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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2021 WAIRC 00547

COUNTRY HIGH SCHOOL HOSTELS AWARD, 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
DEPARTMENT OF EDUCATION

PARTIES

APPLICANT

-v-

UNITED WORKERS UNION

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

WEDNESDAY, 20 OCTOBER 2021

FILE NO/S

APPL 28 OF 2021

CITATION NO.

2021 WAIRC 00547

Result

Award varied

Representation

Applicant

Mr M Salamon and Mr S Dane

Respondent

Mr P Bergesio

Order

WHEREAS this is an application filed by the Department of Education on 22 September 2021 to vary the *Country High School Hostels Award, 1979* (Award) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (IR Act);

AND WHEREAS Schedule A of the application set out the grounds upon which it is made, indicating the application is made primarily to update the Award's terminology without changing employees' substantive entitlements, and Schedule B set out the proposed key amendments;

AND WHEREAS on 30 September 2021, the respondent confirmed that it consented to the variations sought by the application;

AND WHEREAS on 19 October 2021, a directions hearing was held;

AND WHEREAS at the directions hearing, I, the undersigned, suggested an alternative form of words for clause 1 "Title" to reflect the effect of the order varying the Award and the parties' intention in relation to the application;

AND WHEREAS at the directions hearing both parties consented to the suggested alternative form of words for clause 1 "Title";

AND BEING satisfied that the amendments are not intended to, and do not, effect substantive changes to the obligations and entitlements of those covered by the Award;

AND FURTHER BEING satisfied that:

- (a) The amendments proposed do not effect any substantive change to the scope of the Award or its area of operation. The application therefore does not attract the requirements of s 29A of the IR Act for publication of the proposed amendments or service on the s 29A parties;
- (b) The application is not made within a term specified in the Award; and
- (c) The requirements for varying the Award are met;

AND WHEREAS at the directions hearing, the parties waived their rights to speak to the minutes;

AND HAVING heard from Mr M Salamon and Mr S Dane on behalf of the applicant and Mr P Bergesio on behalf of the respondent, the Commission, pursuant to the powers conferred under the IR Act hereby orders –

1. THAT the *Country High School Hostels Award, 1979* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the date of this order.
2. THAT the requirements of s 35 of the IR Act be waived.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

SCHEDULE

1. Clause 1. – Title: delete this clause and insert in lieu thereof the following:

Auxiliary Staff Residential Colleges

(Government) Award 2021

1. - TITLE

This award shall be known as the Auxiliary Staff Residential Colleges (Government) Award 2021 (previously known as the Country High Schools Hostels Award, 1979) and shall replace Award No. 21A of 1969.

2. Clause 2. – Arrangement: delete this clause and insert in lieu thereof the following:

2. - ARRANGEMENT

1. Title
- 1B. Minimum Adult Award Wage
2. Arrangement
3. Scope
4. Term
5. Area
6. Hours
7. Contract of Service
8. Rosters
9. Overtime
10. Public Holidays
11. Long Service Leave
12. Sick Leave
13. Conditions and Allowances
14. Annual Leave
15. Weekend Work
16. Mixed Functions
17. Laundry and Uniforms
18. Casual Employees
19. Shift Work
20. Meal Money
21. Special Rates and Provisions
22. Supported Wage System
23. Part-Time Employees
24. Wages
25. Dispute Settlement Procedure

Schedule A - Parties to the Award

Schedule B - Respondent

3. Clause 3. – Scope: delete this clause and insert in lieu thereof the following:

3. - SCOPE

This award shall apply to Cooks, Kitchenhands, Gardeners/Handypersons, and Domestic Employees employed in Residential Colleges as defined by the *School Education Act 1999* (WA), who are eligible to be members of the United Workers Union (WA).

4. Clause 6. – Hours: delete subclause (1)(b)(iii) of this clause and insert in lieu thereof the following:

(iii) 5 agreed days during the summer student vacation period.

5. Clause 7. – Contract of Service:

A. delete subclause (2) of this clause and insert in lieu thereof the following:

(2) Except by agreement with the employer no employee shall resign without first giving one week's notice and in the absence of such notice the employer may withhold holiday or other pay up to the amount of a weeks wages.

B. delete subclause (5)(a) of this clause and insert in lieu thereof the following:

(5) (a) Subject to the provisions of subclause (1) of Clause 6. - Hours, during the student vacation periods the employer shall be relieved of the obligation to provide work and the employee shall not be entitled to the payment of wages in respect of any such period during which no work is performed other than any period during which the employee is on annual leave or a public holiday which falls on a day the employee would normally have worked.

6. Clause 10. – Public Holidays: delete this clause and insert in lieu thereof the following:

10. - PUBLIC HOLIDAYS

(1) The following days or the days observed in lieu thereof shall, subject as hereinafter provided, be allowed as holidays without deduction of pay, namely, New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign, Western Australia Day, Labour Day, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the parties in lieu of the days named in this subclause.

(2) (a) Where any of the days mentioned in subclause (1) hereof fall on a Saturday or Sunday, the holiday shall be observed on the next succeeding Monday or when Boxing Day falls on a Monday, the holiday shall be observed on the next succeeding Tuesday.

(b) When any of the days observed as a holiday in this clause fall during a period of annual leave, the holiday or holidays shall be observed on the next succeeding work-day or days as the case may be after completion of that annual leave.

(3) Where -

(a) a day is proclaimed as a public holiday or as a public half-holiday under Section 7 of the *Public and Bank Holidays Act 1972* (WA); and

(b) that proclamation does not apply throughout the State or to the metropolitan area of the State, that day shall be a public holiday or, as the case may be a public half-holiday for the purposes of this award within the district or locality specified in the proclamation.

(4) Any employee who is required to work on the day observed as a holiday as prescribed in this clause in their normal hours of work shall be paid for the time worked at the rate of double time and a half, or if the employee agrees to be paid for the time worked at the rate of time and one half and in addition be allowed to observe the holiday on a day mutually acceptable to the employer and the employee.

(5) When an employee is absent on leave without pay, sick leave without pay or workers' compensation, any day observed as a holiday on a day falling during such absence shall not be treated as a paid holiday. Where the employee is on duty or available on the whole of the working day immediately preceding a holiday, or resumes duty or is available on the whole of the working day immediately following a day observed as a holiday as prescribed by this clause, the employee shall be entitled to be paid for such holiday.

(6) This clause shall not apply to casual employees.

7. Clause 11. – Long Service Leave: delete this clause and insert in lieu thereof the following:

11. - LONG SERVICE LEAVE

The conditions governing the granting of long service leave due to full-time government wages employees generally shall apply to employees covered by this award. Provided that all time during term student vacation periods when the employee cannot be usefully employed shall count as service for the purposes of those conditions.

8. Clause 12. – Sick Leave: delete this clause and insert in lieu thereof the following:

12. - SICK LEAVE

(1) (a) An employee shall be entitled to payment for non-attendance on the grounds of personal ill health or injury for one sixth of a week's pay for each completed month of service.

- (b) Payment hereunder may be adjusted at the end of each accruing year, or at the time the worker leaves the service of the employer, in the event of the worker being entitled by service subsequent to the sickness in that year to a greater allowance than that made at the time the sickness occurred.
- (2) The unused portion of the entitlement prescribed in paragraph (a) hereof in any accruing year shall be allowed to accumulate and may be availed of in the next or any succeeding year.
- (3) In order to acquire entitlement to payment in accordance with this clause the employee shall as soon as reasonably practicable advise the employer of their inability to attend for work, the nature of the illness or injury and the estimated duration of the absence. Provided that such advice, other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence.
- (4) No employee shall be entitled to the benefit of this clause unless the employee produces proof to the satisfaction of the employer of such sickness provided that the employer shall not be entitled to a medical certificate for absences of less than three consecutive working days unless the total of such absences exceeds five days in any one accruing year.
- (5) (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee, who suffers personal ill health or injury during the time when she is absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.
- (b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to the employee's place of residence or a hospital as a result of personal ill health or injury for a period of seven consecutive days or more and the employee produces a certificate from a registered medical practitioner that the employee was so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if the employee is unable to attend for work on the working day next following her annual leave.
- (c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time the employee proceeded on annual leave and shall not be made with respect to fractions of a day.
- (d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the worker or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 9 - Annual Leave.
- (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 9 - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave.
- (6) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the *Workers Compensation and Injury Management Act 1981(WA)* nor to employees whose illness or injury is the result of the employee's own misconduct.
- (7) The provisions of this clause do not apply to casual employees.
- (8) For the purposes of this clause, all time during student vacation periods when an employee cannot be usefully employed, shall count as service.

9. Clause 16. – Mixed Functions: delete this clause and insert in lieu thereof the following:

16. - MIXED FUNCTIONS

- (1) Employees employed at work for which a higher rate is fixed shall be paid such higher rate whilst so employed.
- (2) If employed for two hours or more on the higher class of work the employee shall be paid the higher rate for the whole of that day.

10. Clause 19. – Shift Work:

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

- (1) (a) Where on any day an employee commences their ordinary hours of work before 4 a.m. or after 12 noon, the employee shall be paid a loading with respect to those ordinary hours of fifteen per cent.
- (b) The provisions of paragraph (a) of this subclause do not apply to an employee who on any day commences their ordinary hours of work after 12 noon and completes those hours before 6 p.m. on that day.
- (c) Where an employee works a broken shift each portion of that shift shall be considered a separate shift for the purpose of this clause. Provided that a shift broken by a meal break of one hour or less shall not constitute a broken shift.

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

- (3) Where an employee's rostered hours of duty in any day are extended by an early start or a late finish the shift work or weekend rates as the case may be shall be paid for such additional time worked in addition to any overtime payable under clause 9. - Overtime of this award.

11. Clause 24. – Wages: delete subclause (1)(a) of this clause and insert in lieu thereof the following:

- (1) (a) The minimum weekly rates of wage payable to employees covered by this award shall be as follows:

	Base Rate	Arbitrated Safety Net Adjustments	Minimum Total Rate
Cook			
1st year of employment	397.70	463.10	860.80
2nd year of employment	402.00	463.50	865.50
3rd year of employment and thereafter	406.10	464.10	870.20
Groundsperson and/or Gardener			
1st year of employment	383.60	461.20	844.80
2nd year of employment	385.10	461.40	846.50
3rd year of employment and thereafter	392.30	462.20	854.50
Domestic Employee			
1st year of employment	369.70	459.30	829.00
2nd year of employment	374.30	459.90	834.20
3rd year of employment and thereafter	378.40	460.50	838.90

The classification Domestic Employee includes the following designations:

Kitchenhands, Cleaner, Yard Assistant, Dining Room Attendant, and Laundry Attendant.

12. Clause 25. – Dispute Settlement Procedure: add a new clause 25 as follows:**25. - DISPUTE SETTLEMENT PROCEDURE**

- (1) Any questions, disputes or difficulties arising under the award or in the course of the employment of employees covered by the award shall be dealt with in accordance with this clause.
- (2) The employee/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution within three working days.
- (3) If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager's superior and an attempt made to find a satisfactory solution within a further three working days.
- (4) If the dispute is still not resolved, it may be referred by the employee/s or union representative to the employer or their nominee.
- (5) Where the dispute cannot be resolved within five working days of the union representative's referral of the dispute to the employer or their nominee, either party may refer the matter to the Commission.
- (6) The period for resolving a dispute may be extended by agreement between the parties.
- (7) At all stages of the procedure, the employee may be accompanied by a union representative.
- (8) Notwithstanding the above, the union may raise matters directly with representatives of the employer. In each case, the union and the employer shall endeavour to reach agreement. If no agreement is reached, either party may refer the dispute to the Commission for conciliation and/or arbitration.

13. Appendix – Resolution of Disputes Requirement: delete this appendix in its entirety.**14. Schedule A – Parties to the Award: delete this clause and insert in lieu thereof the following:****SCHEDULE A - PARTIES TO THE AWARD**

The following organisation is a party to this award:

United Workers Union (WA)

15. Schedule B – Respondent: delete this clause and insert in lieu thereof the following:**SCHEDULE B - RESPONDENT**

The Director General of the

Department of Education

151 Royal Street

EAST PERTH WA 6004

16. Schedule C – Liberty to Apply: delete this clause in its entirety.

AGREEMENTS—Industrial—Retirement from—

2021 WAIRC 00578

NOTICE

AG 379 of 1997

CITY OF GERALDTON WORKSHOP STAFF ENTERPRISE AGREEMENT 1997

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 37 of 2021

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

City of Greater Geraldton, will cease to be a party to the *City of Geraldton Workshop Staff Enterprise Agreement 1997*, on and from the 11th day of December 2021.

DATED at Perth this 15th day of November 2021.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2021 WAIRC 00577

NOTICE

AG 146 OF 1997

Town of Albany (State) Enterprise Agreement 1997

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 35 of 2021

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

City of Albany will cease to be a party to the *Town of Albany (State) Enterprise Agreement 1997*, on and from the 26th day of November 2021.

DATED at Perth this 27th day of October 2021.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

INDUSTRIAL MAGISTRATE—Claims before—

2021 WAIRC 00555

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2021 WAIRC 00555
CORAM	:	INDUSTRIAL MAGISTRATE J. HAWKINS
HEARD	:	THURSDAY, 2 SEPTEMBER 2021
DELIVERED	:	FRIDAY, 29 OCTOBER 2021
FILE NO.	:	M 64 OF 2021
BETWEEN	:	BRIAN RAVENSCROFT, DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY

CLAIMANT

AND

KULDEEP SINGH JODHA AS TRUSTEE FOR THE BRAR FAMILY TRUST T/AS
INDIAN GARDEN RESTAURANT

RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Assessment of penalty for contravention of section 83E(1)(a) of the <i>Industrial Relations Act 1979</i> (WA)
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Magistrates Court (Civil Proceedings) Act 2004</i> (WA)
Instruments	:	<i>Restaurant, Tearoom and Catering Workers' Award</i> (WA)
Case(s) referred to in reasons:	:	<i>Callan v Smith</i> [2021] WAIRC 216 <i>Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The BKH Contractors Case) (No 2)</i> [2018] FCA 1563 <i>Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union</i> [2017] FCAFC 113 <i>Commissioner of Taxation v Arnold (No. 2)</i> [2015] FCA 34 <i>Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)</i> [2017] FCA 557 <i>Kelly v Fitzpatrick</i> [2007] FCA 1080; (2007) 166 IR 14 <i>Mason v Harrington Corporation Pty Ltd</i> [2007] FMCA 7 <i>Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith</i> [2008] FCAFC 8
Result	:	Penalty imposed
Representation:		
Claimant	:	Ms A. Wilson (of counsel)
Respondent	:	In person

REASONS FOR DECISION

Introduction

- 1 On 19 May 2021, I made orders which included the following:
 - a *The respondent contravened s 102(1)(a) of the Industrial Relations Act 1979 (the Act) on two occasions:*
 - i. *The respondent, being lawfully required to do so, failed to produce records in respect of the Notice 1 to Produce Records by 10 of January 2020; and*
 - ii. *The respondent, being lawfully required to do so, failed to produce records in respect of the Notice 2 to Produce Records by 16 of July 2020.*

(Notices 1 and 2)
- 2 A copy of the orders made 19 May 2021 is annexed at sch 1 (the Orders).
- 3 Brian Ravenscroft, Department of Mines, Industry Regulation and Safety (the Claimant) sought payment of a penalty pursuant to s 83E(1)(a) of the Act for each of the two contraventions of s 102(1)(a) of the Act. The maximum penalty pursuant to s 83E(1)(a) of the Act for such contraventions is \$5,000.
- 4 The Claimant maintains that Kuldeep Singh Jodha as Trustee for the Brar Family Trust t/as Indian Garden Restaurant (Mr Jodha) has committed two contraventions and, therefore, submits that the maximum penalty that can be imposed is \$10,000.
- 5 Following the Orders, the claim for penalty and costs was adjourned to 20 August 2021. It was at this hearing that Mr Jodha first appeared. As a consequence of advising that he was seeking legal advice, a further adjournment to 2 September 2021 was granted.
- 6 On 2 September 2021, both parties appeared. Mr Jodha was not legally represented. The Claimant advised that Mr Jodha had contacted the Claimant in the preceding week to advise that the documents that were subject of the Orders would be provided by Friday, 27 August 2021 (the relevant documents). As of 2 September 2021, Mr Jodha confirmed that he had not provided the relevant documents to the Claimant but indicated that he would be in a position to do so by Friday, 3 September 2021. As a result, I reserved my decision concerning penalty to enable any such compliance to occur. I further ordered that the Claimant lodge and serve any further information as to whether Mr Jodha had provided the relevant documents.
- 7 By letter dated 7 September 2021, the Claimant advised that Mr Jodha had not provided the Claimant with the relevant documents.
- 8 At the hearing on 2 September 2021, Mr Jodha confirmed that he did not wish to be heard in respect to the issue of penalty and costs. He advised that at present he was working and in receipt of income on a part-time basis of approximately \$1,700 per fortnight.
- 9 Prior to 2 September 2021, the Claimant had lodged and served written submissions dated 11 June 2021. Mr Jodha has not lodged any submissions.

Submissions On Penalty From The Claimant

- 10 The Claimant referred to the particulars of claim in respect to the contravening conduct. In summary, the Claimant alleged that at all material times Mr Jodha was the Trustee for the Brar Family Trust and held the business name of Indian Garden Restaurant and operated a restaurant under that name at North Perth (the Restaurant).
- 11 Although not set out in the particulars of the claim, the parties confirmed that Mr Jodha had purchased the Restaurant in or about October 2019, and started trading, in or about November 2019.
- 12 The Claimant's particulars of claim referred to two inspections that occurred on 5 December 2019 and 1 July 2020.
- 13 On 5 December 2019, the Claimant, with another industrial inspector, attended the Restaurant and spoke with staff members. Mr Jodha was not present. An employee who had confirmed that he had been employed at the Restaurant as a full-time cook for approximately nine months, was handed Notice 1, issued pursuant to s 98(3)(e) of the Act. Notice 1 was issued for the purpose of ascertaining whether Mr Jodha had observed the provisions of the Act and the *Restaurant, Tearoom and Catering Workers' Award* (the Award) in relation to employees of the Restaurant. Notice 1 required Mr Jodha to provide the Department of Mines, Industry Regulation and Safety (DMIRS) 'with specified records relating to all employees of the Restaurant for the period 1 August 2019 to 4 December 2019'¹ and required that those documents be produced by 10 January 2020.
- 14 On 6 December 2019, the Claimant received a telephone call from Mr Jodha. Mr Jodha confirmed that he had received Notice 1 and intended to provide the records as soon as possible. Despite this assurance, Mr Jodha did not provide any records to DMIRS by 10 January 2020 or at all.
- 15 On 1 July 2020, the Claimant again attended the Restaurant, accompanied by two other industrial inspectors, pursuant to s 98(1) of the Act. Mr Jodha was not present at the Restaurant but approximately half an hour later he contacted the Claimant. Mr Jodha confirmed that he had not sent any employment records to DMIRS because he had been busy and had given all the records to his accountant with instructions to provide them to DMIRS. As a result, Mr Jodha was advised that 'a new notice to produce records would be served on him and his accountant'² via email on 2 July 2020, with a due date of 16 July 2020. As a result, Notice 2 was issued pursuant to s 98(3)(e) 'of the Act for the purpose of ascertaining whether [Mr Jodha] had observed the provisions of the Act and the Award in relation to employees of the Restaurant'.³ Notice 2 required Mr Jodha to provide DMIRS with the records by 16 July 2020.
- 16 On 9 July 2020, in discussions with another industrial inspector, Mr Jodha confirmed that he would provide the requested documents by 16 July 2020. Again, Mr Jodha did not provide the records as required by Notice 2 by 16 July 2020 or at all.
- 17 At this stage, despite Notices 1 and 2 being issued to Mr Jodha by the Claimant and the Orders, Mr Jodha has failed to provide the relevant documents.
- 18 The Claimant submits that the powers and functions of industrial inspectors support the objects of the Act to ensure that employees' rights are observed by employers and that obstruction of industrial inspectors is serious and undermines the operation of the Act.
- 19 The Claimant submits that the Act 'requires employers to keep time and wages records for their employees and industrial inspectors are empowered by the Act to require the production of [those] records to ensure that employers are meeting their obligations, including paying employees their entitlements'.⁴ The failure to produce employment records makes it difficult, if not impossible, to 'determine whether an employer has complied with their obligations under the Act and [any] relevant award, and prevents industrial inspectors from carrying out investigations and taking any appropriate enforcement action on behalf of employees'.⁵
- 20 The Claimant submits that the action taken by him occurred in the course of a proactive compliance campaign focussing on cafes and restaurants, and that Mr Jodha's conduct has frustrated the efforts of the industrial inspectors to determine whether employees of the Restaurant have been paid correctly.
- 21 As a result, the Claimant submits that both specific and general deterrence are key factors in determining the relevant penalty.
- 22 In respect to specific deterrence, the Claimant submits that:
 - (a) Mr Jodha has continually been uncooperative with industrial inspectors;
 - (b) Mr Jodha has failed to demonstrate contrition and take corrective action;
 - (c) Mr Jodha's actions were repeated and deliberate in that he was in communication with industrial inspectors in respect of Notices 1 and 2 and was aware of what was required; and
 - (d) Mr Jodha 'has demonstrated ... disregard for his obligations as an employer under the Act'.⁶
- 23 As to general deterrence, the Claimant submits that any penalty that is imposed should be meaningful so as to deter others 'from committing similar contraventions, and to emphasise the importance of assisting and co-operating with industrial inspectors who are carrying out their duties under the Act'.⁷ As such, the Claimant maintains that a penalty should 'have a significant deterrent effect on other employers in the café and restaurant sector, which has been identified as having a high level of non-compliance with [employer] obligations, and a higher likelihood of systematic and deliberate underpayment of wages and entitlements'.⁸
- 24 The Claimant submitted that it had no information as to Mr Jodha's capacity to pay but noted that it understood that the Restaurant was not operating. However, at the hearing on 2 September 2021 Mr Jodha, as previously stated, confirmed that he had a capacity to pay, even if on time to pay arrangements, and was in receipt of income of approximately \$1,700 per fortnight. Mr Jodha advised, however, that he had no other assets.

- 25 As to prior non-compliance, the Claimant was not aware that Mr Jodha had previously contravened a civil penalty under the Act.
- 26 As to the range of penalty, the Claimant maintained that where there was no previous history of contraventions, the starting point is on the lower end of the scale. Nonetheless, the Claimant submitted that Mr Jodha's repeated and continuing disregard for the Act, as well as the importance of general deterrence, called for the penalty in the mid-range for each contravention.

Determination

- 27 Schedule 2 and sch 3 attached set out the jurisdiction practice and procedure of the Western Australian Industrial Magistrates Court (IMC) and the relevant legislation and authorities concerning pecuniary penalties. As stated in sch 3, a non-exhaustive range of considerations apply in determining whether the particular conduct calls for the imposition of a penalty and if so the amount. Generally, those non-exhaustive considerations are:
- (a) the nature and extent of the conduct which led to the breaches;
 - (b) the circumstances in which the conduct took place;
 - (c) the nature and extent of any loss or damage sustained as a result of the breaches;
 - (d) whether there had been any similar previous conduct by the respondent;
 - (e) whether the breaches are properly distinct or arose out of one course of conduct;
 - (f) the size of the business involved;
 - (g) whether or not breaches were deliberate;
 - (h) whether senior management was involved in breaches;
 - (i) whether the party committing the breach had exhibited contrition;
 - (j) whether the party committing the breach had taken corrective action;
 - (k) whether the party committing the breach had cooperated with enforcement authorities;
 - (l) the need to ensure compliance with minimum standards by the provision of an effective means for investigation, enforcement of employee entitlements; and
 - (m) the need for specific and general deterrence.
- 28 Further, as found in *Callan v Smith*⁹ regard must be given to the maximum penalty which 'serves as a "yardstick" against which the assessment of penalties is generally to proceed'.¹⁰ It is also necessary to identify the separate contraventions.¹¹

Nature and extent of conduct and the circumstances in which it occurred

- 29 The two contraventions consisted of Mr Jodha's failure to comply with Notices 1 and 2 which sought employment records be provided to DMIRS. Notice 1 required the documents be provided by 10 January 2020 and Notice 2 required the documents be provided by 16 July 2020. Both notices were of the same type and sought the same relevant documents relating to all employees of the Restaurant for the period 1 August 2019 to 4 December 2019. Despite the notices seeking documents for that period, it is important to also note that it was accepted by the Claimant that, Mr Jodha did not commence the business or the Restaurant until October 2019.
- 30 Without the relevant documents, it cannot be ascertained whether any employees of the Restaurant have been paid correctly. Further, the contraventions cumulatively extended over a significant period. Notice 1 having been provided to Mr Jodha on 5 December 2019. Mr Jodha was aware of Notice 1 by at least by 6 December 2019. Notice 2 was provided to Mr Jodha on 2 July 2020.
- 31 It is accepted that these contraventions occurred at a time that Mr Jodha had commenced a new business. However, the contraventions have remained in place for a significant period of time and in circumstances where Mr Jodha had indicated he would endeavour on numerous occasions to comply with Notices 1 and 2, but has failed to do so.
- 32 Given these factors, the penalty for each contravention lies in the mid to high range.

Nature and extent of any loss or damage sustained

- 33 Although there is no quantum to any loss or damage suffered by the Claimant, the continuing non-compliance with Notices 1 and 2 impacts upon DMIRS's ability to ascertain whether Mr Jodha has met his obligations under the Act, including paying his employees their full entitlements. This factor indicates a penalty for each contravention in the mid to high range.

Similar previous conduct

- 34 There is no information which shows that Mr Jodha has previously contravened a civil penalty provision under the Act. This factor indicates a penalty where the starting point is at the lower end of the range.

Whether the breaches are distinct or arose from one course of conduct

- 35 Notices 1 and 2 were of the same type. Both notices required the provision of the same documents. Notices 1 and 2 were provided on different dates and required compliance by different dates. Applying the principles in relation to the course of conduct or one transaction, the contraventions arose out of the same course of conduct, in that Mr Jodha failed to provide the relevant documents sought in Notices 1 and 2 and this contravention continues. Consequently, this should result in an adjustment when aggregating the individually assessed penalties.¹²

The size of the business enterprise involved

36 This is not a factor that can be ascertained as there is little or no information before the Court as to the extent of Mr Jodha's business. Further, as provided in *Callan v Smith*,¹³ the Full Bench of the Western Australian Industrial Relations Commission found that the size of the business should not weigh in favour of diminishing a penalty that should otherwise be assessed.

Deliberateness of contraventions

37 This is a not neutral factor. Mr Jodha was aware of Notices 1 and 2 and had been aware for a significant period of time. In failing to provide the relevant documents for a significant period of time and continuing, it can be inferred that the contraventions were deliberate. This factor therefore lies in the mid to high range.

Corrective action, contrition and co-operation

38 Mr Jodha did not admit the contraventions and it required the Claimant to seek orders by way of default judgment. As at 7 September 2021, Mr Jodha had still not provided the relevant documentation to the Claimant. Nonetheless, on 2 September 2021, Mr Jodha indicated to the IMC that he would comply with the Orders. Even if this could be categorised as some form of admission, the continued lack of compliance by the non-provision of the relevant documents suggests the admission was disingenuous. I therefore afford no discount to this factor.

Specific and general deterrence

39 The evidence established that Mr Jodha had been continually uncooperative with the Claimant for a considerable period. As previously found, the obstructions were repeated and deliberate and despite communications with various inspectors the relevant documents have not been produced. I accept that in failing to provide the relevant documents has impeded the Claimant in carrying out the objects of the Act which as previously stated is to ensure employees' rights are observed by employers.

40 There is no evidence that Mr Jodha has ceased trading, accordingly a component for specific deterrence is required in respect to the possibility of continuing contraventions of the Act.

41 Like all contraventions, general deterrence is an important factor. A civil penalty promotes the public interest in compliance with the law as found in *Callan v Smith*.¹⁴ It is accepted that a penalty should include a significant component for general deterrence and should constitute a significant element in the assessment of penalty to deter other employers from similar conduct. These factors lie in the mid to high range.

Financial position of the respondent

42 The financial position of a person against whom an order is made may be relevant. In this case, Mr Jodha has accepted that he has the capacity to pay, however, as pointed out in *Commissioner of Taxation v Arnold (No. 2)*,¹⁵ in most cases this factor will not carry great weight in the assessment of penalty.

Assessment Of Penalty

43 Weighing the above matters, the penalty for each contravention is as follows:

Contravention	No. of Contraventions	Penalty per Breach	Amount
Section 102(1)(a) of the Act – 10 January 2020	1	\$3,250	\$3,250
Section 102(1)(a) of the Act – 16 July 2020	1	\$3,250	\$3,250
		Total	\$6,500

Adjustments

44 I am satisfied the separate contraventions can be considered as a single course of conduct. Having assessed the individual penalties, it is appropriate to determine if an adjustment be made so that if there is an overlap between separate contraventions a double penalty is not imposed. I am satisfied that it is appropriate to make an adjustment which calls for a reduction of 40% on each contravention. Applying then the totality principle, to ensure that multiple penalties are appropriate and proportionate and considering the conduct as a whole, I am satisfied that the aggregate penalty of \$3,900 is appropriate and requires no further adjustment.

Costs

45 In addition to that penalty applying the decision of *Callum v Smith*¹⁶ costs sought by the Claimant of \$187 by way of disbursements should also be awarded.

Orders

46 It is therefore ordered as follows:

1. Mr Jodha shall pay to the Claimant a penalty of \$3,900.
2. Mr Jodha shall pay to the Claimant costs of \$187.

J. HAWKINS
INDUSTRIAL MAGISTRATE

¹ Originating Claim lodged 29 March 2021 [16].

² Originating Claim lodged 29 March 2021 [26].

³ Originating Claim lodged 29 March 2021 [28].

⁴ Section 49D and s 98(3)(e) of the Act; The Claimant's Submissions lodged 11 June 2021 [6].

⁵ The Claimant's Submissions lodged 11 June 2021 [7].

⁶ The Claimant's Submissions lodged 11 June 2021 [10](d).

⁷ The Claimant's Submissions lodged 11 June 2021 [13].

⁸ The Claimant's Submissions lodged 11 June 2021 [14]; See *Campaign Evaluation Report – Café and Restaurant Proactive Compliance Campaign October 2019 to October 2020*, Department of Mines, Industry Regulation and Safety, 4; *2019 Report of the Enquiry into Wage Theft in Western Australia*, Tony Beech, 90.

⁹ [2021] WAIRC 216.

¹⁰ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The BKH Contractors Case) (No 2)* [2018] FCA 1563 [19].

¹¹ See *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113.

¹² *Callan v Smith* [2021] WAIRC 216 [96], [97].

¹³ [2021] WAIRC 216 [103].

¹⁴ [2021] WAIRC 216 [107], [108].

¹⁵ [2015] FCA 34 [200] - [203].

¹⁶ [2021] WAIRC 216.

Schedule 1 – The Orders

Orders Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (Practice Direction)	Form 20
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Court Use Only	Court at Perth	Claim No: M 64 OF 2021
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Claimant	Name: BRIAN RAVENSCROFT, DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY
	Address: [REDACTED] [REDACTED] [REDACTED] Postcode: [REDACTED]

Respondent <i>Attach Form 28 if more than one respondent</i>	Name: KULDEEP SINGH JODHA AS TRUSTEE FOR THE BRAR FAMILY TRUST T/AS INDIAN GARDEN RESTAURANT
	Address: [REDACTED] [REDACTED] [REDACTED] Postcode: [REDACTED]


Name of Industrial Magistrate	Name: J. HAWKINS
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Orders Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (Practice Direction)	Form 20
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<u>Orders made by the Court</u>	<p>It is hereby ordered that:</p> <ol style="list-style-type: none"> 1. In default of lodging a response and in default of appearance on 19 May 2021, there be judgment for the claimant as follows: <ol style="list-style-type: none"> a. The respondent contravened s 102(1)(a) of the <i>Industrial Relations Act 1979</i> (the Act) on two occasions: <ol style="list-style-type: none"> i. The respondent, being lawfully required to do so, failed to produce records in respect of the Notice 1 to Produce Records by 10 January 2020; and ii. The respondent, being lawfully required to do so, failed to produce records in respect of the Notice 2 to Produce Records by 16 July 2020. 2. Pursuant to s 83E(2) of the Act, the respondent produce to the claimant, by close of business on 2 June 2021, the following records held, controlled or capable of being accessed by the respondent for each employee engaged at Indian Garden Restaurant for the period 1 January 2019 to the date of this order (whether or not those employees are still employed at Indian Garden Restaurant): <ol style="list-style-type: none"> a. the employee's name and contact details (e.g. mobile phone number or email address); b. if the employee was at any stage during their employment under 21 years of age, their date of birth; c. the date on which the employee commenced employment; d. for each day: <ol style="list-style-type: none"> i. the time at which the employee started and finished work; and ii. the period or periods for which the employee was paid; and iii. details of work breaks taken including meal breaks; e. for each pay period: <ol style="list-style-type: none"> i. the gross and net amounts paid to the employee; and ii. all deductions from the employee's pay and the reasons for the deduction; f. all leave taken by the employee, whether paid, partly paid, or unpaid; g. their employment status (i.e. full time, part time or casual); h. their employment classification (as defined in the <i>Restaurant, Tearoom and Catering Workers' Award 1979</i>); i. any written contract of employment or letter of engagement between the employee and the respondent j. if the employee was/is on a visa, a copy of the visa and any sponsorship agreement; k. the employee's PAYG payment summaries (with the employee's tax file number redacted); l. the employee's superannuation fund details; m. details of how the employee was paid (i.e. cash, electronic funds transfer (EFT), cheque or other); and n. if the employee was paid by EFT at any stage, a copy of the respondent's bank statements showing the transfer details. 3. The remainder of the claim for penalty and costs be adjourned to 20 August 2021 at 11:00 am. 4. In respect to the claim for penalty and costs, the claimant shall lodge and serve written submissions by close of business on 18 June 2021.
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<u>Date of Orders</u>	Date: 19 May 2021
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Orders Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (Practice Direction)	Form 20
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<u>Issue and Seal of Court</u>	Issued by the Clerk of the Court on the 19th day of May 2021.  <i>Kirsten Greenwood</i> _____ Clerk of the Court Industrial Magistrates Court, Level 17, 111 St Georges Terrace, PERTH WA 6000 Telephone: (08) 9420 4467 Website: www.imc.wa.gov.au
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WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT This certified copy of the orders made by the court in this matter was issued on the 19th day of MAY 2021.  _____ CLERK OF THE COURT

Schedule 2 – Jurisdiction And Procedure Of The Western Australian Magistrates Court (IMC)

- [1] The IMC has the jurisdiction conferred by the Act and other legislation. Section 83E of the Act confers jurisdiction to impose a penalty if a person contravenes a civil penalty. Section 102(3) of the Act provides that a contravention of s 102(1) of the Act is a civil penalty provision. In the case of an employer, organisation or association the IMC may impose a penalty for a contravention of a civil penalty provision, not exceeding \$5,000.
- [2] The standard of proof to be applied in ‘determining whether there has been a contravention of a civil penalty provision is the standard observed in civil proceedings’: s 83E(8) of the Act. However, the contravention has already been determined by entry of the orders made in default of the lodging of a response and appearance on 19 May 2021.[3] Accordingly, the powers, practice and procedure of the IMC in these proceedings are the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): s 81CA(2) of the Act. Accordingly, in exercising the jurisdiction to impose a penalty, the IMC is exercising a civil jurisdiction and the standard of proof is therefore on the balance of probabilities. When in these reasons I say that I am satisfied, that means I am satisfied on the balance of probabilities.

Schedule 3 – Pecuniary Penalty Orders And Section 83E(1) Of The Industrial Relations Act 1979 (WA)[1]

- Section 83E(1) of the Act provides that the IMC may impose a penalty on a person not exceeding \$5,000 in the case of an employer, organisation or association, and \$1,000 in any other case, if the Court is satisfied a contravention of a civil penalty provision has occurred. The Act allows the Court to order a penalty be paid directly to a ‘person directly affected by the conduct to which the contravention relates’ or to the applicant or Treasurer: s 83F(2) of the Act.
- [2] The purpose served by penalties was described by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 [388] in the following terms:
- In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose. (citations omitted)*
- [3] In *Kelly v Fitzpatrick* [2007] FCA 1080; (2007) 166 IR 14 [14], Tracey J adopted the following ‘non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty’ which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:
- *The nature and extent of the conduct which led to the breaches.*
 - *The circumstances in which that conduct took place.*
 - *The nature and extent of any loss or damage sustained as a result of the breaches.*
 - *Whether there had been similar previous conduct by the Respondent.*
 - *Whether the breaches were properly distinct or arose out of the one course of conduct.*
 - *The size of the business enterprise involved.*
 - *Whether or not the breaches were deliberate.*
 - *Whether senior management was involved in the breaches.*
 - *Whether the party committing the breach had exhibited contrition.*
 - *Whether the party committing the breach had taken corrective action.*
 - *Whether the party committing the breach had cooperated with the enforcement authorities.*
 - *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
 - *The need for specific and general deterrence.*
- [4] The list is not ‘a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations’: Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 [91].
- [5] Applying the principles set out in *Callan v Smith* [2021] WAIRC 216, when properly construed, s 83E(1) of the Act prescribes the maximum penalty that is to be applied to any single contravention of a civil penalty provision.
- [6] ‘Multiple contraventions’ may occur because the contravening conduct done by an employer:
- (a) resulted in multiple contraventions of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;
 - (b) was repeated; and
 - (c) was done with respect to multiple employees.

- [7] Where multiple contraventions occur, it may be necessary to consider the principles in relation to course of conduct or one transaction rule and consider whether it is appropriate to make an adjustment by way of a reduction for each contravention: *Callan v Smith* [111].
- [8] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 [47] - [52]; *Callan v Smith* [112].
- [9] The task of fixing the penalty is a process of 'instinctive synthesis' having regard to the circumstances of the case and the need to maintain public confidence in the statutory regime.
- [10] In his paper on civil penalty contraventions delivered to an 'Employment Law Symposium: Your Guide to Workplace Law 2011', *Law Society of Western Australia* (30 November 2011), Gilmour J of the Federal Court of Australia observed that:

Determining penalties is not a matter of precedent. There is no tariff. Regard must be had in fixing a penalty to the individual circumstances of a case and should not be determined by a line by line comparison with another case. In NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285 at 295 Buchanan J said:

'The facts of the instant case should not be compared with a particular reported case in order to derive therefrom the amount of the penalty to be fixed. Cases are authorities for matters of principle; but the penalty found to be appropriate, as a matter of fact, in the circumstances of one case cannot dictate the appropriate penalty in the different circumstances of another case.'

This proposition was supported in ABCC v CFMEU (No 2) (2010) 199 IR 373 at [11] per Barker J and upheld by the Full Court on appeal in McDonald v Australian Building and Construction Commissioner [2011] FCAFC 29.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2021 WAIRC 00566

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2021 WAIRC 00566
CORAM : COMMISSIONER T B WALKINGTON
HEARD : THURSDAY, 11 MARCH 2021
DELIVERED : FRIDAY, 5 NOVEMBER 2021
FILE NO. : B 167 OF 2019
BETWEEN : ADRIAN DOYLE
 Applicant
 AND
 ROMAN CATHOLIC BISHOP OF BUNBURY
 Respondent

CatchWords : Benefit under a contract – Contractual benefit claim – Terms of contract – Policies implied into terms of contract – Industrial or enterprise agreement implied into terms of contract

Legislation : *Industrial Relations Act 1979* (WA)

Result : Application dismissed

Representation:

Applicant : Mr A Doyle

Respondent : Mr I Curlewis (of counsel)

Case(s) referred to in reasons:

Ansett Transport Industries (Operations) Pty Ltd & Others v Australian Federation of Air Pilots & Others (1989) 95 ALR 211

Belo Fisheries v Froggett (1983) 63 WAIG 2394

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

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193

Simons v Business Computers International Pty Ltd (1985) 65 WAIG 2039

Waroona Contracting v Usher (1984) 64 WAIG 1500

Yousif v Commonwealth Bank of Australia (2010) 193 IR 212; [2010] FCAFC 8

Reasons for Decision

- 1 Mr Doyle seeks an order from the Commission that his former employer Mandurah Catholic College (College) pay him \$345,000 being the equivalent of three years' salary. Mr Doyle asserts that after five years of employment his contract was prematurely terminated because of the abolition of his position in the College's structure. Mr Doyle contends that he was employed under a fixed term contract for eight years and seeks payment of the balance of the contract.
- 2 The College opposes Mr Doyle's application and contends that Mr Doyle's employment was subject to two renewal periods subject to a review in the preceding year of each renewal period. The College asserts that Mr Doyle's contract was not renewed for the third period and was not prematurely terminated. The College contends that the abolition of the position to which Mr Doyle was appointed was permitted under the terms of his contract of employment.

Background and Facts

- 3 Mr Doyle commenced work at the College from 1 January 2014 as the Head of Music. The College invited Mr Doyle to become a member of staff by letter dated 19 September 2013 (Letter A). Letter A set out the offer of employment being Head of Music, full time and ongoing, with an employment period of 1 January 2014 and the salary rate.
- 4 On 26 September 2013, prior to his commencement with the College, Mr Doyle signed a letter of acceptance (Letter B). This letter referred to Letter A and indicated Mr Doyle's agreement to comply with all Catholic Education Commission of Western Australia Policy Statements and College Policy statements.
- 5 On 11 February 2014, Mr Doyle received a second letter from the College (Letter C) which enclosed Letter A and Letter B. Set out in the text of Letter C is the following:

Your contract for this position is for an 8 year term. It is broken into three parts of:		
Initial period	2 years	1 January, 2014 to 31 December, 2015
Renewal Period	3 Years	1 January, 2016 to 31 December, 2018
Renewal Period	3 Years	1 January, 2019 to 31 December, 2021

Your position will be reviewed during the year prior to the next renewal period commencing.
- 6 Annexed to Letter C were three pages titled 'THE SCHEDULE'. Each Schedule detailed the three different periods referred to in Letter C. The first for a period of appointment from 1 January 2014 until 31 December 2015 signed by Mr Doyle on 19 February 2014 and by K Fraser on 11 February 2014; the second schedule is for a period of appointment 1 January 2016 until 31 December 2018 signed by Mr Doyle on 19 February 2014 and by Andrew Watson on 26 August 2016; and the third schedule for a period of appointment 1 January 2019 until 31 December 2021 signed only by Mr Doyle on 19 February 2014.
- 7 In 2018 the College commenced a process to restructure the middle and senior management roles in the school.
- 8 Mr Doyle commenced a period of sick leave in 2018 at the end of Term 1 and remained on sick leave until the end of the year.
- 9 The College Principal gave evidence that in June 2018 he attempted to arrange a meeting with Mr Doyle to discuss Mr Doyle's leave and return to duties. The meeting did not occur because Mr Doyle's representative was not able to attend. Mr Doyle's evidence differs in that he says he was able to attend the meeting and because he was ill requested the attendance of a union advocate. Mr Doyle says the College refused his request for a union advocate to attend and cancelled the meeting. The emails submitted into evidence reflect that Mr Doyle advised the Principal that he was unwell and requested the attendance of union representation. The Principal responded advising that the meeting was cancelled because Mr Doyle was unwell. In addition, the Principal advised Mr Doyle that a union representative was permitted to attend and set out his views on the role of the union advocate. Following the school holidays the meeting was rescheduled for September.
- 10 On 13 September 2018 a meeting was held between the Principal and Mr Doyle at which Mr Doyle was advised of the proposed restructure and the consequential abolition of the position of Head of Music position on 31 December 2018. Mr Doyle was informed that a new Director of the Arts position would be advertised on the following weekend. Mr Doyle's union representative attended the meeting.
- 11 Mr Doyle applied for the Director of Arts position but was unsuccessful. On 21 November 2018 the Principal met with Mr Doyle to discuss the situation for Mr Doyle. The Principal advised Mr Doyle that he was able to continue at the College as a teacher. The Principal offered to maintain Mr Doyle's pay rate at that of the Head of Music for 2019 after which the pay rate would reduce to that of a teacher. Mr Doyle was also offered an alternative of a mutual separation arrangement comprised of six weeks pay in lieu of notice and an ex gratia payment of 16 weeks. Following the meeting the Principal set out the proposals in a letter to Mr Doyle.
- 12 Mr Doyle did not respond to the letter.
- 13 Mr Doyle requested leave without pay from 1 January 2019 to 31 December 2019. This request was granted. In a letter of 6 December 2018 the Principal advised Mr Doyle that he did not agree with Mr Doyle's views of the process of the organisational restructure, observed that Mr Doyle had not provided any information concerning his medical condition that precluded him participating in discussions and that he had the benefit of support from his union. The Principal advised that the mutual separation payment was no longer available. In addition the Principal advised Mr Doyle that he had not changed his view concerning the 2014 Contract of Employment. The Principal informed him that the offer to maintain his salary at the Head of Music rate for 2019 was no longer available and set out the arrangements on his return to duty in 2020

following the period of leave without pay as follows: 'return to work in 2020 to a full-time ongoing Teacher position at Step 10 salary only'. Mr Doyle commenced a period of leave without pay.

- 14 Mr Doyle wrote to the College through his lawyers on 5 February 2019 asserting that 'in the Letter of Offer to our client, dated 11 February 2014, the following is stated "Your contract for the position is for an 8-year term".' Mr Doyle asserted that the College terminated the employment contract on grounds not permitted under the contract and sought damages as a result of the breach. The damages sought is equal to the loss of earnings that Mr Doyle would have earned had the contract not been prematurely terminated.

The Questions to be Determined

- 15 The first question to be determined is whether the employment contract ought to be construed as a fixed term contract for a duration of eight years or a contract for fixed terms of lesser periods.
- 16 The second question to be determined is whether the terms of the contract of employment permitted the College to abolish the position held by Mr Doyle.

What are the Principles that Apply?

- 17 The jurisdiction to enquire into and deal with an industrial matter is conferred by s 23(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**) to hear and determine a claim. Section 29(1)(b)(ii) of the IR Act provides standing to an employee to bring a claim concerning entitlements under a contract of employment: *Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 84 WAIG 2152.
- 18 The Full Bench in *Simons v Business Computers International Pty Ltd* (1985) 65 WAIG 2039 found that the jurisdiction of the Commission in matters pursuant to s 29(1)(b)(ii) is judicial:
- The jurisdiction of the Commission which is founded by proceedings brought under section 29(b)(ii) of the Act is judicial. It is not arbitral or legislative. The Commission's jurisdiction is thus limited to the ascertainment of existing rights by a determination of whether or not an employee has been denied a benefit not being a benefit under an award or an order, to which the employee is entitled under a contract of service
- 19 An applicant making an application pursuant to s 29(1)(b)(ii) must, therefore, establish that their claim is for a benefit to which he/she is entitled under his/her contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit which has been denied under this contract having regard to the obligations on the Commission to act according to equity, good conscience, and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307).
- 20 The meaning of 'entitled' in the context of the section must mean entitled as a matter of legal right, because it refers to benefits under the contract *Perth Finishing College Pty Ltd v Watts*, 2313.
- 21 To establish that there is a claim for a benefit under the contract the terms of the contract must be considered.

Application

- 22 In this matter Mr Doyle must first establish that the terms of his contract provided for a fixed term of eight years for his claim to be successful.
- 23 The terms of Mr Doyle's contract of employment are found by reference to the letter of offer dated 19 September 2013, the letter of his acceptance of that offer dated 26 September 2013, the letter dated 11 February 2014 which enclosed the contractual document and the three pages headed 'THE SCHEDULE' for the periods 1 January 2014 to 31 December 2015, 1 January 2016 until 31 December 2018, and 1 January 2019 until 31 December 2021.
- 24 Mr Doyle contends that the three documents titled 'THE SCHEDULE' are subsidiary and subordinate to the Confirmation of Contract letter dated 14 February 2014.
- 25 I find that the annexures entitled 'THE SCHEDULE' give effect to the references to the 'initial period' and the two 'renewal period(s)' in the letter dated 11 February 2014.
- 26 The letter dated 11 February 2014 both states that the 'position is for an 8-year term' and that there are three renewal periods with an initial period of two years and two renewal periods of three years. It also states that Mr Doyle's position will be reviewed during the year prior to the next renewal period commencing. To ascertain the terms of the contract the contents of Letter C and the meaning of 'renewal period' and the consequences of the inclusion of 'renewal periods' must be considered.
- 27 The Macquarie Dictionary defines 'renew' as 'to make effective for an additional period', 'to make new, or as if new, again', 'to begin again' and 'to become new, or as if new, again'.
- 28 I find that Mr Doyle's contract provides for an initial period and two renewal periods creating three discrete periods which begin again or are made new. The practical effect of the renewal, when the meaning of this word is considered, is that each of the renewal periods are fixed terms. The second fixed term period concluded on 31 December 2018. Alternately, if the second period was extended by agreement or an extension was authorized by the terms of the contract of employment, on 31 December 2019. The third period if renewed would conclude on 31 December 2021.

Was the Second Fixed Term Extended?

- 29 Mr Doyle asserts that his contract was renewed and continued for the renewal period 1 January 2019 to 31 December 2021. Mr Doyle submits that the review due in 2018 was not conducted and this omission effectively results in the renewal for the third period. In his submissions Mr Doyle states that 'a new Contract was signed by both parties in agreement of continuance of the term (due to the successful review in 2016), amendment of Position Title, and amendment of the third

- term review (to occur in 2019 – during the third term)’. During 2019 Mr Doyle was on leave without pay and a review was not conducted.
- 30 The College contends that the renewal period was varied, with the agreement of Mr Doyle, by extending the second renewal period to conclude at the end of 2019. This resulted from the approval of the request from Mr Doyle for leave without pay for the period 1 January 2019 to 31 December 2019. The College contends that Mr Doyle’s refusal to accept the offer made to return to the College from 1 January 2020 in the position of Teacher brought the employment contract to an end at the conclusion of the second renewal period being 31 December 2019.
- 31 The College contends that the Catholic Education Commission of Western Australia policy ‘Appointment of Staff in Catholic Schools’ applied to the terms and conditions of Mr Doyle’s appointment. The College submits the following clauses in this policy provide authority for their contentions that the contract was not reviewed and renewed at the conclusion of the second period:
- 5.5.4 The tenure of the middle leadership position shall be at the discretion of the Principal but shall be no less than one year and no longer than eight years, at which time the position is to be advertised. Reviews shall occur at regular intervals of at least three years.
 - 5.5.5 Continuation of the contract is dependent upon a successful review of performance in relation to defined responsibilities.
 - 5.5.6 The position shall be advertised in the final year of tenure. The incumbent may apply. However, should the incumbent be unsuccessful in obtaining a similar position in the current or any other Catholic school, he/she shall have security of employment as a teacher in the current school.
- 32 A letter from the Principal to Mr Doyle dated 21 November 2018 states that he agreed the performance appraisal scheduled for 2018 be postponed until 2019 for various reasons. The letter further states that ‘Accordingly, while not expressly stated in the contract, I confirm I am willing to acknowledge this as an extension of your current term to 31 December 2019’. The letter set out two options of either taking up a teaching position in 2019 or a mutual separation package to consider.
- 33 On 6 December 2018, by email, Mr Doyle sought approval for leave without pay for the period 1 January 2019 to 31 December 2019. The Principal responded in writing to Mr Doyle on the same day advising him, inter alia, that his leave without pay was granted and that his current contract term expires on 31 December 2019.
- 34 The College asserts that the second fixed term was extended by one year. A review was required to renew that contract beyond that time. The omission of the necessary review had the effect of the contract not being renewed. Therefore, the contract expired on 31 December 2019.
- 35 Mr Doyle contends that the second renewal period concluded on 31 December 2018 and that the third renewal period did not expire until 31 December 2021. Therefore, on early termination of his contract the College is obliged to pay compensation equivalent to three years.
- 36 The central issue to determine is whether the terms of the employment contract incorporated the provisions from the external sources of the terms of the enterprise agreement and/or the policies.

Principles of Incorporation of External Sources into The Terms of a Contract

- 37 An employment contract may incorporate terms contained within sources external to the contract through express or implied reference to the other source. An express reference may be found in a bridging term in the contract which identifies the external source document and indicates the effect the external source document has on the contract.
- 38 To ascertain whether a contract incorporates an external document it is necessary to consider the language of the bridging term. In *Ansett Transport Industries (Operations) Pty Ltd & Others v Australian Federation of Air Pilots & Others* (1989) 95 ALR 211, 256 the Supreme Court of Victoria considered the expression ‘Employment will be in the terms and under the conditions of the Airlines Pilot Agreement 1963’ and found that the reference to the Agreement in the contract of employment had the effect of incorporating the terms of the Agreement into the contract. In *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193, [24] the Full Court considered the expression ‘you agree to abide by all company policies and practises currently in place’ and found that the company policies were incorporated into the contract of employment.
- 39 *Yousif v Commonwealth Bank of Australian* (2010) 193 IR 212; [2010] FCAFC 8, [89], [96] the Full Court considered the expression ‘you are required to comply with all Bank policies and procedures’ and the effect of the statement in the Manual that it ‘is not in any way incorporated as part of any ... agreement entered into by the Bank, nor does it form any part of any employee’s contract of employment’ and found that the language did not have the effect of incorporating the terms of the Agreement into the contract.

Extension of Second Renewal Period and Non-Renewal of Third Period

- 40 Letter A refers to the policy statements:
- As a member of staff you are required to comply with all Catholic Education Commission of Western Australia Policy Statements (which are located at www.ceo.wa.edu.au) and College Policy statements. It is also a condition of your employment that you actively contribute to the maintenance of the Catholic ethos of the College through a manner of life and stated beliefs which are in keeping with the teachings of the Catholic Church
- 41 Letter B contains the statement ‘I agree to comply with all Catholic Education Commission of Western Australia Policy statements and College Policy statements’.

- 42 The language of Letter C is in part similar to that in *Yousif*, however the express statement that the policies do not form part of the employee's contract of employment which appeared in the written terms in *Yousif* is absent from the written contract and policies in this matter. The language of Letter B is an express agreement to comply, similar to the words used in *Riverwood*. I find that the Catholic Education Commission of Western Australia Policy statements and College Policy statements are incorporated into the contract of employment.
- 43 The policy states at clause 5.5.4: 'The tenure of the middle leadership position shall be at the discretion of the Principal but shall be no less than one year and no longer than eight years, at which time the position is to be advertised. Reviews shall occur at regular intervals of at least three years' and at 5.5.5 'Continuation of the contract is dependent upon a successful review of performance in relation to defined responsibilities'.
- 44 I find that the Appointment policy was incorporated into the terms of the contract.
- 45 A review was not conducted in 2018 nor in 2019. The review was not conducted because Mr Doyle was on a period of sick leave or leave without pay during the relevant periods and in these circumstances it was not possible to conduct a review. In the absence of a review being conducted the third renewal schedule was not signed by a representative or delegate of the College. The Appointment Policy is clear that a continuation of a contract of employment is dependent on a successful review of performance. In the absence of the successful review of performance or an agreement that the contract be renewed without the need for a review indicated by the signature of an authorized representative or delegate of the College the contract cannot be said to have continued or have been renewed.
- 46 I find that the contract was not renewed for the third renewal period.

Was the Abolition of the Head of Music Position a Breach of Contract?

- 47 Mr Doyle contends that his contract of employment was prematurely and unilaterally terminated by the College when it implemented a change in organisational structure and abolished his position. Mr Doyle asserts this was a breach of his contract because the terms of his contract did not provide the necessary authority to the College to terminate the contract earlier than the eight years for reasons other than for poor performance and/or misconduct. Mr Doyle maintains his contract was repudiated and he seeks payment or compensation of the equivalent of the Head of Music for three years being the balance of that period.
- 48 Mr Doyle contends that the decision of the College to restructure its organisation and abolish the position of Head of Music created the circumstances in which it was not possible to conduct a review in 2018 and renew the contract for the third period. Mr Doyle claims this is a breach of the contract and he ought be compensated for the breach.
- 49 Mr Doyle says the Enterprise Bargaining Agreement (EBA) supports the contract, but the contract sits above the EBA.
- 50 The College maintains that the terms of Mr Doyle's contract incorporated the terms of the Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. AG 33 of 2012 (the EBA). This provided the authority for the College to make changes to the organisational structure including those that had the consequence of abolishing the position and bringing the entitlement to the salary associated with the position to an end. The College asserts that Mr Doyle's refusal to return to the College to take up a position of teacher at a reduced salary rate is a repudiation of his contract and the College is not obliged to pay him.
- 51 The question to be determined is whether the terms of the EBA are incorporated into the terms of the contract employment. If the answer to this question is in the affirmative, the issue to be determined is whether the EBA permitted the College to abolish Mr Doyle's position.

Application

- 52 In this matter, Mr Doyle's contract references the external document, the EBA, by stating 'you are invited to be a member of staff at Mandurah Catholic College under the terms and conditions of the Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. AG 33 of 2012. A copy of this agreement can be located on www....'. The bridging term is similar to that in *Ansett* and I find that the terms of the EBA were incorporated into Mr Doyle's contract.
- 53 Clause 23 of the EBA provides for the College to notify employees when it has decided to introduce changes such as organisation structures, restructuring of jobs and the elimination or diminution of job tenure and obliges the College to discuss the changes with affected employees and to provide information to employees and the Union. This provision evidences an authority for the College to introduce change including the elimination, or abolition, of jobs.
- 54 Clause 35 of the EBA sets out the obligations of the College in circumstances where a position is abolished, and an employee becomes redundant. The clause sets out the entitlements of employees where their position is abolished or made redundant. The provisions of this clause placed an obligation of the College to provide Mr Doyle with notice of six working weeks of the position of Head of Music being abolished. The relevant clause, clause 25, notes that the notice will usually take effect from the close of the school business at the end of the school term. In circumstances where an employee is not provided with the required notice the employee is entitled to payment of the difference between the notice given and that required to be given.
- 55 The Principal notified Mr Doyle of the abolition of the position of Head of Music on 13 September 2018 at a meeting between the Principal, Mr Doyle and a union representative. I find that Mr Doyle was notified in accordance with provisions of the EBA and his contract of employment (because the contract incorporates the terms of the EBA).

- 56 On 21 November 2018 Mr Doyle was offered two options: Placement in a teacher position with his salary maintained at the Head of Music rate for 2019 or a mutual separation package. Mr Doyle did not respond to the proposals and applied for leave without pay for 2019. Mr Doyle submits he ought be paid for 2019 because the contract continued. The contract between Mr Doyle and the College was a bargain whereby the College paid Mr Doyle for the services Mr Doyle provided. When on leave without pay Mr Doyle was not providing the College with his services. As such the College is not obliged to pay Mr Doyle.

Conclusion

- 57 I find that Mr Doyle has not discharged the onus upon him to establish a benefit to which he is entitled under his contract of employment and for the reasons set out above I will dismiss the application.

2021 WAIRC 00568

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ADRIAN DOYLE

APPLICANT

-v-

ROMAN CATHOLIC BISHOP OF BUNBURY

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 5 NOVEMBER 2021

FILE NO/S

B 167 OF 2019

CITATION NO.

2021 WAIRC 00568

Result

Application dismissed

Representation

Applicant

Mr A Doyle

Respondent

Mr I Curlewis (of counsel)

Order

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

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

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2021 WAIRC 00549

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CRISTINA SHAW

APPLICANT

-v-

M CLINICA PTY LTD

RESPONDENT

CORAM

CHIEF COMMISSIONER S J KENNER

DATE

FRIDAY, 22 OCTOBER 2021

FILE NO/S

B 41 OF 2021

CITATION NO.

2021 WAIRC 00549

Result Application discontinued by leave

Representation**Applicant** Ms A Kaczmarek as agent**Respondent** Mr A Summers*Order*

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

THAT the application be discontinued by leave.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2021 WAIRC 00510**UNFAIR DISMISSAL APPLICATION****WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2021 WAIRC 00510
CORAM : COMMISSIONER T B WALKINGTON
HEARD : ON THE PAPERS
DELIVERED : FRIDAY, 17 SEPTEMBER 2021
FILE NO. : U 16 OF 2021
BETWEEN : HSIAO-HUA (XANTHE) HSU
 Applicant
 AND
 FRASER SUITES PERTH
 Respondent

CatchWords : Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal claim - Whether Commission has jurisdiction - Trading activities of respondent

Legislation : *Fair Work Act 2009* (Cth)
Industrial Relations Act 1979 (WA)

Result : Application dismissed for want of jurisdiction

Representation:

Applicant : Mr C Narayanan

Respondent : Ms M Brown and Ms P Harrison (of counsel)

Case(s) referred to in reasons:

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

R v Brisbane Licensing Court: Ex parte Daniell (1920) 28 CLR 23

Colvin v Bradley Brothers Pty Ltd (1943) 68 CLR 151

Dickson v The Queen (2010) 241 CLR 491

Reasons for Decision

- Ms Hsu was employed by Frasers Perth Management Pty Ltd (**Frasers Perth**) from 9 December 2020 until 28 January 2021. Ms Hsu claims she was unfairly dismissed and has applied to the Western Australian Industrial Relations Commission (**Commission**) for compensation. Ms Hsu contends that she was forced to resign because of the behaviour of two colleagues.
- Frasers Perth objects to the Commission dealing with this matter because it says the Commission does not have the necessary jurisdiction as it is a national system employer. The Commission's jurisdiction is ousted by the *Fair Work Act 2009 (Cth)* (**FW Act**).
- Ms Hsu contends that the Commission has jurisdiction because the FW Act does not apply in her circumstances. Ms Hsu contends that she was employed for a period less than the minimum six-month period required under that act to be able to make an application. Ms Hsu submits that the *Industrial Relations Act 1979 (WA)* (**IR Act**) applies because the FW Act operates to prevent her from making an application to the Fair Work Commission.

Questions to Be Decided

- 4 The questions to be decided are:
- (a) Whether the requirement to be employed for a minimum period in the FW Act operates to enable an application to the Commission; and if it does not
 - (b) Whether Ms Hsu's employer, Frasers Perth is a trading corporation and a national system employer.

Principles

- 5 Section 109 of the Constitution resolves conflicts between the concurrent power of both the Commonwealth and the States to legislate on the same topic by giving the laws of the Commonwealth overriding force:
- 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'
- 6 Both the Western Australian parliament and the Commonwealth parliament have legislated on the topic of industrial law: The IR Act and the FW Act respectively. Both contain provisions concerning termination of employment and access to remedies where it is found that an employee has been unfairly dismissed.
- 7 The High Court has established that where there is an inconsistency in legislations of the Commonwealth and State, the Commonwealth law prevails where:
- (a) It is impossible to obey both laws in *R v Brisbane Licensing Court: Ex parte Daniell* (1920) 28 CLR 23.
 - (b) One law purports to confer a legal right, privilege or entitlement that the other law purports to take away or diminish in *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151.
 - (c) The Commonwealth law evinces a legislative intention to 'cover the field' and a State law also operates in that same field in *Dickson v The Queen* (2010) 241 CLR 491, 502.
- 8 Section 26(1) of the FW Act provides for the FW Act to apply to the exclusion of all State or Territory laws so far as they would otherwise apply in relation to a national system employee or a national system employer:
- (1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.
 - (2) A State or Territory industrial law is:
 - (a) a general State industrial law; or
 - (b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
 - (i) regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);
 - (ii) providing for the establishment or enforcement of terms and conditions of employment;
 - (iii) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;
 - (iv) prohibiting conduct relating to a person's membership or non-membership of an industrial association;
 - (v) providing for rights and remedies connected with the termination of employment;
 - (vi) providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or
 - (c) a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or
 - (d) a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal or comparable value; or
 - (e) a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; or
 - (f) a law of a State or Territory that entitles a representative of a trade union to enter premises; or
 - (g) an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or
 - (h) either of the following:
 - (i) a law that is a law of a State or Territory;
 - (ii) an instrument of a legislative character made under such a law;
 that is prescribed by the regulations.

- (3) Each of the following is a general State industrial law:
- (a) the *Industrial Relations Act 1996* of New South Wales;
 - (b) the *Industrial Relations Act 1999* of Queensland;
 - (c) the *Industrial Relations Act 1979* of Western Australia;
 - (d) the *Fair Work Act 1994* of South Australia;
 - (e) the *Industrial Relations Act 1984* of Tasmania.
- (4) A law or an Act of a State or Territory applies to employment generally if it applies (subject to constitutional limitations) to:
- (a) all employers and employees in the State or Territory; or
 - (b) all employers and employees in the State or Territory except those identified (by reference to a class or otherwise) by a law of the State or Territory.

For this purpose, it does not matter whether or not the law also applies to other persons, or whether or not an exercise of a power under the law affects all the persons to whom the law applies.

- 9 The language of the FW Act falls into the third category established by the High Court and is a Commonwealth law that evinces a legislative intention to 'cover the field' and prevails over a State law that also operates in that same field.
- 10 Section 14(1)(a) of the FW Act defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act refers to paragraph 51(xx) of the Constitution which defines constitutional corporations as corporations which are trading, or financial corporations formed within the limits of the Commonwealth.
- 11 The Western Australian Industrial Appeal Court established in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254; (2008) 89 WAIG 243 (*Lawrence*) that in respect of constitutional corporation employers and those they employ, the IR Act is inconsistent and the FW Act prevails.
- 12 Furthermore in *Lawrence*, the Industrial Appeal Court set out the principles to be applied by the Commission when considering whether an entity is a trading corporation [68]:
- (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* (239); *State Superannuation Board* (303 - 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
 - (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [22].
 - (3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330; *Quickenden* [101].
 - (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); *E* (343, 345); *Pellow* [28].
 - (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board* (304 - 306); *E* (343). Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': *St George County Council* (543) (Barwick CJ); *Tasmanian Dam case* (156) (Mason J).
 - (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: *Adamson* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (584).
 - (7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; *E* (344); *Hardeman* [18].
 - (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler; Hardeman* [26].

Is Frasers Perth a Trading Corporation?

- 13 The applicant made written submissions concerning legal principles and the application of the FW Act and the IR Act. Ms Hsu's contention is that there is effectively a gap in the FW Act, because there is a minimum period of employment and employees with less than the minimum period of employment can access relief through State laws.

- 14 This contention is not accepted. The FW Act expressly requires that an employee has completed a minimum of six months employment. It is a pre-condition to qualify for the protection from unfair dismissal. The IR Act does not prescribe this requirement. The provisions of the Commonwealth law and the provisions of the State law are different and inconsistent. The Commonwealth law is not absent and there is an inconsistency. The FW Act prevails over the State IR Act for national system employers and employees.
- 15 Section 26 of the FW Act operates to apply to all national system employees and national system employers and excludes the provisions of the IR Act.
- 16 The central issue in this matter, then, is whether the employer is a national system employer.
- 17 If the respondent is a trading corporation the jurisdiction of the Commission to deal with the applicant's claim is therefore excluded.
- 18 The issues to be determined in this matter when deciding whether the respondent is a trading corporation is, as set out in *Lawrence*, whether it is incorporated, the character of the activities carried on by it at the relevant time and whether or not it was engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.
- 19 The respondent's General Manager of the property operated at East Perth submitted an affidavit attaching an Annual Financial Report for the year end 30 September 2020, summary of the structure of the company and an extract of the company details held by the Australian Securities and Investments Commission.
- 20 The activities of the respondent are outlined in the affidavit and include offering accommodation, conference food and drink, and event management services. It also operates a restaurant and a bar. The respondent also manages commercial leases for several commercial lessees.
- 21 I find that the activities of the respondent are commercial in nature, and it is a business operated for the purpose of profit. On the undisputed evidence provided by the respondent I am satisfied that Frasers Perth is an incorporated entity, and its main purpose is to trade with the aim of generating a profit.

Conclusion

- 22 Frasers Perth is a trading corporation and Ms Hsu was employed by a national system employer and this Commission does not have jurisdiction to deal with Ms Hsu's application for unfair dismissal.
- 23 An order will issue dismissing this application for want of jurisdiction.

2021 WAIRC 00511

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HSIAO-HUA (XANTHE) HSU

APPLICANT

-v-

FRASER SUITES PERTH

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE FRIDAY, 17 SEPTEMBER 2021

FILE NO/S U 16 OF 2021

CITATION NO. 2021 WAIRC 00511

Result	Dismissed for want of jurisdiction
Representation	(by correspondence)
Applicant	Mr C Narayanan
Respondent	Ms M Brown and Ms P Harrison (of counsel)

Order

HAVING HEARD from Mr C Narayanan on behalf of the applicant and Ms M Brown and Ms P Harrison (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT this application be and is hereby dismissed for want of jurisdiction.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2021 WAIRC 00550

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MICHAEL JOHN ORR

APPLICANT

-v-

ACTION INDUSTRIAL CATERING PTY LTD

RESPONDENT**CORAM** COMMISSIONER T EMMANUEL**DATE** MONDAY, 25 OCTOBER 2021**FILE NO/S** B 65 OF 2021**CITATION NO.** 2021 WAIRC 00550**Result** Application discontinued**Representation****Applicant** On his own behalf**Respondent** Mr M Brown (as agent)*Order*WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 15 October 2021 a conciliation conference was held in this application;

AND WHEREAS at this conciliation conference, the parties agreed to settle application B 65 of 2021;

AND WHEREAS on Friday 22 October 2021 the applicant emailed the Commission and requested that application B 65 of 2021 be discontinued;

AND WHEREAS on Monday 25 October 2021 the applicant confirmed with the Commissioner's Associate by telephone that he wished to discontinue application B 65 of 2021;

AND WHEREAS the respondent confirmed that it consents to this application being discontinued;

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

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

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2021 WAIRC 00573

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ROSS BLENKINSOP

APPLICANT

-v-

OASIS MOBILE

RESPONDENT**CORAM** COMMISSIONER T EMMANUEL**DATE** WEDNESDAY, 10 NOVEMBER 2021**FILE NO/S** B 67 OF 2021**CITATION NO.** 2021 WAIRC 00573**Result** Application dismissed**Representation****Applicant** On his own behalf**Respondent** Not applicable

Order

WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the applicant wrote to the Commission on 10 November 2021 and asked that application B 67 of 2021 be dismissed;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –
 THAT this application be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
 Commissioner.

[L.S.]

CONFERENCES—Matters referred—

2021 WAIRC 00557

DISPUTE RE CONTRACT VARIATION WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2021 WAIRC 00557
CORAM	:	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
HEARD	:	TUESDAY, 26 OCTOBER 2021
DELIVERED	:	FRIDAY, 29 OCTOBER 2021
FILE NO.	:	PSACR 17 OF 2018
BETWEEN	:	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED Applicant AND NORTH METROPOLITAN HEALTH SERVICE Respondent

CatchWords	:	Section 44 decision – No order needed – Declaration has sufficiently dealt with the matter in dispute
Legislation	:	<i>Industrial Relations Act 1979</i> (WA)
Result	:	No orders issued
Representation:		
Applicant	:	Mr W Edwardes (of counsel)
Respondent	:	Mr R Andretich (of counsel)

Supplementary Reasons for Decision

- 1 These reasons supplement the reasons in [2021] WAIRC 000526.
- 2 The Australian Medical Association (WA) (**AMA**) submitted that the Public Service Arbitrator (**Arbitrator**) has the power to make an order giving effect to the declaration it sought at [14] of the *Memorandum of Matters Referred for Hearing and Determination under Section 44*.
- 3 The declaration sought was made.
- 4 Neither party made any submissions at the substantive hearing about whether an order should be made giving effect to the declaration.
- 5 Accordingly, the parties were invited to be heard about whether such an order should be made.
- 6 The AMA said the Arbitrator should order that:
 1. the North Metropolitan Health Service (**Health Service**) amend the contracts of Dr Smith and Dr Farrington, which are dated 1 July 2021, to align with the SARC Pay Scale so that they are remunerated at Level 21; and
 2. the Health Service backpay Dr Smith and Dr Farrington at Level 21 of the SARC Pay Scale from 1 July 2021.

The AMA said this is because Dr Smith and Dr Farrington are currently being paid at Level 18. The AMA acknowledged that the Health Service had given an undertaking that in the event that a ‘favourable’ decision was handed down, the doctors would be paid accordingly, but the AMA said it would benefit the parties to have matters finalised in an order.
- 7 The Health Service said it is unnecessary to make any orders because:
 1. the declaration disposes of the industrial matter that was referred for the Arbitrator’s consideration at [13] of the *Memorandum of Matters Referred for Hearing and Determination under Section 44*;
 2. while declarations do not give any rights to either party, a declaration has been made and the behaviour accepted by public authorities in relation to that is to abide by the terms of the declaration;

3. an undertaking was given to Dr Smith and Dr Farrington that ‘the service will retrospectively amend the contract to provide remuneration in accordance with the SARC Pay Scale referred to in PSA[CR] 17 of 2018 if the decision in that matter, after the exhaustion of appeal rights by the parties, is that the service is required to provide such remuneration in any contract of service’; and
 4. there are no consequential orders that are required.
- 8 In circumstances where:
1. the question that the parties referred for hearing and determination on 19 March 2021 was answered;
 2. the declaration the AMA sought was made; and
 3. the Health Service has given an undertaking that it will comply with the declaration subject to appeal rights being exhausted,

I consider that application PSACR 17 of 2018 was resolved by the making of the declaration. It is unnecessary to make any orders.

UNIONS—Matters dealt with under Section 66

2021 WAIRC 00570

ORDER PURSUANT TO S.66

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)	APPLICANT
	-v- (NOT APPLICABLE)	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER	
DATE	TUESDAY, 9 NOVEMBER 2021	
FILE NO/S	PRES 5 OF 2021	
CITATION NO.	2021 WAIRC 00570	

Result	Discontinued by leave
Representation	
Applicant	Ms J Sims of counsel

Order

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

THAT the application be discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2021 WAIRC 00542

CONTRACTUAL BENEFIT CLAIM

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ASHLEY STEWART	APPLICANT
	-v- UGL OPERATIONS & MAINTENANCE PTY LTD	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 15 OCTOBER 2021 (ON THE PAPERS)	
FILE NO/S	B 6 OF 2021	
CITATION NO.	2021 WAIRC 00542	

Result	Programming orders issued
Representation	
Applicant	Mr B Wilson (of counsel)
Respondent	Mr G Weaver (as agent)

Programming Orders

HAVING heard from Mr B Wilson of counsel on behalf of the applicant and Mr G Weaver as agent on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, orders –

1. THAT the parties file a bundle of agreed documents by 29 October 2021;
2. THAT the applicant file witness statements in support of his application and written submissions by 26 November 2021;
3. THAT the respondent file witness statements in response to the application and written submissions by 14 January 2022;
4. THAT the applicant file any witness statements and written submissions in reply by 28 January 2022; and
5. THAT the matter be listed for a one-day hearing not before 4 February 2022.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2021 WAIRC 00503

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HARRY ARNOTT

APPLICANT

-v-

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER

DATE TUESDAY, 14 SEPTEMBER 2021

FILE NO.

CITATION NO. 2021 WAIRC 00503

Result	Direction issued
Representation	
Applicant	Mr J Raftos of counsel
Respondent	Mr T Lethbridge of counsel

Direction

HAVING heard Mr J Raftos of counsel on behalf of the applicant and Mr T Lethbridge of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs –

- (1) THAT the applicant shall file any amended section 66 application by 23 September 2021.
- (2) THAT direction 3 issued by the Chief Commissioner on 8 September 2021 be revoked.
- (3) THAT the respondent shall file a response to the section 66 application or any amended section 66 application, as the case may be, by 30 September 2021.
- (4) THAT the directions hearing listed before the Chief Commissioner on 16 September 2021 be vacated and that it be relisted on a date to be fixed not before 4 October 2021.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2021 WAIRC 00531

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HARRY ARNOTT

APPLICANT

-v-

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

RESPONDENT**CORAM** CHIEF COMMISSIONER S J KENNER**DATE** MONDAY, 11 OCTOBER 2021**FILE NO.** PRES 4 OF 2021**CITATION NO.** 2021 WAIRC 00531

Result	Direction issued
Representation	
Applicant	Mr J Raftos of counsel
Respondent	Mr R French of counsel

Direction

HAVING heard Mr J Raftos of counsel on behalf of the applicant and Mr R French of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs –

- (1) THAT the applicant file all documents referred to in the amended application filed on 23 September 2021 by 1 November 2021, which documents will stand as annexed thereto.
- (2) THAT the respondent file the document referred to in paragraph 23 of the response filed on 1 October 2021 by 1 November 2021, which document will stand as annexed thereto.
- (3) THAT each party give an informal discovery by serving its list of documents by 1 November 2021.
- (4) THAT inspection of documents be completed by 22 November 2021.
- (5) THAT the applicant file a written outline of the evidence in chief of each witness he proposes to call by 8 November 2021. Each witness outline must identify the topics in respect of which evidence will be given and state the substance of the evidence that each witness will be expected to give at the hearing. This should include the substance of any important conversation(s). Witness outlines are to be signed by each practitioner concerned. A witness outline may not be used for the purposes of cross examination of a witness without the leave of the Commission.
- (6) THAT the respondent file a written outline of the evidence in chief of each witness it proposes to call by 6 December 2021. Each witness outline must identify the topics in respect of which evidence will be given and state the substance of the evidence that each witness will be expected to give at the hearing. This should include the substance of any important conversation(s). Witness outlines are to be signed by each practitioner concerned. A witness outline may not be used for the purposes of cross examination of a witness without the leave of the Commission.
- (7) THAT the applicant and respondent file an outline of submissions and any list of authorities upon which they intend to rely by no later than five days prior to the date of hearing.
- (8) THAT the matter be listed for hearing for two days.
- (9) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2021 WAIRC 00546

ORDER PURSUANT TO S.66

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
HARRY ARNOTT
APPLICANT

-v-
WESTERN AUSTRALIAN POLICE UNION OF WORKERS
RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE TUESDAY, 19 OCTOBER 2021
FILE NO. PRES 4 OF 2021
CITATION NO. 2021 WAIRC 00546

Result Amended direction issued
Representation
Applicant Mr D Howlett of counsel
Respondent Mr R French of counsel

Direction

WHEREAS this is an application pursuant to s 66 of the *Industrial Relations Act 1979* (WA); and

WHEREAS on 11 October 2021 the Commission issued a direction [2021 WAIRC 00531]; and

NOW THEREFORE, having heard Mr D Howlett of counsel on behalf of the applicant and Mr R French of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs –

THAT pars 3, 4, 5 and 6 of the direction be deleted and in lieu thereof there be inserted:

- (3) THAT each party give an informal discovery by serving its list of documents by 6 December 2021.
- (4) THAT inspection of documents be completed by 5 January 2022.
- (5) THAT the applicant file a written outline of the evidence in chief of each witness he proposes to call by 24 January 2022. Each witness outline must identify the topics in respect of which evidence will be given and state the substance of the evidence that each witness will be expected to give at the hearing. This should include the substance of any important conversation(s). Witness outlines are to be signed by each practitioner concerned. A witness outline may not be used for the purposes of cross examination of a witness without the leave of the Commission.
- (6) THAT the respondent file a written outline of the evidence in chief of each witness it proposes to call by 23 February 2022. Each witness outline must identify the topics in respect of which evidence will be given and state the substance of the evidence that each witness will be expected to give at the hearing. This should include the substance of any important conversation(s). Witness outlines are to be signed by each practitioner concerned. A witness outline may not be used for the purposes of cross examination of a witness without the leave of the Commission.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2021 WAIRC 00565

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
M.J EDWARDS T/AS M.J EDWARDS & J.PENDARVIS
APPELLANT

-and-
NATASHA STEPHENSON
RESPONDENT

CORAM FULL BENCH
CHIEF COMMISSIONER S J KENNER
SENIOR COMMISSIONER R COSENTINO
COMMISSIONER T EMMANUEL

DATE FRIDAY, 5 NOVEMBER 2021
FILE NO/S FBA 5 OF 2021
CITATION NO. 2021 WAIRC 00565

Result	Order issued
Appearances	
Appellant	In person
Respondent	Ms E Creek of counsel

Order

The Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT exhibits A1 and A2 tendered in evidence in application U 27/2020 be and are hereby incorporated into the Appeal Book in the herein proceedings filed on 13 October 2021.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2021 WAIRC 00551

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SEAN PATRICK LAMPRECHT

APPLICANT

-v-

WORKSAFE WESTERN AUSTRALIA COMMISSIONER DEPARTMENT OF MINES,
INDUSTRY REGULATION AND SAFETY

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE MONDAY, 25 OCTOBER 2021
FILE NO. OSHT 3 OF 2021
CITATION NO. 2021 WAIRC 00551

Result	Direction issued
Representation	
Applicant	Mr T Retallack (of counsel)
Respondent	Mr A Hay (of counsel)

Direction

HAVING heard from Mr T Retallack (of counsel) on behalf of the applicant and Mr A Hay (of counsel) on behalf of the respondent the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the applicant file and serve closing submissions by close of business on 28 October 2021;
2. THAT the respondent file and serve closing submissions by close of business on 4 November 2021; and
3. THAT the applicant has a right to reply to the respondent's closing submissions by filing and serving a response by close of business on 11 November 2021.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2021 WAIRC 00554

REFERENCE OF DISPUTE - PAY AND OTHER BENEFITS - S.28(2) - OSH ACT 1984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RUSSELL CARRADUS

APPLICANT

-v-

PATRICKS STEVEDORING HOLDINGS PTY LTD

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE THURSDAY, 28 OCTOBER 2021

FILE NO. OSH 7 OF 2021

CITATION NO. 2021 WAIRC 00554

Result Direction Issued

Representation

Applicant Mr L Edmonds (of counsel)

Respondent Ms M Zoras-Christo (of counsel)

Direction

HAVING heard from Mr L Edmonds (of counsel) on behalf of the applicant and Ms M Zoras-Christo (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the preliminary issue of jurisdiction be heard and determined by the Tribunal;
2. THAT the parties will file a joint Statement of Agreed Facts by 4:00 pm on Friday, 5 November 2021;
3. THAT the respondent is to file and serve its outline of submissions with respect to the issue of jurisdiction and any evidence upon which it relies in support of its contentions (by way of affidavit) by 4:00 pm on Friday, 19 November 2021;
4. THAT the applicant is to file and serve its outline of submissions with respect to the issue of jurisdiction and any evidence upon which it relies in support of its contentions (by way of affidavit) by 4:00 pm on Friday, 3 December 2021;
5. THAT the respondent may file and serve any submissions in reply by 4:00 pm on Friday, 10 December 2021;
6. THAT the parties advise the Tribunal of their preference for the matter to be listed for hearing or for the matter to be determined on the papers, by 4:00 pm on Friday, 17 December 2021; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2021 WAIRC 00576

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

EAST METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR

SENIOR COMMISSIONER R COSENTINO

DATE FRIDAY, 12 NOVEMBER 2021

FILE NO. PSA 2 OF 2021

CITATION NO. 2021 WAIRC 00576

Result	Order issued
Representation	
Applicant	Ms P Marcano, Mr R Wyatt and Mr M Lee
Respondent	Mr J Ross and Mr P Heslewood

Order

HAVING heard Ms P Marcano, Mr R Wyatt and Mr M Lee on behalf of the applicant, and Mr J Ross and Mr P Heslewood on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (IR Act), and by consent, hereby orders –

1. THAT the applicant is to file "Grounds for Application" by no later than 17 December 2021.
2. THAT the respondent is to file Outline of Submissions in support of an application for dismissal under s 27(1)(a) of the IR Act by no later than 28 January 2022.
3. THAT the applicant is to file Outline of Submissions in opposition to the application for dismissal by no later than 25 February 2022.
4. THAT the respondent's application for dismissal under s 27(1)(a) of the IR Act is listed for hearing on Friday, 4 March 2022 at 10.00 am.
5. THAT the parties have liberty to apply.

(Sgd.) R COSENTINO,
Senior Commissioner,
Public Service Arbitrator.

[L.S.]

2021 WAIRC 00552

APPEAL AGAINST THE DECISION TAKEN BY THE EMPLOYER ON 20 JANUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TERENCE REGINALD ROY

APPELLANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIR
MR G BROWN - BOARD MEMBER
MR S DANE - BOARD MEMBER

DATE

TUESDAY, 26 OCTOBER 2021

FILE NO

PSAB 14 OF 2021

CITATION NO.

2021 WAIRC 00552

Result	Order issued
Representation	
Appellant	Ms S Kemp, of counsel
Respondent	Mr D Anderson, of counsel

Order

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

AND WHEREAS on 14 October 2021, the appellant's representative wrote to the Public Service Appeal Board (**Board**), advising that the parties have conferred and agreed to consent orders to seek an adjournment of the directions hearing and attached a proposed minute of consent orders signed by both parties;

AND WHEREAS on 14 October 2021, the Board considered the correspondence and satisfied the circumstances warranted an adjournment;

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

1. THAT the directions hearing listed for Friday, 15 October 2021 at 10:00 am be adjourned to Tuesday, 30 November 2021 at 10:00 am.

(Sgd.) R COSENTINO,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2020 WAIRC 00740

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 23 JUNE 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DAVID THIERING

APPELLANT

-v-

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER

DATE

TUESDAY, 25 AUGUST 2020

FILE NO.

PSAB 22 OF 2020

CITATION NO.

2020 WAIRC 00740

Result

Direction issued

Representation

Appellant

Mr D Stojanoski of counsel

Respondent

Mr R Andretich of counsel

Direction

HAVING heard Mr D Stojanoski of counsel on behalf of the appellant and Mr R Andretich of counsel 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 appellant file a written outline of the evidence-in-chief of each witness he intends to call no later than 14 days prior to the date of hearing.
- (2) THAT the respondent file a written outline of the evidence-in-chief of each witness she intends to call no later than seven days prior to the date of hearing.
- (3) THAT each witness outline must identify the topics in respect of which evidence will be given and state the substance of the evidence that each witness will be expected to give at the hearing. This should include the substance of any important conversation(s). Witness outlines are to be signed by each practitioner concerned. A witness outline may not be used for the purposes of cross-examination of a witness without the leave of the Appeal Board.
- (4) THAT the appeal be listed for hearing for one day on a date to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2020 WAIRC 00819

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 23 JUNE 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID THIERING	APPELLANT
	-v-	
	DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER - CHAIRMAN MR C BROWN - BOARD MEMBER MS M JAHN - BOARD MEMBER	
DATE	TUESDAY, 29 SEPTEMBER 2020	
FILE NO	PSAB 22 OF 2020	
CITATION NO.	2020 WAIRC 00819	

Result	Adjourned
Representation	
Appellant	Mr D Stojanoski of counsel
Respondent	Mr R Andretich of counsel

Order

HAVING heard Mr D Stojanoski of counsel on behalf of the appellant and Mr R Andretich 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 appeal be adjourned to a date to be fixed.

[L.S.]

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

2021 WAIRC 00532

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 - CHAIRMAN MR G SUTHERLAND - BOARD MEMBER MR M HAMMOND - BOARD MEMBER	
DATE	TUESDAY, 12 OCTOBER 2021	
FILE NO	PSAB 31 OF 2020	
CITATION NO.	2021 WAIRC 00532	

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

Order

HAVING heard from Mr M Baldwin, of counsel on behalf of the appellant and Ms K Ellson, of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT Order 2 of [2021 WAIRC 00494] 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 **19 October 2021**."
2. THAT Order 3 of [2021 WAIRC 00494] 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 **28 October 2021**. The respondent's book of documents ought to be prepared to avoid unnecessary duplication with the appellant's book of documents."
3. THAT Order 4 of [2021 WAIRC 00494] 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 **19 October 2021**."
4. THAT Order 5 of [2021 WAIRC 00494] 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 **28 October 2021**."
5. 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 00563

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 - CHAIRMAN

MR G SUTHERLAND - BOARD MEMBER

MR M HAMMOND - BOARD MEMBER

DATE

THURSDAY, 4 NOVEMBER 2021

FILE NO

PSAB 31 OF 2020

CITATION NO.

2021 WAIRC 00563

Result

Order issued

Representation

Appellant

Mr M Baldwin, of counsel and Ms F Waring

Respondent

Mr M Ritter, SC and Ms K Ellson, of counsel

Order

HAVING heard from Mr M Baldwin, of counsel and Ms F Waring on behalf of the appellant and Mr M Ritter, SC and Ms K Ellson, of counsel on behalf of the respondent, the Public Service Appeal Board (Board), pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (IR Act), hereby orders –

1. THAT pursuant to s 27(1)(k) of the IR Act, the Attorney-General for the State of Western Australia is permitted to intervene on the issue of whether the Registrar has the power to issue a summons to any person to appear and give evidence in proceedings before the Board and the related issue of whether the Board has power to direct the Registrar to issue a summons.
2. THAT the parties and intervenor have leave to file any additional submissions in relation to the appellant's application dated 2 November 2021 within 7 days of the Registrar making a determination concerning the issue of the summonses filed on 15 October 2021 and 19 October 2021.
3. THAT the appellant's application dated 2 November 2021 is to be determined on the papers, following the Registrar's determination.

4. THAT the appellant is granted leave to file any amended outline of submissions for the substantive hearing by 28 February 2022.
5. THAT Order 2 of [2021 WAIRC 00532] be varied 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 14 March 2022. The respondent's book of documents ought to be prepared to avoid unnecessary duplication with the appellant's book of documents."
6. THAT Order 4 of [2021 WAIRC 00532] be varied to read "THAT the respondent file a written outline of its submissions and list of authorities (of not more than 15 pages) by 21 March 2022."
7. THAT the hearing of the substantive appeal be adjourned to a date after 31 March 2021.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) R COSENTINO,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2021 WAIRC 00548

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 5 NOVEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ANNE MARIE FLETCHER

APPELLANT

-v-

SOUTH METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIR
MR D HILL - BOARD MEMBER
MS R SINTON - BOARD MEMBER

DATE

WEDNESDAY, 20 OCTOBER 2021

FILE NO

PSAB 35 OF 2020

CITATION NO.

2021 WAIRC 00548

Result Order issued**Representation****Appellant** Ms A Fletcher, on her own behalf**Respondent** Mr M Aulfrey*Order*

HAVING heard from Ms A Fletcher, on her own behalf and Mr A Aulfrey on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the matter be listed for hearing for 2 days on a date to be fixed not before 17 November 2021.
2. THAT the appellant file an outline of evidence complying with Practice Note 9 of 2021 for each witness the appellant intends to call to give evidence not less than 14 days prior to the hearing.
3. THAT the respondent file an outline of evidence complying with Practice Note 9 of 2021 for each witness to be called by the respondent not less than 7 days prior to the hearing.
4. THAT the appellant's outline(s) of evidence filed in compliance with Order 2 hereof stand as the appellant's statement of facts relied upon for the purpose of reg 107(9) of the *Industrial Relations Commission Regulations 2005* (WA).
5. 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 00564

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GAYLE PRISCILLA TAWHA

APPLICANT

-v-

NULLAGINE COMMUNITY RESOURCE CENTRE INCORPORATED

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE THURSDAY, 4 NOVEMBER 2021

FILE NO. U 23 OF 2021

CITATION NO. 2021 WAIRC 00564

Result Direction issued

Representation

Applicant Ms G Tawha

Respondent No appearance

Direction

HAVING heard from the applicant on her own behalf 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 directs:

1. THAT each party shall give an informal discovery by serving its list of documents on each other by no later than 25 November 2021;
2. THAT inspection and provision of the documents to each other shall be completed by no later than 9 December 2021;
3. THAT the applicant file and serve upon the respondent any outlines of witness evidence upon which she intends to rely by no later than 30 December 2021;
4. THAT the respondent file and serve upon the applicant any outlines of witness evidence upon which it intends to rely by no later than 27 January 2022;
5. THAT the applicant file and serve an outline of submissions and any list of authorities upon which she intends to rely by no later than 15 February 2022;
6. THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely by no later than 22 February 2022;
7. THAT the matter be listed for hearing for 3 days on 1 March 2022, 2 March 2022 and 3 March 2022; and
8. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2021 WAIRC 00524

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ETTIENNE VAN TONDER

APPLICANT

-v-

SOUTH WEST ABORIGINAL LAND AND SEA COUNCIL

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE WEDNESDAY, 6 OCTOBER 2021

FILE NO/S U 56 OF 2021

CITATION NO. 2021 WAIRC 00524

Result	Order issued
Representation	
Applicant	Mr S Kemp, of counsel
Respondent	Ms C Vinciullo, of counsel

Order

WHEREAS this is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS a directions hearing was listed for 23 September 2021 at 2:15pm in respect of programming the matter for hearing;

AND WHEREAS on 23 September 2021, the respondent's representative wrote to the Commission and attached a minute of proposed consent orders in relation to programming, signed by both parties;

AND WHEREAS on 23 September 2021, the Commission considered the correspondence;

AND WHEREAS on 23 September 2021, the Commission wrote to the parties requesting unavailable dates for the purpose of re-listing the directions hearing;

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

1. THAT the parties are to confer regarding discovery and any application for formal discovery is to be made on or before 15 October 2021.
2. THAT the directions hearing listed for 23 September 2021 be adjourned to 27 October 2021 at 10:00am.
3. THAT the parties have liberty to apply.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2021 WAIRC 00553

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ETTIENNE VAN TONDER

APPLICANT

-v-

SOUTH WEST ABORIGINAL LAND AND SEA COUNCIL

RESPONDENT

CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	WEDNESDAY, 27 OCTOBER 2021
FILE NO/S	U 56 OF 2021
CITATION NO.	2021 WAIRC 00553

Result	Order issued
Representation	
Applicant	Mr S Kemp, of counsel
Respondent	Ms C Vinciullo, of counsel

Order

HAVING heard from Mr S Kemp, on behalf of the applicant and Ms C Vinciullo, of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (IR Act), hereby orders –

1. THAT pursuant to s 27(1)(o) of the IR Act and reg 20 of the *Industrial Relations Commission Regulations 2005* (WA) (IRC Regulations), the respondent file a list of all documents within its possession or under its control which meet one of the descriptions or fall within one of the categories listed in items 1 to 4 and 6 of Schedule 1 to the applicant's application dated 15 October 2021 as amended and attached hereto by no later than 18 November 2021.
2. THAT the respondent makes the documents specified in the list available for inspection and copying, subject to the redaction of Mr Farrell's confidential information by no later than 25 November 2021.
3. THAT the requirements of reg 20(12) of the IRC Regulations be waived.

4. THAT the evidence in chief in this matter be adduced by witness affidavits in accordance with paragraphs 6 to 8 of Practice Note 9 of 2021.
5. THAT the applicant file any affidavit evidence on which he intends to rely at hearing by no later than 15 December 2021.
6. THAT the respondent file any affidavit evidence on which it intends to rely at hearing by no later than 28 January 2022.
7. THAT the applicant file any affidavit evidence in response by no later than 4 February 2022.
8. THAT the parties advise which witnesses are required to be available for cross examination by no later than 11 February 22.
9. THAT by no later than 11 February 2022, the parties each file an outline of written submissions.
10. THAT the matter be listed for hearing for 2 days on 28 February 2022 and 1 March 2022.
11. THAT the parties have liberty to apply.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

Amended Schedule 1 to the applicant's application dated 15 October 2021

1. A copy of Mr Farrell's contract of employment that was due to expire in September 2021.
2. The letter dated on or around 6 May 2021 from SWALSC to Mr Farrell informing him that his employment would terminate on the grounds of redundancy.
3. Any documents recording the resolution of that redundancy dispute lodged by Mr Farrell on 11 May 2021.
4. Any letters, emails or other communications between SWALSC and Mr Farrell regarding the extension of his contract of employment or the issue of a new contract **created prior to 25 June 2021**.
5. A copy of Mr Farrell's current contract of employment.
6. Copies of Agreements Registers II & III **as at 25 June 2021**.
7. Copy of the *Operational* Flowchart and explanatory notes approved by the Board of Directors that would allow SWALSC to transition to a "Heritage Service Provider".

2021 WAIRC 00544

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETRA (JENNY) BRIGHT

APPLICANT

-v-

ROBERT BOMBAK

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE MONDAY, 18 OCTOBER 2021

FILE NO/S U 62 OF 2021

CITATION NO. 2021 WAIRC 00544

Result Order issued

Representation

Applicant Ms P Bright, on her own behalf

Respondent Ms J Grant, of counsel

Order

WHEREAS this is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 20 September 2021, an Order issued [2021 WAIRC 00512] to deal with a preliminary issue in this matter;

AND WHEREAS on 12 October 2021, the respondent's representative wrote to the Commission requesting an extension of time to comply with the filing timeframes in the Order;

AND WHEREAS on 12 October 2021, the Commission sought the applicant's views on the respondent's request;

AND WHEREAS on 14 October 2021, the applicant wrote to the Commission also requesting an extension of time to comply with the filing timeframes in the Order;

AND WHEREAS on 14 October 2021, the Commission considered the correspondence and wrote to the parties confirming it will extend the filing timeframes;

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

1. THAT Order 2 of [2021 WAIRC 00512] be amended to read “THAT the respondent file a Statement of Facts and Documents it relies upon for the determination of the preliminary issue on or before **8 November 2021**.”.
2. THAT Order 3 of [2021 WAIRC 00512] be amended to read “THAT the applicant is to advise the Commission of any dispute concerning the Statement of Facts and Documents on or before **15 November 2021**.”.
3. THAT Order 4 of [2021 WAIRC 00512] be amended to read “THAT the respondent is to file its submissions on the preliminary issue on or before **29 November 2021**.”.
4. THAT Order 5 of [2021 WAIRC 00512] be amended to read “THAT the applicant is to file her submissions on the preliminary issue on or before **13 December 2021**.”.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2021 WAIRC 00572

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRIAN HARLEY

APPLICANT

-v-

WESTERN AUSTRALIA'S LAND INFORMATION AUTHORITY

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

WEDNESDAY, 10 NOVEMBER 2021

FILE NO/S

U 81 OF 2021

CITATION NO.

2021 WAIRC 00572

Result

Order issued

Representation

Applicant

Mr B Harley, on his own behalf

Respondent

Mr M Cox, of counsel and Mr M Hayman

Order

HAVING heard from Mr B Harley, on his own behalf and Mr M Cox, of counsel and Mr M Hayman on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (IR Act), hereby orders –

1. THAT the question of whether the applicant is a government officer for the purposes of s 80E(1) of the IR Act be determined as a preliminary issue (jurisdictional issue).
2. THAT the respondent file its evidence and submissions relevant to the jurisdictional issue by no later than 8 December 2021.
3. THAT the applicant file any responsive evidence and submissions relevant to the jurisdictional issue by no later than 5 January 2022.
4. THAT, subject to further order, the jurisdictional issue be determined on the papers.
5. THAT the matter be listed for a directions hearing on a date to be fixed.
6. THAT the parties have liberty to apply.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Disability Services Commission - United Workers Union (WA) - Disability Support Workers Industrial Agreement 2020 AG 15/2021	10/19/2021	Disability Services Commission	United Workers Union (WA)	Commissioner T B Walkington	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2021 WAIRC 00538

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6 OCTOBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2021 WAIRC 00538
CORAM	:	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER R COSENTINO - CHAIR MS B CONWAY - BOARD MEMBER MS D HOPKINSON - BOARD MEMBER
HEARD	:	THURSDAY, 16 SEPTEMBER 2021, FRIDAY, 17 SEPTEMBER 2021
DELIVERED	:	WEDNESDAY, 13 OCTOBER 2021
FILE NO.	:	PSAB 30 OF 2020
BETWEEN	:	JONATHON ('JOFF') CRABTREE Appellant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	:	Industrial Law (WA) – Public Service Appeal Board – Probationary employment – Fixed term contract – Reasonable training and support provided – Decision to terminate probationary employment not harsh or unreasonable – Board does not have jurisdiction to award compensation as a remedy – Unable to reinstate to a role under a contract that has ceased – Appeal dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Public Sector Management Act 1994</i> (WA) <i>Public Service Award 1992</i> (WA)
Result	:	Appeal dismissed
Representation:		
Appellant	:	Mr J Crabtree, on his own behalf
Respondent	:	Mr R Andretich of counsel and Ms L Jacobson

Case(s) referred to in reasons:

East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth [2000] WAIRC 00067; (2000) 80 WAIG 3155

Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728; (2017) 97 WAIG 1525

Thomas v Chief Executive Officer, Ministry of Fair Trading [2001] WAIRC 04042; (2001) 81 WAIG 2957

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

Raxworthy v The Authority for Intellectually Handicapped Persons (1989) 69 WAIG 2266

State Government Insurance Commission v Johnson (1997) 77 WAIG 2169

Reasons for Decision

- These are the unanimous reasons of the Public Service Appeal Board (the Board).
- Mr Crabtree has appealed to the Board under s 80I(1)(d) of the *Industrial Relations Act 1979* (WA) (IR Act) against the Director General of the Department of Education's (Employer) decision to terminate his employment. Mr Crabtree's notice of appeal seeks reinstatement to his former position together with lost salary for the period between the dismissal and his reinstatement.
- For the reasons that follow, the Board dismisses Mr Crabtree's appeal.

Background

- Mr Crabtree was employed by the Employer on 4 February 2020 in the position of a Level 6 Senior Project Officer in the Public Relations and Marketing Division of the Department of Education (Department).

- 5 Public Relations and Marketing provides a range of services to the Department in the areas of strategic communications and marketing advice; developing communications and marketing plans; developing major advertising campaigns and strategies; implementing the Department's digital communication strategy; and managing the Department's digital channels including its corporate websites. The overriding focus of the Public Relations and Marketing Division is to enhance the image and reputation of the Department and promote Western Australian Government initiatives.
- 6 Mr Crabtree was engaged for the particular project of migrating website content from a number of different sites onto a single Department website. It was envisaged that the project would involve meeting with the current owners of the websites whose content was to be migrated, ascertaining their content needs, and training them to enable them to maintain their own content after the migration was complete.
- 7 The Job Description Form (JDF) for the role provides that as a Senior Project Officer, Mr Crabtree was responsible for:
- (a) undertaking communications and engagement requirements for the Department's public website;
 - (b) planning, implementing and evaluating elements of the Department's public website and providing specialist communications advice and support to business areas;
 - (c) providing professional learning to business areas on best practice when identifying and communicating content for an online environment, and provide training on the use of the platform;
 - (d) developing strategies and procedures supporting the implementation of improvement strategies; and
 - (e) liaising with the Digital Marketing Strategist and other staff to achieve planned outcomes.
- 8 Mr Crabtree reported to the Digital Marketing Strategist, Ms Kim Parkin, who held a Level 7 position.
- 9 Mr Crabtree held formal qualifications relevant to his role, being a Graduate Diploma of Web Communication and a Certificate IV in Information Technology. He also has extensive past experience in project management and delivery.
- 10 Mr Crabtree's employment was subject to an initial six month probationary period, meaning he was a probationary employee at all relevant times until 4 August 2020.
- 11 Shortly after Mr Crabtree commenced employment, on 15 March 2020, the Western Australian Government made a declaration of State of Emergency and Public Health State of Emergency in response to the pandemic caused by COVID-19. This had several effects on Mr Crabtree's employment. First, he commenced working from home and dealing with colleagues remotely. Second, Ms Parkin's attention was diverted to assisting with setting up the Department of Education's website requirements for online learning for public school students. Third, because of the urgent need for resources to be focused on online learning and because meetings with stakeholders could not easily be arranged whilst the Public Health State of Emergency directions were in place, the website migration project, which Mr Crabtree was employed to undertake, was delayed.
- 12 On 2 July 2020, Ms Parkin and her manager, Ms Knox-Robinson, Manager Public Relations and Marketing, met with Mr Crabtree and his union representative to discuss with him a range of concerns and to commence a plan to address those concerns before the end of the probationary employment. Some 12 specific examples of incidents or conduct were raised in the meeting as the basis for the concerns. The matters discussed in the meeting were then confirmed in a letter from Ms Knox-Robinson to Mr Crabtree dated 3 July 2020.
- 13 Mr Crabtree took personal leave from 3 July 2020 to 19 July 2020.
- 14 On 14 July 2020, the Employer extended Mr Crabtree's probationary employment for a further six months to 4 February 2021 in light of his absence from work on personal leave.
- 15 A further meeting was held between Mr Crabtree, his union representative, Ms Parkin and Ms Knox-Robinson on 22 July 2020. This meeting was originally intended to be for the purpose of discussing a performance management plan.
- 16 On 28 July 2020, Ms Knox-Robinson wrote to Mr Crabtree restating the concerns in relation to his performance, conduct and behaviour and inviting him to provide her with information as to why she should not recommend the conclusion of his employment pursuant to cl 8 of the *Public Service Award 1992* (WA). In addition to the 12 examples raised on 2 July 2020, a further two examples arising subsequent to 2 July 2020 were added.
- 17 Following receipt of the 28 July 2020 letter, Mr Crabtree lodged a formal grievance.
- 18 Mr Crabtree also provided a response to the allegations contained in the 28 July 2020 letter by a response in writing dated 4 August 2020 and then emailed a further grievance document to Ms Deborah Leavitt on 18 August 2020.
- 19 After receiving Mr Crabtree's response, Ms Knox-Robinson recommended that Mr Crabtree's employment be "concluded" and accordingly, on 2 September 2020, Mr Damien Stewart, Director for Workforce, wrote to Mr Crabtree putting him on notice of the proposed termination of his employment and seeking his response to the 14 examples underlying the concerns that formed the basis of the recommendation.
- 20 Mr Crabtree did provide his written response to Mr Stewart. Mr Stewart confirmed the decision to terminate the employment by way of a letter dated 6 October 2020, with one week's notice.
- 21 Mr Crabtree contends that the allegations of poor performance cannot be substantiated and were made as "retaliation for my lodging my grievance", being a grievance Mr Crabtree says he made against his manager for bullying, "which included workload, unfair treatment, changing deadlines, setting tasks beyond my skill and spreading rumours" (Notice of Appeal, paragraph 10).

Jurisdiction

- 22 The Board has jurisdiction to hear this appeal under s 80I(1)(d) of the IR Act, which confers on the Board's jurisdiction to hear and determine "an appeal, other than appeal under the *Public Sector Management Act 1994* s 78(1) or the *Health Service Act 2016* s 172(2), by a government officer that the government officer be dismissed".
- 23 As detailed above, Mr Crabtree was a probationary employee when his employment was terminated. The dismissal decision was not described by the Employer as a decision made pursuant to the substandard performance provisions of s 79 of the *Public Sector Management Act 1994* (WA) (PSMA). Rather, it was described as a decision to "annul" or conclude probationary employment on the basis the Employer considered Mr Crabtree was not suitable or compatible to continue in the role of a Senior Project Officer - Public Website.
- 24 By bringing the appeal under s 80I(1)(d) of the IR Act, Mr Crabtree implicitly accepts that the decision that he be dismissed was not made pursuant to s 79(1) of the PSMA, that is, it was not the result of a substandard performance process. In any event, it is clear from the termination letter that the concerns that led to the decision to annul the probationary employment were not merely performance concerns, but also related to behaviour and conduct.
- 25 Nevertheless, Mr Crabtree's employment was a fixed term appointment, subject to satisfactory completion of the probationary period. The consequence is that it was the Employer's actions that brought the employment to an end, such that there was a decision to dismiss: *Thomas v Chief Executive Officer, Ministry of Fair Trading* [2001] WAIRC 04042; (2001) 81 WAIG 2957 at [24]. That decision is one that is within the ambit of s 80I(1)(d) of the IR Act.

The nature of the appeal

- 26 The appeal involves the review of the Employer's decision de novo. As such, the Board is to consider the appeal based on the evidence before it, not merely on the basis of whether the Employer made the right decision available to it at the time. The Board has greater scope to substitute its own view for that of the Employer: *Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266.
- 27 As Fielding C noted in *Raxworthy*:
- The nature of an appeal made under section 80I(1)(e) is somewhat different from the authority ordinarily given to the Commission to enquire into whether a dismissal is fair or not. The decided cases make it clear that in claims of unfair dismissal *per se* the Commission is not to act as an appellate court and substitute its own view as if it were the employer, but rather determine whether the employer's conduct was in all the circumstances reasonable. Hence in cases of misconduct the test is not whether to the satisfaction of the Commission the misconduct occurred, but whether the employer had a reasonable suspicion amounting to a belief that the misconduct had in fact occurred (see *Mavromatidis v. TNT Pty Ltd* (1987) 67 WAIG 1650). However, these proceedings are expressly an appeal, with the Appeal Board being given the power to "adjust" a decision to dismiss an employee. The onus is of course on the Appellant to show that the Board should interfere with and adjust the decision. However, as with promotion appeals the decision is to be reviewed *de novo* on the basis of the evidence before the Board, not merely on the basis of whether the decision maker made the right decision on the evidence available to it at the time (cf: *Colpitts v. Australian Telecommunications Commission* (1986) 20IR 184). The process afforded by section 80I is such that the Commission, constituted by an Appeal Board, is given a greater licence to substitute its own view.
- 28 Fielding C refers in the above extract to s 80I(1)(e) which is not in precisely identical terms, but is the predecessor provision to, s 80I(1)(d).
- 29 What does this mean for how the Board should approach the matter when the Employer's decision to terminate was made during a probationary period and pursuant to the provisions of cl 8 of the *Public Service Award 1992* (WA)? Clause 8 provides:

8. - CONTRACT OF SERVICE

(1) Probation

- (a) Every officer appointed to the Public Service shall normally be on probation for a period not exceeding six months, unless otherwise determined by the employer.
- (b) An officer who is appointed from the Public Sector of Western Australia, and who has had at least six months of continuous satisfactory service immediately prior to permanent appointment will not be required to serve a period of probation.
- (c) At any time during the period of probation the employer may annul the appointment and terminate the services of the officer by the giving of one week's notice or payment in lieu thereof.
- (d) Prior to the expiry of the period of probation, the employer shall have a report completed in respect to the officer's level of performance, efficiency, and conduct, and
- (i) confirm the permanent appointment, or
- (ii) extend the period of probation by up to six months, to a maximum period of probation of 12 months
- (iii) or terminate the services of the officer.

30 In industrial law, the implications of probationary employment are clear. They were explained by the Full Bench of the Western Australian Industrial Relations Commission in *East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth* [2000] WAIRC 00067; (2000) 80 WAIG 3155. At [49], the Full Bench said:

... the following principles apply—

- (a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.
- (b)
 - (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.
 - (ii) There was an identifiable contract of employment for a period, indeed, a fixed term, including a period of probation of three months. This advances the matter beyond a notional first interview situation.
- (c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)
- (d)
 - (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing (see *Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry* [1994] SAIRComm 8 (31 January 1994), citing *Re J M Hamblin v London Borough of Ealing* (1975) IRLR 354 and see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit)).
 - (ii) Further, an employee on probation can expect to be counselled and informed that she/he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment (see *Sommerville v Brinzz Clerk Vehicle Repair Industry* (op cit), citing *Hull v F F Seeley Nominees Pty Ltd* (1988) 55 SAIR 550 at 562).
- (e)
 - (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)
 - (ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer (see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit) and the cases cited therein).

31 By his appeal, the appellant alleges that the dismissal was harsh, oppressive and unfair because:

- (a) Until September 2020, he had no warning about the claims of poor performance being made against him.
- (b) In mid-August 2020, he filed a grievance against his manager, Ms Parkin.
- (c) He believes the claims of poor performance are in retaliation for lodging the grievance.
- (d) The claims of poor performance are factually wrong.
- (e) None of the claims of poor performance were put to him soon after they occurred.
- (f) He received very little feedback about his performance during the period of probation and he received no or inadequate support, induction or training.

32 Mindful of the purpose and implications of probationary employment as set out above, the Board is not inclined in this appeal to entirely disregard the Employer's decision, albeit the appeal is to be determined de novo. The Board may legitimately have regard to, and place weight upon, the subjective view of the Employer in relation to Mr Crabtree's suitability for ongoing employment in determining the appeal. Further, that the employment was probationary, warrants limiting the exercise to rehearing only those aspects of the matter that are strictly necessary to deal with the appellant's grounds of appeal. This approach is, we think, consistent with what was said in *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525 at [26] and [29].

33 Accordingly, we consider there are four factual issues which the Board must consider in this appeal, being:

- (a) whether the concerns raised against Mr Crabtree were genuinely held, or whether they were motivated by Mr Crabtree's grievance;
- (b) whether having the concerns was unreasonable, arbitrary, unfair or capricious. In this regard, some enquiry into the factual basis for holding the concerns may be necessary, but the Board is not concerned with finding that the concerns are made out. The Board is not deciding whether there was underperformance or misconduct justifying termination. Rather, it is deciding whether the Employer's right to terminate employment during the probationary period was misused or abused;

- (c) was Mr Crabtree adequately informed he was not meeting the required standards, including the consequences of failure to improve; and
- (d) did Mr Crabtree receive adequate support and training to enable him to perform satisfactorily?

Evidence

- 34 A significant portion of the evidence before the Board was documentary. The Board received into evidence a Book of Documents (Exhibit 1) comprising Mr Crabtree's application for employment with the Employer, his contract of employment and JDF. Exhibit 1 also contained the documents which the Employer relied upon in determining that a performance management plan was warranted, and in deciding to end the probationary employment as well as the correspondence between the Employer and Mr Crabtree in relation to these matters. It included minutes of relevant meetings, Mr Crabtree's formal grievance and his responses to the allegations concerning his performance and conduct.
- 35 Mr Crabtree tendered a number of other documents to demonstrate his qualifications and experience. He argued these documents showed that his knowledge, skills and experience were underutilised during his employment and because he was not given enough work, or sufficiently meaningful work, he was hindered in his ability to prove his capabilities.
- 36 Mr Crabtree gave oral evidence in which he adopted the contents of his formal grievance and written responses to the allegations contained in Exhibit 1. He stated that he had a five-minute meeting with the Department's Director, Ms Deborah Leavitt, on 19 June 2020 and that at this meeting, Ms Leavitt advised him that Ms Parkin had concerns about his performance. He said that this was the first time he had learned of any such concerns.
- 37 His meeting with Ms Leavitt was prompted because he had earlier expressed interest to Ms Parkin in involvement in other projects or work as he was feeling underutilised. Ms Parkin's response was that it would be inappropriate for Mr Crabtree to work on those projects, given he had been engaged on the public website content migration project with a bespoke JDF. He had overheard Ms Leavitt asking about the status of the website migration project, and wanted to discuss with her where the project was at and what he could do. According to Mr Crabtree, Ms Leavitt suggested he put his concerns in writing to Ms Parkin, which he did in an email dated 23 June 2020.
- 38 Mr Crabtree's email of 23 June 2020 to Ms Parkin relevantly states:
- ...I was surprised to learn that you have issues with my work performance. I would of hoped we could of addressed these issues at the time they occur, and treat them as a learning experience.
- Deb informs me you advise that you have expressed these to me verbally, unfortunately I do not recall any discussions on this.
- It may perhaps be the fact, as disclosed within my employment application, that I do have a learning disability-ADHD. I'm not sure whether this has affected our communication, but I would like communication between us to improve. Perhaps moving forward if there are outstanding issues with my work then let us address them sooner rather than later.
- When I have asked you what needs to occur for the project I am working on, you have advised that we are waiting on meetings being scheduled. I have asked you at that time what I should be preparing ahead of those meetings, and was told to wait. After the team meeting I expressed my interest in supporting other projects in our team whilst I await some progress on the one project I am assigned, and although put down to a typographic error on your part, the initial response of advising me I am a contractor was disheartening and added further detriment to our working relationship.
- As you're aware, I had limited exposure to, or training in Liferay and I have been teaching myself how to use the platform, preparing training material including liaising with ICT to implement the training site located at. I would greatly appreciate some feedback on this so that I can make sure it meets requirements. The training site is <https://www.education.wa.edu.au/group/training-site>
- I would like a strong working relationship to be restored and improved communications, so a plan for how we can achieve this would be welcomed.
- 39 Mr Crabtree's complaint about him being underutilised, given insufficient work and excluded from projects which he considered he could meaningfully have contributed was one of the grounds for alleging he had been bullied in his formal grievance. He also describes Ms Parkin cancelling numerous meetings, being denied clear communications about the scope of his role, being constantly advised of project delays and being assigned menial, simple tasks. His other complaints concerned having "vexatious allegations" made being the allegations put to him on 2 July 2020, the physical location of his desk, the revocation of his study leave approval on 3 July 2020 and being given unrealistic timeframes in which to complete a workshop between 22 and 28 July 2020.
- 40 In cross-examination, Mr Crabtree conceded that he did not disclose that he had ADHD in his employment application. He also conceded that he was trained in website administration by Mr Scott Palmer, Technical Lead ICT Solutions Development and Maintenance, in a one-on-one session.
- 41 As to the performance and conduct concerns, and the 14 allegations underpinning them, Mr Crabtree denied the factual allegations made concerning his involvement in the Landsdale Farm School website on 14 February 2020. In this example, it was alleged that he was actively working on the website, demonstrating to another person how to switch over templates when his actions resulted in the removal of all site content, replacing it with dummy copy. While Mr Crabtree denied that there was a "Build/Convert" button within WordPress, he did not give a cohesive account of what his involvement was, or was not, referring only to an email chain he was party to.
- 42 Mr Crabtree also denied the allegations that he used inappropriate language during training on 23 June 2020. Again, aside from denying the allegation, he gave no account of what he did say during the training session, but pointed out that Ms Parkin was not present at the relevant time.

- 43 In response to an allegation that he created a private "page 11" on the public website causing default permissions on documents to be overwritten, Mr Crabtree says "to the best of my knowledge, this page never existed, as no evidence to suggest anything other has been presented to me, other than the allegation made by Kim Parkin".
- 44 Aside from the above three matters which Mr Crabtree denied, Mr Crabtree's responses were otherwise variably that he either was not aware that his actions had caused any problems, could not recall involvement in the particular issue, that his actions accorded with his previous experience of how to achieve particular tasks, or that he was unfamiliar or untrained in the requirements of the task. On other matters, his evidence was to effectively concede the facts alleged, but downplay or deny any detriment.
- 45 Mr Crabtree admits that on 4 July 2020, which was a Saturday, he logged into the Department's website pages which were not accessible to the public using his departmental email address and password. He then used an app, described as a scraping tool, to attempt to clone the training materials he had developed, located on those pages. He did so in order to use those materials for an assignment he was doing as part of the university course he had planned to undertake between 3 July 2020 and 19 July 2020. He also conceded in cross-examination that he proceeded to attend that course in the period 3 July 2020 to 19 July 2020, being the period that corresponded with a period he was certified by a medical certificate to be unfit for work. On 5 July 2020, he provided a copy of that certificate to the Employer in support of a request to take personal leave.
- 46 In cross-examination, it was put to Mr Crabtree that his access to the website and the training materials for the purpose of his study was neither authorised nor approved. His response was simply that Ms Parkin was aware that he was undertaking study. He referred to an email communication but did not produce any written evidence of having approval to use the training materials for his study.
- 47 Ms Parkin gave evidence on behalf of the Employer. Ms Parkin was one of the panel members who interviewed Mr Crabtree for the position. She said that his application, qualifications and past experience indicated that he was highly qualified and suitable for the role.
- 48 Her evidence was that while she had concerns about Mr Crabtree's performance of particular tasks as early as 14 February 2020 (being the date of the Landsdale Farm website incident), in the early days she put this down to teething problems and lack of familiarity. However, as time progressed her concerns were compounded.
- 49 Ms Parkin said that she offered to provide Mr Crabtree with support in the form of invitations to Mr Crabtree to talk to her about any issues he had and offered to show him how to use elements of the website. He declined these invitations, indicating his preference to "figure things out for myself" and reiterating his familiarity with developing resources for adult learners. Her evidence on these matters were unchallenged.
- 50 Ms Parkin readily conceded that the website migration project was delayed due to the impacts of COVID-19 and shifting of resources and focus to enabling at home and online learning. She also conceded that meetings were cancelled, mainly because of the COVID-19 pandemic and the deferral of the content migration, but pointed out that weekly website meetings still occurred, and Mr Crabtree did not attend two meetings which did proceed.
- 51 However, when Mr Crabtree returned to work on or about 25 May 2020 after a period of working from home and Ms Parkin observed Mr Crabtree's conduct at a meeting with Library Services, she determined that she needed to be more proactive in monitoring Mr Crabtree's performance.
- 52 Ms Parkin gave evidence that a meeting was held with Mr Crabtree and his union delegate on 2 July 2020. According to the minutes, Ms Parkin opened the meeting by explaining its purpose as to discuss Mr Crabtree's performance during the probationary period, his managers' expectations for the role, and ways he could be supported. This included a discussion about the "bespoke" JDF for Mr Crabtree's role and its key responsibilities. Mr Crabtree was told that there were concerns regarding his performance and that the aim was to work with him to help him to improve. The particular concerns were articulated, and 12 specific examples of incidents demonstrating the basis for those concerns were discussed. Mr Crabtree did not respond to the particular examples given during the meeting.
- 53 Mr Crabtree was provided with an opportunity to advise of what support he needed to "achieve expectations". He responded that because he suffered from and was being treated for ADHD, he needed more written instructions rather than face to face. He also said he felt isolated from the team in his current location. He asked for a daily work plan so that he could understand the priorities in his role.
- 54 Prior to this meeting, Mr Crabtree had applied for and been granted study leave for the period 3 July 2020 to 19 July 2020. Because this was a substantial portion of the remaining probationary period, Ms Knox-Robinson informed him at the 2 July 2020 meeting that the approval of that leave would be revoked, in order for the parties to follow a Performance Management Plan over the four weeks of the probationary period remaining. This would include weekly review meetings. This decision was confirmed in an email from Ms Knox-Robinson to Mr Crabtree on 3 July 2020.
- 55 On 3 July 2020, the concerns raised at the meeting were confirmed by a written letter to Mr Crabtree. The letter informed Mr Crabtree that a further meeting would be scheduled for 7 July 2020 "to discuss the focus of your Performance Management Plan and to outline what supports you may need to address the areas of concern".
- 56 The letter dated 3 July 2020 also confirmed that Mr Crabtree would be provided with a four-week timeframe to take on board the concerns and indicate that the employment is able to be continued.
- 57 Mr Crabtree then applied to take personal leave for the period 3 July 2020 to 19 July 2020, being the period he had originally had study leave approved. The application was supported by a medical certificate of Dr Luke Ashford certifying that Mr Crabtree "has a medical condition and will be unfit for work from 03/07/2020 to 19/07/2020 inclusive".

- 58 Ms Parkin received Mr Crabtree's application for personal leave and medical certificate during the weekend following the 2 July 2020 meeting. She said that she was concerned about the bona fides of the medical certificate given the period covered coincided exactly with the period that Mr Crabtree had previously sought to take as study leave. Nevertheless, personal leave was granted to Mr Crabtree but the decision was made to extend the probationary period to ensure there was a proper opportunity to progress the performance management plan. On 14 July 2020, Ms Knox-Robinson wrote to Mr Crabtree advising that the probationary period had been extended in light of his taking personal leave, "in order to ensure you are provided with the four-week timeframe to focus on improving your performance". The performance management meeting scheduled for 7 July 2020 was rescheduled to take place on 22 July 2020.
- 59 In the meantime, Ms Parkin went to access Mr Crabtree's training materials with the intention of reviewing those to provide Mr Crabtree with feedback. That is when she discovered the training materials had been deleted from their previous location on the website. Enquiries with the ICT team led her to conclude that the materials were deleted when Mr Crabtree accessed them on 4 July 2020.
- 60 Mr Crabtree returned to work on 20 July 2020. Ms Parkin emailed him a draft performance management plan on 21 July 2020.
- 61 On 22 July 2020, Ms Parkin, Ms Knox-Robinson and Ms Louise Jacobson, Employee Relations, met with Mr Crabtree and his union representative to discuss the performance management plan. Mr Crabtree was told again that if his performance did not improve, his employment would be terminated through probation. Ms Parkin also advised him that issues had arisen since their last meeting including feedback that had been received about a workshop Mr Crabtree had conducted on 1 July 2020, that Mr Crabtree's summary of that workshop did not address items he had been instructed to provide. He was also asked to remove references on his personal website to the work he was doing at the Department (including images of the Department's website for which he did not have approval to use). He was informed that the incident that occurred on Saturday, 4 July 2020, was of great concern and had been referred to Standards and Integrity.
- 62 It appears from the minutes of the meeting of 22 July 2020 that by this time, while a performance management plan was still an option, the Employer was considering whether that option should be pursued or not in light of the further concerns that had arisen since 2 July 2020. Ms Parkin said to the effect that the Employer would confirm in writing the further issues that had been raised and the possible outcomes which include providing a further period to demonstrate improvement or recommend termination of the employment.
- 63 On 23 July 2020, Ms Parkin emailed Mr Crabtree a prioritised list of work tasks reflecting the performance management plan. The second item on the list was "Plan the content discovery workshop for Disability Services and Support". Her email indicates that a separate email would contain additional information to assist with this task.
- 64 The second email sent at 9:22 a.m. on 23 July 2020 set out the additional details as follows:

Hi Joff,

A discovery workshop is conducted to identify who the audiences are and what they need to do/know so we can map the content to the public website. You shouldn't need to have any background info on the topics to be able to effectively conduct the workshop. The outcome of this process is to:

- Define audiences for the client's programs/content (what are public audiences (PWS), and what are private - educators (Ed resources site))
- Identify content for the public website.
- Identify topics for public website.

As with the SDERA request, the step *after* this would be to do conduct an online card-sort activity with owners of related content and other stakeholders (other branches within Statewide Services). I previously suggested we use optimal workshop for this, as it was used prior and was found suitable.

Steps:

Audience and content mapping

1. Define the audience groups. This should be split by PWS, Ed resources site or both.
2. Define the needs of each of the audience groups.
3. Discover what content is available or required to address these needs. We may need attendees to claim certain topics or content at this stage.
4. Delve deeper into identifying current content gaps, emerging needs and goals.

Post workshop

You would need to write up the outcomes of the session and share with me for review. Once I've approved it you would circulate it to attendees for them to review and ensure nothing has been missed. We can then add the topics uncovered to the list for the card sort.

Any questions please let me know.

- 65 At 9:36 a.m. Mr Crabtree responded as follows:

Hi Kim,

Thank you for providing some guidance for this workshop.

In the performance management meeting you advised the customer persona activity would not be required as you advised you already know who the customer is. Can you please clarify what your expectations are for the audience identification

part of the workshop so we can map out the exact processes and outcomes you would like to see as a result of this workshop.

The detail below is a large body of work to complete in a 2 hour allocation, and may be further reduced as per the SDERA workshop by introductions and discussions, so prior to the workshop to ensure that we are all accountable for the workshop outcomes, I would like us to collaboratively produce a workshop plan with the specific activities and timings.

Previous workshops of this nature over my professional experience are at minimum a full day, if not multiple days, so it's imperative I know exactly what is required for this.

I look forward to further clarification of your expectations for this workshop and the development of a detailed plan with timings.

66 Ms Parkin responded at 3:51 p.m.:

Hi Joff,

Audiences and personas are two very different things. In the SDREA workshop you referred to the personas of fashionista, gym-junkie, techy (or similar) etc. This is not relevant to the customer journey/user experience of our site.

The audiences for this particular branch will probably be something along the lines of: parents of a child with disability, disability service providers, non-profit organisations etc. The workshop process should allow us to identify these particular audiences and the topics/content relevant to them.

This is a relatively small branch so 2 hours should be sufficient.

67 This did not settle things for Mr Crabtree. A few minutes later he emailed Ms Parkin:

Thanks for the clarification Kim,

I'll need more detailed instruction and suggested activities to undertake this task, as my past experience does not provide for the brief period of the workshop, so I am requesting you to provide me with sufficient detail to know what outcomes you are wanting from the workshop and suggestions of activities to achieve these outcomes.

We'll also need to ensure a workshop plan is developed and adhered to if the workshop is to be a success.

I look forward to some further information from you to enable me to undertake this task.

68 Ms Parkin's evidence was that this exchange fortified her concerns that Mr Crabtree was not up to the role he was employed to do. She withdrew this task from him and planned and conducted the workshop herself. Despite Mr Crabtree's assessment that the content would require more than a two hour workshop, it was completed within two hours. It is noted that in response to Ms Parkin's advice to Mr Crabtree that she would facilitate the workshop, Mr Crabtree asked to be provided with the resources as it would be "very useful as a professional development opportunity to observe and take notes".

69 At this point, Ms Parkin concluded that the performance management plan should not be followed and the employment should instead be brought to an end. Mr Crabtree was advised of this recommendation in a letter from Ms Knox-Robinson dated 28 July 2020. The letter indicated that Ms Knox-Robinson was now considering whether to recommend termination of the employment under cl 8 of the *Public Service Award 1992 (WA)*. She provided Mr Crabtree with five days to provide a written response to the concerns raised in the meetings of 2 July 2020 and 22 July 2020, which would be taken into account in determining whether to terminate the employment. The letter repeated the details of the alleged concerns with Mr Crabtree's performance, behaviour and conduct.

70 Ms Knox-Robinson also gave evidence for the Employer. Ms Parkin consulted her for advice in relation to the management of Mr Crabtree and the performance issues. She was involved in the meetings conducted on 2 July 2020 and 22 July 2020 and generally corroborated Ms Parkin's account of the events leading to the recommendation that Mr Crabtree's employment be brought to an end. She did not observe Mr Crabtree's performance of conduct first hand. However, she had previously held a role similar to Ms Parkin's and therefore understood the requirements and expectations of the role. Her evidence was that as a Level 6 Senior Project Officer, it was expected that the person holding the position could work relatively autonomously with little supervision.

The reasons for raising concerns

71 The Employer maintains that its reasons for raising concerns and ultimately ending the employment are those set out in Ms Knox-Robinson's letters to Mr Crabtree of 3 July 2020 and 28 July 2020. It refutes the suggestion there were any ulterior or improper reasons.

72 The key to determining this ground of appeal is the sequence of events, which is set out above under "Background" and "Evidence".

73 Mr Crabtree's case is that the first time he became aware that Ms Parkin held concerns about his performance was when he approached Ms Leavitt on 19 June 2020.

74 The concerns were then raised directly with Mr Crabtree at a meeting between him, Ms Knox-Robinson and Ms Parkin on 2 July 2020, one month prior to the end of the initial probationary period. Mr Crabtree did not challenge the accuracy of the minutes of the meeting.

75 On 28 July 2020, Mr Crabtree lodged his Notice of Formal Grievance. On the same day, he sent an email to Ms Knox-Robinson informing her that he had "now responded to the matters listed by way of formal grievance to Deborah Leavitt". The content of the grievance is in substance in response to the concerns raised at the meetings held on 2 July 2020 and 22 July 2020.

- 76 There is no evidence that Mr Crabtree had raised a grievance either formally or informally prior to 19 June 2020. There is no evidence that Mr Crabtree raised any grievance with Ms Leavitt on 19 June 2020, although it can be inferred that he approached her on that date to discuss his disappointment at not being allocated tasks from other projects. Nevertheless, Ms Parkin had already formed concerns about his performance by that time.
- 77 It is abundantly clear that Ms Parkin's concerns were raised before Mr Crabtree lodged his formal grievance. Further, there is no evidence that either Ms Parkin or Ms Knox-Robinson had any knowledge of the fact of the grievance, its content or Mr Crabtree's intention to make it at the time the concerns were raised with him on 2 July 2020 and 22 July 2020. As a matter of simple logic, there can be no temporal nor causal connection between the lodgement of the grievance and the raising of the concerns.
- 78 There is no merit in Mr Crabtree's case that the reasons for raising the concerns with him were motivated by, or were in retaliation for, Mr Crabtree lodging a grievance.

Was holding the concerns unreasonable, arbitrary, unfair or capricious?

- 79 As indicated earlier in these reasons, the Board does not consider it necessary to investigate the facts concerning each example of underperformance or unsatisfactory conduct, nor determine whether each example is substantiated. Rather, the Board must be satisfied that in forming the view overall that there was a need for improvement and that absent such improvement, Mr Crabtree was unsuitable for ongoing employment, that the Employer was not acting unreasonably, capriciously, unfairly or in an arbitrary manner.
- 80 It may be that some of the examples that were raised with Mr Crabtree did not justly reflect adversely on his performance or conduct. For example, the Board has doubts as to whether Mr Crabtree's call for Mr Palmer to put a request for information in an email in circumstances where he was in the middle of helping someone else at the time Mr Palmer telephoned him was a proper basis for concluding that Mr Crabtree was refusing to take calls or that he "doesn't" want to discuss anything over the phone anymore and wants it all tracked". The Employer's concern was that this incident involved an unreasonable refusal to take a phone call from Mr Palmer and that his actions and interpersonal skills were creating additional workload and creating tension. A large volume of Mr Crabtree's written communications were in evidence. As a general observation, the Board considers the tone and content of his communications to be consistently courteous. It is understandable that Mr Crabtree would view Mr Palmer's email concerning this particular incident as "passive-aggressive".
- 81 Mr Crabtree was criticised for failing to provide material for the Residential Colleges training to Ms Parkin prior to the training session being held, on the basis that he had previously been directed that Ms Parkin had to approve training materials before they were released. However, in support of her contention, that Mr Crabtree had received such a direction prior to the particular occurrence on 30 April 2020, Ms Parkin referred to an email which she sent to Mr Crabtree on 13 February 2020 which was Exhibit 8. That particular email did not concern prior approval of training materials. Rather, it was in response to an email that Mr Crabtree had sent to dgov-strategy@dpc.wa.gov.au to "open discussion" about the Department coming on board with the Whole of Government Analytics approach. Accordingly, this email did not support a finding that Mr Crabtree had been given any direction relevant to approval of training materials.
- 82 There is also a tension between the Employer's position that the occupant of the Level 6 Senior Project Officer position was expected to work autonomously and independently, and the suggestion that training materials had to be pre-approved by Ms Parkin. Again, the basis for criticising Mr Crabtree in this instance may have been misplaced.
- 83 There may also be some validity in Mr Crabtree's complaint that the scope of his role had not been sufficiently clearly defined prior to 18 March 2020 for him to have understood that he required particular authorisation to assist a colleague in Curriculum Support.
- 84 Nevertheless, there are four factors which indicate that the concerns overall were not unreasonably or unfairly held. First, a significant number of examples of workplace events were referred to as underpinning the concerns. These 14 examples contained a relatively high level of specificity.
- 85 Second, the source of the information from which the examples were compiled was various individuals involved in the relevant events, including recipients of training and ICT staff. The examples were not concocted by Ms Parkin and do not simply reflect Ms Parkin's subject views or opinions.
- 86 Third, while Mr Crabtree disputed some of the facts contained in the examples, much was not disputed by him. Significantly, where the allegations related to outcomes which involved risk or damage, Mr Crabtree did not dispute the outcomes or the potential for adverse consequences to the Department of those outcomes. His response primarily sought to deflect his culpability by reference to him not being adequately trained, or not being informed subsequently of any problems in a timely way.
- 87 Fourth, aside from the three matters discussed in paragraphs [80], [81] and [83] above, the factual allegations that formed the examples underpinning the concerns were cogent and credible. There was no evidence before the Board which indicated anything implausible about the examples relied upon.
- 88 While the Board is satisfied that, overall, the Employer was justified in holding the concerns about Mr Crabtree's performance and conduct that it did, we should make it clear that we are not making any finding that the examples underpinning the concerns were all or individually substantiated. It may be, that had the enquiry required it, the case would have been run differently by the parties and more comprehensive evidence would have been before the Board in relation to the individual allegations. The necessary enquiry was narrower, so the evidence presented was appropriately limited.

Was Mr Crabtree given adequate notice of the concerns?

- 89 As outlined above, there is no dispute that Mr Crabtree was notified of the concerns at the meeting between him, Ms Parkin and Ms Knox-Robinson on 2 July 2020. He was provided with the minutes of that meeting. Those minutes comprehensively set out the concerns held by Ms Parkin and set out in detail examples of conduct informing the concerns. The concerns were then set out comprehensively in a letter to Mr Crabtree dated 3 July 2020 which also indicated clearly that if there was no improvement, the employment would be brought to an end.
- 90 Mr Crabtree complains that the issues were not raised with him at the time that they occurred or earlier than 2 July 2020. Ms Parkin explained that while she had concerns from very early in the employment, she initially put it down to teething problems. The COVID-19 pandemic not only disrupted the working relationship while work was conducted remotely, but also changed Ms Parkin's priorities and the demands on her time. It was not until Mr Crabtree returned to working at the office on about 25 May 2020 that she began to have clarity as to the need for management of Mr Crabtree's performance and conduct.
- 91 Nevertheless, as at 2 July 2020, Mr Crabtree was approximately five months into the probationary period, and had a further one month of the probationary period remaining. Even if it could be said that the Employer missed opportunities to raise the concerns sooner, it still raised the concerns at a time when there remained four weeks in which Mr Crabtree could demonstrate improvement and suitability for ongoing employment.
- 92 The Board considers Mr Crabtree was, in these circumstances, adequately counselled and informed that he was not meeting the required standards of performance and conduct.
- 93 After receiving clear notice, and with the knowledge that he had four weeks remaining of the probationary employment to establish improvement in performance and suitability for the role, Mr Crabtree took the following two weeks from 3 July 2020 to 19 July 2020 as personal leave. While he produced a medical certificate stating he had a medical condition, he provided no other evidence as to the nature of his medical condition in circumstances where:
- (a) he was fit to work on 2 July 2020 and 20 July 2020;
 - (b) the medical certificate, and leave sought, covered precisely the same period that he had previously sought to take as study leave;
 - (c) he later sought to revoke part of his personal leave and to take part of the period as annual leave (as he had insufficient personal leave credits to cover the period); and
 - (d) he attended a university course and worked on university assignments in the period.
- 94 The Board infers from the above that Mr Crabtree chose not to attend work in the period 3 July 2020 to 19 July 2020. In arriving at this conclusion, the Board does not find that Mr Crabtree did not have a medical condition on those dates. No doubt Mr Crabtree was under stress and there was likely some health benefit to him in not attending work. However, it was his desire not to attend work and instead complete the university course rather than his medical condition which was the primary reason for him seeking a medical certificate and taking personal leave.
- 95 In other words, Mr Crabtree made a deliberate choice to be absent from work for a large proportion of the time available to him to establish an improvement in his performance and conduct.
- 96 The real problem for Mr Crabtree, then, was not that he was not given adequate notice of the concerns. The problem was that after he was given notice, he did not utilise the opportunity to focus on his employment nor on demonstrating he was capable of performing the role.
- 97 Mr Crabtree's conduct subsequent to being given notice of the concerns on 2 July 2020 is the clearest signal that he was the author of his own destiny. By using his work log-in credentials to access and "clone" the training materials on the Department's website on 4 July 2020 for non-work related activities, Mr Crabtree:
- (a) placed his personal interests above the interests of the Department;
 - (b) created a risk that the Department website would be compromised;
 - (c) accessed the Department's materials in circumstances where he had no legitimate reasons related to his employment to do so;
 - (d) copied the Department's materials without authority or approval and without his supervisor's knowledge.
- The Board accepts the respondent's counsel's submission that this admitted conduct alone was enough to show the lack of suitability for ongoing employment, and justified termination.
- 98 If anything more was needed, Mr Crabtree's requests for detailed instructions from Ms Parkin to complete the Disability Services and Support workshop between 23 July 2020 and 24 July 2020 is it. This was a task that was listed as the second of 6 items in a list of priorities which were contemplated as forming part of a performance management plan. The draft performance management plan expressly states that the Employer's expectations of the role are to:
- Independently* conduct workshops with stakeholders to identify and assess content for migration (emphasis added).
- 99 Mr Crabtree's communications with Ms Parkin concerning this task were cordial, but pedantic, cautious and circumspect in the extreme. His requests that Ms Parkin "clarify what your expectations are for the audience identification part of the workshop" and provide "suggested activities" virtually invited Ms Parkin to personally undertake the work that she had delegated to him. Mr Crabtree painted a clear picture that he was either unable or unwilling to conduct the workshop independently. The demand for such detailed guidance also contradicts his prior complaints that tasks allocated to him were menial or below his competencies, and his references in the communications themselves to his "professional experience".

100 The Board agrees with the respondent that Mr Crabtree's approach to this particular task on the draft performance management plan justified a view that the probationary employment should be brought to an end. Mr Crabtree was clearly on notice, and had had sufficient notice, when he communicated his unwillingness to work independently on this task.

Was Mr Crabtree given adequate training and support during the probationary period?

101 Mr Crabtree submits that principles set out in *East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers Perth* mean that the employer must provide adequate support and training before it can fairly terminate employment during the probationary period. What the Full Bench said in that case about training was that an employee on probation could expect to receive "*reasonable training*" [emphasis added]. We accept the Employer's submission that this means that, in assessing whether there was some failure on the Employer's part, or a lack of training, the seniority of Mr Crabtree's position and his professed qualifications and experience must be taken into account as attenuating the training requirements. In other words, what is reasonable training must be assessed by reference to the seniority of the position, its particular responsibilities and the occupant's past experience and qualifications.

102 As a Level 6 Senior Project Officer, Mr Crabtree's key responsibilities included to:

- (a) Plan, implement and evaluate elements of the Department's public website and provide specialist communications advice and support to business areas; and
- (b) Provide professional learning to business areas on best practice when identifying and communicating content for an online environment and provide training on the use of the platform.

103 In applying for the position, Mr Crabtree held himself out as "a highly experienced and qualified digital marketing professional" holding a Graduate Diploma of Web Communication from Murdoch University. His past experience included coordination of government marketing and communications projects at a state and local level.

104 According to Ms Knox-Robinson, the Employer expected that the occupant of the Senior Project Officer role would be able to work autonomously and with little supervision.

105 In his Notice of Appeal, Mr Crabtree says "I did not receive an induction or any training in the role". This was not the evidence. Ms Parkin's evidence was to the effect that Mr Crabtree received an induction by way of a one-on-one meeting with her on 12 February 2021, a team meeting also on that date and one-on-one training on 17 February 2020 with Mr Palmer on website administration. Mr Crabtree was also provided with information to undertake online professional learning and TRIM training on 4 February 2020. This evidence was not challenged by Mr Crabtree.

106 While Mr Crabtree points to numerous weekly team meetings being cancelled by Ms Parkin, he does not dispute the evidence to the effect that at least six meetings proceeded either in person or via MS Teams in the five or so months of employment to 28 July 2020. This was in addition to the various other interactions and communications that were in evidence between Ms Parkin and Mr Crabtree in relation to particular tasks.

107 Mr Crabtree did not identify any particular topic or task on which he says he needed to be trained in order to properly fulfill his role. For example, in response to the allegation concerning causing the server node to crash by exporting the website, Mr Crabtree says that he used "the normal methodology and processes I have used over the past 20 years of professional experience". He then also says that he was given "just a basic introduction to the platform, and provided no training material or detailed instruction into the use of the Liferay platform, it was an assumption of mine that the export function would operate as per the normal behaviour of a fully functioning website management platform". While he raises the issue of training he also makes it clear that he considered his existing knowledge and experience was adequate for him to draw upon. He does not identify how or why additional training would have caused him to adopt a different approach to the task.

108 Mr Crabtree's argument that the training he was given was unreasonably inadequate was also at odds with his formal grievance, which alleged that the tasks he was given were menial and below his Level 6 position. He points to no evidence that he had requested any particular training or additional support before 2 July 2020.

109 Finally, we note that the incident on 4 July 2020 whereby Mr Crabtree has attempted to copy training materials from the website, and allegedly deleted those materials in the process, cannot be put down to a lack of training or support. As indicated above, this incident on its own could be said to be determinative of Mr Crabtree's future employment.

110 For all of these reasons, we do not consider termination of Mr Crabtree's employment could be said to be harsh, unjust or unreasonable because of a lack of reasonable training or support. Accordingly, the Board declines to adjust the Employer's decision.

Remedies sought

111 Given the Board's conclusion that the termination of the probationary employment was not unfair so as to warrant any adjustment, it follows that Mr Crabtree's appeal must be dismissed. It is not necessary to consider further the issue of remedy. However, even if the Board had taken a different view, it would not have adjusted the decision or granted a remedy to Mr Crabtree in any event.

112 Mr Crabtree's employment was for an 18 month fixed term for a particular project. The term of the contract was due to end on 30 June 2021. Mr Crabtree advised the Board at the commencement of the hearing of his appeal that he no longer sought reinstatement, and instead was seeking monetary compensation.

113 The Board's jurisdiction under s 80I is to "adjust" the decision appealed against. It does not have jurisdiction to award compensation in the same way the Commission does when dealing with claims of unfair dismissal under s 23A of the IR Act. Nor does the Board have the power to make a declaration unless it is associated with substantive orders: *State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169 and *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611 at [616].

114 The Employer's counsel drew the Board's attention to Mr Crabtree's email to Ms Leavitt regarding his formal grievance dated 18 August 2020 in which he states:

In regards to outcome, there will need to be a further discussion to decide on appropriate actions from the above, however the behaviour of both Kim Parkin and Jane Knox-Robinson have decimated the working relationship, so a return to my current role is untenable, as you could well imagine. Part of the outcome I will be seeking is for a transfer to another Public Sector agency, given that I am employed under the Public Sector Management Act, along with positive references from the organisation. I would like a formal apology from both Kim Parkin and Jane Knox-Robinson, and see them undertake professional development to adhere to the principles, behaviours and expectations of public sector employees.

115 To the extent that the probationary period was a time not only for the Employer to assess Mr Crabtree's suitability for the role, but also for Mr Crabtree to see whether the role was right for him, it appears from the 11 August 2020 email that he had decided it was not.

116 Perhaps more significantly, for the Board to adjust the decision to dismiss would mean that the dismissal is quashed and Mr Crabtree is reinstated to a role under a contract that ceased on a date in the past. This would mean that the Employer would bear the cost of reinstatement without having any services performed by Mr Crabtree and with no future utility to any party. For those reasons alone, the Board would not be inclined to make an order adjusting the decision.

Conclusion

117 The decision to terminate Mr Crabtree's probationary employment was not exercised harshly or unreasonably or otherwise in a manner that is contrary to the purpose and principles of probationary employment. No adjustment to the decision appealed against is warranted, and so the appeal must be dismissed.

2021 WAIRC 00539

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6 OCTOBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JONATHON ('JOFF') CRABTREE

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER R COSENTINO - CHAIR
 MS B CONWAY - BOARD MEMBER
 MS D HOPKINSON - BOARD MEMBER

DATE

WEDNESDAY, 13 OCTOBER 2021

FILE NO

PSAB 30 OF 2020

CITATION NO.

2021 WAIRC 00539

Result

Appeal dismissed

Representation

Appellant

Mr J Crabtree, on his own behalf

Respondent

Mr R Andretich, of counsel

Order

HAVING heard from Mr J Crabtree, on his own behalf and Mr R Andretich, of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) R COSENTINO,
 Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2021 WAIRC 00543

APPEAL AGAINST THE DECISION NOT TO GRANT PERMANENCY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2021 WAIRC 00543
CORAM	:	SENIOR COMMISSIONER R COSENTINO - CHAIR MR C BROWN - BOARD MEMBER MR P BUDD - BOARD MEMBER
HEARD	:	WEDNESDAY, 29 SEPTEMBER 2021
DELIVERED	:	WEDNESDAY, 29 SEPTEMBER 2021
FILE NO.	:	PSAB 32 OF 2020
BETWEEN	:	RACHEL WAY Appellant AND CHIEF EXECUTIVE, EAST METROPOLITAN HEALTH SERVICE Respondent

CatchWords	:	Industrial Law (WA) – Public Service Appeal Board – Jurisdiction – Fixed-term contract – Commissioner’s Instruction No. 23 (CI 23) – Decision not to offer permanency – Decision not to extend or renew fixed-term contract – Appeal lodged out of time – Whether or not the appellant was a public service officer with standing to appeal a decision under s 80I(1)(a) – Whether to grant an extension of time within which to appeal – Decisions appealed are not matters within the Board's jurisdiction – Appeal dismissed
Legislation	:	<i>Public Sector Management Act 1994</i> (WA) <i>Health Services Act 2016</i> (WA) <i>Industrial Relations Act 1979</i> (WA) <i>Industrial Relations Commission Regulations 2005</i> (WA) <i>Public Sector Management (General) Regulations 1994</i> (WA) <i>WA Health System - Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses - Industrial Agreement 2016</i> <i>Parliamentary Commissioner Act 1971</i> (WA)
Result	:	Appeal dismissed for want of jurisdiction
Representation:		
Appellant	:	Mr A McGrath, as agent and Ms R Way
Respondent	:	Mr A Chapple and Mr P Heslewood

Case(s) referred to in reasons:

Chan v The Nurses Board of Western Australia [2007] WASCA 123

Civil Service Association (Inc.) v Department of Water and Environmental Regulation [2019] WAIRC 00794; (2019) 100 WAIG 138

Civil Service Association of Western Australia Incorporated v The Director General, Department of Biodiversity, Conservation, and Attractions [2021] WAIRC 00002; (2021) 101 WAIG 58

Danala v The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1972 (WA) as the Hospitals formerly comprised in the Metropolitan Health Services Board (the Metropolitan Health Service) [2010] WAIRC 01036; (2010) 90 WAIG 1787

Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196

Kelly v The Director General, Department of Justice [2002] WAIRC 08164; (2003) 83 WAIG 1283

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

Reasons for Decision

Ex Tempore

1 These are the unanimous reasons of the Public Service Appeal Board (Board) in relation to the preliminary issues listed for hearing.

Background

2 The appellant, Ms Rachel Way, was employed by the East Metropolitan Health Service (the Health Service) as a Level 2 Clinical Nurse Anaesthetic Research. She commenced in that role on 5 March 2018 on a fixed-term contract. She was then engaged pursuant to a second fixed-term contract from 16 March 2020, with an end date of 13 September 2020.

3 In the role of Clinical Trial Coordinator, Ms Way worked with Professor Tomas Corcoran, the Director of Research for the Department of Anaesthesia and Pain Medicine at Royal Perth Hospital. Her job was to coordinate and implement research studies. As the end date of the most recent contract approached, Ms Way was expecting her role to be reviewed for permanency.

4 In her Form 8B - Notice of Appeal, Ms Way refers to Commissioner's Instruction No. 23 (CI 23), which is the process under a Commissioner's Instruction for conversion and appointment of fixed-term contract and casual employees to permanency. In particular, Ms Way was aware that a Clinical Trial Coordinator working in another hospital and for another health service had been made permanent through the CI 23 review process, and this information created an expectation by her that her role would be treated similarly.

5 In the meantime, on 27 August 2021, Professor Corcoran advised Ms Way that he would be seeking another six-month fixed-term contract for her position. However, neither the further six-month contract nor permanent conversion eventuated. Apparently, this was due to the structure or source of funding for Professor Corcoran's research activities. In an email dated 4 September 2020 from Mr Ashley Chapple to Ms Way, the official reason given for refusing permanent conversion was:

...the funding issue is a relevant criterion and so the Anaesthetic Research role is unable to be converted to permanency.

6 Precisely what was meant by this opaque explanation was not explored in this jurisdictional hearing.

7 Ms Way has continued in employment in other research roles.

8 Ms Way's appeal in these proceedings:

(a) was made under s 80I(1)(a) of the *Industrial Relations Act 1979* (WA) (IR Act). That is:

an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;

and

(b) was filed outside the 21-day time limit specified by reg 107 of the *Industrial Relations Commission Regulations 2005* (WA) for commencing an appeal of the present kind.

9 The precise decision, or its substance, against which Ms Way is appealing, is not clearly identified in her appeal, other than by reference to the date of 8 September 2020. Although, in the grounds of appeal, Ms Way describes meeting with Mr Neil Cowan, Co-Director Surgical Division Executive Office and Ms Wendy Baker, Nurse Manager, Surgical Division on 8 September 2020, hoping that they would renew her contract in research.

10 She says instead, she was offered a six-month contract in theatre as a Registered Nurse Level 1, Increment 8, with a review for permanency after three months. It was also uncontentious that the decline of the CI 23 permanency review occurred sometime in August 2020.

11 Ms Way seeks reinstatement to her position on a permanent basis.

12 In its response, the Health Service says that the decisions appealed against are not matters within the Board's jurisdiction. It opposes the grant of an extension of time and seeks an order that the appeal be dismissed.

13 In the course of the hearing of this matter, Ms Way confirmed that there are two decisions against which she is appealing, being first, the decision not to offer permanency and second, the decision not to extend or renew her fixed-term contract.

14 She confirmed that she did not consider there was a dismissal decision and therefore, was not appealing under s 80I(1)(d) of the IR Act. The Board therefore proceeded to hear the matter to determine whether Ms Way is a public service officer with standing to appeal a decision under s 80I(1)(a) of the IR Act and, if the appeal is within the Board's jurisdiction, whether to grant an extension of time within which to appeal.

15 Ms Way was represented by her agent, Mr McGrath, at the hearing.

Evidence

16 The respondent tendered and relied upon Ms Way's latest contract for fixed-term employment, which became Exhibit R1. The respondent did not call any witnesses.

17 Ms Way tendered a large bundle of documents, comprising a timeline, various emails and documents about the creation of a research officer position. The bundle was received into evidence (Exhibit A1) over the respondent's objection that a vast number of the documents in the bundle were not relevant to the issues for determination. The Board read the documents for a general understanding of the background facts, but accepts the documents, particularly those post-dating September 2020, are largely not relevant to the determination of the preliminary issues.

18 Ms Way also relies upon two additional emails tendered into evidence. Ms Way gave oral evidence about the attempts she had made to obtain advice, mainly from the respondent and other parties, about how to challenge the decisions she was aggrieved about.

The jurisdictional issues

19 Section 80I(1) of the IR Act relevantly provides:

(1) Subject to the Public Sector Management Act 1994 section 52, the Health Services Act 2016 section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —

- (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
- 20 The onus of establishing the Board has jurisdiction under this provision lies on Ms Way, as the appellant. There is no dispute about this and the Board finds that the Health Service is an employing authority. The Board also finds that the appeal is not excluded from the Board's jurisdiction under s 52 of the *Public Sector Management Act 1994* (WA) (PSMA) or s 118 of the *Health Services Act 2016* (WA) (HSA).
- 21 There are three relevant questions which the Board must be satisfied about in relation to the decision appealed against, insofar as it is an appeal under s 80I(1)(a). First, whether Ms Way is a public service officer. Second, whether the appeal is against a decision for the purposes of that subsection. And finally, if yes to both of the above, is it a decision in relation to an interpretation of a provision of the PSMA concerning conditions of service other than salaries and allowances of public service officers, noting that Ms Way does not rely upon the decision being in relation to an interpretation of the *Public Sector Management (General) Regulations 1994* (WA) (PSMA Regulations).
- 22 The answer to each of these questions must be "Yes" for Ms Way's appeal to be within the Board's jurisdiction under s 80I(1)(a).
- 23 The parties' submissions focused only on the question of whether Ms Way was a public service officer. Ms Way, through her agent, relied upon the information contained on the Western Australian Industrial Relations Commission's (WAIRC) website as general guidance as to who is a public service officer and who can appeal decisions to the Board.
- 24 Ms Way also relied on her evidence and submissions about the information she was or was not provided by her employer and its IR team to assist her in determining whether she was a public service officer, and how she could dispute these matters. Her submission was to the effect that the employer was obliged to "have her back" in the sense of protecting her. These matters of fact were challenged by the respondent. But in any event, it does not have any bearing on the analysis of the jurisdictional issues.
- 25 Ms Way was unable to obtain Union assistance because she was not a member of a Union at the relevant time. At an earlier directions hearing, the Board encouraged her to seek legal advice. Having Union membership or seeking legal advice may not have changed Ms Way's case, although seeking earlier advice may have put her on a different path to resolving her grievances. Criticising the respondent for not helping her identify if she was a public service officer does not assist her case either.

Is Ms Way a public service officer?

- 26 "Public service officer" is defined in s 7 of the IR Act to mean a "public service officer within the meaning of the *Public Sector Management Act 1994*". The PSMA defines, in s 3, "public service officer" to mean "an executive officer, permanent officer or term officer employed in the Public Service under Part 3".
- 27 Public Service is defined in s 34 of the PSMA as constituted by:
- (a) departments; and
 - (b) SES organisations, insofar as any posts in them, or persons employed in them, or both, belong to the Senior Executive Service; and
 - (c) persons employed under this Part, whether in departments or in the Senior Executive Service in SES organisations or otherwise.
- 28 It is common ground that Ms Way was employed by the Health Service as a Level 2, Increment 2 Registered Nurse under the *WA Health System - Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses - Industrial Agreement 2016*. The Health Service is a health service provider established under s 32 of the HSA.
- 29 Accordingly, Ms Way's appointment and employment is pursuant to Part 9, s 140 of the HSA. Under Part 9, s 104(3) of the HSA, Part 3 of the PSMA does not apply to employees of health service providers. That section provides:
- (1) Unless otherwise specified in this Act or by the regulations, the PSM Act applies to administration and management, human resource management and conduct of health service providers and employees under this Act.
 - (2) For the purposes of subsection (1) the PSM Act applies as if —
 - (a) a reference in that Act to an employee were a reference to an employee as defined in section 6;
 - (b) a reference in that Act to an employing authority were a reference to an employing authority as defined in section 103.
 - (3) The PSM Act Part 3 does not apply to employees.
- 30 Ms Way was not employed under Part 3 of the PSMA. As she was not employed under Part 3 of the PSMA, she is not a public service officer as defined. She has no standing to bring an appeal under s 80I(1)(a) of the IR Act.

No decision

- 31 Although it is not strictly necessary to consider this second issue, for completeness, the Board observes that Ms Way's appeal is not from a decision as described in s 80I(1)(a) either. Whether the decision was the decision not to grant permanency or not to renew or offer a further contract, neither decision involved the interpretation of a provision of the PSMA or the PSMA Regulations made under it concerning conditions of service. Ms Way does not refer to any provision of the PSMA or the PSMA Regulations that is said to be the subject of a decision.

- 32 She does refer to CI 23, but the Board is without jurisdiction to enforce or deal with breaches of Commissioner's Instructions. See *Danala v The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1972 (WA) as the Hospitals formerly comprised in the Metropolitan Health Services Board (the Metropolitan Health Service)* [2010] WAIRC 01036; (2010) 90 WAIG 1787.
- 33 We also refer to the cases which the respondent handed up at the hearing, being the *Civil Service Association (Inc.) v Department of Water and Environmental Regulation* [2019] WAIRC 00794; (2019) 100 WAIG 138 and *Civil Service Association of Western Australia Incorporated v The Director General, Department of Biodiversity, Conservation, and Attractions* [2021] WAIRC 00002; (2021) 101 WAIG 58, which are decisions of the Public Service Arbitrator dealing with industrial issues related to CI 23, but under s 44 of the IR Act.
- 34 In conclusion, because Ms Way is not a public service officer and additionally, because there is no decision under s 80I(1)(a) that is appealed against, the Board is without jurisdiction. Ms Way's appeal must be dismissed for want of jurisdiction.
- 35 The Board wishes to disavow any criticism of Ms Way for bringing her appeal to the Board or bringing it in the way that she has. It has been observed many times, by many people, including the previous Chief Commissioner of the WAIRC, that the scheme of the IR Act concerning its constituent authorities, particularly the Board and the Public Service Arbitrator, are unduly and unnecessarily complex and confusing.
- 36 Indeed, in the Ministerial Review of the State Industrial Relations System Interim Report (March 2018), the author, Mr Mark Ritter SC said:
371. As the analysis of this chapter will illustrate, the law in Western Australia with respect to the regulation of public sector employment and the public sector jurisdiction of the WAIRC is bafflingly complex. There is a patchwork maze of provisions that lead only to confusion, uncertainty and the possibility, at least, for unfairness. This is quite contrary to the ideal of an accessible, fair and modern State system.
372. As will be set out, differently characterised public sector employees have different rights of access to the jurisdiction of the WAIRC. The decisions that they challenge vary, as does the remedies that can be granted...
- 37 In Ms Way's case, the confusion has been compounded by the information she received from the Office of the Parliamentary Commissioner for Administrative Investigations, known in shorthand as the Ombudsman, which we address further below. Regrettably, none of this can change the outcome of this matter.

Extension of time

- 38 As the Board is of the view that it does not have jurisdiction, there is no call to consider the issue of whether it should extend the time for Ms Way to appeal. Indeed, the Board is without power to consider or determine whether an extension of time should be granted. Having said that, if the Board found it had jurisdiction and had to consider whether to extend time to appeal, it would have declined to grant an extension of time for the following reasons.
- 39 The Board has power, pursuant to s 27(1)(n) of the IR Act, to extend the prescribed time in which to institute an appeal. Principles that apply in relation to the exercise of the discretion to extend time within which to appeal under s 80I of the IR Act were considered by the Board in *Nicholas v Department of Education and Training* [2008] WAIRC 01645; (2009) 89 WAIG 817. In that case, the Board applied the principles applied by the Full Court of the Supreme Court of Western Australia and the Court of Appeal, respectively, in *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196 and *Chan v The Nurses Board of Western Australia* [2007] WASCA 123.
- 40 These authorities emphasise four main, but not necessarily exhaustive, factors in considering whether an appeal should be accepted out of time. They are:
- (a) the length of the delay;
 - (b) the reasons for the delay;
 - (c) the prospects of the applicant in succeeding in the appeal; and
 - (d) the extent of any prejudice to the respondent or the Health Service.
- 41 In *Kelly v The Director General, Department of Justice* [2002] WAIRC 08164; (2003) 83 WAIG 1283, the following observations were made relevant to the determination of the present matter at [69]:
- Until the application for extension is granted, there ought be no assumption made that the extension will be granted as a matter of right. The question is whether the circumstances meet the tests for an extension of time...
- (a) Prima facie time limits imposed by the Act are to be complied with and it is for to the applicant to establish the circumstances such that the discretion to extend time should be exercised in his or her favour;
 - (b) an extension of time is not automatic and the discretion residing with the Commission to extend time is for the purpose of enabling the Commission to do justice between the parties;
 - (c) it is for an applicant to demonstrate that strict compliance with the legislation will work an injustice and be unfair in all of the circumstances;
- ...

Length of delay

- 42 The appeal was filed on 5 November 2020, 58 days after the decision appealed against and 37 days out of time. In the scheme of the time limit of 21 days imposed by reg 107 of the *Industrial Relations Commission Regulations 2005 (WA)*, the delay is significant. This factor cannot be determinative on its own, however, it weighs against the grant of an extension of time.
- 43 The other relevant factors must involve strong counterbalancing considerations to displace the effect of this factor being weighted against the grant of an extension of time.

Reasons for the delay

- 44 In her Form 8B – Notice of Appeal, Ms Way provided a copy of an email she sent to the Ombudsman on 10 September 2020, disputing the events of late August 2020, being when the CI 23 review was refused, and early September 2020, in relation to her role, in identical terms as are put forward in this appeal.
- 45 She received a response to that email on 27 October 2020. The Ombudsman described her complaint as being:
...[A]bout the hospital's decision not to renew your contract or offer you a permanent position.
- 46 The Ombudsman advises Ms Way that she has a right of reference to the WAIRC, and, under s 14(4) of the *Parliamentary Commissioner Act 1971* (WA), the Ombudsman shall not investigate complaints about actions in respect of which the complainant has, or had, a right of appeal, reference, or review to or before a tribunal.
- 47 It is noted that the Ombudsman does not identify a right of reference to the Board, specifically, but the Board is a constituent authority of the WAIRC. No criticism is made of Ms Way for not identifying the distinction between the WAIRC and the Board. In short, Ms Way says that she did not know she was able to challenge the decision to the WAIRC or the Board until 27 October 2020.
- 48 She lodged her appeal to the Board relatively soon after the Ombudsman's response. That is, nine days after becoming aware of this avenue of redress. It should be noted as an aside that the Board does not express agreement with, and should not be taken to agree with, the Ombudsman's conclusion that Ms Way had a right of reference to the WAIRC, nor any particular right or remedy available in the WAIRC for the matters referred to in her letter to the Ombudsman.
- 49 Ms Way may have been ill-advised by the Ombudsman. It is entirely understandable that she has made and pressed her appeal in these proceedings in light of what she was told by the Ombudsman. Indeed, it may be that Ms Way was right and acted appropriately in the steps she first took to seek redress for her grievances, that is, by making a complaint to the Ombudsman.

Prospects of success in the appeal

- 50 The appeal does not disclose grounds of such convincing merit that this factor will tilt the balance in favour of granting leave. The appeal does not identify reasons why either the decision not to renew the contract or the decision not to offer permanency were reviewable decisions, nor if they were, why they were unreasonable or unfair, except by reference to another individual working in a different hospital with different qualifications and for a different employing authority. Having said that, the Board accepts that Ms Way subjectively had a genuine expectation of ongoing contracts. In her words, it was not a silly notion, and it was understandable that she would believe she would have her contract renewed in all of the circumstances.

Prejudice to the Health Service

- 51 The Health Service submits that there is prejudice associated with the delay, particularly in circumstances where the respondent's resources are stretched to meet the demands of dealing with the COVID-19 pandemic and the management of the vaccination of the Health Service personnel.
- 52 It is not clear that these are impacts arising from Ms Way's delay in making her appeal or extending the time to make an appeal. However, even the absence of prejudice to the Health Service, is not determinative of whether an extension of time should be granted.

Conclusion

- 53 The Board does not consider it has jurisdiction, and therefore, the appeal must be dismissed.

2021 WAIRC 00519

APPEAL AGAINST THE DECISION NOT TO GRANT PERMANENCY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RACHEL WAY

APPELLANT

-v-

CHIEF EXECUTIVE, EAST METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
 SENIOR COMMISSIONER R COSENTINO - CHAIR
 MR C BROWN - BOARD MEMBER
 MR P BUDD - BOARD MEMBER

DATE

THURSDAY, 30 SEPTEMBER 2021

FILE NO

PSAB 32 OF 2020

CITATION NO.

2021 WAIRC 00519

Result

Order issued

Representation**Appellant**

Mr A McGrath and Ms R Way, on her own behalf

Respondent

Mr A Chapple and Mr P Heslewood

Order

HAVING heard from Mr A McGrath and Ms R Way, in person on behalf of the appellant and Mr A Chapple and Mr P Heslewood on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (IR Act), hereby orders –

1. THAT Order 2 of [2021 WAIRC 00221] issued on 21 July 2021 be varied by wholly substituting it with the following:

"THAT the preliminary issues to be determined are:

 - (a) Whether the appellant is a public service officer with standing to appeal a decision under s 80I(1)(a) of the IR Act; and
 - (b) Whether the appellant is to be granted leave to bring the appeal out of time".
2. THAT the appeal be and is hereby dismissed for want of jurisdiction.

(Sgd.) R COSENTINO,
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2021 WAIRC 00533

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 18 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TREVOR WALLEY

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION AND
ATTRACTIVEIONS

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIR
MS K ROBERTS - BOARD MEMBER
MR J LAMB - BOARD MEMBER

DATE

TUESDAY, 12 OCTOBER 2021

FILE NO

PSAB 4 OF 2020

CITATION NO.

2021 WAIRC 00533

Result	Order issued
Representation	
Appellant	Mr G McIntyre, SC
Respondent	Mr D Anderson, of counsel

Order

HAVING heard from Mr G McIntyre, SC, on behalf of the appellant and Mr D Anderson, of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT leave be granted for the Notice of Appeal to be amended to reflect that the appeal is an appeal by a government officer under s 78 of the *Public Sector Management Act 1994* (WA).
2. THAT the respondent file any submissions in relation to reasonable accommodation and most the recent Job Description Form of the position held by the appellant prior to dismissal by no later than 25 October 2021.
3. THAT the appellant file any submissions in response to the respondent's submissions by no later than 1 November 2021.

(Sgd.) R COSENTINO,
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2021 WAIRC 00569

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 18 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2021 WAIRC 00569
CORAM	:	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON MR J LAMB - BOARD MEMBER MS K ROBERTS - BOARD MEMBER
HEARD	:	MONDAY, 11 OCTOBER 2021
DELIVERED	:	TUESDAY, 9 NOVEMBER 2021
FILE NO.	:	PSAB 4 OF 2020
BETWEEN	:	TREVOR WALLEY Appellant AND DIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIVE Respondent

CatchWords	:	Industrial Law (WA) – Public Service Appeal Board – Section 78 of the <i>Public Sector Management Act 1994</i> (WA) – Misconduct findings – Failure to attend medical appointment – Lawful direction to attend medical appointment – Refusal to sign consent form – Whether request to attend was reasonable – Requirement to undergo assessment a lawful direction? – Findings of breach of discipline quashed – Fitness for work – Dismissal decision adjusted – Appeal upheld
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Public Sector Management Act 1994</i> (WA)
Result	:	Appeal upheld
Representation:		
Applicant	:	Mr G McIntyre, SC
Respondent	:	Mr D Anderson, of counsel

Case(s) referred to in reasons:*Blackadder v Ramsay Butchering Services Pty Ltd* [2002] FCA 603; (2002) 118 FCR 395*Grant v BHP Coal Pty Ltd* [2014] FWC FB 3027*Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525*Hudson v RMIT University* [2020] FWC 4289*Martin v The Director General of Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA)* [2012] WAIRC 00703; (2012) 92 WAIG 1620*Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2016] WAIRC 00236; (2016) 96 WAIG 408*Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266*State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169*Thavarasan v The Water Corporation* [2006] WAIRC 04089; (2006) 86 WAIG 1434**Table of Contents**

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Reasons for Decision

Introduction

- 1 These are the unanimous reasons of the Public Service Appeal Board (Board).
- 2 The appellant, Mr Trevor Walley was a longstanding employee of the respondent, the Director General, Department of Biodiversity, Conservation and Attractions as it is now known (the Department). His career with the Department commenced in 1974. After around 45 years of service, he was dismissed from his employment on 6 January 2020 for breaches of discipline involving his failure to attend an appointment with a medical specialist, and a subsequent failure to sign a consent form which the medical specialist requested he complete.
- 3 Mr Walley appeals from the decision to terminate his employment pursuant to s 80I(1) of the *Industrial Relations Act 1979* (WA) (the Act), disputing both the findings of breach of discipline and the decision to impose the sanction of dismissal which he contends is harsh and unreasonable. The Board must decide whether it should adjust those matters.

Board's jurisdiction and nature of the appeal

- 4 The appeals are brought under s 78 of the *Public Sector Management Act 1994* (WA) (PSMA) and s 80I(1)(b) of the Act.
- 5 Section 78 of the PSMA provides:

78. Appeals etc. against some decisions under s. 79, 82A, 82, 87, 88 or 92

- (1) Subject to subsection (3) and to section 52, an employee or former employee who —
 - (a) is, or was, a Government officer within the meaning of section 80C of the *Industrial Relations Act 1979*; and
 - (b) is aggrieved by —
 - (i) a decision made in respect of the Government officer under section 79(3)(b) or (c) or (4); or
 - (ii) a finding made in respect of the Government officer in the exercise of a power under section 87(3)(a)(ii); or
 - (iii) a decision made under section 82 to suspend the Government officer on partial pay or without pay; or
 - (iv) a decision to take disciplinary action made in respect of the Government officer under section 82A(3)(b), 88(b) or 92(1),
 may appeal against that decision or finding to the Industrial Commission constituted by a Public Service Appeal Board appointed under Division 2 of Part IIA of the *Industrial Relations Act 1979*, and that Public Service Appeal Board has jurisdiction to hear and determine that appeal under and subject to that Division.
- (2) Despite section 29 of the *Industrial Relations Act 1979*, but subject to subsection (3), an employee or former employee who —
 - (a) is not a Government officer within the meaning of section 80C of that Act; and
 - (b) is aggrieved by —
 - (i) a decision made in respect of the employee under section 79(3)(b) or (c) or (4); or
 - (ii) a finding made in the exercise of a power under section 87(3)(a)(ii); or
 - (iii) a decision made under section 82 to suspend the employee on partial pay or without pay; or
 - (iv) a decision to take disciplinary action made under section 82A(3)(b), 88(b) or 92(1),
 may refer the decision or finding mentioned in paragraph (b) to the Industrial Commission as if that decision or finding were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision accordingly.

- (3) Despite section 29 of the *Industrial Relations Act 1979*, but subject to section 52, an employee or former employee —
- (a) against whom proceedings have been taken under this Part for a suspected breach of discipline arising out of alleged disobedience to, or disregard of, a direction which is by virtue of section 94(4) a lawful order for the purposes of section 80(a); and
 - (b) who is aggrieved by —
 - (i) a decision made under section 82 to suspend the employee on partial pay or without pay; or
 - (ii) a finding made in respect of the person referred to in section 82A(3)(a), 87(3)(a)(i) or 88(a),

may refer the decision or finding referred to in paragraph (b) to the Industrial Commission as if that decision or finding were an industrial matter mentioned in section 29(b) of that Act, and that Act applies to and in relation to that decision or finding accordingly.

- (4) In exercising its jurisdiction under subsection (3) in relation to a direction consisting of a lawful order referred to in section 94(4), the Industrial Commission shall confine itself to determining whether or not that direction has been, or is capable of having been, complied with.
- (5) If it appears to the Industrial Commission or the Public Service Appeal Board that the employing authority failed to comply with a Commissioner's instruction or the rules of procedural fairness in making the decision or finding the subject of a referral or appealed against, the Industrial Commission or Public Service Appeal Board —
- (a) is not required to determine the reference or allow the appeal solely on that basis and may proceed to decide the reference or appeal on its merits; or
 - (b) may quash the decision or finding and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommended by the employing authority if the employing authority continues the disciplinary process.

6 The relevant provision of Part IIA – Division 2 of the Act is s 80I which is in the following terms:

80I. Board's jurisdiction

- (1) Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —
- (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
 - (b) an appeal by a government officer under the *Public Sector Management Act 1994* section 78 against a decision or finding referred to in subsection (1)(b) of that section;
 - (c) an appeal by a government officer under the *Health Services Act 2016* section 172 against a decision or finding referred to in subsection (1)(b) of that section;
 - (d) an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed,

and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).

[(2) *deleted*]

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

7 The appeal involves the review of the respondent's decisions de novo. As such, the Board is to consider the appeals based on the evidence before it, not merely on the basis of whether the respondent made the right decision available to it at the time. The Board has greater scope to substitute its own view for that of the respondent. In the case of dismissal for misconduct, it is for the employer to establish on the evidence that the misconduct occurred: *Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266; *Thavarasan v The Water Corporation* [2006] WAIRC 04089; (2006) 86 WAIG 1434.

8 The Department's decision is not to be totally disregarded by the Board hearing and determining the matter. That the appeal involves a hearing de novo does not necessarily mean that the Board must re-hear every aspect of the allegations afresh. What precisely the Board must consider in the proceedings ultimately depends upon the nature of the challenge to the decision under review: *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525 at [26], [29].

- 9 As will be seen from the misconduct findings and grounds of appeal set out below, many of the facts relevant to the appeal are not really in dispute. A notable exception is whether Mr Walley refused to sign a consent form, and the circumstances that caused the appointment with Dr Keith Grainger, Consultant Neurologist to be terminated. However, in the main, it is the conclusions which the Department drew from mostly uncontroversial facts, namely, that Mr Walley's conduct constituted misconduct, and that the misconduct justified termination of employment, that are in contention. Therefore, in this appeal, the Board is required to decide whether, on the evidence before the Board, Mr Walley's conduct was misconduct. If the answer is yes, the Board can consider what, if any, sanction was warranted. If the answer is no, the Board must consider what, if any, adjustment ought to be made to the decision.

The misconduct findings

- 10 The relevant misconduct findings against Mr Walley are set out in the Department's letter to him dated 18 November 2019. It states that the investigation found:

- You were directed to attend a medical appointment, as a fitness for work assessment, with Dr Keith Grainger, Consultant Neurologist with Next Health and Mind Sense on 4 July 2019 and failed to attend that appointment.
- You were directed to attend a medical appointment, as a fitness for work assessment, on 8 August 2019, and while you attended that appointment, you did not participate in the medical assessment because you refused to sign the consent form.

- 11 Based on those findings, the suspected breaches of discipline for disobeying or disregarding a lawful order were sustained.

- 12 The Director General proposed the sanction of dismissal as a result of the above findings. The reasons for proposing that sanction were:

- After your general practitioner certified you as fit for work on 13 February 2019, due to the Department of Biodiversity, Conservation and Attractions' (the department) reasonable concerns about your fitness for work, and the department's desire to ensure that it provided you with a safe workplace, you were directed to attend, and did attend, a fitness for work assessment with Dr Terace.
- In his report, Dr Terace (i) identified permanent restrictions as to your work location, (ii) recognised the risk of the recurrence of Post-Traumatic Stress Disorder symptoms if you are to be exposed to deceased animals, and (iii) recommended that further medical investigations should be carried out, in particular, those investigations being identified in the report of Dr Mandy Vidovich, Clinical Neuropsychologist, dated 16 November 2017.
- Given Dr Terace's recommendation that those further investigations be carried out, you were directed to attend (on two occasions) an appointment with Dr Grainger.
- That direction was made so that the department could comply with its duty to ensure that it is providing you with a safe work place, by seeking to identify whether you are fit for work, and if so, what modifications could be put in place so as to provide you with a safe working environment.
- Having refused to attend or participate in the appointment with Dr Grainger on two occasions, the department is left in a position where it is unable to determine whether it is safe to return to you the workplace in any capacity. In those circumstances, your conduct has frustrated the ability for the employment relationship to continue.

Grounds of appeal

- 13 Mr Walley's Grounds of Appeal are set out in his Further Substituted Appellant's Reasons for Disagreeing with the Decision filed on 6 April 2021. He raises four grounds. To summarise them, acknowledging that in doing so, we risk injustice to the clear and carefully articulated grounds of appeal, they were:

- (a) That the requirement for Mr Walley to be assessed by the Neurologist, Dr Keith Grainger, was unjustified and unreasonable in light of the available medical evidence, Mr Walley's medical history and cultural background.
- (b) Mr Walley's failure to attend the appointment with Dr Grainger on 4 July 2019 was not misconduct because the Department had requested Mr Walley attend, rather than direct that he attend and, in any event, the parties were in dispute as to the reasonableness of the requirement to attend the appointment.
- (c) Mr Walley's failure to sign the consent form when he attended the appointment with Dr Grainger on 8 August 2019 was not misconduct because:
 - (i) Mr Walley's participation in the assessment was the result of the Department's request but not a lawful order or direction;
 - (ii) No direction or order was made by the Department to provide any particular form of consent, nor could it have given such direction or order;
 - (iii) The assessment was terminated by Dr Grainger, not Mr Walley; and
 - (iv) Mr Walley did not decline to, or refuse to, sign the consent form.
- (d) If Mr Walley was directed by the Department to attend the medical appointment, and that direction included an implicit direction to sign the consent form, then such direction was unlawful and unreasonable because of the breadth and generality of the consent form content.

Factual background

- 14 Prior to the hearing, the parties agreed on a Statement of Facts and the documents to be put before the Board. Mr Walley gave oral evidence at the hearing. He also relied upon the oral evidence of his industrial advocate, Mr Michel Amati. The Department did not lead any oral evidence, but tendered further documents concerning Mr Walley's medical and employment history without any objection by the appellant (Exhibit 6).
- 15 The following factual background is taken from the Statement of Agreed Facts (Exhibit 1), the tendered documents (Exhibits 2 to 6) and Mr Walley's uncontested oral evidence.

Mr Walley's employment

- 16 At the relevant times, Mr Walley was employed by the Department as an Aboriginal Education Officer/Eco Education Officer - Aboriginal Cultural Program. He was responsible for providing Aboriginal Education, particularly for developing and delivering the Aboriginal Nearer to Nature cultural programs and excursions to promote understanding of traditional Aboriginal culture, the use of natural resources and traditional conservation techniques. His duties involved developing the program and its associated resources, engaging with Aboriginal cultural and spiritual content and awareness through a curriculum of activities with the public, school children and internally within the Department by delivering special events, excursions, workshops and professional learning.
- 17 The Department described Mr Walley's role to Dr Lawrence Terrace, Consultant Forensic Psychiatrist in these terms:

...

The role of EcoEducation Officer - Aboriginal Cultural Program, involves the development and delivery of Aboriginal EcoEducation cultural programs. The programs are designed to promote understanding of traditional Aboriginal culture, the use of natural and renewable resources and traditional conservation techniques, in the context of the Western Australian environment.

It is an interactive role with school and community groups, requiring the ability to adjust to different group dynamics and answer questions. The role requires the ability to develop and maintain a good rapport with a diverse range of people of all ages and the ability to work effectively as a member of a team.

The role requires field work, including working in native bushland where there is both natural and plantation forests, including pine trees, as well as live and deceased wildlife.

Mr Walley has historically undertaken these tasks within the natural environment within the Perth Hills Discovery Centre (in Beelu National Park) in Mundaring and following a recurrence of his PTSD, trialled working in Yanchep National Park.

A copy of the job description form, detailing the requirements of the position has been included as Attachment 1.

...

- 18 Following the hearing, the parties provided the Board with the most recent Job Description Form (JDF) for Mr Walley's position dated 4 June 2013. It attributes 70% of the position's responsibilities to the development and delivery of Aboriginal EcoEducation cultural programs and excursions.

Mr Walley's Workers' Compensation Claim

- 19 Mr Walley had a diagnosis of Post-Traumatic Stress Disorder (PTSD) which developed in the course of his employment following the traumatic and gruesome discovery by him of a deceased person while he was patrolling crown land in October 2000.
- 20 Liability for a Workers' Compensation Claim relating to the October 2000 incident was accepted in January 2002.
- 21 As a result of his illness, Mr Walley had intermittent periods of incapacity and required medical treatment in the period from 2002 to January 2019. Over that period of 16 years of employment, Mr Walley was certified unfit for a total of about 2 1/2 years.
- 22 Between 22 March 2017 and 22 January 2019, Mr Walley was only fit for and in attendance at work for around three months between 2 June 2018 to September 2018.

Neuropsychological assessment is conducted

- 23 In late 2017, the Department arranged for Mr Walley to be neuropsychologically assessed by Dr Mandy Vidovich, Clinical Neuropsychologist, who produced a report dated 16 November 2017.
- 24 Relevant extracts from Dr Vidovich's report are reproduced as follows:

...

It was anticipated that he would produce performances within the *Average* range for his age. Review of his neuropsychological profile revealed inefficiencies in several domains with results across various measures being below expectation. The most salient, undermining factor, appeared associated with deficits in executive functioning, which impacted on aspects of his communication, the integration of complex visual material, attentional processes, and his capacity to learn novel information. There was no indication of a disorder of mood and he would not expand on past, or any current, psychological symptoms.

In keeping with some of the concerns that had reportedly been raised within the workplace, Mr Walley demonstrated cognitive deficits considered likely to influence aspects of his work performance. The reductions in auditory attention, inefficiency in aspects of his memory, and observed executive dysfunction, are likely to impact on facets of his workplace productivity and interactions. He admitted that it had been some time since he'd had a general medical review and he would be encouraged to attend his GP to address any vascular risk factors and for referrals to screen his eyesight and hearing. Further, it is recommended that he undergo an MRI brain scan. Review neuropsychological assessment in 12 month's time would also be recommended to identify whether there is a progressive component to any of the observed cognitive deficits.

Exploration of return to work options should include addressing any cultural sensitivities related to specific workplace environments and exposure to any salient triggers...

...

With respect to questions three to five, Mr Walley did not disclose any psychological symptoms at the time of the appointments. If he has suffered with PTSD, this was either in remission or he did not wish to elaborate on any aspect of his psychological well-being. Concern is raised regarding his cognitive functioning and he requires medical review and investigations to identify any potential causes and/or reversible contributing factors. He would currently meet diagnostic criteria for a Minor Neurocognitive Disorder (unspecified), for which investigations would be pending, noting also that an MRI brain scan should be performed. Outcomes of these investigations may provide guidance with respect to further treatment.

25 Dr Vidovich declined to comment directly on Mr Walley's fitness for work from a psychiatric point of view, noting that she had no information regarding his previous diagnosis of PTSD.

26 In response to the particular questions the Employer asked Dr Vidovich, she responded:

...

7. ***What is the likelihood in the short and long term of Mr Walley's ability to return to work with full capacity?***

This will depend on the outcome of any medical investigations and whether there are ongoing notations of progressive decline. Currently, he may be capable of restricted duties, with some peer supervision, and in a part-time capacity.

...

10. ***If there are restrictions, are these restrictions going to be permanent thus affecting his ability to continue work as an Eco Education Officer in a full-time capacity?***

At this point in time, and without further investigations, restrictions should be considered temporary. Whilst his profile raises suspicion of an early neurodegenerative process, further medical investigations should be conducted to assist with confirmation regarding his employability in his role as an Eco Education Officer.

27 Mr Walley returned to work in around June 2018.

28 In or about September 2018, a disciplinary process was commenced arising out of allegations that Mr Walley had displayed aggressive behaviour towards colleagues and managers and made unauthorised contact with the media. The disciplinary process was not progressed because Mr Walley commenced another period of long term leave shortly thereafter.

Assessment by Dr Terace, Psychiatrist

29 On 13 February 2019, Mr Walley's GP, Dr Bradley Price, completed a WorkCover WA Progress Certificate of Capacity. He certified Mr Walley as having "full capacity for work from 13/02/19" but requiring further treatment with a restriction on working in Yancheep.

30 After receipt of this certificate, in March 2019, the Department required that Mr Walley attend a fitness for work assessment with a Psychiatrist, Dr Terace, to determine whether Mr Walley was fit to return to work.

31 Mr Walley attended the appointment on 26 March 2019 and the Department received Dr Terace's resultant report dated 14 April 2019 on 16 April 2019, and a supplementary report dated 15 May 2019.

32 The 14 April 2019 report concluded, amongst other things, that Mr Walley had normal cognitive functioning:

The sensorium was clear, and a coherent account of the circumstances was provided at interview to suggest intact general cognition - although I did undertake a formal cognitive assessment or Standardised Mini-Mental State Examination (SMMSE) despite the absence of *objective* evidence of cognitive deficit at clinical interview and despite the absence of any *subjective* descriptions - given the reference in your letter of instruction to concerns raised by Neuropsychologist, Ms Mandy Vidovich. Cognition appeared to be within normal limits as was capacity for cognitive persistence and pace.

The Standardised Mini-Mental State Examination (SMMSE) produced a perfect score of 30/30.

33 Dr Terace further reported:

1. **In your opinion, do you believe Mr Walley is fit to undertake his duties of an EcoEducation Officer within a work environment where there will be exposure to pine trees/plantations and possible exposure to forest and/or deceased wildlife, which have previously resulted in a recurrence of Mr Walley's PTSD?**

1. Mr Walley stated that he does not perceive that he requires restrictions in terms of exposure to pine trees/plantations any more.

2. However, it is possible that exposure to deceased wildlife may trigger a recurrence of his post-traumatic symptoms - especially given his description of a transient visual flashback of maggots during this interview.
3. In my former report dated 1 August 2017 - I stated in point 10 page 28, that Mr Walley was presently fit for his pre-accident occupation on a full-time unrestricted basis.
4. However, in point 9 page 28, I stated that whilst the prognosis was good, he was at risk of further recurrences, and that Mr Walley is probably a psychologically vulnerable individual who was at risk of a further psychological disorder in the future independent of this claim at that time.
5. I note on page 3 of your letter of instruction dated 25 March 2019, you state that the Department has also tried relocation at the Kensington Head Office site and Yanchep National Park, but that Dr Price has stated that Mr Walley was not able to work at the latter.
6. **I did not find sufficient evidence for a recognised psychiatric disorder in the present, such that any former DSM-V psychiatric disorder appears to be close to remission**, assuming the veracity of the history - although he described one transient visual flashback of maggots during the interview - which essentially means that **he is probably at risk of further post-traumatic recurrences (emphasis added)**.

...

2. In your opinion, do you believe Mr Walley is fit to undertake his duties of an EcoEducation Officer within a work environment where there may be additional risk of a PTSD recurrence?

1. Mr Walley is probably at risk of post-traumatic recurrence/symptoms in the environments referred to in the aforementioned body of this report and also in my response to your Question 1 - essentially being Wanneroo Road and Yanchep National Park. However, it is possible that exposure to deceased wildlife may trigger a recurrence of his post-traumatic symptoms- especially given his description of a transient visual flashback of maggots during this interview.

3. If Mr Walley is deemed 'not currently fit':

a. What is the nature and expected duration of his incapacity?

1. As stated, I did not find evidence for a fulminant psychiatric disorder meeting DSM-V criteria in the present, despite his description of a transient visual flashback of maggots, and the essential issue is as to risk pertaining to future recurrence and symptoms. This would suggest that it is possible that exposure to deceased animals may or will trigger such post-traumatic symptoms in the future.
2. He is probably not fit for work that requires attendance to Wanneroo Road or the Yanchep National Park.
3. Exposure to Wanneroo Road, and Yanchep National Park may lead to a recurrence of symptoms in the future.
4. Mr Walley no longer describes an aversion to pine tree forests, and if that is correct, then pine forests specifically are not an exclusion - unless he may be exposed to deceased animals.
5. However, I understood that it was in Yanchep that he found the remains of a suicide victim and he perceives that he cannot return to Yanchep National Park and I understood that this led to Worker's Compensation Claims.

...

26. Therefore, on that basis, assuming the veracity of the history Mr Walley provided at interview, then the specifically posed restrictions appear to be Wanneroo Road where the original suicide occurred, and Yanchep National Park.

However, even if pine trees/pine plantations are no longer concerns for him, as Mr Walley stated at interview, I cannot exclude the possibility that exposure to deceased animals may or will cause posttraumatic recurrences also in other environments.

Whilst Mr Walley has suggested Kings Park, Rottnest Island or Perth Zoo in a similar role - I have concerns about his access to medical services if required urgently on the island. Furthermore, I cannot exclude the potential risk of being exposed to a deceased animal in Kings Park and the possibility that this may cause post-traumatic recurrences.

If exposure to deceased animals has the potential risk of a PTSD recurrence, then reconsideration of his role in those contexts may be required.

b. What is the likelihood in the short and the long term of Mr Walley's ability to return to work with full capacity?

1. In the absence of a present fulminant psychiatric condition, Mr Walley probably has full capacity to return to work with full capacity in the present, observing the restrictions specified, *but* I cannot exclude the possible risk of a PTSD recurrence if he is exposed to deceased animals. I do not know if such restrictions are viable from a pragmatic occupational perspective pertaining to his role, and this is a decision for the Department.

...

7. **What actions could the department take to reduce the likelihood of a recurrence for Mr Walley?**

1. I do not think it is possible to completely exclude the development of future recurrence or the risk of future recurrence.
2. Restricting him from Wanneroo Road and from the Yanchep National Park may reduce the likelihood of recurrence.
3. Mr Walley has specified particular areas he is willing to work. This may reduce the risk of recurrence, but it may not.

However, if your concerns about Mundaring are correct then the risk of returning him to Mundaring is significant.

Furthermore, I cannot exclude the risk that exposure to deceased animals may will give rise to further post-traumatic recurrences in any environment.

...

10. **Please provide any additional information that would be beneficial in managing Mr Walley.**

...

4. I also note the report of Clinical Neuropsychologist, Mandy Vidovich dated 16 November 2017 - and her conclusion in point 10, page 8, that at this point in time, and without further investigations, restrictions should be considered temporary, but whilst his profile raises suspicion of an early neurodegenerative process, further medical investigations should be conducted to assist regarding his employability in his role as an EcoEducation Officer.
5. On page 6, she concluded that Mr Walley demonstrated cognitive deficits likely to influence aspects of his work performance including reductions in auditory attention, and inefficiency in aspects of his memory.
6. She encouraged attendance to his General Practitioner to address any vascular risk factors and referral to screen his eyesight and hearing and recommended that he undergo an MRI brain scan with a recommendation for a Neuropsychological Assessment in 12 months' time to identify whether there was a progressive component to any of the observed cognitive deficits.
7. On the Standardised Mini-Mental State Examination (SMMSE), **I did not identify any particular cognitive deficits, but it should be noted that neuropsychological testing is probably more sensitive (emphasis added).**
8. I do not know whether Mr Walley revisited Ms Vidovich for a further assessment, or whether he underwent the appropriate attendance to General Practitioner or a further MRI.
9. However, given the concerns raised, I strongly recommend that a copy of this report is provided to Mr Walley's treating General Practitioner as soon as possible.

34 Apparently, the Department misunderstood Dr Terace's report as extracted above, understanding him to have opined that further medical investigations should be conducted. It wrote to Dr Terace seeking a supplementary report. The letter of instruction for the supplementary report was not in evidence, but from the face of the supplementary report dated 15 May 2019 it appears Dr Terace was asked, amongst other things:

...

3. **On page 23 you recommend "further medical investigations should be conducted to assist regarding his employability in his role as an EcoEducation Officer". Can you please confirm if this is a formal recommendation from your assessment and if it is, provide details of the medical professional that should be engaged to conduct such assessments?**

...

35 The Department also asked Dr Terace to expand upon his opinion concerning the severity of any risk of recurrence, and how that relates to Mr Walley's fitness for work.

36 Dr Terace's 15 May 2019 supplementary report states:

1. **Throughout the report there is reference to the 'risk of recurrence'.**

Are you able to provide an indication of the severity of this risk? For example based on the likelihood and consequence, is the risk of recurrence minor, moderate or major? This information will assist the department in determining whether the risk is manageable, or if it's too high to place Mr Walley in any environment where there may be deceased fauna.

1. The risk of recurrence and the severity of risk is difficult to quantify in psychiatry, including Post-Traumatic Stress Disorders and post-traumatic symptoms.
2. Rates of recurrence and the degree of risk vary from patient-to-patient and case-to-case.
3. However, given the totality of the evidence, I concluded that the severity of the risk is moderate, and I could not state that it is minor.
4. Please note this a qualitative analysis, and not a quantitative one.

...

3. For example, in 3.b page 20 of my report 14 April 2019, I stated that in the absence of a present fulminant psychiatric condition, Mr Walley probably has full capacity to return to work with full capacity in the present, observing the restrictions specified, *but* I cannot exclude the possible risk of a PTSD recurrence if he is exposed to deceased animals. I do not know if such restrictions are viable from a pragmatic occupational perspective pertaining to his role, and this is a decision for the Department.

...

5. In summary, it is possible that he may or will respond adversely to deceased wildlife in the future, and I cannot exclude this from contributing to further post-traumatic symptoms or recurrences.

6. I considered that this risk is moderate.

7. It is not possible to completely exclude the development of future recurrence or the risk of future recurrence.

...

...

...

7. The area of neurodegenerative disease is outside of my area of expertise and is specifically and ultimately the province of a Consultant Neurologist.

I regret that it is not possible to be more specific than this in this case.

The Department arranges 4 July 2019 appointment with Dr Grainger

- 37 On 29 May 2019 the Department wrote to Mr Walley following its receipt of Dr Terace's reports. In its letter, the Department stated:

You attended a fitness for work assessment with psychiatrist Dr Lawrence Terace on 26 March 2019, and were accompanied by your union representative, Mr Michel Amati, Industrial Officer for the Civil Service Association (CSA).

As advised in emails to Mr Amati dated 29 April and 3 May 2019, the department has received Dr Terace's fitness for work assessment report.

Dr Terace strongly recommends that a copy of the report be provided to your General Practitioner (GP) as soon as possible. As advised in the abovementioned emails, the department requires your written consent to contact and subsequently provide the report to your GP.

In his report, Dr Terace has also stated that should you wish to make an application for the report, it should be read in the presence of, and interpreted by, your GP.

Due to Dr Terace's recommendations, the department is not able to provide the report directly to you or the CSA. Provision of the report outside of Dr Terace's advice could compromise the department's duty of care responsibility to you, as an employee.

Following a review of the report, the department has determined that an additional assessment with a Consultant Neurologist is required. This is derived from Dr Terace's report and his reference to Dr Mandy Vidovich's recommendation for such assessment, in her fitness for work assessment report dated November 2017.

The assessment will provide the department with additional information regarding your health and wellbeing, in relation to your return to work and your ability to undertake your role as an EcoEducation Officer.

A letter has been prepared for Dr Keith Grainger, a Consultant Neurologist with Next Health & Mind Sense, which includes a summary of your work history, including your role, responsibilities and any known medical history. Included in this letter is a list of questions the department requires Dr Grainger to answer, which are relevant to your fitness for work.

An appointment has been made for you to attend an assessment with Dr Grainger at **4.00pm on Thursday 4 July 2019** at Next Health & Mind Sense at 29 Walters Drive, Osborne Park. Please ensure you arrive 15 minutes early to attend to any paperwork. You will be reimbursed for reasonable expenses, including travel costs if required.

Following the appointment, the department will review the report from Dr Grainger to determine your fitness for work and any measures required to ensure your ongoing health and wellbeing in the workplace.

I would encourage you to discuss Dr Terace's initial report with your GP prior to attending the assessment with Dr Grainger; as advised previously, your written authorisation is required prior to the report being released to your GP.

Please confirm receipt of this letter and confirmation of your availability to attend the above appointment to Ms Emma-Lee Thornton, A/Manager Health, Safety and Wellbeing by telephone on 9219 9782 or email via [*email address anonymised*] by close of business on Friday 21 June 2019.

- 38 Consistent with Dr Terace's recommendation, Dr Terace's reports were not provided to Mr Walley at the time of, or prior to, the issue of the letter of 29 May 2019. It is of considerable concern then, that the letter represented to Mr Walley that Dr Terace's report implicitly, if not expressly, recommended an additional assessment with a Consultant Neurologist was required. No fair reading of Dr Terace's report would lead to a conclusion that it recommended an assessment by a Consultant Neurologist.

- 39 Dr Terace did no more than recite and summarise the earlier report of Dr Vidovich, which was by then some 18 months out of date. Dr Terace had himself conducted a Standardised Mini-Mental State Examination, but found no basis for any concerns of cognitive impairment. His report did nothing to support or adopt Dr Vidovich's recommendation. Yet the letter of 29 May 2019 appears designed to give the impression that it did, in circumstances where Mr Walley could not make his own assessment of Dr Terace's opinions or report.
- 40 Further, Dr Vidovich did not recommend further neurological assessment either. Dr Vidovich had recommended other forms of medical investigation to determine any underlying causes of deteriorated cognitive functioning, such as MRI brain scan. Dr Vidovich did suggest repeating the **neuropsychological** assessment to determine whether there was a progressive element (emphasis added).
- 41 In these circumstances there was really no basis on the medical evidence before the Department for requiring a neurological assessment of fitness for work. For the Department to have suggested that it had reasons based on the medical reports was either misguided or misleading or both.
- 42 Through his union The Civil Service Association of Western Australia Incorporated (Union), and reasonably in the circumstances outlined, Mr Walley disputed the necessity for the appointment and whether the request to attend it was reasonable.
- 43 Mr Walley did not attend the appointment scheduled for 4 July 2019.

A further appointment with Dr Grainger is arranged

- 44 By letter dated 19 July 2019, the Department's Acting Manager of People Services, Mr Stephen Bradfield, wrote to Mr Walley referring, for the first time, to the appointment on 4 July 2019 as a "fitness for work assessment". Again, it is noted that neither Dr Terace nor Dr Vidovich had recommended further assessments of fitness for work.
- 45 Mr Bradfield informed Mr Walley that a rescheduled appointment had been made for Mr Walley to see Dr Grainger at 4.00 pm on 1 August 2019: see Exhibit 2, Tab 6. Nothing in Mr Bradfield's letter indicated that the failure to have attended the earlier appointment was misconduct, or a failure to follow a lawful direction. Nothing in the letter suggested that a failure to attend, or further failure, would be treated as misconduct or be associated with any sanctions.
- 46 On 29 July 2019 Mr Walley told the Department that he would attend the appointment and provided a medical certificate from his GP which certified him as unfit for work until 29 September 2019.

1 August 2019 appointment with Dr Grainger

- 47 Mr Walley attended Dr Grainger's rooms on 1 August 2019. On arrival he was presented with a form (Exhibit 3) which relevantly stated:

I hereby consent to such medical examinations and tests as may be requested by the examining doctor and/or referring party subject to my specific instructions. This may include accessing radiological results and information from other medical practitioners. I also hereby consent to any documents and/or medical tests that I provide to Next Health, if relevant to the matters of the assessment and referred to in the report, being provided to the referring party if requested. I confirm the above details are correct and authorise release of this report and supporting documentation to the person/organisation noted above under Referral Source Details. I am aware that I cannot record my assessment without prior consent by the examining doctor and Next Health. I understand I have the right to request a chaperone and that one will be made available to me if asked for. I hereby consent to the use of a chaperone should one be requested by me or by the doctor conducting the assessment.

- 48 Ms Emma-Lee Thornton of Department of Parks and Wildlife was listed under "Referral Source Details" on the form.
- 49 Mr Walley emailed a copy of the consent form to Mr Amati seeking Mr Amati's advice. Mr Walley's evidence was to the effect that he was confused by the content of the consent form and concerned by its breadth. In particular, he was concerned that it apparently allowed Ms Thornton to carry out tests or examinations as he did not believe she was medically qualified.
- 50 Before Mr Amati responded to Mr Walley, Mr Walley was taken into Dr Grainger's rooms where he commenced a discussion with Dr Grainger. According to Mr Walley, Dr Grainger asked him to go into detail about the incident of October 2000 and then proceeded to explain the tests and assessments which Dr Grainger proposed carrying out on Mr Walley. Those tests included shining a light in Mr Walley's eyes, using a device to scan his brain and attaching electrical wires to pass current through his body.
- 51 Mr Walley was concerned about his physical and spiritual wellbeing. He said he was concerned that Dr Grainger did not know enough about his medical history to conduct the tests safely and he was concerned for the effect of these procedures on his spiritual totem, and therefore his own spiritual wellbeing.
- 52 While in Dr Grainger's rooms, Mr Amati called Mr Walley and "discouraged" him from signing the consent form. Mr Amati also spoke directly to Dr Grainger, telling him why he had discouraged Mr Walley from signing, namely that the consent form was too broad.
- 53 Mr Walley's evidence was that at about that point, or just after Dr Grainger finished his conversation with Mr Amati, Dr Grainger's assistant entered the room with a different form (Exhibit 5) and that the assistant was "screaming", "hysterical" and "begged" him to return the first form. He said she got on her knees and was crying, as she asked for the form back, and gave him an alternative form.
- 54 The respondent's counsel invited the Board to reject Mr Walley's evidence about this account as being implausible. The Board does have concerns about the veracity of Mr Walley's evidence in relation to this aspect of the appointment. However, ultimately, he did come into possession of the second form, being a form which gave authority for the release of medical records.

- 55 After the assistant left, Dr Grainger then spoke words into a dictaphone to the effect that the appointment was finished. According to Mr Walley, he did so because he had to attend to and comfort his assistant who was in a state of distress about the confusion over the forms. Again, it should be said that Mr Walley's account in this regard lacks credibility, and the Board is not prepared to find that Dr Grainger terminated the appointment for the reason Mr Walley suggested.
- 56 Mr Walley also suggested that Dr Grainger had indicated agreement with him that the consent form was not ideally worded, and that he had the impression that he and Dr Grainger would work out what to do about the consent forms. Mr Walley admits that he did not sign any consent form, but disputes the assertion that he refused to sign.
- 57 Exhibit 6 includes an email from Dr Grainger's rooms in response to the Department's request for an explanation of the events of 1 August 2019. The email, which is dated 16 October 2019, says:
- Mr Walley did attend on 1 August 2019.
 - Dr Grainger does not recall if Mr Walley was accompanied by anyone.
 - Our usual practice is for the consent form to be signed immediately upon arrival, prior to entering the consult room with the doctor. From time to time the patient may enter the room and sign the consent form with the doctor. Mr Walley was asked to check his personal details and read and sign the consent form immediately upon arrival.
 - Mr Walley did meet briefly with Dr Grainger. Mr Walley was taken into the consult room so that the doctor could explain the assessment and examination process to him while Mr Walley waited for a call back from his Union representative. When the Union representative did eventually phone back, it was determined that consent would not be given to go ahead with the assessment. The assessment was terminated.
 - The assessment did not commence.
 - There were no tests performed

Please let me know if you need any further information.

The Breach of Discipline Process commenced

- 58 By letter dated 28 August 2019, Mr Bradfield informed Mr Walley that he was suspected of committing two breaches of discipline. The letter set out the allegations of breach of discipline as detailed above, and provided Mr Walley with an opportunity to respond to the allegations: Exhibit 2, Tab 7.
- 59 By letter dated 11 September 2019, Mr Walley's Union responded to the letter of allegations on Mr Walley's behalf: Exhibit 2, Tab 8.
- 60 By letter dated 16 September 2019, Mr Bradfield informed Mr Walley that an investigation into the allegations of breach of discipline would take place: Exhibit 2, Tab 9.
- 61 On 18 November 2019 the Department wrote to Mr Walley regarding the Breach of Discipline - Investigation Outcome. The details of that correspondence are set out under "The misconduct findings" above.
- 62 Notably, the Department's reasons recited the background to the allegations and findings, rather than being directed to issues that might generally concern the sanction to be imposed, other than the final point which is that:
- ...[T]he department is left in a position where it is unable to determine whether it is safe to return to you the workplace in any capacity. In those circumstances, your conduct has frustrated the ability for the employment relationship to continue.
- 63 In the letter dated 18 November 2019, the Department informed Mr Walley that the allegations were substantiated and that the Department proposed to dismiss Mr Walley for his conduct. The letter provided Mr Walley an opportunity to respond to the proposed penalty of dismissal: Exhibit 2, Tab 11.
- 64 By letter dated 20 December 2019, Mr Walley's Union responded to the proposed dismissal on Mr Walley's behalf: Exhibit 2, Tab 12.

Decision to dismiss Mr Walley

- 65 The Department terminated Mr Walley's employment by letter dated 6 January 2020 with immediate effect, and paid him five weeks ordinary salary in lieu of notice.
- 66 Mr Walley has not engaged in paid employment since the termination. He asserts that he is ready, willing and able to return to his previous position. His oral evidence under oath was that he has been fit for work since the dismissal. However, his evidence in this regard was obviously not candid. The following exchange occurred in cross-examination:
- Have you been fit for work since the date of your dismissal until now? Yes, I've been fit.
- And before you accessed your superannuation most recently were you accessing the workers' compensation payments? No.
- You weren't? Um, no. Oh, again, I - I have to - I have to be, um - I - I can't remember my bank details. Money would have went in, I don't know. Um, I really don't know. Um, but I - I - I, um, I don't know what the situation is, I, um, I probably -I go to my tax accountant. And to give you a complete answer you'd have to see my tax accountant.
- But did you receive workers' compensation payment after you left the department? Again, I have to - all payment went to my tax. My tax (indistinct) tax.
- 67 Following the hearing, the Board was provided with details of the Workers' Compensation payments Mr Walley received after the termination of his employment. This information was provided with the consent of both parties. This information revealed that Mr Walley had been in receipt of weekly incapacity payments totalling \$235,971 in respect of the incident of October 2000 and that weekly payments were exhausted and ceased as of 29 June 2021.

- 68 Consideration of this ground of appeal should start with a restatement of the principles espoused by Madgwick J in the Federal Court in *Blackadder v Ramsay Butchering Services Pty Ltd* [2002] FCA 603; (2002) 118 FCR 395 at [68]-[69] concerning an employer's ability to require employees to undergo medical assessment:
- (a) It is essential for an employer's compliance with its occupational safety and health duties that it be able:
...where necessary, to require an employee to furnish particulars and/or medical evidence affirming the employee's continuing fitness to undertake duties. Likewise, an employer should, where there is a genuine indication of a need for it, also be able to require an employee, on reasonable terms, to attend a medical examination to confirm his or her fitness. This is likely to be particularly pertinent in dangerous work environments.
 - (b) The question whether it is reasonable for an employer to request an employee to attend a medical examination will always be a question of fact as will the question of what are reasonable terms for the undertaking of the medical examination.
 - (c) A sensitive approach is generally required.
 - (d) Relevant matters will usually include respect for privacy.
 - (e) The requirement to provide medical evidence of fitness and attend a medical examination on reasonable terms are implied by law into contracts of employment on the basis of "necessity" in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at [450].
- 69 Further to the requirement for a sensitive approach respecting an employee's privacy, the Board considers it is incumbent on employers when directing an employee to undergo medical examination to ensure the employee can participate in the process in an informed and empowered way.
- 70 In *Grant v BHP Coal Pty Ltd* [2014] FWCFB 3027, the Full Bench of the Fair Work Commission noted at [110], that "a direction given to an employee is lawful to the extent that it falls reasonably within the scope of service of the employee". Having concluded that the employer in that case was lawfully able to direct its employee to attend a medical examination for a functional assessment, the Full Bench identified contextual factors relevant to the finding at first instance that the direction was reasonable, namely:
- (a) The length of the absence from the workplace;
 - (b) The medical history and nature of the medical condition suffered;
 - (c) The degree of detail provided in medical certificates provided by the employee;
 - (d) Whether the injury was known to be exposed to aggravation;
 - (e) The nature of the employee's job; and
 - (f) The qualifications of the medical practitioner undertaking the assessment.
- 71 The Department submits that the direction that Mr Walley attend a medical assessment with Dr Grainger was reasonable and fair as:
- (a) Mr Walley had a long history of recurrences of PTSD from the original workplace injury suffered in 2000 and the recurrences involved significant periods of leave and resulted in a number of restrictions on his ability to work;
 - (b) the Department had evidence that Mr Walley was not fit for work, there were definite exclusions on where he could work, there was uncertainty about whether he could work at other locations, there was uncertainty as to whether he was a danger to others, there was evidence that he was at risk of relapse and expert opinion was that he should be subject to further assessment; and
 - (c) Dr Vidovich identified particular further assessment as being by a consultant neurologist and provided the Department with recommended consultants.
- 72 As is hopefully evident from the above summary of the medical opinions before the Department at the time it arranged for Mr Walley to be assessed by Dr Grainger, we do not consider the referral was justified or that the Department had a reasonable basis for requiring that Mr Walley attend it. We do not agree that Dr Vidovich identified a need for assessment by a consultant neurologist. There was no evidence before the Board that she provided the Department with the names of recommended consultants or that she recommended Dr Grainger.
- 73 At the time of the referral to Dr Grainger on 29 May 2019 the medical evidence in the Department's possession was, in summary:
- (a) Dr Vidovich had determined that, as at October 2017, Mr Walley met the diagnostic criteria for a Minor Neurocognitive Disorder (unspecified) because he displayed cognitive abilities on some measures as "low average". She was not in a position to say what the cause of these results was, nor whether there was a degenerative component, without further investigations. His results indicated a need for peer supervision, restricted duties and part-time work but without further investigations, those restrictions should be considered temporary.
 - (b) Mr Walley's GP, Dr Price had certified Mr Walley as having full capacity for work from 13 February 2019 but requiring further treatment and with a restriction on working in Yanchep.
 - (c) Dr Terrace considered that, as at 14 April 2019, Mr Walley did not suffer from a recognised psychiatric disorder but was at risk of further post traumatic recurrences. The risk of recurrences arose specifically from exposure to deceased wildlife, or attending at Wanneroo Road/Yanchep National Park. The risk of recurrence was moderate. Mr Walley's cognition appeared to be within normal limits and a Standardised Mini Mental State Examination produced a perfect score of 30/30.

- 74 While Dr Vidovich suggested medical review and investigations, the purpose of such was "to identify any potential causes and/or reversible contributing factors". The investigations recommended were MRI brain scan and neuropsychological review in 12 months to "identify whether there is a progressive component". Dr Vidovich notes that the outcomes of these investigations "may provide guidance with respect to future treatment".
- 75 Notably, Dr Vidovich had not recommended further assessment of fitness for work nor had she suggested review by a Neurologist. As for the investigations she did recommend, these were matters for Mr Walley and his GP to have considered pursuing, rather than the Department, as they were matters of diagnosis and treatment, rather than work capacity.
- 76 From a psychiatric point of view, the medical evidence all pointed to Mr Walley being fit for work "presently". Dr Terace's conclusion was that Mr Walley did not "presently" suffer from any psychiatric illness.
- 77 In these circumstances, any direction to attend for assessment by a Neurologist was unnecessarily invasive of Mr Walley's person. It would not meet the requirement for sensitivity and respect for privacy identified in *Blackadder*.
- 78 The Board accepts, though, that between Dr Price's qualified certification of fitness and Dr Terace's opinions about the risk of recurrence, the Department was left with something of a quandary as to Mr Walley's return to work. The problem is that the dilemma was not going to be answered by a neurological assessment by Dr Grainger. It is clear enough that Dr Price's and Dr Terace's suggested restrictions related to the risk of recurrence of PTSD, not any neurological condition.
- 79 Mr Walley raises an issue about the reasonableness of the requirement to attend the assessment having regard to cultural considerations. We have said above that we consider it is incumbent upon employers to ensure that employees can participate in medical assessments in an informed and empowered way. To meet this requirement, consideration must be given to employees' cultural and religious practices and beliefs. This is particularly so where the employer is a government agency and the employee is an Aboriginal person, against a history of colonial Government control over Aboriginal people and their bodies. For example, it is not unreasonable to expect that government agencies would ensure that medical practitioners to whom employees are referred have sufficient relevant cultural awareness to perform a medical assessment in an appropriate way.
- 80 For the above reasons, we consider Ground 1 is made out and find that the requirement for Mr Walley to be assessed by Dr Grainger was unreasonable.

Ground 2: Did the failure to attend the appointment on 4 July 2019 justify the sanction of dismissal?

- 81 Because the Board finds that Mr Walley had good reasons to dispute the reasonableness of the direction to attend on Dr Grainger for assessment, it follows that his failure to attend the appointment on 4 July 2019 does not constitute misconduct and cannot be grounds for dismissal.
- 82 The Department did not challenge the evidence to the effect that Mr Walley, through Mr Amati, had disputed the reasonableness of the direction to attend the 4 July 2019 appointment. There was merit to Mr Amati's arguments concerning the reasonableness of the direction. That there was a dispute about the direction, which was the subject of ongoing correspondence between the Department and Mr Amati, is further reason as to why the failure to attend should not warrant a finding of misconduct. To find otherwise is tantamount to prohibiting employees from challenging the reasonableness of an employer's direction, even if the direction is patently unreasonable.
- 83 The Board also accepts that because the Department rescheduled the appointment with Dr Grainger without alerting Mr Walley either to the fact it considered his previous failure to attend to constitute misconduct or that any further failure to attend would constitute misconduct, means that the Department waived reliance upon the 4 July 2019 failure in any event.

Ground 3: Was Mr Walley's conduct on 8 August 2018 misconduct?

- 84 The Department relevantly found that Mr Walley "did not participate in the medical assessment because [he] refused to sign the consent form".
- 85 This ground raises issues as to:
- (a) whether the requirement to participate in a medical assessment with Dr Grainger was a lawful direction;
 - (b) if it was a lawful direction, whether signing a consent form was a requirement for the assessment to proceed; and
 - (c) whether Mr Walley refused to give whatever consent was required for the assessment.
- 86 The Department submits that an employee's refusal or failure to sign a consent form which is required by a medical practitioner equates to a failure to attend the assessment. The Department referred the Board to *Hudson v RMIT University* [2020] FWC 4289 (20 August 2020). In that case, the employee had engaged in correspondence with the employer about the form of consent which a medical practitioner required for the purpose of an assessment arranged by the employer. The employee made her own changes to the consent form, which the medical practitioner was unwilling to accept. Commissioner Bissett said:
- [61] In both form and substance Dr Hudson refused to attend the IME as required by RMIT. To suggest that she was willing to attend – but only on her terms – is a refusal to attend an IME as required by RMIT.
- [62] To suggest that by arriving at the IME appointment she was required to do no more, such as signing a valid consent form, is disingenuous and is rejected. Dr Hudson presented in a way that she knew was not acceptable to the provider. To stipulate the terms on which she would attend the IME does, in my opinion, amount to a refusal to attend the IME as required by RMIT. Had Dr Hudson refused to sign the consent form this could reasonably be construed as a refusal to attend the IME. By signing a modified consent form that Dr Hudson knew would not be accepted is, in effect, no different.
- [63] Even if this was not a refusal to attend it is, in both form and substance, a failure to attend in a manner that the IME could proceed.

- 87 Mr Walley's case is distinguishable from *Hudson*. Firstly, for the reasons set out above, the Board does not consider that the requirement to be assessed by Dr Grainger was reasonable or constituted a lawful direction.
- 88 Second, the evidence does not establish what, if any, form of consent Dr Grainger required be completed, nor that Mr Walley refused to sign or give such consent. While Mr Walley was obviously reticent to, was advised not to, and ultimately did not sign the patient consent in Exhibit 3, any initial refusal appears to have been superseded by later events including Dr Grainger's discussion with Mr Amati and the production of a second, alternative form being Exhibit 5.
- 89 Dr Grainger's rooms explained the events of 1 August 2019 in the email to Ms Thornton dated 16 October 2019, reproduced at [57].
- 90 Notably, the explanation does not expressly state who was involved in determining that consent would not be given. Further, the consent referred to in the relevant part of the email is consent to the assessment going ahead, rather than a particular form of written consent.
- 91 The email does not in any way undermine Mr Walley's evidence that he was awaiting advice from Mr Amati before determining whether to sign the consent form, or that Dr Grainger terminated the appointment immediately after speaking to Mr Amati without any further discussion with him about what written consent was required for the assessment to go ahead. As something of an aside, the Board notes that Mr Walley had previously provided consent to the assessments by Dr Vidovich and Dr Terrace and had authorised the release of their reports to his employer.
- 92 Third, neither of the two forms appear to provide irrevocable consent to the conduct of an assessment. Exhibit 3 is expressed to be "subject to my specific instructions". Exhibit 5 does not provide consent to any assessment at all, but rather to the release of records produced following examination. It is difficult to see, then, how the completion of either form might have had any practical role to play in facilitating Dr Grainger's assessment of Mr Walley.
- 93 Finally, there is no evidence as to precisely what form of consent Dr Grainger required to proceed with the assessment. The email from Dr Grainger's rooms refers to a "usual practice" for "the consent form to be signed immediately upon arrival". It does not state the content of the consent form or which parts of it are required.
- 94 In short, we do not consider the Department has discharged its onus of establishing that provision of a particular form of consent was a requirement for the assessment to proceed, nor that Mr Walley refused to give such consent, such that Mr Walley practically refused to attend an assessment with Dr Grainger.

Ground 4: Was the implicit direction to sign the consent form lawful and reasonable?

- 95 By this ground, Mr Walley says that if, which is not admitted:
- (1) the medical procedure proposed to be undertaken by Dr Grainger was directed by the Department to be undertaken by the appellant as a condition of his employment or a precondition to his continuing employment;
 - (2) the direction to undertake the procedure had implicit in it a direction to the appellant to sign a consent to the procedure; and
 - (3) the appellant deliberately failed, declined or refused to sign the Patient Information Record the direction or order was not and could not lawfully or reasonably have been given by the Department to the appellant that he sign:
 - (a) a consent to a medical procedure as a precondition to that medical procedure;
 - (b) the Patient Information and Attendance Record presented to him for signature on 1 August 2019 when it contained words so lacking in meaning as it did;
 - (c) a document consenting to unspecified and unquantified medical examinations and tests; and
 - (d) a document consenting to medical examinations and unspecified and unquantified tests which may be requested at any time by the examining doctor and/or referring party.
- 96 In view of the Board's conclusions on Grounds 1, 2 and 3, it is unnecessary to consider this ground of appeal.

Remedy: Should the decision be adjusted?

- 97 Having concluded that Mr Walley did not commit a breach of discipline or engage in misconduct, the Board is required to consider what relief it should grant. Section 80I(1) of the Act enables the Board to "adjust" the decision or finding. The meaning of "adjust" for the purposes of s 80I(1) was described by the Industrial Appeal Court in *State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169:

...The power to "adjust" a decision for determination can only be a power to reform the decision in some way. In the case of a decision or determination by an employer to dismiss an employee with one month's pay in lieu of notice, the most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question. It may be arguable that the power to adjust a decision of dismissal includes a power to adjust the period of notice. The issue does not arise in this case because no such adjustment was sought by the respondent. He made no claim to reform the decision in that way, that is by altering the period of notice...

- 98 It is uncontroversial that the power in s 80I does not allow for the award of compensation for unfair dismissal, as may be ordered under s 23A of the Act. However, s 80I(1) does enable the Board to order the re-employment of an appellant with consequential orders for the payment of past lost benefits: *Martin v The Director General of Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA)* [2012] WAIRC 00703; (2012) 92 WAIG 1620. That is the relief that Mr Walley seeks.

- 99 The Board has significant reservations about making an order for reinstatement. Mr Walley's evidence and the manner in which he gave it raised concerns about whether he had cooperated in good faith and with honesty with his employer in the management of his PTSD illness, his fitness for work and disciplinary processes. As indicated above, his explanation of the events at Dr Grainger's rooms on 1 August 2020 was implausible. It is open to infer that this account was contrived to suit Mr Walley's defence of the disciplinary process and deflect responsibility for his part in the termination of the assessment. Additionally, Mr Walley's response to questions put to him in cross-examination was frequently to simply deny having any recall of events. This included denying any recollection of being informed of disciplinary action taken against him, of the circumstances triggering extended periods of incapacity and absence from work and of his receipt of Workers' Compensation benefits. Those are not trivial matters, or matters of minute detail which one would expect the fading of memory over time to lead to uncertainty. They concern significant events in Mr Walley's career such that his denial of any recollection of them reflects on his credibility.
- 100 That Mr Walley was evasive in his answers to these questions has two consequences. First, it leads the Board to treat Mr Walley's assertion that he is ready, willing, and able to return to his pre-dismissal occupation and that he has been fit to do so since the date of dismissal with caution. Second, it either reflects or creates precarious ground for the re-establishment of the trust and confidence required for a continued employment relationship.
- 101 The issue regarding Mr Walley's capacity for work was not fully addressed by either party at hearing. The Board invited the parties to provide further written submissions following hearing as to what conclusions the Board could draw on the evidence before it about the inherent requirements of Mr Walley's position and the practicability of reinstatement.
- 102 The evidence before the Board does not enable the Board to reach a sound conclusion either as to what are the inherent requirements of Mr Walley's position nor as to whether Mr Walley is, or has been, fit to perform those requirements since the dismissal or at the date of the hearing.
- 103 Mr Walley's counsel submits that the medical evidence clearly indicated that Mr Walley was fit to perform his position. This may be overstating the effect of the medical evidence. At best, that might describe the recent medical evidence as at 29 May 2019, however it does not reflect the totality of the medical evidence.
- 104 Mr Walley's counsel also submits that, given Mr Walley's position was primarily an educative one, it is possible for reasonable adjustments to be made so as to avoid the triggering factors. He points out that the JDF does not specify the division between developing educative programs and delivering them. It is implicit in this submission that Mr Walley accepts that he is restricted in his ability to deliver programs. More to the point, even if delivering the program is a relatively small proportion of the overall duties, thus does not mean it is not an inherent requirement of the position.
- 105 Mr Walley also submits that it is clear from the evidence that Mr Walley is not always triggered by working around Yanchep National Park or seeing dead animals. Accordingly, while Mr Walley may require some accommodation to perform his position by way of reasonable adjustments, it is not onerous for the Department to provide such accommodation. To date, the Department has not fully explored whether it can make reasonable adjustments or implement Dr Terace's recommendations. Mr Walley was not seeking reinstatement to a different position.
- 106 The Department bears the onus of establishing reinstatement is impracticable: *Harvey* at [193]-[194] citing *Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2016] WAIRC 00236; (2016) 96 WAIG 408. The Department submits that the report of Dr Terace establishes that Mr Walley is not fit to fulfil the inherent requirements of his position. Accordingly, reinstatement is impracticable, and Mr Walley should not be afforded any relief.
- 107 The Department also relies upon Mr Walley's history of recurrences of his Workers' Compensation Claim for PTSD. For example, on about 21 March 2017 Mr Walley reported by email "I have found a dead decaying kangaroo near a pine tree & is impacting on my ability as per past workers condition". He then submitted a Recurrence of Disability Form on 23 March 2017 referencing the discovery of the kangaroo carcass. He remained certified totally unfit for work from 22 March 2017 until June 2018.
- 108 When Mr Walley was questioned about this incident in cross-examination, he skirted around any admission of the effect of the discovery of the kangaroo carcass on his medical condition. He implausibly insisted that he reported the incident only because it would somehow help a forensic scientist, and that he had a duty of care to report it. He stated that he came across dead kangaroos all the time. That is no doubt the case, but he was clearly underplaying the connection between his discovery on 21 March 2017 and his extensive period of unfitness immediately following it.
- 109 Also, on 8 September 2018, Mr Walley emailed his manager, Ms Julia Coggins, to notify her that he had, on 3 September 2018, seen a vehicle parked in the bush near Yanchep National Park Forest area. In his email he stated that this caused him to have flashbacks of a suicide victim in a car, and further that he had similar flashbacks several times when he saw cars parked at or near his place of work at Yanchep Forest. He stated "At present I am fine though reporting is necessary and I am seeking counseling".
- 110 Mr Walley then lodged medical certificates indicating total incapacity due to recurrence of his PTSD in the period from 21 September 2018 to 22 January 2019. It is not clear what if any event triggered the recurrence, but it occurred within a few weeks of Mr Walley reporting having flashbacks and within a few weeks of him being notified of a disciplinary investigation.

- 111 Mr Walley's GP Dr Price completed a WorkCover WA Progress Certificate of Capacity on 13 February 2019 in which he certified Mr Walley as having "full capacity for work from 13/02/19" but requiring further treatment and with a restriction on working in Yanchep National Park. He indicated a further review in two months. By 24 June 2019, Dr Price certified, by way of a WorkCover WA Progress Certificate of Capacity, that Mr Walley had full capacity for work from 24 June 2019, but he still stipulated to "Avoid Yanchep national park". Within four weeks of that date, on 29 July 2019, Dr Price's certification had again changed to "no capacity for any work from 29/07/2019 to 29/09/2019". Then on 22 August 2019, he apparently backflipped, issuing a WorkCover WA Progress Certificate of Capacity stating Mr Walley had full capacity for work from 29 July 2019 but requiring further treatment (and to "Avoid Yanchep forest area") with review in two months.
- 112 We cannot say that it is clear from the medical evidence and Mr Walley's history of recurrences that he is or was fit to perform the inherent requirements of his position.
- 113 If this had been the only reservation, the Board would have been inclined to order Mr Walley's reinstatement. If, as the Department submitted, Mr Walley's work restrictions could not reasonably have been accommodated, then it would be open to the Department to commence a process with a view to medical retirement.
- 114 However, because of the Board's reservations about Mr Walley's bona fides or willingness to engage frankly, candidly and cooperatively with the Department, it is foreseeable that such a course will likely lead to further dispute and place a significant and onerous burden on the Department in the management of Mr Walley's return to work. This is particularly so in circumstances where:
- (a) Mr Walley had been issued a written reprimand in relation to unrelated allegations of breach of discipline on 20 December 2018; and
 - (b) a separate disciplinary process concerning further allegations was commenced on 14 September 2018 but was not pursued because Mr Walley then commenced a period of extended leave for recurrence of his PTSD, and was ultimately discontinued upon the employment ending.
- 115 Having regard to the interests of the persons immediately concerned in this matter, to make an order for reinstatement would not be to exercise the Board's power in accordance with equity, good conscience and the substantial merits of the case: *Harvey* at [192].
- 116 In *Thavarasan* at [73], the Board, chaired by Commissioner Kenner as he was then, expressed the view that it was open to the Board to adjust a dismissal decision by adjusting the period of notice, by way of payment in lieu of notice. In this case, the Board considers the appropriate remedy is to adjust the dismissal decision by quashing the finding of breach of discipline and adjusting the period of notice from 5 weeks to 13 weeks with the effect that Mr Walley should be paid an additional 8 weeks' salary and benefits in lieu of notice. In the Board's view, this period is consistent with the time that it may have taken for any necessary further investigation of return to work options, and a fair medical retirement process to have occurred.
- 117 The Board will make the following orders:
- (a) the findings of breach of discipline are quashed; and
 - (b) the dismissal decision is adjusted by adjusting the period of notice from 5 weeks to 13 weeks.

2021 WAIRC 00571

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 18 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TREVOR WALLEY

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF BIODIVERSITY, CONSERVATION AND
ATTRactions**RESPONDENT****CORAM**PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
MR J LAMB - BOARD MEMBER
MS K ROBERTS - BOARD MEMBER**DATE**

TUESDAY, 9 NOVEMBER 2021

FILE NO

PSAB 4 OF 2020

CITATION NO.

2021 WAIRC 00571

Result	Appeal upheld
Representation	
Appellant	Mr G McIntyre, SC
Respondent	Mr D Anderson, of counsel

Order

HAVING heard from Mr G McIntyre, SC on behalf of the appellant and Mr D Anderson, of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT appeal PSAB 4 of 2020 is upheld.
2. THAT the decision of the respondent to dismiss the appellant dated 6 January 2020 is adjusted by:
 - (a) quashing the findings of breach of discipline; and
 - (b) adjusting the period of notice from 5 weeks to 13 weeks.

(Sgd.) R COSENTINO,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2021 WAIRC 00521

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2021 WAIRC 00521
CORAM : PUBLIC SERVICE ARBITRATOR
 SENIOR COMMISSIONER R COSENTINO
HEARD : MONDAY, 13 SEPTEMBER 2021
DELIVERED : TUESDAY, 5 OCTOBER 2021
FILE NO. : PSA 12 OF 2020
BETWEEN : JANINE COOPER
 Applicant
 AND
 WACHS MIDWEST
 Respondent

CatchWords : Industrial Law (WA) – Public Service Arbitrator – Application for reclassification – Statement of Principles applied – Whether there has been a significant increase in work value – New duties – More responsibility – Increased autonomy – Increase in workload and an increase in work value – Broadened duties are of a higher level – Flow on effect – Overall change in the nature of work – Increase in the skill and responsibility – Changes and increases are significant so as to amount to an increase in work value warranting reclassification – Application upheld

Legislation : *Industrial Relations Act 1979* (WA)

Result : Application upheld

Representation:

Applicant : Ms J Cooper, on her own behalf

Respondent : Ms S Waterton and Ms R Sinton

Case(s) referred to in reasons:

Shehade v Director General of Health as Delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Employer [2015] WAIRC 00973; (2015) 95 WAIG 1786

United Voice WA v The Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board [2014] WAIRC 01098; (2015) 95 WAIG 178

Willers v WorkCover, Western Australian Authority [2010] WAIRC 00183; (2010) 90 WAIG 333

Reasons for Decision

Background

- 1 Ms Cooper has applied under ss 80F(2) and 80E(2)(a) of the *Industrial Relations Act 1979* (WA) to review a decision that her position of Coordinator Patient Information and Clerical Services (Review Position) for the Midwest Region of the WA Country Health Service (Health Service) not be reclassified from Level G5 to Level G6. For the reasons that follow, her application is allowed.
- 2 Ms Cooper has been the substantive occupant of the Review Position for the Midwest Region of the Health Service, since the position was created in July 2013.

- 3 The Review Position falls under the *WA Health System – HSUWA - PACTS Industrial Agreement 2020*. The Review Position, as described in a Job Description Form (JDF) registered on 4 October 2017 (2017 JDF), was last reviewed on that date.
- 4 Ms Cooper applied for the Review Position to be reclassified on 28 October 2020. Her Form 8A – Application for Reclassification (Application) was filed with the Public Service Arbitrator (Arbitrator) on 5 November 2020 before she had received any response to the reclassification request from the Health Service.
- 5 The Arbitrator wrote to Ms Cooper and the Health Service on 10 November 2020 advising the Arbitrator could not consider Ms Cooper's Application before the Health Service had an opportunity to consider and respond to the reclassification request.
- 6 Subsequently, on 23 March 2021, the Health Service informed Ms Cooper and the Arbitrator that the Classification and Establishment Committee (CEC) had denied Ms Cooper's claim for reclassification. In making this decision, the Health Service relied upon an external Review of Classification Determination Report prepared by SWY Consulting dated 5 March 2021 (SWY Report) which recommended the Review Position remain at classification Level G5.
- 7 On 30 April 2021, Ms Cooper confirmed she wished to proceed with her appeal against the Health Service's decision not to reclassify the Review Position. She claims there has been a significant increase in work value since October 2017. She says the work has become more complex, more skills and knowledge are required to perform it, and the level of responsibility involved has increased.

The test for reclassification

- 8 The Arbitrator must determine whether there has been a significant net addition to the work value required of the Review Position since it was last reviewed on 4 October 2017. To do this, the Arbitrator will consider changes in the work, skill level, responsibility of the position, and the conditions under which the work is performed.
- 9 For a position to warrant reclassification on the basis of increased work value, the applicant, in this case Ms Cooper, needs to demonstrate that since the position was last reviewed, the work, skill or responsibility of the position, or the conditions under which the work is performed, have changed, *and* that such change constitutes a significant net addition to work value such as to warrant upgrading to a higher classification. Change of itself is not sufficient. The change must make the work of a higher level. The Arbitrator applies the test strictly. See *Shehade v Director General of Health as Delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Employer* [2015] WAIRC 00973; (2015) 95 WAIG 1786 and *United Voice WA v The Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board* [2014] WAIRC 01098; (2015) 95 WAIG 178 at [11]-[12].
- 10 The test the Arbitrator applies when considering work value changes is derived from the Statement of Principles – July 2021 at Schedule 2 of the 2021 State Wage Case Order [2021] WAIRC 00179; (2021) WAIG 101 477 which relevantly provides:
 - 1.1 This Statement of Principles is to be applied and followed when the Commission is making or varying an award or making an order in relation to the exercise of the jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.
 -
 7. **Work Value Changes**
 - 7.1 Applications may be made for a wage increase under this Principle based on changes in work value.
 - 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute *such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification* [emphasis added].
 - 7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position.
 - 7.4 *These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed* [emphasis added].
 - 7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.
 - 7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, the new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by an employee and not by increasing the rate for all employees working at that classification.
 - 7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.
 - 7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.

- 7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. The assessment should normally be based on the previous work and the nature and extent of the change in work.
- 7.10 The expression "the conditions under which the work is performed" relates to the environment in which the work is done.
- 7.11 *The Commission should guard against contrived classifications and over-classification of jobs* [emphasis added].
- 7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

Evidence

11 The Arbitrator received into evidence and considered the following documents in determining this application:

- (a) Applicant's Outline of Submissions filed on 10 September 2021 (Exhibit A).
- (b) Applicant's Response to SWY Consulting's Position Evaluation Questionnaire on the Review Position contained in the SWY Report (Exhibit B).
- (c) Applicant's Comments on the Comparison of JDFs used by SWY Consulting (Exhibit C).
- (d) JDF for the Operations Manager at Geraldton Hospital (Exhibit D).
- (e) Witness Statement of Mr Stephen Young filed 27 August 2021 with the following annexures (Exhibit E):
 - (i) Email chain between Bronte Shiosaki and Stephen Young appointing SWY Consulting to undertake an independent classification review and assessment process of the Review Position;
 - (ii) 2017 JDF;
 - (iii) Email chain between Ms Cooper, Grant Patrick and Tamara Sweeney regarding the Position Reclassification Request with the following attachments:
 - (A) Organisation Structure Charts of the WA Country Health Service - Midwest Geraldton Hospital of "Operations", "Facilities and Assets", "Facilities and Assets - Maintenance", "Health Information", "Patient Information & Clerical Services", "Support Services", "Support Services - Catering", "Medical Imaging" and "Pharmacy" all registered on 17 March 2015;
 - (B) Matrix – Proposed Position and Comparative Positions;
 - (C) Proposed JDF drafted by Ms Cooper for the Review Position, undated (Proposed JDF);
 - (D) Form E3 Position Evaluation Questionnaire completed by Ms Cooper dated 14 October 2020;
 - (E) Form E4 Position Reclassification Request completed by Ms Cooper dated 14 October 2020;
 - (F) JDF for Manager Administration Services at Albany Hospital - Operations registered 19 July 2019 (Albany JDF);
 - (G) 2017 JDF;
 - (iv) Form E4 Position Reclassification Request completed by Ms Cooper dated 14 October 2020;
 - (v) SWY Report with the following attachments:
 - (A) Form E4 Position Reclassification Request completed by Ms Cooper dated 14 October 2020;
 - (B) Organisation Structure Chart of the WA Country Health Service - Midwest Geraldton Hospital of "Patient Information & Clerical Services" registered on 17 March 2015;
 - (C) 2017 JDF;
 - (D) Proposed JDF;
 - (E) Position Evaluation Questionnaire completed by S Young dated February 2021;
 - (F) Form E3 Position Evaluation Questionnaire completed by Ms Cooper dated 14 October 2020;
 - (G) Albany JDF;
 - (H) JDF for Coordinator Administration at Nickol Bay Hospital registered 3 May 2017 (Nickol Bay JDF); and
 - (I) JDF for Coordinator Patient Support Services at Kalgoorlie Hospital registered 4 July 2013 (Kalgoorlie JDF).
- (f) Respondent's Outline of Submissions dated 27 August 2021 with the following annexures (Exhibit F):
 - (i) Email chain between Commissioner Matthews' Chambers, Ms Cooper and Rebecca Sinton confirming that no determination had been made regarding the Position Reclassification Request, and that it would take some time;
 - (ii) Coordinator Patient Information and Clerical Services Employee Initiation Reclassification WACHS Midwest Human Resources Review dated 18 March 2021; and

- (ii) Email from CEC with Submission Outcome Statement advising the Review Position to remain at Level G5 after reviewing the Position Reclassification Request and the SWY Report.

12 The Arbitrator heard oral evidence of:

- (a) Ms Cooper, via telephone;
- (b) Mr Derek Fraser, Operations Manager at Geraldton Hospital via telephone; and
- (c) Mr Stephen Young, SWY Consulting via telephone.

Ms Cooper's case

- 13 Ms Cooper gave evidence and called Mr Derek Fraser as a witness. Mr Fraser is the Operations Manager at Geraldton Hospital. The Review Position reports to Mr Fraser's position of Operations Manager, although this does not appear to be reflected in Mr Fraser's JDF (Exhibit D) which makes no express reference to the Review Position.
- 14 Ms Cooper explained that the Review Position is responsible for the oversight and coordination of two principal areas of hospital operations. First, the staff performing clerical services within various departments in the hospital, reception and telephone operations. The second area of general oversight and coordination is patient record management.
- 15 Ms Cooper's experience of performing the role is that the most significant demands relate to the coordination, supervision and support of a large number of clerical staff. She also emphasises the demands associated with liaison with operational managers and managers within various hospital departments in the course of fulfilling the coordination of clerical staff that support those departments.
- 16 Ms Cooper described the demands in this regard as having increased since 2017, primarily as a consequence of a restructure undertaken at the behest of a previous Operations Manager which was designed to centralise clerical resources in the hospital. She was unable to pinpoint precisely when this centralisation process commenced or was completed. Mr Fraser explained that it was underway by the time he commenced in the Operations Manager role in 2017, and continued to evolve through 2018 and 2019.
- 17 This restructure of operations involved Ms Cooper physically relocating from the Medical Records Department to the Operations Centre as well as joining the Hospital Management Committee and taking on additional departments, including Medical Imaging. The general gist of her evidence was that the role transformed from one that primarily focused on liaising with the clerical team itself on day to day operational issues, to being part of the Hospital Management Team and focused on liaising and negotiating with the managers of other hospital departments, so that it was more strategic.
- 18 Ms Cooper accepts that her workload is a separate issue to increased work value and insists that the two issues ought not to be confused. In other words, she says the increased workload should not be equated to an absence of, nor negate, an increase in work value.
- 19 In summary, Ms Cooper says there has been a significant increase in the Review Position's work value because:
- (a) there has been an increase in FTE positions reporting to the Review Position;
 - (b) there has been an increase in staffing management due to staff movements and secondments;
 - (c) there has been an increase in liaison regarding service delivery with other managers;
 - (d) the Review Position requires a higher level of communication, negotiation and liaison with managers;
 - (e) there is an increased requirement to develop procedures to reflect constant changes and activity;
 - (f) there is an increased need for knowledge of industrial awards and policies;
 - (g) more time is spent with staff looking after conflicts and wellbeing;
 - (h) there is greater complexity around knowledge and understanding of many departments and services; and
 - (i) there are new duties not listed on the 2017 JDF.
- 20 Ms Cooper says the Review Position should be reclassified because of these new duties and because increases in the demands in relation to existing duties amount to a significant net increase in work value.
- 21 Ms Cooper also placed emphasis on the similarity between the Review Position and the Level G6 position of Manager Administration Services at Albany Hospital – Operations (Albany Hospital Position).
- 22 Ms Cooper completed a Form E3 Position Evaluation Questionnaire on 14 October 2020. In it, she indicates that the Review Position requires a certificate of secondary education (Year 10 equivalent) as the minimum essential level of education plus one to three years' practical experience. She describes the scope of activities as consisting of supervision of a large group that perform similar activities, with substantial knowledge of activities and problems of other functional areas within and/or outside the agency being necessary. She assessed the Review Position as requiring "maximum" interpersonal skills for internal contacts. She describes the role as responsible for managing and delegating work to subordinates, independently drawing up guidelines for working methods and having considerable influence on outcomes of activities and functions.

Increase in FTE positions and staffing demands

- 23 Ms Cooper says that the centralisation of clerical administration has resulted in an increase of nine FTE reporting to her, bringing the total number of FTEs reporting to the Review Position to approximately 35 FTEs or 60 individual employees.
- 24 The increase in FTEs reporting to the Review Position has increased the workload of the role. However, more significantly, Ms Cooper says the increase reflects the increased complexity of the role because the reports are required to work within a greater number of multidisciplinary departments.

New duties

- 25 Ms Cooper argues that the Review Position has the following new duties:
- (a) obtaining feedback about services, assessing and reporting against measures of performance;
 - (b) participating as a member of the Operations Management Team;
 - (c) participating in hospital working groups, committees and projects;
 - (d) undertaking assignments on request from the Operations Manager;
 - (e) managing the administrative requirements for Geraldton Hospital;
 - (f) ensuring compliance with all WACHS Midwest policies and procedures; and
 - (g) liaising with external providers for supplies and contract services.
- 26 Ms Cooper noted that in taking on the Medical Imaging Department, she has necessarily also become involved in ongoing communications with an external third party, being the I-Med Radiology Network (I-Med). She said this private provider's program is "not entirely compatible" with the Health Service's systems, requiring liaison with the State Manager of I-Med, the Contract Manager and WA Administration and Partnerships Manager.
- 27 Additionally, the clerical arrangements of the Visiting Specialist Department are now under her management, having previously been managed by the Medical Administration Department. This department requires extensive intervention, including management support to implement and maintain because private visiting specialists have their own procedures, software and Medicare billing requirements. A particular additional requirement she has identified as a result of managing the Visiting Specialists, is a requirement to manage the waitlist.
- 28 She says it has been necessary to develop new policies and procedures.
- 29 Ms Cooper says the additional duties add responsibility and increase the level of knowledge required and have increased the skills and complexity required to perform the Review Position.

Responsibility

- 30 Ms Cooper gave evidence that the Review Position is expected to liaise with other managers in relation to service delivery and contribute to operations management meetings and so has a higher level of responsibility associated with it. She said:
- ...My contributions affect not just the administration of the clerical component, but provide stakeholders with a comprehensive overview that can contribute to the overall outcome. Much of what I do doesn't focus just on the clerical side of things, the - you understand that the organisation is reliant on your experience and expertise to achieve organisational key performance indicators and goals...
- ...So when I was situated downstairs, I was be - I was handling more day to day, um, issues within the team, and - and facilitating that, whereas now, I'm handling more, um, overall change of, um, how we do things, um, more liaison with incorporating the other - like, the - the clinical teams, because - and I wasn't doing any of that. So if there's a problem now, that's identified and brought to me, I will go to the head of that team, it might be the medical director, um, or the coordinator of nursing (indistinct) and try and source the solution encompassing, you know, from their side as our side, whereas I wasn't doing that, I was fixing, as best I could within the clerical team, at the time, whereas now, I'm encompassing and I'm working with those people.
- 31 Mr Fraser's evidence was to the effect that there is greater reliance upon the Review Position for coordination of patient information and clerical services and a greater scope of outpatient work compared with 2017.

Business International Position Evaluation Remuneration System (BIPERS)

- 32 Ms Cooper's own Form E3 Position Evaluation Questionnaire responses equate to a BIPERS score of 403, placing the position at the bottom end of a Level G8 classification.
- 33 Ms Cooper says that the Health Service gave the Review Position too low of a BIPERS score.
- 34 In particular, Ms Cooper says the Review Position should have received higher scores for Factor 3 - Scope of Activities, because her role requires *substantial* rather than *limited* knowledge of activities and problems outside the position holder's functional area. She gave examples of the requirement to understand St John of God's services and processes in order to implement offsite clerical services to SJOG for public patients, and to understand outpatient reform in order to service the Visiting Specialist Service.
- 35 Ms Cooper's evidence was:
- ...[Y]ou can't just have a limited knowledge of activities and problems outside of the functional area to do the job. I need to have a comprehensive knowledge of that, um, to be able to manage, coordinate, apply resources against the activity across multiple directorates that provide a diverse range of service provision. Um, I've got to consult and contribute toward how our budget and funding streams can, should and will work, and consult and contribute to previous and current reforms, clinical redesigns, strategic planning, facility redevelopments, forward procurement, so you - you have to have - you have to be able to comprehend the business and the developed corporate knowledge to understand the trends and identify the changes to those trends and react accordingly. And I suppose what I'm trying to say is that while I manage a clerical team, um, if - if something happens and someone wants to add a new outpatient clinic, I've got to be able to see the big picture of how that facility is - is going to be utilised. The rooms, the appropriate clinical medical equipment, supporting the clinician, conflicting usage - what - what impacts it may have on other departments.

Like, our - our fracture clinic has an increase in numbers, but that doesn't just affect fracture clinic, it affects x-ray, allied health, theatre, so it's not just about me putting more clients where the work is, but understanding how it all works and how it's going to impact the - the entire service through the hospital and managing the resources to a budget, ah, service that attracts the ABF funding.

- 36 Ms Cooper says the position should receive a score of seven for Factor 4 - Interpersonal Skills because it requires *maximum* skills, internally. In particular, she refers to the need to address complaints, communicate with external providers, contract managers and consumers, and to coach and develop staff. She also refers to the need to support change management for clerical staff. She stated:

...[A] requirement of the role is not just to identify current (indistinct) potential and future issues, it's to come up with solutions, present the issue and solutions, and then, implement. And - and this involves comprehensive consultation with staff members with, ah, department managers, the hospital management team and other directorates. So you've got to be able to understand the entire - how the entire system works, so that you consider all the aspects of the service and the service delivery and manage expectations of like, my team and each department and directorate. I've got to be able to articulate what the effect will be to both my team as well as any actual or potential impacts to the clinical, environmental, facility and business. You need to be concise, have knowledge of advanced review techniques and high-level expertise to explain how I've reached the conclusions, and you've got to apply highly developed skills in negotiation, consultation, summarisation and conflict resolution.

- 37 Ms Cooper submits that Mr Young's BIPERS assessment, being at the lower end of the range for Level G6, supports the classification of the position as a Level G6 in any event.

Policies, industrial awards and development of procedures

- 38 Ms Cooper says her role is constantly updating instructions, creating and implementing new ones that address the latest policies and procedures and identifying how policies or procedures will affect the workflow. She described it as a "continuous cycle of change management".

Albany Hospital Position

- 39 Ms Cooper argues that the Review Position is clearly comparable to the Albany Hospital Position which is classified at Level G6 and that the Health Service's conclusion that the classification of the Albany Hospital Position is anomalous is without foundation.

The Health Services' case

- 40 The Health Service recognises that there has been an increase in workload/work volume for the Review Position, but submits that increased workload does not equate to an increase in work value and is not itself a basis for reclassification.

- 41 The Health Service acknowledges there has been:

- (a) an increase in FTEs reporting to the Review Position (by nine additional FTEs assigned to wards, emergency department, ambulatory care and other patient/hospital services);
- (b) an increased emphasis towards liaison with line managers and clinicians on staffing requirements and other matters; and
- (c) an increased emphasis for reception and telephone communication coverage support and supervision.

but says that all duties which are performed by Ms Cooper are within the scope of the 2017 JDF and further that some of the duties in the 2017 JDF are no longer required to be performed, namely, oversight of Freedom of Information requests.

- 42 The Health Service submits that even if there has been changes in the Review Position, which amount to a broadening of some duties, those changes do not effect a change in work value because the duties do not require a higher level of skill nor involve a higher degree of responsibility.

- 43 The Health Service contends that matters which Ms Cooper relied upon in Exhibit B, are new material which was not provided to the CEC and that she should not be able to raise these matters in this review of the reclassification decision.

- 44 The Health Service called Mr Young as a witness. Mr Young is the Principal Consultant of SWY Consulting, a human resources management consultancy which, since 2001 has provided, amongst other services, Classification/Job Design and Analysis to the WA Public Sector. Mr Young conducted the assessment and evaluation of the classification of the Review Position on behalf of SWY Consulting. The SWY Report which was the outcome of that assessment was tendered into evidence as part of Mr Young's witness statement.

- 45 In conducting the assessment, Mr Young consulted with Mr Fraser as the supervisor of the Review Position. He noted Mr Fraser's concerns regarding the challenges and inadequacies of the existing organisational structure, and his observation that the existing workload of the Review Position was excessive and probably more complex in nature, due in part to changing technology.

- 46 He also consulted with Ms Cooper and reviewed the Organisation Structure Charts and JDFs that were provided to him. This included the Proposed JDF drafted by Ms Cooper which was not officially endorsed but which he accepted "generally described the present-day requirements of the role". It was the Proposed JDF that was used in his assessment process.

- 47 Mr Young additionally undertook a BIPERS assessment of the Review Position and finally, a comparison process with a number of comparable positions.

48 Mr Young summarised his conclusions in the following terms:

...

15. The analysis of the differences between the JDFs between the review position and the proposed position indicates there were minor differences in the key responsibilities, statement of duties and selection criteria requirements prescribed in the review position since it was last reviewed in 2017.
16. Most duties and responsibilities listed in the proposed JDF were prescribed in existing review position JDF, with the notable exception of, "*Overseeing the registration and processing of Freedom of Information requests for the Midwest.*"
17. As a consequence of these relatively minor variations or emphasis in tasking due largely to an increase workload in the work performed, there had similarly been minor changes made to the selection criteria requirements for the proposed position, where there is no longer the previously stated requirement for demonstrated ability to maintain confidentially.
18. Conversely, the proposed position essential selection criteria additionally included a higher-level expectation in regards to written communication skills required, demonstrated ability to initiate and successfully manage improvements to business processes and services, and sound computer skills and knowledge of administration systems and experience with electronic rostering systems prescribed, all of which represented a change of emphasis from experience with information and records management.
19. The above changes in emphasis appeared to demonstrate that there had not been significant changes to the type or nature of work performed nor to the overall responsibilities required of the office holder. Given this observation it followed that there also had not been any significant impact to the prescribed skills demanded from the office holder to carry out important aspects of the work.

49 A further consideration for Mr Young was:

...[W]ithin the broad-banded classification structure that exists within the WA Public Sector there has always been the expectation of evolutionary development of a position within a classification band that would include an allowance for the broadening of its roles and responsibilities, along with an increase in the skill level required to perform the job to the minimum standard required.

Increase in FTE positions and staffing

- 50 In the SWY Report, which the Health Service adopts and relies upon, Mr Young states that the Review Position involves additional activities relating to tasks associated with the requirement to assume supervisory responsibility for nine additional FTEs within various hospital departments.
- 51 Mr Young's oral evidence was that the BIPERS measurement tool does not place great weight on the number of positions or size of the workforce under the control of the position being assessed.

New duties

- 52 In the SWY Report, Mr Young notes that the Review Position involves additional activities relating to an increased emphasis towards liaison with line managers and clinicians on staffing requirements, expectations and the like, as well as an increased emphasis for reception and telephone communication coverage/support and its supervision.
- 53 His oral evidence was that by virtue of the Review Position's position in the management hierarchy, some involvement with management activities and groups had "been in place, as I understand it, for quite a number of years" including prior to 2017. It is not clear the basis upon which he formed this belief.
- 54 Mr Young describes any new duties as relatively minor variations in tasking or changing emphasis and says these changes are due largely to increased workload. He concludes that these changes are not significant changes to the nature of work performed or the overall responsibilities required of the office holder.
- 55 Ms Cooper did not inform Mr Young about, and he was not aware of, the fact that she now additionally had oversight of the Visiting Specialist Department's clerical arrangements or the precise detail as contained in Exhibit B. Nevertheless, he was provided with and reviewed Exhibit B prior to the hearing. Having regard to the additional detail in that document, he was able to say "the generalities" of the rest of the contents of Exhibit B accorded with his understanding of the Review Position's work at the time he prepared the SWY Report. He also said, with the proviso that he could not comment too deeply about it, not having covered it in the assessment process, that it did not change his assessment of work value, because the sorts of activities involved would be assessed at "anywhere between levels 3 and 5".

Policies, industrial awards and development of procedures

- 56 Mr Young accepted that the Review Position involved establishment of procedures, although not as an everyday occurrence.

Responsibility

- 57 Mr Young's view of the responsibility involved in the Review Position was that any changes were a matter of more of the same type rather than additional responsibility:

...[G]etting out there and talking with and, ah, negotiating, if you like, with the, ah, the service client areas, um, was something that was part of the job albeit that it - it - it's definitely expanded because of the number of, um - because of all those services have been sort of centralised I suppose, um, so the - the emphasis really was more of.

Albany Hospital Position

- 58 Mr Young notes that the Albany Hospital Position is at the same fifth level of management in the Health Service's hierarchy, and has two positions under direct supervision. He concluded that the similarities between the Albany JDF and the Proposed JDF for the Review Position are likely the result of Ms Cooper having used the former to prepare the latter. They are virtually identical. From the fact that the position is Level G6, he says it would be reasonable to conclude the Review Position could also be classified at Level G6.
- 59 Mr Young identified two other positions he considered comparable, namely Coordinator Patient Support Services at Kalgoorlie Hospital (Kalgoorlie Hospital Position) and Coordinator Administration at Nickol Bay Hospital (Nickol Bay Hospital Position). The Kalgoorlie Hospital Position is classified at Level G5, and involves comparable tasks and number of FTEs reports. The Nickol Bay Hospital Position is at the sixth level of management but reports to a Level G6 Business Manager with nine FTEs under its control.
- 60 Having said that, Mr Young also concedes that the comparison exercise is problematic and is cautious about over-reliance upon it.

BIPERS

- 61 The Health Service says it relied upon SWY Consulting's BIPERS assessment comprising a Form E3 Position Evaluation Questionnaire completed by Ms Cooper and a separate assessment completed by SWY Consulting. It notes, citing *Willers v Workcover, Western Australian Authority* [2010] WAIRC 00183; (2010) 90 WAIG 333, that a BIPERS assessment is indicative, it is not prescriptive. The purpose of a BIPERS assessment is to provide an indicative classification level once a work value change has been established. Notwithstanding the fact that the Health Service's assessment was that there was no work value change, the comparison conducted confirmed the classification of the Review Position was consistent with like positions and the assessment supported the Review Position remaining at the Level G5 classification.
- 62 Mr Young's assessment, which differed from Ms Cooper's on six of the 10 evaluated factors, resulted in a score of 330, being at the lower end of Level G6. Mr Young set out in the SWY Report his detailed explanation for his evaluation where it differed from Ms Cooper's.
- 63 Mr Young concluded that the Review Position's Scope of Activities attracted a degree rating of four. He describes this rating as requiring "some knowledge of activities and problems outside the officer holder's functional area". He said:

...I really struggle to believe, comprehend the - the need for a - a position of this type a central service that's providing services across the - the facility, um, is required to have substantial knowledge of activities and problems of other functional areas, ah, including the one that we're targeting. Um, each of those other areas that - that this position services certainly has to have some understanding of what they're about in - in the way in which services or, you know, resources are provided. But to have a substantial that's - that's the requirement of whoever's in charge of those particular areas. And the same would apply with these visiting, ah, consultants or services or whatever they're - whatever they're called locally. Um, ah, and - and - and that this position couldn't be held accountable for, ah, everything that they're - they're doing either. So the notion that substantial knowledge of the activities of those other areas I - I make the point again is to me a - a stretch for what's expected in this - in this role. If it is there's something wrong and I - and I - and I didn't pick up on that.

Senior Commissioner: So you don't think substantial knowledge of those external areas is required but is some knowledge? What degree of knowledge is required?

---Some knowledge and, ah, that's why in terms of the scope of activities I talk about knowledge of other areas. I - I think I made the point, ah, in my assessment that, um, ah, and - and that's how I rated it I - I think I recall it, ah, as being, um, some knowledge of other areas, ah, some knowledge of the workings of other areas is - is necessary in the job. Yeah, some - some knowledge of activities and problems of other functional areas within and outside the (indistinct) function areas is necessary. So that's where I rated that and I - I would have thought - I would have thought that that requirement would fit within the parameters of - of - of what I've said about other areas in that way.

- 64 Under Factor 4 - Interpersonal Skills, Mr Young rated the Review Position at five, acknowledging the Review Position involved consultancy, liaison, negotiation and provision of advice and reports, predominantly for an internal audience of management and staff. Accordingly, "good skills" are required. His evidence was that maximum skills for this factor is only "for people such as chief executive officers and first line managers".
- 65 Mr Young states that in using BIPERS as a guide, the score outcome should "usually" be in the mid to upper range of a level to be considered indicative of the work value of that level. This was, he said, the convention and his experience of the use of the BIPERS tool.

Consideration

- 66 Clearly, Ms Cooper is a dedicated and capable employee. I accept, as does the Health Service, that Ms Cooper performs the Review Position at a high level. It is also clear that the Review Position is a demanding one, and that it is associated with high work volume. Indeed, Mr Fraser suggests that the workload of the Review Position is currently excessive.
- 67 However, the question to be answered in this application is whether there is a significant increase in work value to warrant the Review Position being reclassified. As stated on the Western Australian Industrial Relations Commission's website, the requirements of the position, rather than the personal qualities or diligence of the occupant of the position, form the basis of any assessment concerning the classification of a position.

- 68 In general, Ms Cooper's account of changes to the Review Position resulting from the centralisation of clerical services was not challenged by the Health Service. Nor is there any dispute that the changes evolved over the course of 2017, 2018 and 2019 and so qualify as changes since the Review Position was last reviewed on 4 October 2017. The difference between the parties is only as to whether the changes amount to significant changes in work value.
- 69 Accordingly, I accept Ms Cooper's and Mr Fraser's evidence about the changes to the duties and responsibilities of the Review Position. Specifically, I accept Ms Cooper's account of the Review Position involving the following new duties:
- (a) participating as a member of the Operations Management Team. There is no reference in the 2017 JDF to this as a requirement or duty associated with the Review Position.
 - (b) managing the administrative requirements for Geraldton Hospital. The 2017 JDF focuses on managing and supervising staff under the Review Position's supervision, recruiting and rostering. The Review Position now involves the coordination of clerical and administrative support across multiple departments; and
 - (c) liaising with external providers for supplies and contract services.
- 70 I also note that Mr Young was satisfied that the Proposed JDF fairly represented the Review Position's responsibilities and duties. Changes to the Review Position since 2017 can be gleaned from a comparison of the Proposed JDF with the 2017 JDF:
- (a) The position was described as being in the Medical Records Section at Geraldton Hospital. That section has been renamed "Patient Information and Clerical Services Section".
 - (b) There is an additional Administrative Assistant Level G3 reporting to the Review Position as well as an additional nine FTE Clerical positions at Level G2. These positions previously reported to various hospital departments, including Palliative, Radiology, Physiotherapy and Operations.
 - (c) The focus of the key responsibilities has shifted from management and supervision of the team of clerical reports to liaising with managers and team leaders across multiple departments, in order to coordinate the provision of clerical services. This is reflected, for example, in the description of "key responsibilities" as between the 2017 JDF and the Proposed JDF. The 2017 JDF refers to "Oversee the day to day operations of Patient Information and Clerical Services...Manages and supervises the activities of all clerical staff...". The Proposed JDF describes the key responsibilities as "Responsible for planning, directing and coordinating clerical services for the Geraldton Hospital managing a team of people who provide dedicated support to clinics, wards and other services located within the Hospital Campus".
 - (d) There is no longer a requirement to oversee the registration and processing of Freedom of Information requests for the Midwest, although the position continues to have involvement in the administration of the requests.
 - (e) There has been an increased emphasis towards liaison with line managers and clinicians on staffing requirements and expectations, as well as an increased emphasis for reception and telephone communication coverage, support and supervision.
 - (f) It is "desirable" that the occupant of the Review Position have management experience in a health service environment.
 - (g) There is a new requirement for the occupant of the Review Position to have excellent written communication skills, a demonstrated ability to initiate management improvements to business processes and services.
- 71 The Health Service urged that Ms Cooper's evidence about the changes to her role in the form of Exhibit B should not be taken into account in my review of the reclassification decision because it was "new material". I am not satisfied that the information contained in Exhibit B should be excluded nor that it should not be considered for the following reasons.
- 72 First, no objection was taken to Exhibit B being tendered into evidence.
- 73 Second, the Health Service was not able to adequately indicate what substantive aspects of Exhibit B were "new". It can readily be accepted that Exhibit B was not provided to the CEC. That is necessarily so because it was prepared for the purpose of these proceedings and was responsive to the SWY Report. While clearly the format of the contents of Exhibit B was new, it was less clear that the substance of its contents was new. Ms Cooper conceded that the details contained in Exhibit B concerning the Visiting Specialist Services and Medical Imaging Department were neither addressed in her Application nor in her discussions with Mr Young. However, Mr Young's evidence was that while the detail of Exhibit B was not provided to him, Exhibit B generally accorded with his understanding of the role from his interview with Ms Cooper. He conducted an interview with Ms Cooper which he described as being "pretty thorough" and "comprehensive" although he could not recall the detail of what was conveyed to him and he did not record the details in the SWY Report.
- 74 Third, despite taking issue with Exhibit B as "new material", the Health Service elicited evidence from Mr Young at hearing which elaborated on the SWY Report. Such evidence is largely in the same category as the contents of Exhibit B, as it was not evidence that was before the CEC.
- 75 Finally, Mr Young was provided with a copy of Exhibit B prior to the hearing. He read it and was able to comment on it during the hearing. His evidence, as the Health Service correctly submitted, was to the effect that his conclusions remained unaltered even accepting that Exhibit B accurately described the Review Position's duties and responsibilities.

Nature of the work, and knowledge and skill required

- 76 I do not accept Mr Young's assessment of the changes to the Review Position as being "minor differences" or "relatively minor variations in tasking or changed emphasis". Although Mr Young has undertaken a methodical comparison of each of the individual duties listed in the 2017 JDF and the Proposed JDF, and has characterised multiple duties as "similarly specified" in the respective JDFs, my impression is that this exercise has not adequately identified the significance of the changes over the

Review Position as a whole. In other words, by comparing individual duties on a "siloed" analysis, Mr Young has failed to take into account the combined effect of the changes on the level of knowledge and skill required to now perform the Review Position.

- 77 I accept Ms Cooper's submission to the effect that characterising the changes as an increase in workload only is an oversimplification of the true nature of the Review Position's evolution. It can be the case that changes to a role may simultaneously involve an increase in workload and an increase in work value. In this case, the increase in FTEs reporting to the Review Position has increased the workload. But underlying that increase is a fundamental structural change to how the clerical support services are provided across various hospital departments. That structural change, in my view, means that the nature of the Review Position, has changed significantly compared with the requirements of the position in October 2017.
- 78 I also accept that the changes in the nature of the Review Position are such that the broadened duties are of a higher level and involve a sufficient increase in skill and knowledge of individual department operational requirements.
- 79 A key responsibility of the Review Position is to manage the coordination of clerical staff across departments. In the past, the focus was on the day to day management and supervision of clerical staff, including recruitment and rostering. The position did not require the degree of coordination, planning and liaison across departments that is now required. The requirements previously fulfilled by more routine application of processes and past experience have changed so that the Review Position now requires strategic planning, and the balancing of the needs of multiple stakeholders. Problems arising are likely to be of a more complex nature, or requiring more complex solutions. Higher levels of skill and knowledge are therefore involved.

Level of responsibility

- 80 That the Review Position is now required to contribute to operations management by participating as a member of the Operations Management Team is, in my view, indicative of a higher level of responsibility. I was not convinced by Mr Young's assumption that this has always been a requirement of the role, absent any factual basis for his assumption.
- 81 So too, the fact that the Review Position involves a greater degree of contribution to policies and procedures, and liaison with other managers, is an increase in responsibility which increases work value.

Conditions of work

- 82 Ms Cooper does not rely upon changes to the conditions of work, that is, the environment in which the work is performed, as a ground for her claim of an increase in work value. It is, therefore, unnecessary for me to consider this factor.

Significant net increase

- 83 As indicated above, I do not consider the changes to the Review Position to be minor or merely a matter of changed emphasis. I am satisfied that the additions to work value I have described above are sufficiently significant to warrant upgrading the classification of the Review Position.

BIPERS

- 84 I am mindful that in applications of this kind, the Arbitrator is to guard against over-classification of jobs. Having found that the changes to the Review Position amount to a significant net addition to the work value of the Review Position, it is useful to consider the evidence concerning the BIPERS assessment and comparative positions in order to ensure the Review Position is not over-classified.
- 85 I broadly accept Mr Young's BIPERS assessment of the Review Position and his conclusion that Ms Cooper had over-evaluated some of the factors in her own assessment of the BIPERS factors, with three exceptions.
- 86 First, I find that Mr Young's assessment for Factor 3 - Scope of Activities at a rating of four is too low. Mr Young explained that degree four was appropriate because it acknowledges that "some knowledge of activities and problems outside the officer holder's functional area is necessary". However, the Form E3 Position Evaluation Questionnaire describes a rating of four as requiring "Only limited knowledge of activities and problems outside the position holder's functional area" as being necessary. It might be said that limited knowledge is some knowledge. However, the questionnaire only allows for two levels of knowledge: substantial or "only limited". None of the ratings require an absence of any knowledge of outside activities and problems. On that basis, and having regard to the nature of the Review Position, I consider the more appropriate rating for this factor is rating five because it is more accurate to say that it required substantial knowledge of the activities of other functional areas.
- 87 Second, in relation to Factor 4 - Interpersonal Skills, I do not accept Mr Young's explanation that a rating of five, requiring "good" interpersonal skills as opposed to a factor requiring "maximum" interpersonal skills is appropriate because only CEOs and first line managers require maximum communication skills. It is clear that there are several levels within this factor that require maximum communication skills with ratings from five through to nine. Mr Young's rating reflects an assessment of the role as requiring "sound interpersonal, communication and report writing skills together with the ability to lead and work effectively as part of a team". I consider this assessment understates the interpersonal skills required in circumstances where Ms Cooper is required to liaise with managers of multiple departments, resolve conflicts, manage change and deal with external stakeholders. A rating of six would be more appropriate, reflecting frequent internal utilisation of maximum interpersonal skills.
- 88 Third, in relation to Factor 6 - Instructions Received, I consider Mr Young's rating of four to six undervalues this factor as it relates to the Review Position. Mr Young concedes that the Review Position "operates with a reasonable degree of independence from its direct report". It also contributes to the overall Operations Management Team. Accordingly, the description associated with the four to six rating, that is, "responsibility for directing work within a limited area, which sometimes consists of drawing up routine instructions for subordinates" and "result is controlled by supervisor/manager" does not align either with Mr Young's description or the reality of the role's level of autonomy. In my view, the appropriate rating for this factor is nine.

- 89 In the result, in my assessment, the total score for the Review Position should be in the vicinity of 370 which is at the highest end of the range for Level G6. I am therefore satisfied that a reclassification of the Review Position to Level G6 would not result in the Review Position being over-classified.

Comparisons

- 90 Comparative wage justice is not part of the reclassification process. However, comparisons become relevant after a significant increase in work value is established, in order to test the appropriateness of a classification level derived from other tools or guides.
- 91 Mr Young concedes the Level G6 Albany Hospital Position is likely comparable to the Review Position, but treats this comparison with caution in circumstances where the Proposed JDF, which was used for the comparison exercise, may have been designed to be comparable to the Albany Hospital Position. That is a fair position for Mr Young to take. However, these circumstances say nothing about whether the Albany Hospital Position is appropriately classified as a Level G6 position.
- 92 Mr Young goes further, though, and concludes that the Albany Hospital Position is anomalous to the extent that it is classified at Level G6. His rationale for this conclusion is that two other positions which he considers comparable are both classified at Level G6. The effect of his evidence is that the Albany Hospital Position is over-classified.
- 93 I do not agree that there is sufficient reason to disregard the Albany Hospital Position's classification or to treat it as anomalous. The two positions Mr Young relies upon for his conclusion are the Level G5 Kalgoorlie Hospital Position and the Level G5 Nickol Bay Hospital Position. It is apparent from the Kalgoorlie JDF that the role has a significantly narrower scope of duties compared to the Albany Hospital Position (and the Review Position) in that it does not contribute as a member of the Operations Management Team and does not involve the Patient Information aspect of the Review Position's duties.
- 94 As for the Nickol Bay Hospital Position, it is located at and responsible for a district hospital. The Albany Hospital Position and the Review Position are both located and responsible for regional hospitals. Regional hospitals provide a greater range of services and their administration generally would be expected to be more sophisticated than the administration of a district hospital.
- 95 For these reasons, I am not persuaded that the Albany Hospital Position classification should be treated as an anomaly. Its classification at Level G6, together with the fact that the arguably less involved Kalgoorlie Hospital Position and Nickol Bay Hospital Position are classified at Level G5, indicates that a classification of the Review Position at Level G6 is appropriate.

Flow on and structural implications

- 96 Neither party contended that a review of the classification of the Review Position would be associated with any flow on or structural implications. The only comparable positions Mr Young could "easily" identify were the three positions across Albany, Nickol Bay and Kalgoorlie.

Conclusion

- 97 In my assessment, there has been an overall change in the nature of work which the Review Position involves as well as an increase in the skill and responsibility associated with it. I also consider the changes and increases are significant so as to amount to an increase in work value warranting reclassification.
- 98 As to what is the appropriate classification, I consider the BIPERS assessment conducted by Mr Young with the revisions to the three factors discussed above indicates the Review Position is appropriately classified at a Level G6. I am satisfied that this classification is not an over-classification of the Review Position.
- 99 The reclassification should take effect from the date that Ms Cooper formally notified the Health Service that reclassification was sought and provided sufficient information to enable a proper consideration of the application to be made. This occurred when Ms Cooper lodged her Position Reclassification Request and Position Evaluation Questionnaire on 28 October 2020.

2021 WAIRC 00529

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	JANINE COOPER	APPLICANT
	-v-	
	WACHS MIDWEST	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR SENIOR COMMISSIONER R COSENTINO	
DATE	THURSDAY, 7 OCTOBER 2021	
FILE NO	PSA 12 OF 2020	
CITATION NO.	2021 WAIRC 00529	

Result	Application upheld
Representation	
Applicant	Ms J Cooper, on her own behalf
Respondent	Ms S Waterton and Ms R Sinton

Order

HAVING heard Ms J Cooper on her own behalf and Ms S Waterton and Ms R Sinton on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the position of Coordinator Patient Information and Clerical Services (Position No: 614919) for the Midwest Region of the WA Country Health Service at Geraldton Hospital be reclassified from Level G5 to Level G6.
2. THAT the reclassification takes effect from 28 October 2020.

(Sgd.) R COSENTINO,
Senior Commissioner,
Public Service Arbitrator.

[L.S.]
