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CEREMONIAL ADDRESSES—

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BEFORE THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CEREMONIAL

PRESENTATION OF COMMISSION BY CHIEF COMMISSIONER S J KENNER AND SPEECHES OF WELCOME FOR SENIOR COMMISSIONER R COSENTINO

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON MONDAY, 9 AUGUST 2021, AT 08:34 AM

THE HON JUSTICE R LE MIERE

CHIEF COMMISSIONER S J KENNER

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

COMMISSIONER T B WALKINGTON

MR B O'BRIEN appeared for the Australian Mines and Metals Association WA

MR P MOSS appeared for the Chamber of Commerce and Industry WA (Inc)

DR T DYMOND appeared for UnionsWA

HON MINISTER S DAWSON MLC appeared for the Minister for Industrial Relations

MR M CUERDEN SC appeared for the WA Bar Association

MS J BOUJOS appeared for the Law Society of WA

LE MIERE J: I acknowledge the traditional custodians of the land on which we meet, the Whadjuk people, and I pay my respects to their Elders, past, present and emerging.

As a long-standing member of the Industrial Appeal Court, and a one-time Acting President of the Commission, I am honoured and privileged to join the members of the Western Australian Industrial Relations Commission at this special sitting of the Commission to mark the appointment of Chief Commissioner Stephen Kenner, and Senior Commissioner Rachel Cosentino.

I acknowledge the distinguished guests who will address the Commission: The Minister of Industrial Relations, the Honourable Stephen Dawson MLC, Dr Tim Dymond, representing Unions WA, Mr Paul Moss, representing the Chamber of Commerce and Industry of Western Australia, Mr Ben O'Brien, representing the Australian Mines and Metals Association of Western Australia, the President of the Law Society of Western Australia, Ms Jocelyne Boujos, and the President of the Western Australian Bar Association, Mr Martin Cuerden SC.

I acknowledge and welcome Chief Commissioner Kenner's family: his wife, Michelle, his children, Alec, Nicholas, Anya and Anneka, and his daughter-in-law, Gosia.

And Senior Commissioner Cosentino's family: her husband, Ron Clarke, her daughter, Laura, and her parents, Marjorie and Domenic.

I acknowledge the presence of former Presidents or Acting Presidents of the Commission: the Honourable Justice Jennifer Smith, Mr Gavin Fielding AM and Mr Mark Ritter SC, former Chief Commissioners: Mr Bill Coleman, Mr Tony Beech and Ms Pamela Scott, and former Commissioners: Mr Jack Gregor, Ms Stephanie Mayman and Mr Rod Gifford.

I welcome you all as guests to this Ceremonial Sitting for Chief Commissioner Kenner and Senior Commissioner Cosentino.

I could speak at length about the distinguished careers of Chief Commissioner Kenner and Senior Commissioner Cosentino, but I will refrain from doing so, so as to not steal the thunder of the invited speakers. However, I cannot let the occasion pass without acknowledging their achievements and standing.

I first met Stephen Kenner in the 1990s, when we were both lawyers, who, from time to time, worked together, and at times, on opposite sides. Stephen was an outstanding lawyer then, and has gone on to achieve eminence in the practice of Industrial Relations, which is reflected in his national and international professional and academic standing.

Rachel Cosentino enjoyed an outstanding career as a solicitor and barrister before her appointment to this Commission, but she is much too young for our legal careers to have had more than a fleeting interception.

I now invite the Honourable Stephen Dawson MLC, Minister for Industrial Relations, to address the Commission.

Minister?

DAWSON M: Thank you, Justice Le Miere.

Can I begin by saying, ngaala kaaditj, Whadjuk Noongar moort, keyen kaadak nidja boodja. Can I acknowledge the traditional owners on the land which we've gathered, the Whadjuk people of the Noongar nation, and pay my respects to their Elders, past, present and emerging.

Can I also acknowledge you, Justice Le Miere, Chief Commissioner Kenner, Senior Commissioner Cosentino, Commissioner Emmanuel, and Commissioner Walkington.

To those former Commissioners and distinguished guests, ladies and gentleman, welcome this morning. I am pleased to be here to mark this special sitting today, to formally present Mr Stephen Kenner to the position of Chief Commissioner, and to formally welcome Ms Rachel Cosentino to the Western Australian Industrial Relations Commission as the newly appointed Senior Commissioner.

Industrial relations affects the lives of all Western Australians, from the relationships we have with our employers and employees, to the conditions that apply to our employment. For over 100 years, the Commission has played an integral role in dealing with industrial relations matters in Western Australia, whether it's with the setting of minimum wages and conditions of employment, or assisting employers and employees to reach agreements.

The Commission also hears and determines appeals from a number of tribunals and bodies. In exercising these important powers, the Commission is obliged to act according to equity, good conscience, and the substantial merits of each case before it. And so it is to each Commissioner that these obligations fall.

Today, we present – we formally present Mr Kenner to the role of Chief Commissioner of the Western Australian Industrial Relations Commission. Mr Kenner is a long-standing member of the Commission, with a wealth of experience, having first been appointed a Commissioner in 1998. He has occupied the position of Senior Commissioner since 2016, first in an acting capacity, and since 2018, on a substantive basis.

Chief Commissioner Kenner has presided over a wide-range of industrial disputes and employment issues during his tenure. As well as being a current public service arbitrator, he has been the presiding member of the Road Freight Transport Industry Tribunal and the Occupational Health and Safety Tribunal. He was also formerly the Chair of the Western Australian Coal Industry Tribunal.

In all these roles, Chief Commissioner has displayed the important characteristics of integrity and good judgment that have led to him being here today as the Chief Commissioner. It is, I should add, common, in appointments such as that of the Chief Commissioner, to take soundings from stakeholders and colleagues. From these soundings, I can say that Chief Commissioner Kenner is a very well-respected Chief Commissioner, who is recognised for his knowledge and conciliation skills.

Prior to being appointed to the Commission, Mr Kenner was an advocate, solicitor and then partner in Mallesons Stephen Jaques, and headed up its Western Australian Workplace and Employee Relations practice. Mr Kenner was also a Senior Industrial Advocate and Manager with the then Confederation of Western Australian Industry.

I understand Mr Kenner has also presented numerous seminars and conference papers in employment law related topics, has been a guest lecturer at Western Australian universities, provided advice to the Ministerial Advisory Panel on the recent Work Health and Safety Act 2020, and has been active in the Law Society and the Industrial Relations Society of Western Australia.

Mr Kenner, as a long-standing and well-respected member of the Commission, you are very well-qualified to lead the Commission. On behalf of the State government, I congratulate you on your appointment as Chief Commissioner of this esteemed institution.

Today, we also formally welcome Senior Commissioner Rachel Cosentino. Ms Cosentino joins the Commission with extensive experience in industrial relations and employment law. Since being admitted to practice law in Western Australia, Ms Cosentino has worked at Gibson and Gibson Lawyers, before becoming a partner in the same firm, which, at such a young age, was a great testament to her capabilities.

Following the merger of Gibson and Gibson with Slater and Gordon, Ms Cosentino moved to work for that firm, being promoted to WA Practice Group Leader for the general law division, with a role on the National General Law Executive.

More recently, Ms Cosentino has been a barrister at Francis Burt Chambers, where she continued to practice in the area of industrial relations and employment law, as well as various other disciplines.

Ms Cosentino has conducted workplace and governance investigations and represented unions, employees, the State government and employers in the private sector and non-for-profit sector. She has been known as one of the foremost practitioners in the field of industrial relations in Western Australia. It is the Commission's gain to bring that knowledge and experience to the Bench.

Ms Cosentino has also undertaken voluntary work and engaged in pro bono representation for a number of organisations, including the Employment Law Centre and Law Access. Voluntary and community legal work is an indispensable part of our legal system, ensuring equitable access to justice and fairness for vulnerable members of our community. Senior Commissioner Cosentino's broad industrial relations knowledge and experience will ensure that she successfully discharges her obligations as a Commissioner.

Ms Cosentino, on behalf of the State government, I welcome you to the Industrial Relations Commission in the role of Senior Commissioner.

It is a noteworthy occasion that we formally acknowledge the appointment of the Chief Commissioner and Senior Commissioner at the one time. Chief Commissioner Kenner, and Senior Commissioner Cosentino, I warmly congratulate you on your new appointments. I am confident that you will both continue to make a significant contribution to the practice of industrial relations in this State, and I wish you every success in your new roles.

Thank you.

LE MIERE J: Thank you, Minister.

Dr Dymond?

DYMOND, DR: Thank you, Justice Le Miere.

I'd also like to join with other speakers in acknowledging the traditional owners at the place where we meet, the Whadjuk people of the Noongar nation, their Elders, past, present and emerging.

Chief Commissioner Kenner, members of the Commission, Minister Dawson and the other section 50 parties, it is a great honour, on behalf of Unions WA and the working people of this State, to rise to address the Commission on the occasion of the appointment of Senior Commissioner Cosentino.

But firstly, I would like to take a moment to congratulate you, Chief Commissioner, on your appointment. We have appreciated your engagement with Unions WA during your time on the Commission, particularly, your engagement with our WA Union industrial officers and lawyers' network, and also, your engagement on matters with occupational health and safety, which have been well-received by our affiliated unions.

We look forward to continuing our long tradition of productive consultation and dialogue with both yourself as Chief Commissioner and the Commission broadly.

Senior Commissioner, we welcome you to this place after a significant career in industrial relations. I'm pleased to have this opportunity to welcome you on behalf of Unions WA, our council, and our affiliated unions, for your contribution to this important institution, and more broadly, to the State of Western Australia.

The WA Industrial Relations Commission is an important and historically significant institution that has played a critical role in our society. This role shapes the economic health and social outcomes for working people across this State.

We welcome you and celebrate that WA is unique among states in having a bipartisan protection of the jurisdiction of this Commission and the important role it plays in WA's public and private sectors, along with the vital role it plays in work health and safety. Those of us in this room know and appreciate industrial relations underpins our economy and the strength of our social fabric, however, no surprise, at this moment, we face a time of great challenges. Technological and global change, inequality growing around the world, and particularly, inequality in response to the COVID-19 pandemic.

COVID has exposed great gaps in our economy, labour market and work health and safety systems that must be addressed. Nationally, the crisis has plunged millions of workers into unemployment or job insecurity, and has hit some of the most disadvantaged workers, young people, women, temporary visa holders – has hit them all the hardest. The industrial relations issues arising from the pandemic are far from over, particularly, for the Commission, the demands on the public sector have been significant in this pandemic, but also, for workers and their families getting access to safe, productive and dignified work, this is more important than ever.

Senior Commissioner, your experience in industrial relations, experience in representing workers, employers and governments brings tripartite experience to the Bench to deal with both the day to day issues the Commission faces, but also with the global trends that you and all of us will grapple with over the coming years. It is evident, by your distinguished career and experience in industrial relations, that you will contribute earnestly to this institution. Even just a brief review of the Commission's hearing list shows that already you are well into your role, and doing important work on behalf of the State.

And on behalf of Unions WA and its affiliated bodies, we welcome you to the Commission. May it please the Commission.

LE MIERE J: Thank you, Dr Dymond.

Mr Moss?

MOSS, MR: Thank you, your Honour.

It is with great pleasure that I appear on behalf of CCI WA and its members to acknowledge the appointment of Chief Commissioner Kenner to his new role and to welcome the appointment to Senior Commissioner Cosentino to the Industrial Relations Commission.

For our members covered by the State IR system, the Commission plays an important role in providing a fair and balanced industrial relations system that recognises the interests of both workers and employers. That balance comes out not only from the background and experience that the Commission members bring along with them upon their appointment, but also to put aside those learnings and consider matters from the perspective of each party that appears before you.

Fairness is also derived from the recognition that the industrial relations system is not only about the legislation regulation that underpins it, but that at its core, it is fundamentally about people. This is especially true in the case of this Commission and its interactions with the private sector in particular. Inevitably, your decisions impact upon individuals, both the person who owns and runs the business, and the people who rely on the organisation's success for their jobs.

Senior Commissioner Cosentino, we congratulate you on your appointment as Senior Commissioner. You come to the Bench with a range of experiences, both within the industrial relations sphere, but also, notably, outside of it. We are confident that this breadth of experience will assist you in making a substantial and valuable contribution to the work of this Commission.

We also note it acts as a reminder about the breadth of issues impacting upon businesses. The regulation of the employment relationship, whilst essential, is but one part of the multitude of regulations that small business owners must grapple with, and we appreciate the opportunity for that breadth of experience to come into that consideration on how industrial relations interacts with all of those areas.

Chief Commissioner Kenner, CCI is also delighted to congratulate you on your well-deserved appointment. It would be remiss of me not to recognise your work as an advocate on behalf of employers with the Confederation of WA Industry - as CCI WA was previously known, and the experiences that you've gained during that time. However, it is the balance, fairness and respect for the law that you've demonstrated through your time with the Commission that holds you in good stead in your role as Chief Commissioner, along with the respect that you have earned from all the parties represented before you today.

As has occurred with each of your predecessors, CCI looks forward to you putting your own distinctive mark on the operation of this Commission.

We congratulate you both, and wish you well in your new roles.

If the Commission pleases.

LE MIERE J: Thank you, Mr Moss.

Mr O'Brien?

O'BRIEN, MR: Thank you, your Honour.

Just some very brief remarks from me this morning. On behalf of the Australian Mines and Metals Association and its member organisations, especially those based here in Western Australia or those who have operations here in Western Australia, we congratulate Chief Commissioner Kenner and Senior Commissioner Cosentino on their appointments to their respective roles in the Commission.

Both Senior Commissioner Cosentino and Chief Commissioner Kenner are very well-regarded, highly respected members of the industrial relations community here in Western Australia and undoubtedly, the Commission is in very good hands for the years to come.

So in closing, we wish you all the best in your roles, but most importantly, we'd like to thank you for taking on the enormous responsibility that comes with these roles. So thank you for that, and we wish you all the best.

LE MIERE J: Thank you, Mr O'Brien.

Ms Boujos?

BOUJOS, MS: May it please the Commission. I wish to acknowledge the traditional owners of the land on which we meet, pay my respects to their Elders, past and present.

It's my privilege to appear this morning representing the Law Society of Western Australia, to welcome Chief Commissioner Stephen Kenner and Senior Commissioner Rachel Cosentino. Today, we are recognising the careers of these two worthy appointees, who now hold the two most senior positions in the Commission.

Chief Commissioner Kenner, you've enjoyed a career immersed in the field of industrial relations for over 20 years, in which you have garnered specialist knowledge and skills and this has been ably recorded by all previous speakers.

I would just simply like to mention that between 1990 and 1998, you were an advocate, solicitor and then, partner, in the national law firm of Mallesons Stephen Jaques, and developed and headed up their Western Australian Workplace and Employee Relations Practice, and this was at a time when this area was developing greatly.

I know that you are a member of the editorial board of the CCH Australian Labour Law Reporter, and in that role, you have authored and edited articles and commentary and case notes. You're presently a contributing author of Halsbury's Laws of Australia and as previously noted, you have presented numerous seminars and conference papers in all industrial relations fields, nationally and internationally.

Chief Commissioner, you are a long-standing and valuable member of the Law Society of Western Australia, and for that loyalty, I thank you. And you have been active on several law society committees, and for that activity, I thank you. You are known for your exceptional mediation and arbitration skills, a considered decision-maker, who possesses a vast knowledge of the workings of our system of industrial relations in Western Australia.

You are, perhaps, less well-known as a vigneron, someone who grows grapes and turns them into wine. Your vineyard is in New Zealand, perhaps, next door to that other New Zealand-Australian actor, Sam Neill, who also has a vineyard in New Zealand. However, you are victim of COVID separation anxiety. I understand you have not touched your terroir for 18 months. You did try, but a diversion to Tasmania meant you missed a window to get into New Zealand through the travel bubble, but we all hope, for your sake, that that travel bubble will return soon.

And I'm assured, that since your appointment to the Bench, you've established yourself as an excellent leader and your vast knowledge and significant experience and outstanding skill set have made you an excellent choice for the new role as Chief Commissioner. You will continue to play an important role in serving the citizens of our State, and when you can, once again, be in New Zealand for vintage, you will make wonderful wine.

I would now like to congratulate Rachel Cosentino on her appointment as Senior Commissioner. You may not have realised it at the time, but you set yourself on a stellar career path when, upon completion of your Bachelor of Arts degree, you obtained first-class honours in industrial relations. You then expanded your studies to the area of law and obtained a Bachelor of Laws degree.

You commenced your career at Gibson and Gibson Lawyers, and worked as an advocate in Workers Compensation, personal injury, employment law and industrial law matters from 1999 to 2005. At that time, I am reliably informed you were noted for your mode of transport, a motorbike, so handy to park at sites, and then, in town.

Also during that time, I understand you passionately took part in May Day marches. And on one of these marches, you negotiated the most important contract of your life. This is when you asked your husband, "What date should we get married?" But he had fully absorbed the basics of workplace law and negotiation during his relationship with you, and he queried, "Well, have we even got a contract yet? You haven't asked me to marry you". So you did, and then, he was happy to proceed with the details and set the effective date. I believe he's here today, along with your children.

So in 2018, you decided to work independently and joined Francis Burt Chambers as a barrister. Your areas of practice included, principally, industrial relations, employment law, disciplinary tribunals and personal injury. As part of your role, you took part in workplace and governance investigations, represented trade unions, employees, State government, and employers in the private sector and non-for-profit sector. And at this point, you rode a pushbike to work. Now, the RAC statistics indicate that 7 per cent of the population ride pushbikes to work.

Now, all that hard work and achievements have led to a very successful career, culminating in your eminent new appointment here today, and I'm further reliably informed to a new mode of transport, a car.

You have shown great leadership and compassion, and have given back to the community through your voluntary work, which is an acknowledged sign of a true leader. You have provided pro bono representation of litigants through Law Access, which is a wholly owned subsidiary of Law Society, and we thank you for that. In your pursuit of justice, you have never lost sight of what it is about law that makes it so important.

The Honourable Stephen Dawson MLC, Industrial Relations Minister said, "The Commission has presided over industrial relations issues in Western Australia for well over a hundred years, and Mr Kenner and Ms Cosentino are an excellent choice to hold the two most senior positions".

On behalf of the Law Society of Western Australia, and the legal profession, it is my privilege to warmly congratulate you both and wish you all the best on your new appointment roles.

May it please the Commission.

LE MIERE J: Thank you, Ms Boujos.

Mr Cuerden?

CUERDEN, MR: May it please the Commission. I, too, pay my respects to the traditional custodians of the land on which the Commission, today, sits, the Whadjuk people of the great Noongar nation, and I pay my respects to their Elders, past and present.

It is my great pleasure to appear this morning, on behalf of the Western Australian Bar Association, to join in congratulating the Chief Commissioner on his appointment, and in welcoming Senior Commissioner Cosentino as a member of this Commission.

The Chief Commissioner's appointment is welcomed and supported by the Western Australian Bar, and on behalf of the bar, I congratulate you, Chief Commissioner, on this well-earned appointment. But as the representative of the Independent Bar in this State, from where Senior Commissioner Cosentino has come, and as the new member of the Commission, I may seek leave to focus on the Senior Commissioner's appointment this morning.

Senior Commissioner, this is, of course, take two of your welcome. The first, having been scheduled to take place on 30 June, which, as fate had it, turned out to be the second day of the second snap COVID-19 lockdown in this State. As you were appointed with effect from 8 June, it means you have now already been serving on this Commission for two months.

I am indebted to those who have preceded me this morning, who have already spoken of your background, qualifications and experience, which, with respect, make yours a most suitable appointment to this Commission. The five speakers who have preceded me have done the heavy lifting, and all that remains for me to do is to add a splash of colour to the scene by drawing attention to a few of your attributes, which reinforce the wisdom of this appointment. I'm also conscious that, by now, many will be anxious for a tea or coffee, so for these reasons, I'll keep my observations brief.

You were, as has been mentioned, a member of the Independent Bar for three years prior to your appointment to this Commission. You joined the Independent Bar in 2018, although you had, as has been observed, very significant experiences as a legal practitioner prior to that time, with an emphasis on industrial and employment law.

My own experience of you at the Bar, is that you were, if I may say so, a well-liked and popular member of both the Bar and of Francis Burt Chambers, from which you – from where you practiced, and in particular, on the floor from which you practiced, from which there are a number of observers today, who have come to join in your welcome.

As a member of the Bar, you developed a reputation as someone who was prepared to take on challenges, and who was always willing to be a mentor to young lawyers who looked to you for guidance. I've made some inquiries of others, who know you better than I do, in order to supplement my own observations and experience. And I will mention six qualities or attributes, which seem to me to be particularly relevant today.

First, I am told – and this is a quote, that, "You are not a party girl and you don't misbehave". Whether the person who told me that thought I was looking for evidence of misbehaviour is unclear. In any event, a lack of proclivity for misbehaviour is a good start for any appointment to this Commission.

Secondly, I am told that you are not only a keen cyclist and sportsperson, but also an avid reader. I mention this, because an avidity for reading is indicative, not only of a keen intellect, but in the case of a lawyer, indicative of a healthy interest in matters beyond the narrow confines of the law, which is necessary if that person is to understand the broader context in which their decisions operate. This is no less true in the case of this Commission, whose decisions affect people in one of the most fundamental aspects of their lives.

Thirdly, as a negotiator, you have what has been described the perfect poker face. You are said to be completely unreadable. I am sure you will find inscrutability to be a perfectly transferable skill on this Commission.

Fourthly, you have a reputation for taking on challenges. I have been told that you will take on anything. Again, this holds you in good stead.

Fifthly, you have a reputation as someone who is extremely empathetic. You have a reputation as being an extremely kind person. Legal learning is important, but it is impossible to overstate the importance of the quality of empathy in a position such as that which you have now taken up.

The sixth and final matter is something I mention with some hesitation. I preface it by saying that this information about which I have no direct knowledge nor any belief one way or the other as to its accuracy, save to say that my source is reliable. As the rules of evidence don't apply in this jurisdiction, and as a hearsay objection is inevitably met with the response that the evidence will be received and given such weight as the Commission thinks fits, I simply mention that I am reliably informed that you are a quite proficient salsa dancer. I leave it to the Commission to give that information such weight as it might think fit.

Your appointment, Senior Commissioner, to this Commission is welcomed and supported by the Independent Bar, and on behalf of the Western Australian Bar, I wish you every success as you begin this new chapter in your legal career.

May it please the Commission.

LE MIERE J: Thank you, Mr Cuerden.

I invite Chief Commissioner Kenner to respond.

KENNER CC: Thank you very much, Justice Le Miere, for your welcome and for kindly presiding over the Ceremonial Sitting of the Commission.

I sincerely thank the Minister and all of those at the bar table for your generous remarks this morning, welcoming me to the office of Chief Commissioner.

It's a privilege to be appointed to the Bench of the Industrial Relations Commission, and it's an honour to be appointed the Chief Commissioner.

When I first appeared in the Commission, I had the benefit of appearing before many former Commissioners. Later, when I was appointed, I was fortunate to serve with Bill Coleman as the Chief Commissioner, and Gavin Fielding as the Senior Commissioner. I had the benefit too - of serving with former Chief Commissioners Tony Beech and my immediate predecessor, Pam Scott. I learned from them all, and I'm very pleased to see them here this morning, along with other former members of this Commission.

I also wish to thank my Commissioner colleagues, who are on the Bench with me this morning, for their support in my new role.

I, too, am delighted to formally congratulate and welcome Senior Commissioner Cosentino on her appointment to the position of Senior Commissioner. I can say that her arrival was keenly anticipated. She brings with her a wealth of experience as a senior legal and industrial relations practitioner. Her qualities have been extolled by those at the bar table. I wish the Senior Commissioner well for the future, and I look forward to working with her in her new role.

Each Chief Commissioner brings to the office their own life experiences and approach, as I do. I very much look forward to the challenges that lie ahead. The Commission plays a role in the community as an independent and impartial tribunal. Much has been said before about substantial changes in industrial relations, which have occurred in recent years, and which will no doubt also occur in the future. Suffice to say, that the Commission's jurisdiction evolves and modernises to fit the times.

I particularly thank my family for their love and support. Michelle and our children, Alec, and his wife Gosia, Nicholas, Anya and Aneka, all of whom are here this morning. Nicholas normally lives in Toronto, and hasn't been able to return because of the pandemic. While I know he's been champing at the bit to get back, the fact that he's been here with us for the last 18 months, and can be here with us this morning, really does show that every cloud has a silver lining.

When I was first appointed to the Commission, Anya was only a toddler, and Anneka was yet to be born. I now look at them with great pride. Most importantly, they've all grown up to be great human beings. I'm also really pleased to see here today, good friends from law school days, who have made the effort to be here. Thank you for coming.

Thanks also to Cathie Rose, my Acting Associate, who has worked with me since 2010, and has put up with my terrible handwriting for all of those years, and my Executive Assistant, Elizabeth Roberts, for helping me keep the Commission's administrative wheels turning.

Finally, I also wish to acknowledge and thank the Registrar, Sue Bastian, for her support since I have taken over the role of Chief Commissioner, and all of the staff in supporting the Commission.

Thank you very much.

LE MIERE J: Thank you, Chief Commissioner.

Senior Commissioner Cosentino?

COSENTINO SC: I also begin by acknowledging and paying my respects to the Whadjuk people, on whose land we are conducting today's proceedings.

There are many people who I should rightfully express my gratitude to today, but before I get to that, can I tell you that it is particularly gratifying to me that I am able to share this ceremony with the presentation of Commission to the Chief Commissioner? My first ever appearance as an advocate in a contested matter was in this Commission, and it was before the Chief Commissioner, who was then Commissioner Kenner.

I think it was maybe a three or four day hearing about redundancy pay, is what I remember, and I also remember going into the hearing certain that I would shame myself, shatter my client's prospects with my inexperience and naivety and finish a short-lived legal career there and then. Happily, I can say that my experience before Commissioner Kenner was nothing of what I had expected. The Bench was patient and showed genuine respect when listening to my client's evidence and to my submissions.

Commissioner Kenner kindly gave no indication that he knew how amateur I was, and my client was successful. So I owe my initiation into advocacy and the fact that I didn't give it all up in the early days to the Chief Commissioner. It is, as I said, immensely gratifying and perhaps also serendipitous, to be sharing today's events with him.

This leads nicely to also acknowledge and thank the past members of the Commission, who are here with us today, as well as the current Commissioners and the Commission's staff, because the positive experience that I had in that first hearing before Commissioner Kenner, which I would describe as a genuine experience of equality before the law, was my consistent experience appearing here over the years that followed.

Work here, as an advocate, was always a true collaboration between advocates and between advocates and the Bench, in the administration of justice. So I join the Commission knowing there is a worthy legacy and highly regarded culture to uphold.

When I was a child, my dad told me that when, he, in turn, was a teenager, his father would wake him up in the morning with words in Calabrese, but translating, I think, to, "Get out of bed, you're in Australia, there's work to do here". Those words have stayed alive in my mind. For many years, I imagined Nonno was celebrating that WA was a place where migrants had opportunities for secure work, decent pay and conditions, celebrating the egalitarianism that was borne out of and upheld by the labour movement and was a lived reality for his family.

Later, I thought, maybe Nonno was pointing out that WA was a place where entrepreneurs could make a go of it. His family were, after all, primary producers, with a small family business. Maybe he was pointing to the stability and wealth of our economy with the relative – and comparing that with the relative poverty and instability of rural southern Italy.

These days, when the words emerge in my mind, they have a different meaning again. These days, they are telling me that there is, and always will be, work to do to protect the values, the systems and the conditions that created the opportunities that I've enjoyed and the opportunities that my family has enjoyed. The work that is to be done is on the system.

So it is, of course, an honour and a privilege to be appointed to the role of Senior Commissioner, but I have to also describe it as extremely satisfying, not just because the work of the Commission, as the speakers at the bar table have described, not just because the work of the Commission contributes to our economy and society, but because it's constantly interwoven with the important work that public servants in this State do every day of the year, that the Unions of this State do every year, that peak bodies for business and businesses themselves do every day of the year. And I am looking forward to having a part to play in that.

I need to finish my list of thanks. To his Honour, for presiding at the ceremony today, to all of those who spoke from the bar table, I accept your kind sentiments as indicative of your support for the Commission and the work that the Commission does, to my parents, who are here, of whom I am immensely proud, whose lived example is that the important decisions are not about what you do with your life, but what you do with your love.

I acknowledge the presence here today of my other dear family members and many work colleagues, and finally, my husband, Ron, the package, and our darling Laura Lee, there's no metaphor that adequately describes your love, I just know I am incredibly lucky to have it.

LE MIERE J: Thank you, Senior Commissioner.

I will shortly adjourn, and then invite you all, please, to join us for refreshments on level 8.

The Commission will now adjourn.

AT 9.16 AM THE MATTER WAS ADJOURNED ACCORDINGLY

NOTICES—Award/Agreement matters—

2021 WAIRC 00500

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 16 OF 2021

APPLICATION FOR A NEW AGREEMENT TITLED

“SHIRE OF YALGOO UNION INDUSTRIAL AGREEMENT 2021”

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Administrative, Clerical And Services Union Of Employees* and *Shire Of Yalgoo* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

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

5. SCOPE AND PARTIES BOUND

- 5.1 This Agreement constitutes the whole agreement between the Parties to the extent of its terms. This Agreement is the successor to the Shire of Yalgoo Employees Enterprise Agreement 2018-2021 certified by the Western Australian Industrial Relations Commission on 9 March 2020 (**Expired Agreement**).
- 5.2 The parties bound by this Agreement shall be:
- 5.2.1 The Shire of Yalgoo, of 37 Gibbons Street, Yalgoo 6635;
- 5.2.2 The Western Australian Municipal, Administrative, Clerical and Services Union, of 102 East Parade, East Perth WA 6004; and
- 5.2.3 According to s 41A(2) of the Industrial Relations Act 1979 (WA), Employees of the Shire of Yalgoo that are, or are eligible for, membership of the Western Australian Municipal, Administrative, Clerical and Services Union.
- 5.3 This Agreement shall be binding upon and govern the terms and conditions of employment of all Employees of the Shire of Yalgoo. At the time this Agreement was made the number of Employees of the Shire of Yalgoo is 16.

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

13 September 2021

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2021 WAIRC 00479

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2021 WAIRC 00479
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	THURSDAY, 17 DECEMBER 2020
DELIVERED	:	THURSDAY, 26 AUGUST 2021
FILE NO.	:	U 27 OF 2020
BETWEEN	:	NATASHA STEPHENSON
		Applicant
		AND
		M.J EDWARDS T/AS M.J EDWARDS & J.PENDARVIS
		Respondent

CatchWords	:	Industrial Law - Termination of employment - Unfair dismissal - Compensation - Injury - Adjournment refused
Legislation	:	<i>Industrial Relations Act 1979</i> (WA)
Result	:	Application upheld
Representation:		
Applicant	:	Ms E Creek (of counsel)
Respondent	:	No appearance

Case(s) referred to in reasons:

James A Capewell v Cadbury Schweppes Australia Ltd (1998) 78 WAIG 299

Glenn Ross McLeod v Stock Rd Market Tavern [2005] WAIRC 00963; (2005) 85 WAIG 1569

Nicholas Richard Lynam v Lataga Pty Ltd (2001) 81 WAIG 986

Myers v Myers [1969] WAR 19

Ramsay Bogunovich v Bayside Western Australia Pty Ltd (1998) 79 WAIG 8

The Registrar of the Western Australian Industrial Relations Commission v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2007) 87 WAIG 126

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

Reasons for Decision

- 1 The applicant submits that she was unfairly dismissed by the respondent. The respondent had no valid reason for the dismissal, failed to afford the applicant procedural fairness and dismissed the applicant in circumstances that were harsh, oppressive or unfair. The applicant seeks relief from the Western Australian Industrial Relations Commission (**Commission**) in the form of compensation pursuant to s 23A of the *Industrial Relations Act 1979* (WA) (**IR Act**).

Procedural Background

- 2 The hearing for this matter was set down for 17 December 2020. Following consideration of the submissions of the parties the hearing proceeded. The reasons for not adjourning and conducting the hearing in the absence of the respondent are set out as follows.
- 3 On 28 February 2020 the applicant applied to the Commission pursuant to s 29(1)(b)(i) of the IR Act, for relief alleging that she had been unfairly dismissed and sought compensation. In accordance with the legislation and regulations the employer was served with the application and notified should they wish to respond; their response was due on 21 March 2020.
- 4 Mr Edwards did not file a response within the required time frame and was granted an extension until 17 April 2020. The respondent's response was received on 2 June 2020, the day of the conciliation conference. The section concerning the reasons for dismissing the applicant was not completed.
- 5 Conciliation did not result in an agreement to settle and the applicant requested the matter be heard and determined.
- 6 On 14 July 2020 notices of hearing were sent to parties for a directions hearing on 26 August 2020.
- 7 On 25 August 2020 Mr Edwards filed and served an amendment to his response in which he set out the reasons for dismissing the applicant.
- 8 On 26 August 2020 following a direction hearing, directions were issued. The orders included a direction for parties to file and serve an outline of their submissions seven days before the hearing.
- 9 On 11 September 2020 the parties were notified of the date of the hearing, 25 November 2020 and were advised that their outlines of submission and list of authorities were to be filed and served by 18 November 2020.
- 10 On 18 November 2020, Mr Edwards advised that he was working on a reply to the applicant's outline of submissions.
- 11 On 24 November 2020, one day before the scheduled hearing, Mr Edwards sought an adjournment of the respondent seeking a hearing adjournment due to staffing issues and work commitments. Mr Edwards had not yet filed and served his outline of submissions. The applicant agreed to an adjournment subject to Mr Edwards filing and serving his outline of submissions by 27 November 2020 and that the hearing be relisted before 24 December 2020.
- 12 On 24 November 2020, Mr Edwards was advised that an adjournment had been granted and the hearing would be scheduled for 23 December 2020 and an extension to file and serve his outline of submissions was granted until 27 November 2020.
- 13 Mr Edwards advised that 23 December 2020 was not suitable. The parties were notified that the hearing scheduled for 25 November 2020 was vacated and that the hearing was scheduled for 10 December 2020 in accordance with their availability.
- 14 On 25 November 2020, notices of hearing for 10 December 2020 were sent by email to the parties.
- 15 On 1 December 2020, the applicant advised that the respondent had not complied with the direction to file his outline of submissions by 27 November 2020. The applicant requested that Mr Edwards advise the Commission when he intends to file outline of submissions in order to avoid further delays in proceedings and to ensure that the applicant has adequate opportunity to consider the respondent's outline of submissions and prepare for the rescheduled hearing listed for 10 December 2020.
- 16 On 7 December 2020 Mr Edwards requested the hearing listed for 10 December 2020 be adjourned. The respondent advised that he was not able to staff the kennel as a result of illness of staff during most of November, continuing health issues for one member of staff, dogs requiring medication and intensive nursing, supervision and care of five 10 week old puppies. The Respondent advised that it expected to be able to file an outline of submissions by 14 December 2020. The applicant opposed the respondent's request for adjournment:
 - (a) The applicant has already consented and accommodated the respondent's request to reschedule the hearing;
 - (b) The respondent has had adequate opportunity and notice to make necessary arrangements at the Mageela Cottage & Boarding Kennel;
 - (c) The hearing was rescheduled to 10 December 2020 to align with respondent's availability and his reasons requesting adjournment were unsatisfactory.

- 17 On 8 December 2020, the request for adjournment was granted and the hearing was scheduled for 17 December 2020, in accordance with the parties' availability.
- 18 Mr Edwards was notified that further requests for adjournment, unless consented by the other party, will need to be made with submissions and evidence in support of the request. The Commission drew Mr Edward's attention to s 27(1)(c) of the IR Act, that provides power for the Commission to order any party to the matter to pay to another party costs and expenses and s 27(1)(d) of the IR Act that provides that the Commission may proceed to hear and determine the matter or any part of thereof in the absence of any party thereto who has been duly summoned to appear or duly served with the notice of the proceedings.
- 19 On 9 December 2020, notices of hearing were sent to parties for a hearing listed for 17 December 2020.
- 20 On 10 December 2020 the applicant advised that the respondent had failed to file its outline of submissions in accordance with the Commission's directions and requested that a further direction be issued that provided an extension to the respondent to file and serve its outline of submissions by 14 December 2020.
- 21 On 10 December 2020, directions that the respondent file and serve its outline of submissions by 14 December 2020 were issued.
- 22 On 15 December 2020, the respondent notified the Commission that it's representative would not be able to attend the hearing. The respondent advised that because of terminating the employment of an employee, it was short staffed and was not able to engage another employee and train them to enable it's representative to attend the hearing along with one of the nominated witnesses who is also a kennel hand. The respondent submits that the termination of employment of an employee and requirement to find, employ and train another employee precluded the respondent's attendance. The respondent submitted that he envisaged mid-January 2021 will be the earliest that he would be able to attend a hearing with the kennel hand witness. The respondent had not yet filed its outline of submissions due the previous day.
- 23 On the same day the applicant advised that she did not consent to the respondent's request for an adjournment, submitted that the reasons set out are inadequate and are not supported by evidence and that she ought not be further denied the opportunity for the hearing to proceed and be determined. The applicant noted that the hearing was relisted to accommodate the respondent's availability. The applicant expressed concern that the respondent continues to create delays and has failed to comply with the Commission's directions to file the respondent's outline of submissions. The applicant submits that the matter should proceed and be determined in the absence of the respondent in the event he does not attend.
- 24 On 15 December 2020, the Commission emailed the respondent noting that he had not filed and served an outline of submissions required by 14 December 2020 and that he had advised that he was not able to attend the hearing scheduled for 17 December 2020. He had not specifically requested an adjournment. The Commission noted that the applicant opposed the vacation of the scheduled hearing on 17 December 2020, expressed concern that the conduct of the respondent's case is resulting in delays and that he has failed to comply with directions issued by the Commission. The respondent was notified that the Commission will make a determination on whether to proceed with the hearing scheduled for 17 December 2020 and that should the respondent wish to provide any further submissions or any evidence in support of reasons for the hearing to be vacated and scheduled to a date after mid-January 2021, he may do so before **9:00 am on 16 December 2020**.
- 25 The applicant was invited to provide any further submissions concerning the proposed adjournment to the Commission by **4:00 pm on 16 December 2020**.
- 26 The parties were advised that when determining the granting of an adjournment the Commission is guided by the principles set out in *Myers v Myers* [1969] WAR 19 and a copy of the reasons for decision was provided to the parties. The parties were also advised that in the event the Commission grants the respondent's further request for an adjournment, the Commission may order that he pay costs to the applicant in relation to costs incurred because of the adjournment.
- 27 On 15 December 2020 the respondent submitted:

In short, quite simply I have a community expectation and a personal responsibility to attend to the care and welfare of my animals that ranks higher than individual needs of The Applicant, which is exactly the basis on why The Applicant was sacked anyway.

I repeat, I will be unavailable to attend any hearing until I am able find a suitable employee(s) to cover for my and my witness' attendance to this matter. Any attempt to continue with this matter without my submission and attendance will surely lead to a miscarriage of justice.

My submission will go back to recorded events as far back as mid-2019, and a detailed timeline and factual description of these events will be presented to The Commission in due course. These events are taking a substantial amount of time to collate and present as I have very limited time, resources and funds at my disposal, at present.

The sacking of The Applicant has had an immediate and significantly measurable impact on my ability to earn an income along with my ability to "create" any "free" time for anything, let alone for matters such as this.

The claim The Applicant is making against me is substantial and is somewhat conveniently narrowed down to the time surrounding the event of the sacking.

I believe I should be afforded the opportunity to be given a "fair go" at these proceedings, after all I am unable control the unpredictable daily needs of my animals, and nor can I control the secretive, deliberate, and intentional refusal by employees to comply with lawful requests from their employer.

And later the same day the respondent further submitted:

I would like to draw your attention to The Applicant's response and in particular item b "Respondent has had adequate opportunity and notice to make necessary arrangements at the kennel".

It took almost 12 months to train The Applicant (mostly whilst my partner Joy was still alive) to be able to look after the kennel mostly unsupervised but still answerable to me for anything out of the trained/instructed, yet I am expected to be

able to “find” someone else at the drop of a hat to fill in whilst I attend a Hearing, and with my partner no longer being alive?

The kennel has always been run on an “as instructed” basis and still does, never has it run on some repeatable generic format where each dog is merely “a number” to the employee, eg like a vet practice runs, that just leads to premature deaths of animals in my opinion, which I may go into more detail in my submission.

The Applicant knew she was almost irreplaceable by @ September 2019.

I had to give up my work to replace Applicant when I sacked her. E.g. the “You have cost me my income” comment when I sacked The Applicant.

Since my partner Joy died and The Applicant was sacked, I haven’t the funds nor resources available anymore to be able to train up kennel hands “ad lib”.

28 On 16 December 2020, the applicant made the following submissions:

1. An application for an adjournment is within the discretion of the Commission. Following the principles in *Myers v Myers* [1969] WAR 19, where the refusal of an adjournment would result in serious injustice to one party then an adjournment should be granted, unless this would mean a serious injustice to the other party.
2. In this matter, there is no evidence before the Commission that the Respondent would suffer a serious injustice if this adjournment is refused. Rather, the Respondent’s submission is to the effect that he is too busy, having sacked the Applicant from employment in February 2020, to attend the Commission to respond to the consequences of that termination. Yesterday the Respondent wrote to the Commission that “*the care and welfare of my animals ranks higher than individual needs of The Applicant*”, so that “*I will be unavailable to attend any hearing until I am able find a suitable employee(s) to cover for my and my witness’ attendance to this matter*”.
3. The Respondent has had multiple opportunities to appear in the matter, and on each occasion has sought an adjournment. This present adjournment request comes despite the hearing having already been adjourned for a second time, at the Respondent’s request, to this particular date. Rather than being faced with any serious injustice, the Respondent has simply failed (again) to comply with the Commission’s processes and Directions.
4. The Respondent proposes that the matter be adjourned for an indeterminate period of time, until he is able to presumably recruit and train, a replacement for the Applicant. This vague and constant delay is unacceptable. There is no evidence before the Commission to suggest that the matter can ever be dealt with promptly, if there is a further adjournment. The Applicant has grave concerns whether the Respondent will ever be available to attend any rescheduled hearing, given that Respondent has been unable to hire a new employee to replace the Applicant over the past 10 months. The Applicant has no confidence that the Respondent will be able to employ and train a suitable employee within the foreseeable future, and certainly not over the Christmas break so as to be ready in January 2021.
5. The Applicant submits that any prejudice to the Respondent in refusing the adjournment is outweighed by the serious injustice to the Applicant if the hearing is adjourned, for a third time and with no certainty that the Respondent will be able to attend at any relisted hearing date.
6. The Applicant, and the public, have a legitimate expectation of proceedings being managed expeditiously without unnecessary delay, and that matters which come before the Commission are to be dealt with promptly. That has not happened in this case, due to the constant delays requested by the Respondent. The Respondent has a history of failing to comply with the Commission’s Directions, on the basis of various purported inconveniences:
 - (a) From the outset, in the Respondent’s Form 2A - Employer Response to Unfair Dismissal Application filed on 2 June 2020, the Respondent failed to answer the specific question at 3.2 as to why he asserted that the dismissal was not harsh, oppressive or unfair or unfair. Instead he wrote “*Sorry, didn’t have enough time to get to this*”.
 - (b) The Addendum to Form 2A, filed on 25 August 2020 with an apology that the Applicant could not attend the Commission hearing on 26 August 2020, fails to respond to the Applicant’s specific allegations regarding her termination.
 - (c) On 26 August 2020, Commissioner Walkington issued Directions that both parties file and serve an Outline of Submissions and any List of Authorities upon which the party intends to rely upon at least seven days prior to the hearing listed on 25 November 2020.
 - (d) On 18 November 2020, the Applicant filed its Outline of Submissions and List of Authorities in compliance with the Directions. The Respondent notified the Commission on that same day that he was working on a reply to the Applicant’s Outline of Submissions. Despite that, none has been forthcoming.
 - (e) On 24 November 2020, the Respondent sought that the hearing listed on 25 November 2020 be adjourned due to a variety of reasons, including that there was a risk that the Respondent and one of the Respondent’s witnesses had been exposed to COVID-19. No evidence has ever been presented of such exposure. The Applicant confirmed that she was willing to consent to a short adjournment on the basis that the matter be relisted for a hearing before 24 December 2020, and that the Respondent file the Respondent’s Outline of Submissions by 27 November 2020. Such directions were made and the hearing was relisted to 10 December 2020.
 - (f) The Respondent failed to file his Outline of Submissions by 27 November 2020 in accordance with the Commission’s Directions.
 - (g) On 7 December 2020, the Respondent made a second request to adjourn the hearing listed on 10 December 2020 for numerous reasons, including that there would be an inadequate number of employees

at the kennel. The Applicant opposed the Respondent's request for a further adjournment on the basis that the hearing had been rescheduled to a date to accommodate the Respondent's availability, the Respondent had been given adequate opportunity and notice to make necessary arrangements at the kennel and the reasons set out by the Respondent were otherwise unsatisfactory.

- (h) The Commission granted the Respondent's request for an adjournment of the hearing to 17 December 2020. A Direction was issued that the Respondent file and serve an Outline of Submissions by close of business on 14 December 2020.
 - (i) The Respondent failed to file his Outline of Submissions by 14 December 2020 in compliance with the Directions.
 - (j) On 15 December 2020, the Respondent made a third request to adjourn the hearing listed on 17 December 2020 on the basis that Respondent was short staffed and unable to attend the hearing.
7. The Respondent has now sought an adjournment on three separate occasions, each at the eleventh hour. On each occasion the Respondent failed to provide any evidence to support his reasons for seeking an adjournment. The Respondent continues to not comply with the Directions to file an Outline of Submissions and has provided no explanation for non-compliance.
 8. The Applicant submits that there would be prejudice to her if another adjournment is granted. The Applicant was dismissed from her employment on 3 February 2020. The Applicant has expended considerable time and effort in preparing her case, including rostering time off work for each hearing date, and is ready to proceed and give evidence at the hearing listed tomorrow. As set out in *Glenn Ross McLeod v Stock Rd Market Tavern* 2005 WAIRC 00963, matters before the Commission are to be dealt with promptly and evidence should be taken from witnesses as close as possible to the events which the application relates.
 9. The reasons set out in the Respondent's emails dated 15 December 2020 seeking a third adjournment request are wholly inadequate. The Respondent's submissions that he is unable to "control the unpredictable daily needs of my animals" or "control the secretive, deliberate, and intentional refusal by employees to comply with lawful requests from their employer" is not a proper basis to seek an adjournment. It is manifestly unfair for an employee who has been dismissed to then be denied their right to the timely determination of their complaint, on the basis that the employer states that the employee's dismissal itself makes it too hard for the employer to comply with the Commission's directions. The Respondent's position is that he cannot file an Outline of Submissions or attend at a hearing, because he sacked the Applicant and now, 10 months on, is short-staffed because of the termination.
 10. The Respondent has been aware since the directions hearing on 26 August 2020 that he would be required to file an Outline of Submissions in these proceedings and attend a hearing to determine the matters set out in the application. Further, the Respondent has had numerous opportunities since these proceedings were commenced on 28 February 2020 to seek legal representation. The Applicant submits that there would be no injustice to the Respondent in circumstances where the Respondent's conduct demonstrates a persistent failure to comply with the Commission's Directions and an unwillingness to comply with Directions or engage with the Commission's processes.
 11. The Applicant submits that the matter should proceed to a hearing on 17 December 2020 and that the Commission should exercise its powers pursuant to section 27(1)(d) of the Industrial Relations Act 1979 (WA) to proceed to hear and determine the matter in the absence of the Respondent in the event he does not attend the hearing on that day.
- 29 On 16 December 2020, the parties were notified that the respondent's request for a third adjournment had not been granted and the hearing listed for **17 December 2020 at 11:30 am** would proceed.
 - 30 The hearing proceeded for the reasons set out below.
 - 31 On the evening of 16 December 2020, the respondent made further submissions:

First of all, I have never tried to hire an employee to replace The Applicant's position. The Applicant and her position were made redundant when she was sacked, as were two other innocent employees of mine around about the same time, so that I was able to afford to give up work to come back and care for the animals in the manner that I had instructed The Applicant to do, which she failed to do. At the time I needed to cut wage costs by @ \$125,000 per year to afford to give up work.

At the moment I am trying to replace one of the workers who works around me, The Applicant's position no longer exists for any potential employee, and never has been since The Applicant was quite rightly sacked for negligence and Serious Misconduct

Tomorrow I will be working in the kennel from @ 6:30 to @ 10:00am, then I will be taking two dogs (Harley 10 and a half years old and Chilli 13 and a half years old) to the vet as they both have medical conditions that require attention and in the case of Harley, a possible operation may be required before the weekend. I make no apologies and have no regrets about placing the welfare of my animals in front of both the Commission and The Applicant, and I'll tell you why.

- I had to give up a majority of my work to replace that bitch (The Applicant) at the kennel with myself because she would no longer follow instruction, because she thought she knew better about everything now that she had veterinary nurse training under her belt.
- Two other employees along with The Applicant had their employment terminated around the same time (January to April 2020) because of The Applicant's misdemeanours.
- One of those three employees terminated was an innocent Tyreshop employee of mine who unfortunately had to go for me to be able to reduce my wages bill by a combined @ \$125,000.00 to compensate for the wages I could no longer earn.

- Should the hearing proceed tomorrow without me there will be two more innocent employees lose their employment and livelihoods immediately as I will close the tyreshop I own as I will no longer have an interest in employing people anymore.
- Their combined wages amount to in excess of \$100,000.00 of which I have had to subsidise some of this amount personally since COVID-19 affected business.
- The tyre shop, as well as the kennel, do not make any profit.
- I have deliberately held off signing a new lease for the tyreshop this year until I saw where this matter was headed, so fortunately I have no contractual building lease obligations tying me down to keep the tyreshop open.

The Commission is the one who is actually on notice here, as it has a decision to make and quite frankly I don't care which way it goes.

- In my absence it can decide to award to The Applicant what it is seeking along with costs tomorrow, remembering this is an employee who was sacked for Serious Misconduct and unsatisfactory performance and a number of other breaches.
- Because I have lost my ability to work away, I will also have to sack my innocent honest working and compliant tyre shop employees because I'll have to reduce costs to able to pay the amount awarded (if any) to The Applicant. They will both unfortunately lose their livelihoods. One of them has worked for me for almost 6 years, the other for about three years.
- I may also consider sacking or reducing my innocent and hard working kennel employees work hours because I can no longer work away to subsidise their wages.
- I can actually do the kennel by myself each day if I have to. It's a long 15 hour day seven days a week, but if I have to save \$200-\$250 per day by sacking the kennel employees to save the money to pay to The Applicant I will do it. It's no longer any skin off my nose who I pay the money to, it's all just a cost to me, don't care who gets it.

In summary and in short, there is a real chance four employees will lose all or a majority of their livelihoods should The Commission decide to proceed with this hearing tomorrow without me, I don't care either way. I'll still have my dogs, which if I'd kept The Applicant in my employ back in February 2020, I wouldn't have as many alive today as I still do. I am very glad to hear The Applicant has chosen a different career path – it was the right thing to do and I support her move into a non animal care industry.

Attached is a copy of a bill for a dog that required further medical attention and veterinary intervention partially because The Applicant would not follow simple instruction to administer a \$50.00 course of antibiotics as prescribed upon veterinary advice. Have a look at how much it ended up costing me and for two weeks the dog nearly died, but eventually Gucci pulled through and is still alive today.

Personally, I think it is a disgrace the way the WAIRC operates with minor disputes like this, lawyers should not be involved. I will make sure this matter gets reviewed by those who are in a position to make changes.

- 32 At the hearing the applicant advised she had considered the respondent's further submissions and maintained her objection to a further adjournment. The hearing was not adjourned and proceeded in the absence of the respondent for the reasons set out below.

Principles

- 33 In *Myers v Myers* the Supreme Court considered the principles to be applied in determining whether to adjourn a hearing or not. Where a refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party: *Myers v Myers*, 21. In considering whether to grant an adjournment of a hearing by the Commission, the exercise of discretion is to consider not only fairness and justice to the parties but, in an appropriate case, the public interest is to be considered. As Ritter AP in *The Registrar of the Western Australian Industrial Relations Commission v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2007) 87 WAIG 126 [45] - [46] observed, this is consistent with the principal object in s 6(c) of the IR Act and the exercise of the jurisdiction of the Commission set out in s 26(1)(c) of the IR Act
- 34 As set out in *Glenn Ross McLeod v Stock Rd Market Tavern* [2005] WAIRC 00963; (2005) 85 WAIG 1569, matters before the Commission are to be dealt with promptly and evidence should be taken from witnesses as close as possible to the events which the application relates.
- 35 During this matter the respondent has sought an adjournment for the notified hearing on three occasions because of reasons associated with staffing its business operations. The respondent submits that he is 'unable to control the unpredictable daily needs of my animals, and nor can I control the secretive, deliberate, and intentional refusal by employees to comply with lawful requests from their employer'. The respondent attributes his inability to conduct his case to the nature of his business and the conduct of his employees. The respondent includes the termination of the applicant described as a 'sacking' by the respondent, as a contributing factor to his inability to prepare and conduct his case.
- 36 The respondent also contends that its representative was not able to attend hearings because it was short staffed because of its actions in either recruiting staff and/or terminating the employment of staff. The respondent has not submitted any evidence of the matters that preclude its representative from attending hearings. These are matters within the respondent's control and its decisions are a matter for which they are responsible. The applicant ought not be denied her entitlement to an expeditious hearing because of the respondent's choices concerning its business operations.
- 37 The respondent's representative advised that he was not available to attend any hearing until he finds a suitable employee(s) to staff his business operations in his absence and the absence of his witness' attendance. The respondent's representative did not provide any certainty as to his availability in the future.

- 38 In relation to the respondent's outline of submissions, the respondent's representative advised that preparation of the outline of submissions were taking a substantial amount of time to collate, he had limited time and that he would present his submissions in due course. The representative did not provide an anticipated time frame. The respondent has not sought extensions to be able to file and serve its outline of submissions. The applicant has facilitated the opportunity for the respondent to file and serve its outline of submission outside of the time frame set down in directions.
- 39 The respondent submits that progression of this matter without his submission and the conduct of a hearing in his absence will be a miscarriage of justice. The respondent contends that he ought to be given a 'fair go' at these proceedings.
- 40 The respondent has not complied with directions concerning the submission of outlines of submissions and the scheduling of hearings. The directions have been issued following consideration of the parties' submissions and subsequently varied to accommodate the respondent. The respondent has been provided with ample opportunity to submit its outline of submissions, however despite undertakings to do so has failed to do so within the set time frames. The respondent continues to assert that it is working on preparing an outline of submissions, however, cannot be certain when these will be submitted because their business operations have priority over this matter.
- 41 The respondent's contentions that the termination of the applicant resulted in reduced staffing of its business operations and contributed to its inability to complete an outline of submissions. Its representative's inability to attend a hearing, are matters for the respondent's organisation of its business operations. The applicant's employment was terminated in early February 2020 and the respondent is yet to appoint another employee to replace her. Despite earlier submissions concerning the need to replace the applicant before it was able to attend hearings and prepare its outline of submissions the respondent makes the contradictory assertion that it never intended to replace the applicant.
- 42 Given the respondent's conduct and submissions in support of his request to extend the time frame to submit an outline of submissions in due course, I am unable to conclude that an extension of time to submit an outline of submissions would result in the respondent complying with an extended time frame. The applicant's legitimate expectation that the case be progressed without unnecessary delay ought not be prejudiced because of the respondent's decisions concerning its business operations.
- 43 The scheduling of hearings has taken into consideration the respondent's availability on each occasion. Evidence should be taken from witnesses as close as possible to the events which the application relates.
- 44 The applicant has expended time and effort in preparing her case, including rostering time off work for each hearing date. The respondent notified of its representative's inability to attend the hearing with little notice. As a result, the applicant has been required to make further arrangements in relation to work commitments and in preparation of her case.
- 45 I find the respondent's submissions that its representative will not be in position to attend a hearing until it can find a suitable employee to cover his absence from the workplace and the contradictory submission that it has never intended to replace the applicant, are not credible. The respondent has not provided any evidence of efforts to address this alleged barrier. The respondent has also declined to appoint an alternate representative. I am not convinced that if the hearing was adjourned the respondent will address this barrier and enable the hearing to proceed. The respondent has been provided with ample opportunity to file and serve its outline of submissions and has not done so. I am not convinced that extending the time further would result in an outline of submissions being filed and served.
- 46 Considerable time has now elapsed in the matter to accommodate the respondent's previous requests for adjournments of this hearing and it has become unfair to continue to deny the applicant a determination in these proceedings. I find that any prejudice to the respondent is outweighed by the prejudice to the applicant.
- 47 For these reasons, an adjournment was not granted, and the hearing proceeded in the absence of the respondent's representative.

Was the Applicant Unfairly Dismissed?

- 48 On 27 June 2018, the applicant commenced employment at Mageela Cottage & Boarding Kennel (**Kennel**) in the role of kennel hand. The applicant's position is a Level 2 position covered by the *Animal Welfare Industry Award*, and she was responsible for feeding, cleaning and caring for the dogs at the Kennel. The applicant is a qualified veterinary nurse with a Certificate IV in Veterinary Nursing from Applied Vocational Training.
- 49 Initially the applicant worked for an average of 25 to 30 hours per week and from September 2019 this increased to 38.56 hours per week. Rosters were planned in advance.
- 50 On 1 February 2020, the applicant identified that there had been a shortfall between the gross and net pay for the pay period 18 January 2020 to 24 January 2020. The applicant was not provided with payslips by the respondent throughout her employment. The applicant sent a text message to the respondent and an exchange about the payment and calculation of the applicant's wages ensued by text message. In response the respondent informed the applicant that deductions had been made from her pay to cover bathroom, food, drink and phone usage breaks.
- 51 The applicant gave evidence that on 3 February 2020 at approximately 7:00 am, Mr Edwards, the proprietor of the Kennel, approached the applicant and stated that 'It's time for you to go Nat'. In response to the applicant's question about his statement, Mr Edwards further stated 'I don't like your attitude', 'You are costing me income' and 'I don't like your attitude and you are hard to be around. You're a good worker and your work was fine but it's time for you to leave'. Mr Edwards then required the applicant to return her key to the Kennel and locked the door immediately after the applicant exited the room.

Question to Decide

- 52 I must decide whether the applicant's dismissal, when viewed objectively, was harsh, oppressive or unfair.

Principles of Unfair Dismissal

- 53 In determining whether the dismissal was harsh, oppressive or unfair, the Commission is guided by the decision of the Industrial Appeal Court in *The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385. That is, the Commission must make an objective assessment as to whether the respondent exercised its legal right to terminate so harshly or oppressively against the applicant as to amount to an abuse of that right. This involves a consideration as to whether the applicant has received 'less than a fair deal' and whether there had been 'a fair go all around'. The applicant bears the onus of establishing that the dismissal was, in all the circumstances, unfair within the principles set out in *Undercliffe Nursing Home*.
- 54 Where an employee is dismissed based on misconduct, the employer bears the evidential onus of proving that the alleged incident or conduct occurred and that the conduct was a valid basis for dismissal.

Was the Applicant Unfairly Dismissed?

- 55 The applicant submits the respondent dismissed her without notice on 3 February 2020. At the time the respondent advised her that it did not like her attitude, and she was difficult to be around.
- 56 In the respondent's response filed in the Commission on 2 June 2020, the respondent states that the applicant was terminated for serious misconduct for the following alleged reasons: (a) neglecting the care and welfare of the animals; (b) falsely claiming hours worked and claiming unauthorised hours of work; (c) damaging the profitability and viability of the business; (d) refusing to work reasonable hours as requested; (e) refusing to communicate with the respondent; (f) disruptive and upsetting behaviour towards her fellow employees; and (g) dishonesty.
- 57 The applicant contends that at the time of her dismissal, the respondent did not notify the applicant that the alleged reasons were the reasons for her termination. The respondent did not raise or provide notice during the applicant's employment of any issues regarding the applicant's conduct or performance nor warn the applicant that dismissal was a possibility.
- 58 The applicant submits that the alleged reasons are baseless and are an attempt by the respondent to justify his conduct after the fact.
- 59 The respondent contends that on 1 February 2020, it discovered that the applicant had not been undertaking necessary support and treatment for one of the dogs at the Kennel. The respondent submits that the applicant had been instructed to undertake particular tasks or treatments and had refused or failed to do so. The respondent says this was discovered in general conversation with another employee.
- 60 The respondent states in its Addendum to his response, submitted on 25 August 2020, that on the afternoon of 1 February 2020, he informed another employee that he would have to 'sack' Ms Stephenson because of Ms Stephenson's neglect and mistreatment of an animal, Cooper, at the Kennel. The respondent requested the employee to work on the Monday morning when he intended to remove Ms Stephenson.

The respondent further states that:

Ms Stephenson was only allowed to come back to my property on the following Monday morning February 3 on the pretence that she was working, so that I could obtain the front door key to my house that Ms Stephenson had in her possession. If it were not for the front door key in Ms Stephenson's possession I would have phoned/texted Ms Stephenson and sacked her on the spot on Saturday afternoon February 1. I had very little to say to Ms Stephenson on the morning when I sacked her as I was still emotionally distraught and absolutely disgusted by the deliberate mistreatment and neglect to Cooper at the hands of Ms Stephenson, and Cooper's subsequent deteriorating health. To be honest, all I wanted to do to Ms Stephenson was to flatten her with my fists, but I refrained and got her out of my house and out of my sight as soon as I arrived home to dismiss her.

Findings

- 61 The applicant gave evidence that the respondent did not raise his concerns about mistreatment or neglect of Cooper with her. Ms Stephenson's evidence is that she raised concerns about Cooper's wellbeing with Mr Edwards, however they disagreed about the course of action that was in Cooper's best interests and that she undertook the tasks as instructed by her employer. The applicant gave evidence of text messages exchanged with Mr Edwards about Cooper's condition and treatment. These text messages do not include any reference to Mr Edwards raising concerns that the applicant was mistreating or neglecting Cooper.
- 62 The respondent submits in his Addendum, that he dismissed the applicant because she refused to work afternoon, weekend, and public holiday shifts on a regular basis and that he had warned her in late December 2019 that her 'job was on the line'.
- 63 The respondent contends that Ms Stephenson manipulated the shift roster and regularly refused to work some shifts. The applicant's evidence is that rosters were prepared in advance and that Mr Edwards made changes to the roster once the employees had provided their input. The respondent contends that Ms Stephenson also claimed unauthorised hours of work. Ms Stephenson gave evidence that claims concerning manipulation of the shift roster, alleged refusals to work shifts and claims for unauthorised hours of work were not raised with her at any time prior to her dismissal.
- 64 The respondent contends that the applicant failed to perform reasonable and lawful requests including being warned three times for unreasonable use or 'fair use' of mobile phone during working hours and claiming excessive hours of work when compared with other workers during the same period. Ms Stephenson's testimony is that she was not warned about concerns with her performance or conduct. Specifically, Ms Stephenson denies receiving warnings about her mobile phone usage.
- 65 The respondent maintains that Ms Stephenson reported the Kennel to the Royal Society for the Prevention of Cruelty to Animals (RSPCA). Mr Edwards informed Ms Stephenson that both she and the RSPCA were on notice, that he expected the name of the person who made the report to be disclosed within seven days and if this did not occur all 60 dogs would be euthanized. Ms Stephenson denies that she made a report to the RSPCA.

- 66 The applicant gave evidence at the hearing, and I found she gave her evidence honestly, to the best of her recollection and I have no hesitation in accepting her evidence.
- 67 If an employer has concerns for an employee's performance or conduct, these concerns ought to be raised with the employee and an opportunity to address the concerns ought to be provided to an employee.
- 68 If the respondent had concerns for the applicant's conduct or performance, it failed to raise these matters with her, failed to inform the applicant of any consequences if the alleged concerns were not addressed and failed to assist or support the applicant to address the alleged concerns. The respondent failed to seek an explanation or response to any alleged concerns with her performance or conduct and did not provide the applicant with a 'fair go all round'.
- 69 The respondent admits that on hearing from another employee that the applicant had allegedly mistreated one of the dogs and apparently refused or failed to follow instructions, the respondent immediately decided to dismiss the applicant and decided to do so when the applicant presented at the workplace for her next shift. The respondent neither sought an explanation nor a response to the allegations of mistreatment of the dogs and allegations of failure or refusal to follow instructions.
- 70 In my assessment the respondent exercised its legal right to terminate Ms Stephenson in a manner that was harsh, unfair and amounted to an abuse of that right.

Remedy

- 71 I am satisfied that the working relationship between the applicant and the respondent has broken down and is irreparable. There is no longer the required confidence of an employer-employee relationship between the applicant and the respondent. In addition, the applicant is currently employed. Reinstatement is not appropriate, and compensation may be awarded to the applicant.
- 72 In determining the appropriate amount of compensation to be awarded, the Commission must have regard to the factors set out in s 23A(7) of the IR Act and the factors set out in *Ramsay Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8.
- 73 The central issue is how long the applicant would have continued in employment had she not been dismissed. The applicant submits that she had regular or consistent hours of work based on a roster prepared in advance and had an expectation of continuing employment for at least 181.5 hours in accordance with the roster.
- 74 I am satisfied that the applicant took reasonable steps to mitigate her loss and secured alternative employment five weeks after her dismissal.
- 75 Using an average during her total employment of 36.3 hours, the applicant's total lost wages for the expected period of work in accordance with the advance roster is \$4,599.21. The applicant would also have been entitled to receive two weeks' notice of \$1,839.68. I will therefore order the applicant be paid \$6,438.89 in compensation for loss.
- 76 When considering the circumstances of this case and the Commission's obligations under s 26 of the IR Act, I find that this period approximates the time frame the respondent should have utilised to properly and appropriately investigate any concerns with the applicant's conduct raised by the conversation with another employee and the other issues the respondent cites as the reasons it terminated the applicant's employment.
- 77 In addition to the loss of wages the applicant also claims compensation for injury and distress caused by the respondent's callous treatment following her dismissal as follows:
- (i) failing to provide the applicant with a separation certificate, which created delays and difficulties in the applicant accessing Centrelink support during her unemployment;
 - (ii) sending the applicant numerous text messages alleging that she complained to the RSPCA about the respondent. The applicant did not make the complaint to the RSPCA and the respondent's actions caused the applicant distress and suffering;
 - (iii) threatening to tarnish the applicant's reputation to potential future employers resulting in the applicant changing careers;
 - (iv) threatening to euthanize 60 dogs if the applicant and the RSPCA did not confirm who made the complaint to the RSPCA which caused the applicant concern and distress; and
 - (v) delaying the provision of the applicant's tax group certificate which caused the applicant stress.
- 78 Injury is also a broad concept, incorporating 'all manner of wrongs' and includes, for example, humiliation, injury to feelings and 'being treated with callousness': *James A Capewell v Cadbury Schweppes Australia Ltd* (1998) 78 WAIG 299, 303.
- 79 For compensation to be awarded for injury, the injury must 'fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal'.
- 80 There will be an element of distress in most dismissal cases, however the circumstances in which the dismissal from employment has been affected may be sufficient to demonstrate the injury which is experienced. Situations where an employee is locked out of the workplace or is escorted from the premises, or the termination has been conducted in full view of other staff are examples of callous treatment justifying recognition for compensation for injury: *Nicholas Richard Lynam v Lataga Pty Ltd* (2001) 81 WAIG 986.
- 81 I find that the applicant suffered distress beyond that of most dismissals and as a result undertook training in a new field of expertise so that she may change careers. I find the respondent's treatment of the applicant both at the time of the dismissal, in locking the door after her, and after the dismissal, in respect of text messages concerning reports to the RSPCA, threats to euthanize 60 dogs and threats to tarnish the applicant's reputation with future employers to be callous. I will therefore order she be paid \$3,000 for the injury suffered.

Conclusion

82 I find the applicant was unfairly dismissed and therefore, I will order that the respondent pay the applicant \$9,438.89.

2021 WAIRC 00480

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NATASHA STEPHENSON

APPLICANT

-v-

M.J EDWARDS T/AS M.J EDWARDS & J.PENDARVIS

RESPONDENT**CORAM**

COMMISSIONER T B WALKINGTON

DATE

THURSDAY, 26 AUGUST 2021

FILE NO/S

U 27 OF 2020

CITATION NO.

2021 WAIRC 00480

Result

Application upheld

Representation**Applicant**

Ms E Creek (of counsel)

Respondent

No appearance

Order

HAVING HEARD from Ms E Creek (of counsel) on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby:

1. DECLARES THAT the dismissal of the applicant was unfair; and
2. ORDERS THAT the respondent pay the applicant \$9,438.89 compensation within 14 days of this Order.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2021 WAIRC 00487

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STEPHEN TURNER

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

TUESDAY, 31 AUGUST 2021

FILE NO/S

U 12 OF 2020

CITATION NO.

2021 WAIRC 00487

Result

Application discontinued by leave

Representation**Applicant**

Mr Maré, of counsel and Mr K Beale, of counsel

Respondent

Mr McIlwaine, of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2021 WAIRC 00496

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 DANIEL JOHN SPRY

PARTIES**APPLICANT**

-v-

BEAVER TREE SERVICES AUST PTY LTD

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON**DATE** FRIDAY, 10 SEPTEMBER 2021**FILE NO.** B 1 OF 2021**CITATION NO.** 2021 WAIRC 00496**Result** Direction issued**Representation****Applicant** Ms J Raftos (of counsel)**Respondent** Mr G Smith (of counsel)*Direction*

WHEREAS on 27 August 2021 the respondent filed with the Commission an application pursuant to section 27(1)(a) of the *Industrial Relations Act 1979* (WA), seeking that the matter be summarily dismissed or alternatively struck out; and

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

1. THAT the section 27(1)(a) application be heard on the papers;
2. That the respondent file and serve an outline of submissions and any affidavits upon which they intend to rely by no later than 15 September 2021;
3. THAT the applicant file and serve an outline of submissions and any affidavits upon which they intend to rely by no later than 22 September 2021;
4. THAT the respondent may file and serve written submissions in reply by 29 September 2021; and
5. THAT the parties have liberty to apply.

(Sgd.) T B WALKINGTON,
 Commissioner.

[L.S.]

2021 WAIRC 00497

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 DANIEL JOHN SPRY

PARTIES**APPLICANT**

-v-

BEAVER TREE SERVICES AUST PTY LTD

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON**DATE** FRIDAY, 10 SEPTEMBER 2021**FILE NO.** B 1 OF 2021**CITATION NO.** 2021 WAIRC 00497

Result	Direction issued
Representation	
Applicant	Ms J Raftos (of counsel)
Respondent	Mr G Smith (of counsel)

Direction

WHEREAS on 8 July 2021 the Commission issued a Direction [2021] WAIRC 00204;

WHEREAS on 21 July 2021 the applicant filed and served his further and better particulars in support of his claim;

WHEREAS each party was directed to give formal discovery by serving a list of documents by no later than 6 August 2021;

WHEREAS on 23 August 2021 the applicant filed and served a witness statement upon which he intends to rely;

WHEREAS on 27 August 2021 the respondent applied for orders under section 27(1)(a) of the *Industrial Relations Act 1979* (WA) that the matter be summarily dismissed; or alternately the claim be struck out and that the directions issued on 7 July 2021 be stayed pending the outcome of their application; and

WHEREAS on 10 September 2021 the Commission issued a Direction [2021] WAIRC 00496;

AND HAVING heard from Mr J Raftos (of counsel) on behalf of the applicant and Mr G Smith (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT witness evidence be adduced by signed witness statements which will stand as the evidence in chief on this matter;
2. THAT the respondent file and serve any signed witness statements upon which they intend to rely by no later than 15 September 2021;
3. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross examination one week before the hearing;
4. THAT the applicant file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 20 September 2021;
5. THAT the respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 27 September 2021;
6. THAT the hearing remains listed for 29 September 2021, 30 September 2021 and 1 October 2021; and
7. THAT the parties have liberty to apply.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2021 WAIRC 00485

**DISPUTE RE CLAUSE 28 OF THE WA HEALTH SYSTEM - AUSTRALIAN NURSING FEDERATION -
REGISTERED NURSES, MIDWIVES, ENROLLED (MENTAL HEALTH) AND ENROLLED (MOTHERCRAFT)
NURSES - INDUSTRIAL AGREEMENT 2020**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

AUSTRALIAN NURSES FEDERATION INDUSTRIAL UNION OF WORKERS PERTH

APPLICANT

-v-

SOUTH METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 30 AUGUST 2021
FILE NO/S	C 27 OF 2021
CITATION NO.	2021 WAIRC 00485

Result	Order issued
Representation	
Applicant	Ms M Comey
Respondent	Mr M Aulfrey, Ms J Reid and Mr C Donoghue

Order

WHEREAS on 26 August 2021, the applicant filed an application under s 44 of the *Industrial Relations Act 1979* (WA) (the Act) for a compulsory conference to seek the assistance of the Commission to resolve a dispute arising as to proposed changes to the roster for permanent employees engaged to work in the emergency department of Fiona Stanley Hospital.

AND WHEREAS the applicant says that the proposed changes, namely the implementation of a new “Disco shift” (6:30am to 2:00am) with effect from 31 August 2021, require agreement under cl 28 of the *WA Health System – Australian Nursing Federation – Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2020* (the Agreement).

AND WHEREAS the applicant contends that the requirements of cl 28 of the Agreement have not yet been met.

AND WHEREAS the applicant sought an interim order to maintain the existing rostering arrangements until the dispute is resolved.

AND WHEREAS the respondent says that cl 28 of the Agreement does not apply to the proposed introduction of “Disco shifts”.

AND WHEREAS the respondent further says that:

- (a) Rosters for the 4 week period commencing 31 August 2021 were published on 2 August 2021;
- (b) Employees require adequate notice of rostered shifts; and
- (c) It is therefore highly impracticable and potentially jeopardises patient wellbeing to attempt to change rosters with short notice.

AND WHEREAS at a compulsory conference on 27 August 2021 the parties reached an agreement in relation to the dispute and requested that the Commission make orders in terms of that agreement pursuant to s 44(8)(a) of the Act.

NOW THEREFORE the Commission, pursuant to the powers conferred under s 44 the Act, hereby orders –

1. THAT a trial of the incorporation of the “Disco shift” onto the permanent employee roster to facilitate shift transitions from afternoon to night shift is to be conducted for the roster commencing 31 August 2021 until the end of the roster period for the roster issued on 3 January 2022.
2. THAT by no later than 31 October 2021, the respondent will provide the applicant with a list of employees affected by the incorporation of the “Disco shift” onto the permanent employee roster.
3. THAT the respondent will conduct a secret ballot of the employees listed in Order (2) above to determine the level of support for continuing the trial roster on a permanent basis. The ballot must remain open for employee participation for at least 7 days and close no later than 5:00pm on 6 December 2021.
4. THAT the applicant will not conduct any campaign designed or likely to influence the outcome of the ballot.
5. THAT the introduction of “Disco shifts” onto the permanent employee roster will continue on a permanent basis following the ballot unless a majority of employees voting in the ballot vote against its continuation.
6. THAT any party may apply to the Commission to convene a conference at short notice under s 44 of the Act for assistance to resolve any dispute which may arise in relation to the conduct of the ballot, or these Orders.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2021 WAIRC 00488

**DISPUTE RE CLAUSE 28 OF THE WA HEALTH SYSTEM - AUSTRALIAN NURSING FEDERATION -
REGISTERED NURSES, MIDWIVES, ENROLLED (MENTAL HEALTH) AND ENROLLED (MOTHERCRAFT)
NURSES - INDUSTRIAL AGREEMENT 2020**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

AUSTRALIAN NURSES FEDERATION INDUSTRIAL UNION OF WORKERS PERTH

APPLICANT

-v-

SOUTH METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

TUESDAY, 31 AUGUST 2021

FILE NO/S

C 27 OF 2021

CITATION NO.

2021 WAIRC 00488

Result

Correction Order issued

Correction Order

WHEREAS a 'slip' error occurred in the Order [2021 WAIRC 00485] that was deposited in the office of the Registrar on 30 August 2021; and

NOW THEREFORE the Commission, in order to correct this error, and pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the second paragraph in the Order [2021 WAIRC 00485] be amended to read:

“AND WHEREAS the applicant says that the proposed changes, namely the implementation of a new “Disco shift” (6:30pm to 3:00am) with effect from 31 August 2021, require agreement under cl 28 of the *WA Health System – Australian Nursing Federation – Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2020* (the Agreement).”.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2021 WAIRC 00494

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 15 OCTOBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SANJA SPASOJEVIC

APPELLANT

-v-

SPEAKER OF THE LEGISLATIVE ASSEMBLY

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIR
MR G SUTHERLAND - BOARD MEMBER
MR M HAMMOND - BOARD MEMBER

DATE

FRIDAY, 10 SEPTEMBER 2021

FILE NO

PSAB 31 OF 2020

CITATION NO.

2021 WAIRC 00494

Result	Order issued
Representation	
Appellant	Mr M Baldwin, of counsel
Respondent	Ms K Ellson, of counsel

Order

WHEREAS this is an appeal pursuant to s 80I(1)(c) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 10 September 2021, the respondent's representative wrote to the Public Service Appeal Board (**Board**), advising that the parties have conferred and agreed to proposed orders to vary the Order [2021 WAIRC 00454] and attached a minute of proposed consent orders reflecting the variations;

AND WHEREAS on 10 September 2021, the Board has considered the correspondence and wrote to the parties with proposed further orders;

AND WHEREAS on 10 September 2021, the parties' representatives consented to the Board's proposed further orders;

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

1. THAT Order 1 of [2021 WAIRC 00454] be amended to read “THAT discovery by the appellant be informal and be provided by **17 September 2021**.”.
2. THAT Order 2 of [2021 WAIRC 00454] be amended to read “THAT the appellant file outlines of evidence complying with Practice Note 9 of 2021 for each witness to be called and a book of documents on which she intends to rely that is bound, indexed and paginated by **24 September 2021**.”.
3. THAT Order 3 of [2021 WAIRC 00454] be amended to read “THAT the respondent file outlines of evidence complying with Practice Note 9 of 2021 for each witness to be called and a book of documents on which it intends to rely that is bound, indexed and paginated by **1 October 2021**. The respondent's book of documents ought to be prepared to avoid unnecessary duplication with the appellant's book of documents.”.

4. THAT Order 4 of [2021 WAIRC 00454] be amended to read “THAT the appellant file a written outline of her submissions and a list of authorities (of not more than 15 pages) by **5 October 2021**.”
5. THAT Order 5 of [2021 WAIRC 00454] be amended to read “THAT the respondent file a written outline of its submissions and list of authorities (of not more than 15 pages) by **19 October 2021**.”
6. THAT the requirement for the appellant to comply with reg 107(9) of the *Industrial Relations Commission Regulations 2005* (WA) to file a Statement of Facts be dispensed with.
7. THAT if any party intends to refer to or tender any document in a language other than English in the course of the hearing, the document(s) must be translated into English by an accredited translator and such translation be exchanged and filed by **19 October 2021**.
8. THAT the parties have liberty to apply on short notice.

(Sgd.) R COSENTINO,
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2021 WAIRC 00484

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GLENN WALLIS

APPLICANT

-v-

THE JS MORLEY FAMILY TRUST & THE SERMOR FAMILY TRUST

RESPONDENT

CORAM

COMMISSIONER T EMMANUEL

DATE

MONDAY, 30 AUGUST 2021

FILE NO.

U 55 OF 2021

CITATION NO.

2021 WAIRC 00484

Result

Directions issued

Representation

Applicant

On his own behalf

Respondent

Ms S Morley & Mr J Morley (as agents)

Direction

HAVING heard from the applicant on his own behalf and Ms S Morley & Mr J Morley as agents on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the applicant email to my Associate a list of the names and contact details of the witnesses he intends to call by Monday 6 September 2021;
2. THAT the applicant file in the Registry any documents on which he intends to rely at the hearing by Monday 6 September 2021;
3. THAT the respondent email to my Associate a list of the names and contact details of the witnesses it intends to call by Monday 13 September 2021;
4. THAT the respondent file in the Registry any documents on which it intends to rely at the hearing by Monday 13 September 2021;
5. THAT this application be listed for a 1-day hearing after 20 September 2021.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shire of Waroona Outside Staff Collective Industrial Agreement 2021 AG 14/2021	09/10/2021	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Waroona	Commissioner T B Walkington	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2021 WAIRC 00482

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 9 AUGUST 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BROCK DELFANTE

APPELLANT

-v-

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MS B CONWAY - BOARD MEMBER
MR B KIRWAN - BOARD MEMBER

DATE

FRIDAY, 27 AUGUST 2021

FILE NO

PSAB 25 OF 2019

CITATION NO.

2021 WAIRC 00482

Result	Appeal dismissed
Representation	
Appellant	On his own behalf
Respondent	Ms M Di Lello (as agent)

Order

WHEREAS this is an appeal to the Public Service Appeal Board (**Board**) under s 80I(1)(c) of the *Industrial Relations Act 1979* (WA) that was listed for a hearing for mention on Wednesday, 11 August 2021;

AND WHEREAS on Wednesday, 11 August 2021 the Board issued an order [2021] WAIRC 00461 which ordered that ‘unless the appellant contacts the Public Service Appeal Board by 4pm, Wednesday 25 August 2021 and provides the Public Service Appeal Board with information that satisfies the Public Service Appeal Board that application PSAB 25 of 2019 should proceed, application PSAB 25 of 2019 will be dismissed’;

AND WHEREAS on Wednesday, 25 August 2021 the appellant wrote to the Board and said: ‘I am awaiting a response from NMHS regarding the settlement that the Board has been notified about. The response includes confirmation the CEO has signed the Deed and the planned way by which NMHS plans to make the settlement payment. Following this, I plan to notify the Board that the settlement payment has occurred in order to close the matter’;

AND WHEREAS it is clear that the parties have reached a compromise agreement in relation to the matters the subject of application PSAB 25 of 2019;

NOW THEREFORE, in circumstances where the Public Service Appeal Board considers that application PSAB 25 of 2019 should not proceed because matter has settled, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT application PSAB 25 of 2019 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2019 WAIRC 00779

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLE MARIE STAPLES

APPLICANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER - CHAIRMAN

MS J AUERBACH – BOARD MEMBER

MS J LOVE – BOARD MEMBER

DATE

THURSDAY, 31 OCTOBER 2019

FILE NO.

PSAB 15 OF 2019

CITATION NO.

2019 WAIRC 00779

Result

Direction issued

Representation

Appellant

Mr J Raftos of counsel and with him Ms J Edinger of counsel

Respondent

Ms J Vincent of counsel and with her Ms F Lender

Direction

HAVING heard Mr J Raftos of counsel and with him Ms J Edinger of counsel on behalf of the appellant and Ms J Vincent of counsel and with her Ms F Lender on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the respondent file and serve a response to the appeal by 14 November 2019.
- (2) THAT the appellant file and serve submissions and evidence, if any, in opposition to the appellant's recusal application by 21 November 2019.
- (3) THAT the respondent's recusal application be listed for hearing on a date to be fixed.
- (4) THAT the directions hearing be otherwise adjourned sine die.
- (5) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2019 WAIRC 00887

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION

: 2019 WAIRC 00887

CORAM

: PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER S J KENNER- CHAIRMAN
 MS J AUERBACH- BOARD MEMBER
 MS J LOVE- BOARD MEMBER

HEARD

: WEDNESDAY, 11 DECEMBER 2019

DELIVERED

: FRIDAY, 20 DECEMBER 2019

FILE NO.

: PSAB 15 OF 2019

BETWEEN

: NICOLE MARIE STAPLES

Appellant

AND

PATHWEST LABORATORY MEDICINE WA

Respondent

Catchwords : *Industrial Relations Law (WA) - Application for recusal of Appeal Board member on the basis of apprehended bias by association - Application considered - Necessary threshold of association not established - Application dismissed*

Legislation : *Industrial Relations Act 1979 (WA) s 80H*

Result : Order issued

Representation:

Counsel:

Appellant : No appearance

Respondent : Ms J Vincent of counsel

Solicitors:

Respondent : State Solicitor's Office

Case(s) referred to in reasons:

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337

Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438

Johnson v Johnson (2000) 201 CLR 488

Webb & The Queen (1994) 181 CLR 41

Case(s) also cited:

Fingleton v Christian Ivanoff Pty Ltd (1976) 14 SASR 530

Philip Danala v The Minister for Health [2010] WAIRC 01035; (2010) 90 WAIG 1793

Reasons for Decision

KENNER SC:

1 To the extent that it is necessary for me to do so, I agree with Ms Auerbach's reasons in not acceding to the respondent's application that she not sit as a member of this Appeal Board and hear this appeal. For those reasons, the application for recusal is dismissed.

MS AUERBACH:

Introduction

2 This application relates to an appeal by Ms Staples, the appellant in these proceedings, against the respondent's decision to take disciplinary action by way of a reprimand in the form of a written warning dated 24 July 2019. On 30 October 2019 the respondent filed an application seeking that I recuse myself from sitting as an Appeal Board member on the grounds of reasonable apprehension of bias. This interlocutory application was listed for hearing on 11 December 2019.

The respondent's case

3 As I understand the respondent's submissions, there is no suggestion of any actual bias, but of apprehension of bias by reason of my association with the Australian Medical Association (AMA), and in turn, the appellant (see par 9 of the Schedule to the respondent's application).

4 Specifically it is submitted that I have a direct association with the AMA by reason of being a senior industrial officer of the AMA and that the AMA is in turn, directly associated with the appellant by reason of the appellant being a member of the AMA, with another officer of the AMA having provided some assistance and/or advice and/or advocacy to the appellant in the course of the disciplinary process.

5 The respondent has pointed to two email communications between Ms Thorp, who was an Industrial Officer of the AMA at the time, and the respondent, in which Ms Thorp sought to set up a meeting. The respondent also relied upon a couple of emails from the appellant to the respondent, in which the appellant confirms that she has sought or is seeking advice from the AMA, prior to responding to the allegations of misconduct.

6 The respondent therefore submits that I would be placed in the invidious position of reviewing, and being open to critiquing, document(s) and/or correspondence produced by the appellant, potentially on the advice or with the assistance of the AMA, and that this could be perceived as an impediment to me bringing an impartial mind to the matter before the Appeal Board.

The legal principles

7 The test for determining whether there is a reasonable apprehension of bias has been set out by the High Court in *Johnson v Johnson (No3)* (2000) 201 CLR 488, where at par 11, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated:

“...whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide...”.

8 The test is based on the rationale that justice must not only be done, but also seen to be done, in order to maintain public confidence in the administration of justice. In *Webb & The Queen* (1994) 181 CLR 41 at 69, Deane J stated that “the test is an objective one and the standard to be observed in its application is that of a hypothetical fair minded and informed lay

observer". Furthermore at 76, "the standard which such an observer would require of each will vary according to the functions being discharged and the particular circumstances".

- 9 It was recognised in *Webb*, that there are at least four common categories, sometimes overlapping, of apprehended bias: by interest, by conduct, by association and by extraneous information. The third category, apprehended bias by association, is said to consist of cases where "the apprehension of pre-judgement or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings": *Webb* at 74.
- 10 However, as stated in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, by Gleeson CJ, McHugh, Gummow and Hayne JJ, at 345:

"The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed".
- 11 And, as noted by McHugh J in *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 461-462:

"...no conclusion of apprehended bias by association can be drawn until the court examines the nature of the association, the frequency of contact, and the nature of the interest of the person associated, with the decision-maker. It is erroneous to suppose that a decision is automatically infected with an apprehension of bias because of the pecuniary interest or other interest of a person associated with the decision-maker. Each case must turn on its own facts and circumstances."
- 12 In the specific case of a member of the court or tribunal having previously provided legal advice to a party to the proceedings, *Re Polites; Ex Parte The Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 confirms at 87-88 that:

"A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before the tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate."

Issues arising

- 13 There is no suggestion of actual bias made by the respondent. For the avoidance of any doubt, however, I can categorically state that I have never had any dealings with the appellant, with respect to the matter before the Appeal Board or indeed any other matter. If I had provided advice or assistance to the appellant in relation to the matter before the Appeal Board, I would not have allowed myself to be nominated to sit on this appeal.
- 14 If any advice or assistance was provided to the appellant, it was provided by Ms Thorp, who was an industrial officer with the AMA until early October 2019.
- 15 From the material adduced by the respondent, it is difficult to ascertain what advice, if any, was provided by Ms Thorp. It appears that she attempted to assist in setting up a face to face meeting between the appellant and the respondent, and that she may have advised the appellant she should "clarify all the errors" contained in the complaint about her. If this was indeed the extent of the advice, it seems to consist of little more than common sense and general assistance with the processes to be followed in the course of responding to an allegation of misconduct.
- 16 Even if more substantive advice was provided, however, and even assuming that any advice given was actually heeded, I have difficulty in accepting that the necessary threshold set out in *Hot Holdings* has been met for apprehended bias by association, in terms of addressing the nature of the association, the frequency of contact and the nature of the interest.
- 17 Moreover, with respect, the respondent appears to have misconceived the purpose of the appeal process. The Appeal Board is not examining any advice given to the appellant or actions taken by her in reliance on any advice, or the appropriateness of any responses provided by the appellant to the allegation. The Appeal Board will be required to examine the decision of the respondent in the disciplinary proceedings and the appropriateness of any such decision in the context of the events which gave rise to the disciplinary proceedings. It is the respondent's decision alone which is under review, not the correctness of any advice given to the appellant in relation to the disciplinary process.
- 18 Furthermore, it is necessary to consider the formation of the Appeal Board under section 80H of the *Industrial Relations Act 1979*. Section 80H of the Act seems to aim at striking a fair balance by requiring a nomination from both the employer and the union, with the Presiding Member of the Appeal Board being a member of the Commission.
- 19 It is inherent in the purpose and business of a union that it provides assistance to its members before, during and after any disputes a member may be having with their employer. That is what a union does. Similarly, the employer's own Human Resources or Industrial Relations consultants assist their managers and decision makers in going through performance management and/or disciplinary processes with their employees. That is what Human Resources or Industrial Relations advisers do.
- 20 Any person nominated by the employer and by the AMA will, by reason of their nomination alone, have some association with the body nominating them, either as an employee, or an officer or a member, or by being a co-worker or colleague (within the wider Department of Health) of the human resources adviser involved in the employer's decision making process. The nomination by either the employer or the union is not likely to be of a "person off the street" with no association with the nominating body, nor does that seem to be envisaged by the legislation. If there was a requirement for no association, s 80H of the Act would have said so.

- 21 Furthermore, regardless of any necessary association, Appeal Board members are required and agree to act independently. They do not sit on the Appeal Board as a member or an employee of the nominating body, and they do not represent the interests of the party which nominated them. They are to act and do act independently.

Conclusion

- 22 On the basis of the above, I do not consider I should accede to the respondent's application and I decline to recuse myself from continuing to sit on the Appeal Board to hear this appeal.

MS J LOVE:

- 23 I agree with Ms Auerbach's reasons in this application.
- 24 The nature of Ms Auerbach's employment with the AMA and the material submitted does not meet, in my view, the threshold for a reasonable apprehension of bias by association in accordance with the legal principles noted in these reasons.
- 25 The legislative construct of the *Industrial Relations Act 1979* would support some level of association by virtue of the requirements of s80H(4). Similar to Ms Auerbach's reasoning, the practical application of this section for an employer's representative is to ensure that they have had no dealings with the matter before the Appeal Board before accepting an employer's nomination.
- 26 I note the requirement for Appeal Board members to act impartially and independently. Whilst they are nominated by an association or employer, they do not represent the interests of the party that nominated them.
- 27 I support the dismissal of this recusal application.

2019 WAIRC 00888

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLE MARIE STAPLES

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER S J KENNER - CHAIRMAN
 MS J AUERBACH - BOARD MEMBER
 MS J LOVE - BOARD MEMBER

DATE

FRIDAY, 20 DECEMBER 2019

FILE NO

PSAB 15 OF 2019

CITATION NO.

2019 WAIRC 00888

Result Application dismissed

Representation

Appellant No appearance

Respondent Ms J Vincent of counsel

Order

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

THAT the respondent's application seeking the recusal of Appeal Board member Ms J Auerbach be and is hereby dismissed.

[L.S.]

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

2020 WAIRC 00150

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION NICOLE MARIE STAPLES	APPELLANT
	-v- PATHWEST LABORATORY MEDICINE WA	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MS J AUERBACH - BOARD MEMBER MS J LOVE - BOARD MEMBER	
DATE	TUESDAY, 3 MARCH 2020	
FILE NO	PSAB 15 OF 2019	
CITATION NO.	2020 WAIRC 00150	

Result	Order issued
Representation	
Appellant	Dr N Staples
Respondent	Ms J Vincent of counsel

Order

HAVING heard Dr N Staples on her own behalf and Ms J Vincent of counsel on behalf of the respondent, the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the herein appeal be and is hereby adjourned sine die.

[L.S.]

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

2020 WAIRC 00677

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION NICOLE MARIE STAPLES	APPELLANT
	-v- PATHWEST LABORATORY MEDICINE WA	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MS J AUERBACH - BOARD MEMBER MS J LOVE - BOARD MEMBER	
DATE	THURSDAY, 6 AUGUST 2020	
FILE NO	PSAB 15 OF 2019, PSAB 20 OF 2020	
CITATION NO.	2020 WAIRC 00677	

Result	Order and directions issued
Representation	
Appellant	Ms F Stanton of counsel and with her Ms J Edinger of counsel
Respondent	Mr D Anderson of counsel

Order and Directions

HAVING heard Ms F Stanton of counsel and with her Ms J Edinger of counsel on behalf of the appellant and Mr D Anderson of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent, hereby –

- (1) ORDERS that appeals PSAB 15 of 2019 and PSAB 20 of 2020 be and are hereby joined and that they be heard and determined together.
- (2) DIRECTS that the respondent file a response to appeal PSAB 20 of 2020 by 31 August 2020.
- (3) DIRECTS that there be an informal discovery.
- (4) DIRECTS that the appellant file an outline of the evidence of each witness to be called by the appellant by 15 September 2020.
- (5) DIRECTS that the respondent file an outline of evidence of each witness to be called by the respondent by 29 September 2020.
- (6) DIRECTS that the appellant file an outline of submissions and any list of authorities by 6 October 2020.
- (7) DIRECTS that the respondent file an outline of submissions and any list of authorities by 13 October 2020.
- (8) DIRECTS that the appeals be listed for hearing for hearing for three days not before 19 October 2020, on dates to be fixed by the Appeal Board.
- (9) DIRECTS that the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2020 WAIRC 00818

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLE MARIE STAPLES

APPLICANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER - CHAIRMAN

MS J AUERBACH – BOARD MEMBER

MS J LOVE – BOARD MEMBER

DATE

FRIDAY, 25 SEPTEMBER 2020

FILE NO.

PSAB 15 OF 2019, PSAB 20 OF 2020

CITATION NO.

2020 WAIRC 00818

Result Direction issued

Representation

Applicant Ms J Edinger of counsel

Respondent Mr T Pontre of counsel

Direction

HAVING heard Ms J Edinger of counsel on behalf of the appellant and Mr T Pontre of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent, hereby directs –

- (1) THAT pars 5, 6 and 7 of the order and directions made on 6 August 2020 ([2020] WAIRC 00677) be deleted and in lieu thereof the following apply:
 - (a) (5) The respondent file an outline of evidence of each witness to be called by the respondent by 2 October 2020.
 - (b) (6) The appellant file an outline of submissions and any list of authorities, and any book of documents, both in electronic and hard copy form, which the appellant will seek to tender, by 16 October 2020. Any book of documents filed is to be indexed and paginated.

- (c) (7) The respondent file an outline of submissions and any list of authorities, and any book of documents, both in electronic and hard copy form, which the respondent will seek to tender, by 30 October 2020. Any book of documents filed is to be indexed and paginated.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00892

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 11 JUNE 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLE MARIE STAPLES

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MS J AUERBACH - BOARD MEMBER
MR J LOVE - BOARD MEMBER

DATE

WEDNESDAY, 4 NOVEMBER 2020

FILE NO

PSAB 20 OF 2020, PSAB 15 OF 2019

CITATION NO.

2020 WAIRC 00892

Result Order issued**Representation****Appellant** Ms J Edinger of counsel**Respondent** Mr T Pontre of counsel*Order*

HAVING heard Ms J Edinger of counsel on behalf of the appellant and Mr T Pontre of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the respondent be granted leave to file an outline of evidence of Dr Edwards-Smith.
- (2) THAT the appellant be granted leave to file a further outline of evidence of Dr Tay in reply to the outline of evidence of Dr Edwards-Smith.

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

[L.S.]

2020 WAIRC 00893

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLE MARIE STAPLES

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MS J AUERBACH - BOARD MEMBER
MS J LOVE - BOARD MEMBER

DATE

WEDNESDAY, 4 NOVEMBER 2020

FILE NO

PSAB 15 OF 2019, PSAB 20 OF 2020

CITATION NO.

2020 WAIRC 00893

Result	Order issued
Representation	
Appellant	Ms J Edinger of counsel
Respondent	Mr T Pontre of counsel

Order

HAVING heard Ms J Edinger of counsel on behalf of the appellant and Mr T Pontre of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the respondent be granted leave to take evidence from Dr Suzanne Phillips by video link.

[L.S.]

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

2020 WAIRC 00894

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLE MARIE STAPLES

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MS J AUERBACH - BOARD MEMBER
MS J LOVE - BOARD MEMBER

DATE

WEDNESDAY, 4 NOVEMBER 2020

FILE NO

PSAB 15 OF 2019, PSAB 20 OF 2020

CITATION NO.

2020 WAIRC 00894

Result	Order issued
Representation	
Appellant	Ms J Edinger of counsel
Respondent	Mr T Pontre of counsel

Order

HAVING heard Ms J Edinger of counsel on behalf of the appellant and Mr T Pontre of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appellant be granted leave to take evidence from Dr Eileen Tay by video link.

[L.S.]

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

2020 WAIRC 00897

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 11 JUNE 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLE MARIE STAPLES

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MS J AUERBACH - BOARD MEMBER
MS J LOVE - BOARD MEMBER**DATE**

MONDAY, 9 NOVEMBER 2020

FILE NO

PSAB 20 OF 2020, PSAB 15 OF 2019

CITATION NO.

2020 WAIRC 00897

Result

Order issued

Representation**Appellant**

Ms F Stanton of counsel and with her Ms J Edinger of counsel

Respondent

Mr T Pontre of counsel

Order

HAVING heard Ms F Stanton of counsel and with her Ms J Edinger of counsel on behalf of the appellant and Mr T Pontre of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the respondent be granted leave to file a witness outline for Ms Kandiah.
- (2) THAT the appellant be granted leave to file a witness outline in response to the witness outline of Ms Kandiah.
- (3) THAT the appeals be adjourned to a directions hearing on a date to be fixed by the Appeal Board.

(Sgd.) S J KENNER,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2021 WAIRC 00158

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 24 JULY 2019 AND 11 JUNE 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLE MARIE STAPLES

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIR
MS J AUERBACH - BOARD MEMBER
MS J LOVE - BOARD MEMBER**DATE**

FRIDAY, 11 JUNE 2021

FILE NO

PSAB 15 OF 2019; PSAB 20 OF 2020

CITATION NO.

2021 WAIRC 00158

Result	Order issued
Representation	
Appellant	Dr N Staples, in person
Respondent	Mr T Pontre, of counsel

Order

HAVING heard from Dr N Staples on her own behalf and Mr T Pontre of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT PSAB 15 of 2019 and PSAB 20 of 2020 be listed for hearing on 30 August, 31 August, 1 September, 2 September and 3 September 2021; and
- (2) THAT the parties have liberty to apply on short notice.

(Sgd.) R COSENTINO,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2021 WAIRC 00489

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 11 JUNE 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLE MARIE STAPLES

APPELLANT

-v-

PATHWEST LABORATORY MEDICINE WA

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIR
MS J AUERBACH - BOARD MEMBER
MS J LOVE - BOARD MEMBER

DATE

TUESDAY, 31 AUGUST 2021

FILE NO

PSAB 15 OF 2019; PSAB 20 OF 2020

CITATION NO.

2021 WAIRC 00489

Result	Appeals discontinued by leave
Representation	
Appellant	Ms P Giles, and Mr D Stojanoski, both of counsel
Respondent	Mr S Pack, of counsel

Order

WHEREAS on 31 August 2021, the appellant sought and was granted leave to discontinue the matters;

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

1. THAT the hearing listed for 1 September, 2 September and 3 September 2021 be vacated.
2. THAT the requirement for the appellant to file notices of discontinuance be and is hereby dispensed with.
3. THAT the matters PSAB 15 of 2019 and PSAB 20 of 2020 be and are hereby discontinued by leave.

(Sgd.) R COSENTINO,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2021 WAIRC 00490

REFERENCE OF DISPUTE - S 28(2) - OSH ACT 1984

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION : 2021 WAIRC 00490
CORAM : COMMISSIONER T B WALKINGTON
HEARD : FRIDAY, 12 MARCH 2021
DELIVERED : WEDNESDAY, 1 SEPTEMBER 2021
FILE NO. : OSHT 2 OF 2020
BETWEEN : MELISSA ANNE RASMUSSEN
 Applicant
 AND
 DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Occupational Safety and Health Tribunal - Refusal to work - Entitlements - Remedy limited to pay or benefit - Leave to discontinue or withdraw granted - Application to dismiss for want of prosecution
Legislation : *Industrial Relations Act 1979* (WA)
 Industrial Relations Commission Regulations 2005 (WA)
 Occupational Safety and Health Act 1984 (WA)
Result : Applicant granted leave to discontinue
Representation:
Applicant : Mr J Carroll (of counsel)
Respondent : No appearance

Case(s) referred to in reasons:

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

Nathan Maher v Director General of Health as a delegate of the Minister of Health in his incorporated capacity under section 7 of the Hospitals Health Services Act 1972 for the Metropolitan Health Services Board (2012) 92 WAIG 386

Reasons for Decision

- 1 The applicant seeks orders for:
 - (a) the payment of salary and entitlements for the period 31 October 2019 to 19 December 2019;
 - (b) an external investigation or audit of the workplace;
 - (c) reinstatement of her employment at an alternative workplace within the Department of Education;
 - (d) damages;
 - (e) aggravated damages; and
 - (f) compensation.
- 2 The respondent opposes the orders sought and contends that the Occupational Safety and Health Tribunal (**Tribunal**) is limited to ordering payment of salary and entitlements for the period 31 October 2019 to 19 December 2019 and lacks the requisite authority to make any of the other orders sought. The respondent submits that the Tribunal ought not make an order for payment of salary and entitlements for the period of 31 October 2019 to 19 December 2019, pursuant to s 28(2) of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**), because the applicant's actions were not in accordance with the requirements of s 26(2a) of the OSH Act and the applicant was not exposed to a risk of imminent and serious injury, or imminent and serious harm to her health (s 26(2b) of the OSH Act).
- 3 The respondent has sought an order that the referral be dismissed pursuant to s 27(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**) because of the applicant's failure to prosecute her application.

Background

- 4 On 31 October 2019 the applicant reported a purported breach of the OSH Act to the Occupational Health and Safety Representative at the school in which she worked. The report concerned claims that the applicant's employer had failed to act on disclosures of workplace bullying and failed to remove and investigate a student the applicant believed was using drugs on the school site. In addition, the applicant notified that her request for flexible work was denied and a request for alternate

- duties was denied. In the incident report form the applicant stated that all reasonable requests to minimise injury were denied and as a result she has not been able to enter the workplace.
- 5 The applicant did not attend at the workplace from 31 October 2019.
 - 6 On 11 November 2019 the respondent advised the applicant that she had not provided sufficient detail to enable an investigation of the matters in the incident report.
 - 7 On 15 November 2019 the applicant submitted a completed Accident Incident Investigation Report Form, in which she states she formed the view that one of her students was under the influence of drugs and/or alcohol.
 - 8 On 26 November 2019 the Occupational Health and Safety Representative submitted a report of her investigation into the issues raised by the applicant.
 - 9 On 28 November 2019 the applicant was requested to attend a meeting the following day with the school principal to discuss the outcome of the Accident Incident Investigation Report Form among other matters. The applicant declined the invitation and did not attend the meeting.
 - 10 On 24 February 2020 the applicant referred the matter to the Tribunal seeking payment of entitlements from 31 October 2019 to 19 December 2019, an order for an external investigation or audit of the workplace and reinstatement of her employment at an alternative workplace within the Department of Education.
 - 11 The respondent opposes the remedies sought and contends that s 28(1) of the OSH Act does not apply as the applicant left the school from at least 31 October 2019 onwards without authorisation from the respondent as required under s 26(2a) of the OSH Act. The respondent submits that with the exception to the notification and authorisation requirements in s 26(2a) of the OSH Act it was not enlivened as the incident was localised to the applicant's year 7 classroom. The respondent disputes that there were reasonable grounds for any belief that to remain at any location on the school's premises during the claim period would expose the applicant to a risk of imminent and serious injury, or imminent and serious harm to her health (s 26(2b) of the OSH Act)). The respondent submits that the applicant's concerns were confined to work in the applicant's year 7 classroom and not the entire school site.
 - 12 On 16 June 2020 the applicant was requested to provide an update to the Tribunal.
 - 13 On 18 June 2020 the applicant made a request to amend her application:
 - (a) Expressing concern that the respondent's counsel had inappropriately written to the Chief Commissioner seeking that the applicant's application for unfair dismissal be joined with the referral to the Tribunal;
 - (b) Expressing concern that the respondent's representatives did not have the necessary authority to conduct conciliation causing the conciliation conference to an excessive length;
 - (c) Expressing concern that the respondent's representative had presented an irrelevant sensitive document during the conciliation conference.
 - (d) Had obtained documents by a freedom of information application that she believed established the hazardous nature of her workplace;
 - (e) Observed that the applicant had yet to receive a copy of the final investigation report; and
 - (f) Extended the remedies sought to a claim for damages, aggravated damages and compensation.
 - 14 The respondent filed and served a response to the application to amend denying assertions made by the applicant, opposing the application to amend and inclusion of orders seeking to extend the remedies sought.
 - 15 On 26 June 2020 the applicant was advised that the Tribunal had directed that a directions hearing be held on 28 August 2020 to consider and determine her application to amend her claim. The date of the direction hearing was scheduled at a date convenient to the parties.
 - 16 On 27 August 2020 the applicant requested that she appear by video conference and that in the event her offer to settle was rejected by the respondent she would propose that the matter be heard on the papers. The applicant was granted her request to appear by video link.
 - 17 On 27 August 2020 the applicant emailed a copy of an offer to settle the matter to the respondent and the Tribunal. The terms of settlement proposed included the 'redaction' of a complaint lodged with the Legal Profession Complaints Committee.
 - 18 On 28 August 2020, fifteen minutes prior to the commencement of the direction hearing the applicant emailed that she was unwell and would not attend. The email was received as the hearing commenced.
 - 19 At the directions hearing the respondent applied to the Tribunal to dismiss the matter and submitted that it would file an application and submissions in support of this application.
 - 20 On 10 September 2020 the applicant emailed a copy of a purported medical certificate dated 28 August 2020 for the period 28 August 2020 to 8 September 2020 inclusive, stating she was medically unfit for work or study and included a handwritten annotation of 'or attending court'. The applicant also advised that she wished to engage legal representation.
 - 21 On 4 November 2020 the respondent was requested to inform the Tribunal if it maintained its application to dismiss the matter.
 - 22 The following day the applicant emailed the Tribunal expressing concern that she did not know of the change in the respondent's representative and that she had not been informed of the respondent's intention to apply to the Tribunal to have her matter dismissed. The applicant advised that she had searched the Gazette to ascertain if she had missed an outcome of the directions hearing and the transcript, and did not understand what had ensued since her last communication. The applicant advised that she had submitted an offer to the respondent and had not yet had a response.

- 23 The respondent's representative informed the applicant that 'the respondent's legal representative is the State Solicitor's Office and changes to the individual solicitor does not require a *Form 11 – Notification of Representative Commencing or Ceasing to Act*, to be filed and served. The respondent further advised that it indicated to the Tribunal that the respondent would cause a letter to issue on the topic of whether to join the related applications if they were not already joined and that the respondent would exercise its right to apply in time for the proceedings to be dismissed.
- 24 In response to the applicant's enquiry concerning the lack of expected action by the respondent to date, the respondent advised that this was a result of the applicant's recent request to be provided with an opportunity to seek and obtain legal advice through the public scheme. The respondent confirmed that there was no settlement offer pending given that the applicant had concluded that her settlement had been rejected by the respondent. The respondent's representative advised that he did not have instructions to pursue settlement discussions further at this time.
- 25 On 5 November 2020 the applicant was informed that the Tribunal had not issued any directions and that the respondent had informed the Tribunal that they would make an application for the matter to be dismissed and would file submissions in support of this application.
- 26 On 7 December 2020 parties were notified of a hearing for 29 January 2021, by email and post. The applicant did not respond to an invitation to advise of her unavailable days.
- 27 On the day of the hearing the applicant advised that she would not attend the hearing because she had carer responsibilities and had been unsuccessful in engaging a professional carer. The applicant advised that the 'The Commission is aware of my Carer responsibilities'. The applicant stated that she wished to have the matter determined on the papers. The applicant did not attend the directions hearing on 29 January 2021. At the hearing the respondent applied to the Tribunal for the matter to be dismissed pursuant to s 27(1)(a) of the IR Act.
- 28 On 29 January 2021 the Tribunal notified the parties that a hearing would be listed for the applicant to show cause why her application ought not be dismissed. The Tribunal issued an order for the respondent to file and serve written submissions fourteen days before the date of the hearing. The party's availability was sought for the hearing.
- 29 On 5 February 2021 the parties were notified that the hearing was listed for 12 March 2021.
- 30 On 22 February 2021 the respondent filed and served upon the applicant written submissions in support of its application to dismiss for want of prosecution.
- 31 On the evening of 11 March 2021, the applicant filed a *Form 1A – Multipurpose Form* indicating that she was 'withdrawing or discontinuing an application' and/or 'requesting to amend an application' by which she:
- (a) Objected to the respondent being represented by solicitors;
 - (b) Complaining of the failure to notify of a change in solicitors;
 - (c) Complained on the conduct of the respondent's representative;
 - (d) Advised of her inability to leave her house or interact with others;
 - (e) Advised of her need to engage professional representation and her inability to do so to date; and
 - (f) Regrets that she must withdraw her claim if her application is rejected.
- 32 The applicant did not appear at the hearing on 12 March 2021. The hearing proceeded in the absence of the applicant.

Hearing on the Papers

- 33 Regulation 32A(2) of the *Industrial Relations Commission Regulations 2005 (WA) (IR Regs)* provides that the Tribunal may determine any proceedings by conducting a hearing on the papers unless the proceedings require oral evidence to be given or a party of the proceedings objects to having the proceedings determined on the papers.
- 34 The applicant has requested that the referral be determined on the papers.
- 35 The respondent objects and contends that the nature of the claim would require at the least the cross examination of evidence concerning events on the day the applicant left the workplace.
- 36 Given the respondent's objections it is not open to determine these proceedings on the papers.
- 37 In any event I agree that there may be a need for oral evidence and at a minimum the capacity to cross examine witness evidence. I would exercise my discretion authorised by reg 32A(1)(c) of the IR Regs to decide that it is not appropriate for these proceedings to be determined on the papers.

Consent for a Legal Practitioner

- 38 The applicant contends that the respondent has mistakenly assumed her consent for the respondent to be represented by a legal practitioner. The applicant objects to the respondent being represented by a legal practitioner and refers to s 31 of the IR Act in support of her contentions.
- 39 In applications made pursuant to the OSH Act, the provisions of the IR Act and the OSH Act must be read together. The provisions of s 31(1) of the IR Act are modified by s 51I of the OSH Act. This results in the legislation granting the right for any party or intervenor in proceedings before the Tribunal to be represented by a legal practitioner.
- 40 The applicant's consent for the respondent to be represented by a legal practitioner is not required.

Conciliation

- 41 In the heading to the schedule of the applicant's *Form 1A – Multipurpose Form* filed on 12 March 2021, there is a reference to 'and order to convene a Conciliation Conference'. In the submissions set out in the Form 1A the applicant contends that the respondent misled the Tribunal in its submissions that a conciliation conference had been conducted.
- 42 Section 51J of the OSH Act authorises the Tribunal to assist the parties to reach an agreement if the Tribunal considers the issued involved may be resolved by conciliation.
- 43 Offers to settle the matter have been exchanged between the applicant and respondent. This has not resulted in a settlement of the matter.
- 44 I do not consider the resolution of the issues between the parties subject to the application under s 28(2) of the OSH Act would be assisted by conciliation.

Application to Dismiss the Matter under s 27(1)(a) of the IR Act

- 45 The Tribunal can dismiss a matter under s 27(1)(a) of the IR Act:
- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
 - (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
 - (i) that the matter or part thereof is trivial; or
 - (ii) that further proceedings are not necessary or desirable in the public interest; or
 - ...
 - (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;
- 46 In *The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barmenco Pty Ltd – Plutonic Project* (2000) 80 WAIG 3162, the Full Bench set out the principles to consider when deciding whether to dismiss an application for want of prosecution. They include the length of the delay, the explanation for the delay, the hardship to the applicant if the application is dismissed, the prejudice to the respondent if the action is allowed to proceed, and the conduct of the respondent in the litigation.

Length of delay and reasons for delay

- 47 After lodging the referral to the Tribunal in February 2020 the applicant has not sought to progress the matter. The Tribunal has listed direction hearings however the applicant has not attended these proceedings either in person or by video when this has been granted. The applicant's contact with the Tribunal has consisted of requests for information in response to the Tribunal notifying of hearing dates and her advice of her inability to attend hearings.
- 48 The applicant's explanation for not attending the direction hearing on 29 January 2021 because of her caring responsibilities was not adequate. Seven weeks' notice of the directions hearing was provided, the applicant did not provide any explanation of the attempts to arrange alternate care and did not make a request for an adjournment nor appearance by video or telephone link.
- 49 The applicant failed to attend a hearing to show cause as to why her application ought not be dismissed. The applicant notified the Tribunal of her inability to attend with little or no notice and lodged a Form 1A seeking to both withdraw her application and amend her application. The applicant states that she regrets she must withdraw her claim if her application is rejected.
- 50 Rejection of her application to amend, in circumstances where the application is opposed, requires the Tribunal hear and determine the application. The applicant has failed to attend direction hearings to progress the matter to be heard and determined. Alternately, the applicant may have been referring to rejection by the respondent of her proposal to settle the matter.
- 51 It may be inferred from the applicant's Form 1A that she is unable to attend a hearing because of an injury that has caused a relapse of a disability. The applicant mistakenly submits that the Commission is aware of the nature of her disability. The effect of the injury or disability on the process for hearing this matter has not been explained. The applicant has not provided any evidence to support her contentions relating to an injury or disability.
- 52 The applicant has advised that she is not able to leave her home however she has not requested that the hearing be conducted by telephone or video link. The applicant sought that the matter be determined on the papers. I have set out the reasons for not granting this request earlier in these reasons.
- 53 The applicant has not adequately explained the reasons for her inability to attend hearings. The applicant has failed to adequately explain the reasons for the delay in progressing her referral.

Hardship to Applicant

- 54 The hardship to the applicant which would result from the Tribunal dismissing the matter in accordance with s 27(1) of the IR Act must be considered. In *Nathan Maher v Director General of Health as a delegate of the Minister of Health in his incorporated capacity under section 7 of the Hospitals Health Services Act 1972 for the Metropolitan Health Services Board* (2012) 92 WAIG 386 [23] the question of hardship was considered, and it was observed that hardship requires more than an applicant being deprived of an opportunity to have their day in court and there must be hardship which flows from that deprivation.

- 55 The applicant has sought to amend her application to include remedies of damages, aggravated damages and compensation.
- 56 Section 28(2) of the OSH Act limits the Tribunal's consideration of an entitlement to the applicant to any pay or benefit for the period of time that an employee refuses to work in accordance with s 26(1) of the OSH Act. The Tribunal does not have the necessary authority to consider damages, aggravated damages nor compensation. The applicant does not provide any submissions that refer the Tribunal to a source of authority to make an award beyond that of s 26(1) of the OSH Act.
- 57 The applicant has not provided any submissions or evidence of hardship that flows from the denial of her referral.

Prejudice to Respondent and Conduct of Respondent

- 58 The respondent submits that as a consequence of the effluxion of time the memories of witnesses will have faded.
- 59 The respondent has appeared through counsel at the conciliation conference and each of the direction hearings listed in this matter and submits that there is nothing in the conduct of the respondent which would count against the proceedings being dismissed.
- 60 I find nothing in the conduct of the respondent and its representative to have contributed to the delay.

Dismiss the Referral or Grant Leave to Discontinue

- 61 On 12 March 2021 the applicant submitted a Form 1A seeking to both amend her application and withdraw/discontinue her application. In her submissions the applicant states that 'should the Commission reject my application I regrettably must advise the withdrawal of my claim'.
- 62 By the words 'my application' the applicant may be referring to the Form 1A seeking to amend her application to include additional remedies. Alternately the applicant may be referring to the entire claim. The additional remedies sought in the amendment application are not available for the Tribunal and therefore the application to amend the remedies cannot succeed and must be refused. It should also be noted that only one of the three remedies sought in the originating application are available to the Tribunal.
- 63 Granting leave to discontinue an application will have a different outcome to that of a decision to dismiss. Should leave to discontinue be granted the applicant may make a fresh referral. For referrals to the Tribunal concerning reviews of decisions there is a time limit from the event that is the cause of the application. The OSH Act does not prescribe a time limit for matters concerning the entitlements of employees who refuse to work where he or she has reasonable grounds to believe that to continue to work would expose him or her to a risk of imminent and serious injury to his or her health.
- 64 The absence of a specified time limit possibly reflects the purpose of the provisions being applied in the context of a resolution of workplace issues. In the Second Reading Speech for the Occupational Health, Safety and Welfare Amendment Bill 1987 (WA) the Minister for Labour, Productivity and Employment indicated that sections 26, 27 and 28 of the Bill were designed to protect an employee's common law right to a safe working environment in situations where there was an immediate and serious threat to health and safety; '[I]n addition, and only upon the adherence of strict procedures as detailed, the Bill will enable a health and safety representative to direct that work shall cease.'; Western Australia, *Parliamentary Debates, Legislative Assembly*, 9 April 1987, 547 (Mr Peter Dowding, Minister for Labour).
- The Bill provides that where work is halted as a result of a direction from a health and safety representative or by the employee exercising his common law right the employer is able to assign the employees involved to reasonable alternative work with the same pay and benefits applying as if he or she had continued in their normal work; Western Australia, *Parliamentary Debates, Legislative Assembly*, 9 April 1987, 547 (Mr Peter Dowding, Minister for Labour).
- 65 The purpose of these provisions is to enable employees who believe that to undertake a task or remain in a location will be a serious risk to their health or risk of injury to remove themselves from the risk and engage in a process to remediate the risk. It is necessary for the employee wishing to enforce an entitlement to pay and benefits to demonstrate that they refused to work or remain at the workplace and notified the employer of their belief of the risk to their safety and health at that time with the matter subsequently deemed an issue under s 24(1) of the OSH Act. An employee is required to demonstrate that s 24 and s 25 of the OSH Act have already been engaged or that continuing work would risk imminent and serious injury or imminent and serious harm to his or her health.
- 66 I infer from the applicant's submissions that should her application to amend the remedies sought be refused and/or her application for the matter to be heard on the papers be refused she seeks to discontinue her referral. The respondent submitted that the Tribunal may allow the applicant to discontinue her referral because the preconditions for continuing cannot be met. The respondent observed that in these circumstances this may be the best course for the applicant.
- 67 The application to withdraw or wholly discontinue the referral is made after the respondent has filed a counterproposal or answer and after the Tribunal has set down the matter for hearing. The Tribunal may grant leave to discontinue the application or order that the application be discontinued or dismissed.
- 68 If I have misconstrued the applicant's written submissions of 12 March 2021 granting leave to discontinue the referral provides the applicant an opportunity to consider her situation.
- 69 The respondent's submissions concerning its application to dismiss the referral is not without merit, however in consideration of the balance of injustice to the parties in these circumstances, I will grant the applicant leave to discontinue.

Conclusions

- 70 The applicant is granted leave to discontinue.
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2021 WAIRC 00491

REFERENCE OF DISPUTE - S 28(2) - OSH ACT 1984

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES

MELISSA ANNE RASMUSSEN

APPLICANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE WEDNESDAY, 1 SEPTEMBER 2021
FILE NO/S OSHT 2 OF 2020
CITATION NO. 2021 WAIRC 00491

Result Applicant granted leave to discontinue
Representation
Applicant Mr J Carroll (of counsel)
Respondent No appearance

Order

HAVING HEARD Mr J Carroll (of counsel) on behalf of the respondent and there being no appearance by the applicant, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) and the *Occupational Safety and Health Act 1984* (WA), hereby orders:

THAT the application be and is hereby discontinued.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.
