application

- 12 The appellant says that his statement is likely to be able to show new evidence which might materially have affected the Commissioner's decision to take removal action, and it is in the interests of justice that it be admitted. He says that the Commissioner acted upon wrong or mistaken information in that in the summary of investigation, at [15], it says that the equipment allegedly stolen by the appellant amounted to between \$50,000 and \$265,000. He says that the significant cost in the report would have influenced the Commissioner's decision to take removal action as it increased the seriousness of the matter. He says the value was eventually less than \$50,000.
- 13 Secondly, the appellant says that the Commissioner acted in a mistaken belief that the alleged stolen property was in the appellant's possession and that he lied to detectives about not knowing its whereabouts.

Statement - the New Evidence

- 14 The appellant says that the new evidence arose at the trial of the charge before the District Court. He says he had been unable to communicate in his letter to the Commissioner of 23 May 2016, what that evidence was. Had he been able to do so, it would have demonstrated that he was not guilty of wrongdoing and proved that he did not lie when questioned. He says that he was not able to provide that new evidence to the Commissioner before his criminal trial, but is now able to do so, as the criminal proceedings have been finalised.
- 15 The appellant's statement is made up of 138 paragraphs. The Commissioner does not object to [1] in which the appellant identifies himself as such, and [64] onwards. However, he objects to the remainder of the paragraphs.
- 16 The first of the two groups of paragraphs opposed by the Commissioner set out the appellant's personal and service background. The appellant says that these are matters going to his aptitude as a serving police officer and matters to his credit in determining his suitability for the office he held until his removal, and mitigate against his removal.
- 17 The Commissioner says it has no bearing on the ground of appeal, being that he was not guilty of the wrongdoing alleged of him, that is the five allegations. The Commissioner also objects on the grounds that the material could have been put to him by the appellant in the appellant's response to the NOITR, however he chose not to do so.
- 18 The second issue dealt with in the disputed paragraphs is an allegation by the appellant that the investigation process is infected by apprehended bias. The appellant says that Acting Inspector Ellery bullied and discriminated against him while he worked at the State Security Investigation Group. Acting Inspector Ellery was an author of the Investigation Final Report which was included in the matters considered by the Commissioner in deciding to take removal action.

Consideration and Conclusions

19 The WAIRC is required to consider a range of factors in deciding whether to grant leave to an appellant to tender new evidence. Section 33R(3)-(4) of the *Police Act 1892* provides:

“33R. New evidence on appeal

- (3) The WAIRC may grant the appellant leave to tender new evidence if —
- (a) the Commissioner of Police consents; or
 - (b) the Commission is satisfied that —
 - (i) the appellant is likely to be able to show that the Commissioner of Police has acted upon wrong or mistaken information;
 - (ii) the new evidence might materially have affected the Commissioner of Police’s decision to take removal action; or
 - (iii) it is in the interests of justice to do so.
- (4) In the exercise of its discretion under subsection (3) the Commission shall have regard to —
- (a) whether or not the appellant was aware of the substance of the new evidence; and
 - (b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access, before his or her removal from office.”

20 The WAIRC needs to be satisfied about any one or more of the matters in s 33R(3)(b). In accordance with *Laurent v Commissioner of Police* [2009] WAIRC 839 at [12] and [13], this means that leave will be refused unless the WAIRC is satisfied of one or more of those three matters, that is if the WAIRC is satisfied on one or more of those matters, the WAIRC will have discretion to grant leave.

21 In exercising that discretion, the Commission is to have regard to the matters in s 33R(4) of:

- (a) whether or not the appellant was aware of the substance of the new evidence; and
- (b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access, before his removal from office.

22 “New evidence” is defined in s 33R(11) of the *Police Act 1892* as follows:

- “(11) In this section —
- new evidence** means evidence other than evidence of —
- (a) any document or other material that was examined and taken into account by the Commissioner of Police in making a decision to take removal action;
 - (b) the notice given under section 33L(1);
 - (c) a written submission made to the Commissioner of Police by the appellant under section 33L(2);
 - (d) the notice given under section 33L(3)(b); and
 - (e) a notification of the removal from office.

[Section 33R inserted: No. 7 of 2003 s. 6.]”

23 I note firstly that the appellant’s background information is not relevant to the sole ground of appeal, that he is not guilty of the wrongdoing alleged against him.

24 Secondly, according to the NOITR, much of the material was before the Commissioner in the Investigation Final Report which was considered by the Commissioner. Therefore it is not new evidence in accordance with the definition contained in s 33R(11). Further, it does not meet the test of showing that the Commissioner acted upon wrong or mistaken information.

25 Thirdly, had the appellant wished to draw particular attention to that material, he had an opportunity as part of responding to the NOITR. There is no suggestion that putting this material to the Commissioner at that time could have adversely affected his rights in the trial, which was the basis of his limited response to the Commissioner.

26 In these circumstances it is not new evidence, nor is it otherwise justified to receive it now on the ground that it would be in the interests of justice to do so.

27 As to the issue of apprehended bias because of Acting Inspector Ellery’s involvement, the appellant knew of this when he received the NOITR and the attached documents. He did not explain why he did not address this issue at the time he made his response to the Commissioner. There is no suggestion that it was a matter that would have affected his rights in defending the criminal charge.

28 Therefore, it too is not new evidence and the appellant was aware of it and had access to the relevant documents before his removal.

29 I am not satisfied that the matters contained in the disputed paragraphs demonstrate the matters set out in s 33R(3).

30 Although the appellant says in his grounds in this application that there were matters that arose in the trial, and the transcript of both trials is before us, no reference was made to where in the trials they came to light. In fact, they were known before the trial, and before the appellant responded to the NOITR.

31 I would dismiss the application.

KENNER SC:

32 I agree with the reasons for decision of Scott CC and have nothing to add.

MATTHEWS C:

33 I agree with the reasons for decision of Scott CC and have nothing to add.

2020 WAIRC 00859

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00859
CORAM : CHIEF COMMISSIONER P E SCOTT
 SENIOR COMMISSIONER S J KENNER
 COMMISSIONER D J MATTHEWS
HEARD : MONDAY, 24 FEBRUARY 2020
DELIVERED : THURSDAY, 22 OCTOBER 2020
FILE NO. : APPL 42 OF 2016
BETWEEN : ADIB ABDENNABI
 Appellant
 AND
 THE COMMISSIONER OF POLICE WA POLICE
 Respondent

CatchWords : Industrial law (WA) – Appeal pursuant to s 33P of *Police Act 1892* – Loss of confidence by Commissioner of Police – Removal of Police Officer – Officer acquitted of criminal offence of stealing – Whether removal harsh, oppressive, or unfair – Officer lied and was deceptive to employer and detectives – Secondary employment – Obligations and responsibilities as police officer – Commercial interests above duty – Conflict of interest – Undermining integrity of WA Police – Public interest – Police officer’s association with suspected criminal – Open for Commissioner of Police to conclude officer was guilty of wrongdoing alleged of him – Commissioner of Police entitled to lose confidence in officer as member of WA Police – Removal not harsh, oppressive, or unfair – Appeal dismissed

Legislation : *Criminal Investigation Act 2006* s 6, s 42
Industrial Relations Act 1979 (WA)
Police Act 1892 (WA) s 8, s 33
Surveillance Devices Act 1998 (WA) s 7(1)

Result : Appeal dismissed

Representation:
Counsel:
Appellant : Mr R Yates (of counsel)
Respondent : Ms C Chapman (of counsel)

Case(s) referred to in reasons:*AM v Commissioner of Police* [2009] WAIRC 01285; (2009) 90 WAIG 276*Carlyon v Commissioner of Police* [2004] WAIRC 11966; (2004) 85 WAIG 706*McGrath v Commissioner of Police* [2005] WAIRC 1989; (2005) 85 WAIG 2006*The Honourable Minister of Police v Western Australia Police Union of Workers* [2000] WAIRC 01174; (2000) 81 WAIG 356*Undercliffe Nursing Home v The Federated Miscellaneous Workers Union of Australia, Hospital, Services and Miscellaneous, WA Branch* (1985) 65 WAIG 385*Reasons for Decision***The Western Australian Industrial Relations Commission:**

- 1 Adib Abdennabi was a Senior Constable with WA Police until 23 June 2016 when the Commissioner of Police lost confidence in him pursuant to s 33 of the *Police Act 1892* (WA) and he was removed from WA Police. All of the Commissioner’s reasons for losing confidence arise from Mr Abdennabi undertaking secondary employment while being a serving officer.
- 2 Mr Abdennabi appeals against his removal, pursuant to s 33P of the *Police Act*. His grounds of appeal are that his removal was harsh, oppressive or unfair because:
 - (1) it was not reasonably open on the material before the Commissioner to have concluded that Mr Abdennabi was guilty of the wrongdoing alleged of him, in part or in whole; and
 - (2) it was not reasonably open to the Commissioner to have removed him for any alleged wrongdoing that is provable against him, based on the material before the Commissioner, and thus the removal was not justified to maintain the proper functioning of the Police Force.

- 3 The Commissioner's reasons for removal were reformulated following the WAIRC agreeing to receive new evidence from Mr Abdennabi. The new evidence related to two trials before the District Court of Western Australia of criminal charges against Mr Abdennabi, as well as a statement by Mr Abdennabi. The reformulated reasons are contained in a letter to Mr Abdennabi from the Commissioner dated 26 November 2019. The letter attaches a memorandum (the Memorandum) to the Commissioner from Inspector Mulligan setting out the background to the loss of confidence, with 74 attachments, including photographs, discs containing video recordings and transcripts of interviews and of proceedings in the District Court. Where we refer to Attachments in these Reasons, they are the attachments to the Memorandum. On the basis of his analysis of the materials, Inspector Mulligan recommended to the Commissioner that he not revoke the removal action he had previously decided on, prior to the new evidence and the reformulated grounds. The Commissioner accepted and acted on the recommendation.

The Commissioner's reasons

- 4 The reasons the Commissioner says he lost confidence in Mr Abdennabi, as reformulated, were that:
- (A) In November 2015, December 2015 and/or February 2016, Mr Abdennabi lied to detectives and was deceptive when they questioned him in relation to the alleged theft of bakery equipment.
 - (B) In April 2015, Mr Abdennabi removed a dough flattener from 35 Adrian Street, Welshpool without legal entitlement to do so.
 - (C) In February 2016, Mr Abdennabi disobeyed a lawful order issued by Superintendent Massam on 20 January 2016 by continuing to perform secondary employment after being advised his approval to do so had been rescinded.
 - (D) On a number of occasions in 2015 and 2016, whilst on duty and in police uniform, Mr Abdennabi used his mobile telephone, or attended business premises in Perth and Northbridge to conduct aspects of his secondary employment, contrary to Secondary Employment Policy HR – 12.
 - (E) During a managerial interview on 26 February 2016, Mr Abdennabi lied to internal investigators.
 - (F) From or about 2013 to 2014, Mr Abdennabi associated with Mr Zreik despite knowing, or having reason to suspect, that Mr Zreik engaged in criminal behaviour.

Background

- 5 The Memorandum and other documents set out the background. It includes that Mr Abdennabi joined WA Police in June 2008, having previously been with the London Metropolitan Police for approximately four years. Following his graduation and a three-month period at Perth Police Station, he was transferred to State Security Investigation Group (SSIG) where he spent three years as a field intelligence officer.
- 6 In November 2011, Mr Abdennabi was transferred out of SSIG to a patrol/enquiry officer position at Cannington Police Station.
- 7 In August 2012, while at Cannington Police Station, Mr Abdennabi sought approval to commence secondary employment with Extreme Renos Pty Ltd, a painting and decorating company of which he was the director. This application was approved on 22 August 2012.
- 8 In April 2013, Mr Abdennabi, as a director of a second company, Carthage Catering Pty Ltd, signed a lease to operate a bakery, Carthage Bakery, at 35 Adrian Street, Welshpool. Mr Abdennabi then made an application for secondary employment in respect of work at the bakery. However, this was not approved by his District Officer due to Mr Abdennabi actively seeking a transfer or actually being transferred at the time. According to the policy dealing with personnel engaging in secondary employment (HR – 12 Secondary Employment), secondary employment is monitored by the officer's officer in charge or manager (HR – 1200.11) and existing approvals expire when the officer is transferred or promoted (HR – 1200.06). The officer is not permitted to commence secondary employment until they are formally advised that it has been approved (HR – 1200.06).
- 9 In July 2013, Mr Abdennabi sought permission to be released from district tenure in order to apply for a part-time position at Bayswater Police Station, stating his desire to undertake university studies. He was transferred to Bayswater Police Station on 5 August 2013.
- 10 On 10 October 2013, Mr Abdennabi was involved in an incident at the Welshpool bakery when an associate, Mr Zreik, threatened Mr Abdennabi with a knife and damaged property. This incident is said to have drawn attention to the fact that Mr Abdennabi did not have permission for secondary employment at the bakery. On 17 November 2013, he submitted a renewal application for secondary employment at both Carthage Bakery and Extreme Renos. In relation to the bakery operation, Mr Abdennabi said in this application:
- My Wife and I have leased 35 Adrian Street Welshpool and opened a shop selling middle eastern grocery and fresh Lebanese bread.
- My wife will operate the shop and conduct the daily running of the business. I will assist her with ordering and stacking shelves on weekly leave days.
- The Bakery side of the business is subcontracted to Peace Lebanese Bakery to produce flat Lebanese bread
- We are in the process of preparing a lunch bar on the premises. Once the work is complete the lunch bar will be subcontracted.
- (Attachment 12)
- 11 This application was rejected on the basis that Mr Abdennabi was not coping with the pressures of his employment and study commitments, and had taken a significant amount of sick leave.

- 12 Between 17 November 2013 and February 2015, Mr Abdennabi was on extended annual leave and paid and unpaid parental leave. During this time, he was transferred from Bayswater Police Station and placed in Temporary Holdings.
- 13 On 26 November 2013, Mr Abdennabi lodged a grievance against the refusal of his secondary employment application. On 22 January 2014, the decision was reversed, and he was granted approval to resume his secondary employment.
- 14 In February 2015, Mr Abdennabi resumed work and commenced in a part-time position at Perth Police Station.
- 15 On 10 April 2015, Carthage Bakery's lease of the Welshpool premises ended, and Mr Abdennabi moved the bakery to Unit 1, 22 Beale Way, Rockingham.
- 16 On 27 June 2015, Mr Abdennabi submitted a renewal application for secondary employment at Carthage Bakery in Rockingham, some two and a half months after the move to the new premises. Importantly, this application specified that Mr Abdennabi's role was to collect orders at the end of the day and pass them on to the production manager. He said:

Since April 2013, my wife and I operated a flat bread bakery at 35 Adrian Street Welshpool. In April 2015 we relocated the business to 1/22 Beale way Rockingham.

My wife and I operate business with the assistance of contractors to produce the bread and deliver it to some small retailers.

My Role is to collect the bread orders at the end of every day and produce an order sheet that I pass to the production manager. During the days that am on Police duty, My wife do this task that takes ½ hour.

This year we decided to sell the business. We currently in discussions with two different interested parties from Sydney.

(Attachment 18)

Allegations relating to vacating Welshpool premises

- 17 On 16 July 2015 and 28 October 2015, Mr Jamal Fahd Hishmeh made statements to WA Police and was interviewed by Detective Sergeant Surman of Kensington Detectives (Attachment 15). He alleged that on vacating the Welshpool premises, Mr Abdennabi had stolen plant and equipment including a dough flattening machine. Mr Hishmeh said he was the owner of the Welshpool premises and he gave his version of the arrangement he entered into with Mr Abdennabi for Mr Abdennabi to lease the Welshpool premises.
- 18 Mr David Ainslee Lamb had also made a statement to police (Attachment 17). He said he was the director of MLV Commercial and Industrial Real Estate. Mr Lamb stated that he prepared a lease for the Welshpool premises. The period of the lease was for 24 months to 31 March 2015, if not renewed. Mr Lamb said that there were problems regarding the payment of the rent and there were unapproved modifications to the premises.
- 19 Mr Lamb said that at the expiry of the lease, the tenant failed to vacate as required. On 8 April 2015, he attended the premises along with another person for the purpose of locking the tenant out as he was in breach of the contract. He had a discussion with Mr Abdennabi and it was agreed that the lock out would be deferred until Friday, 10 April 2015 at 3 pm. However, on Thursday, 9 April 2015, Mr Lamb attended the premises to undertake an inspection to draft a list of items for the tenant to fix.
- 20 At this inspection, Mr Lamb took photographs. He said that the premises were in a very poor state and there was an enormous amount of work required by the tenant to make good the premises. The next day, when he returned to take control of the premises, the premises were in a worse state than the previous day.
- 21 On 10 November 2015, a search warrant was executed at Unit 1, 22 Beale Way, Rockingham and a list of 30 items to be searched for was attached, along with photographs of a range of items including a dough flattener and associated equipment, including custom-made steps (Attachment 21).
- 22 The officer in charge of the execution of the warrant was Detective Sergeant Surman. Detective Sergeant Surman interviewed Mr Abdennabi at the scene, and the interview and the search were video recorded and transcribed (Attachment 22).
- 23 Detective Sergeant Surman clarified to Mr Abdennabi that the allegation against him was of stealing and that it related to the premises at Adrian Street, Welshpool. Mr Abdennabi indicated that he had a lease at those premises for nine years. However, after almost two years, the landlord, Mr Hishmeh, asked him to leave and there was a dispute between Mr Abdennabi and Mr Hishmeh. Mr Abdennabi said that he had invested money and did not get the return on the investment. He said '[s]o the day I left Adrian Street, I did not go back again. And the day I left I took anything and anything I took, everything, it's mine. Okay. Everything. Any screw I removed from there it's mine, or I have claim over it' (ts 8). He said that he removed any items that he had made or repaired or any parts he had purchased. He said there was a dispute between he and his landlord over the lease and that it should be a lease dispute not a criminal matter. Detective Sergeant Surman went through the list of the items in the search warrant and indicated that there were 30 items in total and that they would now go inside the Rockingham premises, and they would film the premises.
- 24 Detective Sergeant Surman and Mr Abdennabi discussed a number of items on the premises, in particular number 10 on the list, the dough flattener and associated equipment including custom-made steps. Detective Sergeant Surman said about this equipment that it '[a]ppears to be the steps and the machine here. What can you tell me about the steps and the machine?' Mr Abdennabi said:

The steps I got out of the rubbish in, um, from the skip that he had. He [threw] everything into the skip and I got these, um, these, these ones. And that wasn't actually the steps that he's talking about. Um, they were, these were in the shop, in the shop. It had things like sort of a display thing. Ah, I took this off the, the, off the rubbish, off the skip, it was a metal skip. And this flattener I purchased this flattener from Adelaide.

- 25 Mr Abdennabi said he bought it from a business called Flat Bread Bakery or something like that, that the man's name was Eddie, that the price was \$24,000 and that he was paying for it by instalments. He still owed \$16,000 to \$18,000. He said he had a receipt for the purchase; that he had signed a document for the instalment arrangements; that he had receipts for the transport because he had to ship it across and he could prove that the one before them was not Mr Hishmeh's dough flattener, '[u]m, he gave his flattener to [indistinct] bakery.' Mr Abdennabi then said:
- He had a flattener but he's left, I think he's [indistinct] In fact a lot of stuff he's sort of 'cause of him that he's making insurance claim and that's what I thought. I didn't think he is, ah, claiming that I, I stole the stuff. ... I didn't want him to do insurance fraud, ah, based, based on items that he's claiming that are, are, that are stolen or damaged or whatever. I put my name forward they say that, I'm waiting for them to basically contact me when they, at the stage when they need the, for the investigation' (ts 17).
- 26 They continued the inspection of the premises and of particular items.
- 27 On 17 December 2015, Mr Abdennabi was interviewed by Detective Sergeant Surman and another officer at Kensington Police Station. The interview was recorded and transcribed (Attachment 34). At page 3 of the transcript of the interview, Detective Sergeant Surman informed Mr Abdennabi that he was going to discuss an allegation of damage and stealing that had occurred leading up to 10 April 2015, in relation to Mr Abdennabi's lease of the Welshpool premises. Mr Abdennabi confirmed that he had leased the premises from 'roughly April 2013 until 10 April 2015' (ts 4).
- 28 Mr Abdennabi went on to explain how he became involved in leasing the premises from Jamal, who we take to be Mr Jamal Hishmeh. Mr Abdennabi said that he had taken on the equipment that was already there from the owner of the business. He said the equipment was not in a good condition and that the previous operator had wrecked the equipment. He said that the previous operator had a partner, Mohammed Zreik, who knew how to operate the equipment. He was informed that he should get Mr Zreik to fix up the equipment or to show him how it works (ts 7). He met Mr Zreik, who told him that the machinery was old and was worth nothing. Mr Zreik could take over the machinery and make it work and he would help Mr Abdennabi and bake for him.
- 29 Mr Abdennabi said his wife would run the grocery shop and Mr Zreik would bake on the premises. Mr Zreik had a product brand called Peace Lebanese Bakery and Mr Abdennabi wanted to use his own brand of Carthage Bread, so they agreed to produce under both brands.
- 30 According to Mr Abdennabi, Jamal Hishmeh took most of his belongings and equipment but left others behind. Mr Abdennabi then outlined in detail what we understand to be Mr Hishmeh continuing to occupy part of the premises without Mr Abdennabi's agreement and that they had a falling out. However, he also described how the previous owner had vacated the premises but left some things including some frames, which he said Mr Abdennabi could use. We understand the frames are part of the dough making equipment. Some equipment was put into a skip bin. Mr Abdennabi also made reference to some crates being stored at Saidoun Bakery.
- 31 At page 12, Mr Abdennabi said '[s]o, just to show you now he's claiming – he's sold to somebody else and now he's claiming them from that – he's claiming that I took them or stole them or damaged them or whatever'.
- 32 The interview then covered specific items set out in the search warrant. At pages 45 and 46 of the transcript of the interview, they discussed the bakery equipment including the dough flattener marked in photographs F1 and F2. Detective Sergeant Surman pointed to one photograph and noted that the dough flattener was located between two proofers in the photograph taken on 9 April, but that there was nothing in that position in the photograph taken on 10 April. He asked Mr Abdennabi to tell him what happened to that piece of machinery. Mr Abdennabi said '[w]ell I took rollers and stuff that I – I had. I took 'em off. And the rest of it. And for the frame stayed.'
- 33 Later in the same page of transcript, he said that when he took the pieces, in fact 'George did (the work), '[h]e knew what has to be done. And he dismantled the stuff that we put in' (page 46).
- 34 On 23 February 2016, further search warrants were executed by Detective Sergeant Surman at the Rockingham premises, but these warrants included Units 2 and 5 as well as Unit 1 (Attachment 23). Each warrant contained an identical list of items, including photographs. Item number 10 in each warrant was a dough flattener and associated equipment including custom-made steps.
- 35 The search was again video-taped and transcribed (Attachment 24). The search team arrived at the premises before Mr Abdennabi. When Mr Abdennabi arrived, Detective Sergeant Surman informed him, amongst other things, that they also had a search warrant for Unit 5 on this occasion because 'we received information that it's a unit you have access to and store property in' (ts 3). He went on to note that the items listed in the search warrants for Units 1 and 5 were identical because there was a potential that things could have been moved between units.
- 36 Detective Sergeant Surman gave Mr Abdennabi a copy of the search warrants and read through the list of 33 items with him. He noted that they had arrived at 7.15 that morning, knocked on the front door and Fares let them in. They then left the premises and waited outside for Mr Abdennabi to arrive before continuing the search.
- 37 Detective Sergeant Surman asked Mr Abdennabi '[n]ow, do you have access to Unit 5?' Mr Abdennabi's response is initially indistinct and then Mr Abdennabi said, 'I don't at the moment'. Detective Sergeant Surman asked him '[o]kay. Do you have any property that's stored in Unit 5?', to which Mr Abdennabi said '[y]es'. Detective Sergeant Surman asked him why he did not have access to that particular unit at the moment and Mr Abdennabi said, 'I just don't have keys.' He was asked 'where are the keys?' and Mr Abdennabi said '[w]ith the landlord [indistinct]'. Detective Sergeant Surman said that that was okay – that Fares had given him a set of keys when they arrived. Mr Abdennabi then said 'my keys are here.' The video shows that Mr Abdennabi patted his jacket pockets. Detective Sergeant Surman said 'okay. Well, Fares gave me this set of keys that he got off the table inside. Ah, so obviously we've opened Unit 5 and then it's been locked up again, ah, pending your arrival' (ts 6).

38 Later in the search of Unit 5, Mr Abdennabi was with Detective Sergeant Surman as he was examining a dough flattener. Detective Sergeant Surman said that it appears to be the same dough flattener as in the photograph attached to the search warrant but that it was not in the same condition because it had been disassembled and moved (ts 13). He asked Mr Abdennabi what he could tell him about that piece of equipment. Mr Abdennabi said:

That some components are mine. The rollers, the rollers of, on it are, are mine. The frame is, ah, is not mine, but I'm holding it against my deposit. I've got a ten thousand dollar deposit [indistinct] oh it's we haven't started [indistinct] they haven't acknowledged that, the fact that I've got deposit on there.

...

There are, the rollers [indistinct] the chrome ones, they're, they're mine [indistinct] the cogs and stuff, ah, the pushers, the, ah, the sensors, they're mine. Um, the, belt [indistinct] the belt. So I just, um, I didn't have time to strip it down and take what's mine, but the, um, I'm holding it on, against my deposit (ts 13).

39 Later in the search, Mr Abdennabi said that he was only given 10 days to vacate the Welshpool premises and that he needed more time than he had (ts 19).

40 Following the search, Mr Abdennabi was arrested and charged with stealing in relation to the allegation made by Mr Hishmeh.

41 On 25 February 2016, Mr Abdennabi was stood down from police duties.

Allegations relating to conducting secondary employment while on duty

42 On Sunday, 17 January 2016, First Class Constable Dale White, who had worked with Mr Abdenabbi, advised Sergeant Matthew Donkin that she believed Mr Abdennabi was conducting secondary employment whilst on duty. Constable White reported that while working with Mr Abdennabi in Northbridge on the night of 15 January 2015, while in uniform and wearing full accoutrements, Mr Abdennabi discussed with a person at a kebab shop that the business owed him money. Constable White also later reported that while on patrol, Mr Abdennabi talked to the operators of shops about his bakery and the bread he produced and offered to supply samples.

43 Sergeant Donkin made enquiries of others who had worked with Mr Abdennabi around that time. Constable Gallo reported that on 9 February 2016, while on patrol with Mr Abdennabi in around July/August 2015, Mr Abdennabi was handed three or four \$50 notes by an employee of a kebab shop they visited.

44 Constable Sawyer reported that when she was working with Mr Abdennabi, he disclosed to her that he was owed money by the owner of a kebab shop.

45 Constable Fraser reported that in the few times he had worked with Mr Abdennabi, Mr Abdennabi had made a few calls regarding his secondary employment, although PC Fraser said that the calls did not interfere with anything they were doing at the time (Attachment 58).

46 On 18 January 2016, Sergeant Donkin submitted a Police Conduct Report to the Superintendent in charge of the Ethical Standards Division into the allegations that Mr Abdennabi was breaching secondary employment guidelines by engaging in secondary employment while on duty (Attachment 19).

47 As a result, on 20 January 2016, District Superintendent Kim Massam wrote to Mr Abdennabi and informed him that his authority to perform secondary employment was withdrawn effective immediately. He noted that Mr Abdennabi's application for secondary employment had identified his wife as a director of Carthage Bakery and that his application submitted on 6 June 2015 had been reviewed in accordance with the Secondary Employment Policy. He noted that there was a current criminal investigation relating to Mr Abdennabi's secondary employment at his previous business bakery address in Welshpool. District Superintendent Massam noted that he placed Mr Abdennabi's application to continue his secondary employment on hold, awaiting the outcome of the criminal investigation 'as I held concerns about the conflict between your secondary employment and your employment with WA Police.' He also noted that it had come to his attention 'that an allegation has been raised recently that while on duty you collected payments from businesses that you supply to as part of your secondary employment. If this allegation is sustained this would represent a serious breach of the Western Australia Police Code of Conduct and the principles of *HR – 12 Secondary Employment*.' The letter went on:

In light of this new information your approval to conduct secondary employment is rescinded, effective immediately.

Should you disobey my lawful order and continue to engage in secondary employment I will treat any breach very seriously and again institute further disciplinary interventions.

(Attachment 20)

48 On 4 February 2016, Mr Abdennabi wrote to Senior Sergeant Winstone asking that the order be rescinded and he sought permission to resume his secondary employment, citing the effect it was having on him, and that he was in the process of preparing the business for sale. He needed to continue to work in the business. This request was refused on 10 February 2016.

49 Between 15 and 24 February 2016, police undertook covert surveillance of Mr Abdennabi and the bakery premises at Rockingham.

50 On 26 February 2016, Mr Abdennabi was the subject of a managerial interview by internal investigators. This interview was recorded and transcribed (Attachment 49). In the interview, Mr Abdennabi acknowledged receipt of District Superintendent Massam's letter of 20 January 2016 (ts 22), and that his request for the decision to be rescinded was rejected. He provided information to Detective Sergeants Garnett and Sainsbury about his attendance at the bakery in the period since the approval was withdrawn on 20 January 2016. At page 88 of the transcript, Mr Abdennabi acknowledged that he had been undertaking work for the bakery, including making deliveries, having initially denied doing so and providing an explanation for why his telephone might have been tracked as it moved through suburbs in the bakery's truck.

- 51 The internal investigation into Mr Abdennabi's conduct was completed on 11 April 2016. It recommended Mr Abdennabi be considered for loss of confidence. Inspector Smith from the Police Conduct Review Unit was appointed Review Officer and he completed a Summary of Investigation, in which he concluded that there was sufficient doubt about Mr Abdennabi's honesty, integrity, performance and conduct to warrant a loss of confidence by the Commissioner. The Commissioner determined that he had lost confidence in Mr Abdennabi and signed a Notice of Intent to Remove. This was served on Mr Abdennabi on 4 May 2016 in respect of the five matters which we set out earlier. Mr Abdennabi was invited to provide a written response to the allegations.
- 52 At the time, Mr Abdennabi was facing criminal charges and advised the Commissioner that while he disputed the allegations, he was not prepared to comprehensively respond on the basis that it may prejudice his defence in his forthcoming criminal trial. The Commissioner considered this response and on 14 June 2016, advised Mr Abdennabi that he maintained his loss of confidence and had written to the Hon. Minister for Police requesting Mr Abdennabi's removal from WA Police.
- 53 Since Mr Abdennabi's removal, there were two criminal trials in the District Court of the charges of stealing bakery equipment valued at \$50,000. The first trial, which commenced on 23 April 2018, resulted in the jury being unable to return a verdict and the second trial, which commenced on 5 March 2019, acquitted him.
- 54 Following the acquittal, Mr Abdennabi sought leave to tender new evidence which included a statement made by him on 7 June 2019 in which he set out his personal and professional history, and put his position regarding his conduct and the allegations against him. The WAIRC granted leave to tender part of that statement as it related to the criminal charges and the trials in District Court (2019 WAIRC 00761). In accordance with s 33R(8), the Commissioner was then entitled to reformulate his reasons, which he did on 26 November 2019, taking account of Inspector Mulligan's Memorandum of 26 November 2019 and the 74 attachments.
- 55 As we noted above, Mr Abdennabi made a statement on 7 June 2019 for the purposes of this appeal. In that part which we received into evidence, he responded to Reason for removal A. Mr Abdennabi denied lying to detectives during the investigation and stood by his answers given in the interview on 23 February 2016 regarding whether he had a key to Unit 5. He noted that this issue was before the jury in the first trial, and the jury was unable to return a verdict. He noted that in the second trial, Prior DCJ made a positive finding that he did not lie. Mr Abdennabi refutes the allegation that he lied in the execution of the search warrant on 10 November 2015. He says that it was clearly demonstrated in the second trial that the dough flattener seized from his premises was not the dough flattener alleged to have been stolen and was therefore not the dough flattener covered by the warrant.

Consideration and conclusions

- 56 The appellant bears the burden of establishing that the decision to take removal action was harsh, oppressive or unfair (*Police Act*, s 33Q(2)).
- 57 In *Carlyon v Commissioner of Police* [2004] WAIRC 11966; (2004) 85 WAIG 706, the WAIRC set out the tests to be applied arising from the terms of the *Police Act*. The WAIRC must also 'examine closely those reasons in terms of substance and the process by which they were formulated' [15]. It must decide whether the reasons are actually made out. It noted that the test is whether the decision of the Commissioner to remove Mr Abdennabi was harsh, oppressive or unfair (s 33Q(2)). It went on to elaborate on that test by reference to the 'fair go all round' test set out in relation to unfair dismissal matters in *Undercliffe Nursing Home v The Federated Miscellaneous Workers Union of Australia, Hospital, Services and Miscellaneous, WA Branch* (1985) 65 WAIG 385. In this case, Brinsden J noted that 'the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question 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?'
- 58 The WAIRC went on to note that s 33Q(4) of the *Police Act* imposes a specific duty on the WAIRC to have regard to the interests of the appellant and the public interest which is taken to include:
- (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
 - (ii) the special nature of the relationship between the Commissioner of Police and members of the Force.
- 59 It went on to observe:
183. This provision ensures that the industrial standard based as it is on an employer/employee relationship is, in the circumstances of this statutory appeal process, particular to the service within the Police Force.
 184. The interests of the Appellant and those aspects of public interest which go to the maintenance of public confidence in the Police Force have been identified by the parties in the cases considered here under section 33Q(1) of the Act, or in the reiteration by the WAIRC of legal principles which apply in an appeal.
 185. What has not been articulated is the special nature of the relationship between the Commissioner of Police and members of the Police Force under section 33Q(4)(b)(ii) of the Act, which goes to the public interest and how these are to be regarded by the WAIRC in determining the appeal.
 186. In our view this provision serves to remind the WAIRC to take into account that the nature of the relationship between the Commissioner of Police and members of the Police Force extends beyond those duties and obligations which are implied in normal employer/employee relationships. It goes beyond the member's duty of honesty, fidelity, obedience and to co-operate and the Commissioner of Police's duty to provide training and a safe work environment. It encompasses the commitment of a member to discharge the requirements of his/her commission whether on duty or off duty and to serve as a member of a disciplinary force. While the very nature of policing assumes that the environment

in which members discharge their duties will not always be safe it is the duty of the Commissioner of Police to ensure that members receive appropriate education, training, information and supervision in order for them to make decisions appropriate to the proper discharge of their duties and in the public interest.

187. It is within the context of this relationship between the Commissioner of Police and the Appellant that the WAIRC must, in addition to the other matters cited in the statute, have regard in determining the appeal.
188. We consider that the specific requirements for the WAIRC to have regard to the interest of the Appellant and the public interest which is taken to include those matters set out in section 33Q(4)(b)(ii) of the Act can be accommodated with the industrial notion of a 'fair go all round'.
- 60 At [207], the WAIRC noted that 'there is an all encompassing requirement for members [of the Police Force] to uphold the highest standards of ethical behaviour.'
- 61 It is to be borne in mind that the Commissioner's action is not a dismissal but arises where, having regard to the officer's integrity, honesty or conduct, the Commissioner loses confidence in the officer's suitability to remain an officer (*McGrath v Commissioner of Police* [2005] WAIRC 01989; (2005) 85 WAIG 2006, [21]; *The Honourable Minister of Police v Western Australia Police Union of Workers* [2000] WAIRC 01174; (2000) 81 WAIG 356 [111] – [112], [127]).
- 62 While Mr Abdennabi was entitled to the presumption of innocence in his criminal trial, as noted in *AM v Commissioner of Police* [2009] WAIRC 01285; (2009) 90 WAIG 276 at [50], the issues before the Commissioner were about his integrity and honesty, about lies and deception in interviews, and in his removal of something he had no entitlement to take.
- 63 This case is all about Mr Abdennabi's conduct arising from his secondary employment. As noted in *Carlyon* at [186], as a police officer, he is required to discharge his commission whether on duty or off duty and to serve as a member of a disciplinary force. In this regard, Mr Abdennabi had a duty of integrity and honesty in his dealings and in how his secondary employment intersected with his responsibilities as a police officer. They are not separate.
- 64 Section 33Q(4) sets out the issues the WAIRC is required to have regard to in deciding such an appeal. They include:
Without limiting the matters to which the WAIRC is otherwise required or permitted to have regard in determining the appeal, it shall have regard to –
- (a) the interests of the appellant; and
 - (b) the public interest which is taken to include –
 - (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
 - (ii) the special nature of the relationship between the Commissioner of Police and members of the Force.
- 65 Mr Abdennabi says that the Commissioner's reasons for taking removal action are not soundly based. He also says that, in effect, if there is a reasonable basis for finding wrongdoing against him, based on material before the Commissioner, his removal was not justified for the purpose of maintaining the proper functioning of the Police Force.
- 66 We conclude, for the following reasons, and without reservations, that Mr Abdennabi subjugated his obligations and responsibilities as a police officer to his secondary employment and his commercial interests. It led him to act contrary to his obligation. His removal was in accordance with the public interest as set out in s 33Q(4)(b).

Consideration of Reason A

- 67 We have no hesitation in finding that it was open to the Commissioner to conclude that Mr Abdennabi lied or was deceptive as alleged in Reason A. Firstly, on 10 November 2015, Mr Abdennabi claimed he bought his dough flattener from someone in Adelaide, and that Mr Hishmeh sold his dough flattener to another bakery. Everything he took from the Welshpool premises was his, he said.
- 68 On 17 December 2015, Mr Abdennabi said he took the rollers and left the frame. George had dismantled it.
- 69 On 23 February 2016, he initially said that some of the components were his, and he identified the rollers, the cogs, the pushers and the sensors and the belt were his. However, he then changed his story from 17 December 2015 to say that to say that he did not have time to strip it down. He took the whole machine. At this point, for the first time, Mr Abdennabi asserted a claim over it as he was holding it against his deposit.
- 70 There were three conflicting explanations about what happened to Mr Hishmeh's machine – it was given to another bakery, the machine was dismantled and Mr Abdennabi's parts were taken but not the frame, and finally that it was not dismantled – there was not sufficient time, and it was being held against money owing. Not all of those explanations can be true. Further is the explanation that Mr Abdennabi purchased his machine from Adelaide.
- 71 We have no hesitation in finding that the explanations on 10 November and 17 December were lies. The final explanation came only after it was clear that the photographs from 9 and 10 April disclosed the disappearance of the dough flattener from its place in the Welshpool premises.
- 72 What is to be made of the findings of the District Court about whether Mr Abdennabi lied to Detective Sergeant Surman at the search on 23 February 2016 when he said he did not have access to Unit 5?
- 73 We note that in the first District Court trial, the Court did not have the video and transcripts of the search on 23 February 2016 before it. The evidence regarding whether Mr Abdennabi lied when he indicated that he did not have access to Unit 5 was from Detective Sergeant Surman's evidence and it was in the context of past inconsistent statements and whether Mr Abdennabi deliberately lied. Sweeney DCJ, noted to the jury that Detective Sergeant Surman's evidence on that point was unchallenged in cross-examination. Her Honour pointed out to the jury the distinction between a deliberate lie affecting Mr Abdennabi's credibility and a deliberate lie constituting actual proof of guilt itself (ts 570). If the jury drew an inference

that it was proof of guilt, that would support the State's case against Mr Abdennabi. In other words, her Honour left the matter in the jury's hands.

- 74 In the second trial, the transcript of the exchange and an excerpt from the video recording were before the Court (ts 1241 – 1248). Detective Sergeant Surman was cross-examined about what Mr Abdennabi said. Prior DCJ, in the absence of the jury, dealt with the issue of whether the State could submit that Mr Abdennabi's statement to Detective Sergeant Surman that he did not have access to Unit 5 constituted a lie, in particular, such a material lie as to reflect a consciousness of guilt. His Honour was not satisfied that there was sufficient evidence that it was a lie and decided that he would give no direction to the jury as to how they could use it in their deliberations, if they found that what Mr Abdennabi said was a lie (ts 1293).
- 75 Therefore, what was dealt with by two judges of the District Court was whether it was a deliberate lie and if so, was it a matter of credibility generally or proof of guilt of the offence? Sweeney DCJ made no decision, either in Mr Abdennabi's favour or not. Prior DCJ did not direct the jury one way or the other but concluded for his purposes that it was not a lie.
- 76 We find that the conflicting findings of the two judges in their decisions about directions to the jury are not determinative of the issue of whether Mr Abdennabi was deceptive about his access to Unit 5.
- 77 We also note that the issue before the District Court was whether, beyond a reasonable doubt, Mr Abdennabi had stolen the dough flattener that belonged to Mr Hishmeh. The matter before the WAIRC is whether it was reasonably open to the Commissioner to have concluded that Mr Abdennabi lied and was deceptive in the investigation and a different standard of proof applies. The Commissioner had the video evidence and transcript, as well as other evidence that was not before the District Court.
- 78 We have no hesitation in finding that it was open to the Commissioner to conclude that Mr Abdennabi was deceptive when he told Detective Sergeant Surman that he did not have access to Unit 5 and that the keys were with the landlord. In fact, Detective Sergeant Surman had been given the key by Fares, Mr Abdennabi's employee, from the table in Unit 1, the unit under Mr Abdennabi's control. In our view, an inference is clearly open that Mr Abdennabi had moved the machine from Unit 1 where it was last seen, to Unit 5. It was only discovered when, according to Detective Sergeant Surman, information was provided that Mr Abdennabi had access to that unit and had some property in there. Mr Abdennabi's intent appears to have been to attempt to delay the search of Unit 5.
- 79 In those circumstances, we conclude that it was reasonably open for the Commissioner to conclude as he did in Reason A.

Consideration of Reason B

- 80 In the search on 23 February 2016, Mr Abdennabi finally conceded that he had taken the dough flattener from the Welshpool premises, but he claimed he held it against money owed to him.
- 81 Two things lead us to believe this was not a genuinely held belief. Firstly, Mr Abdennabi came to this explanation after a number of concocted stories.
- 82 The second is that both Sweeney DCJ in the first trial and Prior DCJ in the second trial explained that once Mr Abdennabi's lease expired, he had no right over the machine. It does not require a finding of fraudulent intent for this reason to be soundly based.
- 83 However, the first reason of the concocted stories brings us clearly to a conclusion that the Commissioner was entitled to reasonably believe that Mr Abdennabi had removed the dough flattener without legal entitlement.

Consideration of Reason C

Secondary employment policy

- 84 The Western Australia Police policy dealing with a secondary employment by personnel (HR –12 Secondary Employment) says that '[i]t is the policy of the Western Australia Police (WA Police) that personnel must not engage in any paid secondary employment without the approval of the Commissioner of Police or duly authorised Approving Officer.'
- 85 The purpose of the policy is set out as including to:
- Ensure that WA Police personnel do not compromise their ability to discharge the function of their public office by involvement in inappropriate secondary employment.
 - ...
 - Ensure that the involvement of any WA Police personnel in any form of secondary employment does not give rise to a real or perceived conflict of interest between the member's public and private interest.
 - Ensure that the involvement in any secondary employment does not detract from the image of the WA Police as an institution of public trust.
 - Ensure that all WA Police personnel are aware of their responsibilities in relation to any matter involving an application for secondary employment.
 - Provide clear guidelines for determining applications for secondary employment and the conditions and limitations that will apply.

(Attachment 4)

- 86 The policy sets out a range of high-risk areas where a secondary employment will be approved only in exceptional circumstances. None of the businesses that Mr Abdennabi applied to undertake secondary employment in are listed within those high-risk categories.
- 87 The policy is quite detailed in terms of the process for approval and includes guidelines for approving officers and other matters.

88 HR – 12.00.04 Principles, sets out the basis of the secondary employment being approved. It states:

The major consideration regarding approval of an application for secondary employment shall be the preservation of the integrity of the WA Police, maintenance of operational capabilities, workplace safety and the avoidance of any real or perceived conflict of interest with police duties and responsibilities.

In every instance, secondary employment will be approved on the following principles:

1. The secondary employment is undertaken in the member's own time.
2. The timing and duration of the secondary employment will not compromise a member's ability to function effectively or interfere with work performance. Neither the combined total of hours worked nor when the work occurs should render the applicant too fatigued (or otherwise unfit) to complete their rostered shifts and duties. The rostered hours of duty in accord with the relevant industrial agreements have primacy.
3. The secondary employment will not detract from the image of the WA Police as an institution of public trust.
4. Police duty takes precedence over secondary employment.
5. ...
6. WA Police personnel must not wear any part of their uniform or use any WA Police accoutrements, resources or confidential information in the course of undertaking secondary employment.
7. ...
8. ...

Breaches of this policy by members engaged in secondary employment will be viewed seriously and may result in revocation, and/or management or disciplinary action.

89 Clause HR – 12.00.05 Secondary Employment Revocation sets out that:

The Commissioner of Police may revoke any approval for secondary employment at any time when any of the principles are contravened or where, in the opinion of the Commissioner of Police, continuation of that secondary employment is not in the public interest, in the interest of the WA Police or in the interest of the member concerned. Revocations of secondary employment will be monitored and remedial action taken if required.

The office which approved the secondary employment may take necessary interim action including suspension of the approval, pending determination of the revocation process.

90 There is an appeal process set up in the policy at HR – 12.00.16 Appeal Process. This provides that any personnel who have had a secondary employment application rejected or an approval rescinded may lodge an appeal through the In-House Grievance System and have the appeal considered by a Determining Officer. There is no provision that enables an officer, having had their application rejected or approval rescinded, to commence or continue in the secondary employment during the course of the appeal process.

91 When he was interviewed on 26 February 2016, Mr Abdennabi accepted that his permission to perform secondary employment was rescinded. Not only was it rescinded, but District Superintendent Massam expressly informed him that if he disobeyed the lawful order and continued to engage in secondary employment, District Superintendent Massam would 'treat any breach very seriously and again institute further disciplinary proceedings.' It could not have been clearer.

92 However, in the interview on 26 February 2016, after obfuscating, attempting to find loopholes in the direction and after it became clear that he had been observed and his phone had been tracked, Mr Abdennabi conceded that he had been undertaking work in the bakery business. However, he attempted to provide mitigating circumstances.

93 He now says that there was no contumacy, that is, it was not obstinately or wilfully doing what was prohibited, without reasonable cause or in the belief that it would be excused. He says it was because he was in financial difficulty and was trying to sell the business, and that he did not understand that he was actually prohibited from doing what he did.

94 The excuse of being in financial difficulty may be true. However, with respect to Mr Abdennabi, he chose to attempt to operate a business and to do so, he worked part time as a police officer. The approval for him to undertake secondary employment was rescinded because of the apparent conflict between his work as a police officer and his conduct of the business. Mr Abdennabi chose the business over his police responsibilities.

95 When he was interviewed, Mr Abdennabi was dishonest about the work he was actually performing for the business until he came to realise that his phone records were accessible to the Commissioner's investigators. Had he genuinely believed, as he asserted in his new evidence (Appellant's New Evidence, Appellant's Statement, 7 June 2019 [104]), that he thought he was complying with the order, as he understood at the time that it did not prohibit him from doing things that were confined to his home, then two things become apparent. The first is that he was dishonest and evasive in the interview about what work he had been doing until he noted, as we have indicated above, that the investigators had access to his phone records and knew that the phone had been moving about the city and he had been taking and making telephone calls. The second is that he acknowledged making deliveries to a number of suburbs a good distance from the bakery and from his home.

96 It may have been hard on Mr Abdennabi to be placed in the situation of having to cease operating the business immediately, but he brought it on himself by his conduct and his choice to treat his responsibility as a police officer as secondary to his business's needs. To be a police officer is not like a normal job. It brings far greater constraints and responsibilities and carries significant powers and authorities.

97 Reason C is made out.

Consideration of Reason D

- 98 We have set out earlier, in brief terms, the reports Sergeant Donkin received from other police officers working with Mr Abdennabi were that he was undertaking aspects of his business while on duty and in uniform.
- 99 On one hand, Mr Abdennabi denies the accusations and that he thought he had adequately separated the two potentially conflicting occupations. On the other, he acknowledges that with hindsight, he may have been naïve. He also attempts to defend himself by saying that the owner of one of his clients, Euro Kebabs, has passed away, otherwise he could corroborate his account.
- 100 With respect to Mr Abdennabi's arguments, in our view it was open to the Commissioner to have accepted the accounts given individually by four of his officers, by Constables White, Gallo, Sawyer and Fraser, about Mr Abdennabi's conduct. They included that he discussed with a client that they owed him money and said he would be back to collect it. He spoke to business operators, promoting his products. He appears to have accepted money from a debtor. He used his phone for business purposes while on duty. During those events, he was wearing his uniform and accoutrements and carrying with him the full force of his office.
- 101 Mr Abdennabi did not take sufficient steps to separate the two conflicting interests. He used times when he was on duty to further the interests of the business and this is contrary to the Policy. This had the real prospect of detracting from the image of the WA Police as an institution of public trust. In doing so, he undermined the integrity of the WA Police.
- 102 In our view, Reason D is made out.

Consideration of Reason E

- 103 Reason E is that during the managerial interview on 26 February 2016, Mr Abdennabi lied to internal investigators. This allegation relates to the interview where his activities on Wednesday, 24 February 2016 in respect of the operation of the business, were under investigation. Mr Abdennabi's initial account at pages 77 – 88 of the transcript was, he apparently conceded, objectively incorrect and that the true position was clarified at pages 88 – 97 of the transcript. At page 89 of the transcript, after being accused of lying, Mr Abdennabi explained that his memory had been refreshed while they were talking and that he had depression and has moments of complete blank out. At page 90, he is said to have explained 'that would have been yesterday' referring to his account of his activities initially given to the investigators.
- 104 Later in the interview, at pages 105 – 106, Mr Abdennabi denied undertaking the work for the bakery, including deliveries and meeting a prospective buyer, but said he was 'doing what needs to be done ...' to provide income for the business. He went on to say that he had to 'offload' the business at a huge loss.
- 105 Mr Abdennabi's intentions and conduct were made quite clear at pages 112 – 114 of the transcript when Detective Sergeant Garnett confirmed and reinforced that Mr Abdennabi had previously had his approval to undertake secondary employment withdrawn and that that related to engaging in any activity associated with the bakery. Mr Abdennabi attempted to have a prospective date put on that directive, however Detective Sergeant Garnett said to him '[y]ou should have cut off all ties on the 20th' (being 20 January 2016) (page 113), to which Mr Abdennabi continued to challenge and quibble.
- 106 Mr Abdennabi also split hairs when answering questions about for whom he was doing the work, including that he was doing work for or 'representing' his wife, when the work was clearly work for the Carthage Bakery business.
- 107 An examination of the remainder of the transcript leads us to draw a conclusion that Mr Abdennabi was far from forthcoming. Each piece of information about his activities that day had to be drawn from him by focussing and re-focussing the questions. In our view, it was clearly open to the Commissioner to conclude that Mr Abdennabi was not truthful about his activities that day, and only conceded when he knew the interviewers already had the answers.

Consideration of Reason F

- 108 There are a number of aspects of this reason. Mr Abdennabi employed Mr Zreik from the commencement of the bakery business in 2013. Mr Abdennabi is said to have known that Mr Zreik had a lengthy and significant criminal record. Mr Abdennabi accessed the Police records in 2013 but says he did not recall that when he became involved with Mr Zreik.
- 109 The issues in Reason F are:
1. Mr Abdennabi continued to employ Mr Zreik in spite of holding serious suspicions that Mr Zreik was dealing drugs from the bakery's truck. Mr Abdennabi put a tracking device on the truck without Mr Zreik's knowledge, in breach of the *Surveillance Devices Act 1998* (WA).
 2. Mr Zreik was charged following an incident at the bakery in which he is said to have threatened to kill Mr Abdennabi with a knife and damaged the walls of the bakery with a hammer. Mr Zreik was placed on protective bail and prohibited from attending the bakery or contacting or attempting to contact Mr Abdennabi. Mr Abdennabi sought to have the charges withdrawn because they affected his ability to run the business.
 3. Mr Abdennabi caused Mr Zreik to breach his bail conditions by contacting him to resolve their dispute.
- 110 Mr Abdennabi says that it is incorrect that he did not take any steps when he began to suspect Mr Zreik. He says that when he was interviewed about the allegation on 25 November 2014, he explained to investigators that he noticed that Mr Zreik would go through more than a tank of fuel in the work truck; that Mr Abdennabi had installed a GPS tracker device on the truck and that the device showed that the truck was making stops at parklands and public toilets all over the metropolitan area. He suspected that these stops were for the purpose of selling drugs and he spoke to Sergeant Smith at Cannington Police Station and gave him a log of the details of the GPS tracker. He assumed the police would investigate and arrest Mr Zreik but that did not happen. Mr Abdennabi says he wanted to get rid of Mr Zreik as an employee, but he did not have a valid reason to do so.

- 111 Mr Abdennabi says that it must be borne in mind that there would have been a conflict of interest for him to have conducted a criminal investigation into Mr Zreik. He says he did what he should have done when a police officer suspects criminal behaviour on the part of an associate and that was to report it to police and not interfere in the police investigation. The allegation was investigated by the Internal Affairs Unit and finalised in 2014. It sustained findings of installing the GPS tracker on a vehicle without the driver's permission and also allowing Mr Zreik to breach a violence restraining order protecting Mr Abdennabi. Mr Abdennabi received a letter of corrective advice.
- 112 Mr Abdennabi says that it is now unfair to allege wrongdoing on his behalf on a basis which was not a sustained finding against him at the time. In any event, he says that such finding is not soundly based because there is no evidence that he did anything but what he should have done in the circumstances. Therefore, Mr Abdennabi says Reason F is not soundly based.
- 113 In our view, the first aspect is made out. In a managerial interview on 25 November 2014, Mr Abdennabi disclosed to detectives that he had installed the tracking device on the truck without Mr Zreik's knowledge (Attachment 74, page 13). He said he did so because he suspected Mr Zreik was dealing drugs. He reported the matter to Cannington Police but continued to employ Mr Zreik. Mr Abdennabi said they turned a blind eye to Mr Zreik's drug habit (page 46), and that he 'didn't want to get rid of him just like that, um, so I had to find a reason' (page 24). We respectfully agree with Inspector Mulligan's conclusion that '[b]y allowing Mr Zreik to continue to work for him, it appears Mr Abdennabi placed the commercial needs of the bakery ahead of his responsibilities as a police officer.' This is reinforced by Mr Abdennabi's motivation relating to the second aspect.
- 114 As to the second aspect, Mr Abdennabi sought out the investigating officer, Detective Constable Ferguson, and wrote to him requesting that the charges against Mr Zreik arising from Mr Zreik threatening him and damaging the premises be withdrawn (Attachment 68). He said that he and Mr Zreik had reconciled and he wished to withdraw his statements in the matter.
- 115 The duty counsel at Perth Magistrates Court, representing Mr Zreik, also wrote to Detective Constable Ferguson. She said that she was aware that Mr Abdennabi, the complainant, may have contacted him about withdrawing the charges. She explained that 'the two men are cousins and business partners. They are both directors of the same company and play an active role in running their bakery business together on a daily basis. It is likely that if the charges against Mr Zreik are not withdrawn, there may be a considerable practical and commercial burden placed on Mr Abdennabi' (Attachment 69).
- 116 Inspector Mulligan concluded that Mr Abdennabi's conduct in attempting to have serious criminal charges against a man with significant criminal history discontinued was not in the public interest. It was said to have been established that Mr Abdennabi was trying to have Mr Zreik's charges discontinued so that Mr Zreik could get back to working for him in the bakery. This is said to constitute a conflict of interest and Mr Abdennabi was provided with verbal guidance.
- 117 We agree that this constitutes a serious conflict between Mr Abdennabi's obligations as a police officer and his business interests. They are not reconcilable.
- 118 As to the allegation of Mr Abdennabi facilitating Mr Zreik breaching bail, this was said to have occurred when Mr Zreik appeared in court on 24 October 2013 and when he was said to have been accompanied by Mr Abdennabi. Mr Zreik advised the magistrate that he and Mr Abdennabi had discussed their relationship and solved everything, despite his bail conditions stipulating that Mr Zreik was not to contact or attempt to contact Mr Abdennabi. This is said to effectively admit a breach of Mr Zreik's protective bail conditions. However, we are not satisfied that the evidence is clear enough to enable this conclusion.
- 119 The transcript of the hearing in the Magistrates Court on 24 October 2013 does not indicate that Mr Abdennabi accompanied Mr Zreik to the court, as alleged, thereby causing Mr Zreik to breach the protective bail condition (Document 72). The transcript merely records that the accused, Mr Zreik, informed the magistrate that '[w]ell, I just want to – the victim's here' [the victim being Mr Abdennabi] ... there's the victim. We had a discussion. We solved everything.' However, in the interview (Attachment 74, page 41), Mr Abdennabi said that he called the detectives who were investigating and asked them to drop the charges. Notwithstanding that Mr Zreik had threatened to kill him and pulled a knife on him, Mr Abdennabi still wanted him back. Mr Zreik was apparently remorseful and was also necessary to the business. Mr Abdennabi thought he would give him a second chance (Attachment 74, page 43). He did not only go to the detectives, but he went to the Perth Magistrates Court with a letter. He said that he spoke to the prosecutor because the detective told him he could do nothing about it, it was out of his hands, so he went to speak to the prosecutor (page 44).
- 120 In our view, there is more than one possible interpretation of Mr Zreik's expression '[w]e had a discussion'. It may be seen in the context of Mr Abdennabi having approached the prosecutor and Mr Zreik's counsel to seek that the charges be dropped.
- 121 However, we have no hesitation in finding that the other two issues arising from Mr Abdennabi's association with Mr Zreik were sufficient to make it open to the Commissioner to conclude that the association was contrary to Mr Abdennabi's obligation as a police officer.
- 122 In our view, Mr Abdennabi should not have placed himself in a position of having a person who was valuable to his business, undertaking work using the truck, and engaging in activity which he suspected was unlawful. It is true that he could not deal with the matter himself as a police officer and he was correct in his action of reporting it to Cannington Police. However, that does not mean that he could then turn a blind eye and ignore the fact that he had serious concerns about his employee's activities.
- 123 It is clear, too, that he was suffering a conflict of interest because if he lost Mr Zreik's services, it would have been detrimental to his business.
- 124 In our view, Mr Abdennabi again placed his commercial interests above his responsibilities and obligations as a police officer and this is one of the significant issues in the potential for police officers in engaging in secondary employment to have a serious conflict of interest.

125 This reason is made out.

Conclusion regarding grounds 1 and 2

126 In all of the circumstances, we conclude that on the material before the Commissioner of Police, it was open to him to conclude that Mr Abdennabi was guilty of the wrongdoing alleged of him in all but one relatively minor aspect of those reasons.

127 As to ground 2, that it was not reasonably open to the Commissioner to have removed Mr Abdennabi for any alleged wrongdoing that is provable against him, in our view the history of Mr Abdennabi's conduct as part of the operation of his commercial interests makes clear that he placed those interests above his obligations as a police officer. They caused him to lie and be deceptive to the Commissioner's officers on a number of occasions relating to a number of issues and to engage in activities contrary to his obligations.

128 We have not one moment's hesitation in concluding that there was good reason why the Commissioner would have ceased to have confidence in Mr Abdennabi's integrity, honesty or conduct. His conduct entitled the Commissioner to conclude that it was in the public interest for him to be removed as that conduct would easily erode public confidence in the integrity, honesty and conduct of members of the Police Force. His removal was not harsh, oppressive or unfair.

129 We would dismiss both grounds of appeal.

Concluding comment

130 We note in passing that while the policy dealing with secondary employment places limits and restrictions of such employment, it seems to us that there is something inherently in conflict between carrying out commitments as a sworn police officer 'whether on duty or off duty' and conducting secondary employment or operating a business. They seem to provide many, possibly unforeseen, opportunities for conflict. Yet the policy and processes suggest that it is an entitlement, not an exception.

2020 WAIRC 00860

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ADIB ABDENNABI

APPELLANT

-v-

THE COMMISSIONER OF POLICE WA POLICE

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER D J MATTHEWS

DATE

THURSDAY, 22 OCTOBER 2020

FILE NO/S

APPL 42 OF 2016

CITATION NO.

2020 WAIRC 00860

Result

Appeal pursuant to s 33 of the *Police Act 1892* dismissed

Representation

Applicant

Mr R Yates (of counsel)

Respondent

Ms C Chapman (of counsel)

Order

This appeal having come on for hearing before the Commission on 24 February 2020, and having heard Mr R Yates (of counsel) on behalf of the appellant, and Ms C Chapman (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and the *Police Act 1892*, hereby orders –

THAT the appeal pursuant to s 33P of the *Police Act 1892* be and is hereby dismissed.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

On behalf of the Western Australian Industrial Relations Commission.

2020 WAIRC 00161

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	LACHLAN PERHAVEC	APPLICANT
	-v-	
	COMMISSIONER OF POLICE	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	THURSDAY, 5 MARCH 2020	
FILE NO/S	APPL 12 OF 2020	
CITATION NO.	2020 WAIRC 00161	

Result	Appeal adjourned
Representation	
Applicant	Mr R Yates of counsel
Respondent	Ms N Eagling of counsel

Order

WHEREAS on Tuesday, 25 February 2020, Lachlan Perhavec instituted an appeal pursuant to s 33P of the *Police Act 1892* against the decision of the Commissioner of Police to take removal action on 11 February 2020; and

WHEREAS on Tuesday, 25 February 2020, the appellant filed an application for orders:

1. that the hearing of the appeal be adjourned under s 33T of the Police Act for 12 months until criminal charges against him are finally determined by a court or otherwise disposed of;
2. that the Commissioner of Police need not comply with reg 91 of the *Industrial Relations Commission Regulations 2005* until further order of the Commission, and
3. that either party may apply to vary the terms of the order; and

WHEREAS on Wednesday, 4 March 2020, the Commission received correspondence from the respondent stating that he has no objection to the appellant's application for orders; and

WHEREAS, having regard to s 33T(3) of the Police Act, an application by the appellant requires the adjournment of the hearing of the appeal.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s 33T of the Police Act, hereby orders –

1. THAT the hearing of the appeal be adjourned until 4 March 2021.
2. THAT the appeal be listed for mention on a date to be determined by the Commission in due course.
3. THAT compliance with reg 91 of the *Industrial Relations Commission Regulations 2005* by the Commissioner of Police need not occur until further order.
4. THAT either party may apply to vary the terms of this order.

(Sgd.) S J KENNER,
Senior Commissioner,

[L.S.]

On behalf of the Western Australian Industrial Relations Commission.

2020 WAIRC 00890

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	LACHLAN PERHAVEC	APPELLANT
	-v-	
	COMMISSIONER OF POLICE	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	TUESDAY, 3 NOVEMBER 2020	
FILE NO/S	APPL 12 OF 2020	
CITATION NO.	2020 WAIRC 00890	

Result	Appeal discontinued
Representation	
Appellant	Mr R Yates of counsel
Respondent	Ms N Eagling of counsel

Order

WHEREAS on 25 February 2020, Lachlan Perhavec instituted an appeal pursuant to s 33P of the *Police Act 1892* against the decision of the Commissioner of Police to take removal action on 11 February 2020; and

WHEREAS on 25 February 2020, the appellant also filed an application for an order that the hearing of the appeal be adjourned under s 33T of the *Police Act 1892* for 12 months, and consequential orders, until criminal charges against him are finally determined by a court or otherwise disposed of; and

WHEREAS on 5 March 2020, The Western Australian Industrial Relations Commission (WAIRC), pursuant to the powers conferred on it under s 33T of the *Police Act 1892*, issued an order [2020 WAIRC 00161] adjourning the appeal until 4 March 2021; and

WHEREAS on 24 September 2020, the appellant filed a *Form 1A – Discontinuance*; and

WHEREAS the Commissioner of Police did not wish to express a view regarding the discontinuance;

NOW THEREFORE, WAIRC, pursuant to the powers conferred by the *Industrial Relations Act 1979* and the *Police Act 1892*, hereby orders –

THAT the appeal be and is hereby discontinued.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2020 WAIRC 00877

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2020 WAIRC 00877
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	WEDNESDAY, 17 JUNE 2020, THURSDAY, 2 JULY 2020
DELIVERED	:	THURSDAY, 29 OCTOBER 2020
FILE NO.	:	U 48 OF 2020
BETWEEN	:	BOYD GRAY
		Applicant
		AND
		THE TRUSTEE FOR THE MJ ZAZA FAMILY TRUST
		Respondent

CatchWords	:	Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal claim - Name of respondent - Whether Commission has jurisdiction - Trusts and trustees - Trading activities of respondent.
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Fair Work Act 2009</i> (Cth)
Result	:	Application dismissed for want of jurisdiction
Representation:		
Applicant	:	In person
Respondent	:	Mr M Zaza

Case referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) V Lawrence (No 2) [2008] WASCA 254; (2008) 89 WAIG 243

Reasons for Decision

- 1 Mr Boyd Gray was employed by The Trustee for The MJ Zaza Family Trust trading as Zaza Aluminium Commercial Windows and Doors (**Zaza Aluminium**). On 14 March 2020 Mr Gray received a letter notifying him that his employment was terminated because of redundancy. Mr Gray says the redundancy was not genuine and his dismissal was unfair.
- 2 Zaza Aluminium say that Mr Gray's position was no longer required following a restructure of their business operations and dispute Mr Gray's claim that his termination was unfair.
- 3 The Western Australian Industrial Relations Commission (**Commission**) conducted two conciliation conferences between the parties and the parties engaged in discussions with a view to reaching settlement.
- 4 Subsequently, in July 2020, Zaza Aluminium notified the Commission that the correct entity that employed Mr Gray was Bonaro Pty Ltd as trustee for The MJ Zaza Family Trust which is a trading corporation. Therefore, Zaza Aluminium say the Commission does not have jurisdiction. Zaza Aluminium requested this issue be determined before the matter proceeded further.

Question to be decided

- 5 The questions to be decided in this matter are the correct employer, whether the employer is incorporated, the character of the activities carried on by it at the relevant time and whether or not it was engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.

Background and Evidence

- 6 The parties did not object to the matter being heard on the papers and the parties were invited to make submissions and file material relevant to the issues.
- 7 On 14 August 2020 Mr Zaza, a Director for Bonaro Pty Ltd submitted a copy of an ASIC search of Bonaro Pty Ltd (ACN 114 739 310), a copy of the Trust Deed of the MJ Zaza Family Trust, a copy of an ASIC Business Name search of Zaza Aluminium and a pay slip of Mr Gray.
- 8 On 10 September 2020 Mr Zaza submitted a copy of the financial report for the year ended 30 June 2019 for Bonaro Pty Ltd as Trustee for the MJ Zaza Family Trust, on a confidential basis pursuant to s 33(3) of the *Industrial Relations Act 1979* (WA).
- 9 Mr Gray submitted that he had spoken with several state and federal government agencies concerning his situation and each had suggested that the scant information available for Zaza Aluminium indicated that he ought to make an application to the Commission. Mr Gray did not dispute any of the material submitted by the respondent.

Principles

- 10 Section 14(1)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**) defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines constitutional corporations as corporations which are trading, or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or employer including the FW Act.
- 11 *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254; (2008) 89 WAIG 243, sets out the principles to be applied by the Commission when considering whether an entity is a trading corporation [68].
 - (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* (239); *State Superannuation Board* (303 – 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
 - (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [22].
 - (3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330; *Quickenden* [101].
 - (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); *E* (343, 345); *Pellow* [28].
 - (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board* (304 – 306); *E* (343). Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': *St George County Council* (543) (Barwick CJ); *Tasmanian Dam case* (156) (Mason J).
 - (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: *Adamson* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (584).
 - (7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; *E* (344); *Hardeman* [18].

- (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler; Hardeman* [26].

12 Business trading names do not have an identifiable legal personality and cannot be employers.

13 A trust is also not a legal entity and it is the trustee, the person/entity responsible for administering the trust, who enters into the employment contracts. If the trustee is a company, it may be a constitutional corporation and a national system employer.

Who is the Employer and is the Employer a Trading Corporation?

14 Mr Gray's payslip identifies his employer as 'The Trustee for The MJ Zaza Family Trust'. However, this is a business trading name which has no identifiable legal personality and cannot have been Mr Gray's employer.

15 In his application to the Commission Mr Gray named his employer as The Trustee for the MJ Zaza Family Trust. On the undisputed information and documentation provided by the respondent I am satisfied that Mr Gray's employer was the trustee which is Bonaro Pty Ltd.

16 On examination of the materials submitted by Zaza Aluminium, I am satisfied that Bonaro Pty Ltd engages in trading activities associated with the conduct of a commercial enterprise of the nature set out in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)*.

Conclusion

17 An order will issue dismissing this application for want of jurisdiction.

2020 WAIRC 00878

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BOYD GRAY

APPLICANT

-v-

THE TRUSTEE FOR THE MJ ZAZA FAMILY TRUST

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

THURSDAY, 29 OCTOBER 2020

FILE NO/S

U 48 OF 2020

CITATION NO.

2020 WAIRC 00878

Result Application dismissed for want of jurisdiction

Representation

Applicant In person

Respondent Mr M Zaza

Order

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

THAT this application be, and by this order is, dismissed for want of jurisdiction.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00895

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DONG-SYUE WU

APPLICANT

-v-

YITING LI

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

THURSDAY, 5 NOVEMBER 2020

FILE NO/S

B 117 OF 2019

CITATION NO.

2020 WAIRC 00895

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);
 AND WHEREAS on 2 August 2019, the applicant filed a *Form 3 – Contractual Benefit Claim* with the Western Australian Industrial Relations Commission (**Commission**);
 AND WHEREAS on 6 August 2019, a stamped copy of the application was returned to the applicant and served on the respondent;
 AND WHEREAS on 30 August 2019, 4, September 2019, 5 September 2019, the Commission rang the respondent's mobile number several times and there being no response;
 AND WHEREAS on 10 September 2019, the Commission sent a letter to the respondent requesting a *Form 3A – Employer Response to Contractual Benefit*, be filed within 21 days of being served the application;
 AND WHEREAS a *Form 3A – Employer Response to Contractual Benefit Claim*, was not filed by the respondent;
 AND WHEREAS on 11 October 2019, letters were sent by registered post including signature upon receipt, to the applicant and respondent requesting availability to list this matter for a conciliation conference;
 AND WHEREAS on 22 October 2019, an email was sent to the applicant attaching the letter dated 11 October 2019;
 AND WHEREAS on 30 October 2019 and 1 November 2019, letters dated 11 October 2019 sent to the applicant and respondent were returned unopened to the Commission;
 AND WHEREAS on 4 August 2020 this matter was listed for hearing for 3 November 2020 to show cause why this matter should not be dismissed for want of prosecution;
 AND WHEREAS on 23 September 2020, Australia Post tracking indicated letters to both applicant and respondent were delivered on 6 August 2020;
 AND WHEREAS on 3 November 2020 at the hearing, there was no appearance by on behalf of the applicant;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application B 117/2019 be, and hereby is, dismissed.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2020 WAIRC 00863

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

CITATION	:	2020 WAIRC 00863
CORAM	:	COMMISSIONER D J MATTHEWS
HEARD BY WRITTEN SUBMISSIONS	:	WEDNESDAY, 7 OCTOBER 2020, MONDAY, 12 OCTOBER 2020
DELIVERED	:	THURSDAY, 22 OCTOBER 2020
FILE NO.	:	U 104 OF 2020
BETWEEN	:	LEYLA DJUMAEVA Applicant AND KALGOORLIE HEALTH CAMPUS Respondent

CatchWords	:	Industrial Law (WA) - Unfair dismissal application - If the applicant is an employee will be a "government officer" pursuant to section 80C <i>Industrial Relations Act 1979</i> - No jurisdiction to hear and determine application in general jurisdiction of Western Australian Industrial Relations Commission
Legislation	:	<i>Industrial Relations Act 1979</i> s 80C
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	In person
Respondent	:	Mr P Budd (as agent)

Reasons for Decision

- 1 Dr Djumaeva has brought an unfair dismissal application against the “Kalgoorlie Health Campus” in the general jurisdiction of the Western Australian Industrial Relations Commission.
- 2 On 25 August 2020 an “Employer Response to Unfair Dismissal Application” was filed with the Western Australian Industrial Relations Commission.
- 3 The “Employer Response to Unfair Dismissal Application” gives “WA Country Health Service” as the details of the “legal name of organisation or business” responding to the unfair dismissal application.
- 4 Nothing turns on this at the moment other than it seems that, if there was an employment relationship, the respondent seems to be saying it was not one with, as the applicant nominates, the Kalgoorlie Health Campus.
- 5 I am sure the respondent is correct. The Kalgoorlie Health Campus sounds like a building or precinct rather than an entity capable of employing anyone.
- 6 In any case, the response alleges that the Western Australian Industrial Relations Commission may not, in its general jurisdiction, hear and determine this matter because, if there was an employment relationship, the applicant would have been a “government officer” as defined by section 80C *Industrial Relations Act 1979*.
- 7 I agree. I refer the applicant to the definition of “government officer” in section 80C *Industrial Relations Act 1979* and the later sections relating to the body with jurisdiction to deal with complaints by government officers that they have been unfairly dismissed.
- 8 I know that the respondent says that, for other reasons, the applicant was not an employee at all, but that question cannot be decided by the Western Australian Industrial Relations Commission in its general jurisdiction.
- 9 The current application is dismissed for want of jurisdiction.

2020 WAIRC 00867

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LEYLA DJUMAEVA

APPLICANT

-v-

KALGOORLIE HEALTH CAMPUS

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

FRIDAY, 23 OCTOBER 2020

FILE NO/S

U 104 OF 2020

CITATION NO.

2020 WAIRC 00867

Result Application dismissed**Representation****Applicant** In person**Respondent** Mr P Budd (as agent)*Order*

HAVING heard from the applicant in person and Mr P Budd, as agent, for the respondent on the papers;

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

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2020 WAIRC 00864

UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00864
CORAM : COMMISSIONER D J MATTHEWS
HEARD BY WRITTEN SUBMISSIONS : MONDAY, 31 AUGUST 2020, THURSDAY, 3 SEPTEMBER 2020
DELIVERED : WEDNESDAY, 22 OCTOBER 2020
FILE NO. : U 44 OF 2020
BETWEEN : STEVEN OTS
 Applicant
 AND
 ENABLE WA INC
 Respondent

CatchWords : Industrial Law (WA) - Unfair dismissal application - Respondent is a "trading corporation" - No jurisdiction to hear and determine application
Legislation : *Industrial Relations Act 1979* (WA) - *Fair Work Act 2009* (Cth)
Result : Application dismissed
Representation:
Applicant : In person
Respondent : Ms E Hartley (of counsel)

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2) [2008] WASCA 254; (2008) 178 IR 168

Decision

- 1 Steven Ots has brought an unfair dismissal claim against Enable WA Inc.
- 2 Enable WA Inc says that the claim should be dismissed for want of jurisdiction because it is a constitutional corporation.
- 3 Given that Mr Ots' claim is one relating to his alleged unfair dismissal, in order for the Western Australian Industrial Relations Commission to have jurisdiction to hear the claim, the Western Australian Industrial Relations Commission must be satisfied the *Fair Work Act 2009* (Cth) does not apply to Mr Ots' employment with Enable WA Inc.
- 4 The *Fair Work Act 2009* (Cth), relevantly, in relation to unfair dismissal claims, applies to the exclusion of the *Industrial Relations Act 1979* (WA) in so far as the State Act would otherwise apply in relation to a "national system employer".
- 5 The *Fair Work Act 2009* (Cth) defines "national system employer" as a "constitutional corporation, so far as it employs, or usually employs, an individual".
- 6 "Constitutional corporation" is defined to mean "a corporation to which paragraph 51(xx) of the Constitution applies" and, relevantly, "constitutional corporations" are defined as "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".
- 7 Enable WA Inc. says it is a trading corporation. If a corporation is a trading corporation, the jurisdiction of the Western Australian Industrial Relations Commission to deal with Mr Ots' claim is excluded by section 26(1) of the *Fair Work Act 2009* (Cth) and section 109 of the Constitution.
- 8 According to the decision of Steytler P in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254, in deciding whether an entity may properly be described as a trading corporation, the following principles should be considered:
 - (1) *A corporation may be a trading corporation even though trading is not its predominant activity.*
 - (2) *However, trading must be a substantial and not merely a peripheral activity.*
 - (3) *In this context, "trading" is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services.*
 - (4) *The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant.*
 - (5) *The ends which a corporation seeks to serve by trading are irrelevant to its description. Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as "trade".*
 - (6) *Whether the trading activities of an incorporated body are sufficient to justify its categorisation as a "trading corporation" is a question of fact and degree.*
 - (7) *The current activities of a corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of a corporation, although a*

corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade.

(8) *The commercial nature of an activity is an element in deciding whether the activity is in trade or trading.*

- 9 In support of its position Enable WA Inc filed a statutory declaration of Robert George Holmes, its Chief Executive Officer.
- 10 Having regard to the content of that statutory declaration, that content not having been challenged in any way, it is clear beyond all doubt that Enable WA Inc is a trading corporation.
- 11 Enable WA Inc provides various support services to disabled persons. It competes to attract such persons to its business. No person has to select Enable WA Inc to provide them with the services they require or desire. There are other businesses in the market a disabled person could choose.
- 12 Although much of the money received by Enable WA Inc comes from the Commonwealth Government under the National Disability Insurance Scheme it is not directly funded by the Commonwealth Government to provide any services. It receives its money under a system whereby a disabled person who is entitled to money from the Commonwealth Government **chooses** to spend that money with Enable WA Inc, instead of one of its competitors.
- 13 I agree with the submissions put by Enable WA Inc that it engages in a “traditional trading fee for service arrangement”.
- 14 I cannot imagine that there is a good argument to be put up against that made by Enable WA Inc in relation to jurisdiction.
- 15 Mr Ots does not attempt to make one.
- 16 Mr Ots’ unfair dismissal claim belongs in the Fair Work Commission.
- 17 Mr Ots writes, in his written submissions, that lawyers acting on his behalf “filed paperwork with Fairwork only for me to be informed that was the incorrect jurisdiction and I needed to apply to the Industrial Relations Commission instead.”
- 18 I do not know exactly how Mr Ots got the idea that the Western Australian Industrial Relations Commission was the correct jurisdiction, but it was the wrong idea.
- 19 His claim to the Fair Work Commission, should he choose to make one, will be out of time and it will be a matter for that body to decide whether to accept it. To assist I provide a chronology of relevant events:
- 26 March 2020 – Mr Ots dismissed by Enable WA Inc;
 - 1 April 2020 – Unfair dismissal application filed by Mr Ots with the Western Australian Industrial Relations Commission;
 - 20 April 2020 – Enable WA Inc filed response to unfair dismissal application raising jurisdictional objection;
 - 23 April 2020 – Parties attended conciliation conference via telephone;
 - 7 May 2020 – Parties attended second conciliation conference via telephone.
 - 8 May 2020 – Orders issued by the Western Australian Industrial Relations Commission in the following terms:
 - (1) Enable Wa Inc file written submissions in relation to jurisdiction by close of business, Thursday, 21 May 2020;
 - (2) Mr Ots file written submissions in response by close of business, Thursday, 4 June 2020; and
 - (3) the parties have liberty to apply.
 - 21 May 2020 – Enable WA Inc’s submissions in relation to jurisdiction filed with the Western Australian Industrial Relations Commission;
 - 25 May 2020 – Mr Ots’ submissions in relation to jurisdiction filed with the Western Australian Industrial Relations Commission;
 - 15 June 2020 – The Western Australian Industrial Relations Commission sought further and better information from the parties in relation to jurisdiction;
 - 24 June 2020 – Notification of representative commencing to act for Enable WA Inc filed with the Western Australian Industrial Relations Commission;
 - 25 June 2020 – Directions hearing listed for Monday, 6 July 2020;
 - 6 July 2020 – Directions hearing held and further conciliation conference to occur by shuttle conference listed at suggestion of Enable WA Inc’s representative;
 - 31 July 2020 – Third conciliation conference held via in person shuttle conference;
 - 10 August 2020 – Further directions hearing listed for Monday, 17 August 2020;
 - 17 August 2020 – Second directions hearing held.
- Orders issued by the Western Australian Industrial Relations Commission in the following terms:
- (1) By 4:00 pm on 31 August 2020, Enable WA Inc file any evidence and documents verified by statutory declaration on which Enable WA Inc intends to rely in support of the respondent’s jurisdictional objections to Mr Ots’ claim;
 - (2) By 4:00 pm on 31 August 2020, Enable WA Inc file an outline of submissions and list of authorities in support of Enable WA Inc’s jurisdictional objections to Mr Ots’ claim;
 - (3) By 4:00 pm on 7 September 2020, Mr Ots file any evidence and documents verified by statutory declaration on which Mr Ots intends to rely in response to Enable WA Inc’s jurisdictional objection to the applicant’s claim;
 - (4) By 4:00 pm on 7 September 2020, Mr Ots file an outline of submissions and list of authorities in response to Enable WA Inc’s jurisdictional objection to Mr Ots’ claim;

- (5) The Commission shall determine Enable WA Inc's jurisdictional objection to Mr Ots' claim on the papers; and
- (6) The parties have liberty to apply.
- 31 August 2020 – Enable WA Inc's outline of submissions, authorities and statutory declaration of Robert George Holmes filed with the Western Australian Industrial Relations Commission;
- 3 September 2020 – Mr Ots' submissions filed with the Western Australian Industrial Relations Commission; and
- 22 October 2020 – Reasons for decision issued by the Western Australian Industrial Relations Commission.

2020 WAIRC 00866

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STEVEN OTS

APPLICANT

-v-

ENABLE WA INC

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE FRIDAY, 23 OCTOBER 2020
FILE NO/S U 44 OF 2020
CITATION NO. 2020 WAIRC 00866

Result Application dismissed
Representation
Applicant In person
Respondent Ms E Hartley (of counsel)

Order

HAVING heard from the applicant in person and Ms E Hartley, of counsel, for the respondent on the papers;

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

[L.S.]

(Sgd.) D J MATTHEWS,
 Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2020 WAIRC 00900

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 DONALD ANDREW PARNELL

APPELLANT

-v-

THE ROMAN CATHOLIC ARCHBISHOP OF PERTH

RESPONDENT

CORAM FULL BENCH
 CHIEF COMMISSIONER P E SCOTT
 COMMISSIONER T EMMANUEL
 COMMISSIONER T B WALKINGTON

DATE MONDAY, 9 NOVEMBER 2020
FILE NO/S FBA 9 OF 2020
CITATION NO. 2020 WAIRC 00900

Result	Order issued
Appearances	
Appellant	Mr P Mullally as agent
Respondent	Mr I Curlewis of counsel

Order

Having heard from Mr P Mullally as agent on behalf of the appellant, and Mr I Curlewis of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT Exhibits “R9” and “C1” are hereby deemed to be included in the Appeal Book filed on 25 August 2020.
2. THAT Exhibits “R9” and “C1” remain suppressed in accordance with the decision of Senior Commissioner Kenner at first instance but may be inspected by the representative or counsel of each party.
3. THAT the application filed by the appellant on 5 October 2020 seeking:
 - a) To amend ground 5 of the Appeal; and
 - b) The admission of new evidence regarding the termination of employment of Clarissa Hunter,
 be and is hereby dismissed.
4. THAT the summonses issued to:
 - a) Debra Sayce;
 - b) Richard Miles;
 - c) The Secretary, Catholic Education Western Australia Limited; and
 - d) Bishop of Bunbury (Gerald Holohan),
 be set aside.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2020 WAIRC 00907

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DONALD ANDREW PARNELL	APPELLANT
	-v-	
	THE ROMAN CATHOLIC ARCHBISHOP OF PERTH	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON	
DATE	THURSDAY, 12 NOVEMBER 2020	
FILE NO/S	FBA 9 OF 2020	
CITATION NO.	2020 WAIRC 00907	

Result	Correction Order issued
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Correction Order

WHEREAS on 9 November 2020, an Order [2020 WAIRC 00900] was deposited in the office of the Registrar; and

WHEREAS an error occurred in the words of order 3(b) of that Order;

NOW THEREFORE the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the Order of the Full Bench of 9 November 2020 [2020 WAIRC 00900] be corrected by adding the word “alleged” in order 3(b), so that it reads “The admission of new evidence regarding the alleged termination of employment of Clarissa Hunter;”.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2020 WAIRC 00871

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR LESLIE MAGYAR	APPELLANT
	-v- DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON	
DATE	TUESDAY, 27 OCTOBER 2020	
FILE NO.	FBA 10 OF 2020	
CITATION NO.	2020 WAIRC 00871	

Result	Direction issued	
Representation		
Appellant	Mr N Marsh of counsel	
Respondent	Mr D Anderson of counsel	

Direction

Having heard from Mr N Marsh of counsel on behalf of the appellant, and Mr D Anderson of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the appeal be conducted in a two-stage process, being:
 - a. The appellant's application for an extension of time in which to file the appeal and to introduce fresh evidence, be dealt with as preliminary issues; and
 - b. If the appellant is successful in respect to both matters, the Full Bench will subsequently deal with the merits of the appeal.
2. THAT the preliminary matters be heard at 2:15 pm on Tuesday, 24 November 2020.
3. THAT the appellant is to file a written outline of submissions and list of authorities by no later than 14 days prior to the preliminary hearing.
4. THAT the respondent is to file a written outline of submissions and list of authorities by no later than 7 days prior to the preliminary hearing.
5. THAT the parties have liberty to apply on short notice.

By the Full Bench

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2020 WAIRC 00908

APPLICATION PURSUANT TO SECTION 66

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION LESLIE JAMES MARSHALL, BARRY MICHAEL BERGER	APPLICANTS
	-and- (NOT APPLICABLE)	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	THURSDAY, 12 NOVEMBER 2020	
FILE NO/S	PRES 3 OF 2020	
CITATION NO.	2020 WAIRC 00908	

Result	Orders issued	
Appearances		
Applicants	Mr L Marshall	

Order

WHEREAS the applicants seek orders in relation to The Master Ladies' Hairdressers' Industrial Union of Employers of WA (the Organisation), an organisation of employers registered pursuant to s 54 of the *Industrial Relations Act 1979* (WA) (the Act); and
 WHEREAS the Organisation has been unable to comply with its Rules and seeks to take steps to bring itself into compliance with the Rules and with its obligations pursuant to the Act; and

WHEREAS an application has been made to the Chief Commissioner for orders pursuant to s 66 of the Act to:

- (a) remove the word 'Ladies' in the Rules, including in the name of the Organisation, on the basis that such reference is contrary to anti-discrimination legislation, in accordance with s 66(2)(a)(i) of the Act;
- (b) to deem particular persons to be members of the Organisation;
- (c) to establish a Committee of Management to hold office until an Annual General Meeting can be held;
- (d) to appoint a President and Vice President pending the Annual General Meeting; and
- (e) to order that an Annual General Meeting, in accordance with the Rules of the Organisation, be held; and

WHEREAS the Chief Commissioner directed that the application be the subject of notice inviting any interested persons to inspect the application; and

WHEREAS such notices were published on the Commission's website on 31 August 2020 and in the Western Australian Industrial Gazette of 20 September 2020 (2020) 100 WAIG 1349); and

WHEREAS notice of the hearing of the matter was published in the 'West Australian' newspaper on 17 October 2020; and

WHEREAS no objections have been lodged as at the time of hearing of the matter on Wednesday, 11 November 2020; and

WHEREAS having heard from Leslie James Marshall about the circumstances of these matters; and taking account of:

- (a) the provisions of s 66 of the Act;
- (b) the importance of the organisation complying with its Rules and with its obligations pursuant to the Act;
- (c) the objects of the Act contained within s 6 – Objects of Act, in particular the following:
 - (i) object (ab), 'to promote the principles of freedom of association and the right to organise; and
 - (ii) object (e), 'to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations'; and
 - (iii) object (f), 'to encourage the democratic control of organisations so registered and the full participation by members of such an organisation in the affairs of the organisation'; and
- (d) the circumstances of the organisation and the expressed desire of the applicants and those persons who have agreed to hold office in accordance with the orders sought;

NOW THEREFORE, I, the Chief Commissioner of the Western Australian Industrial Relations Commission, have formed the opinion that the orders sought are appropriate and necessary, and in accordance with the provisions of s 66 of the Act, hereby order that –

1. The Rules of the Master Ladies' Hairdressers' Industrial Union of Employers of WA be varied in Rule 1, Rule 5 and Rule 13 by deleting the word 'Ladies', so that the name of the Organisation is The Master Hairdressers' Industrial Union of Employers of WA;
2. The Organisation convene an Annual General Meeting in accordance with the Rules of the Organisation, to be held no later than 30 June 2021;
3. Until the convening of the Annual General Meeting in accordance with its Rules:
 - (a) The following persons be deemed to be members of the Organisation:
 - (i) Barry Berger;
 - (ii) Leslie James Marshall;
 - (iii) Kristee Hogg;
 - (iv) Gavin Pound;
 - (v) Robert Ragni;
 - (vi) Tracey Hayes; and
 - (vii) Josie Doria
 - (b) An Interim Committee of Management be formed and that it be comprised of those persons named in paragraph (a) above;
 - (c) At its first meeting, the Interim Committee of Management elect a President and Vice President;
 - (d) The Interim Committee of Management has the authority to exercise all of the powers, duties and functions of the Committee of Management, and each member of the Interim Committee of Management shall have the authority to exercise all of the powers, duties and functions of the offices held by each of them as if each were elected pursuant to the rules of the Organisation.
4. Order 3 shall operate until 30 June 2021 when it shall cease to operate, unless extended by further order; and

5. There shall be liberty to apply.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner,
The Western Australian Industrial Relations Commission.

2020 WAIRC 00874

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
MR J LAMB - BOARD MEMBER
MS K ROBERTS - BOARD MEMBER

DATE

WEDNESDAY, 28 OCTOBER 2020

FILE NO

PSAB 4 OF 2020

CITATION NO.

2020 WAIRC 00874

Result Respondent name amended

Representation

Appellant In person

Respondent Mr J Carroll (of counsel)

Order

HAVING heard from the appellant in person and Mr J Carroll, of counsel, for the respondent on Wednesday, 28 October 2020 and by consent:

The Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that the respondent in this matter be "Director General, Department of Biodiversity, Conservation and Attractions".

[L.S.]

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

2020 WAIRC 00850

APPEAL AGAINST THE DECISION TO TAKE IMPROVEMENT ACTION ON 21 JULY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ALESSANDRA GRANITTO

APPELLANT

-v-

THE DEPARTMENT OF EDUCATION WESTERN AUSTRALIA

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR G BROWN - BOARD MEMBER
MS L WARD - BOARD MEMBER

DATE

TUESDAY, 13 OCTOBER 2020

FILE NO

PSAB 23 OF 2020

CITATION NO.

2020 WAIRC 00850

Result	Order issued
Representation	
Appellant	Ms J Dilena (of counsel)
Respondent	Mr D Anderson (of counsel)

Order

HAVING heard from Ms J Dilena of counsel on behalf of the appellant and from Mr D Anderson of counsel 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 appellant be granted to leave to amend her appeal in accordance with the *Form 1A Multipurpose Form* that she filed on 14 September 2020.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00870

APPEAL AGAINST THE DECISION TO TAKE IMPROVEMENT ACTION ON 21 JULY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ALESSANDRA GRANITTO

PARTIES

APPELLANT

-v-

THE DEPARTMENT OF EDUCATION WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE TUESDAY, 27 OCTOBER 2020
FILE NO. PSAB 23 OF 2020
CITATION NO. 2020 WAIRC 00870

Result	Direction issued
Representation	
Appellant	Ms J Dilena (of counsel)
Respondent	Mr D Anderson (of counsel)

Direction

HAVING heard from Ms J Dilena of counsel on behalf of the appellant and Mr D Anderson of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 10 November 2020;
2. THAT the appellant file a written outline of submissions by 24 November 2020.
3. THAT the respondent file a written outline of submissions by 8 December 2020.
4. THAT discovery be informal.
5. THAT this matter be listed for a half-day hearing.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00904

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 5 AUGUST 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STEVEN WATERS

APPELLANT

-v-

THE PUBLIC SECTOR COMMISSIONER, PUBLIC SECTOR COMMISSION

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON – CHAIR

MR B HAWKINS - BOARD MEMBER

MR D STEWART - BOARD MEMBER

DATE

WEDNESDAY, 11 NOVEMBER 2020

FILE NO.

PSAB 24 OF 2020

CITATION NO.

2020 WAIRC 00904

Result

Direction issued

Representation**Appellant**

Ms D Larson (as agent)

Respondent

Mr J Carroll (of counsel)

Direction

HAVING heard from Ms D Larson (as agent) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT discovery be informal;
2. THAT written statements of evidence in chief of each witness the appellant intends to call are filed no later than 6 weeks prior to the date of the hearing;
3. THAT written statements of evidence in chief of each witness the respondent intends to call are filed no later than 28 days prior to the date of the hearing;
4. THAT the appellant file a written outline of submissions 14 days prior to the date of the hearing;
5. THAT the respondent file a written outline of submissions 7 days prior to the date of the hearing;
6. THAT the matter be listed for hearing for 3 days, and;
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2020 WAIRC 00909

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JAMEE CAREY

APPLICANT

-v-

SHIRE OF HALLS CREEK

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

DATE

THURSDAY, 12 NOVEMBER 2020

FILE NO.

U 68 OF 2020

CITATION NO.

2020 WAIRC 00909

Result Direction issued
Representation
Applicant Mr J Carey
Respondent Mr A Sinanovic (of counsel)

Direction

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

1. THAT the applicant file and serve an outline of evidence of each witness he intends to call, including himself, 28 days prior to the date of the hearing;
2. THAT the respondent file and serve an outline of evidence of each witness they intend to call, 14 days prior to the date of the hearing;
3. THAT any witnesses not located in the Perth metropolitan area have liberty to appear via video link;
4. THAT the matter be listed for a hearing for 1 day on a date to be set, and;
5. THAT the parties have liberty to apply at short notice.

(Sgd.) T B WALKINGTON,
 Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Parliamentary Employees General Agreement 2019 PSAAG 5/2020	N/A	The Civil Service Association of Western Australia (Inc)	The Hon. Kate Doust MLC, President of the Legislative Council, The Hon. Peter Watson MLA, Speaker of the Legislative Assembly, Media, Entertainment and Arts Alliance of Western Australia (Union of Emp	Chief Commissioner P E Scott	Discontinued
Executive Transport Services Employees Agreement 2020 AG 12/2020	10/28/2020	Department of the Premier and Cabinet	Transport Workers' Union of Australia WA Branch	Commissioner T B Walkington	Agreement registered

2020 WAIRC 00929

NOTICES—Award/Agreement Matters

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. PSAAG 9 OF 2020

APPLICATION FOR A NEW AGREEMENT TITLED

“WA HEALTH SYSTEM - HSUWA - PACTS INDUSTRIAL AGREEMENT 2020”

NOTICE is given that an application has been made to the Commission by the *North Metropolitan Health Service And Others and Health Services Union Of Western Australia (Union Of Workers)* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

1. TITLE

This Agreement will be known as the WA Health System - HSUWA – PACTS Industrial Agreement 2020.

5. APPLICATION AND PARTIES BOUND

- 5.1 This Agreement will extend to and bind the employees, Employers and the organisation of employees (Union) bound by the WA Health - HSU Award 2006.
- 5.2 This Agreement will operate throughout the State of Western Australia.

- 5.3 The Employers party to and bound by this Agreement are the Health Service Providers which include:
- (a) Child and Adolescent Health Service;
 - (b) East Metropolitan Health Service;
 - (c) Health Support Services;
 - (d) North Metropolitan Health Service;
 - (e) Path West Laboratory Medicine WA;
 - (f) Quadriplegic Centre;
 - (g) South Metropolitan Health Service; and
 - (h) WA Country Health Service.
- 5.4 The union party to and bound by this Agreement is the Health Services Union of Western Australia (Union of Workers).
- 5.5 The estimated number of employees bound by this Agreement at the time of registration is 18,748.
- 5.6 This Agreement is comprehensive and applies to the exclusion of the WA Health- HSU Award of 2006.
- 5.7 This Agreement replaces the WA Health - HSUWA - PACTS - Industrial Agreement 2018.
- 5.8 This Agreement does not apply to positions within the Health Executive Service as defined in subclause 9.25 of Clause 9- Contract of Service.
- 5.9 Pursuant to section 20(1)(f) of the *Health Services Act 2016* (WA), the System Manager has the function of managing WA health system-wide industrial relations on behalf of the State.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

[L.S.]

20 November 2020

(Sgd.) S BASTIAN,
Registrar.
