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INDUSTRIAL MAGISTRATE—Claims before—

2021 WAIRC 00053

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2021 WAIRC 00053
CORAM	:	INDUSTRIAL MAGISTRATE J. HAWKINS
HEARD	:	WEDNESDAY, 25 NOVEMBER 2020
DELIVERED	:	FRIDAY, 5 MARCH 2021
FILE NO.	:	M 198 OF 2019
BETWEEN	:	FWC PTY LTD

CLAIMANT

AND

FAIR WORK INSPECTOR BELINDA MAUNDER

RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Review of Compliance Notice pursuant to s 717 of the *Fair Work Act 2009* (Cth) – Alleged contravention of cl B.2.3 '***Food and beverage attendant grade 3***' of *Restaurant Industry Award 2010* (Cth) – Award coverage – Award Classification – Whether an employee is an Award Free Manager
Legislation	:	*Fair Work Act 2009* (Cth) *Acts Interpretation Act 1901* (Cth) *Industrial Relations Act 1979* (WA)
Instruments	:	*Restaurant Industry Award 2010* (Cth) *Restaurant, Tearoom and Catering Workers Award 1979* (WA)
Case(s) referred to in reasons:	:	***Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman*** (2016) 304 FLR 264 ***Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 1458 ***Hana Express Group Ltd v Fair Work Ombudsman*** (2020) 350 FLR 359 ***Miller v Minister of Pensions*** [1947] 2 All ER 372 ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCA 621 ***The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7)*** [2013] FCCA 1097 ***Logan v Otis Elevator Company Pty Ltd*** [1997] IRCA 200

		Ware v O'Donnell Griffin (Television Services) Pty Ltd [1971] AR (NSW) 18
		Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4) [2015] FCCA 1178; 301 FLR 1
		City of Wanneroo v Holmes [1989] FCA 553; 30 IR 362
		Joyce v Christoffersen [1990] FCA 381; 33 IR 390
		Tucker v Digital Diagnostic Imaging [2011] FWA 1767
		Spring 2002 Pty Ltd v Katherine Sampson [2006] WAIRC 5864
Result	**:**	Compliance Notice Confirmed
Representation:		
Claimant	**:**	Mr G. McCorry (agent)
Respondent	**:**	Ms H. Millar (of counsel) instructed by Ms S. Anici from Australian Government Solicitor

REASONS FOR DECISION

Introduction

1 The Claimant, FWC Pty Ltd (FWC), is a National System Employer within the meaning of s 14(1)(a) of the *Fair Work Act 2009* (Cth) (FW Act). FWC operated a restaurant called Chocolateria San Churro, Northbridge (the Restaurant).

2 It is not in dispute that between July 2011 and May 2016 FWC employed Mr Mohammed Usman Javed (Mr Javed) at the Restaurant on a fulltime basis, including during the period of 21 October 2013 to 20 May 2016 (the Contravention Period). During the Contravention Period, Mr Javed claims that he routinely worked 50 - 60 hours over 6 days per week but was not paid overtime as required under the *Restaurant Industry Award 2010* (Cth) (the Award).[1]

3 On 26 September 2019, the Respondent, being Fairwork Inspector, Ms Belinda Maunder (Ms Maunder), issued a Compliance Notice to FWC under s 716 of the FW Act, in respect to Mr Javed's employment during the Contravention Period.

4 The Compliance Notice alleged that Mr Javed was employed as a '***Food and beverage attendant grade 3***' (the Attendant) under the Award and required FWC to calculate and rectify its failure to pay Mr Javed overtime for that classification during the Contravention Period.[2]

5 FWC seeks a review of the decision to issue the Compliance Notice under s 717(1)(a) of the FW Act and says that it has not committed the contraventions set out in the Compliance Notice.

6 The parties have lodged a '*Statement of Agreed Facts*' (SOAF) which is attached to these reasons at sch 1. As a result, FWC does not dispute the validity of the Compliance Notice. Further, the parties agree that cl 33 of the Award, which deals with overtime, remained in effect without amendment until the end of the Contravention Period. It is also agreed that cl 4 of the Award provides that it covers employers throughout Australia in the restaurant industry and their employees in the classifications listed in '*Schedule B – Classification Structure and Definitions*' to the exclusion of any other modern award. Although the parties do not agree as to whether the Award applied to Mr Javed during the Contravention Period, they accept that if the Western Australian Industrial Magistrates Court (IMC) finds that the Award does apply, then Mr Javed is entitled to receive overtime payments in accordance with cl 33.1(a) and cl 33.2 of the Award.

7 The matters in dispute as listed in the SOAF are as follows:

(a) FWC says that Mr Javed's employment was not covered by the Award.

(b) Ms Maunder says that Mr Javed was an employee covered by the Award and was a full-time Attendant in accordance with '*Schedule B – Classification Structure and Definitions*' of the Award.

8 The Attendant is defined in the Award as follows:

> *B.2.3* ***Food and beverage attendant grade 3*** *means and employee appropriate level of training and is engaged in any of the following:*
>
> *(a) supplying, dispensing or mixing of liquor:*
>
> *(b) assisting in the cellar;*
>
> *(c) undertaking general waiting duties of both food and liquor including cleaning of tables;*
>
> *(d) receipt of monies;*
>
> *(e) assisting in the training and supervision of food and beverage attendants of a lower grade;*
>
> *(f) delivery duties; and*
>
> *(g) taking reservations, greeting and seating guests.*

9 FWC's amended statement of claim alleges that there was no obligation to pay Mr Javed overtime as the annual salary paid to him was contractually intended to be compensation for all ordinary and reasonable additional hours of work. However, FWC abandoned that issue and made clear that it only sought to prove that:

(a) dependent upon the written contracts between FWC and Mr Javed, which referred to Mr Javed as a Manager and reliant on other relevant documents and evidence, the Award had no application to Mr Javed and argued that the Award did not apply to a Manager. FWC further submitted that cl 4.1 and cl 4.2 of the Award and s 143(7) of the

FW Act applied. In effect FWC argued that as a Manager, the Award could not apply to Mr Javed's employment; and/or

(b) if Mr Javed was covered by the Award, FWC says that he would not have been classified as the Attendant. In effect, FWC says that this is because the work performed by Mr Javed did not fall within the classification in the Award of the Attendant or any relevant classification under the Award and further Mr Javed did not hold the '***appropriate level of training***' as defined in cl 3 of the Award.[3]

10 FWC seeks a finding that it did not contravene the Award and says the Compliance Notice should be cancelled.

11 Ms Maunder says the Compliance Notice should be confirmed as the Award applied to Mr Javed's employment and the appropriate classification under the Award is the Attendant. Alternatively, Ms Maunder submitted that should the IMC find that Mr Javed's employment was more properly characterised as falling within '***Food and beverage attendant grade 4***' of the Award, then the Compliance Notice should be varied pursuant to s 717(3) of the FW Act.

12 Accordingly, the role Mr Javed was employed to do is therefore one of the key issues for determination.

Jurisdiction And Burden Of Proof

13 The jurisdiction of the IMC is set out at sch 2 attached to these reasons.

14 FWC wants the Compliance Notice cancelled. As such, it is required to prove that this should occur on the balance of probabilities.[4]

15 The standard of balance of probabilities is well accepted and means '*more probable than not*'.[5]

16 When I say I am 'satisfied' in these reasons, I mean I am satisfied upon the balance of probabilities.

Issues To Be Determined

17 The issues to be determined are as follows:

(a) Whether Mr Javed and FWC are covered by the Award?

(b) If Mr Javed's employment was covered by the Award, what classification if any under the Award applied to his employment during the Contravention Period.

Assessment Of Evidence

18 Ms Maunder was called as a witness but was not subject to any cross-examination. Ms Maunder's statement is therefore accepted as reliable.[6] Ms Maunder also relied upon the evidence of Mr Javed. Mr Javed's witness statement was tendered in evidence by consent.[7]

19 FWC relied upon the evidence of Mr Frederick Kok Wai Chew (Mr Chew), a Director of FWC. Mr Chew's witness statement was tendered in evidence by consent.[8]

20 Both Mr Chew and Mr Javed were the subject of cross-examination at trial.

21 Ultimately this matter requires the IMC to determine whether the Award covered Mr Javed's employment and if so, what classification, if any, was applicable to his employment during the Contravention Period.

22 The most significant factual dispute between the evidence of Mr Chew and Mr Javed concerned the extent of Mr Javed's duties during the Contravention Period.

23 There was no real dispute that, in 2011, Mr Javed commenced working for FWC as a kitchenhand. Nor is it disputed that in 2012, Mr Javed was offered and accepted a new role at the Restaurant entitled 'Café Manager'.[9]

24 FWC contend that Mr Javed was employed as a Manager and performed managerial functions. As such, FWC maintains that Mr Javed's essential and primary employment was as a Manager and that the Award does not apply to Managers, even if they perform duties covered by the Award.[10]

25 Broadly speaking Mr Chew's evidence attempted to prove that Mr Javed's employment was as some form of Manager whose duties were not covered by the Award or any classification within the Award. As stated, FWC submits that Mr Javed's essential and primary employment was as a Manager[11] and that he was an award free Manager. In substance, although Mr Chew conceded that some of Mr Javed's duties fell within the classification of the Attendant under the Award, he sought to suggest that Mr Javed's duties were more than those referred to in that classification.

26 Nonetheless, both Mr Chew and Mr Javed's evidence was that the majority of Mr Javed's time was spent undertaking duties referred to in cl B.2.3(c), cl B.2.3(d) and cl B.2.3(e) of the Award. That is both Mr Chew and Mr Javed agreed that the majority of Mr Javed's duties involved general waiting duties of food including cleaning of tables, receipt of monies, and assisting in the training and supervision of food and beverage attendants of a lower grade.[12]

27 However, in an attempt to suggest that Mr Javed's duties were more than that set out in the relevant classification, Mr Chew referred to Mr Javed's duties including:

- unlocking and preparing the Restaurant for business;
- locking up the takings in the Restaurant safe;
- shutting down and locking up the Restaurant;
- having access to the safe;
- being responsible for monitoring stock levels and ordering stock;
- training staff;

- being responsible for quality control and monitoring food safety;
- cleaning logs;
- dealing with complaints and incidents whilst on duty;
- supervising and training staff;
- assisting with the rostering of staff;
- approving leave requests;
- overseeing compliance issues and being responsible for repairs and maintenance.[13]

28 In effect, Mr Chew maintained that these further duties placed him outside of the Award.

29 Mr Javed disputed that he performed the variety of duties referred to by Mr Chew as not falling within the Award. Mr Javed was very clear in his evidence that he was not able to approve leave requests for staff, although, he acknowledged that he was able, from time to time, to approve timesheets.[14] In respect to approving leave, Mr Javed explained that this was performed by staff through an online programme known as 'Deputy XL' and that all leave ultimately was approved by Mr Chew. Mr Javed explained he had no access to Deputy XL.[15] As to the rostering of staff, Mr Javed only did this for a short period of three to four weeks in 2015. Further Mr Javed made clear that he was not responsible for locking up the takings in the Restaurant safe on a daily basis. Nor did he train staff in local area promotions or new roll out menus. He explained that staff were trained on new roll out menus via an online training software system known as 'Monk'. He also explained he was not responsible for ordering stock.[16] As for stock levels, he indicated that the ordering of stock was done by the Operational Manager or Mr Chew. Mr Javed clarified that he was able to have input into this by advising that a particular item was running low, but the ultimate ordering was by others. Further, as to purchasing stock, it was only small incidentals such as milk or marshmallows that Mr Javed was able to quickly purchase from a nearby store.[17] Mr Javed made clear that throughout the Contravention Period such responsibilities were divided between Ms Jessie Kong (who was the Store Manager), the Operational Manager, and Mr Chew.[18]

30 Mr Chew was carefully cross-examined in respect to the extent of Mr Javed's duties. In many instances, Mr Chew's evidence was difficult to understand. On the issue of ordering stock, he prevaricated, first suggesting that Mr Javed did order stock, then suggesting that technically he did not.[19]

31 On the issue of rostering, likewise, Mr Chew's evidence was difficult to understand. Although he suggested Mr Javed could approve leave, he also indicated Mr Javed did not do the rosters of staff and that the entering of approval of leave was carried out by someone else.[20]

32 Further, despite in examination-in-chief suggesting that Mr Javed was responsible for repairs and maintenance,[21] in cross-examination after some prevarication Mr Chew agreed that Mr Javed did not have the power to have third parties come and repair things at the Restaurant.[22]

33 In addition, despite suggesting in examination-in-chief that Mr Javed was responsible for staff training,[23] Mr Chew agreed in cross-examination that Mr Javed did not have the power to monitor the training undertaken by staff on the training module known as Monk.[24]

34 As to Mr Javed's job description, there was likewise a variety of evidence both from Mr Javed and Mr Chew.

35 Mr Javed received several letters on engagement which are set out at sch 3 of these reasons (Letters of Engagement).[25] Paragraph 1.3 of each of those Letters of Engagement states:

> *The duties of this position are set out in the **attached** position description.*(original emphasis)

36 The Letters of Engagement annexed to Mr Javed's witness statement and Mr Chew's witness statement[26] did not have the position description attached.

37 The opening paragraph of the Letters of Engagement referred to Mr Javed's position as 'Café Manager'.

38 Mr Chew sought to suggest that no such role as Café Manager existed and that the description was only used to assist Mr Javed in his visa application.[27] This was clearly not correct. Mr Chew was referred to a document entitled '*Café Manager Job Description*' at BM-7 of Ms Maunder's witness statement.[28] This was a document provided to Ms Maunder by Mr Chew himself. This was one of the examples of Mr Chew's inconsistent evidence.[29]

39 In cross-examination, Mr Chew was taken to the position description of a Store Manager that he had provided to Ms Maunder.[30] He disagreed that the duties set out in the Store Manager's description was a more detailed and senior set of responsibilities as compared to the description of a Café Manager. When asked if there was anything in the Café Manager description about reaching or exceeding sales targets, Mr Chew disingenuously suggested that there was not in 'that' version of Café Manager. This was despite having been ordered by Ms Maunder to provide all relevant documentation. Confusingly Mr Chew then suggested that both position descriptions were applicable to Mr Javed.[31] Despite Mr Javed's Letters of Engagement referring to his position as a Café Manager, Mr Chew sought to categorise Mr Javed's employment as a Co-Store Manager. Mr Chew did not however produce any documents to support his evidence that such a position existed.

40 Mr Chew was asked to explain the hierarchy of the staff in the Restaurant. He indicated that there were upwards of eight Managers employed in the Restaurant and the hierarchy was:

- Director;
- Store Manager;

- Shift supervisor; and
- Staff.

41 He made no mention of Duty Manager but maintained that a Duty Manager would fall between the category of a Store Manager and a Shift Supervisor. His evidence was to the effect that the Restaurant did not have a Duty Manager.[32] This was despite the rosters provided by Mr Chew to Ms Maunder, describing Mr Javed as a Duty Manager. Again inconsistently, Mr Chew's witness statement at [12] states:

> *Now produced and shown to me and marked FWC-5 are a sample of rosters showing Mr Javed as the Duty Manager at various times.*

42 Further at [10] of Mr Chew's witness statement, he suggested that Mr Javed would report to the Store Manager but then retracted this in cross-examination.[33]

43 Mr Chew maintained that Mr Javed was not entitled to overtime because he was in a management position. This is despite cl 3.1 of the Letters of Engagement stating:

> *3.1 Unless more generous provisions are provided in this letter or in the attached Schedule, the terms and conditions of your employment will be those set out in the Restaurant Industry Award 2010 and applicable legislation. This includes, but is not limited to, the National Employment Standards in the Fair Work Act 2009 …*

44 Mr Chew sought to suggest that when appointing Mr Javed he simply used a template from the Fair Work Commission website and sought to suggest that he did not understand the meaning of the Letters of Engagement. However, when the extent of his professional experience and qualifications were put to him, which included attaining a Bachelor of Commerce, he then sought to suggest he had merely overlooked cl 3.1 of the Letters of Engagement.

45 Given the confusing and inconsistent evidence of Mr Chew outlined above, I did not form a favourable view of his evidence. He was not fulsome in his answers and slow to answer. Many times, his oral evidence was inconsistent with his witness statement and primary documents. Accordingly, where his evidence was inconsistent with Mr Javed's, I give it no weight and find his evidence unreliable.

46 There is no dispute that Mr Javed referred to himself in various written documents as a Manager. He accepted that:

- the Letters of Engagement referred to him as a Café Manager.[34]
- in his 'LinkedIn' profile he referred to himself as a Duty Manager[35] and in his complaint to the Fair Work Ombudsman, he described himself as a Café Manager.[36]
- in organisational charts he provided to Ms Maunder he described himself as a Duty Manager.
- he had some capacity to allow refunds or replacement orders for dissatisfied customers.
- if the Operational Manager or Assistant Store Manager were not present, he would be in charge.[37]
- when new staff commenced or were on trial, he would show them where everything was located.[38]

47 These were all admissions against interest which satisfied me that Mr Javed was not seeking to 'tailor his evidence'.

48 Mr Javed was challenged as to his '***appropriate level of training***' as defined in cl 3 of the Award.

49 Mr Javed clearly confirmed that he had received relevant training whilst undertaking a '*Diploma of Hospitality and Certificate 3 in Commercial Cookery*'.[39] It is accepted that Mr Javed agreed he did not finish that course, however, he made clear that he completed the competency units set out in his 'Statement of Attainment' from the College of Innovation & Industry Skills and from the Business Technology Institute of Australia.[40]

50 The concessions referred to above by Mr Javed were against interest. Nonetheless, Mr Javed struck me as a forthright witness who was not seeking to tailor his evidence and I found him to be a credible witness. Where there is a disparity between the evidence of Mr Javed and Mr Chew, I prefer the evidence of Mr Javed.

Determination

51 The determination of Award coverage and Award classification in this matter are linked. Accordingly, my reasons in respect to both issues are as follows.

52 This matter requires consideration of the Award coverage and what Mr Javed's role was when employed by FWC.

53 A modern award made by the Fair Work Commission does not impose an obligation or give an entitlement unless the award *applies* to the employer and the employee: s 46 of the FW Act. An award *applies* to the employer and the employee if the award *covers* each of them: s 47 of the FW Act. An award *covers* an employer and an employee if the award is expressed to cover each of them: s 48(1) of the FW Act. It follows that the starting point to determine award coverage is the words of the award itself. More specifically, it is '*the objective meaning of the words used* [in the relevant award] *bearing in mind the context in which they appear and the purpose they are intended to serve*': ***Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 1458 [22].

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

55 The parties agreed that the Award applied to FWC and its employees (save that it was disputed that Mr Javed's employment was covered by the Award).[41]

56 There is no dispute that the Letters of Engagement made clear that unless more generous provisions were provided in those letters, the terms and conditions of Mr Javed's employment were those set out in the Award.[42] The Letters of Engagement provide documentary evidence that in 2012 and 2015 FWC considered that the Award applied to Mr Javed's employment. There was no suggestion, in the Letters of Engagement, that being employed as Café Manager meant that the Award did not cover Mr Javed's employment.

57 It was not submitted by FWC that it provided Mr Javed with more generous provisions than those set out in the Letters of Engagement. Nor was any evidence led to prove this point.

58 Rather what was argued was that Mr Javed was an award free Manager. In arguing that Mr Javed was an award free Manager, FWC firstly submits that Mr Javed's employment was excluded under the Award.

59 FWC contended that pursuant to cl 4.2 of the Award, Mr Javed was excluded from Award coverage by the FW Act. Clause 4.2 of the Award provides as follows:

> *The award does not cover an employee excluded from award coverage by the Act* [that is the FW Act]

60 FWC relies on s 143(7) of the FW Act which states as follows:

> *A modern award must not be expressed to cover classes of employees:*
>
> *(a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or*
>
> *(b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.*

61 There is a note at the foot of that provision that states that '*managerial employees have traditionally not been covered by awards*'.

62 No evidence was led by FWC that Managers in the restaurant and hospitality industry have traditionally not been covered by the Award. Accordingly, I am not satisfied that s 143(7) of the FW Act applies to exclude the Award.

63 The remainder of FWC's submissions as to the Award coverage focused on the work performed by Mr Javed and in particular whether the classification of the Attendant applied to Mr Javed's employment.

64 The following principles are relevant:

(a) '*Where the particular issue is whether an employee is engaged in a particular classification or class of work, then the Court takes a practical approach and will consider the aspect of the employee's employment which is the principal or major or substantial aspect*': ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCA 621 [27]; ***The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7)*** [2013] FCCA 1097; ***Logan v Otis Elevator Company Pty Ltd*** [1997] IRCA 200 (Moore J).

(b) Determining the major or substantial aspect of an employee's employment is '*not merely a matter of quantifying the time spent on the various elements of work performed ... the quality of the different types of work done is also a relevant consideration*': ***Ware v O'Donnell Griffin (Television Services) Pty Ltd*** [1971] AR (NSW) 18.

(c) The focus is upon the identification of the skills and duties required of an employee who is called upon to perform the function that is required to be performed by the employer. The individual performance of a particular employee (e.g. quality and quantity of work, capacity for more complex work, et cetera) is less relevant than the skills and duties necessary to perform the function required to be performed by the employer: ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCA 621 [32]; ***Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4)*** [2015] FCCA 1178; 301 FLR 1 [256].

(d) The task of the Court in examining the major, substantial or principal aspect of the work performed by the employee will include consideration of the amount of time spent performing particular tasks, but also the circumstances of the employment, and what the employee was employed to do. The question is one of fact, to be determined by reference to the duties actually attaching to the position, rather than its title: ***City of Wanneroo v Holmes*** [1989] FCA 553; 30 IR 362, 379; ***Joyce v Christoffersen*** [1990] FCA 381; 33 IR 390, 278.

(e) In ***Tucker v Digital Diagnostic Imaging*** [2011] FWA 1767 [22] the range of factors to be taken into consideration as part of a classification assessment were set out. This includes:

- *the contents of any job description;*
- *the actual time occupied in different duties (a substantive role/function analysis);*
- *possession or absence of particular qualifications and whether such qualifications are necessary to the exercise of the primary functions that are performed; and*
- *the level of importance … of particular duties in the context of the employing organisation's overall purpose.*

65 I am satisfied that Mr Javed was employed by FWC as a Manager. The Letters of Engagement, being the written contract of employment between the parties, referred to him as a Café Manager and from time to time he was referred to by other titles, including Duty Manager.

66 However, as previously stated, the title given to an employee is not necessarily determinative. Regard must be given to the major, substantial or principal aspect of work performed by Mr Javed.

67 There was no job description attached to the Letters of Engagement. Further, the job descriptions of Store Manager and Duty Manager,[43] on the evidence I have accepted, did not match the major or substantial duties carried out by Mr Javed.

68 The undisputed evidence of both Mr Javed and Mr Chew was that the majority of Mr Javed's work involved general waiting duties of food including cleaning of tables, receipt of monies, and assisting in the training and supervision of food and beverage attendants of a lower grade. These were all duties described at cl B.2.3(c), cl B.2.3(d) and cl B.2.3(e) of the Award.

69 Although these were not the only duties performed by Mr Javed, they were the major and substantial aspect of his employment.

70 That is not to say that Mr Javed's duties did not involve him carrying out other duties some of which could be described as managerial or supervisory. Examples of such managerial or supervisory duties include Mr Javed having the capacity to allow refunds or replacement orders for dissatisfied customers. Also, if the Operational Manager or Assistant Store Manager was not present, Mr Javed accepted he would be in charge. In addition, when new staff commenced, Mr Javed would show them where things were located in the Restaurant.

71 There was no clear evidence that these duties formed the major or substantial aspect of Mr Javed's work.

72 Further, I was not satisfied based on my findings of credibility, that the major and substantial role performed by Mr Javed involved (as suggested by Mr Chew):

- locking up the takings in the Restaurant safe;
- having access to the safe;
- ordering stock;
- approving leave requests;
- rostering staff;
- training staff in menu roll outs; and
- being responsible for repairs and maintenance.

73 Therefore, while the Letters of Engagement, being the contract of employment, refer to Mr Javed as a Café Manager, his role as a Manager did not wholly or principally require him to be engaged in award free managerial duties.

74 The major and substantial duties of Mr Javed were those described at cl B.2.3(c), cl B.2.3(d) and cl B.2.3(e) of the Award.

75 The remaining issues to be determined are:

(a) whether Mr Javed held the appropriate qualifications to be classified as the Attendant; and

(b) whether some other classification under the Award applies.

76 Mr Javed held the appropriate qualifications to be classified as the Attendant. Mr Javed held a Certificate IV and Diploma in Business. He also partially completed a Diploma of Hospitality.[44]

77 However, FWC submits that Mr Javed has not achieved the appropriate level of training as defined in cl 3 of the Award.

78 '[A]***ppropriate level of training***' is defined in cl 3.1 of the Award. Clause 3.1(a) of Award states:

(a) has completed an appropriate training program that meets the training and assessment requirements of a qualification or one or more designated units of competency from a Training Package (emphasis added).

79 The Award does not define 'Training Package'.

80 Given the requirement to not adopt a narrow or pedantic approach to the interpretation of an Award, when read in context, I am satisfied that an '***appropriate level of training***' can mean the grouping together of units of competency.

81 Although Mr Javed did not complete his Diploma of Hospitality he completed many units towards its completion.

82 Those units of competency included cleaning and maintaining kitchen premises, preparing and serving espresso coffee, implementing food and safety procedures, et cetera.

83 Both Mr Javed and Mr Chew agreed that Mr Javed's duties included many of the competencies set out in his qualifications.[45]

84 Therefore, when judged objectively many of the qualifications held by Mr Javed were pertinent to the duties he performed for FWC.

85 The definition of '***appropriate level of training***' in cl 3.1 of the Award only requires a person to hold '*one or more designated units of competency*'. FWC however submitted, based on comments by Ritter AP in ***Spring 2002 Pty Ltd v Katherine Sampson***,[46] that the appropriate level of training must relate to cl B.2.3(a) to cl B.2.3(f) of the Award.

86 ***Spring v Sampson*** does not stand for that proposition. In that case, Ritter AP analysed the grammar used in the clause of the Award being scrutinised. The relevant classification being scrutinised was under the *Restaurant, Tearoom and Catering Workers Award 1979* (WA) and read as follows:

*(5) **Food and Beverage Attendant Grade 3** means an employee who has the appropriate level of training and is engaged in any of the following:*

(a) supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;

(b) assisting in the cellar or bottle department, where duties could include working up to four hours per day (averaged over the relevant work cycle) in the cellar without supervision;

(c) undertaking general waiting duties of both food and liquor including cleaning of tables;

(d) receipt and dispensing of monies;

(e) engaged on delivery duties; or

(f) in addition to the tasks performed by a food and beverage attendant grade 2 the employee is also involved in:

(i) the operation of a mechanical lifting device; or

(ii) attending a wagering (e.g. TAB) terminal, electronic gaming terminal or similar terminal.

(g) and/or means an employee who is engaged in any of the following:

(i) full control of a cellar or liquor store (including the receipt, delivery and recording of goods within such an area);

(ii) mixing a range of sophisticated drinks;

(iii) supervising food and beverage attendants of a lower grade;

(iv) taking reservations, greeting and seating guests;

(v) training food and beverage attendants of a lower grade (emphasis added)

87 At [54] Ritter AP found:

> *54 The Industrial Magistrate decided that the Respondent was not a Food and Beverage Attendant Grade 3 because the training requirement applied to all of the duties set out within this classification. In my opinion, with respect, the Industrial Magistrate was in error in so deciding. This is because in my opinion the description of duties in clause 6(5)(g) of the definition of a Food and Beverage Attendant Grade 3 is disjunctive from subclauses 6(5)(a)-(f). In using the word 'disjunctive' I intend it to mean that the requirement for an appropriate level of training applies to subclauses (a)-(f) but not subclause (g). This is so, in my opinion, despite the way in which the clause is set out in that the reference to an appropriate level of training is in what is set out as a preamble to all of subclauses (a)-(g). Despite this however, at the end of each of subclauses (a)-(e) there is a semicolon and following the final semicolon there is the word 'or'. There is then subclause (f) which is concluded by a full stop. Subclause (g) then commences 'and/or'. The use of the word 'or' at this point is consistent with the commencement of a disjunctive criterion. Overall the grammatical arrangement of clause 6(5) is consistent with subclause (g) being disjunctive from subclauses (a)-(f). This view is reinforced by the preamble to subclause (g). This preamble would be unnecessary if subclause (g) was not to be construed as disjunctive from subclauses (a)-(f).* (emphasis added)

88 Accordingly, Ritter AP in ***Spring v Sampson*** found that the words 'and/or' between cl 5(a) to cl 5(f) and cl 5(g) of the relevant award were disjunctive. Therefore, Ritter AP found that the appropriate level of training applied only to cl 5(a) to cl5 (f) of the relevant award.

89 I am not satisfied Ritter AP's determination stands for the broader position put by FWC, that for a relevant classification to apply, the appropriate level of training must be held in respect to all elements of a classification simply because those elements are expressed conjunctively.

90 I accept that the conjunctive word 'and' appears after subclauses B.2.3(f) and B.2.3(g) of the Award.

91 This is not the same grammar discussed by Ritter AP in ***Spring v Sampson***.

92 Further, to hold that the use of 'and' after cl B.2.3(f) of the Award meant that an employee needs to hold appropriate qualifications in all the duties mentioned in cl B.2.3(a) to cl B.2.3(f) would give the words, '*any of the following*' in the preamble of cl B.2.3 no meaning.

93 I am therefore not satisfied that to bring himself within the definition of the Attendant, Mr Javed was required to hold an appropriate level of training in all duties mentioned in cl B.2.3(a) to cl B.2.3(f) of the Award.

94 Based on the findings previously made I am satisfied that Mr Javed had achieved qualifications in competencies relevant to his duties and relevant to the definition of the Attendant under the Award.

95 Having attained such competencies I am satisfied that Mr Javed had achieved the appropriate level of training for the Attendant as described in the Award.

96 Having found that the major or principal duties of Mr Javed were those described in cl B.2.3(c), cl B.2.3(d), cl B.2.3(e) and cl B.2.3(g) of the Award, I am satisfied that this is the appropriate classification.

97 For the reasons expressed above, I am satisfied that the Award applied to Mr Javed's employment during the Contravention Period and he was required to be paid as the Attendant as described in the Award.

Orders

98 Pursuant to s 717(3) of the FW Act the Compliance Notice is confirmed.

J. HAWKINS
INDUSTRIAL MAGISTRATE

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[1] Exhibit 3 - Witness statement of Mr Javed dated 11 November 2020 (Javed Statement) [28].

[2] Exhibit 1 - Witness statement of Ms Maunder dated 11 November 2020 (Maunder Statement), Annexure BM-15.

[3] FWC's Outline of Submissions dated 18 November 2020 (FWC's Outline of Submissions) [12] - [34].

[4] See ***Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman*** (2016) 304 FLR 264 [28] - [29], [32] - [35]; ***Hana Express Group Ltd v Fair Work Ombudsman*** (2020) 350 FLR 359 [49], [54].

[5] See ***Miller v Minister of Pensions*** [1947] 2 All ER 372.

[6] Exhibit 1.

[7] Exhibit 3.

[8] Exhibit 2 - Witness statement of Frederick Kok Wai Chew dated 29 October 2020 (Chew Statement).

[9] Exhibit 3[2] - [3].

[10] FWC's Outline of Submissions [33].

[11] FWC's Outline of Submissions [25].

[12] Transcript, 32 (Mr Chew's evidence), 36 (Mr Javed's evidence); Exhibit 3 [26].

[13] Exhibit 2 [10] - [15]; Transcript, 11.

[14] Transcript, 37 (Mr Javed's evidence).

[15] Transcript, 37 (Mr Javed's evidence).

[16] Transcript, 38 (Mr Javed's evidence).

[17] Transcript, 38 (Mr Javed's evidence).

[18] Exhibit 3.

[19] Transcript, 16 (Mr Javed's evidence).

[20] Transcript, 17 (Mr Chew's evidence).

[21] Transcript, 11.

[22] Transcript, 17.

[23] Transcript, 11.

[24] Transcript, 17.

[25] Exhibit 3.

[26] Exhibit 2, FWC 1.

[27] Transcript, 18.

[28] Exhibit 1.

[29] Exhibit 1 [8.h].

[30] Exhibit 1, BM-8.

[31] Transcript, 19 - 20.

[32] Transcript, 21 - 22.

[33] Transcript, 25.

[34] Transcript, 36.

[35] Transcript, 39.

[36] Transcript, 40.

[37] Transcript, 48 - 49.

[38] Transcript, 50.

[39] Transcript, 45.

[40] Exhibit 3, MUJ-5, MUJ-9

[41] SOAF [19], [21].

[42] Clause 3.1 of the Letters of Engagement.

[43] Exhibit 1, FWC-3, FWC-4.

[44] Exhibit 3, [19] - [21], [23]-[24], MUJ-5 - MUJ-7, MUJ-9 - MUJ-10.

[45] Exhibit 3, MUJ-5 - MUJ-7, MUJ-9 - MUJ-10.

[46] [2006] WAIRC 5864 [54] (***Spring v Sampson***).

Schedule 1 – '*Statement of Agreed Facts*'

Statement of Agreed Facts

A. Introduction

1. This document, a Statement of Agreed Facts, relates to proceedings M 198 of 2019 (the **Proceedings**) commenced by FWC Pty Ltd (the **Claimant**) against Fair Work Inspector (**FWI**) Belinda Maunder (the **Respondent**). By the Proceedings, the Claimant has sought review of a statutory notice issued by the Respondent in her capacity as a FWI employed by the Fair Work Ombudsman.

2. The Claimant and the Respondent have agreed that the facts and admissions in paragraphs 4 to 20 below are not disputed for the purpose of the Proceedings only.

3. The Claimant and the Respondent have also agreed that the matters in paragraphs 21 and 22 *are* in dispute.

B. Background

4. The Claimant is and was at all material times:

   a. registered as an Australian proprietary company limited by shares;

   b. directed by Mr Frederick Kok Wai Chew and Ms Wenjie Fong;

   c. trading under the business name 'Chocolateria San Churro Northbridge' (the **Restaurant**); and

   d. operating a restaurant.

5. At all material times, the Claimant's registered office was at BM&Y 47 Ord Street, West Perth WA 6005 (**Registered Office**).

6. The Respondent is and was from 7 November 2018:

   a. a FWI appointed pursuant to s 700(1)(a) of the *Fair Work Act 2009* (Cth) (the **FW Act**); and

   b. empowered to exercise the duties, functions and powers conferred upon her by the FW Act, including pursuant to s 716 of the FW Act.

7. Mohammed Usman Javed:

   a. was employed by the Claimant to work full-time at the Restaurant, including during the period from 21 October 2013 to 20 May 2016 (the **Contravention Period**); and

   b. was provided two letters of employment dated 15 August 2012 and 23 January 2015.

C. Compliance Notice

8. On 26 September 2019, the Respondent issued a statutory notice pursuant to s 716 of the FW Act (the **Compliance Notice**) to the Claimant in respect of the employment of former employee Mr Javed during the Contravention Period.

9. The Compliance Notice stated that the Respondent reasonably believed that the Claimant had contravened clauses 33.1(a) and 33.2 of the *Restaurant Industry Award 2010* (the **Award**).

10. The Compliance Notice required the Claimant by 14 October 2019 to:

    a. calculate the underpayments, if any, owed to Mr Javed;

    b. rectify the underpayments; and

    c. prepare a schedule of underpayments calculated to be owing to Mr Javed, outlining the amount Mr Javed had been paid to remedy any underpayment identified (**Schedule**).

11. The Compliance Notice also required the Claimant to provide the Respondent with the Schedule and reasonable evidence demonstrating that the rectification of any underpayments had been made to Mr Javed, within 7 days of the payment being paid.

12. The Compliance Notice:

    a. was validly issued;

    b. was validly served on the Claimant by way of service at the Registered Office;

    c. was also sent by email to the Claimant's Director, Mr Frederick Kok Wai Chew, on 26 September 2019 and receipt of same was confirmed by Mr Chew on 27 September 2019; and

    d. met the requirements of s 716(3) of the FW Act.

13. The Claimant has not entered into an undertaking with respect to the contraventions referred to in the Compliance Notice.

14. The Claimant now seeks review of the Compliance Notice on the ground that it has not committed the contraventions set out in the Compliance Notice (see s 717(1)(a) of the FW Act).

D. The Award

Agreed Facts

15. The Award as first made by the Australian Industrial Relations Commission is the document linked here: https://www.fwc.gov.au/documents/awardsandorders/html/pr991086.htm.

16. Clause 33 of the Award, which deals with overtime, remained in effect without amendment until the end of the Contravention Period.

17. Clause 4 of the Award provides that it covers employers throughout Australia in the restaurant industry and their employees in the classifications listed in Schedule B – Classification Structure and Definitions to the exclusion of any other modern award.

18. During the Contravention Period, the Restaurant operated in the restaurant industry.

19. During the Contravention Period, the Award applied to the Claimant and its employees (save that Mr Javed's coverage is in dispute, see paragraph 21 below) in the classifications listed in Schedule B – Classification Structure and Definitions to the Award.

20. While the parties do not agree as to whether the Award applied to Mr Javed during the Contravention Period, the parties agree that if the Award applied to Mr Javed during the Contravention Period, then Mr Javed was entitled to receive overtime payments in accordance with clauses 33.1(a) and 33.2 of the Award.

Matters in Dispute

21. The Claimant's position is that Mr Javed's employment was not covered by the Award.

22. The Respondent's position is that Mr Javed was an employee covered by the Award. The Respondent says that Mr Javed was a full-time Food and Beverage Attendant Grade 3 in accordance with Schedule B – Classification Structure and Definitions of the Award.

23. If it is held that the Award applied to Mr Javed, then:

    a. the Claimant's position is that the Claimant has not committed the alleged contraventions of the Award

    b. the Respondent's position is that Mr Javed was not paid the amounts he was entitled to under clauses 33.1(a) and 33.2 of the Award.

Schedule 2 – Jurisdiction of Western Australian Industrial Magistrates Court (IMC) to review a Compliance Notice

[1] Section 717(1) of the FW Act states:

> ***717 view of compliance notices***
>
> *(1) A person who has been given a notice under section 716 may apply to the Federal Court, the Federal Circuit Court or an eligible State or Territory Court for a review of the notice on either or both of the following grounds:*
>
> *(a) the person has not committed a contravention set out in the notice;*
>
> *(b) the notice does not comply with subsection 716(2) or (3).* (emphasis added)

[2] Section 2C of the *Acts Interpretation Act 1901* (Cth) provides that reference to a 'person' includes '*corporate as well as an individual*'.

[3] The IMC, being a court constituted by an industrial magistrate, is '***an eligible State or Territory Court***': FW Act, s 12 (see definition of '***eligible State or Territory court***' and '***magistrate court***'): and also *Industrial Relations Act 1979* (WA) s 81 and s 81B.

[4] Accordingly, it is open to the IMC to review a Compliance Notice given to a person by a Fair Work Inspector on the grounds that the person has not committed a contravention set out in the Notice.

[5] The extent of a court's power to review has been the subject of detailed analysis: ***Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman*** (2016) 304 FLR 264.

[6] Section 717 of the FW Act does not state what rules of evidence and procedure applies in a review of a Compliance Notice.

[7] Section 551 of the FW Act requires the strict rules of evidence and procedure for civil matters to be applied when hearing proceedings relating to a contravention of a civil remedy provision.

[8] Albeit, that s 717 is not defined under the FW Act as a civil remedy provision (see s 539 of the FW Act), the review requires a determination of whether FWC contravened the Award. A contravention of an Award (s 45 of the FW Act) is a civil remedy provision (s 539 of the FW Act). Accordingly, I am satisfied s 551 of the FW Act applies to this application under s 717 of the FW Act.

2021 WAIRC 00035

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2021 WAIRC 00035
CORAM	**:**	INDUSTRIAL MAGISTRATE J. HAWKINS
HEARD	**:**	WEDNESDAY, 9 DECEMBER 2020, THURSDAY, 10 DECEMBER 2020
DELIVERED	**:**	FRIDAY, 12 FEBRUARY 2021
FILE NO.	**:**	M 167 OF 2018
BETWEEN	**:**	GREGORY WILLIAM DAY
		CLAIMANT
		AND
		ROBERT LINDSAY SEVERN
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Employee/Employer Relationship or Independent Contractor – Scope of *Clerk (Commercial, Social and Professional Services) Award No. 14 of 1972* (WA) – Casual Employee vs Permanent Part-Time Employee – Annual Leave under *Minimum Conditions of Employment Act 1993* (WA) – Payment in Lieu of Notice under s 759 of the *Fair Work Act 2009* (Cth)
Legislation	**:**	*Minimum Conditions of Employment Act 1993* (WA) *Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA) *Workers' Compensation and Rehabilitation Act 1981* (WA) *Superannuation Guarantee (Administration) Act 1992* (Cth) *Taxation Administration Act 1953* (Cth) *Magistrates Court (Civil Proceedings) Act 2004* (WA)
Instruments	**:**	*Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972* (WA)
Case(s) referred to in reasons:	**:**	***Botica v Top Cut TMS Holdings Pty Ltd (ACN 134606661)*** [2020] WAIRC 61 ***Abdulla v Viewdaze Pty Ltd AIRC trading as Malta Travel*** (2003) 53 ATR 30 ***Stevens v Brodribb Sawmilling Co Pty Ltd*** [1986] HCA 1; 160 CLR 16 ***Hollis v Vabu Pty Ltd*** [2001] HCA 44 ***Karen Bailey v Spangaro (No 1) Pty Ltd*** [2019] FWC 4359 ***Kimber v Western Auger Drilling Pty Ltd*** [2015] FWCFB 3704; 252 IR 1 ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37 ***Transport Workers Union of Australia v Coles Supermarkets Pty Ltd*** [2014] FCAFC 148 ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** [2006] FCA 813; 153 IR 426 ***Kucks v CSR Limited*** (1996) 66 IR 182 ***Amcor Limited v Construction, Forestry, Mining and Energy Union*** [2005] HCA 10; 222 CLR 241 ***RJ Donovan And Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch*** (1977) 57 WAIG 1317 ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCA 621 ***The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7)*** [2013] FCCA 1097

Logan v Otis Elevator Company Pty Ltd [1997] IRCA 200

Ware v O'Donnell Griffin (Television Services) Pty Ltd [1971] AR (NSW) 18

Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4) [2015] FCCA 1178; 301 FLR 1

City of Wanneroo v Holmes [1989] FCA 553; 30 IR 362

Joyce v Christoffersen [1990] FCA 381; 33 IR 390

Kershaw v Sunvalley Australia Pty Ltd [2007] WASCA 278

WorkPac Pty Ltd v Skene [2018] FCAFC 131; 264 FCR 536

Moate v IPC Pty Ltd [2020] WAIRC 390

Sammut v AVM Holdings Pty Ltd [No 2] [2012] WASC 27

Result : Claim in part proven

Representation:

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

Respondent : Mr D. Eley (agent) from Sterling IR Pty Ltd

REASONS FOR DECISION

Introduction

1 Mr Gregory William Day (Mr Day) entered into an oral contract with Mr Robert Lindsay Severn (Mr Severn) on 2 July 2013 to undertake work for him. Mr Day carried out work for Mr Severn until 25 March 2018, when this arrangement was terminated by Mr Severn.

2 The role of Mr Day's employment was in dispute. Mr Day claimed he was in an employee/employer relationship with Mr Severn. Mr Severn disputed this and maintained Mr Day was an independent contractor.

3 The nature of Mr Day's claim, which commenced on 1 October 2018, has changed over the lengthy course of this proceedings. At trial Mr Day confirmed that his claim was limited to:

(a) Penalty rates that should have been paid to him for Saturday and Sunday work performed for Mr Severn for the period 4 July 2015 to 17 December 2017 at the rates claimed for a '*Grade 6 administrative officer*' pursuant to the *Clerk (Commercial, Social and Professional Services) Award No. 14 of 1972* (WA) (the Award);

(b) Unpaid annual leave for the period from 2 July 2013 to 25 March 2018 pursuant to cl 12 of the Award or, in the alternative, pursuant to the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act); and

(c) Three weeks payment in lieu of notice of termination of Mr Day's employment pursuant to s 759 and s 117 of the *Fair Work Act 2009* (Cth) (FW Act).

4 In addition, Mr Day is also seeking that the Western Australian Industrial Magistrates Court (IMC) impose penalties pursuant to s 83(4)(a)(ii) of the *Industrial Relations Act 1979* (WA) (IR Act) and that such penalties be paid to Mr Day.

5 Schedule 1 of these reasons for decisions outline the jurisdiction, and practice and procedure of the IMC.

6 It was uncontentious that Mr Day was employed to attend a land sales site office (the Office) located at Jindowie estate in Western Australia (the Site). Nor is there any dispute that Mr Severn did not own the land being sold at that site. Rather, Mr Severn had contract with Australand/Frasers Property Australia (Australand/Frasers), the developers of the Site, to have the Office manned during set hours and days of the week.

7 As stated, Mr Severn firstly denies that Mr Day was an employee but, rather, maintains that he was an independent contractor.

8 Secondly, Mr Severn claims that if Mr Day was an employee then the applicable instrument that should be applied to the relationship would be the MCE Act and not the Award for the following reasons:

(a) Mr Day was engaged as a real estate sales representative for the purposes of selling parcels of land;

(b) Any clerical work undertaken by Mr Day was merely incidental to the function of selling parcels of land;

(c) Mr Day was required, as a part of his employment, to maintain a licence to be a real estate sales representative;

(d) The Office at which Mr Day worked had no office equipment other than a chair and a table;

(e) Mr Day has given evidence that he handed out sales brochures and advertising literature;

(f) Mr Day has given evidence that he went to movie nights and social functions;

(g) None of the classifications in cl 11 of the Award relate in any way to the functions performed by Mr Day as a clerk; and

(h) No other award or instrument covers the functions performed by Mr Day.

9 Thirdly, Mr Severn says that if an employee/employer relationship existed then Mr Day was a casual employee not a permanent part-time employee.

10 Potentially the following issues arise for determination:

(a) Was Mr Day in a relationship of employee/employer or independent contractor with Mr Severn?

(b) If Mr Day was in a relationship of employee/employer with Mr Severn then:

(i) Is the Award applicable to Mr Day's employment?

(ii) If the Award is not applicable, is the MCE Act applicable and was Mr Day a casual or part-time employee?

(iii) Was Mr Day entitled to payment in lieu of notice?

(c) What orders and payment of pecuniary penalty, if any, should be awarded to Mr Day?

Issue 1 – Was Mr Day An Employee Or Independent Contractor?

11 This is like many cases that come before the IMC where there are factors that suggest an employer/employee relationship and factors that suggest an independent contractor relationship.

12 The IR Act in s 7 defines '***employee***' and '***employer***' to mean as follows:

*[E]**mployee** means –*

(a) any person employed by an employer to do work for hire or reward including an apprentice; or

(b) any person whose usual status is that of an employee; or

(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or

(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,

but does not include any person engaged in domestic service in a private home unless …

*[E]**mployer** includes –*

(a) persons, firms, companies and corporations; and

(b) the Crown and any Minister of the Crown, or any public authority,

employing one or more employees and also includes a labour hire agency or group training organisation that arranges for an employee (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person

13 The IR Act, however, does not define the meaning of an 'independent contractor'. The meaning given to an employee in the IR Act is not expansive. Unlike other statutes such as the *Workers' Compensation and Rehabilitation Act 1981* (WA) and the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGAA) the IR Act does not have an extended definition of '***employee***'.

14 Mr Day argued that given the extended definition in the SGAA it may have application. It has previously been found by this Court that it is impermissible to draw upon an extended definition of '***employee***' in the SGAA to determine the ordinary meaning of employee.[1] Although not bound by that determination, given principles of judicial consistency, I adopt the reasoning in ***Botica***.

15 The summary of common law principles governing the employee and independent contractor issue likewise was set out in ***Botica*** and those principles are adopted.[2]

16 It was made clear in respect to the authorities referred in ***Botica*** that there are competing factors that suggest Mr Day and Mr Severn were in employer/employee relationship and there were factors that suggested that Mr Day was an independent contractor. Nonetheless it is necessary to view the totality of the relationship between the parties and not any single factor in determining this issue.

17 Below sets out findings of some factors that have been referred to in various authorities in determining whether Mr Day was an employee pursuant to a contract of service or was an independent contractor pursuant to a contract for services.[3]

The terms of engagement

18 There was no express written contract between the parties governing Mr Day's terms of engagement. However, a contract of employment can exist as a result of a verbal agreement. There was no dispute that in or about mid-2013, Mr Severn met with Mr Day and Mrs Jenine Fay Day (Mrs Day) and agreed to employ Mr Day. The dispute between the parties is whether Mr Severn agreed to employ Mr Day as an independent contractor or as an employee.

19 There is divergent evidence on whether Mr Day was told he was being engaged as an independent contractor. Mr Severn was adamant that he made clear to Mr Day when he met Mr Day and Mrs Day in mid-2013, that Mr Day's appointment would be as an independent contractor and that he was required to provide his ABN number. Whereas Mr Day and Mrs Day were firm in their evidence that the issue of being an independent contractor was never discussed nor was the need to provide an ABN number. Although evidence was produced that Mr Day did have an ABN number, despite him suggesting he never had one, he was steadfast that he had not been asked for it by Mr Severn.

20 Both Mr Day and Mr Severn however agreed that Mr Day was engaged to sell lots of land at the Site as a real estate sales representative and to attend the Office at the times required by Australand/Frasers. There was also no dispute that Mr Day was required during his employment to maintain his licence as a real estate sales representative. There was no dispute between both Mr Day and Mr Severn that it was agreed he would be paid an hourly rate of $25 for his attendance at the Office. It was also agreed that he would be paid commissions for the sale of lots of land. Apart from the exact times when Mr Day attended the

Office, both Mr Severn and Mr Day agreed that his duties would be to attend the Office on Monday, Tuesday, Wednesday, Saturday and Sunday.

21 Mr Day, as required by Mr Severn, sent Mr Severn timesheets that recorded the dates and times he attended the Office and the lots of land for which he sought commission. The only parties present at the time of the discussions in mid-2013 as to Mr Day's engagement, was Mr Day, Mrs Day and Mr Severn. Although Mr Gavin Grieve (Mr Grieve), Mr Severn's tax agent, confirms Mr Severn's evidence that Mr Severn had never directly employed anyone, it is to be noted that Mr Grieve was not present at the meeting between Mr Day and Mr Severn. Any evidence as to what Mr Severn told Mr Grieve in respect to that meeting has no probative force.

22 It was submitted that Mr Day's evidence was implausible and not credible because:

(a) He denied having an ABN number wherein in reality ASIC records revealed Mr Day did possess an ABN number in 2013 which was ultimately cancelled in 2015;

(b) Mr Day could give no other detail about other entitlements that were discussed at the mid-2013 meeting. It was argued therefore that this was more consistent with Mr Day understanding that his appointment was that of an independent contractor, as suggested by Mr Severn; and

(c) Mr Day gave evidence that he had always been self-employed.

23 I am not satisfied that Mr Day's evidence on this issue lacked credibility. Mrs Day, who was a credible witness, corroborated his version of events. Mr Day's lack of memory as to his ABN number was consistent with it not having been discussed at the mid-2013 meeting. Further, despite Mr Severn being adamant he had asked Mr Day for his ABN number, there is no evidence he followed this up in writing nor sought to have his tax agent do so which would be more consistent with Mr Severn's suggestion that he had appointed Mr Day as an independent contractor. Nor was there any evidence that Mr Severn required Mr Day to present him with invoices for work completed. At one point Mr Severn sought to suggest that the timesheets were invoices that Mr Day presented but ultimately, he agreed that they were not. Mr Severn paid Mr Day pursuant to timesheets, (which is more consistent with Mr Severn not having raised the issue of independent contractor).

24 Given those issues of plausibility and inconsistencies, I found Mr Severn's evidence on this issue unreliable. Whereas for the reasons outlined above I found Mr Day and Mrs Day's evidence on this issue reliable. I therefore prefer the evidence of Mr Day and Mrs Day and find that the issue of whether Mr Day would be an independent contractor was not discussed by Mr Severn with Mr Day. I also find that it was agreed that Mr Day would be paid $25 per hour for attending the Office and a commission for sales of land as a licensed real estate sales representative. Mr Day's timesheets produced by Mr Severn consistently show that Mr Day provided details of the days and number of hours worked, and the lot numbers of land sold.

Did Mr Day have the right to delegate work to others?

25 There was no evidence that Mr Day could have others undertake the work he was required to perform.

Control

26 There was no dispute that Mr Severn did have the right to exercise control over the place Mr Day worked and his hours of work.[4]

27 There is no real dispute on the evidence of the parties that Mr Day was required to attend the Office on Monday, Tuesday, Wednesday, Saturday and Sunday. There was some discrepancy between Mr Day's witness statements as to the exact hours he worked. However, in cross-examination he conceded that generally he worked between 11.00 am - 4.00 pm on Monday, Tuesday, Wednesday and 12.00 noon - 4.00 pm on Saturdays and Sundays. Further, Mr Day's timesheets generally accord with the times he recalled attending, albeit on some occasions he worked more hours and sometimes he worked less. Indeed, this is corroborated by Mr Severn's evidence who indicated he paid Mr Day for the times set out in his timesheets, despite sometimes being more hours than contemplated and sometimes less hours.

28 Further, both Mr Day and Mr Severn gave evidence that it was a requirement of Mr Severn's arrangement with Australand/Frasers that the Office be open during Monday, Tuesday, Wednesday and Saturday and Sunday. This arrangement with Mr Day commenced on or about 2 July 2013 and continued until 25 March 2018 (a period of four years and eight months).

29 The Office was rudimentary with only tables and chairs. The Office was made available for Mr Day's use by Mr Severn and Mr Day was also provided with brochures. I accept that those brochures were not necessarily brochures provided directly by Mr Severn as they were brochures created by Australand/Frasers. However, access to those brochures was made available to Mr Day when given use of the Office by Mr Severn.

30 I also accept that there was little evidence that Mr Severn maintained day-to-day on-site control of Mr Day. This is not a situation where Mr Day attended Mr Severns' office and met Mr Severn on a daily basis. However, it is clear that Mr Day was required to submit his timesheets to Mr Severn which recorded the time worked and the lots he sold. Mr Severn confirmed that he only paid Mr Day based on those timesheets which impliedly confirmed that Mr Severn was maintaining control of Mr Day to ensure that he was compliant with the days and hours that he was required to attend the Office.

31 Further, it was not disputed that Mr Day did take phone calls after hours as his phone number was placed on advertisements created by Australand/Frasers. In addition, there was not any dispute in the evidence that Mr Day at one point completed contracts of sale. Mr Severn did not dispute that Mr Day completed contracts of sale but suggest he stopped this as Mr Day had completed a contract incorrectly and had cost him money. Mr Day disputed that this ever occurred, and he continued to complete contracts regularly in respect to sales of lots of land. Nonetheless Mr Severn accepted that Mr Day would still fill in basic details of contracts.[5]

32 As to Mr Day's attendance at the Office, Mr Severn confirmed Mr Day's evidence that whilst at the Office he was required to meet and greet people which included members of the public and builders. Mr Severn also did not dispute that Mr Day attended weekly meetings on a Monday at the offices of Australand/Frasers. Mr Severn was aware those meetings generally involved discussions of sales at the Site. However, Mr Severn was adamant he never directed Mr Day to attend those meetings. Equally so, Mr Severn never directed Mr Day not to attend those meetings and it can be inferred that he had given approval therefore for Mr Day to attend those meetings.

33 I accept that Mr Day's witness statements did seek to suggest he was also involved in daily inspections of the Site and reporting any problems with the Site, such as graffiti or illegal dumping, to Mr Severn. However, in cross-examination Mr Day conceded that any reports on these issues were made to Australand/Frasers and were without the direction of Mr Severn.

34 Mr Day also suggested he was engaged in arranging finance for prospective purchasers. There was, however, a dispute that this was at the direction of Mr Severn. Mr Severn's unchallenged evidence is that this was never at his direction. Accordingly, I am not satisfied that Mr Severn gave Mr Day direction to originise finance, undertake the inspection of the Site and report any problem to him.

35 Nonetheless, I am satisfied that on Monday, Tuesday, Wednesday, Saturday and Sunday during the hours 11.00 am - 4.00 pm and 12.00 noon - 4.00 pm Mr Day was required to attend the Office and meet and greet the general public or builders, and provide them with any information such as brochures in respect to the sale of lots of land. I am also satisfied that Mr Day, whilst in attendance at the Office, was involved in preparing contracts of sale by at least preparing the preliminaries of such contracts. I am also satisfied that Mr Day was required to provide Mr Severn with proof of his attendance at the Office by submitting timesheets which indicated the times at which he attended the Office.

36 For the reasons expressed above I am satisfied that Mr Severn exercised control over Mr Day's work.

Was Mr Day able to do other work?

37 Mr Severn's unchallenged evidence was that he never prevented Mr Day from working for others. However, there was no cogent evidence Mr Day did so. Nor is there any evidence that he had separate premises from where he worked for others. Indeed, there is a lack of documentary evidence to prove that Mr Day, during the relevant periods, undertook paid work for others. Albeit I accept that there is some evidence that in the period from November 2017 to March 2018 he had been advertised as a real estate agent representing LJ Hooker, there was simply no evidence he performed any work or was remunerated for any work with LJ Hooker during that period.

Tools of trade

38 Mr Day did concede that he used his own mobile phone, computer, and rudimentary stationery when at the Office. However, there was no evidence he invested significantly in items of equipment necessary to complete his daily task. Nor was there evidence these items of equipment were shown to relate to any separate business Mr Day was operating whilst also undertaking work for Mr Severn.

Was Mr Day representing himself to the world at large as an emanation of Mr Severn's business?

39 There was no evidence Mr Day was required to wear a uniform by Mr Severn nor was there any evidence that Mr Day did wear such a uniform. Although Mr Day initially suggested he was provided with a business card, he conceded that the business card he may have been provided with, was provided to him by Australand/Frasers.

Could Mr Severn dismiss Mr Day?

40 There is no dispute that Mr Severn did bring the arrangement with Mr Day to an end on 25 March 2018. The unchallenged evidence of Mr Severn was that his contract with Australand/Frasers was subject to review and that he had informed Mr Day of this.

41 This indicia, to some extent, is neutral as to whether Mr Day was an employee or contractor, as Mr Severn would always have the ability to terminate his contract with Mr Day.

How was Mr Day remunerated?

42 There is no dispute Mr Severn paid Mr Day $25 per hour for the hours worked. Nor is there any dispute that the amount paid coincided with the times set out on the timesheets submitted weekly to Mr Severn by Mr Day. This occurred throughout the period from 2013 to 2018. Further, the sample of timesheets reveal amounts of commission (which apart from the commission for a development known as 'Santorini') were paid by Mr Severn. Accordingly, the weight of the evidence shows Mr Severn remunerated Mr Day on a weekly basis for attending the Office and for commissions upon the sales of lots.

Was tax deducted from amounts paid to Mr Day?

43 There is no dispute that PAYG tax was deducted from the amounts paid to Mr Day by Mr Severn. However, there was evidence from Mr Grieve that he needed to account for tax that might be able to be recouped by Mr Day. Mr Grieve conceded that he issued the PAYG group certificates as this was the form he had available at his office, albeit that he was aware that a different form was the most suitable.

44 Mr Grieve was not presented as an expert witness and conceded that he was not an expert in assessing if a person was employer, employee or an independent contractor. Mr Grieve insisted he was told by Mr Severn that Mr Day was an independent contractor. Despite this, on the tax documents prepared by Mr Grieve, Mr Day was treated as an employee.

45 At face value the payment of group tax is generally the strongest feature suggesting a relationship of employment. However, it has been accepted that the issuing of group certificates in error may affect the weight to be given to such indications.[6] This however is not a case where the PAYG group certificate was issued in error. Mr Grieve did not suggest that he sought at any time to rectify this error. I consider his explanation of the use of an incorrect form to account for tax simply implausible.

Other Indicia

46 Clearly on the evidence from both parties Mr Day was never paid any sick leave or holiday pay. Mr Day was required to work as a licenced real estate sales representative and indeed there was evidence that from November 2017 LJ Hooker commenced advertising Mr Day's services as a real estate agent whilst Mr Day was still carrying out work for Mr Severn. To some extent this was consistent with Mr Day being aware that Mr Severn's contract with Australand/Frasers was coming to an end. However as previously stated, there was no evidence that Mr Day was remunerated for the work he carried out, if any, with LJ Hooker in the period from November 2017 to March 2018. Nor is there any financial documentation which shows that during the period from 2013 to 2018 Mr Day operated a business or expended significant expenses carrying out business work for others.

Issue 1 – Was Mr Day An Employee Or Independent Contractor – Conclusion

47 It is necessary to view the totality of the relationship between the parties and not one factor. In ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd***[7] the Federal Court suggested it was helpful also to determine firstly whether a worker was engaged in the conduct of business in his or her own right. If a worker is not engaged in his or her own business, it follows that the worker is serving the interests of the employer's business and is the employee of that business.

48 On the basis of the findings made above, I am satisfied that the contract between the parties was oral and made no mention of Mr Day working as an independent contractor. Mr Day was employed to provide his personal services as a licensed real estate sales representative for set times and days of the week. He was required also to submit timesheets, not invoices, upon which he was remunerated. Mr Day did so for a substantial period, from 2013 to 2018. There is simply no evidence that Mr Day, during this period, ran a separate business for which he was remunerated. There was no evidence he invested significantly in plant or equipment or other significant items used to carry out work in a business he owned or operated. There was no evidence Mr Day conducted business from a separate premises during this period. Further, the work performed by Mr Day was carried out at a premises to which he was directed to attend by Mr Severn. This premises was made available to him by Mr Severn albeit that Mr Severn did not own or lease those premises.

49 Mr Day was paid upon the provision of timesheets required to be submitted to Mr Severn. The timesheets set out the times and dates Mr Day attended the Office, and sales of lots of land for which he was paid a commission. Further, PAYG tax was deducted from those payments. Even though Mr Day had some capacity to work for others there was no evidence which can be given any weight to show that he did so. Mr Day was the subject of control by Mr Severn in relation to his attendance at work and indeed in the manner in which he performed his work. Mr Severn himself, gave evidence that Mr Day was not, in the latter part of his employment, able to complete contracts of sale but only fill in the preliminaries due to errors Mr Day had made on such a document. The primary purpose of the relationship between the parties was for Mr Day to provide his personal services to Mr Severn. As such, he fell within the definition of an '***employee***' under the IR Act, being a person employed to do work for reward or in part for commission.

50 Further, when the totality of the relationship is viewed objectively, I am satisfied that Mr Day was employed under a contract of service and was in an employee/employer relationship with Mr Severn and was not an independent contractor.

Issue 2 – Is The Award Applicable To Mr Day's Employment By Mr Severn?

51 Being satisfied that Mr Day was an '***employee***', the next issue to be determined is whether the Award applied to Mr Day's employment. This is not a case where the parties entered into a written agreement that made reference to the Award. Nor was it discussed between the parties that the Award governed his conditions of employment. Mr Day submits that the Award applied to his employment and that he was employed as a '*Grade 6 administrative officer*' under the Award.

52 The starting point to determine award coverage are the words of the Award itself. In particular, it is, '*the objective meaning of the words used* [in the relevant Award] *bearing in mind the context in which they appear and the purpose they are intended to serve*'.[8]

53 An award has to be interpreted:

- by giving consideration to the natural and ordinary meaning of the words used;[9] and
- in light of its industrial context and purpose, not in '*a vacuum divorced from industrial realities'*.[10]

54 An award must '*make sense according to the basic conventions of English language'*[11] and '*narrow* [and] *pedantic approaches to the interpretation of an award are misplaced*'.[12]

55 Although there is some limitation to the claim by Mr Day in respect to penalty rates it is nonetheless accepted by the parties that in respect to the claim for annual leave, Mr Day is not time-barred. That claim runs from 2 July 2013 to 25 March 2018. This is relevant to which version of the Award applies and the scope of the Award.

56 Clause 4 of the 2013 version of the Award (which appears to have been unchanged in subsequent versions of the Award) reads as follows:

4. – SCOPE

> *This award shall apply to all workers employed in the clerical callings mentioned herein (including telephone attendants and messengers where such worker does clerical work) by those employers named and engaged in the industry set out in Schedule 'A' hereto, provided that it shall not apply to workers employed in the callings of Dental Assistant and or Dental Receptionist under the Dental Technicians' and Attendant/Receptionists' Award 1982.*

57 Accordingly, the scope of this Award was fixed by reference to an industry as carried on by '*the Respondents*' set out in the schedule to the Award. Such a scope clause was the subject of an industrial appeal court decision in ***RJ Donovan And Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch***.[13] Such clauses are sometimes referred to as 'Donovan Scope Clause'.

58 In the Award, named employers are parties to the Award under an industry heading and one such heading is '*Agents Real Estate and/or Developers and/or Builders*'. Thereafter employers, who are Respondents to the Award, are named. It is generally accepted that it is the industry heading itself that is relevant in determining the scope of the Award.

59 The issue of scope of the Award was not contested by Mr Severn. I am satisfied that Mr Severn was not named as a respondent to the Award. However, the Award was applicable to the industries named in sch A of the Award which includes '*Agents Real Estate and/or Developers and/or Builders*' which was the industry in which Mr Severn operated. I am therefore satisfied that the scope of the Award applied to Mr Severn.

60 The key issue as to the Award coverage was whether Mr Day fell within any classification under the Award. Mr Severn argued that largely upon the evidence of Mr Day he was not carrying out functions of a clerk for Mr Severn. Accordingly, Mr Severn argued that the applicable instrument (if any) that should be applied to the relationship would be the MCE Act.

61 Mr Day however submits that his classification under the Award for the period from 4 July 2015 to 17 December 2017 was that of a '*Grade 6 administrative officer*'. Clause 11.2.6 of the Award that applied from 4 July 2015 to 17 December 2017 sets out the meaning given to a '*Grade 6 administrative officer*' in the Award in summary, as follows:

(a) Employees in this grade perform clerical and administrative duties using a more extensive range of skills and knowledge at a level higher than required in Grade 5. They are responsible and accountable for their own work, and may have responsibility for the work of a section or unit. They exercise initiative, discretion and judgement within the range of their skills and knowledge. Supervision is by means of reporting to more senior staff as required.

(b) Computer - skill level 5

Operating/co-ordinating a group of computers such as a small multi-user system or a large group of personal computers which may include operating a help desk, running and monitoring batch jobs and performing regular back-ups and restores.

(c) Enterprise/industry, specialist skills - skill level 6

Apply knowledge of the organisation's objectives and performance, and apply specialist knowledge, in areas such as projected growth, product trends and general industry conditions, examples include: knowledge of competitors and major clients market structure in the performance of own responsibilities; import/export activities. Indicative Specialist Skills Include; Use knowledge of basic statistics to interpret data from spreadsheets, statistical tables, graphs and frequency tables in the performance of own responsibilities. Administration of workers compensation claims, insurance and disputed claims.

(d) Supervisory - skill level 3

Plan and organise work priorities of a unit or section; re-schedule workloads as necessary and resolve operational problems for unit or section; monitor work quality of those supervised; use observations, diagnosis and intervention skills to ensure unit/section meets objectives; organise and chair necessary work meetings/conferences; assist in planning future sectional/office organisational resources and equipment needs.

(e) Business/financial skills - skill level 5

Administer individual salary packages, travel expenses, allowances and company transport. Administer specialist salary and payroll requirements, e.g. Eligible Termination Payments, Superannuation Trust Deed Requirements, Redundancy Calculations, Maintenance Support Schemes, etc.

(f) Secretarial - skill level 4

As well as having shorthand skills of Skill Level 3, arrange conferences and external meetings, including venues, agendas, documentation, audio-visual requirements, catering, transport and accommodation; originate executive correspondence; assist executive in preparing, attending and following up appointments, interviews, meetings, etc; assume responsibility for Designated areas of executive's work, on delegated authority.

62 The meaning of a '*Grade 6 administrative officer*' has been unchanged in the versions of the Award that apply to the period claimed.

63 I am satisfied that on the undisputed evidence Mr Day's tasks required him principally to undertake the following duties:

(a) To act as a real estate sales representative for the purposes of selling parcels of land at the Office of the Site;

(b) To attend the Office of the Site on limited hours on Monday, Tuesday, Wednesday and Saturday and Sunday;

(c) To meet and greet members of the public or builders who were interested in purchasing lots at the Site;

(d) To prepare contracts of sale of lots from the Site; and

(e) To provide sales brochures and advertising literatures to any persons who attended the Office.

64 As to whether the classification relied on by Mr Day in the Award applies, I must have regard to the following relevant principles:

(a) '*Where the particular issue is whether an employee is engaged in a particular classification or class of work, then the Court takes a practical approach and will consider the aspect of the employee's employment which is the principal or major or substantial aspect*': ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCA 621 [27]; ***The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7)*** [2013] FCCA 1097; ***Logan v Otis Elevator Company Pty Ltd*** [1997] IRCA 200 (Moore J).

(b) Determining the major or substantial aspect of an employee's employment is '*not merely a matter of quantifying the time spent on the various elements of work performed ... the quality of the different types of work done is also a relevant consideration*': ***Ware v O'Donnell Griffin (Television Services) Pty Ltd*** [1971] AR (NSW) 18.

(c) The focus is upon the identification of the skills and duties required of an employee who is called upon to perform the function that is required to be performed by the employer. The individual performance of a particular employee (e.g. quality and quantity of work, capacity for more complex work, et cetera) is less relevant than the skills and duties necessary to perform the function required to be performed by the employer: ***Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd*** [2016] FCA 621 [32]; ***Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4)*** [2015] FCCA 1178; 301 FLR 1 [256].

(d) The courts and industrial tribunals have developed principles to be applied to ascertain whether an employee falls within a particular classification described in an award or an agreement. Where the employee performs mixed functions, the approach has been to examine the '*major and substantial employment*' of the employee or the '*principal purpose*' or '*primary function*' of the employee. For example, in ***Logan v Otis Elevator Company Pty Ltd*** [1997] IRCA 200, Moore J referred to and applied decision of Sheldon J in ***Ware v O'Donnell Griffin (Television Services) Pty Ltd*** [1971] AR (NSW) 18 where his Honour, applying the '*major and substantial employment*' test, relevantly observed:

> *…it is not merely a matter of quantifying the time spent on the various elements of work performed by a complainant; the quality of the different types of work done is also a relevant consideration.*

(e) The task of the Court in examining the major, substantial or principal aspect of the work performed by the employee will include consideration of the amount of time spent performing particular tasks, but also the circumstances of the employment, and what the employee was employed to do. The question is one of fact, to be determined by reference to the duties actually attaching to the position, rather than its title: ***City of Wanneroo v Holmes*** [1989] FCA 553; 30 IR 362, 379; ***Joyce v Christoffersen*** [1990] FCA 381; 33 IR 390, 278.

65 On the issue of classification, I am satisfied that the Office at which Mr Day was employed was rudimentary. It was not set up as a typical office with computers, photocopiers, telephones, working desk, relevant stationery normally expected for carrying out clerical duties.

66 Although in a very rudimentary way,

- Mr Day carried out some clerical duties such as answering phone calls and filling out sales documentation, his clerical duties were incidental to his core role of selling parcels of land as a licensed real estate sales representative.
- Mr Day was not required to report to more senior staff.
- He did not '[o]*perate or co-ordinate a group of computers … or large group of personal computers*'.
- He was not required to '[u]*se knowledge of basic statistics to interpret data from spreadsheets, statistical tables*' or '*apply specialist knowledge, in areas such as projected growth, product trends and general industry conditions*'.
- He was not required to '*plan and organise work priorities of a unit or section*' or '*re-schedule workloads as necessary* [or] *resolve operational problems*'.
- He was not required to monitor the quality of persons he supervised nor did he supervise any persons.
- He was not required to '*assist in planning future … organisational resources and equipment*', nor did he '[a]*dminister individual salary packages, travel expenses or allowances*' of others.
- There was no evidence he had any shorthand skills at level 3 or was involved in arranging '*conferences and external meetings, including venues, agendas, documentation, audio-visual requirements, catering, transport*', accommodation et cetera.

67 A '*Grade 6 administrative officer*' under the Award is the highest class of clerical officer.

68 It was not submitted that any other classification applied to Mr Day's employment.

69 Mr Day was employed by Mr Severn as a licensed real estate sales representative.

70 Given my finding in [63] above, I am satisfied that Mr Day's role did not wholly or principally require him to carry out the clerical duties outlined in the classification relied upon by Mr Day or any of the classifications in the Award.

71 I am, therefore, not satisfied that the Award covered Mr Day's employment with Mr Severn. Accordingly, Mr Day has no entitlement to claim annual leave pursuant to the Award.

Issue 3 – Is The MCE Act Applicable To Mr Day's Employment And Was Mr Day A Casual Or Part-Time Employee?

72 Having found the Award inapplicable, the next issue is whether the MCE Act applies to Mr Day's claim for annual leave. There is no real dispute on the evidence that Mr Day was not paid for periods that he was on leave.

73 Section 12 of the MCE Act provides as follows:

> *The minimum weekly rate of pay applicable at a particular time to an employee —*
>
> *(a) who has reached 21 years of age; and*

(b) who is not an apprentice,

is the rate in effect at that time under section 50A(1)(a)(i) of the IR Act in relation to employees who have reached 21 years of age and who are not apprentices.

74 There is no dispute that Mr Day's claim was one that has changed materially over time. It could be described as an ambit claim. The amended statement of claim lodged on 18 June 2020 (Amended Claim) makes claims in the alternative. At [15] of the Amended Claim it is submitted:

The entitlement to paid annual leave arose from clause 12 of the Award or in the alternative by operation of S. 23 of the Minimum Conditions of Employment Act 1993 (WA).

75 Despite that alternative claim, the Amended Claim seeks to quantify the entitlement to annual leave by reference to an hourly rate of $24.19.[14] Albeit that it has not been properly stated, this appears to be the hourly rate relied upon by Mr Day as applicable to a '*Grade 6 administrative officer*' classification under the Award and that rate, being the rate applicable as at 1 July 2017, as set out in [13] of the Amended Claim.

76 Accordingly, the Amended Claim does not quantify the entitlement to annual leave on the alternative basis of the application of the MCE Act. Nor do the submissions lodged by Mr Day or Mr Severn deal with the jurisdiction of IMC to order any payments under the MCE Act.

77 The jurisdiction of the IMC to deal with an application for annual leave pursuant to the MCE Act has not been addressed by the parties.

78 Pursuant to s 83 of the IR Act, an application to the IMC for enforcement can only be made in respect to an instrument to which s 83 of the IR Act applies. The instruments referred to in s 83 of the IR Act include an award, an industrial agreement or an employer-employee agreement or an order made by the Western Australia Industrial Relations Commission. This jurisdiction was discussed in ***Kershaw v Sunvalley Australia Pty Ltd***.[15] Le Miere J at [17] stated as follows:

17 The MCE Act provides for minimum conditions of employment. Section 3(1) provides that 'minimum condition of employment' means amongst other things, a condition for leave prescribed by the MCE Act. Section 23(1) provides that an employee (other than a casual employee) is entitled, in relation to each year of service, to a period of paid annual leave equal to the number of hours the employee is required ordinarily to work in a four week period during the year, up to 152 hours. Section 5(1) provides that the minimum conditions of employment are taken to be implied in a contract of employment. Section 7 provides that a minimum condition of employment may be enforced where the condition is implied in a contract of employment, under s 83 of the Industrial Relation Act 1979 (WA) … as if it were a provision of an award, industrial agreement or order other than an order made under s 32 or s 66 of that act.

79 At [22] it was stated:

22 The effect of s 5 of the MCE Act is that the minimum conditions of employment, including entitlement to paid annual leave prescribed by s 23, is implied in a contract of employment. The effect of s 7 is that that minimum condition may be enforced under s 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than a order made under s 32 or s 66 of that Act.

80 Further, in [23]:

23 Section 83 of the IR Act provides that specified people may apply for the enforcement of a provision 'where a person contravenes or fails to comply with a provision of an instrument to which this section applies'. A condition for paid annual leave prescribed by s 23 of the MCE Act and implied in a contract of employment is, by reason of s 7 of the MCE Act, deemed to be a provision of an instrument to which s 83 of the IR Act applies. *Any person who is a party to the instrument or to whom it applies may apply for the enforcement of the provision of the instrument - see s 83(1)(e).* (emphasis added)

81 In ***Kershaw***, the Full Court was dealing with whether the respondent was a party to the contract of employment with the appellant. In that case there had been a sale of the employer's business to the respondent, set out in a Deed. The Full Court found that such a Deed was not an instrument to which s 83(1) of the IR Act applied by application of the deeming provision in s 7 of the MCE Act.

82 I am bound by the decision of ***Kershaw***. Albeit that the plurality did not comment on the applicability of the MCE Act and s 83 of the IR Act as it concerns oral contracts, I am nonetheless satisfied that it cannot be distinguished. To do so would exclude employees employed under an oral contract of employment from pursuing such entitlements. Given that the MCE Act is beneficial legislation, such an interpretation would result in an absurdity.

83 Accordingly, I am satisfied that Mr Day was employed pursuant to an oral contract of employment with Mr Severn.

84 As such, a condition of paid annual leave prescribed by s 23 of the MCE Act can be implied into that contract of employment and in accordance with the decision of ***Kershaw*** is deemed to be a provision of an instrument to which s 83 of the IR Act applies.

85 Further, s 23 of the MCE Act provides as follows:

(1) An employee, other than a casual employee, *is entitled for each year of service, to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year, up to 152 hours.*

(2) An entitlement under subsection (1) accrues pro rata on a weekly basis.

(2a) Entitlements under subsection (1) are cumulative.

> *(3) In subsection (1),* ***year*** *does not include any period of unpaid leave.*
>
> *(4) Subsection (1) does not apply to an employee of a class prescribed by the regulations.* (emphasis added)

86 This gives rise to the issue as to whether or not Mr Day was a permanent part-time employee or a casual employee. Mr Severn submits that the overwhelming evidence is that Mr Day was a casual employee. The MCE Act does not define the meaning of casual employee. Albeit dealing with the FW Act the issue of the meaning of casual employment was discussed in ***WorkPac Pty Ltd v Skene***.[16]

87 This issue was discussed in the decision of ***Moate v IPC Pty Ltd***[17] where the following propositions in respect to the meaning of casual employee was set out at [70] by reference to ***Skene*** and are as follows:

> *(a) The vast majority of employees fall into one of three categories – full-time, part-time or casual.*
>
> *(b) The characteristic that distinguishes full-time and part-time employment is that those employments are on-going … on-going employment is employment for an indefinite term subject to rights of termination … It is characterised by a commitment by the employer, subject to rights of termination, to provide the employee with continuous and indefinite employment according to an agreed pattern of ordinary time … A corresponding commitment to provide service is given by the employee.*
>
> *(c) The characteristics that distinguish casual employment is the absence of a 'firm advance commitment from the employer to the continuing and indefinite work according to an agreed pattern of work. Nor does a casual employee provide a reciprocal commitment to the employer'.*
>
> *(d) 'The key indicators of an absence of the requisite firm advance commitment will be irregularity, uncertainty, unpredictability, intermittency and discontinuity in the pattern of work of the employee in question. Those features will commonly reflect the fact that, whilst employed, the availability of work for the employee is short-term and not-ongoing and that the employer's need for further work to be performed by the employee in the future is not reasonably predictable'. Examination of the particular circumstances of an employee's pattern of work is necessary to determine the significance of the pattern; a regular pattern of work may not, in particular circumstances, evidence an advance commitment by an employer.*
>
> *(e) Whether an employer's 'requisite* advance commitment *… is absent or present must be objectively assessed including by reference to the surrounding circumstances created by both the contractual terms and the regulatory regime … applicable to the employment' … '*[T]*he real substance, practical reality and true nature of that relationship will need to be assessed'.*
>
> *(f) The characterisation of employment by the employer or employee (or both) are 'matters to be taken into account in determining the true character of the employment … The payment by the employer and the acceptance by the employee of a casual loading … speaks to the intent of the parties to create casual employment' and will be relevant to the characterisation of the relationship. The engagement or remuneration of an employee on an hourly basis will also be relevant in assessing the relationship of the parties. However, if examination of the real substance, practical reality and true nature of that relationship reveals an objectively demonstrated firm advance commitment to continuing and indefinite work by the employer, self-characterisation as 'a casual' or payment of a 'casual loading' or engagement on an hourly basis will not alter the true characterisation of the relationship as one of full-time or part-time employment. Payment of a casual loading and payment of hourly rates are not determinative factors.*
>
> *(g) Employment arrangements may change over time. Casual employment may become full-time or part-time. '*[R]*epetition of a particular working arrangement may become so predictable and expected that, at some point, it may be possible to say that what began as …* [casual employment] *has become, upon the tacit understanding of the parties, a regular ongoing engagement'.* (original emphasis)

88 This is not a case where the parties discussed whether Mr Day's employment amounted to casual employment. There was some inconsistency in Mr Day's evidence that he categorised the position he held as a full-time role. However, there was clear and largely unchallenged evidence by Mr Day that he worked from 11.00 am - 4.00 pm on Mondays, Tuesdays, Wednesdays and 12.00 noon - 4.00 pm on Saturdays and Sundays, which clearly proved he was not employed full-time.

89 Some timesheets were produced by Mr Day. They did not cover the entirety of the period for which Mr Day was employed by Mr Severn. Mr Severn seeks to rely on an average produced by those timesheets that Mr Day worked 19.23 hours per week over a 32-week period. However, Mr Day maintained that he rarely took time off. Mr Day continued to undertake work for a significant period of time from 2013 to 2018. There was a striking feature of Mr Day's work that it was regular and predictable. It was not a case that Mr Day was contacted at the beginning of each week and advised the number of hours he would be working. Rather, Mr Severn required him to attend the Office on Monday, Tuesday, Wednesday, Saturday and Sunday on the hours required by Australand/Frasers. At no time was Mr Day paid anything other than a flat rate of $25 per hour with there being no casual loading applied to his rate of pay. There was no self-categorisation by the parties that Mr Day was employed on a casual basis. Mr Day's income, as shown in his Income Tax Returns for the periods from 2014 to 2018, was as follows:

- 2014 – $19,433;
- 2015 – $41,875;
- 2016 – $35,656;
- 2017 – $26,613; and
- 2018 – $20,333.

90 Albeit that the average number of hours worked over the 32-week period (from the sample of weekly hours provided by the timesheets) fluctuated from time to time, this was still consistent with an observable pattern occurring on a regular basis. The features of the employment relationships therefore suggest that the practical reality of the relationship between the parties was a firm advance commitment by Mr Severn to Mr Day to continuing and indefinite work in accordance with an agreed pattern and a reciprocal commitment by Mr Day to provide his labour indefinitely and continuously to Mr Severn.

91 I am therefore satisfied that Mr Day was not a casual worker but, rather, was a permanent part-time employee.

92 Mr Severn's submissions in respect to the issue of annual leave were directed to there being insufficient information to properly deal with the claim for entitlement for annual leave under the MCE Act. In particular, it was contended that the claim by Mr Day was simply for an average number of hours over a designated period of time on the assumption that no annual leave had ever been taken. In particular, Mr Severn points to the timesheets submitted by Mr Day (Exhibit 4) that show at various times Mr Day may have been on leave. As a result, in [91] of Mr Severn's outline of final trial submissions it is stated:

> *The Claimant, if able to show that he was an employee and entitled to annual leave will need to provide substantial more detail about exactly what dates he is claiming for unpaid leave, as there is evidence of leave that has already been taken, albeit unpaid, but the time limit to seek payment has expired.*

93 Despite this written submission, Mr Severn's agent accepted during oral submissions that, if accrued annual leave had not been taken, this would not be affected by any limitation period.

94 Exhibit 4 reveal notations that Mr Day was on holiday between:

- 28 September 2015 – 4 October 2015 (five working days);
- 7 March 2016 – 13 March 2016 (five working days);
- 6 June 2016 – 12 June 2016 (five working days);
- 4 March 2017 – 8 March 2017 (five working days);
- 12 August 2017 – 16 August 2017 (five working days); and
- 23 September 2017 – 27 September 2017 (five working days).

95 Section 23(3) of the MCE Act provides that for the purposes of calculating annual leave pursuant to s 23(1) of the MCE Act, '*a **year** does not include any period of unpaid leave*'. There is no dispute on the evidence that Mr Day was not paid for periods which he did not work. There is a lack of clarity on the evidence as to whether or not Mr Day's absence from work during the periods mentioned above was with the permission of Mr Severn. This was not addressed to the requisite standard by Mr Severn. To exclude periods of unpaid leave I need to be satisfied that such a period was with the permission of Mr Severn.

96 Given the lack of clarity on the issue of whether the time noted on the timesheets produced by Mr Day were taken with the permission of or at the discretion of Mr Severn, I am not satisfied that I can find that these periods were unpaid leave.

97 Turning then to the number of hours worked by Mr Day. There was acceptance by Mr Day that on some occasions he worked 23 hours per week and on other occasions he worked less. The timesheets corroborate this evidence. As a result, it is appropriate to calculate Mr Days entitlement by reference to an average as corroborated by the available timesheets.

98 The average number of hours worked per week over 32-week period set out in the timesheets is 19.23 hours. The agreed hourly rate for Mr Day was $25 per hour. Therefore, I am satisfied that pursuant to s 23 of the MCE Act Mr Day was entitled to annual leave that accrued upon the date of termination, being 25 March 2018. Pursuant to s 24(2) of the MCE Act, Mr Day was entitled to be paid for annual leave that accrued at the date of termination.

99 Applying the requirements of s 23(1) of the MCE Act, annual leave is calculated as follows:

19.23/38 hours x 152 hours	= 76.92 hours per year
4.75 years (the number of years worked by Mr Day) x 76.92 hours per year	= 365.37 hours
365.37 hours x $25 per hour	= $9,134.25

Issue 4 – Is Mr Day Entitled To Payment In Lieu Of Notice?

100 Although this is a state based claim, Mr Day relies on s 759 of the FW Act to claim payment in lieu of notice. Section 759 of the FW Act provides as follows:

> *(1) The provisions of Subdivision A of Division 11 of Part 2-2, and the related provisions identified in subsection (2), apply in relation to a non-national system employee as if:*
>
> *(a) any reference in the provisions to a national system employee also included a reference to a non-national system employee; and*
>
> *(b) any reference in the provisions to a national system employer also included a reference to a non-national system employer.*

101 Section 117 of the FW Act deals with the requirement for notice of termination or payment in lieu and falls within Subdivision A of div 11 of pt 2-2 of the FW Act. No issue was taken with the application of that provision to this claim. The only contention raised in respect to this issue by Mr Severn, was that, on Mr Day's own evidence, he had been given no less than two to three weeks' advance notice of the fact that his employment would be terminated. The evidence of Mr Day in his supplementary witness statement was that he had three months' notice of termination of his employment. However, in cross-examination he sought to assert that this was a mistake in the document and that he meant it to read two to three weeks.

Whether Mr Day was given two to three weeks or two to three months' notice, is irrelevant, as the notice, under s 117 of FW Act, must be in writing. No such written notice was given.

102 Pursuant to s 117(2) of the FW Act the amount paid for payment in lieu must be '*at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice*'. Section 117(3) of the FW Act sets out the method for ascertaining the minimum period of notice and for a period of more than three years but not more than five years, the period for payment in lieu is three weeks.

103 There was no written notice given to Mr Day of date of termination of his employment. Accordingly, Mr Day was entitled to be paid three weeks' wages in lieu of notice at his full rate of pay. On the facts that I have found, the average hours worked by Mr Day was 19.23 hours. Accordingly, Mr Day is entitled to payment in lieu of notice calculated as follows:

- 19.23 hours x $25 per hour x 3 weeks = $1,442.25.

Orders

104 Subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), Mr Severn shall pay to Mr Day, $10,576.50 for unpaid annual leave pursuant to the MCE Act and payment in lieu of notice pursuant to s 759 and s 117 of FW Act.

105 I will hear further submissions from the parties in respect to the claim for interest and the claim for a penalty.

J. HAWKINS
INDUSTRIAL MAGISTRATE

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[1] ***Botica v Top Cut TMS Holdings Pty Ltd (ACN 134606661)*** [2020] WAIRC 61 [31].

[2] ***Botica*** [32] - [39].

[3] ***Abdalla v Viewdaze Pty Ltd*** (2003) 53 ATR 30; ***Stevens v Brodribb Sawmilling Co Pty Ltd*** [1986] HCA 1; 160 CLR 16; ***Hollis v Vabu Pty Ltd*** [2001] HCA 44.

[4] ***Karen Bailey v Spangaro (No 1) Pty Ltd*** [2019] FWC 4359 [38] (citing ***Kimber v Western Auger Drilling Pty Ltd*** [2015] FWCFB 3704; 252 IR 1): '*Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like. Control of this sort is indicative of a relationship of employment*'.

[5] Exhibit 11: Mr Severn's Witness Statement [52], [53].

[6] ***Abdulla v Viewdaze Pty Ltd AIRC trading as Malta Travel*** (2003) 53 ATR 30 [42].

[7] [2015] FCAFC 37.

[8] ***Transport Workers Union of Australia v Coles Supermarkets Pty Ltd*** [2014] FCAFC 148 [22].

[9] ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** [2006] FCA 813; 153 IR 426, 438.

[10] ***City of Wanneroo***, 438, 440.

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

[12] ***Kucks v CSR Limited*** (1996) 66 IR 182; ***Amcor Limited v Construction, Forestry, Mining and Energy Union*** [2005] HCA 10; 222 CLR 241.

[13] (1977) 57 WAIG 1317.

[14] See [12] of the Amended Claim.

[15] [2007] WASCA 278.

[16] [2018] FCAFC 131; 264 FCR 536 [172] - [173].

[17] [2020] WAIRC 390.

Schedule 1 – Jurisdiction Of The Western Australian Industrial Magistrates Court

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

[2] The powers, practice and procedure of the IMC are the same as a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA). The onus of proving a claim is on the Claimant and the standard of proof required to discharge this onus is proof '*on the balance of probabilities*'.

[3] When in these reasons I say I am satisfied, that means I am satisfied on the balance of probabilities. The IMC is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit. In ***Sammut v AVM Holdings Pty Ltd [No 2]*** [2012] WASC 27 [40] - [47], Commissioner Sleight examined a similarly worded provision regulating cases in the State Administrative Tribunal of Western Australia, noting:

> [T]he rules of evidence are [not] to be ignored … After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth … The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.

RECEIVED APPLICATION—Matters pertaining to

2021 WAIRC 00065

RECEIVED APPLICATION - UNFAIR DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HALEY PATRICIA HARVEY
	APPLICANT
	-v-
	BURGE, ON-USA
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 11 MARCH 2021
FILE NO/S	REGC 4 OF 2021
CITATION NO.	2021 WAIRC 00065

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 21 January 2021, an application was received for filing by the Commission's Registry. At the time of filing, the prescribed $50 filing fee was not paid;

AND WHEREAS on 21 January 2021 and 22 January 2021, the Commission's Registry attempted to contact the applicant by telephone to discuss the application. On 27 January 2021, an email was sent by the Commission's Registry to the applicant providing general information about the Commission's jurisdiction and was offered the opportunity to seek advice;

AND WHEREAS on 16 February 2021, the Commission's Registry further attempted to contact the applicant. On 23 February 2021, a further email was sent by the Commission's Registry informing the applicant that she was required to pay the prescribed $50 filing fee if she wished to proceed with her application;

AND WHEREAS on 3 March 2021, the application was referred to the Senior Commissioner for directions. The Senior Commissioner directed a letter be sent to the applicant requesting her to advise of her intentions regarding the application by no later than Wednesday, 10 March 2021 and that if no response is received, the application would be discontinued. The applicant failed to respond;

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

THAT the application be and is hereby discontinued.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2021 WAIRC 00054

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2021 WAIRC 00054
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	TUESDAY, 9 MARCH 2021
FILE NO.	**:**	B 167 OF 2019
BETWEEN	**:**	ADRIAN DOYLE Applicant AND ROMAN CATHOLIC BISHOP OF BUNBURY Respondent

CatchWords	:	Application to set aside summons under s 33(2) of the *Industrial Relations Act 1979* - Summons set aside - Order issued
Legislation	:	*Industrial Relations Act 1979* (WA)
Result	:	Summons to witness set aside
Representation:		
Applicant	:	Mr A Doyle
Respondent	:	Mr I Curlewis (of counsel)

Reasons for Decision

1 On 1 July 2020 the name of the respondent was changed to the 'Roman Catholic Bishop of Bunbury' (RCBB) by order [2020] WAIRC 00385.

2 On 12 February 2021 Mr Adrian Doyle issued a summons for Bishop Holohan to give evidence in this matter.

3 The Roman Catholic Bishop of Bunbury (**RCBB**) applied for the summons to be set aside on 26 February 2021. Mr Doyle maintains that the summons ought not be set aside. Both parties consented to this issue being considered and determined on the papers.

4 The RCBB says that the operational and management of employment matters concerning Mr Doyle was at all material times delegated by the Bishop of each Diocese to the Catholic Education Commission of Western Australia (**CEWA**) which in turn delegated operational power to the principal of each school. Bishop Holohan has no knowledge about the terms of the employment contract and is not able to respond to questions concerning the employment contract. The RCBB submits that it would be inefficient and unnecessary for Bishop Holohan to give evidence in this matter.

5 Mr Doyle submitted that the 'legal' employer needs to be verified before the hearing and that CEWA did not become CEWA Ltd until January 2020. Mr Doyle submitted letters dated 14 November 2019 and 22 July 2020 from CEWA contending that the employment authority changed between the Bishop of Bunbury, CEWA and the College Principal several times.

6 Mr Doyle further submits that the attendance of Bishop Holohan is required because he has been misdirected by the RCBB on the issue of the legal identity. Mr Doyle contends that CEWA and the principal have rejected the delegated authority and that witnesses at the hearing will answer questions differently in the presence of Bishop Holohan. Mr Doyle maintains that Bishop Holohan is aware of the employment position, contract, and this matter.

7 The Mr Doyle submitted a letter dated 3 March 2021 he received from Bishop Holohan. The letter advises that Bishop Holohan is unable to say anything about the contract or anything concerning this matter. Mr Doyle states in an email on 4 March 2021 that he 'accept(s) his written response as long as it is included (as papers) in the Commissioner's considerations to set aside the summons by papers'.

8 The RCBB agrees that the letter ought to be considered by the Western Australian Industrial Relations Commission (**Commission**). The RCBB submits that the letter is the only evidence before the Commission and supports the contention that Bishop Holohan's attendance will not assist the Commission; that Bishop Holohan is unable to say anything about the matters in dispute and Mr Doyle has accepted the content of Bishop Holohan's letter.

Principles

9 The purpose of requiring a person to attend before a court or tribunal to give evidence is to ensure that relevant evidence is put before the court or tribunal at the hearing so that justice can be done between the parties.

Application

10 Mr Doyle's submissions in support of refusing to set aside the summons, concerns the legal identity of the employer. I find that the employing authority is the Roman Catholic Bishop of Bunbury as per order [2020] WAIRC 00385. The issue of the legal employing authority was considered and determined at the time this order was made. Mr Doyle has confirmed that he is now not seeking to change the name of RCBB. The RCBB agrees that the named RCBB is the legal employing authority. Therefore, there is no contest as to the legal employing authority and it follows no requirement to adduce evidence as to the legal employing authority.

11 Mr Doyle has not provided any evidence to support his assertion that the RCBB has sought to misdirect him as to the legal employing authority. In any event, if Mr Doyle believes the RCBB in this matter is not the true identity of the employer and the order issued by the Commission ought to be corrected Mr Doyle would need to make an application to amend the name of the RCBB.

12 There is also no evidence concerning Mr Doyle's assertion that other witnesses will answer questions differently in the presence of Bishop Holohan. In any event, a summons requires a person to give evidence and does not require a person be present during the evidence of other persons.

13 The letter from Bishop Holohan to Mr Doyle submitted by Mr Doyle for the consideration of the Commission in this matter sets out that Bishop Holohan does not have any knowledge of the matters before the Commission and therefore does not have any evidence to give.

14 For the reasons set out above I would set aside the summons and an Order to do so will issue.

2021 WAIRC 00055

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN DOYLE
	APPLICANT
	-v-
	ROMAN CATHOLIC BISHOP OF BUNBURY
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 9 MARCH 2021
FILE NO/S	B 167 OF 2019
CITATION NO.	2021 WAIRC 00055

Result	Summons to witness set aside
Representation	
Applicant	Mr A Doyle
Respondent	Mr I Curlewis (of counsel)

Order

HAVING heard from Mr A Doyle on his own behalf and Mr I Curlewis (of counsel) on behalf of the respondent the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT the summons issued to Bishop Gerard Holohan dated 12 February 2021 be and is hereby set aside.

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

2021 WAIRC 00061

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2021 WAIRC 00061
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	WEDNESDAY, 10 MARCH 2021
FILE NO.	**:**	B 37 OF 2020
BETWEEN	**:**	DAMIEN BILLI
		Applicant
		AND
		MACKENZIE MARINE AND TOWAGE PTY LTD
		Respondent

CatchWords	**:**	Contractual benefits claim - Jurisdiction to deal with claim - Whether salary exceeds prescribed amount - Meaning of salary - Compulsory superannuation - Non-compulsory superannuation contributions - Salary exceeds prescribed amount
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29AA(3)
		Industrial Relations (General) Regulations 1997 (WA) pt 3 reg 5
Result	**:**	Application dismissed for want of jurisdiction
Representation:		
Applicant	**:**	Mr G Walsh (as agent)
Respondent	**:**	Mr S Mare (of counsel)

Cases referred to in reasons:

Adrian Ciccotosto v TPS Firepower Pty Ltd [2004] WAIRC 12079; (2004) 84 WAIG 2607

Andjelko Budimlich v J-Corp Pty Ltd [2014] WAIRC 00303; (2014) 94 WAIG 503

Martin Jasper Radford v Coinstar Pty Ltd [2002] WAIRC 05608; (2002) 82 WAIG 1049

Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 84 WAIG 2152

Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) (1986) 67 WAIG 325

The Totalisator Agency Board v Edith Fisher (1997) 77 WAIG 1889

Reasons for Decision

1 Mr Damien Billi applied pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (**IR Act**) for payment of 'Remuneration – Payment of Salary and Superannuation. Salary - $13,421.13 per month; Superannuation - $2,013.17 per month' which he says he is entitled to and has not been paid.

2 At the time Mr Billi applied he was employed as a Tug Master by Mackenzie Marine and Towage Pty Ltd (**Mackenzie**).

3 Mackenzie contend that the Western Australian Industrial Relations Commission (**Commission**) lacks jurisdiction to deal with the matter because Mr Billi's salary exceeds the prescribed amount. Mackenzie assert that s 29AA of the IR Act provides that where an employee's contract of employment provides for a salary that exceeds the prescribed amount the Commission must not determine the claim. Mackenzie also contend that Mr Billi has not identified a benefit under a contract of employment that he has been denied.

4 On 15 September 2020, Mr Billi sought to amend his claim (**amended claim**) as follows:

- The restoration of 30 days of personal leave.
- The back payment of 2 months' salary for the pay periods from 15/02/2020 – 14/03/2020 and from 15/03/2020 – 15/04/2020 in the amount of $26,842.26.
- The back payment of 2 months' superannuation for the pay periods from 15/02/2020 – 14/03/2020 and from 15/03/2020 – 15/04/2020 in the amount of $4026.34.
- The additional back payment of salary and allowances from 1 April 2020 to 14 May 2020 as provided by the new Enterprise Agreement.

5 Mackenzie maintained their objection to the jurisdiction on the basis that the employment contract provided for a salary that exceeded the prescribed amount and as a consequence the Commission is not able to hear and determine Mr Billi's claim.

6 As established in ***Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)*** (1986) 67 WAIG 325 once a question of jurisdiction is raised, the Commission must determine that question before exercising power to resolve the dispute before it.

The Question to be Decided

7 I must decide whether Mr Billi's salary for the purposes of s 29AA of the IR Act exceeds the prescribed amount.

Facts and Evidence

8 It is not in dispute that Mr Billi was employed under a written contract of employment dated 3 December 2016 and cl 4 sets out the remuneration he was to be paid:

> **4. REMUNERATION**
>
> ***Salary***
>
> 4.1 Your salary will be $154,476 per annum. This salary will be paid in lieu of any wages, overtime, allowances or salaries payable under the Award or the Agreement. Base salary increase will be paid on CPI on the 6th of December 2017, 6th of December 2018, 6th of December 2019.
>
> ***Superannuation***
>
> 4.2 The Company will make superannuation contributions of 15%, in accordance with superannuation guarantee legislation. The contributions will be made to a complying fund of your choice.
>
> ***Payment of salary***
>
> 4.3 Your salary will be paid on a monthly basis on the 15th day of each month, (or before if the 15th is a weekend day or Public holiday) by electronic funds transfer to your nominated financial institution.

9 Clause 4.1 of the contract provides annual increases in salary, and at the time of the application (20 March 2020) Mr Billi's employment contract provided for a base salary of $161,053.56, payment of a statutory superannuation contribution of $15,300.08 and an additional payment in the form of a further employer superannuation contribution of $8,857.95.

10 The parties do not agree on the period that ought be considered material for this matter (**the material period**). The parties also differ on the payment received by Mr Billi during the material period. Mr Billi contends that the payment received is a total of his base salary, statutory superannuation and additional superannuation contributions during 15 April 2019 to 15 April 2020. Mackenzie contend that the relevant payments that are to be considered are the base salary and the additional superannuation contributions. The statutory superannuation payments are to be excluded. Mackenzie say that the material period is the twelve months prior to the date of Mr Billi's claim, being made on 20 March 2020.

11 Given the dispute as to the facts concerning the material period and the salary received, the Commission convened a scheduling conference to determine the process for hearing evidence if the facts remained in dispute. Both parties expressed a strong preference for the matter of jurisdiction to be determined on the papers.

Principles

12 The jurisdiction to enquire into and deal with an industrial matter is conferred by s 23(1) of the IR Act to hear and determine a claim. Section 29(1)(b)(ii) of the IR Act provides standing to an employee to bring a claim: ***Matthews v Cool or Cosy Pty Ltd*** [2004] WASCA 114; (2004) 84 WAIG 2152.

13 Acting under the power conferred by s 23(1) and s 29(1)(b)(ii) of the IR Act, the Commission may hear and determine an industrial matter referred by an employee that is a claim of a benefit the employee claims to be entitled under his or her contract of employment.

14 Section 23(1) of the IR Act cannot be read in isolation, or only together with s 29(1)(b)(ii). Both of these provisions must be read with the restrictions set out in s 29AA(4) and s 29AA(5) of the IR Act. This approach applies the principle that the IR Act is to be read as a whole. Section 29AA(4) and s 29AA(5) of the IR Act are very specific provisions that operate to prohibit the Commission from determining a claim where the contract of employment of the employee who seeks to refer the claim pursuant to s 29(1)(b)(ii) of the IR Act provides for a salary that exceeds the prescribed amount.

15 The limitation provided for in s 29AA(4) and s 29AA(5) of the IR Act prevails to read down the general jurisdiction to enquire into and deal with an industrial matter conferred in s 23(1) of the IR Act when the matter referred is a claim that an employee has not been allowed a benefit to which he or she is entitled to under the contract of employment.

16 Section 29AA(4) and s 29AA(5) of the IR Act clearly provides a limitation on claims referred pursuant to s 29(1)(b)(ii) of the IR Act that can be determined by the Commission:

> (4) The Commission must not determine a claim that an employee has not been allowed by his or her employer a benefit to which the employee is entitled under a contract of employment if —
>
> (a) an industrial instrument does not apply to the employment of the employee; and
>
> (b) the employee's contract of employment provides for a salary exceeding the prescribed amount.
>
> (5) In this section —
>
> ***industrial instrument*** means —
>
> (a) an award; or
>
> (b) an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section; or
>
> (c) an industrial agreement; or
>
> (d) an employer-employee agreement;
>
> ***prescribed amount*** means —
>
> (a) $90 000 per annum; or
>
> (b) the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section.

17 The relevant regulation which specifies the 'prescribed amount' is reg 5 of the *Industrial Relations (General) Regulations 1997* (WA) (**Regulations**):

> **5. Prescribed amount — section 29AA**
>
> (1) For the purposes of paragraph (b) of the definition of "prescribed amount" in section 29AA(5) of the Act the specified salary is $90 000, or that amount as affected by indexation in accordance with regulation 6.
>
> (2) For the purposes of paragraph (b) of the definition of "prescribed amount" in section 29AA(5) of the Act the salary provided for in an employee's contract of employment is to be worked out as follows —
>
> (a) for an employee who was continuously employed by an employer and was not on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the greater of —
>
> (i) the salary that the employee actually received in that period; and
>
> (ii) the salary that the employee was entitled to receive in that period;
>
> (b) for an employee who was continuously employed by an employer and was on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the total of —
>
> (i) the actual salary received by the employee for the days during that period that the employee was not on leave without full pay; and

(ii) for the days that the employee was on leave without full pay an amount worked out using the formula —

$$\frac{\text{remuneration mentioned in subparagraph (i)} \times \text{days on leave without full pay}}{\text{days not on leave without full pay;}}$$

or

(c) for an employee who was continuously employed by an employer for a period less than 12 months immediately before the dismissal or claim — the amount worked out using the formula —

$$\frac{\text{remuneration received} \times 365}{\text{days employed.}}$$

18 The definition of salary is important for the purposes of the calculation of an employee's salary concerning the prescribed amount.

19 As set out in ***The Totalisator Agency Board v Edith Fisher*** (1997) 77 WAIG 1889 (***TAB***); and ***Andjelko Budimlich v J-Corp Pty Ltd*** [2014] WAIRC 00303; (2014) 94 WAIG 503 [22] the elements of a salary are those payments that are fixed periodically and are paid for regular work or services.

20 In ***Adrian Ciccotosto v TPS Firepower Pty Ltd*** [2004] WAIRC 12079; (2004) 84 WAIG 2607 [16] (***Ciccotosto***) the Commission concluded that disbursement of remuneration at an employee's discretion under a more beneficial tax arrangement does not reduce the salary for the purposes of s 29AA of the IR Act. In ***Martin Jasper Radford v Coinstar Pty Ltd*** [2002] WAIRC 05608; (2002) 82 WAIG 1049 (***Radford***) the Commission held that superannuation contributions paid by an employer in addition to contributions prescribed by law, were to be included in the salary.

Application

21 I find that the prescribed amount for the period commencing 1 July 2019 and ending on 1 July 2020 of $166,680 is the relevant determination for consideration of this matter.

22 Mr Billi's remuneration included a base salary, statutory superannuation payments and additional superannuation contributions paid to his nominated fund by his employer. I find that at the time of making the application Mr Billi's contract of employment provided for a gross annual salary of $161,053.56 and statutory super of an amount equivalent to 9.5% ($15,053.56) and additional superannuation contributions of an amount equivalent to 5.5% ($8,857.95).

23 I do not include the amount of paid statutory superannuation payments in the 'salary' paid to Mr Billi. This amount is an obligation placed on the employer by a statutory scheme. Consistent with ***TAB*** and ***Ciccotosto*** I find that the payments identified as 'Employer Superannuation Contribution' that are additional contributions to Mr Billi's superannuation fund are payments that are regular and paid for services rendered and computed by time. The disbursement of salary by way of contribution to a superannuation fund is a beneficial tax arrangement and should be included for determining his salary for the purpose of s 29AA of the IR Act.

Applicant's Claim

24 At the time of making the application Mr Billi contended his contract of employment provided for a gross annual salary of $161,053.56 and that during the 'last twelve months' he received a salary of $129,930.89. Mr Billi asserted that on the basis that he received less than $166,680 the Commission is able to determine the claim. Mr Billi did not provide the dates for the 'last twelve months' nor the appropriate method to be applied within reg 5 of the Regulations. Calculations relied on, if any, for the purposes of reg 5 of the Regulations were not provided.

25 Mackenzie submits that the material period for the purposes of s 29AA of the IR Act is the 12 months immediately before the date of the claim, being 20 March 2020. During that period Mr Billi had not been paid for 35 days and received payments of $154,987.95 which excluded the statutory superannuation contributions. These facts would result in a salary, for the purposes of s 29AA of the IR Act of $171,426.07.

26 Mr Billi made a further submission that asserted he received $138,395.81 in salary and superannuation payments in the period of 15 April 2019 to 15 April 2020. Mr Billi provided scanned copies of his pay slips. Mr Billi contended that as he received $138,395.81 in salary and superannuation payments and this was below the prescribed amount therefore the Commission was able to hear and determine his claim.

27 Following an objection from Mackenzie it was resolved that the pay slip for the period 15 May 2019 to 14 June 2019 had been omitted from the information and materials provided by Mr Billi. The addition of the salary and superannuation payment for that month result in Mr Billi having received $153,632.03 in salary and superannuation for the period Mr Billi claims is material

28 Consistent with ***Radford*** I consider the applicant is not correct to include payments received for statutory superannuation. The elements of the salary received by Mr Billi are his base salary and the amount equivalent to 5.5% of the base salary, being for additional contributions to his superannuation fund.

29 In his submissions Mr Billi sets out that he was paid 30 days personal leave for which he sought to be restored to his leave entitlement through this application. The days for which personal leave was paid are not specified. Mr Billi also seeks the payment of two months' salary and superannuation which he contends he was not paid.

30 The payslips submitted by Mr Billi show that he did not receive his usual salary and superannuation payments for two pay periods being 15 February 2020 to 14 March 2020 (29 days) and 15 March 2020 to 15 April 2020 (32 days). That is Mr Billi's claim includes a period of 61 days that he did not receive his salary and superannuation payments, that he was on leave without pay.

31 Taking Mr Billi's contentions, the preceding 12 months as being 15 April 2019 to 15 April 2020 with 61 days of that period being unpaid, Mr Billi received a base salary of $133,707.05 and additional superannuation payments of $7,358.89. The total salary received, excluding the statutory compulsory superannuation payments, by Mr Billi was $141,060.94.

32 Mr Billi's submissions set out his contention that the salary he received during the period ought be used to determine whether his salary exceeded the prescribed amount. However, this does not correctly apply reg 5(2) of the Regulations. Mr Billi's submissions state that for a period of 61 days he was not paid. As such the formula in reg 5(2)(b) of the Regulations, applies and results in a salary of $169,365.93. Mr Billi's salary exceeds the prescribed amount.

33 Alternately if there is not a period of leave without pay, reg 5(2)(a) of the Regulations sets out that the salary to be used is the greater of either the salary that the employee actually received in that period and the salary that the employee was entitled to receive. Applying this formula the greater is the salary entitled to be received which is $169,911.51. The amount exceeds the prescribed amount.

34 Alternately Mackenzie contends that the 12 months immediately preceding the claim being 21 March 2019 to 20 March 2020 is the material period to consider. During this period Mr Billi was not paid for 35 days. In this scenario the base salary and additional superannuation, excluding the statutory compulsory superannuation payments, received is $154,987.95. Applying reg 5(2)(b) of the Regulations, results in a salary of $177,426.07. This amount exceeds the prescribed amount.

35 Mr Billi disputes the accuracy of the payroll summary provided by Mackenzie on the basis that they are 'entirely false and inaccurate'. No evidence was submitted in support of this assertion.

Amended Claim

36 On 15 September 2020 Mr Billi submitted an application to amend his claim. The amended claim maintained that he received $153,632.03 in salary during the period 15 April 2019 to 15 April 2020. The amended claim refers to the prescribed salary being $172,200.

37 I find that the making of an amended claim does not change the prescribed amount that ought to apply to this matter. The prescribed amount for the purposes of determining Mr Billi's claim is $166,680. Mr Billi's claim was made on 20 March 2020 and the period for which he claims a benefit to which he is entitled and has been denied concerns a period up until 15 April 2020. The prescribed amount of $172,200 was set for a period commencing 1 July 2020. Mr Billi does not provide any evidence nor authorities for the assertion that the prescribed salary that ought be applied is one that concerns a period some months after the period material to the claim.

38 Mr Billi's amended claim cites the text of reg 5(2)(b) of the Regulations, however the relevant calculations are not set out. Regulation 5(2)(b) of the Regulations sets out the formula to be applied in circumstances where an employee was on leave without pay for any time during the preceding period of 12 months immediately before the dismissal or claim. Despite citing the text of the regulation, Mr Billi's amended application maintains that the salary he received, being $153,632.03 is the correct salary to assess the prescribed amount. Clearly this is incorrect. This amount includes statutory superannuation which ought be excluded. In addition, the correct application of reg 5 of the Regulations and the formula in reg 5(2)(b) of the Regulations results in a salary of $169,365.93. This salary exceeds the relevant prescribed amount.

39 Both Mr Billi's original claim and amended claim included payment received for overtime of $871.66 during 20 May 2019 to 19 June 2019. Inclusion of occasional overtime payments remains an open question in this matter. However, it is one that need not be determined as the removal of this amount does not result in a salary calculated in accordance with the Regulations, which is lower than the prescribed amount.

Conclusion

40 For the reasons set out above I conclude that Mr Billi's salary exceeds the prescribed amount and I do not have jurisdiction to hear and determine his claim.

2021 WAIRC 00062

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAMIEN BILLI
	APPLICANT
	-v-
	MACKENZIE MARINE AND TOWAGE PTYLLTD
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 10 MARCH 2021
FILE NO/S	B 37 OF 2020
CITATION NO.	2021 WAIRC 00062

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr G Walsh (as agent)
Respondent	Mr S Mare (of counsel)

Order

HAVING heard from Mr G Walsh (as agent) on behalf of the applicant and Mr S Mare (of counsel) 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 is hereby dismissed for want of jurisdiction

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

2021 WAIRC 00048

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2021 WAIRC 00048
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	TUESDAY, 1 SEPTEMBER 2020 AND BY WRITTEN SUBMISSIONS FRIDAY, 11 SEPTEMBER 2020, FRIDAY, 18 SEPTEMBER 2020
DELIVERED	**:**	WEDNESDAY, 3 MARCH 2021
FILE NO.	**:**	B 94 OF 2018
BETWEEN	**:**	WARREN MEDCRAFT
		Applicant
		AND
		METLABS AUSTRALIA PTY LTD
		Respondent

CatchWords	**:**	Industrial Law (WA) - Application for denied contractual benefits - Applicant claims oral contract variation - Claim not made out
Legislation	**:**	
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr G McCorry (as agent)
Respondent	**:**	Mr G Rogers (of counsel)

Decision

1 Warren Medcraft worked for Metlabs Australia Pty Ltd from June 2013 to July 2018. At various times over the course of his employment his employer paid to him money over and above his ordinary salary.

2 Mr Medcraft says that the amounts were paid to him pursuant to an oral agreement, having contractual effect, between him and Mr Kristopher Townend, the Managing Director of the respondent, made in early 2015.

3 Mr Medcraft says the exact terms of the agreement were that he would receive, in addition to his ordinary salary, a sum equating to 2.5% of the respondent's profit in any year, where a profit was made.

4 Mr Medcraft says that for the financial year 2017-2018 he was denied that contractual benefit.

5 In support of his claim Mr Medcraft points to the following:

(1) his evidence of the meeting at which the agreement was allegedly made;

(2) the evidence of Ms Kay Heald to the effect that she was present at the meeting and heard the oral agreement reached and that she was, in fact, subject to an agreement on the same terms; and

(3) evidence that Mr Medcraft and Ms Heald subsequently received money in addition to their ordinary salary which, it is claimed, equated to 2.5% of the respondent's profits, where a profit was made.

6 The evidence corresponding to (1) above is found at paragraph 3 of Mr Medcraft's first witness statement:

> In early 2015, Kris Townend, General Manager Ashley Thomsett, Administration Manager Kay Heald and I had a Business Review Meeting at the Kewdale Hotel. It was held at the hotel because Kris Townend did not want to be disturbed by work issues. We each discussed matters relevant to our work and also discussed the profit and loss figures. Kay had provided us with copies and the P&L Statement. At the end of the meeting Kris said that we were doing very well and he would give us a share of the profit. I don't remember whether any figures were discussed but we were happy. I do not recall what anyone said in response.

7 The evidence corresponding to (2) above is found at paragraph 3 of Ms Kay Heald's first witness statement:

> In what I recall as being around the middle of May 2015, the four of us, Townend, Thomsett, Medcraft and myself had a general management meeting at the Kewdale Hotel followed by lunch. We sat outside and discussed the profit and loss figures for the year to date. I had taken a copy of the profit and loss statement to the meeting and we all went through it. The business was doing well and at the end of the meeting Kris said to all of us that we were doing very well and he would give us a share of the profit and said it would be 10 percent split four ways, so 2.5 percent each. We agreed and all shook hands with Kris.

8 In relation to (3) above there is no evidence in exactly these terms at all. Amounts paid in addition to ordinary salary were paid to Mr Medcraft in two subsequent financial years when the respondent made a profit, and not in the financial year it did not, but those payments were not 2.5% of the profit. Even on the best analysis of the figures for Mr Medcraft's claim it could only be said, quoting from paragraph 20 of the applicant's written closing submissions:

> … the net bonus payments made to the applicant, Ms Heald and Mr Thomsett, when superannuation and tax were added to those figures were each approximately 2.5 percent of the MYOB generated net profit figure for 2014/2015 and the accountant adjusted net profit figures for 2016/2017.

9 In relation to the evidence at (1) and (2) Mr Townend gave the following corresponding evidence:

> I recall that in or about May 2015, Ashley, Kay, Warren and myself went to the Kewdale Hotel.
>
> I do not recall what the meeting was about or exactly what was discussed. I do recall that the meeting was informal and was not a formal management meeting.
>
> Although I cannot recall exactly what was discussed, I do not believe I would have ever discussed profit sharing, bonuses, cash gifts or anything of that sort in such a public place with a number of employees present. At all times I have considered these were private matters and would have only ever discussed them one on one with an employee in private. The only time I can recall talking about any possible bonus payment with other Metlabs employees present was in the 2012 Accounting Meeting.

10 Mr Ashley John Thomsett, the other person present, gave evidence as follows:

> I recall attending a meeting at the Kewdale Hotel in or about the middle of 2015. I do not recall exactly what was discussed. I recall that Kris Townend, Warren Medcraft and Kay Heald were present. I do recall that Metlabs' financial position and its profit and loss for that financial year was discussed. The meeting then moved onto more of an informal gathering where we had lunch and some drinks rather than a more formal management meeting. There was no discussion about any bonuses, profit sharing or anything like that.

11 Mr Medcraft only has Mr Townend saying, having seen the profit and loss for 2015, that "we were doing very well and he would give us a share of **the** profit" (*my emphasis*). Mr Medcraft says he cannot remember whether any figures were discussed. Alone that evidence could not possibly make out the claim.

12 Ms Heald's version has Mr Townend speaking about only the 2014-2015 financial year. She has him saying, having looked at the profit and loss as at May 2015 that year, "we were doing very well and he would give us a share of **the** profit" (*my emphasis*).

13 No one gave evidence that the promise was of the kind Mr Medcraft's claim alleges, that is a variation to the contract so that Mr Medcraft received 2.5% of any profits made into the future.

14 The evidence that the agreement stretched into the future is evidence that the amounts of subsequent payments made in excess of ordinary salary were 2.5% of the profit made in those years. But those payments were not 2.5% of profit. They were, even on the applicant's case, "approximately" 2.5% of the "MYOB generated net profit" in 2014-2015 and 2.5% of the "accountant adjusted net profit" for 2016-2017 and then only "when superannuation and tax were added."

15 The evidence, even taken at its highest for the applicant, cannot make out the claim.

16 I note here that Mr Medcraft asserts that the deal struck at the Kewdale Hotel replaced a deal he had struck with Mr Townend in the previous year. I do not understand the relevance of that evidence and in fact, if I was to accept it, it must, as a matter of common sense, do damage to Mr Medcraft's claim. The 2014 deal was significantly better than the Kewdale Hotel deal and yet Mr Medcraft attempts no explanation for accepting the later deal without demur.

17 I note also that there was some evidence about a meeting in June 2017 where it is said Mr Townend said he was "happy with how we were doing and that there would be bonuses this year". Whether or not words to this effect were said by Mr Townend at that meeting is, in terms of what took place at the Kewdale Hotel, neither here nor there. Those words did not reference, let alone reiterate or reinforce, what the applicant and Ms Heald say was said at that Kewdale Hotel meeting. In fact, this evidence supports that Mr Townend revisited the issue of bonuses each year.

18 As a matter of fact, I find that the applicant's case, even when taken at its highest, does not make out the claim.

19 Further, even if the evidence had all lined up, and the applicant had been paid exactly 2.5% of profit, with the profit being calculated in the same way and paid applying the same formula, this may have provided pause for thought on the facts but would not have changed the outcome. This is because there was nothing contractual about the agreement said to have been made.

20 There is nothing in the way of evidence of consideration attaching to the parties' enjoyment of the bargain said to have been struck. There was no suggestion that the applicant gave up an opportunity elsewhere or did anything at all in response to, or reliance upon, the promise alleged to have been made. He did not go on working for the respondent in circumstances where absent the promise he may have left. There was no practical benefit provided to the respondent as a result of the promise said to have been made.

21 My view, on both the facts and the law, was that Mr Townend liked to, adopting the vernacular, 'bung' his employees some money from time to time. There was nothing predictable or formal about it. It was certainly not contractual.

2021 WAIRC 00050

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WARREN MEDCRAFT
	APPLICANT
	-v-
	METLABS AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 3 MARCH 2021
FILE NO/S	B 94 OF 2018
CITATION NO.	2021 WAIRC 00050

Result	Application dismissed
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Mr G Rogers (of counsel)

Order

HAVING heard from the Mr G McCorry, as agent, for the applicant and Mr G Rogers, of counsel, for the respondent on Thursday, 1 September 2020 and by written closing submissions on Friday, 11 September 2020 and Friday, 18 September 2020;

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

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

UNIONS—Matters dealt with under Section 66

2021 WAIRC 00052

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TREVOR WILSON
	APPLICANT
	-v-
	THE MASTER PLUMBERS AND GASFITTERS ASSOCIATION OF WA (UNION OF EMPLOYERS)
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 3 MARCH 2021
FILE NO/S	PRES 4 OF 2019
CITATION NO.	2021 WAIRC 00052

Result	Discontinued by leave
Representation	
Applicant	Ms J Grant of counsel
Respondent	Mr S Heathcote of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Senior Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders —

THAT the application be discontinued by leave.

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

PRACTICE NOTES—

2021 WAIRC 00066

The Western Australian Industrial Relations Commission

PRACTICE NOTE 1 OF 2021

Delivery of reserved decisions

Introduction

1. Practice Note 1 of 2021 is issued by The Western Australian Industrial Relations Commission (the **Commission**) for the purpose of informing parties to matters before it of the general practice around the delivery of reserved decisions.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 1 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

Practice of Commission

3. It is the general practice of the Commission to deliver reserved decisions as soon as practicable after the completion of the hearing.

Communication between the Commission and parties

4. Commissioners may indicate an approximate time frame to parties for a particular decision to be delivered, taking into account their other commitments. In some cases, it is necessary to deliver a decision as a matter of urgency. Other cases, where the issues to be determined are more complex or where there have been lengthy hearings, or hearings involving considerable reference material or evidence, a longer period of time may be required for the Commissioner to write and deliver their reasons for decision.
5. It is difficult to set specific time frames within which Commissioners will deliver their decisions. That is because there are times when Commissioners' workloads are high, meaning the time available to them for writing decisions is sometimes insufficient.
6. Parties or their legal practitioners or agents should not feel inhibited from making enquiries regarding the progress of a decision which has not been delivered within any time frame given to them at the conclusion of the hearing.
7. Where a party to proceedings wishes to enquire about the time being taken for the delivery of a reserved decision, they, or where applicable, their legal practitioner or agent, should contact the Associate to the Commissioner concerned. In the case of a Full Bench or Commission in Court Session matter, contact should be made with the Associate to the presiding Commissioner.
8. If, after having contacted the relevant Associate, the party (or their legal practitioner or agent) wishes to pursue their enquiry further, they may raise the matter with the Chief Commissioner in writing.

Relevant legislation

Industrial Relations Act 1979, ss 22B, 27, 28, 113.

Industrial Relations Commission Regulations 2005, reg 39.

Useful resources

9. The Commission's website contains additional resources.

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

2021 WAIRC 00067

The Western Australian Industrial Relations Commission

PRACTICE NOTE 2 OF 2021

Inspection and search of Commission records

Introduction

This Practice Note 2 of 2021 replaces Practice Note 1 of 2000, issued on 28 June 2000.

1. Practice Note 2 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing interested persons of the process required to be undertaken when seeking to inspect or search the Commission's records.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* (**the IR Act**) and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 2 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

Conducting searches

3. No search of Commission files, records or documents is to be conducted by any officer of the Commission for or on behalf of any member of the public, department, organisation or body.

Due diligence searches

4. Searches of the Commission's due diligence database may be conducted by interested persons, with the approval of the Registrar. Due diligence searches are conducted to determine whether a company (or an individual) has been, or still is, involved in proceedings before the Commission.
5. All requests to conduct a due diligence search must be made in writing to the Commission. Requests will be accepted via email, post, or facsimile, or delivered in person to the Commission's Registry.
6. The party requesting the search is responsible for conducting the search or assigning an alternative party to conduct the search on their behalf. Any requesting party outside of Perth who cannot attend the Commission will be required to contact an agent in Perth to conduct the search for them.
7. The Commission's due diligence database contains records of the Commission and the Industrial Magistrate's Court (WA) dating back to 1999.

Inspection of Commission records

8. No active Commission file is to be inspected without the consent of the Commissioner to whom the matter has been allocated. Where the matter is before a Full Bench, the consent of the presiding Chief Commissioner or Senior Commissioner must be sought, and in the case of a Commission in Court Session, the consent of the presiding Commissioner.
9. Subject to par 8 above, all applications, notices of appeal, responses, counter-proposals and transcripts of proceedings (provided that the Commission has not made an order preventing any such inspection) shall be available for inspection at the office of the Registrar during office hours.
10. All documents filed with the Registrar under s 63 and s 65 of the IR Act may be inspected at the office of the Registrar during office hours.
11. No information produced in evidence in proceedings before the Commission under s 33(5) of the IR Act will be available for production or inspection unless an order is made by the Commission permitting it.
12. Subject to this Practice Note, persons who have an interest, in the opinion of the Registrar, may inspect a decision (as defined in s 7 of the IR Act), including the reasons for decision, provided that a sufficient interest wider than idle interest or mere curiosity is established.
13. No fees or charges are applicable in relation to the inspection of the Commission's records.

Requests for copies of Commission records

14. Copies of Commission records may be provided upon request. Such requests should be made via the Commission's Registry. Applicable fees and charges are set out in *Fees and charges* below.

Fees and charges

15. In accordance with the Industrial Relations (General) Regulations 1997, the following fees and charges apply:

Due diligence search (per named entity)	$20.00 each
Transcript of Commission proceedings	$3.30 per page
Photocopy of a document	$0.22 per page

Relevant legislation

Industrial Relations Act 1979, ss 7, 27, 28, 33, 63, 65, 113.

Industrial Relations Commission Regulations 2005, regs 39, 80.

Industrial Relations (General) Regulations 1997, Sch 1, Sch 2.

Useful resources

16. The Commission's website contains additional resources.

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

2021 WAIRC 00068

The Western Australian Industrial Relations Commission

PRACTICE NOTE 3 OF 2021

Written and oral submissions to the Full Bench and the Commission in Court Session

Introduction

1. Practice Note 3 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing appellants/applicants, respondents, interveners and objectors to matters listed for hearing and determination before the Full Bench of the practice required to be undertaken concerning the filing of documents.

2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 3 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

Exclusion to comply with this Practice Note

3. The Full Bench may, in any appeal or application made to it, direct that an unrepresented party need not comply with this Practice Note in whole or in part, if in all the circumstances the Full Bench considers it appropriate to do so.

Required Practice

4. Subject to par 3 above, in any appeal or other matter listed for hearing and determination by the Full Bench or the Commission in Court Session, unless it is directed otherwise, the following practice applies.

5. The appellant/applicant is to file a written outline of submissions, and a list of the legislation and authorities they rely upon at least 14 calendar days prior to the date and time listed for the hearing of the matter.

6. A copy of the appellant/applicant's documents filed in accordance with par 5 above, will be served on the respondent and any intervener or objector by the Registrar within 24 hours of filing.

7. The respondent and any intervener or objector are to file a written outline of submissions, and a list of the legislation and authorities they rely upon at least seven calendar days prior to the date and time listed for the hearing of the matter.

8. A copy of the respondent's (and any intervener or objector's) documents filed in accordance with par 7 above will be served on the applicant/appellant by the Registrar within 24 hours of filing.

9. Any legislation or authorities which the appellant/applicant, respondent, intervener, or objector intends to refer to or read from at the hearing should be marked with an asterisk (*).

10. In circumstances where par 9 above is complied with, parties are not required to provide hard copies of that legislation and/or those authorities to the Full Bench or the Commission in Court Session, at the hearing of the matter.

11. In accordance with s 61 of the Interpretation Act 1984, where the last day of filing of a written outline of submissions falls on an 'excluded day' (…Saturday, Sunday, public service holiday, and a bank holiday or public holiday throughout the State… - see s 61(2)), the time for filing an outline of submissions will be the next business day.

Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 49, 55, 66, 67, 72, 72A, 73, 82, 84, 84A, 113.

Interpretation Act 1984, s 61.

Industrial Relations Commission Regulations 2005, regs 39, 59, 60, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 102, 103.

Useful resources

12. The Commission's website contains additional resources.

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

2021 WAIRC 00069

The Western Australian Industrial Relations Commission

PRACTICE NOTE 4 OF 2021

Providing copies of decisions to the Commission during proceedings

Introduction

1. Practice Note 4 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing parties to matters before it of the acceptable formats of decisions of courts and tribunals that are submitted during proceedings.

2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 4 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

Acceptable formats

3. In any proceedings before the Commission, parties seeking to provide copies of decisions of the Commission, or any other courts or tribunals, may do so by providing those decisions in any of the formats set out below:

   (a) a version of the decision downloaded from the website of the Australasian Legal Information Institute (AustLII) at AustLII, in the 'signed by AustLII' format; or

   (b) a version of the decision published in a series of law reports by a commercial publisher on a council of law reporting; or

   (c) a version of the decision from an alternative source in a format that the Commission deems acceptable.

4. When providing a decision to the Commission in accordance with par 3(a) above, parties are first required to verify that the copy submitted has not been replaced by a more recent version. Parties can undertake this verification by accessing the 'verify version' link within the electronic copy of the 'signed by AustLII' version of the decision published on the AustLII website.

Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 113.

Industrial Relations Commission Regulations 2005, reg 39.

Useful resources

5. The Commission's website contains additional resources.

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

2021 WAIRC 00070

The Western Australian Industrial Relations Commission

PRACTICE NOTE 5 OF 2021

Appeals and applications before the Full Bench and the Commission in Court Session – want of prosecution

Introduction

This Practice Note 5 of 2021 replaces Practice Note 1 of 2005, issued on 18 November 2005.

1. Practice Note 5 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) and is to be applied in circumstances where appeals or applications have been filed in the Commission's Registry but not actively progressed by the appellant/applicant, their legal practitioner or agent.

2. In accordance with s 113(1) of the *Industrial Relations Act 1979* (**the IR Act**) and reg 39(3) of the Industrial *Relations Commission Regulations 2005* (**the Regulations**), Practice Note 5 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

Referring inactive matters to the Full Bench and the Commission in Court Session

3. The Registrar or Deputy Registrar must bring before the Full Bench an appeal or an application within the jurisdiction of the Commission in Court Session, which has not been progressed by an appellant/applicant, their legal practitioner or agent, for a period of more than six months from the date of the previous action having been taken with respect to that matter.

4. In accordance with par 3 above, before referring the matter to the Chief Commissioner or Senior Commissioner on behalf of the Full Bench, or the presiding Commissioner of the Commission in Court Session, the Registrar must first have served, in accordance with the Regulations, a Form 17 – Notice of Hearing upon all relevant and/or interested parties to the matter.

5. On the date of the hearing, the Full Bench, or the Commission in Court Session as the case may be, will allow parties, interveners, objectors, or s 72A(5) IR Act participants an opportunity to be heard in relation to:

   (a) any interlocutory orders or directions that ought to be made;

   (b) whether the appeal or application, or any part of it, should be dismissed or otherwise dealt with in accordance with s 27 of the IR Act; and

   (c) whether any, and if so what, other orders or directions should be made.

Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 49, 55, 66, 67, 72, 72A, 73, 82, 84, 84A, 113.

Industrial Relations Commission Regulations 2005, regs 39, 59, 60, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 102, 103

Useful resources

6. The Commission's website contains additional resources.

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

2021 WAIRC 00071

The Western Australian Industrial Relations Commission

PRACTICE NOTE 6 OF 2021

Interlocutory proceedings before the Full Bench and its presiding Commissioner, the Commission in Court Session or the Chief Commissioner sitting alone

Introduction

This Practice Note 6 of 2021 replaces Practice Note 2 of 2001, issued on 23 May 2001.

1. Practice Note 6 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**). This Practice Note only has application in proceedings before the Commission which are constituted by a Full Bench and its presiding Commissioner, the Commission in Court Session or the Chief Commissioner sitting alone, where the parties are represented by legal practitioners or agents.

2. In accordance with s 113(1) of the *Industrial Relations Act 1979* (**the IR Act**) and reg 39(3) of the *Industrial Relations Commission Regulations 2005* (**the Regulations**), Practice Note 6 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

Interlocutory applications

3. In all interlocutory matters, the parties will file a written outline of submissions, to which their respective arguments will be confined.

4. The applicant must file their outline of submissions at the time of filing their application unless the Commission otherwise directs.

5. The respondent must file its response to the applicant's application within three calendar days.

6. The applicant may file any additional submissions in reply to the respondent's response within a further three calendar days.

7. The Commission, at its discretion, may fix alternative time limits to those set out in pars 4, 5 and 6 above where circumstances require that to occur.

8. The Commission may also, at its discretion, limit oral arguments, conduct interlocutory proceedings by telephone or video-link, or decline to hear oral submissions in cases where written submissions have been filed.

9. In accordance with reg 32A of the Regulations, the Commission may decide in a particular case that it is appropriate for interlocutory proceedings to be determined by conducting a hearing on the papers.

Applications to stay the operation of a Commission order

10. This Practice Note, with any required modifications, also applies to any interlocutory proceedings before the presiding Commissioner of a Full Bench in an application made to stay the operation of a Commission order, pursuant to s 49(11) of the IR Act.

Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 49, 55, 66, 67, 71, 71A, 72, 73, 84A, 113.

Industrial Relations Commission Regulations 2005, regs 20, 21, 22, 23, 24, 27, 32A, 35, 36, 39.

Useful resources

11. The Commission's website contains additional resources.

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

2021 WAIRC 00072

The Western Australian Industrial Relations Commission

PRACTICE NOTE 7 OF 2021

Public Service Arbitrator Reclassification Applications

Introduction

This Practice Note 7 of 2021 replaces Practice Note 1 of 2018, issued on 23 May 2018.

1. Practice Note 7 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing employees, employers and relevant registered organisations of the process required to be undertaken when seeking the reclassification of a position within the public sector.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 7 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

General approach

3. The Public Service Arbitrator encourages discussion between the parties and the disclosure of relevant information and documentation at all stages of the reclassification application process.
4. Before an applicant requests that an application be listed for hearing, the employer should have made the applicant fully aware of the reasons of the employer (and of the classification review committee) for rejecting the application for reclassification. This should include a copy of any report presented to and relied on by the employer for its consideration. However, it should be recognised that such reports are not always accepted by employers and accordingly, may be of little use to the applicant in considering their situation. Whether such a report may be relied upon in the hearing of the application will be a matter for the Public Service Arbitrator to determine. The applicant should have had the opportunity to consider their position, after assessing the employer's reasons, before deciding to proceed with their application.
5. It should be recognised that, in determining reclassification applications, the Public Service Arbitrator is performing a review of the decision made by the employer, including the conclusions of the classification review committee. It is not appropriate for parties to adopt an adversarial approach to the proceedings. There will be an opportunity for each party to ask questions of witnesses for the purposes of clarification and elaboration. However, this is not cross-examination in the sense usually undertaken in hearings before the Commission generally.
6. The reclassification application should be based on the material that was before the employer and not on new material that was not previously considered. Where an applicant seeks to pursue an application based in part or in whole on new material not considered by the employer, or the employer seeks to introduce new material or reasons for rejecting the application, the Public Service Arbitrator is likely to not proceed with the application until that new material has been considered.

Procedure

7. Unless it is directed otherwise, the following practice applies.
8. At least seven calendar days before the hearing of the application, the applicant is to provide the Public Service Arbitrator with a written statement of the facts upon which the applicant relies to support the application and any relevant witness statement(s).
9. A copy of the applicant's written statement and any witness statement(s) will be served on the employer, or its legal practitioner or agent, by the Registrar.
10. At least three calendar days before the hearing, the employer is to provide the Public Service Arbitrator with a written statement of the basis upon which it relies to refuse or otherwise question the application and any relevant witness statement(s).

11. A copy of the employer's written statement and any witness statement(s) will be served on the applicant, or the applicant's legal practitioner or agent, by the Registrar.
12. The material included in the parties' statements is the primary evidence to be considered by the Public Service Arbitrator. Where there is a need for oral evidence, witnesses may be asked questions by the other party with a view to clarifying or eliciting information. However, this is not an opportunity for cross-examination of a party in the traditional sense.
13. The evidence presented to the Public Service Arbitrator should be confined to that information provided to the employer for consideration of the application for reclassification and the employer's reasons for refusing the application.
14. The hearing of the application will proceed on the following basis:
    (a) the applicant or the applicant's legal practitioner or agent may, if desired, make a brief opening statement to outline the basis of the application;
    (b) the applicant may give evidence to support the application which, in the normal course of events, will be confined to those matters raised in the written statements submitted by the applicant and the employer;
    (c) the employer may then question the applicant;
    (d) the applicant may then be re-questioned in light of the employer's questioning;
    (e) the applicant may call any other witnesses;
    (f) the case for the applicant then closes;
    (g) the employer, or through its legal practitioner or agent, then opens its case and in doing so may make a brief opening statement;
    (h) the employer may give evidence to support its position which, in the normal course of events, will be confined to those matters raised in the written statements submitted by the applicant and the employer;
    (i) the applicant may then question the employer;
    (j) the employer may then be re-questioned as a result of the applicant's questioning;
    (k) the employer may then call any other witnesses;
    (l) the case for the employer then closes; and
    (m) both parties may then make brief closing statements.
15. A period of 1.5 hours is normally set aside for the hearing of each application for reclassification.

Operative date

16. The normal practice is that successful reclassification applications are effective from the date on which the employee formally notified the employer that a reclassification is sought and provided sufficient information to enable a proper consideration of the application to be made.

Relevant legislation

Industrial Relations Act 1979, ss 27, 28, Pt IIA Div 2, 113.

Industrial Relations Commission Regulations 2005, reg 39, Pt 12.

Useful resources

17. The Commission's website contains additional resources.

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

2021 WAIRC 00073

The Western Australian Industrial Relations Commission

PRACTICE NOTE 8 OF 2021

Concurrent expert evidence

Introduction

This Practice Note 8 of 2021 replaces Practice Note 1 of 2006, issued on 28 June 2006.

1. Practice Note 8 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) to provide guidance in relation to the process adopted by the Commission when dealing with concurrent expert evidence.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 8 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

Practice of Commission

3. Where more than one expert witness is to be called in a matter and the Commission decides that the evidence of the expert witnesses will be heard together, unless the Commission otherwise determines, the procedures set out below in *Prior to the hearing* and *At the hearing* should be followed.

Prior to the hearing

4. As soon as possible after the filing of the experts' reports prior to the hearing, the Commission will advise the parties' legal practitioners or agents of the intention of the Commission to hear the evidence of expert witnesses together and direct the parties to advise the expert witnesses to be called by them:
   (a) that the Commission requires the experts to meet and confer with one another in the absence of the parties and their legal practitioners or agents;
   (b) that the object of the experts conferring is for them to prepare a written statement containing the matters in their respective reports about which they agree, and to identify any matters in their respective reports about which they disagree and the reasons for that disagreement;
   (c) that the expert witnesses are to use their best endeavours to reach an agreement;
   (d) that the expert witnesses are to each sign the written statement and arrange for one of them to lodge it with the Commission, and give copies of it to the parties, no less than three days before the commencement of the hearing; and
   (e) that if any of the expert witnesses considers that further work is required to be done before the written statement can be finalised, the expert witnesses should prepare and sign the written statement in relation to those matters which are able to be agreed and identify in that document what further work is required to be done. The expert witnesses should complete any further work as quickly as possible and complete, sign and lodge with the Commission a further written statement and give copies of it to the parties.

At the hearing

5. The Commission will call the expert witnesses to give evidence together and each will be sworn in by the Associate.
6. The Commission will arrange for the expert witnesses to be seated at a table where their evidence may be conveniently transcribed and heard by the Commission and each of the parties and their legal practitioners or agents.
7. The Commission will then explain the procedure to be followed and ask the expert witnesses if they have any questions regarding that procedure.
8. The Commission will then mark the filed written statement as an exhibit.
9. The Commission will then ask questions of the expert witnesses.
10. The Commission will then give the expert witnesses an opportunity to ask each other any questions which they consider might assist the Commission.
11. The Commission will then provide an opportunity for the expert witnesses to be asked questions by the parties or their legal practitioners or agents.
12. The Commission will then ask the expert witnesses if any matters arise from the questions asked by the parties or their legal practitioners or agents upon which any of them wishes to comment and give them an opportunity to do so.
13. That will then complete the evidence given by the expert witnesses and they will then be discharged from giving evidence.

Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 33, 113.

Industrial Relations Commission Regulations 2005, regs 39, 45.

Useful resources

14. The Commission's website contains additional resources.

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

2021 WAIRC 00074

The Western Australian Industrial Relations Commission

PRACTICE NOTE 9 OF 2021

Witness outlines and witness statements

Introduction

1. Practice Note 9 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing parties to matters before it of the general practice in relation to witness outlines and witness statements.

2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 9 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

General

3. As a general approach, and subject to any direction made by a Commissioner, in accordance with this Practice Note, evidence in chief from a witness in a hearing will be given orally.

4. There may be circumstances where, given the nature of the case, such as the number of witnesses to give evidence in a hearing and the likely nature of that evidence, that a Commissioner may make directions for the filing of witness outlines or witness statements. Such directions will only generally be made if this course will assist in the expeditious and just determination of a matter.

5. In cases where a witness's evidence is likely to be contentious, involving the memory of a witness, or will involve matters of credit of the witness, then directions for the filing of witness statements are unlikely to be made.

Witness statements

6. Where a Commissioner has made directions for the filing of witness statements, the written statement will be the evidence the witness would have given orally in chief. When the witness adopts the statement in the hearing, it will stand as the witness's evidence in chief. Generally, a witness will not be able to give further evidence in chief, without the leave of the Commission.

7. If in a witness statement a witness refers to a document, a copy of that document should be attached to the statement and marked as "Annexure 1, 2, 3 etc".

8. At the hearing of a matter, when the witness is called to give evidence, a copy of the witness statement will be produced, and the witness asked to identify it. Subject to any objections as to its content, the witness statement will then be tendered into evidence and given an exhibit number.

Witness outlines

9. A witness outline is not a witness statement and is not tendered into evidence. It is an outline of the evidence it is expected a witness will give in a hearing.

10. A witness outline must only cover matters relevant to the case. It should refer to the topics the witness will give evidence about and the substance of that evidence, including any important conversations.

11. Where a document is referred to in a witness outline, it should be identified clearly and if a copy of the document has not been provided to the other party or access to it has not been provided, a copy of the document should be annexed to the witness outline.

12. Subject to any order or direction a Commissioner may make, a witness outline may not be used to cross-examine the witness, without the leave of the Commission.

Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 33, 113.

Industrial Relations Commission Regulations 2005, regs 39, 43.

Useful resources

13. The Commission's website contains additional resources.

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

2021 WAIRC 00075

The Western Australian Industrial Relations Commission

PRACTICE NOTE 10 OF 2021

Evidence or submissions by telephone or video-link

Introduction

1. Practice Note 10 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing parties to matters before it, of the general practice in relation to the taking of evidence or the making of submissions in proceedings before the Commission, by telephone or by video-link.

2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 10 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

General

3. The taking of evidence or the making of submissions in matters before the Commission by telephone or video-link may be permitted on application to the Commission by a party to the proceedings.

4. Subject to any order or direction a Commissioner may make, the party seeking to have evidence taken or submissions made by telephone or video-link may be responsible for any costs involved.

Application

5. The party seeking to have evidence given or submissions made by telephone or video-link must make an application to the Commission in accordance with reg 44 of the *Industrial Relations Commission Regulations 2005* using Form 1A – Multipurpose Form.

Obligations on a party

6. If an application to have evidence taken or submissions made by video-link is approved by the Commission, the relevant party must ensure that any video-link equipment is compatible with the Commission's equipment.

7. The Associate to the presiding Commissioner will arrange a test prior to the day that the evidence is to be given or submissions are to be made, to ensure that the video-link equipment is of the appropriate quality and is operational.

8. To prepare for evidence to be given by telephone or video-link, the party calling the witness must take several steps prior to the hearing including:

   (a) The witness is in a quiet and private room that may be closed off such that only the person appearing, and any other person permitted by the Commission, is present.

   (b) The witness has advised the form of oath or affirmation to be taken and in the case of an oath, the witness has available to them an appropriate religious text.

   (c) Ensuring the witness has with them a copy of any witness statement they have made and any documents to which they will refer in giving their evidence. Any such documents not already on the Commission's file must be lodged in the Registry no later than two clear days prior to the hearing and a party must ensure that the application number of the matter and the names of the parties are clearly marked on a covering page.

   (d) Explaining to the witness that giving evidence by telephone or video-link is an extension of a hearing room and is a formal proceeding before the Commission.

Obligations on a witness

9. A witness must be present at the video-link facility no later than 15 minutes prior to giving their evidence.

10. A witness must be appropriately dressed to reflect the solemnity of the proceedings before the Commission.

Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 33, 113.

Industrial Relations Commission Regulations 2005, regs 39, 44.

Useful resources

11. The Commission's website contains additional resources.

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

2021 WAIRC 00076

The Western Australian Industrial Relations Commission

PRACTICE NOTE 11 OF 2021

Electronic devices in hearing rooms

Introduction

1. Practice Note 11 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing parties to matters before it of the general practice in relation to the use of electronic devices in hearing rooms in Commission proceedings.

2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 11 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

General

3. Unless permitted by a Commissioner or by this Practice Note, electronic devices may not be used in any hearing room.

4. Additionally, an electronic device may not be used in a hearing room:

   (a) to record or digitally transcribe the proceedings except as permitted by this Practice Note or by a Commissioner;

   (b) in a way that disrupts the hearing room recording system or other equipment;

   (c) to record video images, to take photographs, to generate sound or require speaking into the device; or

   (d) in any manner that disrupts the solemnity of the proceedings or the decorum in the hearing room.

5. Members of the legal profession, registered industrial agents and self-represented parties may use an electronic device to send and receive text-based messages provided the device is in silent mode, does not interfere with proceedings and earphones are not used.

Accredited media

6. Subject to any order or direction of a Commissioner, accredited media, who may be required by Commission staff to produce photo identification issued by their media organisation, may use electronic real-time text-based communications and social media for the purposes of accurate reporting of proceedings.

7. This is subject to the accredited media representative not interrupting the proceedings and ensuring that any suppression or other non-publication orders are not contravened. Additionally, any such communications must not enable witnesses excluded from a hearing room until they are called, from being informed about the content of evidence being adduced by a witness.

8. Any such audio recording made by an accredited media representative must not be broadcast or published in any way.

No restriction

9. This Practice Note does not alter or detract from the restriction on the publication of proceedings in a hearing room under the *Industrial Relations Act 1979* (WA) or by order or direction of the Commission.

Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 33, 113.

Industrial Relations Commission Regulations 2005, reg 39.

Useful resources

10. The Commission's website contains additional resources.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2021 WAIRC 00041

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL WEGENER
	APPLICANT
	-v-
	THE TRUSTEE FOR COTTESLOE HOTEL TRUST & THE TRUSTEE FOR RICHMOND EQUITY FUND
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 18 FEBRUARY 2021
FILE NO.	B 119 OF 2020
CITATION NO.	2021 WAIRC 00041

Result	Direction issued
Representation	
Applicant	Mr Daniel Wegener
Respondent	Mr Ron Jones (as agent)

Direction

HAVING heard from the applicant on his own behalf and Mr R Jones (as agent) on behalf of the respondent the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the applicant file and serve any signed witness statements and documents upon which he intends to rely by no later than 2 months prior to the date of the hearing;
2. THAT the respondent file and serve any signed witness statements and documents upon which they intend to rely by no later than 1 month prior to the date of the hearing;
3. THAT the applicant file and serve a written outline of submissions and any list of authorities upon which he intends to rely by no later than 14 days prior to the date of the hearing;
4. THAT the respondent file and serve a written outline of submissions and any list of authorities upon which they intend to rely by no later than 7 days prior to the date of the hearing;
5. THAT the matter be listed for hearing for 1 day on a date to be fixed; and,
6. THAT the parties have liberty to apply on short notice.

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

2021 WAIRC 00043

DISPUTE RE RELOCATION OF CANNINGVALE 3-4 BUSH FIREFIGHTING APPLIANCE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	DEPARTMENT OF FIRE AND EMERGENCY SERVICES
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 25 FEBRUARY 2021
FILE NO/S	C 25 OF 2020
CITATION NO.	2021 WAIRC 00043

Result	Order issued, joining a party
Representation	
Applicant	Ms R Cosentino (of counsel)
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Ms R Cosentino (of counsel) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

THAT the Fire and Emergency Services Commissioner be and is hereby joined as a party of this application.

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

2021 WAIRC 00045

DISPUTE RE RELOCATION OF CANNINGVALE 3-4 BUSH FIREFIGHTING APPLIANCE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	DEPARTMENT OF FIRE AND EMERGENCY SERVICES AND FIRE AND EMERGENCY SERVICES COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 26 FEBRUARY 2021
FILE NO.	C 25 OF 2020
CITATION NO.	2021 WAIRC 00045

Result	Direction issued
Representation	
Applicant	Ms R Cosentino (of counsel)
Respondent	Mr J Carroll (of counsel)

Direction

HAVING heard from Ms R Cosentino (of counsel) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondents the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the United Professional Firefighters Union of Western Australia file and serve an amended grounds and relief sought by 4:00pm on 26 February 2021;
2. THAT evidence in chief in this matter be adduced by signed witness statements which will stand as the evidence in chief on this matter;
3. THAT the United Professional Firefighters Union of Western Australia file and serve witness statements by 5 March 2021;
4. THAT the Department of Fire and Emergency Services AND the Fire and Emergency Services Commissioner file any further witness statements by 12 March 2021;
5. THAT the matter be listed for hearing for 1 day on 16 March 2021; and
6. THAT the parties have liberty to apply on short notice.

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

2021 WAIRC 00040

DISPUTE RE RESPONDENT'S DECISION TO PREVENT UNION MEMBER TO ATTEND PCC MEETINGS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 17 FEBRUARY 2021
FILE NO.	CR 1 OF 2021
CITATION NO.	2021 WAIRC 00040

Result	Recommendation made
Representation	
Applicant	Mr D Stojanoski (of counsel)
Respondent	Mr A Clark (as agent)

Recommendation

HAVING heard Mr D Stojanoski, of counsel, for the applicant and Mr A Clark, as agent, for the respondent during conferences pursuant to section 44 *Industrial Relations Act 1979* on Wednesday, 27 January 2021 and Tuesday, 16 February 2021

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby recommend that Mr Ken Brown attend meetings of the Prisons Consultative Committee held pursuant to clause 175.2 Department of Justice Prison Officers' Industrial Agreement 2020 and on the express understanding that such attendance not be used in aid of future argument on his behalf.

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

2021 WAIRC 00042

APPEAL AGAINST THE DECISION OF THE CHIEF COMMISSIONER IN PRES 5/2020

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	ANNE LORNA BEST
	APPELLANT
	-v-
	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH
	RESPONDENT
CORAM	BUSS J
DATE	THURSDAY, 25 FEBRUARY 2021
FILE NO/S	IAC 1 OF 2021
CITATION NO.	2021 WAIRC 00042

Result	Programming Order Issued

Programming Order

Programming Orders made:

1. By 4.00 pm on 10 March 2021, the respondent is to file and serve written submissions in support of its notice of motion dated 23 February 2021.
2. By 4.00 pm on 24 March 2021, the appellant is to file and serve written submissions in response.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2021 WAIRC 00051

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY RAYMOND MORAN
	APPLICANT
	-v-
	WORKSAFE WA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 3 MARCH 2021
FILE NO.	OSHT 7 OF 2020
CITATION NO.	2021 WAIRC 00051

Result	Direction issued
Representation	
Applicant	Ms V Kafentzis (of counsel)
Respondent	Ms S Arif (of counsel)

Direction

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

1. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as evidence in chief;
2. THAT the applicant file and serve upon the respondent any witness statements upon which he intends to rely by no later than 5 March 2021;
3. THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely by no later than12 March 2021;

4. THAT the respondent be at liberty to adduce further evidence in chief if required as a result of the amended date of Direction 2 by 26 March 2021;
5. THAT the parties provide any rebuttal statements by 26 March 2021;
6. THAT the applicant file and serve upon the respondent an outline of submissions by no later than 1 April 2021;
7. THAT the respondent file and serve upon the applicant an outline of submissions by no later than 9 April 2021;
8. THAT the parties shall give notice to each other of any witnesses required to attend the hearing for cross-examination at least 3 days prior to the hearing 16 April 2021;
9. THAT the matter is listed for 3 days on 21 April 2021, 22 April 2021 and 23 April 2021; and
10. THAT the parties have liberty to apply on short notice.

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

2021 WAIRC 00063

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 DECEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL JOHN MILLWARD
	APPELLANT
	-v-
	CHIEF EXECUTIVE, NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL
	MS J COATES – BOARD MEMBER
	MS J AUERBACH – BOARD MEMBER
DATE	WEDNESDAY, 10 MARCH 2021
FILE NO.	PSAB 1 OF 2021
CITATION NO.	2021 WAIRC 00063

Result	Directions issued
Representation	
Appellant	Ms J Edinger (of counsel)
Respondent	Mr J Carroll (of counsel)

Direction

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

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 1 April 2021;
2. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 23 April 2021;
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 7 May 2021;
4. THAT the appellant file a written outline of submissions by 21 May 2021;
5. THAT the respondent file a written outline of submissions by 28 May 2021;
6. THAT the matter be listed for a 2-day hearing not before 7 June 2021;
7. THAT discovery be informal; and
8. THAT the parties have liberty to apply.

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

2021 WAIRC 00064

APPEAL AGAINST A DECISION TO TERMINATE EMPLOYMENT (OTHER THAN S.78(1) PSM ACT OR S.172 HEALTH SERVICES ACT 2016) - S.80I(1)(D)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WILDALIZ DE JESUS AROCHO
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL
	MR M GOLESWORTHY – BOARD MEMBER
	MR G BROWN – BOARD MEMBER
DATE	THURSDAY, 11 MARCH 2021
FILE NO.	PSAB 3 OF 2021
CITATION NO.	2021 WAIRC 00064

Result	Direction issued
Representation	
Appellant	Mr M Giles (as agent)
Respondent	Mr D Barratt (as agent)

Direction

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

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 23 April 2021;
2. THAT the appellant file a witness statement for herself, outlines of evidence for each of her other witnesses and documents, other than the agreed documents, on which she intends to rely, by 10 May 2021;
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 24 May 2021;
4. THAT the appellant file written submissions by 8 June 2021;
5. THAT the respondent file written submissions by 22 June 2021;
6. THAT discovery be informal; and
7. THAT the parties have liberty to apply.

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

2021 WAIRC 00032

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 SEPTEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICHOLAS CHURCHILL
	APPELLANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR R THORNTON - BOARD MEMBER
	MS S YOUNG - BOARD MEMBER
DATE	THURSDAY, 11 FEBRUARY 2021
FILE NO	PSAB 28 OF 2020
CITATION NO.	2021 WAIRC 00032

Result	Application adjourned
Representation	
Appellant	Ms M Saraceni (of counsel)
Respondent	Mr T Pontre (of counsel)

Order

HAVING heard from Ms M Saraceni of counsel on behalf of the appellant and Mr T Pontre 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 application PSAB 28 of 2020 be adjourned until 9 April 2021.

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

2021 WAIRC 00036

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 24 NOVEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY STEVEN PORTEUS
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR C BROWN - BOARD MEMBER
	MS T BORWICK - BOARD MEMBER
DATE	MONDAY, 15 FEBRUARY 2021
FILE NO	PSAB 36 OF 2020
CITATION NO.	2021 WAIRC 00036

Result	Directions issued
Representation	
Appellant	In person
Respondent	Mr S Pack (of counsel)

Direction

Having heard from the appellant on his own behalf and from Mr S Pack 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 18 March 2021;
2. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 1 April 2021;
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 19 April 2021;
4. THAT the appellant file a written outline of his submissions by 4 May 2021;
5. THAT the respondent file a written outline of its submissions by 18 May 2021;
6. THAT the matter be listed for a 2-day hearing;
7. THAT the parties have liberty to apply; and
8. THAT discovery be informal.

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

2021 WAIRC 00037

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 24 NOVEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY STEVEN PORTEUS
	APPELLANT
	-v-
	DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR C BROWN - BOARD MEMBER
	MS T BORWICK - BOARD MEMBER
DATE	MONDAY, 15 FEBRUARY 2021
FILE NO	PSAB 36 OF 2020
CITATION NO.	2021 WAIRC 00037

Result	Order issued
Representation	
Appellant	In person
Respondent	Mr S Pack (of counsel)

Order

HAVING heard from the appellant on his own behalf and Mr S Pack of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT the name of the respondent be amended to Director General, Department of Mines, Industry Regulation and Safety.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Greens (WA) Inc. Staff Agreement 2020 - The AG 1/2021	02/15/2021	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	The Greens (WA) Inc.	Commissioner D J Matthews	Agreement Registered

RECLASSIFICATION APPEALS—

2021 WAIRC 00039

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EOIN O'BRIAIN
	APPLICANT
	-v-
	DEPARTMENT OF LOCAL GOVERNMENT SPORT AND CULTURAL INDUSTRIES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 16 FEBRUARY 2021
FILE NO	PSA 3 OF 2019
CITATION NO.	2021 WAIRC 00039

Result	Application discontinued
Representation	
Applicant	On his own behalf
Respondent	N/A

Order

WHEREAS on 15 February 2021 the applicant wrote to the Public Service Arbitrator by email and asked that application PSA 3 of 2019 be discontinued;

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

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

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