Western Australian

# Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 6 WEDNESDAY 23 JUNE, 2021 Vol. 101—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—
101 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

## UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

**2021 WAIRC 00147**

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | STEVEN LIONEL KEAN |
| | **APPLICANT** |
| | **-v-** |
| | PRESIDENT OF LEGISLATIVE COUNCIL KATE DOUST, DEPARTMENT OF PREMIER AND CABINET, ROBIN SCOTT MLC |
| | **RESPONDENTS** |
| **CORAM** | CHIEF COMMISSIONER S J KENNER |
| **DATE** | TUESDAY, 25 MAY 2021 |
| **FILE NO/S** | U 96 OF 2020, U 121 OF 2020 |
| **CITATION NO.** | 2021 WAIRC 00147 |

| | |
|---|---|
| **Result** | Discontinued by leave |
| **Representation** | |
| **Applicant** | Mr S Kean |
| **Respondent** | Mr D Anderson of counsel and with him Mr M McIlwaine of counsel |

*Order*

WHEREAS the applicant sought and was granted leave to discontinue the applications, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the applications be discontinued by leave.

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

# CONFERENCES—Matters referred—

**2021 WAIRC 00137**

**DISPUTE RE UNION MEMBER'S TRANSFER IN ROLE**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) |
| | **APPLICANT** |
| | **-v-** |
| | NORTH METROPOLITAN HEALTH SERVICE |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE ARBITRATOR<br>COMMISSIONER T EMMANUEL |
| **DATE** | TUESDAY, 18 MAY 2021 |
| **FILE NO** | PSACR 20 OF 2020 |
| **CITATION NO.** | 2021 WAIRC 00137 |

| | |
|---|---|
| **Result** | Application discontinued |
| **Representation** | |
| **Applicant** | Ms P Marcano (as agent) |
| **Respondent** | Ms M Gillam (as agent) |

*Order*

WHEREAS this is an application made under s 44 of the *Industrial Relations Act 1979* (WA);

WHEREAS on 17 May 2021 the applicant filed a notice of discontinuance in the Registry;

WHEREAS the respondent does not object to this application being discontinued;

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

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

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

# CORRECTIONS—

**2021 WAIRC 00150**

**WA HEALTH SYSTEM - HSUWA - PACTS INDUSTRIAL AGREEMENT 2020**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | NORTH METROPOLITAN HEALTH SERVICE, CHILD AND ADOLESCENT HEALTH SERVICE, EAST METROPOLITAN HEALTH SERVICE |
| | **APPLICANTS** |
| | **-v-** |
| | HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE ARBITRATOR<br>COMMISSIONER T EMMANUEL |
| **DATE** | FRIDAY, 28 MAY 2021 |
| **FILE NO** | PSAAG 9 OF 2020 |
| **CITATION NO.** | 2021 WAIRC 00150 |

| | |
|---|---|
| **Result** | Correcting order issued |
| **Representation** | |
| **Applicants** | Ms C Holmes (as agent) |
| **Respondent** | Ms N Kefford (as agent) |

*Correcting Order*

WHEREAS the *WA Health System – HSUWA – PACTS Industrial Agreement 2020* was registered as an industrial agreement by the Public Service Arbitrator's order [2020] WAIRC 01002 on 30 December 2020;

AND WHEREAS on 10 March 2021 the applicants made an application to the Public Service Arbitrator for an order to correct typographical errors in the *WA Health System – HSUWA – PACTS Industrial Agreement 2020* they say were caused by the inadvertence of the parties' representatives (**Application**);

AND WHEREAS the applicants ask that the Public Service Arbitrator issue an order correcting the typographical errors outlined in the 'Table of Proposed Amendments' in schedule B of the Application, which is reproduced below (**Table**);

AND WHEREAS the respondent consents to the Public Service Arbitrator making the corrections set out in the Table;

AND WHEREAS the parties have provided to the Public Service Arbitrator a copy of the *WA Health System – HSUWA – PACTS Industrial Agreement 2020* which has been corrected in accordance with the Table and which is attached to this order;

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

THAT the *WA Health System – HSUWA – PACTS Industrial Agreement 2020* be corrected in relation to the typographical errors outlined in the 'Table of Proposed Amendments' in schedule B of the Application, reproduced here:

**Table of Proposed Amendments**

| Page Number | Clause | Amendment | Reason |
|---|---|---|---|
| 3 | Cl 2 | Replace 'Torres Straight Islanders' with 'Torres Strait Islanders'. | Typing error |
| 4 | Cl 3.1 | Replace 'WA Health System – HSUWA – PACTS – Industrial Agreement 2020.' with 'WA Health System – HSUWA – PACTS Industrial Agreement 2020.' | Typing error |
| 7 | Cl 5.7 | Replace 'WA Health System – HSUWA – PACTS – Industrial Agreement 2018' with 'WA Health System – HSUWA – PACTS Industrial Agreement 2018'. | Typing error |
| 11 | Cl 9.2(c) | Replace 'positionthat' with 'position that' and replace 'witin' with 'within'. | Typing error |
| 16 | Cl 9.10(d) and cl 9.10(e) | Insert a line between cl 9.10(d) and cl 9.10(e) | Formatting error |
| 20 | Cl 9.24 | Replace 'WA Health System – HSUWA – PACTS – Industrial Agreement 2020' with 'WA Health System – HSUWA – PACTS Industrial Agreement 2020'. | Typing error |
| 26 | Cl 12.8(a)-(d) | Adjust paragraph indents to align with the rest of the agreement. | Formatting error |
| 32 | Cl 15.5(g) | Replace '(iii) cost implications;' with '(ii) cost implications;'. | Typing error |
| 49 | Cl 18.5(a) | Insert 'Art Therapist;' in the list of callings before 'Audiologist' and insert 'Music Therapist;' in between 'Medical Scientist' and 'Neurophysiology Technologist'. | Inadvertent omission |
| 52 | Cl 18.11(a)(i) | Replace cross-reference to cl 18.9(a) with cl 17.10(a). | Incorrect subclause reference |
| 52 | Cl 18.11(a)(ii) | Replace cross-reference to cl 18.9(b)(iii) with cl 17.10(b)(iii). | Incorrect subclause reference |
| 52 | Cl 18.11(a)(iii) | Replace cross-reference to cl 18.9(c)(iii) with cl 17.10(c)(iii). | Incorrect subclause reference |
| 76 | Cl 35.1 | Replace 'employee who does not, the the course of their duties' with 'employee who does not, during the course of their duties'. | Typing error |
| 101 | Cl 42.18 | Adjust paragraph indents to align with the rest of the agreement. | Formatting error |

| Page Number | Clause | Amendment | Reason |
|---|---|---|---|
| 102 | Cl 43.1 and cl 43.2 | Adjust formatting so that the text is justified in the same way as the rest of the agreement. | Formatting error |
| 102 | Cl 43.1 | In both cases, replace '13 weeks paid Long Service Leave' with '13 weeks' paid Long Service Leave'. | Typing error |
| 106 | Cl 44.4(e) | Replace cross-reference to cl 42.4(d) with cl 44.4(d). | Incorrect subclause reference |
| 112 | Cl 44.19(a) | Replace cross-reference to cl 44.4(a) with cl 44.2(a). | Incorrect subclause reference |
| 113 | Cl 44.19(m) | Replace cross-reference to cl 44.4(h) with cl 44.2(h) | Incorrect subclause reference |
| 115 | Cl 45.5 | Insert '(WA)' after '*State Superannuation Act 2000*' and after '*State Superannuation Regulations 2001*'. | Typing error |
| 125 | Title before cl 53.5 | Bold the title '*Access to Family and Domestic Violence Leave*'. | Formatting error |
| 128 | Cl 55 | Replace 'Torres Straight Islanders' with 'Torres Strait Islanders'. | Typing error |
| 132 | Cl 57.3(b) | Replace 'Removal Allowance' with 'removal allowance'. | Typing error |
| 138 | Cl 61.5 | Replace cross-reference to 'section 114' with 'section 141'. | Typing error |
| 143 | Cl 65.3(a) | Replace 'Paythe' with 'Pay the'. | Typing error |
| 146 | Cl 68.5(a) and cl 68.5(b) | Adjust paragraph indents to align with the rest of the agreement. | Formatting error |
| 146 | Cl 68.3(e) | Insert '(WA)' after '*Employment Dispute Resolution Act 2008*'. | Typing error |
| 148 | Schedule 1, Part 12 | Replace '$131,304' with '$131,198'. | Typing error |
| 152 | Schedule 4, Column B | Replace cross-reference to 'clause 25.5' with 'subclause 25.6'. | Incorrect subclause referenced |

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

# PROCEDURAL DIRECTIONS AND ORDERS—

**2021 WAIRC 00132**

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** DAVID EASTCOTT

**APPLICANT**

**-v-**

EC PROJECTS PTY LTD

**RESPONDENT**

**CORAM** COMMISSIONER T B WALKINGTON
**DATE** THURSDAY, 13 MAY 2021
**FILE NO.** B 13 OF 2021
**CITATION NO.** 2021 WAIRC 00132

**Result** Direction issued
**Representation**
**Applicant** Mr C Fogliani (of counsel)
**Respondent** Mr D Brajevic

*Direction*

HAVING heard from Mr C Fogliani (of counsel) on behalf of the applicant and Mr D Brajevic on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the directions hearing listed for 2:15 pm on Thursday, 13 May 2021 is vacated;
2. THAT by no later than 4:30 pm on 10 June 2021, the parties shall file an agreed statement of facts;
3. THAT by no later than 4:30 pm on 24 June 2021, the applicant will file and serve his written outline of submissions, an outline of evidence for any witnesses upon whose evidence he wishes to reply, and copies of any authorities on which they rely;
4. THAT by no later than 4:30 pm on 8 July 2021, the respondent will file and serve its written outline of submissions, an outline of evidence for any witnesses upon whose evidence they rely, and copies of any authorities on which they rely;
5. THAT by no later than 4:30 pm on 15 July 2021, if required, the applicant will file and serve further written submissions in reply, an outline of evidence for any witnesses upon whose evidence they rely, and copies of any authorities on which they rely;
6 THAT chambers will liaise with the parties to find a suitable date no earlier than 22 July 2021 for the matter to be listed for hearing;
7. THAT evidence at the hearing will be by way of viva voce evidence; and
8. THAT the parties have liberty to apply.

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

---

**2021 WAIRC 00151**

**DISPUTE RE JOB SECURITY REVIEW PROVISIONS IN UNION AGREEMENTS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | UNITED WORKERS UNION (WA), HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) |
| | **APPLICANTS** |
| | **-v-** |
| | NORTH METROPOLITAN HEALTH SERVICE, CHILD AND ADOLESCENT HEALTH SERVICE, EAST METROPOLITAN HEALTH SERVICE & OTHERS |
| | **RESPONDENTS** |
| **CORAM** | COMMISSIONER T EMMANUEL |
| **DATE** | MONDAY, 31 MAY 2021 |
| **FILE NO/S** | C 20 OF 2021 |
| **CITATION NO.** | 2021 WAIRC 00151 |

| | |
|---|---|
| **Result** | Order issued |
| **Representation** | |
| **Applicants** | Ms N Kefford & Ms S Sayed (as agents) |
| **Respondents** | Mr L Martyr (as agent) |

*Order*

HAVING heard from Ms N Kefford and Ms S Sayed (as agents) on behalf of the applicants, and Mr L Martyr (as agent) on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT 'PathWest Laboratory Medicine WA' be added as a respondent to this application.

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

---

**2021 WAIRC 00152**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 DECEMBER 2020**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2021 WAIRC 00152 |
| **CORAM** | : | PUBLIC SERVICE APPEAL BOARD<br>COMMISSIONER T EMMANUEL – CHAIR<br>MS J AUERBACH – BOARD MEMBER<br>MS J COATES – BOARD MEMBER |
| **HEARD** | **:** | WEDNESDAY, 5 MAY 2021 |
| **DELIVERED** | **:** | FRIDAY, 4 JUNE 2021 |
| **FILE NO.** | **:** | PSAB 1 OF 2021 |
| **BETWEEN** | **:** | MICHAEL JOHN MILLWARD<br>Appellant<br>AND<br>CHIEF EXECUTIVE, NORTH METROPOLITAN HEALTH SERVICE<br>Respondent |

| | | |
|---|---|---|
| CatchWords | **:** | Public Service Appeal Board – Discovery – Documents not relevant to what is in issue – Documents not necessary for the fair disposal of the case |
| Legislation | **:** | *Industrial Relations Act 1979* (WA): s 27(1)(o) |
| Result | **:** | Discovery application dismissed |
| **Representation:** | | |
| Appellant | **:** | Ms F Stanton (of counsel) |
| Respondent | **:** | Mr J Carroll (of counsel) |

**Cases referred to in reasons:**

***Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel & others*** (1995) 75 WAIG 1801

***Calvert v PathWest Laboratory Medicine WA*** [2019] WAIRC 00792

***Civil Service Association of Western Australia Incorporated v Director General, Education Department of WA*** [2001] WAIRC 03773

***Ellis v The Grand Lodge of WA of Antient Free and Accepted Masons Incorporated & others*** (1998) 79 WAIG 1736

***Mollinger v National Jet Systems Pty Ltd*** (C no 5 of 1998, unreported, Dec 279/99 M Print R3130)

***Sexton v Pacific National (ACT) Pty Ltd*** (U2002/5282, unreported, PR931440)

*Reasons for Decision*

1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).

2 Professor Millward was employed by North Metropolitan Health Service (**Health Service**) as a clinical academic at Sir Charles Gairdner Hospital (**SCGH**) from about August 2003. He was dismissed on 21 December 2020 for breaches of discipline related to the overtime taken by and engagement as a contractor of another Health Service employee. Professor Millward has appealed this decision to the Board.

3 On 29 March 2021, Professor Millward filed an application for discovery, which he later amended. He now asks the Board to order that:

> By 7 May 2021, the Respondent must discover and produce to the appellant any documents within the Respondent's possession, custody or control in relation to suspicions or allegations about the veracity or validity of Ms Judith Innes-Rowe's overtime claims which were at any time between 26 November 2014 and 7 March 2019 created, received or in the possession of:
>
> i. any employee or member of the Integrity and Ethics Unit of North Metropolitan Health Service NMHS (NMHS);
>
> ii. any employee or member of the Executive of NMHS, including but not limited [to] Dr Robyn Lawrence when Chief Executive, or of the Executive of Sir Charles Gardiner Hospital (SCGH);
>
> iii. all Co-Directors and all Deputy Co-directors of the Medical Specialties Division of SCGH; and
>
> iv. all persons who had responsibilities or performed work in relation to human resource management or industrial relations at or for NMHS or SCGH.

4 Professor Millward argues that 'the documents sought are relevant to the degree to which the Appellant should be held liable for any alleged misconduct and to matters in mitigation'. Professor Millward says the documents may demonstrate differential treatment of other employees guilty of like misconduct.

5 The Health Service says that the applicable principles in relation to discovery at the Commission are well settled and relies on ***Civil Service Association of Western Australia Incorporated v Director General, Education Department of WA*** [2001] WAIRC 03773 at [6] where Kenner C (as he was then) applied ***Ellis v The Grand Lodge of WA of Antient Free and Accepted Masons Incorporated & others*** (1998) 79 WAIG 1736, 1736-37, which applied ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel & others (1995) 75 WAIG 1801***.

6 The Health Service says the Board should dismiss the discovery application because the documents sought are not relevant to the issues to be decided. Further, even if the Board considers that the documents are relevant, any relevance is tangential at best and is outweighed by the oppressive nature of the discovery request.

**Relevant principles**

7 Discovery is confined to what is in issue on the pleadings. The Board can only make an order for discovery under s 27(1)(o) of the *Industrial Relations Act 1979* (WA) if it is just to do so and necessary for the fair disposal of the case. 'Just' means 'right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right': ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel & others*** at 1805.

**The allegations**

8 The Board understands the two relevant allegations in question are set out in letters from the Health Service to Professor Millward dated 15 November 2019, 3 April 2020 and 6 November 2020.

**Allegation One:**

Between 30 April 2011 and 18 December 2018 at Perth you committed a breach of discipline contrary to section 161(d) of the *Health Services Act 2016* by being negligent or careless in the performance of your functions.

**Particulars**

a. You are employed as a Consultant Medical Oncologist at Sir Charles Gairdner Hospital (SCGH) in Nedlands.

b. Between 30 April 2011 and 18 December 2018, Ms Judith Innes-Rowe was employed as a Clinical Trials Manager at the Clinical Trials Area with the Oncology Department, SCGH.

c. Ms Innes-Rowe reported to you while she was working at SCGH.

d. Between 1 July 2011 and 18 December 2018, Ms Innes-Rowe claimed and was paid $593,614.00 in overtime.

e. Ms Innes-Rowe was not entitled to claim overtime.

f. You received a copy of Ms Innes-Rowe's overtime claims which was inconsistent with the approval process.

g. You failed to apply an appropriate level of oversight by not scrutinising the overtime forms submitted by Ms Innes-Rowe resulting in additional and unnecessary costs to the Clinical Trials Unit.

h. You failed to apply an appropriate level of oversight by not scrutinising the Payroll Certification Statements in relation to the overtime claimed by Ms Innes-Rowe resulting in additional and unnecessary costs to the Clinical Trials Unit.

**Allegation Two:**

Between around 19 December 2018 and 3 June 2019 at Perth you committed a breach of discipline contrary to section 161(c) of the *Health Services Act 2016* by committing an act of misconduct.

**Particulars**

a. You are employed as a Consultant Medical Oncologist at Sir Charles Gairdner Hospital (SCGH) in Nedlands.

b. On 19 December 2018, you approved Ms Judith Innes-Rowe to be engaged on a contract for service through Hays Specialist Recruitment (Australia) Pty Ltd (Hays) to work at the Clinical Trials Area with the Oncology Department, SCGH.

c. Between 19 December 2018 and 2 June 2019, Ms Judith Innes-Rowe continued to be engaged on a contract for service through Hays to work at the Clinical Trials Area with the Oncology Department, SCGH.

d. Ms Innes-Rowe reported to you while she was working at SCGH.

e. Prior to Ms Innes-Rowe commencing on the Hays contract, she had been employed to work at the Clinical Trials Area with the Oncology Department, SCGH, since 12 October 1995, and performing the duties of Clinical Trials Manager at Level G-9 since 30 April 2011 under various WA Health System – HSUWA – Pacts Industrial Agreements.

f. You were aware that Ms Innes-Rowe was not entitled to claim overtime while employed at Level G-9 under the WA Health System – HSUWA – Pacts Industrial Agreements.

g. You approved pay and conditions while Ms Innes-Rowe was employed on the Hays contract that were not in accordance with the WA Health Industrial Agreement pay and conditions, which were more favourable than Ms Innes-Rowe could have achieved as an employee of North Metropolitan Health Service (**NMHS**), and were more detrimental to NMHS than if Ms Innes-Rowe (or any other person engaged in her role) was engaged as an employee of NMHS. By way of example, you approved Ms Innes-Rowe to work hours of her own choosing, and you agreed that hours worked after 5:00pm would be paid at overtime rates, irrespective of what time she commenced work that day.

h. In an email dated 28 November 2017 from Ms Rebecca Wilson, Senior Payroll Officer, Health Support Services, you were made aware that as of 20 November 2017 the NMHS Authorisation Schedule had changed.

From that date, overtime required approval by a Tier 3 Officer. You are not a Tier 3 Officer and, therefore, you were aware that you could not approve overtime.

i. You approved payment by NMHS to Hays, including overtime, for the services provided by Ms Innes-Rowe, the last being on 3 June 2019 for the week ending 2 June 2019.

j. By approving Ms Innes-Rowe's employment through a Hays contract, you facilitated Ms Innes-Rowe receiving overtime payments that you knew she was otherwise not entitled to claim or be paid if she continued to be employed through a WA Health System – HSUWA – Pacts Industrial Agreement.

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

9 The Board understands that the two key issues we must decide in this appeal are:

1. whether Professor Millward engaged in breaches of discipline by (broadly):
   a. failing to apply appropriate oversight by failing to scrutinise overtime forms submitted by Ms Innes-Rowe and Payroll Certification Statements in relation to overtime claimed by Ms Innes-Rowe; and
   b. engaging Ms Innes-Rowe as a contractor through a recruitment agency, thereby facilitating overtime payments for hours worked by Ms Innes-Rowe to which she would not have been entitled, and Professor Millward could not have approved, if Ms Innes-Rowe had been employed by the WA Health System.
2. if so, whether dismissal is a proportionate response to the conduct. The Board will need to consider whether the Health Service's lawful right to dismiss was exercised so harshly or oppressively against Professor Millward as to amount to an abuse of that right: ***Calvert v PathWest Laboratory Medicine WA*** [2019] WAIRC 00792, [50].

10 Professor Millward must therefore persuade the Board that the documents he seeks are necessary to resolve the matters set out at [9].

**Professor Millward's submissions**

11 At the heart of Professor Millward's discovery application is the argument that the conduct of others is relevant to the question of whether his dismissal was harsh or oppressive.

Lack of knowledge about fraudulent conduct

12 Professor Millward points to his lack of knowledge of any fraudulent conduct by Ms Innes-Rowe at the time of her resignation in late 2018. He says that as early as November 2014, officers or employees of Health Support Services (**HSS**) and the Health Service knew about matters that suggested that Ms Innes-Rowe may be making false overtime claims. Those matters were not brought to Professor Millward's attention.

13 In particular, Professor Millward points to HSS's email to Ms Innes-Rowe on 26 November 2014 and two internal reports that recommend disciplinary action be taken against Ms Innes-Rowe. The first is the Preliminary Assessment dated 23 May 2018, which refers to queries about Ms Innes-Rowe's pay being reported to the Health Service's Area Director, Human Resources and the Health Service's Director of HR at Sir Charles Gairdner Hospital in March 2018. The second is the Preliminary Assessment Decision dated 22 June 2018. Professor Millward says, and the Health Service does not dispute, that he was unaware of those reports and their content.

14 Professor Millward argues that if suspicions about the veracity of Ms Innes-Rowe's overtime claims as at August 2018 had been brought to his attention, he would not have engaged her any further, such that the second allegation, about Professor Millward engaging Ms Innes-Rowe as a contractor through a recruitment agency, would not have occurred.

15 Professor Millward also points to the Further Preliminary Assessment that led to the Further Preliminary Assessment Decision by the Health Service's Chief Executive on 18 January 2019. Professor Millward says that while Ms Innes-Rowe was engaged as a contractor, he was unaware of any suspicions held by any HSS or Health Service staff of dishonest or fraudulent conduct by Ms Innes-Rowe. Professor Millward argues that others could have terminated Ms Innes-Rowe's engagement as a contractor, including members of the Health Service Executive team or hospital executives. They did not.

Significance of documents sought – comparable conduct and differential treatment

16 Professor Millward says that HSS employees are experts in human resources. They had information to suggest there were issues with Ms Innes-Rowe's honesty. HSS employees took no action to bring that information to Professor Millward's attention. Further, the Health Service human resources employees had concerns about Ms Innes-Rowe by June 2018. The Health Service could have suspended Ms Innes-Rowe and investigated her. It did not. That gives rise to a question about whether it was fair to dismiss Professor Millward in circumstances where other HSS and Health Service employees (who were better (relevantly) qualified than Professor Millward and better informed about Ms Innes-Rowe's conduct than Professor Millward) failed to act to protect the monies paid from the Special Purpose Accounts (**SPA**).

17 Professor Millward argues those facts are analogous to ***Mollinger v National Jet Systems Pty Ltd*** (C no 5 of 1998, unreported, Dec 279/99 M Print R3130) **(National Jet Systems**), with the Health Service Integrity & Ethics and Health Service Executive being the captain of the plane, and with Professor Millward being the first officer. Allegation One involves managerial ability. At the hearing Professor Millward argued that he is the co-pilot who is basically untrained and others are the captains – they are qualified, informed and skilled in human resources. While Professor Millward had responsibility in terms of oversight, HSS employees are equipped to process, scrutinise and check overtime claims against the industrial agreement. Professor Millward is not.

18 Professor Millward argues suspicion of fraud is 'absolutely material' to the allegation about Ms Innes-Rowe's engagement as a contractor and the Board must judge that allegation against the backdrop of Professor Millward's lack of knowledge of any reason to be suspicious of Ms Innes-Rowe.

19 The documents showing others' knowledge of Ms Innes-Rowe's dishonest overtime claims are relevant because differential treatment of employees guilty of like misconduct is relevant to the determination of whether dismissal was harsh, unjust or unreasonable.

20 Professor Millward says the conduct of others is comparable because:

a. in relation to the allegation about oversight, HSS staff engaged in comparable conduct. The Board should ask what did they do after raising the query about overtime with Ms Innes-Rowe in November 2014? If they did nothing, then that is comparable conduct. If concerns about Ms Innes-Rowe's overtime claims had been communicated to Health Service staff and they did nothing, then that is comparable conduct too; and

b. in relation to the allegation about engagement as a contractor, the issue is Ms Innes-Rowe's continued engagement. It was within the power of others to end the contractor engagement. They did not ask Professor Millward to bring the engagement to an end and they did not end it.

21 The thrust of Professor Millward's submission is that others knew about Ms Innes-Rowe's fraudulent conduct and could have acted to protect SPA monies. If they did not, that amounts to comparable conduct.

Oppression

22 Professor Millward says that there is no evidence of oppression and it is not apparent why it would take so much time to search for relevant documents.

Is the differential treatment an issue in dispute?

23 In his written submissions and at first during the hearing, Professor Millward argued that the issue of differential treatment on the basis of comparable conduct is in issue in this matter because it is raised in the pleadings at [39](c) of Professor Millward's Notice of Appeal.

24 That paragraph says:

> Senior officers of the Respondent, including the Investigator, had serious concerns about the validity of Ms Innes-Rowe's overtime claims on and from 23 May 2018 which were not conveyed to the Appellant at any time.

25 When at the hearing the Board pointed out that [39](c) of the Notice of Appeal goes to concerns others may have had but says nothing about a lack of consequences for others, Professor Millward's representative said at TS 15: 'It doesn't, it doesn't speak of differential treatment, you're quite right.' Professor Millward's representative confirmed this again at TS 17.

**Health Service's submissions**

26 In essence, the Health Service says the documents sought are not discoverable because they are not relevant to what is in issue. Even if they were, they are tangential at best and of limited relevance. Further, the request is oppressive.

27 The Health Service says the Board must closely assess whether cases are comparable at all before turning to any differential treatment and its effect.

Comparable conduct and differential treatment

28 The Health Service says the allegations do not raise the issue of fraud or knowledge of fraudulent conduct.

29 In relation to Allegation One, the Health Service says its case is:

a. Professor Millward had relevant managerial oversight over Ms Innes-Rowe;

b. Professor Millward signed certification statements for the Clinical Trials Unit certifying pay for staff;

c. between December 2014 and November 2017, Ms Innes-Rowe copied Professor Millward into emails she sent to HSS/HCN with her overtime claims. The claim forms identified Professor Millward as the manager to approve overtime; and

d. the overtime claimed by Ms Innes-Rowe was patently excessive. Any reasonable person in Professor Millward's position would have been put on notice to investigate further whether the overtime claims were legitimate.

30 The Health Service distinguishes this case from ***National Jet Systems***. It says HSS employees would have no idea what goes on in the Clinical Trials Unit. Further, the Health Service says ***Sexton v Pacific National (ACT) Pty Ltd*** (U2002/5282, unreported, PR931440) involved comparable conduct between two people involved in the same incident. Those two people had different functions so it was not possible to compare their conduct. Here, the comparator would need to be someone receiving the overtime forms, who had factual managerial oversight of Ms Innes-Rowe and knowledge of what she was doing in the Clinical Trials Unit. HSS employees had neither.

31 The Health Service argues that there is nothing to suggest that any of the people set out at [3] above had any relevant managerial oversight of Ms Innes-Rowe or the same or similar understanding of Ms Innes-Rowe's role or duties as Professor Millward in order to understand the appropriateness of her hours of work. The cases are not comparable and there is no need to consider differential treatment.

32 Allegation Two alleges misconduct when entering into a contractual arrangement with a recruiter for Ms Innes-Rowe because of the nature and terms of that arrangement. That Ms Innes-Rowe's historical overtime claims lacked veracity or validity is not relied on by the Health Service. Knowledge of fraud is not in issue. It is the nature of the contractor arrangement where Professor Millward knew he did not have authority to approve overtime for Ms Innes-Rowe and that a person in her position did not have the ability to obtain overtime as an employee. The Health Service says it does not allege Professor Millward approved overtime for Ms Innes-Rowe while she was a contractor.

33 There is nothing to suggest that the people set out at [3] above negotiated with Ms Innes-Rowe or the recruiter in relation to the terms and conditions of the contractor arrangement, nor that Professor Millward consulted with any of those people in relation to whether to engage Ms Innes-Rowe on the contractor arrangement. The people copied into Professor Millward's email stating he had engaged Ms Innes-Rowe as a contractor did not know the terms of the contractor engagement or what

Professor Millward knew about his lack of ability to approve overtime. Knowledge of fraud is irrelevant because it is not the issue the Health Service has with Professor Millward's conduct. The cases are not comparable. The documents sought would not and could not lead to an argument of differential treatment of comparable cases of misconduct.

34 For completeness, the Health Service notes that HSS and the Health Service are separate entities. HSS was not Professor Millward's employer. Further, the Health Service says that it is not relevant what would have happened if Professor Millward had been aware of Ms Innes-Rowe's fraudulent conduct.

Is the differential treatment an issue in dispute?

35 The Health Service says Professor Millward does not identify differential treatment of employees guilty of like misconduct as a basis for the dismissal being harsh.

Oppression

36 The Health Services says if the Board orders discovery in the terms sought, to comply it would be necessary to search the emails, correspondence and documents of around 136 people. That would take weeks if not months.

**Consideration**

37 The Board does not consider that the documents sought are necessary for the fair disposal of the case. This is because they are not relevant to what is in issue on the pleadings.

38 Knowledge about fraudulent conduct by Ms Innes-Rowe is not part of the allegations. It is not in issue in the proceedings. To the extent that the documents sought relate to knowledge of fraudulent overtime claims by Ms Innes-Rowe, the documents are not relevant or necessary for the fair disposal of the case.

39 While Professor Millward relied on paragraph 39(c) of the Notice of Appeal as putting in issue differential treatment based on comparable conduct, at the hearing his representative rightly conceded that that paragraph does not raise differential treatment. In our view, differential treatment based on comparable conduct is not in issue.

40 We consider that even if the pleadings did raise the issue of differential treatment, it is unlikely that the documents sought would be necessary for the fair disposal of the case. This is because on what is currently before the Board, it does not appear that those people set out in [3] above (being the comparators pointed to by Professor Millward) are comparable. There is nothing before the Board to suggest that those comparators had the same or similar managerial responsibilities or knowledge of Ms Innes-Rowe's work and hours as Professor Millward, such that they could have engaged in the same alleged breaches of discipline or be considered comparable in the same incident.

41 Allegation One and Allegation Two are not general. Detailed particulars of the allegations have been set out. Given the very specific nature of the allegations, it is difficult to see how the Board could conclude that the comparators could be seen to have engaged in comparable conduct in the relevant incident. For example, in relation to Allegation One, it is not apparent to the Board that any of the comparators had relevant managerial oversight of Ms Innes-Rowe, were copied in to her overtime claims and noted as the manager approving her overtime. In relation to Allegation Two, on what is before the Board at this stage of proceedings, it does not appear to the Board that the issue in Allegation Two is Ms Innes-Rowe's continued engagement or knowledge of her fraudulent conduct. The issue is engaging Ms Innes-Rowe as a contractor on terms and conditions that allowed her to choose her hours of work in a way that could result in payments equivalent to overtime being payable.

42 It is not apparent to the Board that any of the comparators knew Ms Innes-Rowe was not authorised to claim overtime, had been told they were not authorised to approve her overtime and then approved Ms Innes-Rowe's engagement as a contractor on terms and conditions that allowed Ms Innes-Rowe to choose her hours of work and overtime rates being payable to the recruiter as a result.

43 For these reasons, the Board considers that the documents sought are not relevant. They are not necessary for the fair disposal of the case. It would not be just to make the order sought.

44 The application for discovery is dismissed.

---

**2021 WAIRC 00153**

**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 - CHAIR |
| | MS J AUERBACH - BOARD MEMBER |
| | MS J COATES - BOARD MEMBER |
| **DATE** | FRIDAY, 4 JUNE 2021 |
| **FILE NO** | PSAB 1 OF 2021 |
| **CITATION NO.** | 2021 WAIRC 00153 |

| | |
|---|---|
| **Result** | Discovery application dismissed |
| **Representation** | |
| **Appellant** | Ms F Stanton (of counsel) |
| **Respondent** | Mr J Carroll (of counsel) |

*Order*

HAVING heard from Ms F Stanton (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), orders –

THAT the appellant's application for discovery be, and by this order is, dismissed.

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

---

**2021 WAIRC 00148**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT DATED 27 JANUARY 2021**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | KATHLEEN IRWIN |
| | **APPELLANT** |
| | **-v-** |
| | DIRECTOR GENERAL, DEPARTMENT OF HEALTH |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD |
| | COMMISSIONER T EMMANUEL - CHAIR |
| | MR M ABRAHAMSON - BOARD MEMBER |
| | MS L KELLY - BOARD MEMBER |
| **DATE** | WEDNESDAY, 26 MAY 2021 |
| **FILE NO** | PSAB 6 OF 2021 |
| **CITATION NO.** | 2021 WAIRC 00148 |

| | |
|---|---|
| **Result** | Directions issued |
| **Representation** | |
| **Appellant** | Ms H Harper (as agent) |
| | Mr M Giles (as agent) |
| **Respondent** | Mr S Pack (of counsel) |

*Direction*

HAVING heard from Ms H Harper and Mr M Giles (as agents) on behalf of the appellant 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), directs –

1. THAT the appellant file an application for formal discovery setting out the proposed categories of documents for discovery by Friday, 11 June 2021;
2. THAT the respondent file a response setting out the categories to which objection is made, and the grounds for objection, by 21 June 2021;
3. THAT the appellant file written submissions about the categories in dispute by 2 July 2021; and
4. THAT the respondent file written submissions about the categories in dispute by 12 July 2021.

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

**2021 WAIRC 00133**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 15 JANAURY 2021**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | JILL DIXON |
| | **APPELLANT** |
| | **-v-** |
| | LOTTERYWEST |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD<br>COMMISSIONER T B WALKINGTON - CHAIR<br>MS B CONWAY - BOARD MEMBER<br>MS R BARROW - BOARD MEMBER |
| **DATE** | THURSDAY, 13 MAY 2021 |
| **FILE NO.** | PSAB 8 OF 2021 |
| **CITATION NO.** | 2021 WAIRC 00133 |

| | |
|---|---|
| **Result** | Direction issued |
| **Representation** | |
| **Appellant** | Ms J Dixon |
| **Respondent** | Mr S Pack (of counsel) |

*Direction*

WHEREAS the respondent applied for an order to dismiss the appeal on the basis that the parties have reached a binding settlement agreement and at the hearing on 13 May 2021 the Board determined this matter be heard and determined as a preliminary matter.

HAVING heard from Ms J Dixon on her own behalf and Mr S Pack (of counsel) on behalf of Lotterywest, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT Ms Dixon file and serve a signed witness statement for each witness attaching any supporting documentation by no later than 27 May 2021;
2. THAT Lotterywest file and serve any witness statements attaching supporting documentation in response to Ms Dixon's witness statements by no later than 10 June 2021;
3. THAT Lotterywest file and serve an outline of submissions and any list of authorities upon which it intends to rely by no later than 24 June 2021;
4. THAT Ms Dixon file and serve an outline of submissions and any list of authorities upon which she intends to rely by no later than 8 July 2021;
5. THAT the preliminary matter be listed for hearing for 1 day on a date to be set, and;
6. THAT the parties have liberty to apply.

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

---

**2021 WAIRC 00131**

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | AARON RYAN |
| | **APPLICANT** |
| | **-v-** |
| | THE MINISTER FOR CORRECTIVE SERVICES |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER T EMMANUEL |
| **DATE** | THURSDAY, 13 MAY 2021 |
| **FILE NO.** | U 4 OF 2021 |
| **CITATION NO.** | 2021 WAIRC 00131 |

| | |
|---|---|
| **Result** | Direction issued |
| **Representation** | |
| **Applicant** | Mr C Fordham (of counsel) |
| **Respondent** | Mr S Pack (of counsel) |

*Direction*

HAVING heard from Mr C Fordham of counsel on behalf of the applicant and Mr S Pack of counsel on behalf of the respondent, the Commission, 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 26 May 2021;
2. THAT the applicant file outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 10 June 2021;
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 1 July 2021;
4. THAT the applicant file written submissions by 15 July 2021;
5. THAT the respondent file written submissions by 29 July 2021;
6. THAT discovery be informal; and
7. THAT the matter be listed for a 3-day hearing.

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

# INDUSTRIAL AGREEMENTS—Notation of—

| Agreement Name/Number | Date of Registration | Parties | | Commissioner | Result |
|---|---|---|---|---|---|
| Building and Engineering Trades (Government) Agreement 2021 AG 4/2021 | 05/20/2021 | Department of Biodiversity, Conservation and Attractions and others | Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch, Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Indust | Commissioner T Emmanuel | Agreement registered |
| Public Transport Authority/ARTBIU (TransWA) Industrial Agreement 2021 AG 9/2021 | 05/24/2021 | Public Transport Authority of Western Australia | The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch | Commissioner T Emmanuel | Agreement registered |
| WA Health System - Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses - Industrial Agreement 2020 AG 8/2021 | 05/24/2021 | North Metropolitan Health Service, Child and Adolescent Health Service, East Metropolitan Health Service | Australian Nursing Federation, Industrial Union of Workers Perth | Commissioner T Emmanuel | Agreement registered |
| WA Health System - HSUWA - PACTS Industrial Agreement 2020 PSAAG 9/2020 | 12/30/2020 | North Metropolitan Health Service, Child and Adolescent Health Service, East Metropolitan Health Service | Health Services Union of Western Australia (Union Of Workers) | Commissioner T Emmanuel | Correcting order issued |

| Agreement Name/Number | Date of Registration | Parties | | Commissioner | Result |
|---|---|---|---|---|---|
| WA Health System – United Workers Union (WA) – Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2020 AG 7/2021 | 05/27/2021 | North Metropolitan Health Service, Child and Adolescent Health Service, East Metropolitan Health Service | United Workers Union (WA) | Commissioner T Emmanuel | Agreement registered |

# PUBLIC SERVICE APPEAL BOARD—

**2021 WAIRC 00141**

**APPEAL AGAINST THE DECISION NOT TO PAY EMPLOYEE ENTITLEMENTS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | | |
|---|---|---|
| **CITATION** | **:** | 2021 WAIRC 00141 |
| **CORAM** | **:** | PUBLIC SERVICE APPEAL BOARD<br>COMMISSIONER T EMMANUEL - CHAIR<br>MR G BROWN - BOARD MEMBER<br>MR R DAVENPORT - BOARD MEMBER |
| **HEARD** | **:** | THURSDAY, 22 APRIL 2021 (ON THE PAPERS) |
| **DELIVERED** | **:** | THURSDAY, 20 MAY 2021 |
| **FILE NO.** | **:** | PSAB 37 OF 2020 |
| **BETWEEN** | **:** | MICHAEL COE<br>Appellant<br>AND<br>DEPARTMENT OF EDUCATION<br>Respondent |

| | | |
|---|---|---|
| CatchWords | **:** | Public Service Appeal Board – Redundancy – Section 94 decision –Appeal dismissed for want of jurisdiction |
| Legislation | **:** | *Industrial Relations Act 1979* (WA): s 80H & s 80I<br>*Public Sector Management Act 1994* (WA): s 78(4), s 78(5), s 94 & s 95<br>*Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) |
| Result | **:** | Appeal dismissed for want of jurisdiction |
| **Representation:** | | |
| Appellant | **:** | On his own behalf |
| Respondent | **:** | Ms S Young (as agent) |

**Cases referred to in reasons:**

***Crowley v Chief Executive Officer, Department of Commerce*** [2017] WAIRC 00262

***Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) & others*** (1986) 67 WAIG 466

*Reasons for Decision*

1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).

2 Mr Coe was employed by the Director General, Department of Education (**Director General**) as a Level 7 Public Service Officer. On 23 September 2020, the Director General made Mr Coe an offer of voluntary severance by letter and informed Mr Coe that:

> If you accept this offer of voluntary severance and nominate an effective date of resignation, which is less than 4 weeks after the date you accept this offer, you will receive an incentive payment as calculated below:
>
> - less than 1 week after acceptance, receives an additional 12 weeks' pay
> - more than 1 week and less than 2 weeks after acceptance, receives an additional 8 weeks' pay
> - more than 2 weeks and less than 3 weeks after acceptance, receives an additional 4 weeks' pay
> - more than 3 weeks and less than 4 weeks after acceptance, receives no additional pay.

3 On the second page of the letter, it says 'should you wish to accept this offer of voluntary severance, please sign the attached copy of this letter and return it to [name and email address omitted] by **no later than Monday 16 November 2020**.' (original emphasis)

4 Mr Coe subsequently wrote to the Department of Education to clarify by what date his resignation should be effective in order to receive the full incentive payment of 12 weeks. The Department of Education informed him that 'if your intention is to claim the 12 week incentive payment then the acceptance will need to be dated 5 October 2020 and emailed through on Monday 5 October 2020.'

5 Mr Coe signed an offer of voluntary severance on 5 October 2020, stating that his resignation would be effective one week from that date. He appeals to the Board against a decision that he says took place on 1 October 2020.

6 In his notice of appeal, Mr Coe says:

> To ensure that as part of the severance that I would receive the 12 week incentive I was advised in writing that to achieve this I needed to provide my response back to the Department by the 5 October 2020 and date this acceptance the 5 October 2020 which I believe is contrary to the Offer which stated a response is required by 16 November 2020.
>
> I queried this advice on several occasion [sic] and again received conflicting advice by the HR department and felt that I was pushed into having to accept this advice and in turn I missed out on several weeks of pay (2.5 pays), between 5 October and 16 November 2020.

7 The Director General raises two preliminary matters in relation to Mr Coe's appeal. She argues that the Board does not have jurisdiction to hear and determine his appeal and that in any event, his appeal has been filed out of time. The Director General says that even if the Board decides it has jurisdiction to hear and determine Mr Coe's appeal, it should not accept his appeal out of time.

8 It is not in dispute that Mr Coe's appeal centres around a 'section 94 decision' and whether the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) were fairly and properly applied in relation to him.

9 The parties agree that the Board should deal with the jurisdictional objection first and on the papers.

**What the Board must decide**

10 The Board must decide whether it has jurisdiction to hear and determine Mr Coe's appeal. In essence, to answer that question the Board must consider whether it can hear and determine an appeal in relation to a 'section 94 decision'.

**Relevant legislation**

11 Mr Coe has filed his appeal to the Board under s 80I(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**). That section deals with appeals to the Board 'by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers'. Other relevant legislative provisions are set out below.

**Director General's submissions**

12 The Director General says that the Board does not have jurisdiction to hear and determine any appeal against a decision made under s 94 of the *Public Sector Management Act 1994* (WA) (**PSM Act**) because of s 80I(3) of the IR Act, which says:

> A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in the *Public Sector Management Act 1994* section 94 or 95A.

13 The Director General concedes that in some circumstances, a 'section 94 decision' may be referred to the Commission, but not the Board, under s 95 of the PSM Act.

14 Under s 95(1) of the PSM Act, a 'section 94 decision' is defined as 'a decision made or purported to be made under regulations referred to in section 94 (other than a decision which is a lawful order by virtue of section 94(4)).' The regulations referred to in s 94 of the PSM Act are the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (**Regulations**).

15 The Director General says that her decision to require Mr Coe's 'acceptance of the offer of voluntary severance before 5 October 2020 in order to qualify for the maximum incentive payment of 12 weeks' was made in accordance with the Regulations, and so is a 'section 94 decision'.

16 The Director General also draws the Board's attention to s 95(6) of the PSM Act which says:

> The Industrial Commission does not have jurisdiction in respect of a section 94 decision if the employment of the employee concerned is terminated.

17 Finally, the Director General relies on the reasoning in ***Crowley v Chief Executive Officer, Department of Commerce*** [2017] WAIRC 00262 at [26] and says that Mr Coe 'was not an employee when this application was filed' and so his appeal is incompetent.

18 The Director General asks that the Board dismiss Mr Coe's appeal for want of jurisdiction.

**Mr Coe's submissions**

19 Mr Coe, relying on s 95(5) of the PSM Act, says that the Board has jurisdiction 'to hear and determine any appeal against a section 94 decision if the regulations referred to in section 94(4) of the [PSM Act] were not fairly and properly applied to, thereby allowing the Board jurisdiction by way of s 80I of the [IR Act].'

20 Mr Coe argues that the regulations referred to in s 94 of the PSM Act were not fairly and properly applied to him.

21 Further, Mr Coe says that his employment was 'not terminated with reference to section 94(6) of the [PSM Act] and should not be read as such'. He argues that his employment was not terminated at all.

22 Mr Coe says that ***Crowley v Chief Executive Officer, Department of Commerce*** deals with sections of the PSM Act which 'are irrelevant to the case at hand'. The PSM Act 'specifies termination and redundancy at different points without defining the terms. The concepts are legally vastly different and should never be used interchangeably.'

23 Mr Coe also argues that the Board has jurisdiction to hear and determine an appeal against a section 94 decision under s 78(4) and s 78(5) of the PSM Act because 'the directions were not capable of being complied with' and the Director General 'failed to comply with the rules of procedural fairness.'

24 Mr Coe says that the Commission's website directed him to lodge the appeal that he did, and says that the Acting Senior Registry Officer 'provided information and guidance by way of email to the Applicant on initiating a Form 8B – Notice of Appeal – Government Officers, Public Service Officers (**Form 8B**) in accordance with published information.'

25 In his submissions, Mr Coe says:

> [23] By way of the Western Australia Industrial Relations Commission website, in its own terms:
>
> **Types of applications that can be made**
>
> Employees who are not government officers, but are (or were) employed under the Public Sector Management Act 1994 (WA) can make an application to the Commission to appeal the following decisions or findings of their employer in relation to their employment:
>
> the decision of their employer made or purported to be made under the Public Sector Management (Redeployment and Redundancy) Regulations 2014 (WA) concerning their employment; and
>
> the termination of their employment while their status was that of a registered employee. A "registered employee" is an employee who is surplus to the resource requirements of a State government department and has been formally registered by their employer for redeployment, retraining or redundancy in accordance with the requirements of the Public Sector Management (Redeployment and Redundancy) Regulations 2014 (WA).

26 He says in any event, there is no alternative option to appeal the decision he wishes to appeal.

**Director General's submissions in reply**

27 The Director General filed brief submissions in reply, adding:

> ***Crowley v Chief Executive Officer, Department of Commerce*** was specifically concerned with the meaning of "terminated" as used in section 95(6) of the *Public Sector Management Act, 1994*. It includes termination at the election of either employer or employee: [26]. The decision also affirmed that the Commission has exclusive jurisdiction to review section 94 decision: [69]. The Public Service Appeal Board does not have jurisdiction.

**Consideration**

28 It is clear from Mr Coe's submissions that his appeal relates to whether the Regulations were fairly and properly applied to him. In effect, Mr Coe appeals a section 94 decision to the Board.

29 Fundamentally, Mr Coe does not appear to appreciate the distinction between the Commission and the Board. The Board is not the Commission. The Board is a constituent authority of the Commission: s 80H(1) of the IR Act. The Board does not have all of the Commission's jurisdiction and powers.

30 Relevant to this matter, the Board's jurisdiction is set out in s 80I of the IR Act:

> **80I. Board's jurisdiction**
>
> (1) Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
>
> (b) an appeal by a government officer under the *Public Sector Management Act 1994* section 78 against a decision or finding referred to in subsection (1)(b) of that section;
>
> (c) an appeal by a government officer under the *Health Services Act 2016* section 172 against a decision or finding referred to in subsection (1)(b) of that section;
>
> (d) an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).
>
> *[(2) deleted]*
>
> (3) A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in the *Public Sector Management Act 1994* section 94 or 95A.
>
> *[Section 80I inserted: No. 94 of 1984 s. 47; amended: No. 32 of 1994 s. 14; No. 1 of 1995 s. 29; No. 39 of 2010 s. 109; No. 8 of 2014 s. 6; No. 11 of 2016 s. 295(6).]*

31 It is clear that s 80I does not confer on the Board jurisdiction to hear appeals in respect of section 94 decisions.

32 Section 95(2) of the PSM Act provides that a section 94 decision may be referred to the Commission.

33 The Full Bench in ***Crowley v Chief Executive Officer, Department of Commerce*** held at [69]:

> [T]here is only one power conferred to hear and determine a claim by a government officer, including a former government officer, that he or she has not been paid a severance payment in accordance with the requirements of the Redeployment and Redundancy Regulations. The sole power of the Commission to hear and determine such a claim and the power of a government officer to refer such a claim is confined to a referral made pursuant to s 95 or s 96A of the PSM Act.

34 Mr Coe has not referred such a claim to the Commission. Instead he has brought an appeal to the Board.

35 In the Board's view, it is unnecessary to consider arguments about the effect of s 78(4) and s 95(6) of the PSM Act. Those sections do not apply to the Board. Arguments about whether the Commission, a separate authority, would have jurisdiction are not relevant to the question of whether the Board has jurisdiction to hear and determine Mr Coe's appeal.

36 Mr Coe relies on s 78(5) of the PSM Act. It provides:

> (5) If it appears to the Industrial Commission or the Public Service Appeal Board that the employing authority failed to comply with a Commissioner's instruction or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the Industrial Commission or Public Service Appeal Board —
>
> (a) is not required to determine the reference or allow the appeal solely on that basis and may proceed to decide the reference or appeal on its merits; or
>
> (b) may quash the decision or finding and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommenced by the employing authority if the employing authority continues the disciplinary process.
>
> *[Section 78 amended: No. 39 of 2010 s. 95.]*

37 Perhaps that section may be considered if the Board were hearing a substantive appeal. It is not relevant to the question of jurisdiction. Further, it cannot confer jurisdiction where none exists.

38 That the Commission's website directs users to Form 8B in certain circumstances does not assist Mr Coe. The website contains information, not advice. It is intended to assist users. The website cannot confer, or have any bearing on, jurisdiction.

39 In any event, some of the information on the website Mr Coe refers to is not relevant to these circumstances. The website states simply:

> Employees who are not government officers, but are (or were) employed under the Public Sector Management Act 1994 (WA) can make an application to the Commission to appeal the following decisions or findings of their employer in relation to their employment:
>
> …
>
> - the decision of their employer made or purported to be made under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) concerning their employment; or
> - the termination of their employment while their status was that of a registered employee. A "registered employee" is an employee who is surplus to the resource requirements of a State government department and has been formally registered by their employer for redeployment, retraining or redundancy in accordance with the requirements of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA).

It provides information for employees who are not government officers.

40 Mr Coe concedes that he was a public service officer. Public service officers are government officers: s 80C(1) of the IR Act.

41 Contrary to Mr Coe's submission, the Board has not yet considered the issue of whether it should extend the time for Mr Coe to appeal. First the Board must be satisfied that it has jurisdiction to hear and determine Mr Coe's appeal: ***Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) & others*** (1986) 67 WAIG 466, 30.

42 That Mr Coe perceives 'there is no alternative option to appeal such a decision' does not bear on whether the Board has jurisdiction to hear and determine his appeal.

43 For these reasons the Board does not have jurisdiction to hear and determine Mr Coe's appeal.

44 This appeal is dismissed for want of jurisdiction.

---

**2021 WAIRC 00142**

**APPEAL AGAINST THE DECISION NOT TO PAY EMPLOYEE ENTITLEMENTS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | |
|---|---|
| **PARTIES** | MICHAEL COE |
| | **APPELLANT** |
| | **-v-** |
| | DEPARTMENT OF EDUCATION |
| | **RESPONDENT** |
| **CORAM** | PUBLIC SERVICE APPEAL BOARD<br>COMMISSIONER T EMMANUEL - CHAIR<br>MR G BROWN - BOARD MEMBER<br>MR R DAVENPORT - BOARD MEMBER |
| **DATE** | THURSDAY, 20 MAY 2021 |
| **FILE NO** | PSAB 37 OF 2020 |
| **CITATION NO.** | 2021 WAIRC 00142 |

| | |
|---|---|
| **Result** | Appeal dismissed |
| **Representation** | |
| **Appellant** | On his own behalf |
| **Respondent** | Ms S Young (as agent) |

*Order*

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

THAT application PSAB 37 of 2020 be, and by this order is, dismissed.

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

# OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

**2021 WAIRC 00155**

**REVIEW OF DECISION - S.61A - OSH ACT**

**THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL**

| | | |
|---|---|---|
| **CITATION** | : | 2021 WAIRC 00155 |
| **CORAM** | : | COMMISSIONER T B WALKINGTON |
| **HEARD** | : | WEDNESDAY, 4 NOVEMBER 2020 |
| **DELIVERED** | : | FRIDAY, 11 JUNE 2021 |
| **FILE NO.** | : | OSHT 1 OF 2020 |
| **BETWEEN** | : | EUGENE MALATYNSKI<br>Applicant<br>AND<br>WORKSAFE WESTERN AUSTRALIA COMMISSIONER<br>Respondent |

| | | |
|---|---|---|
| CatchWords | : | Reviewable decision - demolition work - class 1 demolition licence - lawfully obtained experience - recent experience - safe and proper manner - properly supervise and manage |
| Legislation | : | *Occupational Safety and Health Act 1984* (WA)<br>*Occupational Safety and Health Regulations 1996* (WA) |
| Result | : | Decision of the WorkSafe Commissioner Affirmed |
| **Representation:** | | |
| Applicant | : | Mr E Malatynski |
| Respondent | : | Ms M Lord (of counsel) |

**Case(s) referred to in reasons:**

***Waugh v Kippen*** (1986) 160 CLR 156

***Shepherd v Murray*** [2000] WASCA 281

*Reasons for Decision*

1 Mr Eugene Malatynski (**Mr Malatynski**) applied to the Occupational Safety and Health Tribunal (**Tribunal**) for a review of the WorkSafe Commissioner's decision to not grant him a licence to undertake demolition work. Mr Malatynski seeks an order that the Tribunal substitute its decision for that of the WorkSafe Commissioner and he be granted a licence to undertake demolition work.

2 The WorkSafe Commissioner opposes the granting of a licence to Mr Malatynski on the grounds that he is not satisfied that Mr Malatynski is able to undertake demolition work in a safe and proper manner. The WorkSafe Commissioner contends that Mr Malatynski does not have the necessary relevant experience to be granted a licence for the class applied for. The WorkSafe Commissioner submits that the Tribunal should affirm his decision to not grant Mr Malatynski a Class 1 Demolition Licence.

**Background**

3 On 10 May 2019, UMCC Pty Ltd applied for a Class 1 Demolition Licence nominating Mr Malatynski, the Director of the company, as the competent person for the purposes of the licence. A handwritten notation on the front of the application form stated 'Class 1 Restricted Licence (reference to discussion with Mark)'.

4 Officers of WorkSafe assessed the application and conducted reference checks to verify the statement of experience submitted by Mr Malatynski in support of his application.

5 On 5 July 2019 Mr Malatynski sat the Class 1 (Version 1) examination and failed. On his second attempt at the Class 1 (Version 2) examination on 31 July 2019 he also failed. Mr Malatynski passed the Class 2 (Version 1) examination on 5 September 2019.

6 Mr Malatynski subsequently provided a handwritten document of descriptions of a list of jobs and a second statement of experience undated using the template guide provided by WorkSafe.

7 On 28 October 2019, the WorkSafe Commissioner advised Mr Malatynski in writing that he had assessed his application for a licence to carry out demolition work and had formed the preliminary view that his application be refused. The WorkSafe Commissioner advised that the assessment was based on the full criteria for a class 1 demolition licence because the class type 'Class 1 Restricted Licence' that had been handwritten on the form was not a class type provided for in the *Occupational Safety and Health Regulations 1996* (WA) (**OSH Regulations**). Mr Malatynski's application was refused on the basis that the experience he had provided in support of his application was limited and did not cover the full scope of a class 1 licence and was not obtained lawfully. Mr Malatynski was invited to provide further information to address the identified deficiencies.

8 Mr Malatynski provided further information to WorkSafe on 6 December 2019.

9 On 13 January 2020, the WorkSafe Commissioner notified Mr Malatynski of his decision to refuse his application because he had not provided experience that satisfied the requirements to be granted a licence being a minimum of three substantial, full class 1 demolition jobs completed during the previous five years. Mr Malatynski was advised that most of the work contained in the documented experience he provided in support of his application was performed unlawfully.

10 Mr Malatynski seeks a review by the Tribunal of the WorkSafe Commissioner's decision.

**Principles**

11 There are a range of health and safety risks associated with demolition work including unplanned structure collapse, weakened building materials, contaminants, falls from heights and falling objects. Hazards in the workplace are regulated by the *Occupational Safety and Health Act 1984* (WA) **(OSH Act)** and matters concerning the licensing of persons to demolish structures are contained in the regulations to this Act.

12 Section 60(1) of the OSH Act provides the Governor with the power to make regulations necessary or convenient to giving effect to the purposes of the OSH Act. Schedule 1 of the OSH Act provides the matters for which regulations can be made and includes the registration or licensing of any work, plant, process, substance or workplace and any person carrying out any kind of work by the WorkSafe Commissioner or any other prescribed person or authority.

**13** OSH Regulations at Part 3 of Division 9 – Safety requirements in relation to certain work processes and Subdivision 7 – Demolition, sets out the requirements for persons conducting demolitions to be licensed. Regulation 3.116 of the OSH Regulations sets out the WorkSafe Commissioner's authority to issue a demolition licence:

> **3.116. Class 1, 2 or 3 demolition licences, application for etc.**
>
> (1) A person may, in an approved form, apply to the Commissioner to be licensed to do class 1, class 2 or class 3 demolition work and the application is to be accompanied by the appropriate fee set out in Schedule 6.1A, which is to be refunded if the application is refused.
>
> (2) On an application under subregulation (1) the Commissioner may issue to the applicant a licence to do class 1, class 2 or class 3 demolition work if the Commissioner is satisfied that the applicant is able to do that class of demolition work in a safe and proper manner.
>
> (3) A licence may be issued subject to such conditions that the Commissioner sees fit and endorses on the licence.
>
> (4) A licence has effect for 2 years from its issue unless it is sooner cancelled or suspended under subregulation (5).
>
> (5) The Commissioner may, by notice in writing, cancel or suspend a licence issued to a person if —
>
> (a) the person is convicted of an offence against these regulations or the Act; or
>
> (b) in the opinion of the Commissioner, the person —
>
> (i) breaches a condition of the licence; or
>
> (ii) is unable to comply with a condition of the licence or a provision of these regulations or the Act.

14 The OSH Regulations provide for three classes of licence which authorise different types of demolition work:

> **3.114. Terms used**
>
> In this Subdivision —
>
> ***class 1***, in relation to demolition work, means demolition work of any of the following kinds —
>
> (a) work comprising the total demolition of a building or structure that is 10 metres or more in height when measured from the lowest ground level of the building or structure to the highest part of the building or structure;

(b) work —

(i) comprising the partial demolition of a building or structure that is 10 metres or more in height when measured from the lowest ground level of the building or structure to the highest part of the building or structure; and

(ii) affecting the structural integrity of the building or structure;

(c) work —

(i) comprising the total or partial demolition of a building or structure; and

(ii) involving the use of load shifting equipment on a suspended floor;

(d) work comprising the total or partial demolition of pre-tensioned or post-tensioned structural components of a building or structure;

(e) work comprising the total or partial demolition of a building or structure containing precast concrete elements erected by the tilt-up method of construction;

(f) work involving the removal of key structural members of a building or structure so that the whole or a part of the building or structure collapses;

(g) work done to a building or structure involving explosives;

(h) work comprising the demolition or partial demolition of a building or structure that involves the use of a tower crane or any crane with a safe working load greater than 100 tonnes;

(i) work involving the removal of an area of brittle or fragile roofing material in excess of 200 $m^2$ from a building or structure if any part of the area to be removed is 10 metres or more above the lowest ground level of the building or structure;

***class 2***, in relation to demolition work, means demolition work comprising the total or partial demolition of a building or structure that is less than 10 metres in height when measured from the lowest ground level of the building or structure to the highest part of the building or structure but does not include —

(a) the total or partial demolition of a single storey dwelling; or

(b) work of a kind referred to in paragraphs (c), (d), (e), (f), (g), or (h) of the definition of ***class 1***;

***class 3***, in relation to demolition work, means work comprising the removal of more than 200 $m^2$ of brittle or fragile roofing material from a building or structure;

…

15 The activities and tasks for which a Class 1 Demolition Licence is required are those which have the greatest risk. An essential difference between class 1 and class 2 demolition work is the height of the structure being removed. If the structure is 10 m or higher it is classified as class 1 demolition work.

16 The Supreme Court of Western Australia in ***Shepherd v Murray*** [2000] WASCA 281 has held that the objects of the OSH Act are to secure the safety of persons at the workplace. Consistent with ***Waugh v Kippen*** (1986) 160 CLR 156 an interpretation which favours a broad construction, and the purpose or objects of an Act should be preferred in the case of workplace safety and health law.

17 The purpose of granting a Class 1 Demolition Licence, in keeping with the objects of the OSH Act, is to authorise satisfactorily competent and experienced individuals to demolish structures in accordance with the OSH Act, OSH Regulations, published Codes of Practices and Australian Standards.

**Granting a Licence**

18 The WorkSafe Commissioner's power to grant a Class 1 Demolition Licence under reg 3.116 of the OSH Regulations is discretionary. It requires the assessment of an applicant's ability to undertake class 1 demolition work in a safe and proper manner. The WorkSafe Commissioner must be satisfied of the applicant's abilities. The Macquarie Dictionary defines 'satisfy' in this context as 'to convince'; similarly, the Shorter Oxford Dictionary defines 'satisfy' as to furnish with sufficient proof or information; to set free from doubt or uncertainty; to convince.

19 The OSH Regulations require a person's ability to be assessed. The Webster dictionary defines 'ability' as competence in any occupation or field of action, from the possession of capacity, skill, means, or other qualification.

**Review of WorkSafe Commissioner's Decision by the Tribunal**

20 In respect of this review application before the Tribunal, section 61A of the OSH Act provides:

**61A. Review of Commissioner's decisions under regulations**

(1) In this section –

***reviewable decision*** means –

(a) a decision made under the regulations by the Commissioner himself or herself; and

(b) a determination of the Commissioner on the review, under the regulations, of a decision made under the regulations by a person other than the Commissioner, whether or not the decision was made by that person as a delegate of the Commissioner,

but does not include a decision made by a person acting as a delegate of the Commissioner.

(2) A person who is not satisfied with a reviewable decision may, within 14 days of receiving notice of the decision, refer the decision to the Tribunal for review.

(3) On reference of a decision under subsection (2), the Tribunal is to inquire into the circumstances relevant to the decision and may –

(a) affirm the decision; or

(b) set aside the decision; or

(c) substitute for the decision any decision that the Tribunal considers the Commissioner should have made in the first instance.

(4) Pending the decision on a reference under this section, the operation of the reviewable decision is to continue, subject to any decision to the contrary made by the Tribunal.

**Nature of the Review**

21 The nature of the review under section 61A(3) of the OSH Act conducted by the Tribunal is by way of a rehearing. The powers of the Tribunal are exercisable without having to find error in a decision made by the WorkSafe Commissioner and having regard to material that was not before the WorkSafe Commissioner.

22 The Tribunal is required to 'inquire into the circumstances relevant to the decision' which requires the Tribunal to inquire for itself the circumstances giving rise to the decision and the validity of the conclusions reached.

23 Having inquired into the circumstances, it is then for the Tribunal to determine whether the decision can be affirmed, set aside, or substituted for another decision that the Tribunal considers the WorkSafe Commissioner should have made in the first instance. The Tribunal must approach the facts and circumstances as found by it on its inquiry as if it were determining whether it could reasonably reach the decision of the WorkSafe Commissioner to not grant the licence, having regard also to the reasons and matters set out in the WorkSafe Commissioner's decision.

24 Accordingly, Mr Malatynski must satisfy the Tribunal that, on the evidence and information before it, it would be appropriate to grant the licence. Mr Malatynski must demonstrate recent and relevant experience in performing demolition work of the type relevant for the class of licence under a licence. The Tribunal must be convinced that on the evidence and information before it that Mr Malatynski is able to undertake demolition work safely and properly.

**Questions to Be Decided**

25 The matter to be determined is whether I ought:

(a) affirm the decision; or

(b) set aside the decision; or

(c) substitute for the decision another decision that I consider the WorkSafe Commissioner should have made.

26 To set aside the WorkSafe Commissioner's decision and substitute another decision to grant a licence I must be satisfied, that is I must be convinced on the evidence and information before me, that Mr Malatynski is able to undertake demolition work in a safe and proper manner.

**Requirement for Specific Information and Details**

27 The WorkSafe Commissioner submits that class 1 demolition work involves many hazards that may cause a serious injury or can be fatal for workers and the public. A person undertaking class 1 demolition work must be competent and maintain constant attention because a structure, or part of a structure, can unexpectedly become unstable, equipment may suddenly fail or the presence of hazardous substances, such as asbestos, may be identified. Therefore, the WorkSafe Commissioner considers it imperative that demolition licences are only granted to persons with sufficient experience in the relevant particular class.

28 The WorkSafe Commissioner has developed and published benchmarks and standards by which to assess a person's skills and abilities for the purposes of determining whether an applicant for a demolition licence satisfies the requirement that he/she is able to perform the work in a safe and proper manner. The WorkSafe Commissioner submits that for him to be satisfied that a person applying for a Class 1 Demolition Licence is able to perform the work in a safe and proper manner, the applicant must detail three relevant jobs in the previous five years and this be supported by two references with contactable referees, proof of training of safe methods of demolition and proof of their ability to develop a safety and health management plan. This ought to be capable of being verified.

29 Mr Malatynski submits that he has safely and properly demolished and deconstructed three buildings over 10.1 m. Mr Malatynski says the best person to judge if he completed this work safely and in a proper manner is the person for whom he is working because they observe how the work is done and how Mr Malatynski controls the project operation. Mr Malatynski says most of his work at the Southern Ports Authority - Port of Bunbury involved working at heights between 10 m and 20 m using elevated work platform, boom lifts and cranes. Mr Malatynski says that all of the deconstruction projects he controlled have been done in a safe and proper manner and to customer satisfaction. There have been no injuries or incidents. Mr Malatynski provided a number of references from people who had engaged him to undertake demolition or deconstruction work over a lengthy period of time.

30 I do not agree with Mr Malatynski's contention that the best persons to assess his work experience are those persons he was engaged by to complete work. The legislation and regulations clearly authorise the WorkSafe Commissioner to undertake the assessment of his work experience. The regulations require the assessment to be that of being satisfied that the applicant is

able to do that class of demolition work in a safe and proper manner. Appling the definitions for satisfy as set out in [18] means the information provided in support of applications must be sufficiently specific to be able to be verified.

31 The references submitted into evidence are character references or attest to the quality of work undertaken by Mr Malatynski. Whilst the references attest to positive qualities of Mr Malatynski and the work he has performed they are general in nature and do not provide the information and detail necessary to demonstrate that the requirements of reg 3.116 of the OSH Regulations are satisfied. I find that the utility of the references are limited to confirming that Mr Malatynski undertook the jobs or projects contained in his statements of experience. Where there is a reference to the particular work experience set out in his statements of experience there is insufficient detail to enable an assessment of Mr Malatynski's abilities for the purposes of determining whether to grant a licence.

**Requirement for the Work Experience to be Within the Previous Five Years**

32 In his application Mr Malatynski submitted a statement of demolition experience dated 7 February 2019 which contained entries for:

a) 22 June 2007 at Newton Moore High School under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 6 m.

b) 24 October 2006 at Old Louies Service Station under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 5.2 m.

c) 13 July 2006 at Windscreen O'Brian [sic] under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 4 m.

d) Undated at Bunbury Library under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 5 m.

e) 21 February 2006 at Bunbury Nissan Workshop under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 4 m.

33 Subsequently Mr Malatynski submitted a second, undated, statement of demolition experience which contained entries for:

a) 21 February 2006 at Bunbury Nissan Office and Display under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 6.5 m.

b) 21 February 2006 at Bunbury Nissan Workshop under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 5.8 m.

c) 21 February 2006 at Total Eaton under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 6.5 m.

d) 21 February 2006 at Pauls Fruit & Veg under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 6.5 m.

e) 4 June 2006 at Louies Old Workshop under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 5.2 m.

f) 22 June 2007 at Newton Moore High School under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 6 m.

g) 13 June 2006 at Windscreen O'Brian [sic] under Licence WAD66 held by J&P Deconstruction Pty Ltd at a height of 4 m.

h) 2008 at Bunbury Library at a height of 5.5 m.

Items (e), (f), (g) and (h) were submitted previously in the statement of experience dated 7 February 2019. Items (c) and (d) are additional items to those submitted in the statement of experience dated 7 February 2019. Items (a) and (b) separated two elements of the previous statement of experience at item (e) dated 7 February 2019.

34 Mr Malatynski agreed that the work undertaken in 2006 and 2008 is not recent experience and involved structures under 10 m in height. However, Mr Malatynski contends that this experience ought to be considered in support of his application because you build on your experiences and you never lose that experience.

35 The WorkSafe Commissioner submits that the experience ought to be acquired through work on three jobs within the previous five years. Therefore, the Tribunal ought not consider this experience for the purposes of assessing Mr Malatynski's abilities.

36 I find that the work described and itemised in both statements of experience is for structures which are at a height under 10 m and are not relevant work for the purposes of a Class 1 Demolition Licence.

37 The regulations require a person's ability to be assessed. The Webster dictionary defines 'ability' as competence in any occupation or field of action, from the possession of capacity, skill, means, or other qualification. The ability to be assessed is a person's current ability or current skills and capacities. The information and evidence provided to demonstrate a current ability needs to be reasonably current. The information provided in the two statements of experience are of work undertaken at least 12 years prior to the application being made. Whilst it may be true that experience is built upon over time, there must be recent experience to support an assessment of current abilities. An assessment of Mr Malatynski's current abilities cannot be made from work undertaken 12 years or more ago.

38 I do not consider a guideline requiring the experience to be acquired during the previous five years to be unreasonable for the purposes of assessing a person's ability, in other words competence in, capacities and skills, to undertake hazardous work. There is no evidence that this guideline or standard was applied in an arbitrary manner nor without regard to the merits of an individual's application.

**Experience Obtained Unlawfully**

39 Mr Malatynski provided a handwritten list of 15 entries describing various work on different structures. Mr Malatynski agreed that this document is a description of work undertaken at the Southern Ports Authority - Port of Bunbury involving demolition of structures at heights above 10 m and done without a licence. Mr Malatynski explained that initially the work was undertaken as refurbishment work and he understood that he could undertake this work without a licence. The regulations clearly state that work at heights above 10 m requires the person performing the work to hold a Class 1 Demolition Licence. Therefore, this experience was obtained unlawfully.

40 I find that the long-established public policy principle that no person should benefit from their wrongdoing applies in this matter. Accordingly, I will not consider this experience obtained contrary to the law.

41 Mr Malatynski submitted a letter, photographs and one additional job in support of his application. In his letter Mr Malatynski refers to recent demolition work and states that:

a) He quoted for the work on the basis that he may be successful in obtaining a demolition licence or the work would be undertaken in conjunction with J&P Deconstruction Pty Ltd.

b) He contacted an officer of WorkSafe to ascertain if he was able to de-clad the structure and was advised he was able to undertake work up to the point that did not affect the stability of the structure.

c) At the point at which the main columns, the saw tooth beam trusses, the roof trusses and the diagonal bracing remained he organised J&P Deconstruction Pty Ltd to complete the work using Mr Malatynski's staff who had been trained in demolition work. Mr Malatynski supervised in conjunction with J&P Deconstruction Pty Ltd's crane driver supervisor.

d) That he had measured the structure a further time from the top of the overhang to the lowest part of the structure and reassessed the height to be above 10 m.

42 The WorkSafe Commissioner contends that this work involves one demolition job of structures over 10 m high and required a Class 1 Demolition Licence from the commencement of the work. That is, the person undertaking the de-cladding is required to hold a Class 1 Demolition Licence or work under the supervision of a person with a Class 1 Demolition Licence.

43 Mr Malatynski stated that he commenced work on demolition of the structure on 27 March 2019 and did not work in conjunction with a person holding a licence until 10 June 2019 when J&P Deconstruction Pty Ltd were engaged. Mr Malatynski submits that he had understood he was able to undertake the de-cladding as this did not require a Class 1 Demolition Licence. Mr Malatynski says he gained this understanding during a conversation he had with an officer of WorkSafe.

44 I find that the work experience obtained at the Southern Ports Authority - Port of Bunbury until 10 June 2019 is not able to be considered in support of Mr Malatynski's application because it was unlawfully obtained as it was demolition work on a structure over 10 m high undertaken by a person who did not possess the required Class 1 Demolition Licence. The work undertaken between 10 June 2019 and 17 June 2019 may be able to be considered, however the duration of the work is limited and is insufficient on its own.

45 On 10 June 2019 UMCC Pty Ltd was issued with Improvement Notice 46800231 (**IN 46800231**) for contravening reg 3.117(2) of the OSH Regulations. IN 46800231 states that Mr Malatynski removed wall and roof sections as part of the total demolition of a 9.98 m high building without a Class 2 Demolition Licence exposing persons involved in the demolition process to risk of injury from unlicensed persons carrying out demolition work. Mr Malatynski did not seek a review of IN 46800231.

46 A second Improvement Notice 46800232 (**IN 46800232**) was issued to UMCC Pty Ltd on 10 June 2019 for contravening reg 4.44(1)(b) of the OSH Regulations. The IN 46800232 states that front end loader registration BY 110R and Excavator 311B were owned by Mr Malatynski and were being used for demolition work at the Bunbury Port Authority Inner Harbour [sic] on 10 June 2019. Neither machine was fitted with falling object protective structures and placed employees operating the machines at risk of injury from falling objects. Mr Malatynski did not seek a review of IN 46800232.

47 Mr Malatynski did not comply with the IN 46800231 because J&P Deconstruction Pty Ltd were engaged, and work continued under the demolition licence held by them. Mr Malatynski did not comply with the directions in IN 46800232 because the machines were not used again where there were risks of falling objects and other machines fitted with the necessary protective structures were used on the job.

48 In reference to both improvement notices Mr Malatynski stated that in his view they should not have been issued to him because he was not the licence holder.

49 Working in a safe and proper manner involves working in accordance with the duties and obligations imposed by a regulatory scheme. Demolition work undertaken in an unsafe and improper manner may result in serious risk, injury or a fatality. The improvement notices cast doubt on Mr Malatynski's capacity to work in a proper manner. In addition, Mr Malatynski's assertion that he ought not have been issued the improvement notices because he was not the holder of the demolition licence demonstrates a lack of knowledge of his obligations and casts further doubt on his abilities to undertake demolition work in a safe and proper manner.

**Conclusion**

50 On the information and evidence before me I am not satisfied that Mr Malatynski is able to meet the requirements of the OSH Regulations and undertake class 1 demolition work in a safe and proper manner. Therefore, I find that the WorkSafe Commissioner's decision ought to be affirmed.

**2021 WAIRC 00156**

**REVIEW OF DECISION - S.61A - OSH ACT**

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

| | |
|---|---|
| **PARTIES** | EUGENE MALATYNSKI |
| | **APPLICANT** |
| | **-v-** |
| | WORKSAFE WESTERN AUSTRALIA COMMISSIONER |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER T B WALKINGTON |
| **DATE** | FRIDAY, 11 JUNE 2021 |
| **FILE NO/S** | OSHT 1 OF 2020 |
| **CITATION NO.** | 2021 WAIRC 00156 |

| | |
|---|---|
| **Result** | Decision of the WorkSafe Commissinoer Affirmed |
| **Representation** | |
| **Applicant** | Mr E Malatynski |
| **Respondent** | Ms M Lord (of counsel) |

*Order*

HAVING heard from the applicant on his own behalf and Ms M Lord (of counsel) on behalf of the respondent the Commission, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Occupational Safety and Health Regulations 1996* (WA), hereby orders:

THAT WorkSafe Commissioner's decision be and is hereby affirmed.

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

---

**2021 WAIRC 00135**

**REVIEW OF IMPROVEMENT NOTICE**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

| | | |
|---|---|---|
| **CITATION** | **:** | 2021 WAIRC 00135 |
| **CORAM** | **:** | COMMISSIONER T B WALKINGTON |
| **HEARD** | **:** | THURSDAY, 23 JULY 2020, WEDNESDAY, 22 JULY 2020 |
| **DELIVERED** | **:** | FRIDAY, 14 MAY 2021 |
| **FILE NO.** | **:** | OSHT 5 OF 2019 |
| **BETWEEN** | **:** | GHD PTY LIMITED<br>Applicant<br>AND<br>WORKSAFE WESTERN AUSTRALIA COMMISSIONER<br>Respondent |

| | | |
|---|---|---|
| CatchWords | **:** | Improvement Notice - requirement for terms of notice to be certain and unambiguous - duties of a designer - obligation to provide written report to client - requirement to identify hazards and risks in written report - end product of design. |
| Legislation | **:** | *Mines Safety and Inspection Act 1994* (WA)<br>*Occupational Safety and Health Act 1984* (WA)<br>*Occupational Safety and Health Regulations 1996* (WA) |
| Result | **:** | Improvement notice affirmed with modification |
| **Representation:** | | |
| Applicant | **:** | Mr A Mossop and Mr S Puxty (of counsel) |
| Respondent | **:** | Ms C Stamp and Ms T Hollaway (of counsel) |

**Cases referred to in reasons:**

***Alcoa of Australia Limited v Andrew Chaplyn*** *[2019] WAIRC 00011; (2019) 99* WAIG 93

***Electrical Power Transmission Pty Ltd v Robinson*** (1973) 2 QL 329

***Slivak v Lurgi (Australia) Pty Limited*** [2001] HCA 6; (2001) 205 CLR 304

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

***Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare*** (1992) 74 WAIG 2

*Reasons for Decision*

1 This matter concerns the referral to the Occupational Safety and Health Tribunal (**Tribunal**) of an improvement notice issued to GHD Pty Ltd (**GHD**) concerning reg 3.140(2) of the *Occupational Safety and Health Regulations 1996* (WA) (**OSH Regulations**). GHD seek an order from the Tribunal that the improvement notice be revoked. The Worksafe Western Australia Commissioner (**Worksafe Commissioner**) opposes the application and contends that the Tribunal ought to affirm the improvement notice with a modification to the date to comply with the notice.

2 GHD is the Australian operation of an international professional services company providing engineering design, architecture, environmental and construction consultancy services to clients.

3 In 2018 GHD was engaged by Civmec Holdings Pty Ltd (**CIVMEC**) to design a ship building facility at 16 Nautical Drive, Henderson. CIVMEC incorporated pre-cast concrete hollowcore panels for the flooring system of the ship assembly hall. The concrete panels measure 8.7 metres x 1.2 metres and weigh approximately 3 tonne each. The supplier of the concrete panels, BGC, was selected by CIVMEC.

4 CIVMEC engaged a contractor, Above All Rigging (**AAR**), to lift and install the panels into the floor. On 18 February 2019, a concrete panel fell and landed on the concrete deck, destroying the panel and damaging part of the concrete deck.

5 Worksafe Inspectors attended the site on the same day and following their inspection of the site, a Worksafe Inspector issued CIVMEC, AAR and GHD with Improvement Notices.

**6** Improvement Notice 45300297 (IN 45300297) issued to GHD on 26 February 2019 states:

> The Worksafe Inspector issuing the notice formed the opinion that:
>
> a) The applicant is a designer at the construction site;
>
> b) The applicant incorporated pre-cast concrete hollowcore plank into the building design;
>
> c) The applicant provided a safety in design report to the client;
>
> d) The safety in design report did not set out the hazards of the design and the measures used to reduce the risks; and
>
> e) The hazard that was not included in the report is a heavy hollowcore plank falling from height whilst being lifted into position by a crane.

7 GHD requested the Worksafe Commissioner review the IN 45300297. On 15 May 2019, the Worksafe Commissioner notified GHD that he affirmed IN 45300297 with a modification to the date GHD was required to comply with the notice to 5:00 pm on 24 May 2019.

8 GHD has referred the decision of the Worksafe Commissioner to the Tribunal for a further review of IN 45300297. GHD contend that the Tribunal ought to revoke IN 45300297 because it exceeds the scope of a designer's obligations. That is, there was no justification for the issuance of the IN 45300297 or its review by the Worksafe Commissioner being affirmed on the basis that as a matter of law the alleged contravention was not within the scope of GHD's duty.

9 In addition, GHD contend that there were no reasonable grounds for forming an opinion that GHD was in contravention of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act)** and submit that the design documentation appropriately identified the relevant hazards or risks associated with the design and the control or elimination of those risks during the design process.

10 Furthermore, GHD contends that IN 45300297 is uncertain, vague, and ambiguous for the following reasons:

> i) it failed to specify the nature of the contravention by GHD of its duty as a designer under section 23 of the Act to ensure that the design of the structure did not, as far as is practicable, expose persons properly constructing the structure to hazards (which GHD has the ability to control or eliminate);
>
> ii) it failed to identify how any act or omission by GHD exposed persons to the hazard of "being hit by a falling object";
>
> iii) it failed to specify how the written materials (within the meaning of regulation 3.140(2)) supplied by GHD to CIVMEC contravened the Regulations; and
>
> iv) it failed to include directions as to measures to be taken to remedy any alleged contravention with sufficient clarity.

11 The Worksafe Commissioner maintains IN 45300297 was validly issued, that GHD failed to comply with its duty prescribed in reg 3.140 and that the IN 45300297, when read as whole, does not suffer from the defects alleged by GHD. The Worksafe Commissioner says the IN 45300297 should be affirmed with modification to allow additional time for compliance.

**Questions to be Decided**

12 I must decide whether the decision of the Worksafe Commissioner to affirm IN 45300297 should be:

> a) affirmed; or
>
> b) affirmed with modification/s; or
>
> c) revoked.

13 To make this determination I must first determine if GHD is a 'designer' within the meaning of the OSH Act and OSH Regulations and in the circumstances, I must determine whether the terms of the IN 45300297 is within the duties of a designer.

14 If I find GHD is a designer, and the terms of IN 45300297 are within the scope of duties of a designer I must decide whether the written report provided by GHD to its client satisfies the requirements of reg 3.140.

15 If I find GHD is a designer, the terms of the IN 45300297 are within the scope of duties of a designer and that the information provided by GHD did not meet the requirements of reg 3.140, I must decide whether the IN 45300297 is properly constructed as required by s 48 of the OSH Act.

**Review of Improvement Notices by Occupational Safety and Health Tribunal – Principles**

16 Section 48 of the OSH Act provides the authority for Worksafe Inspectors to issue improvement notices where she/he forms the opinion that there is a contravention of the OSH Act and reads as follows:

> **48. Improvement notices, issue and effect of**
>
> (1) Where an inspector is of the opinion that any person —
>
> (a) is contravening any provision of this Act; or
>
> (b) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated,
>
> the inspector may issue to the person an improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention.
>
> (2) An improvement notice shall —
>
> (a) state that the inspector is of the opinion that the person —
>
> (i) is contravening a provision of this Act; or
>
> (ii) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated;
>
> and
>
> (b) state reasonable grounds for forming that opinion; and
>
> (c) specify the provision of this Act in respect of which that opinion is held; and
>
> (d) specify the time before which the person is required, to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention; and
>
> (e) contain a brief summary of how the right to have the notice reviewed, given by sections 51 and 51A, may be exercised.
>
> (3) A person, other than the employer, issued with an improvement notice shall forthwith give the notice, or a copy of it, to the employer, and where —
>
> (a) under subsection (1), an improvement notice is issued to an employer; or
>
> (b) under this subsection an improvement notice, or a copy thereof, is given to an employer,
>
> the employer shall cause the notice, or a copy of it, to be displayed in a prominent place at or near any workplace affected by the notice.
>
> (3a) A person shall not remove an improvement notice displayed under subsection (3) before the requirements of that improvement notice have been satisfied.
>
> (3b) Subsection (3a) does not apply in respect of an improvement notice that is suspended under section 51 or 51A or that has ceased to have effect.
>
> (3c) If an improvement notice is issued —
>
> (a) to a self-employed person in respect of a contravention of section 21; or
>
> (b) to a body corporate to which section 21B applies in respect of a contravention of that section,
>
> the person or body shall comply with subsection (3) and (3d) as if the person or body were an employer.
>
> (3d) If an improvement notice is modified by the Commissioner under section 51(5)(b), the employer shall cause a copy of the Commissioner's decision to be displayed with the improvement notice, or a copy of it, as required by subsection (3).
>
> (4) Subject to sections 51 and 51A, if a person —
>
> (a) is issued with an improvement notice; and
>
> (b) does not comply with the notice within the time specified in it,
>
> the person commits an offence.
>
> (5) A person issued with an improvement notice commits an offence if the Commissioner is not notified forthwith upon the requirements of the improvement notice being satisfied.
>
> (6) If a person contravenes subsection (3), (3a), (3c) or (3d), the person commits an offence.

**Review by Worksafe Commissioner**

17 Section 51 of the OSH Act provides for an improvement notice issued by a Worksafe Inspector to be referred for review by the Worksafe Commissioner. The Worksafe Commissioner may affirm the notice, affirm the notice with such modifications as seem appropriate, or cancel the notice. The Worksafe Commissioner must issue in writing a notice containing the reasons for their decision to the person that referred the matter for review.

18 A person, issued with such a notice, is not satisfied with the Worksafe Commissioner's decision, may refer the matter to the Tribunal for further review.

**Review by Occupational Safety and Health Tribunal**

19 In respect of the application for review of the improvement notice, s 51A of the OSH Act provides:

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

20 The Full Bench of the Western Australian Industrial Relations Commission in ***The Worksafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd*** [2007] WAIRC 01273; (2008) 88 WAIG 22 [93], held that s 51A(5) of the OSH Act requires that the Tribunal inquire into the circumstances relating to the improvement notice. The Tribunal determines whether, on those facts and circumstances, the Worksafe Inspector was justified in forming the opinion she/he did as established in ***Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare*** (1992) 74 WAIG 2.

**Occupational Safety and Health Duties of Designers**

21 Section 23 of the OSH Act sets out the obligations on a person that designs the plant to be used at workplaces:

> **23. Duties of manufacturers etc.**
>
> (1) A person that designs, manufactures, imports or supplies any plant for use at a workplace shall, so far as is practicable —
>
> (a) ensure that the design and construction of the plant is such that persons who properly install, maintain or use the plant are not in doing so, exposed to hazards; and
>
> (b) test and examine, or arrange for the testing and examination of, the plant so as to ensure that its design and construction are as mentioned in paragraph (a); and
>
> (c) ensure that adequate information in respect of —
>
> (i) any dangers associated with the plant; and
>
> (ii) the specifications of the plant and the data obtained on the testing of the plant as mentioned in paragraph (b); and
>
> (iii) the conditions necessary to ensure that persons properly using the plant are not, in so doing, exposed to hazards; and
>
> (iv) the proper maintenance of the plant,
>
> is provided when the plant is supplied and thereafter whenever requested.
>
> (2) A person that erects or installs any plant for use at a workplace shall, so far as is practicable, ensure that it is so erected or installed that persons who properly use the plant are not subjected to any hazard that arises from, or is increased by, the way in which the plant is erected or installed.

(3) A person that manufactures, imports or supplies any substance for use at a workplace shall, so far as is practicable, ensure that adequate toxicological data in respect of the substance and such other data as is relevant to the safe use, handling, processing, storage, transportation and disposal of the substance is provided —

(a) when the substance is supplied; and

(b) thereafter whenever requested.

(3a) A person that designs or constructs any building or structure, including a temporary structure, for use at a workplace shall, so far as is practicable ensure that the design and construction of the building or structure is such that —

(a) persons who properly construct, maintain, repair or service the building or structure; and

(b) persons who properly use the building or structure,

are not, in doing so, exposed to hazards.

22 The effect of these provisions is to impose duties in relation to the whole lifecycle of structures from design to supply, installation, dismantling and disposal. These duties imposed on 'upstream duty holders' have the objective of ensuring safety by elimination of hazards and risks during the design of new structures.

23 Section 60 of the OSH Act provides for Regulations necessary or convenient to give effect to the purposes of the OSH Act. The OSH Regulations prescribe minimum standards and have a general application, or define specific requirements related to a particular hazard or type of work. Part 3 of Division 12 of the OSH Regulations concern the construction or building industry.

24 Regulation 3.140(2) sets out the obligation of designers of work for commercial clients to give clients written reports:

**3.140. Designer of work for commercial client to give client report**

(1) This regulation applies in relation to a client if the work at the construction site was, is being or is to be done for the client as part of the client's trade or business.

(2) The designer must give a written report to the client setting out —

(a) the hazards —

(i) that the designer has identified as part of the design process; and

(ii) that arise from the design of the end product of the construction work; and

(iii) to which a person at the construction site is likely to be exposed;

and

(b) the designer's assessment of the risk of injury or harm to a person resulting from those hazards; and

(c) what things the designer has done to reduce those risks (for example, changes to the design, changes to construction methods); and

(d) which of those hazards the designer has not done anything in respect of to reduce those risks.

Penalty: the regulation 1.16 penalty.

(3) The level of detail in the report must be appropriate for the client, the nature of the hazards and the degree of risk.

25 Regulation 3.140 forms part of the overall scheme and should be read together and interpreted consistently with s 23(3a) of the OSH Act to determine the scope of a designer's duty.

26 Section 57 of the OSH Act provides for the development and approval of Codes of Practice for the purposes of providing practical guidance to persons that are subject to a duty under the OSH Act.

27 The relevant Code of Practice in this matter is the *Code of Practice on Safe Design of Buildings and Structures 2008* (**COP**) approved by the relevant Minster in March 2008. The COP states that designers should provide clear, precise information suitable for people in control and users during the phases of construction and use of a building or structure.

28 The COP includes a section for designers on providing information and documentation of key information concerning hazards:

Points for designers to consider when providing information include:

- making notes on drawings, as these will be immediately available to construction workers;
- developing a register or list of significant hazards, potential risks and control measures;
- providing information on significant hazards, including:
  - hazardous substances or flammable materials included in the design;
  - heavy or awkward prefabricated elements likely to create handling risks;
  - features that create access problems;
  - temporary work required to construct or renovate the building as designed.

29 Section 57(8) of the OSH Act provides that where it is alleged that a person has contravened a provision of an OSH regulation and the COP was in effect at the time, the COP is admissible in evidence.

**Is GHD the Designer?**

30 The words 'design' and 'designer' are not defined in the OSH Act. Regulation 3.137 defines a designer, in relation to construction work at a construction site, as a person in charge of the, or a part of the, design of the end product of the construction work.

31 GHD submitted documentation to the Tribunal, the *GHD Standard Operating Procedure - HSE Safety in Design HSE360* ***(HSE360)***, that it regularly uses which describes the minimum expectations and the tools and procedures that GHD has in place to fulfil its requirements as a 'designer". Within the *HSE360* a designer is defined as:

> A person is deemed a designer if their work involves them in:
>
> - making decisions for incorporation into the design that may affect the health or safety of persons who construct, use or carry out other activities in relation to the asset.

32 GHD contend that the pre-cast hollowcore plank used in construction of the floor was a generic product, manufactured and supplied by another party, BGC. GHD submit that it did not design the pre-cast hollowcore plank.

33 Worksafe Commissioner say that GHD designed the flooring system and selected the plank which had specific features and that GHD in selecting the type of flooring system is the designer of part of the end product of the design.

34 I find that GHD designed the flooring system and incorporated the pre-cast hollowcore panels as a specific element of the design. GHD may have selected a different method or material or component for the flooring system. Applying GHD's definition of a designer, it is the designer of the flooring system for this matter.

35 I find that GHD was in charge of the part of the design of the end product of the construction work being the floor of the Ship Assembly Hall and office. That is, GHD consistent with the definition in the OSH Regulations, is the designer.

**Scope of Duties of a Designer - Principles**

36 The duty of a designer pursuant to s 23 of the OSH Act is to ensure that the design and construction of the plant is such that persons who properly install, maintain, or use the plant are not in doing so exposed to hazards. As held in ***Electrical Power Transmission Pty Ltd v Robinson*** (1973) 2 QL 329 the term 'ensure' means to 'make certain' or 'make sure'.

37 In ***Slivak v Lurgi (Australia) Pty Limited*** [2001] HCA 6; (2001) 205 CLR 304 ***(Slivak)***, a case concerning the duty of a designer of a structure under s 24(2a)(a) of the *Occupational Health, Safety and Welfare Act 1986* (SA), three members of the High Court (Gleeson CJ, Gummow, Hayne) rejected the proposition that a designer of a structure owed 'some form of non-delegable duty of care in respect of all aspects of the erection of a structure' [36]. Where a builder departs from the design and this departure gives rise to a risk to the safety of those employed to build the structure, the designer will not be liable. The duty of a designer is limited to 'matters which are within the power of the designer to perform or check, such as ascertaining what use the structure will be put to, what loads it will experience when being built and the nature of the location in which it is to be erected' [37].

**Scope of Duties of a Designer – Application**

38 The Worksafe Commissioner submits that reg 3.140 is a separate and distinct duty from that set out in s 23 of the OSH Act. The Worksafe Commissioner assert that the regulation is made under s 60(5) of the OSH Act which provides that regulations may be made with respect to any matters specified in Schedule 1 of the OSH Act. The Worksafe Commissioner contends that when reg 3.140 is viewed as a separate duty stemming from Schedule 1A the general duties imposed by s 23 of the OSH Act are not relevant.

39 The Worksafe Commissioner contends that reg 3.140 requires a written report that sets out the hazards which arise from the design of the end product of the construction work. The designer selected the hollowcore panels and the hazard arises from the selection of this material. The written report needs to include the designer's assessment of the risk of injury or harm resulting from the hazard.

40 The Worksafe Commissioner submits that GHD ought to have identified that there is a hazard that arises in the construction phase from the pre-cast hollowcore panels and that does not assert that GHD is required to address the risk nor advise on how to conduct the activity of installing the panels. The Worksafe Commissioner asserts that GHD failed its obligations under reg 3.140 as it failed to include an item specific to the pre-cast panels in the written report, the Safety in Design Risk Management Register (Register).

41 GHD contend that the scope of their duty as a designer is limited to matters of design and the obligation to ensure safety as far as reasonably practical applies to matters which are within the power of the designer to perform or check. GHD contend that it is not reasonably practical to expect a designer to articulate every conceivable risk to precise detail that could be experienced during the construction phase and doing so would result in a substantial increase in the volume of work required to be compliant. GHD submit that there is no utility in a designer telling a contractor specialised in an activity how to conduct that activity and assert that to find that GHD was responsible for addressing the matter would enlarge the duties of designers beyond the express terms of the legislative scheme. GHD contend that the duty of a designer is to ensure safety as far as reasonably practicable, and it applies to matters which are within the power of the designer to perform or check. GHD submit that ***Slivak*** supports their contentions. GHD submit that if it is found that the installation of the panels is not within the designer's general duties then the failure to identify this hazard in the written report is not a contravention of reg 3.140.

42 I do not accept GHD's contention that it cannot be required to address the hazards associated with lifting and installing the hollowcore panels because Division 9, Subdivision 1 of the OSH Regulations specifically provide for matters concerning the manufacture, design, transport and erection/installation of concrete panels. The regulations cited refer to the concrete panels that are made for the purpose of being incorporated into a wall. In this matter the hollowcore panels are incorporated into the floor and not the wall and these regulations do not apply.

43 I find that GHD's selection of pre-cast hollowcore panels for the flooring system is a matter of design. The selection of this material gives rise to specific risks and hazards. As outlined in the COP designers should provide clear information to those in control or users at the phases of construction and use of a building or structure. Regulation 3.140 requires this information to be in the form of a written report that sets out the hazards, the designer's assessment of the risk of injury or harm resulting from these hazards, the action the designer has taken to reduce the risks and the design hazards where the designer has not taken action.

44 Regulation 3.140 provides for the identification of hazards which are not in the control of designers to eliminate or reduce. The regulation requires such hazards, that arise from the design, to be identified and where the designer cannot eliminate or reduce the hazard, state this to be the case.

45 Regulation 3.140 does not require GHD to direct or supervise the installation of the pre-cast hollowcore panels. However, it is within GHD's power to include a specific reference to the pre-cast hollowcore panels in the written report to the client, the Register, noting that this is a risk or hazard that the GHD have not taken any action to reduce.

46 In ***Slivak*** the High Court considered and affirmed the finding of the Full Court of the Supreme Court of South Australia that:

> Deciding what is reasonably practicable must involve balancing the likelihood of injury, and the severity of an injury that might ensue, against the availability of protective measures and their effectiveness and cost. The evidence in the present case is that the design was safe and there is no evidence to suggest that the fabrication work and erection work was not to be carried out by a competent contractor. In my opinion, the designer of the structure could reasonably expect that the extent which the cell floor plate overlapped the supporting structures would be checked when the plate was put in position and before it was moved. That in itself does not excuse the designer from considering the risk of injury [21].

47 GHD's contention that it would be unreasonable to require it to create a specific reference to the pre-cast hollowcore panels need to be weighed against the risk of serious injury or fatality of the hazard. The COP provide guidance on the information that should be included in the Register and specifically refers to significant hazards that are heavy or awkward prefabricated elements likely to create handling risks. The hollowcore panels are heavy and awkward prefabricated elements that create handling risks during the construction phase. The risk of injury arising from these elements ought to have been considered by the designer.

48 I find that it is within the scope of GHD's responsibility and obligation as a designer to include a specific reference to the hollowcore panels in the Register.

**Requirements of the Duty to Provide Written Report – Principles**

49 Regulation 3.140 requires a designer to provide a written report to a client that sets out the hazards the designer has identified as part of the design process, and that arise from the design of the end product of the construction work which is likely to expose a person at the construction site. The written report is to include the designer's assessment of the risk or injury or harm and whether the designer has done anything to reduce the risks or not done anything to reduce the risks. The level of detail in the report is a result of an assessment of the client, the nature of the hazards and the degree of risk. The provisions of reg 3.140 are set out in paragraph [24].

50 The COP provides further guidance on the requirements of reg 3.140 to designers and the relevant sections are set out in paragraph [27] and [28] of these reasons.

51 Determining the level of detail required in the written report is a product of weighing the factors set out in reg 3.140.

**Duty to Provide Written Report - Application**

52 GHD provided a Register to CIVMEC on 16 January 2019.

53 GHD also provided Structural Notes in a cover sheet to the drawings or specifications to CIVMEC on 16 January 2019.

54 GHD submit that the hazard of the pre-cast hollowcore panels falling when being lifted by a crane during the construction phase is included in the written report, being the Register. GHD contend that the Register meets the requirements set out in reg 3.140. GHD asserts that the relevant hazard is identified in the Register in the following items:

> Item 9 - Suspended loads for the Ship Assembly Hall noting the hazard/aspect as 'construction crane operations for installation of larger modules'; during the operation phase; and in the section for unplanned/unwanted event, noting 'small cranes not handling large modules safely'; and in the section for contributing factors/causes/root causes/latent causes/direct causes, noting '1. Heavy, awkward modules, 2. increased number of cranes on site', and in the section for maximum foreseeable loss, noting 'fatality'; and in the section for basis for MFL, noting 'multiple crane operations during construction'; and in the section for source, noting 'concept, design SID, workshop'; and in the section for new actions/further requirements noting '1. recommend the introduction of a site tower crane to handle larger lifts. This can be used for smaller lifts if schedule allows' and in red 'CIVMEC to establish erection methodology/module versus stick build'; and in the section 'action response/hazard closure statement', noting 'tower cranes have been considered and will not be used. Crawler cranes will be used'.
>
> Item 17 - Suspended loads for the Ship Assembly Hall noting the hazard/aspect as 'cranes on different levels crossing over'; during the operation phase; and in the section for unplanned/unwanted event, noting 'crane masts impacting with each other or structure'; and in the section for contributing factors/causes/root causes/latent causes/direct causes, noting '1. multiple cranes on site at one time, 2. SIMOPS, 3. crane working arcs not considered in the design'; and in the section for maximum foreseeable loss, noting 'serious injury, equipment damage'; and in the section for basis for MFL, noting 'congested worksite, many simultaneous activities going on'; and in the section for source, noting 'concept, design SID, workshop'; and in the section for new actions/further requirements, noting '1. crane numbers can be reduced by the

introduction of a site tower crane, 2. design to ensure where possible multiple cranes are not competing for space, 3. communicate the risk to the CRAW'.

Item 20 - Suspended loads for the Ship Assembly Hall noting the hazard/aspect as 'crane working near glazing'; during the construction phase; and in the section for unplanned/unwanted event, noting 'crane loads falling or swinging through glazing'; and in the section for contributing factors/causes/root causes/latent causes/direct causes, noting 'glazed areas, crane work in vicinity'; and in the section for maximum foreseeable loss, noting 'injury from dropped glass'; and in the section for source, noting 'concept, design SID, workshop', and in the section for new actions/further requirements, noting '1. design to limit where possible the swing arc of any crane that is required to operate in the vicinity of the glazed sections'.

55 GHD contends that the level of detail in the Register and/or the Structural Notes was appropriate for the client. The use of hollowcore panels in flooring was not unusual and that the hazards associated with the transporting, lifting or installing are matters within the expertise and ambit of the duties of manufacturers, suppliers, installers and the principal or main contractor. GHD's evidence is that the panels are generic in large scale commercial constructions, have been available in Australia for over 50 years and are the most common form of pre-cast floor used in Australia. GHD submit that in these circumstances a specific reference to the hazard of a falling plank during the construction or installation of the panels was not necessary nor required.

56 The Worksafe Commissioner contends that the suspended loads items within the Register failed to note the risk of the pre-cast hollowcore concrete plank falling when being lifted by a crane. The panels weigh about 3 tonne and the hazard of the panels falling resulting in serious injury or a fatality is a severe risk. Worksafe Commissioner submit that the hazard ought to be specifically identified in the Register noting the residual risk if the designer had not implemented any control measures.

57 Item 9 of the Register is concerned with the hazard resulting from small cranes not handling larger modules safely. The reference to larger modules and what these actually are is not clear. In his evidence Mr Airey considered this was a reference to steel modules.

58 Item 20 of the Register is a reference to cranes at different levels crossing over. It cannot be said that this item identifies the hazard of the hollowcore panels falling when being lifted by a crane.

59 The Register at Item 20 refers to the hazard of a load being lifted by a crane falling or winging through glazing in the Ship Assembly Hall during the operation phase of the facility. This item is not a reference to the hazard from the fall of a plank being installed in the flooring system. However, this reference does indicate that, given the consequences of the hazard, the inclusion of a hazard of a falling load from a crane during the construction phase could be included as an identified risk of similar serious consequence.

60 Mr Airey, was engaged by GHD to provide the Tribunal with expert evidence, described the omission of a specific reference in the Register to the lifting of pre-cast concrete panels as a hazard as surprising. Mr Airey gave evidence that he considered the omission surprising as the pre-cast panels are heavy and require very specific management to ensure safe placement.

61 Mr Airey produced three versions of the report and repeated this observation in each. Initially Mr Airey was not provided with the Register and his report was based on the Structural Notes. Subsequently, Mr Airey was provided with a copy of the Register. Initially Mr Airey had understood that the Register had been produced by CIVMEC and not GHD. This was not correct. Mr Airey produced a second report including a statement expressing his surprise at the omission of a specific reference to the lifting of the pre-cast hollowcore panels. Subsequently, Mr Airey was made aware that the Register was produced by GHD and provided to its client, CIVMEC.

62 I find that the third report is the relevant report to consider in this matter. Mr Airey's report sets out his views on the responsibility of the manufacturer as a result of their role in designing the panels and the responsibility of the installer of the panels. Mr Airey states that the designer would review the manufacture and erection procedure of the panels to ensure the pre-cast elements would not be overstressed.

63 In his third report, Mr Airey retained his statement concerning the omission of any reference of the panels and added a statement to the effect that the omission (of a reference to the pre-cast hollowcore panels) was probably due to GHD's knowledge that shop drawings containing methods of handling, amongst other matters, would be provided by GHD to CIVMEC. If this was done, GHD could review the risk of lifting and placing the panels into position.

64 Mr Airey states that the checks conducted by GHD during the construction phase are to provide the capacity for GHD to certify that the construction achieved the intended design. GHD are not ensuring that hazards are avoided during the construction phase. Mr Airey states that the responsibility for supplying and erecting the panels is that of the supplier and CIVMEC. The IN 45300297 does not allege that GHD is responsible for the supply and erection of the panels nor does it allege that GHD has the responsibility to ensure the erection of the panels was safely conducted. The IN 45300297 is concerned with the question of whether GHD failed to include a reference to the hazards arising from the panels.

65 I conclude from Mr Airey's evidence that the Register ought to include a specific reference to the pre-cast hollowcore panels and the hazard arising from the installation of these panels in the flooring system.

66 GHD submit that the written report required in reg 3.140 is not one document and other documents such as the Structural Notes provided by GHD to CIVMEC are part of the written report. GHD contend that the Structural Notes include a reference to pre-cast concrete and the hazard of a plank falling while being lifted is identified in the document.

67 The Worksafe Commissioner says it is only the Register that satisfies all the requirement of reg 3.140 and that the disbursement of information concerning hazards through multiple different documents adds a level of complexity and difficulty to people engaged in downstream processes accessing the written report and informing themselves of the hazards during construction.

68 I find that reg 3.140 requires the one written report. The text of the regulation states 'a written report' and sets out the content of the report. The COP refers to one report, being 'this' report containing information concerning hazards and risks that a designer is required to communicate to their client along with any action taken to reduce the risk and any parts of the design where hazards have been identified but not resolved. Clear and precise information is required.

69 It is best practice to include hazards in documentation other than the written report. COP recommend adding a 'safe design plan' to plan sets and notes to improve communication of residual risks to people further down the lifecycle of the structure. The inclusion of safety information to documents in addition to the written report does not remove the requirement to include in the Register relevant information.

**Terms of the Improvement Notice Issued by Worksafe Western Australia Commissioner**

70 GHD submit that the terms of the IN 45300297 were uncertain, vague and ambiguous. Therefore, the IN 45300297 does not comply with the requirements of s 48 of the OSH Act.

71 GHD contend that the IN 45300297 fails to identify whether it was issued pursuant to s 48(1)(a) or 48(1)(b) of the OSH Act and that this failure is telling because neither provision applies. GHD further submit the notice did not sufficiently identify the alleged contravention and it did not unambiguously outline the matters that required to be remedied. GHD contend that the direction to 'ensure as the designer all aspects of reg 3.140 are raised with your client in a written report' does nothing more than simply restate the requirements of the OSH Regulation. The direction fails to precisely identify what in particular needs to be remedied. GHD contend that the notice identified a hazard of 'being hit by a falling object' but it does not adequately state how any act or omission by GHD exposed persons to that hazard and GHD say the notice failed to identify with sufficient clarity the time by which the applicant was to comply. The notice requires compliance by '0000' on 19 March 2019. GHD say '0000' is fraught with imprecision as it may mean the start or the end of 19 March 2019 and that this uncertainty is undesirable where failure to comply by a deadline may result in a criminal offence.

72 The Worksafe Commissioner contends that there is no general principle that uncertainty in an executive instrument results in legal invalidity. The Worksafe Commissioner submits that the contravention is identified in the IN 45300297 as the contravention of reg 3.140(2). The Worksafe Commissioner submits there is no uncertainty of the directions when the IN 45300297 is read as a whole. The Worksafe Commissioner submits that the first part of the correction which states to ensure all aspects of reg 3.140 are raised, the particulars of the breach of reg 3.140 is to identify the hazard of being hit by a heavy hollowcore plank whilst it is being lifted at heights. This they say is the aspect that needs to be raised in the second part of the direction that states that the hazard is clearly articulated by reading the IN 45300297 as a whole. The Worksafe Commissioner submits that on any reasonable reading of the IN 45300297 all the applicant needs to do to comply with the IN 45300297 and the direction is to include in the Register an additional entry that covers a hazard of being hit by heavy hollowcore panels whilst it is being lifted at heights, its assessment of the risk of this and if it has not done anything to address this. That is, if the Tribunal was to find otherwise it submits that this does not invalidate the IN 45300297 because the directions are discretionary and can be easily excised from the notice under the Tribunal's power to modify the notice without affecting the validity of the IN 45300297 itself.

**Certainty of Terms of Notice – Principles**

73 The Full Bench of the Western Australian Industrial Relations Commission recently considered the requirements for precision of a Prohibition Notice issued under the *Mines Safety and Inspection Act 1994* (WA) (MSI Act) in ***Alcoa of Australia Limited v Andrew Chaplyn*** [2019] WAIRC 00011; (2019) 99 WAIG 93 ***(Alcoa):***

> 75 We agree that the words used in s 31AD and s 31AE, and the context in which they appear in the MSI Act, confer power to issue a prohibition notice that must be certain in its terms as a condition of its valid exercise.
>
> 76 This intention arises from the stated objects in s 3(1)(a), (b) and (c) of the MSI Act which provide (among other objects):
>
> (a) to promote, and secure the safety and health of persons engaged in mining operations; and
>
> (b) to assist employers and employees to identify and reduce hazards relating to mines, mining operations, work systems and plant at mines; and
>
> (c) to protect employees against the risks associated with mines, mining operations, work systems at mines, and plant and hazardous substances at mines by eliminating those risks, or imposing effective controls in order to minimize them; and
>
> 77 This intention also arises from s 31AF and the fact that a person issued with a prohibition notice commits an offence if the person does not comply with the notice, or such of the provisions of the notice as are applicable to the person (s 31AG).
>
> 78 The requirement to specify the matters in s 31AF(c) can only be construed in this context as a requirement to unambiguously identify and make these matters clear (see the discussion in a different statutory context in ***Re Lawrence; Ex parte Goldbar Holdings Pty Ltd*** (1994) 11 WAR 549, 554, 566 (Malcom CJ); applied by Allanson J in ***Bio-Organics Pty Ltd v The Chief Executive Officer, Department of Water and Environment Regulation*** [2018] WASC 236 [31] - [34]).
>
> 79 Thus, on its face a prohibition notice issued pursuant to s 31AB(b) (when read with s 31AF(c)) must unambiguously identify and make clear the mine, or the plant, mining practice or hazardous substance (that is dangerous or likely to become dangerous).

80 When s 31AF is read together with s 31AD and s 31AE, and within its context and legislative purpose, a prohibition notice must unambiguously identify and make clear what is to be done to remove the hazard and the requirements that are to be complied with until the inspector is satisfied the hazard or likely hazard has been removed.

**Certainty of Terms - Application**

74 I agree that the words used in s 48 of the OSH Act and the context in which they appear in the OSH Act confer power to issue an improvement notice that must be certain in its terms as a condition of its valid exercise.

75 This intention also arises from s 48(5) of the OSH Act an effect that a person issued with an improvement notice commits an offence if the Commissioner is not notified forthwith upon their requirements of the improvement matters being satisfied.

76 I find that the requirement that GHD is 'required to remedy the above' is a clear reference to GHD's failure to include a reference to the risk to the hazard of the hollowcore panels falling when being lifted into position by a crane during the construction phase in the Register.

77 I find the direction 'you are required to ensure all aspects of reg 3.140 are raised with your client in a written report', 'refer to the *Code of Practice Safe Design of Buildings and Structures 2008*' and 'refer to section 23(3a) of the *Occupational Health and Safety Act 1984*' are not sufficient in that the direction ought to have included the identification of the relevant sections of the COP.

78 In ***Alcoa*** the Full Bench found the use of the words 'might' and 'has been' gave rise to ambiguity because 'might' raises a concept of going to a vague possibility and 'has been' because there ought to be an assessment of the state of the hazard at the relevant time. The person in receipt of the prohibition notice (in that matter) is entitled to know, with a high degree of specificity, what it is prohibited from doing. Similarly, in this matter GHD is entitled to know what it is required to do to remedy its failure. The requirement to remedy the omission of the reference to the hazard is clear. However, the further direction to 'ensure all aspects of reg 3.140 are raised with your client' is not capable of being confirmed pursuant to s 48 (5) of the OSH Act with veracity.

79 Worksafe Commissioner contend that any inadequacy in the directions within the IN 45300297 ought not invalidate the IN 45300297. The Worksafe Commissioner submit that the provision of directions are not mandatory and the discretionary directions may be excised from the IN 45300297 without affecting the validity of the IN 45300297.

80 An improvement notice ought to specify the requirements imposed upon the recipient. The IN 45300297 in this matter does fulfill this requirement in part in section 1, whereas in section 2 the directions are not sufficiently clear and unambiguous. However, this does not result in a conclusion that IN 45300297 is invalid and ought to be revoked. The IN 45300297 is able to be affirmed with a modification to remove the directions set out in section 1 and include a direction to include the hazard of hollowcore panels falling when being lifted by a crane in the Register.

81 I agree with GHD's submissions that the manner of the expressed time to comply in the IN 45300297 is ambiguous.

82 At the hearing GHD submitted that the construction project was near completion. The evidence is that the installation of the flooring and the lifting of concrete panels was completed by the middle of 2019. GHD made submissions to the effect that there may be no need to consider the issues in this matter because the IN 45300297 can no longer have practical effect.

83 The IN 45300297 requires GHD to remedy the omission of a reference to the hazard arising from the hollowcore panels from the Register. There is no difference in the practical effect of adding this reference to the Register at any time from the issuance of the IN 45300297, the date of the hearing some twelve months after the completion of the floor and the issuance of this decision. The addition of the reference is a retrospective activity done after the installation, or at least the commencement of the installation, of the floor. It is not disputed that a hollow core panel fell during the installation of the floor which resulted in the attendance of Worksafe inspectors at the site and subsequently the issuing of the IN 45300297.

84 Section 48(1)(a) of the OSH Act provides for an improvement notice to be issued where an inspector is of the opinion that any person is contravening the OSH Act and s 48(1)(b) of the OSH Act has contravened a provision of the OSH Act in circumstances that make it likely the contravention will continue and be repeated. GHD contend that IN 45300297 fails to specify under which of these provisions it was issued. I agree that the particular provision of the OSH Act is not clearly specified. In my view both sub-clauses were capable of being applicable at the time that IN 45300297 was issued. With completion of the floor, IN 45300297 may be modified to specify that it is issued pursuant to s 48(1)(b) of the OSH being that there has been a contravention of a provision of the OSH Act in circumstances that make it likely that the contravention will continue or be repeated.

**Conclusion**

85 For the reasons set out above I would affirm the IN 45300297 with a modification to remove the directions and add a direction to include hazards arising from the selection of the flooring system in the written report and a modification to the date for compliance to 11 June 2021.

**2021 WAIRC 00138**

**REVIEW OF IMPROVEMENT NOTICE**

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

| | |
|---|---|
| **PARTIES** | GHD PTY LIMITED |
| | **APPLICANT** |
| | **-v-** |
| | WORKSAFE WESTERN AUSTRALIA COMMISSIONER |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER T B WALKINGTON |
| **DATE** | TUESDAY, 18 MAY 2021 |
| **FILE NO/S** | OSHT 5 OF 2019 |
| **CITATION NO.** | 2021 WAIRC 00138 |

| | |
|---|---|
| **Result** | Improvement notice affirmed with modification |
| **Representation** | |
| **Applicant** | Mr A Mossop (of counsel) and Mr S Puxty (of counsel) |
| **Respondent** | Ms S Stamp (of counsel) and Ms T Hollaway (of counsel) |

*Order*

HAVING HEARD Mr A Mossop (of counsel) and Mr S Puxty (of counsel) on behalf of the applicant and Ms C Stamp (of counsel) and Ms T Hollaway (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 *Occupational Safety and Health Regulations 1996* (WA), hereby orders:

1. THAT Improvement Notice 45300297 be and is hereby affirmed with modification, pursuant s 51A(5)(b) of the *Occupational Safety and Health Act 1984* (WA); and
2. THAT Improvement Notice 45300297 be modified to remove the directions and add a direction to include the hazard of hollowcore panels falling when being lifted by a crane in the written report provided to clients pursuant to regulation 3.140 of the *Occupational Safety and Health Regulations 1996* (WA) to 14 June 2021.

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

---

**2021 WAIRC 00139**

**REVIEW OF DECISION - S.61A - OSH ACT**
**THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL**

| | | |
|---|---|---|
| **CITATION** | **:** | 2021 WAIRC 00139 |
| **CORAM** | **:** | COMMISSIONER T B WALKINGTON |
| **HEARD** | **:** | THURSDAY, 27 AUGUST 2020 |
| **DELIVERED** | **:** | THURSDAY, 20 MAY 2021 |
| **FILE NO.** | **:** | OSHT 9 OF 2019 |
| **BETWEEN** | **:** | MR DANNY RAWLINSON-SHELTON<br>Applicant<br>AND<br>WORKSAFE<br>Respondent |

| | | |
|---|---|---|
| CatchWords | **:** | Reviewable decision - restricted asbestos licence - lawfully obtained experience - safe and proper manner - properly supervise and manage |
| Legislation | **:** | *Occupational Safety and Health Act 1984* (WA)<br>*Occupational Safety and Health Regulations 1996* (WA) |
| Result | **:** | Decision of WorkSafe Commissioner Affirmed |
| **Representation:** | | |
| Applicant | **:** | Mr P Mullally (as agent) |
| Respondent | **:** | Ms C Stamp (of counsel) and Ms T Hollaway (of counsel) |

**Case(s) referred to in reasons:**
***Waugh v Kippen*** (1986) 160 CLR 156
***Shepherd v Murray*** [2000] WASCA 281

*Reasons for Decision*

1 Mr Danny Rawlinson-Shelton (**Mr Shelton**) applied to the Occupational Safety and Health Tribunal (**Tribunal**) for a review of the WorkSafe Commissioner's decision to not grant him a restricted licence to remove non-friable asbestos. Mr Shelton seeks an order that the Tribunal substitute its decision for that of the WorkSafe Commissioner and he be granted a restricted licence to remove non-friable asbestos.

2 The WorkSafe Commissioner opposes the granting of a restricted licence to Mr Shelton on the grounds that he is not satisfied that Mr Shelton is able to undertake asbestos work involving non-friable asbestos in a safe and proper manner. WorkSafe Commissioner contends that Mr Shelton does not have the appropriate training and experience to properly supervise and manage asbestos work involving non-friable asbestos containing material done under the licence. The WorkSafe Commissioner submits that the Tribunal should affirm his decision to not grant Mr Shelton a restricted asbestos licence.

**Background**

3 On 10 September 2019, Mr Shelton applied to the WorkSafe Commissioner for a licence to carry out restricted asbestos removal work of more than 10 sqm of non-friable asbestos containing material. Mr Shelton's application included a statement of his experience in which he detailed his experience in four projects involving asbestos removal work.

4 On 26 September 2019, an officer of WorkSafe requested further information to consider the application. This information was required by 16 October 2019.

5 On 22 October 2019, the asbestos licence application form was revised adding greater detail and guidance on the requirement to demonstrate experience in planning and supervising asbestos removal work.

6 On 29 October 2019, an officer of WorkSafe contacted Mr Shelton and advised that his application had lapsed because he had not responded to the request for further information. Mr Shelton requested more time to provide the further information and was granted an extension until 5 November 2019. Mr Shelton was also provided with a copy of the updated application form.

7 On 4 November 2019, Mr Shelton provided information for three additional projects in his statement of experience using the updated application form.

8 On 29 November 2019, the WorkSafe Commissioner advised Mr Shelton in writing that he had formed a preliminary view to refuse his application and set out the reasons being the experience cited was not lawfully obtained and that he had not provided sufficient evidence that he was able to supervise and manage asbestos removal done under a licence. Mr Shelton was invited to provide further information to address the identified deficiencies.

9 On 11 December 2019, Mr Shelton responded and cited his 20 years' experience removing asbestos, the completion of a relevant training course, and advised of his view that the *Occupational Safety and Health Regulations 1996* (WA) (**OSH Regulations**) do not refer to where or how experience is obtained.

10 On 23 December 2019, the WorkSafe Commissioner notified Mr Shelton of his decision to refuse his application for the reasons set out in his earlier correspondence and that he had formed the view that he was not satisfied Mr Shelton fully understands the regulatory requirements for safe asbestos removal.

**Principles**

11 The use of asbestos and asbestos-containing material in construction and maintenance of plant and infrastructure is prohibited in Australia. Respirable asbestos fibres inhaled into a person's lungs cause the respiratory diseases mesothelioma and asbestosis. Until its prohibition in 2003 asbestos was used extensively in buildings and for insulation and a variety of different industries. Consequently, removal and disposal of asbestos is strictly controlled.

12 Hazards in the workplace are regulated by the *Occupational Safety and Health Act 1984* (WA) **(OSH Act)** and matters concerning the licensing of persons to remove asbestos are contained in the regulations to this Act.

13 Section 60(1) of the OSH Act provides the Governor with the power to make regulations necessary or convenient to giving effect to the purposes of the OSH Act. Schedule 1 of the OSH Act provides the matters for which regulations can be made and includes the registration or licensing of any work, plant, process, substance or workplace and any person carrying out any kind of work by the WorkSafe Commissioner or any other prescribed person or authority. In addition, the regulations may prohibit the carrying on of prescribed activities at workplaces or the performance of prescribed work except by or under the supervision of persons with prescribed qualifications, training or experience.

14 OSH Regulations at Part 5 of Division 4 – Further requirements in relation to certain hazardous substances at Subdivision 1 – Asbestos, sets out specific duties and obligations in relation to asbestos-containing materials. The OSH Regulations specify two types of asbestos containing materials:

- friable asbestos-containing materials are those which are asbestos fibres or fibrils that can be broken up and crushed by hand; and
- non-friable asbestos is asbestos that is normally contained in something else such as asbestos cement, adhesives, embedded in gaskets and vinyl floor tiles. The hazard level of non-friable asbestos is generally low, except in cases where the material is subject to aggressive treatment such as cutting or grinding with power tools or drilling holes through products containing asbestos.

15 In 2010 the legislative scheme regulating the removal of asbestos was amended to reflect the different hazard levels of the two types of asbestos. Prior to 2010 a person was required to be licenced to remove asbestos-containing material. Since 2010 the removal of friable asbestos may only be undertaken by an unrestricted licensed removalist. Removal of non-friable asbestos over 10 sqm may only be undertaken by a person who has a restricted licence.

16 Regulation 5.45(2A) provides the requirement to be licensed and imposes a duty on persons performing the removal of non-friable asbestos-containing material over 10 sqm to perform this work only where they are licensed to so do or are operating under the employment or other engagement of a person who holds a licence.

> **5.45. Asbestos removal work, duties as to**
>
> …
>
> (2A) Subject to regulation 5.53A(5), a person who, at a workplace, is an employer, the main contractor, a self-employed person or the person having control of the workplace must ensure that any asbestos work at the workplace involving more than $10m^2$ of non-friable asbestos-containing material –
>
> (a) Is done by –
>
> (i) the holder of an unrestricted licence or a restricted licence; or
>
> (ii) a person employed or otherwise engaged by the holder of an unrestricted licence or a restricted licence;
>
> and
>
> (b) is done in accordance with –
>
> (i) Part 9 of the *Code of Practice for the Safe Removal of Asbestos* 2nd Edition [NOHSC: 2002 (2005)]; and
>
> (ii) the unrestricted licence or the restricted licence, as the case requires.

17 Regulation 5.45(2A) requires licence holders to ensure that any work completed under their licence is done so in accordance with the *Code of Practice for the Safe Removal of Asbestos 2nd Edition* [NOHSC: 2002 (2005)] (**CoP**). Failure to do so is an offence and attracts a penalty.

18 The Supreme Court of Western Australia in ***Shepherd v Murray*** [2000] WASCA 281 has held that the objects of the OSH Act are to secure the safety of persons at the workplace. Consistent with ***Waugh v Kippen*** (1986) 160 CLR 156 an interpretation which favours a broad construction, and the purpose or objects of an Act should be preferred in the case of workplace safety and health law.

19 The purpose of granting a restricted asbestos licence, in keeping with the objects of the OSH Act, is to authorise satisfactorily competent and experienced individuals to perform asbestos removal work in accordance with the OSH Act, OSH Regulations, published Codes of Practices and Australian Standards.

**Granting a Licence**

20 The WorkSafe Commissioner may grant a restricted asbestos licence, pursuant to reg 5.45B:

> **5.45B. Restricted asbestos licence, grant of**
>
> After receiving an application under regulation 5.44(1)(b) the Commissioner may grant a restricted asbestos licence if the Commissioner is satisfied that —
>
> (a) if the applicant is an individual –
>
> (i) the applicant is able to do asbestos work involving non-friable asbestos-containing material in a safe and proper manner; and
>
> (ii) the applicant has the training and experience to properly supervise and manage asbestos work involving non-friable asbestos-containing material done under the licence.

21 The WorkSafe Commissioner's power to grant a restricted asbestos licence under reg 5.45B is discretionary. It requires the assessment of an applicant's ability to undertake the removal of asbestos in a safe and proper manner and in accordance with the CoP and the applicant's ability to properly supervise and manage asbestos work. The Worksafe Commissioner must be satisfied of the applicant's abilities. The Macquarie Dictionary defines 'satisfy' in this context as 'to convince'; similarly, the Shorter Oxford Dictionary defines 'satisfy' as to furnish with sufficient proof or information; to set free from doubt or uncertainty; to convince.

**Review of WorkSafe Commissioner's Decision by the Tribunal**

22 In respect of this review application before the Tribunal, section 61A of the OSH Act provides:

> **61A. Review of Commissioner's decisions under the regulations**
>
> (1) In this section –
>
> ***reviewable decision*** means –
>
> (a) a decision made under the regulations by the Commissioner himself or herself; and
>
> (b) a determination of the Commissioner on the review, under the regulations, of a decision made under the regulations by a person other than the Commissioner, whether or not the decision was made by that person as a delegate of the Commissioner,
>
> but does not include a decision made by a person acting as a delegate of the Commissioner.

(2) A person who is not satisfied with a reviewable decision may, within 14 days of receiving notice of the decision, refer the decision to the Tribunal for review.

(3) On reference of a decision under subsection (2), the Tribunal is to inquire into the circumstances relevant to the decision and may –

(a) affirm the decision; or

(b) set aside the decision; or

(c) substitute for the decision any decision that the Tribunal considers the Commissioner should have made in the first instance.

(4) Pending the decision on a reference under this section, the operation of the reviewable decision is to continue, subject to any decision to the contrary made by the Tribunal.

**Nature of the Review**

23 The nature of the review under section 61A(3) of the OSH Act conducted by the Tribunal is by way of a rehearing. The powers of the Tribunal are exercisable without having to find error in a decision made by the WorkSafe Commissioner and having regard to material that was not before the WorkSafe Commissioner.

24 The Tribunal is required to 'inquire into the circumstances relevant to the decision' which requires the Tribunal to inquire for itself the circumstances giving rise to the decision and the validity of the conclusions reached.

25 Having inquired into the circumstances, it is then for the Tribunal to determine whether the decision can be affirmed, set aside, or substituted for another decision that the Tribunal considers the WorkSafe Commissioner should have made in the first instance. The Tribunal must approach the facts and circumstances as found by it on its inquiry as if it were determining whether, on those facts and circumstances, it could reasonably reach the decision of the WorkSafe Commissioner to not grant the licence, having regard also to the reasons and matters set out in the decision.

26 Accordingly, Mr Shelton must satisfy the Tribunal that, on the evidence and information before it, it would be appropriate to grant the licence. Mr Shelton must demonstrate recent and relevant experience in performing the removal of asbestos and the necessary training and experience in supervising and managing asbestos work performed under a licence. The Tribunal must be convinced that on the evidence and information before it that Mr Shelton is able to safely and properly do asbestos work involving non-friable asbestos. The Tribunal must also be convinced that on the evidence and information before it Mr Shelton has the training and experience to properly supervise and manage asbestos work involving non-friable asbestos-containing material done under a licence.

**Questions to Be Decided**

27 The matter to be determined is whether I ought:

(a) affirm the decision; or

(b) set aside the decision; or

(c) substitute for the decision another decision that I consider the WorkSafe Commissioner should have made.

28 To set aside the WorkSafe Commissioner's decision and substitute another decision to grant a licence I must be satisfied, that is I must be convinced on the evidence and information before me, that Mr Shelton he is able to undertake, supervise and manage asbestos work involving non-friable asbestos containing material in a safe and proper manner.

**Background**

29 Mr Shelton has run his own construction and landscaping business, Lasting Impressions Construction and Landscaping, since 2006. Prior to this Mr Shelton worked for two employers and has gained a total of over 20 years' experience in removing asbestos.

30 Mr Shelton contends that the requirement for a licence was not in effect until 2010 and prior to then he had undertaken asbestos removal, properly wrapping and disposing of the asbestos items. Initially he undertook this work while working in his father's business and then in his own business. The asbestos removal work usually concerned fencing.

31 Mr Shelton contends that his overall experience during the 20 years including his work involving removal of asbestos under 10 sqm should be considered and qualify for the issuance of a licence.

32 Mr Shelton gave evidence that until recently, he was unaware of the regulatory requirement to hold an asbestos licence and that he was completely unaware of the change in regulations made in 2010. In August 2019, Mr Shelton was prompted to contact WorkSafe after he was asked by a company if he was able to do reports for properties and his considerations of obtaining a building licence. An officer of WorkSafe advised him a licence was required and he would need to undertake training and submit an application.

33 Mr Shelton completed the Restricted Asbestos Removal Licence (WSRAL001) WorkSafe (WA) Approved training course in late August 2019.

34 In his initial application for a licence dated 2 September 2019, Mr Shelton provided information for four different projects involving fence sheets, wall sheets and eaves sheets. The dates of the projects were not provided and were undertaken by Mr Shelton as project manager in his own business. Details of a person who could verify the experience were not provided.

35 On 26 September 2019, an officer of WorkSafe advised Mr Shelton that his statement of experience submitted was insufficient and required greater detail including information about:

1. amount and quantity of non-friable (bonded) asbestos removed in sqm;
2. details of all the projects worked on i.e. the address, project name (if applicable), home land etc;
3. nominated persons role in detail, for example if you were involved in the planning and methodology of the removal, or if you supervised the project etc;
4. restricted asbestos licence number of employers worked under.

A template setting out the required details was provided to Mr Shelton.

36 Mr Shelton provided details of a further three projects. The addresses of two of the projects submitted were the same as the projects initially submitted. As such Mr Shelton provided information for five projects.

37 Of the five jobs submitted as part of the Statement of Experience, none were completed under the employment of a restricted asbestos licence holder. On 29 November 2019, the WorkSafe Commissioner notified Mr Shelton in writing that this experience would not be considered because it was not obtained lawfully. Mr Shelton was invited to provided further examples of experience under supervision of a licence holder. On 23 December 2019, the WorkSafe Commissioner notified Mr Shelton that his application was refused.

38 Mr Shelton contends that his 20 years of experience, including projects of less than 10 sqm, of safely removing and disposing of asbestos ought to be sufficient to demonstrate he can safely and properly remove asbestos. In addition, Mr Shelton says that the OSH Regulations do not prescribe where or how the necessary experience is obtained.

39 In his submissions Mr Shelton contends in his evidence, that he has been safely removing asbestos for 20 years, along with his description of how he removes and disposes of asbestos, is sufficient for this Tribunal to substitute a decision to grant a licence and revoke the WorkSafe Commissioner's decision.

40 Mr Shelton submits that the legislation and regulations do not prevent the WorkSafe Commissioner, and this Tribunal, from considering experience gained by Mr Shelton not under a licence. I find that the long-established public policy principle that no person should benefit from their wrongdoing applies in this matter. The law requires that the person undertaking the removal of non-friable asbestos exceeding 10 sqm be licenced or to be supervised by a person who is licenced. Accordingly, the experience gained by Mr Shelton contrary to the law will not be considered by the Tribunal. Mr Shelton has not provided details of any projects in which he undertook work involving asbestos removal under the supervision of a person with a licence. Therefore, I do not have any experience to assess. A broad interpretation of the law does not mean that I ought to consider statements of generality with little evidence and detail to substantiate the experience claimed. I find that there is no basis to revoke the WorkSafe Commissioner's decision and conclude that his decision ought to be affirmed.

**Experience Gained in Projects Under 10 sqm**

41 Mr Shelton submits that he may also rely on projects under 10 sqm. Mr Shelton did not provide information of any projects or experience to the Tribunal of any projects under 10 sqm. In the absence of details of any projects under 10 sqm, I am unable to substantiate the experience and assess its compliance with the legislation and CoP. I find that there is no basis to revoke the WorkSafe Commissioner's decision and conclude that his decision ought to be affirmed.

**Supervision and Management**

42 Mr Shelton did not provide any details of any work or projects that demonstrated he has the training and experience to properly supervise and manage asbestos work involving non-friable asbestos-containing material done under a licence. Mr Shelton did not provide any examples of his work involving planning for the removal of asbestos, air monitoring and decontamination processes.

43 In the absence of relevant details of any work or projects I am unable to substantiate Mr Shelton's experience in properly supervising and managing asbestos work and assess its compliance with the requirements of the legislation. I find that there is no basis to revoke the WorkSafe Commissioner's decision and conclude that his decision ought to be affirmed.

**Safely and Properly**

44 Mr Shelton submits that he has experience in removing asbestos safely and properly gained during the previous 20 years. The safe and proper removal of asbestos is regulated by a scheme of legislation, regulations, and codes of practice. A knowledge of the requirements of the scheme of regulations concerning the removal of asbestos is necessary to be able to maintain that this task is undertaken safely and properly. One of those requirements is for a person removing non-friable asbestos exceeding 10 sqm to be licenced or to be supervised by a person who is licenced. Mr Shelton gave evidence that he had no knowledge of this requirement until August 2019. At least up until that time Mr Shelton had removed asbestos contrary to the law. Prior to this, Mr Shelton was clearly aware of the existence of licensing for asbestos removal because he gave evidence that his website stated that he was licenced to remove asbestos. Mr Shelton submits that on becoming aware of the requirement for a licence, he removed the website completely as he was not able to access the site to modify its contents. (I would note the Facebook page for Mr Shelton's business, Lasting Impressions WA, continues to state that it is licensed for asbestos removal in the 'About' section, albeit the most recent post was in 2018.) Mr Shelton submits that his knowledge of the OSH Regulations and the requirement of the regulations is not a relevant consideration. I cannot conclude that Mr Shelton is able to safely and properly undertake or supervise asbestos removal when he is either ignorant of the regulations and does not understand the legal requirements or has knowingly acted contrary to the legal requirements.

**Conclusion**

45 On the information and evidence before me I am not satisfied that Mr Shelton is able to meet the requirements of the OSH Regulations and do asbestos work involving non-friable asbestos containing material in a safe and proper manner. In addition, on the information and evidence before me I am not satisfied that Mr Shelton has the training and experience to properly supervise and manage asbestos work involving non-friable asbestos-containing material done under licence. Therefore, I find that the WorkSafe Commissioner's decision ought to be affirmed.

---

**2021 WAIRC 00140**

**REVIEW OF DECISION - S.61A - OSH ACT**

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

| | |
|---|---|
| **PARTIES** | MR DANNY RAWLINSON-SHELTON |
| | **APPLICANT** |
| | **-v-** |
| | WORKSAFE |
| | **RESPONDENT** |
| **CORAM** | COMMISSIONER T B WALKINGTON |
| **DATE** | THURSDAY, 20 MAY 2021 |
| **FILE NO/S** | OSHT 9 OF 2019 |
| **CITATION NO.** | 2021 WAIRC 00140 |

| | |
|---|---|
| **Result** | Decision of WorkSafe Commissioner Affirmed |
| **Representation** | |
| **Applicant** | Mr P Mullally (as agent) |
| **Respondent** | Ms C Stamp (of counsel) and Ms T Hollaway (of counsel) |

*Order*

HAVING heard Mr P Mullally (as agent) on behalf of the applicant and Ms C Stamp (of counsel) and with her Ms T Hollaway (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Occupational Safety and Health Regulations 1996* (WA), hereby orders:

THAT WorkSafe Commissioner's decision be and is hereby affirmed.

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