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FULL BENCH—Appeals against decision of Industrial Magistrate—

2022 WAIRC 00631

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 51/2021 GIVEN ON 19 JANUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2022 WAIRC 00631
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T B WALKINGTON
HEARD	:	FRIDAY, 22 APRIL 2022
DELIVERED	:	MONDAY, 22 AUGUST 2022
FILE NO.	:	FBA 1 OF 2022
BETWEEN	:	B. K ELSEGOOD & D.S ELSEGOOD & D.K ELSEGOOD & ELSEGOOD HOLDINGS PTY LTD & S.M ELSEGOOD & FALCONCREST HOLDINGS PTY LTD Appellants AND ALAN MAHON Respondent

Catchwords	:	Industrial law (WA) - Appeal against the decision of the Industrial Magistrate - Whether the respondent was made redundant in accordance with the General Order of the Commission made under s 50 of the Industrial Relations Act 1979 - Relevant principles of interpretation of industrial instruments considered and applied - Whether open for appellants to raise point not argued at first instance on appeal - Relevant principles considered and applied - Alleged errors of fact and law - No error demonstrated - Appeal dismissed
Legislation	:	*Fair Work Act 2009* (Cth) s119(1)(a) *Industrial Relations Act 1979* (WA) s 7, s 50, s 83 *Industrial Relations Commission Regulations 2005* reg 102(3) *Partnership Act 1895* (WA) s 10
Result	:	Appeal dismissed

Representation:

Counsel:

Appellants	:	Mr G McCorry as agent
Respondent	:	Mr P Mullally as agent

Case(s) referred to in reasons:

Alfresco Concepts Pty Ltd v Troy Patrick Franse [2015] WAIRC 00244; (2015) 95 WAIG 437

Atwell v Roberts [2013] WASCA 37; (2012) 43 WAR 507

Bampton v Viterra Limited [2015] SASCFC 87

Ex parte Merrett (1997) 140 FLR 412

Federal Commissioner of Taxation v Sahhar (1985) 59 ALR 98

Jones v Department of Energy and Minerals (1995) 60 IR 304

Quality Bakers Australia v Goulding (1995) 60 IR 327

R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Ltd (1977) 16 SASR 6

Playfair Development Corp Pty Ltd v Ryan [1969] 2 NSWR 661

Sealanes (1985) Pty Ltd v John Francis Foley and John Anthony Bukterica [2006] WAIRC 04110; (2006) 86 WAIG 1239

SGS Australia v Taylor (1993) 73 WAIG 1760

Short v FW Hercus Pty Limited (1993) 40 FCR 511

The Australian Rail Tram and Bus Industry Union of Employees v Public Transport Authority of Western Australia [2017] WAIRC 00830; (2017) 97 WAIG 1689

Trades and Labour Council of Western Australia v Minister for Consumer and Employment Protection and Ors [2005] WAIRC 0134; (2005) 85 WAIG 1667

UGL Rail Services Pty Ltd v Janik [2014] NSWCA 436

Reasons for Decision

KENNER CC:

Background and proceedings at first instance

1 At the material times, the appellants were a partnership conducting a steel manufacturing business, manufacturing sheet metal products for the building industry. The appellant's Chief Executive Officer, the respondent, Mr Mahon, had been in that position since June 2015. The business traded under the name 'Combined Metal Industries'. It was a family business and Mr Darren Elsegood was the Managing Partner. His siblings were the other natural persons in the partnership.

2 In early 2020, the appellant's business was in a difficult financial position. It had to reduce its costs. Reductions in salaries for employees were required. On 23 March 2020 a meeting took place between Mr Elsegood, Mr Douglas, a business associate and adviser to the appellants, and the respondent. The respondent was informed that due to the circumstances of the business, the appellants could not afford to keep him on his $250,000 remuneration package. The respondent was told that if he was not prepared to have his remuneration reduced, then his employment would have to be terminated. The respondent did not agree to a reduction in his remuneration.

3 After a short break, the meeting resumed. The respondent was informed that as he was not prepared to take a reduction in his remuneration, then his employment would be terminated for financial reasons. A letter was provided to the respondent on the same day, confirming the termination of his employment and his final entitlements.

4 Following the termination of the respondent's employment, Mr Elsegood took over the responsibilities of managing the business, with assistance from Mr Douglas, in his capacity as an external consultant. This arrangement continued until about August 2021, when another CEO was appointed.

5 The respondent commenced a claim in the Industrial Magistrates Court, in the court's general jurisdiction under s 83 of the *Industrial Relations Act 1979* (WA)*,* alleging that the appellant had contravened cl 4.4 of the Commission's General Order in relation to termination, change and redundancy: [2005] WAIRC 01715; (2005) 85 WAIG 1681. There was no dispute that the General Order is an 'entitlement' provision as defined in s 7 of the Act. It was contended that the appellants had made the respondent redundant, as that term is defined in cl 4.1 of the General Order and failed to pay him severance pay as provided in cl 4.4, in the sum of $38,461.54. This was an agreed sum if liability was established.

6 It is convenient at this point to set out cl 4.1 of the General Order which is in the following terms:

> 4.1 …
>
> Redundancy occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.
>
> ….

7 In her decision, Industrial Magistrate O'Donnell identified the issue for determination as:

…whether the termination of the Claimant's employment can be properly regarded as redundancy in the sense that, on 23 March 2020 the Respondent had made a definite decision that it no longer wished the job the Claimant had been doing to be done by anyone.

(Reasons at [31] AB13)

8 The appellants at first instance contended that because the duties of the CEO of the business continued to be performed after the termination of the respondent's employment, this meant that the appellants did wish the job the respondent had been performing, to be done by someone. Therefore, accordingly, the respondent was not made redundant and was not entitled to severance pay under cl 4.4 of the General Order.

9 The learned Industrial Magistrate considered the relevant law as to what constitutes redundancy. Her Honour considered well-known common law cases such as ***Quality Bakers Australia v Goulding*** (1995) 60 IR 327; ***Sealanes (1985) Pty Ltd v John Francis Foley and John Anthony Bukterica*** [2006] WAIRC 04110; (2006) 86 WAIG 1239; and ***Jones v Department of Energy and Minerals*** (1995) 60 IR 304. After considering the authorities, her Honour then identified that the question arose as to whether the general principles to be derived from these cases, had application to the circumstances before her, where (as in cl 4.1 of the General Order) the meaning of 'redundancy' is defined, or whether a different result may arise (reasons at [38] AB14).

10 In addressing that issue, the learned Industrial Magistrate had regard to the reasoning of the Full Court of the South Australian Supreme Court in ***Bampton v Viterra Limited*** [2015] SASCFC 87. In that case a manager responsible for port and country operations at a grain bulk handling operation in South Australia, had his responsibilities divided. He took over the country operations, and another position took over the ports. There was no change to his remuneration, status, or hours of work etc. He claimed he had been made redundant under a clause in a redundancy policy which applied to his employment. The policy relevantly stated:

An Employee's position is redundant where the Company has made a definite decision that it no longer requires the job an Employee has been doing done by anyone

…

11 The learned Industrial Magistrate considered this definition of redundancy to be in very similar terms to the definition in cl 4.1 of the General Order. Her Honour concluded, from an examination of that case, that the:

…text, context and evident purpose of that clause and the one under consideration in the case before me, is such that it is both useful and appropriate for me to have regard to the discussion in ***Bampton***.

(Reasons at [41] AB14)

12 Her Honour had regard to the observations of Kourakis CJ in ***Bampton*** at [44], where his Honour rejected the employer's argument in that case that the devolution of a longstanding employee's responsibilities to other employees is not a redundancy, because the 'job' is still being performed by others. Kourakis CJ considered that such a construction of the clause in question 'eviscerates the manifest purpose of Viterra's redundancy provision'.

13 Adopting Kourakis CJ's approach and having regard to the origins of the form of clause in the Viterra redundancy policy, as considered by Blue J (Vanstone J agreeing) in ***Bampton***, and in reliance on ***Short v FW Hercus Pty Limited*** (1993) 40 FCR 511, her Honour rejected the appellants' approach to the construction of cl 4.1 of the General Order. Her Honour concluded that demonstrating that component parts of a job are still being performed by other employees after the termination of an employee's employment, was not sufficient to avoid severance pay obligations. What is important is whether there are any duties left for the employee [made redundant] to perform (Reasons at [50] AB16).

14 In concluding there is no exhaustive definition of redundancy as discussed by Ryan J in ***Jones***, the learned Industrial Magistrate found that as of 23 March 2020, there was no longer any function or duties left to be performed by the respondent and the appellants:

…had decided that it (sic) no longer wished the job Mr Mahon had been doing done by anyone". This is further supported by the fact that no person then held the position of CEO until August 2021.

(Reasons at [59] AB17)

15 On this basis, her Honour concluded that the termination of the employment of the respondent was by reason of redundancy as defined in cl 4.1 of the General Order and that the appellants had failed to pay the respondent severance pay as required by cl 4.4. The appellants were ordered to pay the respondent $38,461.54 plus pre-judgment interest in the sum of $4,217.07.

16 The appellants now appeal to the Full Bench from the decision of the court under s 84 of the *Act*.

The appeal

17 The appellants challenge the learned Industrial Magistrate's conclusion that the respondent was made redundant and seek to quash the decision and set aside the orders made. The grounds of appeal are in the following terms:

The learned industrial magistrate erred in fact and law in:

Failing to take into consideration that clause 4.1 of the General Order provides that a redundancy for the purposes of the General Order " ... . *occurs where an employer* has *made* a *definite decision that the employer no longer* wishes *the job the employee* has *been doing done by anyone",* when: -

(a) the undisputed evidence was that no such definite decision had been made by the Respondent and that the Respondent wished to keep the Claimant employed in the job he was performing; and

(b) the court actually and correctly found - at [48] - the Respondent wished to keep the Claimant employed in the job he was performing, albeit at a lower salary.

2) Wrongly applying the general principles of other cases to circumstances uniquely different, in that the other cases were distinguishable by the nature of the jobs made redundant in them, whereas Claimant was the Chief Executive Officer of the Respondent and that decision making role is one that cannot be made redundant except when a business ceases to be carried on and the decision making functions of that role are only then no longer required to be performed by anyone.

3) Wrongly finding - at [57] - that there was an irresistible inference to be drawn *"that* as *at 23 March 2020 there* was *no longer any function or duty to be performed by Mr Mahon, and the Respondent had decided that it no longer wished the job Mr Mahon had been doing to be done by anyone"* and that *"this* was *further supported by the fact that no person then held the position of CEO until August 2021"* when in fact and law:-

(a) the functions and duties were only no longer required to be performed by Mr Mahon after his employment had been terminated ;

(b) the evidence of Darren Elsegood and the court's own finding - at [26] - was that Mr Elsegood took over the role of CEO and the duties performed by the Claimant;

(c) it is not the title of the position or job that determines whether or not the functions or duties of the position have been made redundant but whether those functions and duties are not going to be performed by anyone in the future; and

(d) it does not follow as a matter of fact or law or permissible inference that if nobody held and used the title of CEO in the business (but still performed the role and all the functions of a CEO) the business did not have a CEO, there was no CEO role or functions required to be performed and that the job thus had been made redundant.

The contentions of the parties

The appellants

18 The appellants filed an outline of submissions that alleged errors of fact and errors of law made by the learned Industrial Magistrate. The written submissions did not specially identify and address each ground of appeal. Nonetheless, a summary of the appellants' submissions is as follows.

19 The appellants referred to the learned Industrial Magistrate's findings of fact that:

(a) there was no evidence that in March 2020 the Appellant was implementing a carefully planned overhaul or restructure of CMI,

(b) nonetheless, the difficult financial position the Appellant found itself in at that time lead to a reorganisation of sorts, and specifically to the termination of the Respondents employment when he declined to accept a reduction in pay,

(c) the Appellant terminated the Respondent's employment because it could no longer afford his remuneration.

(d) the Appellant offered to retain the Respondent in its employ and as it's CEO on a lower salary,

(e) as at 23 March 2020 there was no longer any function or duty to be performed by the Respondent and the Appellant had decided that it no longer wished the job the Respondent had been doing to be done by anyone.

(f) no person then held the title of CEO until August 2021,

(g) after the termination of the Respondent's employment the Appellant's managing partner took over his duties with some assistance from an outside consultancy.

20 The appellants contended that the learned Industrial Magistrate made factual errors and that some of her factual findings were inconsistent. First, the appellants submitted that her findings as to par (b) and par (d) above, were inconsistent in that it was contended if the respondent had accepted the appellants' proposal for a reduction in salary, he would have remained the CEO. This would not constitute a re-organisation. Consequently, the termination of the respondent's employment and the assumption of the respondent's duties by Mr Elsegood also could not be a re-organisation of any sort.

21 As to the findings in par (e) and par (g) above, the appellants submitted that they are inconsistent because if Mr Elsegood took over responsibility for the respondent's position as the CEO, then it was not open to conclude that the appellants had decided that they no longer wished the job done by the respondent, to be done by anyone.

22 Furthermore, as to the finding by the learned Industrial Magistrate that no one had a title of CEO until August 2021, the submission was this was not relevant to whether the termination of the respondent's employment was properly characterized as a redundancy.

23 Finally, it was contended that the learned Industrial Magistrate erred in fact in not finding that the position of CEO is one that cannot be made redundant. This was put on the basis that unless the business is wound up, such a position is always required, as the ultimate decision maker of a business entity.

24 As to errors of law, the appellants contended that the learned Industrial Magistrate erred in her reliance on ***Bampton*** and the cases cited therein, because it and those authorities applied to circumstances where redundancy obligations were not defined in any industrial instrument. The appellants contended that the meaning and effect of the terms of cl's 4.1 and 4.4 of the General Order, are to be ascertained only from a consideration of the text of the General Order itself.

25 Adopting this approach, the appellants submitted that the plain language of cl 4.1 of the General Order, is inconsistent with the findings of the learned Industrial Magistrate and that the appellants wished to retain the services of the respondent, albeit at a reduced salary. The appellants further maintained that such a finding was inconsistent with the requirement that under cl 4.1 of

the General Order, that the employer must have made a 'definite decision' that it no longer wished the job the employee had been doing, done by anyone.

26 Whilst the case was not referred to by the learned Industrial Magistrate in her reasons, the appellants contended that the decision of ***UGL Rail Services Pty Ltd v Janik*** [2014] NSWCA 436, which was cited in ***Bampton***, is more apposite to the present circumstances. In that case, where a general manager was dismissed, and another person was appointed to take over the general manager's functions, the Court of Appeal of New South Wales held that the general manager was not made redundant. The appellants submitted that the reasoning adopted in that case, should have been found to have applied to the situation of the dismissal of the respondent.

The respondent

27 In his submissions, the respondent referred to the origins of the redundancy provisions in the General Order, beginning with the ***Termination Change and Redundancy*** cases heard by the former Australian Conciliation and Arbitration Commission in 1984: (1984) 8 IR 34; (1984) 9 IR 115. The respondent also referred to the terms of the National Employment Standards in the *Fair Work Act 2009* (Cth), in s 119(1)(a), which are in almost identical terms to the General Order provisions. In general, the respondent submitted that the cases dealing with redundancy contemplate the circumstance of a downturn in business, which occurred on the facts of the instant case. The respondent submitted that the appellants made a financial decision that they could no longer afford to pay the respondent at his rate of salary, and this led to the termination of his employment.

28 On the facts, the respondent contended that the 'restructure' involved the work the respondent formerly performed, being performed by Mr Elsegood, assisted by an external consultant, such that the former CEO position was no longer required. Approached differently, the respondent contended that after the change was put in place by the appellants, the respondent had no duties to perform, and his employment was terminated on the grounds of redundancy.

29 Specifically, as to ground 1, the respondent submitted that the evidence before the court, and the finding made by the learned Industrial Magistrate, was that the respondent was dismissed on 23 March 2020 because the appellants could no longer afford to pay his remuneration. The alternative of a reduction in his salary, was not agreed. The respondent submitted this situation was made clear by the letter given to the respondent from Mr Elsegood, dated 23 March 2020, after the meeting on the same day. This letter (AB60), formal parts omitted, provided as follows:

> Further to our meeting earlier today, we now write to confirm the following:
>
> - Your employment has been terminated effective 23rd March 2020
> - Your employment was terminated on the following grounds:
>   - The business is unable to afford your remuneration.
>   - You were offered the opportunity to accept a lower wage however you refused that offer.
> - Having perused your employment contract. we can confirm that your entitlements will be paid to you in accordance with the contract and any relevant statutory requirements.
> - We will seek a Full and Final release document from you once both parties have mutually agreed the quantum amount and our Salaries and Wages Clerk has calculated your final Remuneration so as to avoid any confusion going forward.

30 The respondent submitted that the appellants' assertion of error, by the learned Industrial Magistrate, in not finding there had been no definite decision by the appellants that they did not want the respondent's job done by anyone, in reliance on [48] of her Honour's reasons, was misguided. This was because, the finding at [48] by the learned Industrial Magistrate was that despite being willing to pay the respondent less to retain him in employment, did not mean his refusal to accept this proposal and his subsequent dismissal was not a redundancy. It was submitted that this finding and the dismissal of the respondent on this basis, was entirely consistent with the definition of redundancy in cl 4.1 of the General Order and supported the orders made at first instance.

31 As to ground 2, the respondent made several submissions. First, it was put that the ground failed to comply with reg 102(3) of the *Industrial Relations Commission Regulations 2005*, in that it does not provide particulars as to why the learned Industrial Magistrate's conclusion was wrong in law. Second, there is no authority or principle referred to by the appellants as to why a CEO cannot be made redundant. Third, and in any event, the issue raised by this ground of appeal was not raised and argued before the learned Industrial Magistrate at first instance. Thus, it cannot now be raised and argued for the first time on appeal.

32 In relation to ground 3, the respondent submitted that the basis for this ground is the learned Industrial Magistrate's finding that after 23 March 2020, the appellants no longer had a job of CEO. The respondent contended that this conclusion was well open on the evidence and indeed was Mr Elsegood's evidence in cross-examination.

33 Overall, the respondent contended that the findings of fact made by the learned Industrial Magistrate were open on the evidence at first instance and the conclusions reached by her Honour were correct. It was contended that the appeal should be dismissed.

The General Order - history and context

34 The General Order was made under s 50 of the *Act*. Section 50 enables the Commission in Court Session to make a General Order relating to industrial matters having application throughout the State, whether employees affected are covered by an award or industrial agreement or not. To the extent to which a General Order applies to employees covered by an award or industrial agreement, it may vary or add to them.

35 A General Order, and the General Order arising for consideration on this appeal, is an industrial instrument resulting from proceedings before the Commission In Court Session on the application of the then Trades and Labour Council of Western Australia (now UnionsWA), a body recognised under s 50 of the *Act* with standing to seek a General Order: ***Trades and***

Labour Council of Western Australia v Minister for Consumer and Employment Protection and Ors [2005] WAIRC 0134; (2005) 85 WAIG 1667 per Beech CC, Gregor SC and Kenner C. A General Order, as with an award or an industrial agreement, may be the subject of an application for the interpretation of its terms under s 46 of the *Act*. This is because by s 46(5), it is provided that an 'award' for the purposes of s 46, 'includes an order, including a General Order…and an industrial agreement'.

36 Being an industrial instrument made by the Commission under the *Act*, the well-established principles applicable to the interpretation of industrial instruments have application. In ***The Australian Rail Tram and Bus Industry Union of Employees v Public Transport Authority of Western Australia*** [2017] WAIRC 00830; (2017) 97 WAIG 1689, Smith AP (as she then was) (Scott CC agreeing) set out the relevant principles of interpretation adopted and applied by Full Benches of the Commission at [75] - [80] as follows:

> 75 In determining whether a party to proceedings has contravened or failed to comply with a provision of an industrial instrument, an Industrial Magistrate's Court must necessarily interpret the provisions of an industrial agreement in accordance with the principles that apply to the interpretation of industrial agreements: ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2013) 94 WAIG 1. These principles are also to be applied by the Commission when hearing and determining an application for the true interpretation of an award as defined under s 46 of the Act, which includes an industrial agreement.
>
> 76 In ***Health Services Union of Western Australia (Union of Workers) v The Director General of Health*** [2012] WAIRC 01117; (2012) 93 WAIG 1, Beech CC and I observed that [38] - [40]:
>
>> Firstly, it is clear that the task of construction of industrial instruments is to be approached in a way that allows for a generous construction. Secondly, part of the context of construction of an industrial instrument is how it is made. Where an industrial instrument is an award, the principles to be applied were set out by French J in *City of Wanneroo v Holmes* (378 - 379) where his Honour said:
>>
>>> The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words: *Re Clothing Trades Award* (1950) 68 CAR 597 (Aust Indus Ct, Full Ct). The words are to be read as a whole and in context: *Australian Timber Workers Union v W Angliss & Co Pty Ltd* (1924) 19 CAR 172. Ambiguity if any, may be resolved by a consideration, inter alia, of the history and subject matter of the award: *Picard v John Heine & Son Ltd* (1924) 35 CLR 1. Resort to such matters as prefatory statements and negotiations is of dubious assistance if admissible at all: *Seymour v Stawell Timber Industries Pty Ltd* (1985) 13 IR 289 at 290; 9 FCR 241 at 244 (Northrop J) (13 IR at 299; 9 FCR at 254) (Keely J) cf 13 IR at 309; 9 FCR at 265 (Gray J). The logs of claim and arbitrator's reasons for decision may be referred to determine the ambit of the dispute which led to the making of the award so that where there are two possible interpretations, one within the ambit and one without, the former may be preferred. Evidence of the conduct of the parties subsequent to the making of the award however, cannot be relied upon to construe it: *Seamen's Union of Australia v Adelaide Steamship Co Ltd* (1976) 46 FLR 444, 446, disapproving *Merchant Seamen's Guild of Australia v Sydney Steam Collier Owners and Coal Stevedores Association* (1958) 1 FLR 248. That is not to say the words must be interpreted in a vacuum divorced from industry realities. As Street J said in *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503:
>>>
>>>> '… it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result ... from an agreement between the parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.' – See also *Re Crown Employees (Overtime) Award* [1969] AR(NSW) 60 at 63; *Re Hospital Employees Administrative and Clerical (State) Award* (1982) 2 IR 123.
>>>
>>> It is of course no part of the court's task to assign a meaning in order that the award may provide what the Court thinks is appropriate – *Australian Workers Union v Graziers Association (NSW)* (1939) 40 CAR 494. Indeed it has been said that a tribunal interpreting an award must attribute to the words used their true meaning even if satisfied that so construed they would not carry out the intention of the award making authority – *Re Health Administration Corporation; Re Public Hospital Nurses (State) Award* (1985) 12 IR 122; *Rogers Meat Co Pty Ltd v Howarth* [1960] AR(NSW) 291; *Re Government Railways and Tramways (Engineers etc) Award* [1928] AR 53 at 58 (Cantor J).
>>
>> Justice French subsequently reaffirmed what he said in *City of Wanneroo v Holmes in City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* when he observed [57]:
>>
>>> It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities — *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378-379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned — see eg *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or

illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in *City of Wanneroo v Holmes* (at 380):

> Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties.

Later, Kirby and Callinan JJ in *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241; (2005) 79 ALJR 703; (2005) 138 IR 286 [96] and [129] favoured an even more generous contextual approach that had been expressed in *Kucks* by Madgwick J who had said (184):

> It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.
>
> …

37 In ***TLC and Ors*** at [2], the Commission in Court Session referred to the claim for a General Order having its origins in the ***Termination, Change and Redundancy*** cases. This origin, in the context of the relevant contract provision there under consideration, was also discussed by Blue J in ***Bampton***, at [189] - [195]. His Honour noted that the ***Termination, Change and Redundancy*** award clause for redundancy was based on the definition adopted by Bray CJ in ***R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Ltd*** (1977) 16 SASR 6. The passage of Bray CJ's judgment at [8], was cited by her Honour at first instance at [46] of her reasons. This broad meaning of 'redundancy', and the circumstances in which it may occur, were a part of the industrial history and context in the Commission in Court Session's consideration in making the General Order in the terms that it did.

38 In this respect, the Commission in Court Session noted in its decision at [29] - [33] that the ***Termination, Change and Redundancy*** clause had, by the time of those proceedings, been adopted widely, both by variations to many State awards of this Commission, more broadly in other industrial jurisdictions throughout Australia, and was also inserted into Part 5 of the *Minimum Conditions of Employment Act 1993* (WA). Specifically, in relation to the definition of 'redundancy', and those aspects of the TLC claim that departed from the 'standard clause' adopted in State awards following the ***Termination, Change and Redundancy*** decisions, the Commission in Court Session observed at [78] - [82] as follows:

> Redundancy – the definition
>
> 78 In relation to the provisions claimed regarding redundancy we note those parts of the claim which are consistent with the determinations of the previous Commissions in Court Session already referred to. The claim defines redundancy as where an employer has made a definite decision that the employer no longer wishes the position the employee held to be held by anyone and that decision leads to the termination of employment of the employee (emphasis added). The clause as approved by this Commission on previous occasions defines redundancy as occurring where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision leads to the termination of employment of the employee.
>
> 79 The definition as approved by this Commission on previous occasions is one of relatively long standing. It is a definition which is consistent in its language with both s.40 of the MCE Act and the definition in the AIRC Redundancy decision. While we have had regard to the submissions of the TLC in support of its claim on the material before us we are not persuaded that a change is warranted to what is otherwise an accepted definition of redundancy because the definition is wide enough to include a position being abolished. As EM Heenan J observed in *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 at [76] not only does redundancy occur where an employer no longer requires that work to be performed by anyone (citing *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-Operative Ltd* (1977) 16 SASR 6), organisational restructuring may result in a position being abolished and the functions of that position being divided or given to others (citing *Bunnett v Henderson's Federal Spring Works Pty Ltd* (1989) 31 AILR 356).
>
> 80 The TLC claim also omits the words commonly found at the end of the definition: "except where this is due to the ordinary and customary turnover of labour". The TLC submitted that the words are no longer relevant and add nothing to the definition except the potential for confusion. The history of the words was said to be related to the economic recession present in 1983 and the New South Wales Industrial Relations Commission decision in *Shop, Distributive and Allied Employees Association (New South Wales) v Countdown Stores* (1983) 7 IR 273. The TLC submitted that the South Australian Industrial Relations Commission in 1987 omitted the words for the reason that the distinction between employees who lose their jobs in times of recession and those who lose their jobs in times of economic prosperity is not tenable; standards for redundancy, it is submitted, are now accepted throughout Australia and by this Commission regardless of economic circumstances.
>
> 81 The omission of the words was opposed on the basis that the words are not ambiguous and have been readily interpreted and applied by the Commission.

82 We note that the definition of redundancy in the *Minimum Conditions of Employment Act 1993* which is applicable to employees in this State generally by virtue of that legislation does not contain those words. Therefore including them in the General Order to issue will result in a provision which is less favourable than the corresponding condition in the MCE Act: that Act requires discussions to occur whether or not the decision that the employer no longer wishes the job the employee has been doing done by anyone is due to the ordinary and customary turnover of labour. That provision of the MCE Act presently applies and therefore those words will be omitted from the General Order to issue.

39 In particular, the observations of the Commission in Court Session at [79] refer to the circumstance of a restructuring of an organisation leading to a position (or job) being abolished and the functions of that position being given to others. Those observations are consistent with the views expressed by Kourakis CJ (Vanstone J agreeing) in ***Bampton***, cited by the learned Industrial Magistrate at [43] of her reasons, where Kourakis CJ rejected the employer's argument to the contrary in that case.

40 In ***Short***, an appeal to the Full Court of the Federal Court concerned the application of cl 31 of the Metal Industry Award 1984 in relation to redundancy. In this matter, the Industrial Court of South Australia found that the respondent, FW Hercus Pty Ltd, had failed to pay the appellant an amount for severance pay. On appeal to a single judge, the appeal was upheld and the order to pay Mr Short severance pay was set aside. On appeal to the Full Court, the court (Keely, Burchett and Drummond JJ) was required to consider whether the employer had failed to comply with its award obligations.

41 At the time of his dismissal, the appellant was one of two full-time drafting employees employed by the respondent. The proprietor of the firm, Mr Hercus, also performed drafting work. Due to financial difficulties, resulting from a downturn in trade, the respondent needed to reduce the number of employees. Whilst drafting work was still required to be done by the respondent as a part of its business, the appellant's drafting position was not continued. The appellant contended that his termination of employment constituted a redundancy under cl 31 of the Award. The respondent contended that the appellant was 'retrenched' because of insufficient work, and not because the respondent 'wished' that drafting work no longer be done. The relevant first part of cl 31 - Redundancy of the Award in issue in those proceedings, was in very similar terms to the definition of redundancy in cl 4.1 of the General Order, and it provided as follows:

Discussions before termination

(a) (i) where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment…

42 As noted, the words 'and this is not due to the ordinary and customary turnover of labour' were not included in the definition determined by the Commission in Court Session. They are not material to these proceedings. In relation to the argument put by the respondent about the employer's 'wishes', Keely J considered that the focus is whether the employer no longer wants or requires or desires a particular job done. At [131], his Honour said:

> …in my opinion the respondent had made a "definite decision" that it "no longer [wished] the job…done by anyone…". It is not to the point that, before making that decision, the respondent "wished" that it was not experiencing a downturn in trade and wished that it did not have to let the appellant go because of that downturn in trade. It plainly no longer required the job done and the reason for that decision was that, as a result of the downturn in trade, "we just have not got it to be done".
>
> The "definite decisions" to which the subclause refers is a "decision that the employer no longer wishes the job…done by anyone…". In my opinion the words "employer no longer wishes" mean that the employer no longer "wants" or "requires" or "desires" the job done. That wish is formed after considering the matter and making a definite decision as to what it "wishes". The word "wishes" in the subclause is not referring to the "wish" of the employer that it had sufficient orders so that it could not "have to let him [the employee] go".

43 In his judgment, Burchett J commented on circumstances in which cl 31(a)(i) of the Award would become operative as follows:

> …[B]ut the clause is not made conditional upon the employer wishing to retrench an employee. The clause simply postulates the *cessation* of the employer's wish to have the particular job done by anyone. That may be because some delightful alternative has enticed the employer; because the job has just come to an end: because of the employer's insolvency; or for any one of a number of other reasons. The clause does not say that the employer must be happy about his decision; only that he must have made it.

44 His Honour then went on to consider the importance of history and context in the interpretation of industrial awards and specifically the redundancy clause in terms of its general purpose and policy. It was his Honour's opinion from that history, the clause under consideration concerning redundancy, was not intended to have a restricted meaning. Rather it should be construed broadly, as being applicable to redundancy for whatever reason. The history that informed his Honour's conclusion in this respect commenced with ***Adelaide Milk*** and the observations of Mitchell J and Bright J in that case. In particular, his Honour focused on the breadth of meaning of 'redundancy' as enunciated by Bray CJ in that case, adopted and applied in the ***Termination, Change and Redundancy*** cases, referred to above.

45 Burchett J at [138], referred to the words used in cl 31 of the Award as being formulated by Bray CJ in ***Adelaide Milk*** and observed that they were adopted in the ***Termination, Change and Redundancy*** cases, became a standard form of clause, and were incorporated widely in awards, as noted by the Commission in Court Session in its decision. In concluding in this respect, his Honour continued at [138]:

> Any ambiguity in expression of cl 31 is clarified when its sources are examined. In the nature of the industrial process, the draftsmen of the variation of the award must have been acquainted with those sources. It is not to be thought that the words of Bray CJ were deliberately chosen to convey a meaning quite other than this meaning. Especially this is so when

his meaning had been examined in detail by the Australian Conciliation and Arbitration Commission in the *Termination, Change and Redundancy* cases.

46 Drummond J agreed generally with the reasons of Keely and Burchett JJ. His Honour noted at [139], his agreement with the observations of Burchett J, that recourse can be had to the 'wider context of the award provision'.

47 Accepting that a construction of cl 4.1 of the General Order faithful to the text must be adopted, from the above analysis, the meaning of the definition of 'redundancy', in cl 4.1 as a matter of industrial history and context, is also to be informed by the breadth of the meaning of the term so adopted. The definition should be construed broadly. This is the consistent approach of the Commission to the interpretation of industrial instruments; was the approach of the Court in ***Short,*** in considering an award provision definition in very similar terms to cl 4.1 of the General Order; and was also the approach adopted in ***Bampton.*** It is the approach I will take in this appeal.

Consideration

Ground 1

48 Returning then to the grounds of appeal. The gravamen of ground 1 appears to be a complaint that the learned Industrial Magistrate erred in not concluding that the appellants had made 'no definite decision' that it wished the respondent's job to be not done by anyone. The evidence at first instance as to the events of 23 March 2020 was brief. The respondent said in his witness statement that on the morning of 23 March 2020, both Mr Elsegood and Mr Douglas came into his office unannounced. Mr Douglas conducted the meeting. He told the respondent that the respondent had yet to reply to a request from Mr Elsegood that he agree to a reduction in his salary. The respondent replied that he had received no such request. On being told this, the respondent said that Mr Douglas retracted what he had said and informed him that it would be better for the respondent to resign.

49 The respondent told both Mr Elsegood and Mr Douglas that he did not want to resign. Mr Douglas then informed the respondent that the business could no longer afford his remuneration. The respondent said Mr Douglas made mention of termination of his employment. The respondent asked what reduction in his salary was being requested by the appellants and that this be put in writing. Some discussion then took place with Mr Douglas suggesting that the respondent and he go 'off-site' to discuss the matter of his notice. The respondent declined. When it was put to him in cross-examination that the appellants wanted to keep him in their employment, the respondent replied that this was not evident from the meeting. Both Mr Elsegood and Mr Douglas then left the room, with Mr Douglas returning a short time later. Mr Douglas then informed the respondent that his employment was being terminated that day and he was to clear out his office, which the respondent then did. The dismissal was confirmed in writing the same day, in terms as set out earlier in these reasons.

50 Mr Douglas was not called to give evidence. Mr Elsegood largely confirmed the respondent's version of the events in his testimony. He said by early 2020 the position of the appellants' business was becoming perilous. Reductions in salaries of management staff were being discussed. The respondent's position was considered and Mr Elsegood said that if he did not take a reduction in his remuneration, his employment would have to end. From this evidence, the termination of the respondent's employment was clearly in contemplation at an early stage.

51 Mr Elsegood confirmed that Mr Douglas put to the respondent in the meeting on 23 March 2020 that the appellants' business was in a perilous state, and it could not afford a CEO at the respondent's rate of salary. Unless the respondent agreed to a reduction, Mr Elsegood then said it was 'best if CMI and Mr Mahon parted company and it would look better if he resigned' (Mr Elsegood's witness statement at [7]). Mr Elsegood confirmed that a short break in the meeting then took place, following which he said both himself and Mr Douglas returned to the respondent's office and the respondent was told his employment was being terminated on financial grounds.

52 After the respondent left the business, Mr Elsegood testified that he took over the duties of the former CEO and Mr Douglas' company provided some consultancy services to assist Mr Elsegood in this regard. The precise nature of that assistance was not in evidence. Mr Elsegood confirmed that he was a working partner in the appellants' business prior to this time. This situation continued until August 2021, when Mr Elsegood said that a new CEO was appointed. Mr Elsegood further confirmed in his evidence that after the respondent was dismissed, there was no separate job of a CEO in the business.

53 The contention advanced by this ground of appeal that the evidence supported the conclusion that the appellants wished to keep the respondent in his job cannot be sustained. Consideration must be given to the timing of the relevant events. It was the case that on Mr Elsegood's undisputed evidence the appellants had in mind a reduction in salaries for management, which included the respondent, due to the financial state of the appellants' business. On the evidence, it seemed that a similar arrangement had been entered into with the respondent, some years prior.

54 However, it was also clear on Mr Elsegood's evidence, as noted above, that the dismissal of the respondent was in prospect, should he not agree to a reduction in his remuneration. The meeting that took place on 23 March 2020 was in two stages. The first stage was the initial discussion with the respondent, albeit brief, where Mr Douglas on behalf of the appellants put a proposal for the respondent's remuneration to be reduced because the business could not afford to keep paying him his then rate of salary. This course of action was not accepted by the respondent.

55 At that point, the second stage of the meeting took place. Consistent with Mr Elsegood's evidence, faced with the respondent's refusal to take a reduction in his pay, and after a brief adjournment of the meeting, the appellants decided to dismiss the respondent on financial grounds. This decision was then communicated unequivocally to the respondent on the resumption of the meeting. The dismissal was summary in nature, albeit with subsequent payment of entitlements. By that time a definite decision had been taken, and it was implemented forthwith.

56 Based on that evidence, all the learned Industrial Magistrate's findings at [16] - [27] (AB12) were open and indeed, were the only findings reasonably open, on the evidence. The contention advanced by the appellants that at [48] of her Honour's reasons, where the appellants contended that her Honour correctly found that the appellants wished to keep the respondent in

employment, is to misconstrue this finding. What her Honour said in this paragraph was entirely consistent with the evidence. The appellants being willing to retain the respondent in their employment if he did what they wished was one thing. On the basis that the respondent did not do what the appellants wanted, and this led to his dismissal, could not, and did not, exclude the dismissal being properly characterised as a redundancy.

57 There was no error committed by the learned Industrial Magistrate and this ground is not made out.

Ground 2

58 This ground suggests that a CEO of a business cannot be made redundant. The basis for such an assertion seemed to be that, given the nature of the job of a CEO, as the ultimate decision maker, a business must always have one. No authority or point of principle was advanced by the appellants to support this contention. Whilst the response filed by the appellants at first instance alluded to this issue in the briefest of terms by the statement 'The job is not one that could be abolished' (AB34), no reference was made to this issue in the appellants' written or oral submissions to the court in the proceedings at first instance. That is, at no stage of the proceedings was the attention of the court or the respondent drawn to this issue, as one that the appellants intended to press as a defence to the respondent's claim.

59 At [12] of the appellants' written outline of submissions in these proceedings, it is contended that her Honour failed to find:

> …that the role and function of a CEO is one that cannot be made redundant other than on the winding up of the business because the CEO's principal role and function is to be the ultimate decision maker in the organisation.

60 This contention was never put to the learned Industrial Magistrate as part of the appellants' case at first instance. Accordingly, the respondent had no opportunity to respond to it and her Honour no opportunity to consider it as a part of the court's process of reasoning and decision making. The Industrial Magistrates Court is not a court of pleadings.

61 The general approach is that a party is bound by its case and, except in very limited circumstances, a point not raised in proceedings may not be raised for the first time on appeal. The relevant principles applicable to this issue were set out in some detail by Smith AP (as she then was) in ***Alfresco Concepts Pty Ltd v Troy Patrick Franse*** [2015] WAIRC 00244; (2015) 95 WAIG 437. Whilst that was an appeal to the Full Bench under s 49 of the *Act* from a decision of the Commission, her Honour considered and applied the general principles applicable to appellate intervention. At [114] Smith AP said:

> 114 …In ***Kingstyle Investments***, the principles that apply when a new point is sought to be raised on an appeal were considered. At [50] - [54] I observed:
>
> > Appeals brought under s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act) are not by way of rehearing, but are appeals in the strict sense: ***Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch*** (1984) 64 WAIG 852; see the discussion in ***The Minister for Health v Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203 [73] (Smith AP and Beech CC). Fresh evidence can, however, be admitted by a Full Bench where special or exceptional circumstances are raised: ***Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Ltd*** (1990) 70 WAIG 3040. This does not allow a matter to be heard without regard to the manner in which a matter was conducted at first instance. In ***Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*** [2012] WASCA 50, Martin CJ set out the circumstances when a new point may be raised on appeal to an appellate body at [49] - [52]:
> >
> > > 49 [I]n ***University of Wollongong v Metwally (No 2)*** [1985] HCA 28; (1985) 60 ALR 68, the High Court observed:
> > >
> > > > It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so (71).
> > >
> > > 50 Similar observations were made by the Court of Appeal of New South Wales in the case under appeal in ***Coulton v Holcombe***. Their Honours observations as to:
> > >
> > > > ... the finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at first instance: keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court
> > >
> > > were endorsed by the plurality in ***Coulton v Holcombe*** (8) as important principles underpinning the public interest in the finality of litigation: see also ***Liftronic Pty Ltd v Unver*** [2001] HCA 24; (2001) 179 ALR 321, 330 - 331 (Gummow and Callinan JJ).
> > >
> > > 51 However, this is not to say that a new point can never be raised on appeal. In ***Water Board v Moustakas*** [1988] HCA 12; (1988) 180 CLR 491, the plurality (Mason CJ, Wilson, Brennan and Dawson JJ) observed:
> > >
> > > > It is true that in ***Maloney v Commissioner for Railways*** (1978) 18 ALR 147, 152 it was recognised that in 'very exceptional cases' a plaintiff's omission to put at trial a case formulated on appeal may not be conclusive against him. But it was pointed out that the opportunity to assert the new case at another trial should only be granted where the interests of justice require it and such a course can be taken without prejudice to the

defendant. No exceptional circumstances arise in this case where the parties adopted the course which they took of their own choice (498).

52 It is significant to note that the High Court has twice described the circumstances in which a party will be allowed to raise a new point on appeal as 'very exceptional'. Such a course will only be permitted if two requirements are met. First, the interests of justice must require determination of the new point. Second, there must be no prejudice to the party against whom the new point is taken.

…

(paragraph deleted)

…

In ***Minister for Education v Liquor Hospitality and Miscellaneous Union, Western Australian Branch*** [2011] WAIRC 00818; (2011) 91 WAIG 1839 [23] - [24], I had regard to the principles set out in ***Water Board v Moustakas*** (1988) 180 CLR 491, 497 - 498 and then had regard to the observations of Branson and Katz JJ in ***H v Minister for Immigration and Multicultural Affairs*** [2000] FCA 1348 [7] - [8] where their Honours said:

In our view, the readiness with which appeal courts have in the past been satisfied that it is expedient in the interests of justice to allow a fresh point to be argued and determined on appeal is unlikely to continue into the future. The volume and complexity of the cases presently required to be heard and determined by the intermediate appellate courts of Australia is such that it is increasingly important that such courts are able to devote their time to the genuine review of first instance decisions. It is becoming increasingly difficult, in our view, to establish that it is expedient in the interests of justice that the time of three or more judges should be spent giving original consideration to issues that ought to have been raised before the primary judge. The interests of justice in this sense extend beyond the interests of the parties to the appeal to encompass the interests of other litigants whose appeals require hearing and determination, and the broad public interest in efficient judicial administration.

I then observed at [25] - [26]:

25 When assessing whether it would be expedient in the interests of justice to allow a new point to be raised Branson and Katz JJ also had regard to whether the point had any merit [9].

26 From these passages the following principles guide when a finding could be made that it is expedient and in the interests of justice to entertain a point:

(a) The point must be one of construction or of law and not be met by calling evidence.

(b) In deciding whether or not a point was raised at trial no narrow or technical view should be taken. Ordinarily the pleadings will be of assistance.

(c) In very exceptional cases an omission to put a case formulated on appeal may not be conclusive. The opportunity to assert the new case should be granted only where the interests of justice require it and such a course can be taken without prejudice to the defendant.

(d) Consideration of the interests of justice should extend to a consideration of relevant matters beyond the interests of the parties to the interests of other litigants and efficient case management.

(e) When assessing the interests of justice, the merit of the new point sought to be raised is a relevant consideration.

62 Her Honour also referred to decisions of the Court of Appeal dealing with the same issue as follows at [115]-[116]:

115 The principles that govern the circumstances in which a party would be allowed to raise on appeal an argument which had not been raised in proceedings below were recently applied by the Court of Appeal in ***Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd*** [2014] WASCA 28. When summarising the well-established principles Martin CJ (Pullin and Murphy JJA agreeing) [85] said in relation to the prejudice which a party may suffer as a result of the other party being able to raise a new argument on appeal that the following comments of Gleeson CJ, McHugh and Gummow JJ in ***Whisprun Pty Ltd v Dixon*** [2003] HCA 48; (2003) 77 ALJR 1598 [51] are of direct relevance. In ***Whisprun***, their Honours said:

It would be inimical to the due administration of justice if, on appeal, a party could raise a point that was not taken at the trial unless it could not possibly have been met by further evidence at the trial (*University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483; *Coulton v Holcombe* (1986) 162 CLR 1 at 8-9; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 875 [44]; *Water Board v Moustakas* (1988) 180 CLR 491 at 496-497; cf *R v Birks* (1990) 19 NSWLR 677 at 683-685). Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not taken at the trial and could or might possibly have been met by rebutting evidence or cross-examination. Even when no question of further evidence is admissible, it may not be in the interests of justice to allow a new point to be raised on appeal, particularly if it will require a further trial of the action (*Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 at 645-646). Not only is the successful party put to expense that may not be recoverable

on a party and party taxation but a new trial inevitably inflicts on the parties worry, inconvenience and an interference with their personal and business affairs.

116 Recently applied by Martin CJ (Mazza JA and Hall J agreeing) in ***Calandra v Civil Aviation Safety Authority*** [2015] WASCA 31 [19].

63 It is not appropriate for the appellants to put a submission to the Full Bench on appeal that her Honour failed to make a particular finding at first instance, when the affirmative proposition was never fairly and squarely raised as a part of the appellants' case before the court. This is not a question of jurisdiction: ***SGS Australia v Taylor*** (1993) 73 WAIG 1760. The General Order has application to all employees within the Commission's jurisdiction throughout the State. By its terms, it contains no exclusions of categories of employees.

64 I am not persuaded that the point raised has any merit, such that it would be in the interests of justice for it to be permitted to be raised on this appeal for the first time. No authority or point of principle was advanced by the appellants in submissions that the respondent, as the CEO, could not be made redundant by nature of the job he held. From the materials before the court, as set out in the respondent's Executive Service Agreement (AB 65-87), the respondent was employed by the appellants as a partnership, comprising five natural persons and two companies. As a partnership, whilst it is collectively under s 10 of the *Partnership Act 1895* (WA) a firm, the partnership has no separate legal personality: ***Federal Commissioner of Taxation v Sahhar*** (1985) 59 ALR 98 per Lockhart J at 102; ***Atwell v Roberts*** [2013] WASCA 37; (2012) 43 WAR 507 per Buss JA at [121].

65 A business carried on by a partnership may be actively carried on by a partner or a manager, as an employee: ***Playfair Development Corp Pty Ltd v Ryan*** [1969] 2 NSWR 661. All partners can participate in the management of a partnership, subject to the terms of the relevant partnership agreement. The overall management of a partnership may be delegated by the partners under a partnership agreement, to a managing partner, or group of partners, even though the position of a managing partner is not one legally recognized: ***Ex parte Merrett*** (1997) 140 FLR 412 per Young J at 417.

66 In this case, Mr Elsegood, as the Managing Partner, took over the responsibilities of running the business, on the abolition of the CEO position. He did so as the Managing Partner. The partners were entitled to employ the respondent in the position as the CEO, under the Executive Employment Agreement between the partnership and the respondent. They were also entitled to abolish the position and terminate the Agreement, which they did. Contrary to the submissions of the appellants, given the nature of a partnership, there is no requirement in the general law, or under the *Partnership Act 1895* (WA), that requires a partnership as a firm, to have a 'CEO', as the ultimate decision maker, as the ground of appeal seems to suggest.

67 This ground is not made out.

Ground 3

68 The appellants contended that the learned Industrial Magistrate was in error when she concluded at [57] of her reasons that there was an irresistible inference that the result of the events of 23 March 2020 was that the respondent no longer had any functional duty remaining for him to perform, and this resulted from the appellants' decision that it no longer wanted the respondent's former job of CEO to be done by anyone.

69 The uncontroverted evidence at first instance was that the job of CEO that the respondent had performed since June 2015 had ceased to exist. That was Mr Elsegood's evidence, referred to above. This was because of the economic necessity to reduce costs, given the financial position of the business. Irrespective of whether the former responsibilities and functions of the respondent were assumed by one, two or more other persons, the indisputable fact was that there were no longer any duties or functions available to be performed by the respondent.

70 The appellants referred to and relied upon a decision of the of New South Wales Court of Appeal in ***UGL Rail Services.*** The appellants contended that in ***UGL***, a general manager was dismissed, and another person appointed to perform much the same functions as the person dismissed. It was held by the Court that this did not to constitute a redundancy. ***UGL*** is distinguishable firstly on the facts, and secondly, on the basis that the redundancy provision under consideration did not involve application of the ***Termination, Change and Redundancy*** type award entitlement, construed in the context of its origin and historical application, but rather, an undefined term of a common law contract.

71 In ***UGL***, the respondent was employed as the appellant's General Manager, Strategic Projects. The appellant manufactured rail infrastructure and rolling stock and provided rail maintenance services. By a side letter, the respondent was entitled to severance payments if he was made redundant. There was nothing else in the contract identifying what that meant. At first instance, a judge of the District Court found the respondent was made redundant when his employment was terminated after a restructuring. A claim based on an options clause of the contract was rejected.

72 The relevant facts in ***UGL*** were the appellant company reorganized the area of operations in which the respondent worked. The respondent was replaced by another person from inside the company, who took over much of the respondent's job of General Manager, Strategic Projects, which was retitled as 'General Manager Passenger Sales'. There was no suggestion that the appellant was in financial difficulty or that the respondent had become superfluous to the appellant's needs. The appellant contended that the respondent's employment was not terminated because his job had been abolished, rather, the appellant no longer wanted the respondent performing the job, which was given to someone else. The Court upheld the appeal and found the respondent was not made redundant. In the judgment of the Court, Sackville AJA (Adamson J agreeing), considered the common law cases as to the meaning of redundancy, and noted the importance of context, when considering its meaning. In referring to the observations of Vickery J in ***Hodgson v Amcor Ltd*** (2012) 264 FLR 1, his Honour said:

> The opening words of this extract must be kept in mind: the starting point for analysis must be the language of the relevant statute, award or contract of employment. Subject to this qualification, Vickery J's analysis in my view accurately summarises the principles stated in the cases. The key concept is that the job performed by the claimant ceases to exist, or the duties have so changed that for all practical purposes the role no longer exists. This concept cannot be applied in the

manner of a mathematical formula. A difficult judgment may have to be exercised, for example where the nominal position remains in place but the duties of that position are substantially altered: see *Commonwealth Bank of Australia v Financial Services Union* at [27]. Similarly, if the name of the position has been changed, but many of the duties and responsibilities attached to the previous position are retained, there may be no redundancy. But the fact that the duties attached to a position have changed or some responsibilities have been transferred to other positions does not establish that the position, or the occupant of the position, has been made redundant. Ordinarily, it is necessary for the employee claiming to have been made redundant to show that the changes in the duties and responsibilities of a position are so substantial that for practical purposes the position no longer exists. That may come about in a particular case where a position appears to continue (whether under the name or a different name), but the duties and responsibilities of the position are so substantially altered that it is largely stripped of its functions.

73 Sackville J concluded that the respondent's job was not 'emptied of its duties', his job was not abolished and nor had it ceased to exist: at [147]. Notably too, his Honour found that the appellant made it clear that the duties previously performed by the respondent needed to be performed 'in a more vigorous manner' and the importance of certain customers for the appellant's business being looked after, suggesting an element of a lack of satisfaction by the appellant with the respondent's performance. Importantly, the appellant's reasons for terminating the respondent's employment did not involve abolishing his position or a redistribution of the functions of his job to others: at [150].

74 In this case, in the sense described by Bray CJ in ***Adelaide Milk*** at [8], the respondent's employment was terminated not through any fault of his own, but because of the decision taken by the appellants to no longer have a job or position of CEO, because of financial constraints. That job, which the respondent formerly performed, no longer existed. It being no longer in existence, the respondent no longer had any duties to perform. It was not until August 2021 that the job of CEO was restored. The respondent was made redundant as defined in cl 4.1 of the General Order, as that definition should be interpreted, and the learned Industrial Magistrate made no error in reaching that conclusion, on all the evidence before her.

Conclusion

75 The appeal must be dismissed.

COSENTINO SC:

76 I have had the benefit of reading the draft reasons of the Chief Commissioner. I agree with those reasons and have nothing further to add.

WALKINGTON C:

77 I also agree with the reasons of the Chief Commissioner and have nothing further to add.

2022 WAIRC 00632

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 51/2021 GIVEN ON 19 JANUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	B. K ELSEGOOD & D.S ELSEGOOD & D.K ELSEGOOD & ELSEGOOD HOLDINGS PTY LTD & S.M ELSEGOOD & FALCONCREST HOLDINGS PTY LTD
	APPELLANTS
	-v-
	ALAN MAHON
	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T B WALKINGTON
DATE	MONDAY, 22 AUGUST 2022
FILE NO/S	FBA 1 OF 2022
CITATION NO.	2022 WAIRC 00632

Result	Appeal dismissed
Representation	
Appellants	Mr G McCorry as agent
Respondent	Mr P Mullally as agent

Order

HAVING heard from Mr G McCorry as agent on behalf of the appellants, and Mr P Mullally as agent on behalf of the respondent the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

(1) THAT the appeal be and is hereby dismissed

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2022 WAIRC 00070

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 131 OF 2021 GIVEN ON 20 OCTOBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2022 WAIRC 00070
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T B WALKINGTON
HEARD	:	TUESDAY, 15 FEBRUARY 2022
DELIVERED	:	THURSDAY, 17 FEBRUARY 2022
FILE NO.	:	FBA 7 OF 2021
BETWEEN	:	MICHAEL COE Appellant AND DEPARTMENT OF EDUCATION Respondent

ON APPEAL FROM:

Jurisdiction	:	**INDUSTRIAL MAGISTRATE'S COURT**
Coram	:	**INDUSTRIAL MAGISTRATE E O'DONNELL**
Citation	:	
File No	:	**M 131 of 2021**

Catchwords	:	Industrial Law (WA) - Appeal against decision of Industrial Magistrate - Jurisdiction of the court - Claim not within court's jurisdiction - Appeal dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) s 81A, s 83 *Public Sector Management Act 1994* (WA) *Public Sector Management (Redeployment and Redundancy) Regulations 2014*
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	In person
Respondent	:	Mr R Andretich of counsel
Solicitors:		
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Bluescope Steel (AIS) Pty Ltd and Another v Australian Workers' Union (2019) 270 FCR 359

Grasby v R (1989) 168 CLR

Reasons for Decision

THE FULL BENCH:

Background

1 The appellant was employed by the respondent as a level 7 employee in the position of Regional Coordinator Operations. On 23 September 2020 the appellant was made an offer of voluntary severance under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014*. The letter of offer from the respondent dated 23 September 2020 relevantly provided as follows:

> I am pleased to be able to offer you voluntary severance in accordance with the provisions of regulation 11 of the *Public Sector Management (Redeployment and Redundancy) Regulations* 2014 (the Regulations).

The offer of voluntary severance is subject to you resigning your employment with the Department of Education effective no later than 4 weeks after the date of your acceptance of this offer.

In accordance with regulations 13 and 14 and as at the date of this letter, the estimated severance and leave payment amounts (subject to adjustment) that you would receive are outlined below:

$139,895.67	Voluntary severance payment (includes maximum 12 week incentive payment)
$ 60,714.55	Leave pay out
$200,610.22	Gross total payout
$173,283.22	Net total pay out

Please Note: The final amounts that you will receive if you accept this offer are dependent upon the date of acceptance and the date your registration becomes effective (the maximum incentive payment of 12 weeks is included in the figures above).

If you accept this offer of voluntary severance and nominate an effective date of resignation, which is less than 4 weeks after the date you accept this offer, you will receive an incentive payment as calculated below:

An employee who accepts an offer of voluntary severance and resigns:

- less than 1 week after acceptance, receives an additional 12 weeks' pay
- more than 1 week and less than 2 weeks after acceptance, receives an additional 8 weeks' pay
- more than 2 weeks and less than 3 weeks after acceptance, receives an additional 4 weeks' pay
- more than 3 weeks and less than 4 weeks after acceptance, receives no additional pay.

While the Department of Education is obliged to and will deduct the amounts it is required to by law for taxation purposes in respect to the above payments, ultimately the taxation liability is determined by the Australian Taxation Office (ATO). Consequently, if there are any discrepancies in the treatment of your personal taxation arrangement then you will be responsible for the payment of any additional taxation on these payments.

In considering the appropriateness of the acceptance of voluntary severance in your circumstances, you are strongly encouraged to obtain independent and professional financial advice. You may also wish to seek advice from the ATO and your superannuation fund provider.

If you choose to accept the offer you must not subsequently be employed in the public sector before the expiry of a period of restriction. The period of restriction applicable to you is equal to the total number of weeks in respect of which the severance payment was paid and will be 45 weeks.

Should you wish to accept this offer of voluntary severance, please sign the attached copy of this letter and return it to Joanne Bergmans at deployment@education.wa.edu.au by **no later than Monday 16 November 2020.** If your acceptance is received after this date it will be invalid unless the Department of Education is prepared to accept it out of time. Following receipt of your acceptance, a formal Letter of Severance will be provided to you to confirm the terms and conditions of your voluntary severance. The amounts that will be paid to you will be adjusted to accord with your date of acceptance and the effective date of your resignation.

You should note that in the event you choose to not accept this offer, you will remain a registrable employee who may be transferred to another position; or where this is not possible, you may be registered for redeployment under regulation 18.

Please contact Joanne Bergmans on 9264 8718 if you require additional information concerning the offer of voluntary severance.

2 Subsequent to receiving the letter of offer, the appellant sought information and advice from officers of the respondent as to various matters. The net effect of this was that the appellant maintained that he was only ultimately given three weeks to accept the offer of voluntary severance, instead of eight weeks as prescribed by the *Regulations*. The appellant contended that this was because of incorrect advice that he received from officers of the respondent. Thus, the appellant maintained that he had been deprived of five weeks' salary, due to having to accept the offer earlier than he actually was required to do so.

3 The appellant commenced proceedings in the Industrial Magistrate's Court, claiming that his shortened period of employment involved a contravention of both the offer of voluntary severance and the *Regulations*. In his statement attached to the originating claim, the appellant said 'it is my view in the view of my legal counsel that I have been the victim of obvious injustice as the Public Sector Management (Redeployment and Redundancy) Regulations of 2014 referred to in section 94 of the Public Sector Management Act (1994) and my entitlements provided in the Offer of Severance dated 23 September 2020 were not fairly and properly applied to me.' The appellant claimed a net amount of $10,417.86 for the alleged shortfall of his salary (AB2). The respondent contested the appellant's claim and contended that the court had no jurisdiction to deal with it (AB3-4). The respondent made an application to the court to dismiss the appellant's claim for want of jurisdiction (AB4-5).

4 The court listed the respondent's application to dismiss the appellant's claim on 20 October 2021. After hearing from the parties, her Honour, Industrial Magistrate O'Donnell, granted the respondent's application and dismissed the appellant's claim for want of jurisdiction (AB6-7).

The appeal

5 The appellant now appeals against the decision of the learned Industrial Magistrate to the Full Bench under s 84 of the *Industrial Relations Act 1979* (WA). Whilst not entirely clear from the notice of appeal, it appears that the appellant contends that cl 51.1 of the now superseded *Public Sector CSA Agreement 2019* was contravened. It referred to matters of redeployment and redundancy being dealt with in accordance with the *Public Sector Management Act 1994* (WA) and the *Regulations.* When read with cl 61 – Dispute Settlement Procedure of the *Agreement*, the appellant seemed to suggest the latter gave the

court jurisdiction to deal with disputes as to such matters. The appellant contended that the court was able to enforce statutory instruments such as Acts of Parliament and awards and industrial agreements. The appellant contended that the respondent failed to comply with the *Agreement*, *the PSM Act* and the *Regulations*. However, it was not entirely clear how it was that the appellant maintained that such contraventions arose.

Consideration

6 For the following reasons, which we can relatively shortly state, in our view the appeal is without merit and it should be dismissed.

7 The Industrial Magistrate's Court is established under Part III of the *Act* as an inferior court of record. As such, it has no inherent jurisdiction and powers and they are as specified in the *Act*: ***Grasby v R*** (1989) 168 CLR 1 per Dawson J at 16-17. The court's jurisdiction is prescribed by ss 81A and 81AA of the *Act* as follows:

> **81A. Jurisdiction under this Act of industrial magistrate's court**
>
> An industrial magistrate's court has the jurisdiction conferred on it by sections 77, 80(1) and (2), 83, 83A, 83B, 83D, 83E, 96J, 97V(3), 97VJ(3), 97YC, 97YG, 110, 111 and 112.
>
> **81AA. Jurisdiction under other Acts of industrial magistrate's court**
>
> In addition to its jurisdiction under this Act, an industrial magistrate's court has the jurisdiction conferred on it by the following —
>
> (a) the *Construction Industry Portable Paid Long Service Leave Act 1985* section 53;
>
> (ba) Part IV of the *Long Service Leave Act 1958*;
>
> *[(bb) deleted]*
>
> (bc) section 196(2) of the *Children and Community Services Act 2004*.
>
> *[(b) deleted]*

8 For present purposes, the jurisdiction of the court, set out in s 81A, which is relevant is s 83 of the *Act*, which is in the following terms:

> **83. Enforcing awards etc.**
>
> (1) Subject to this Act, where a person contravenes or fails to comply with a provision of an instrument to which this section applies any of the following may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the provision —
>
> (a) the Registrar or a deputy registrar;
>
> (b) an industrial inspector;
>
> (c) in the case of an award or industrial agreement, any organisation or association named as a party to it;
>
> (d) in the case of an award, industrial agreement or order, an employer bound by it;
>
> (e) any person on his or her own behalf who is a party to the instrument or to whom it applies;
>
> (f) if an employee under an employer-employee agreement is a represented person, a representative acting on his or her behalf.
>
> (2) In this section —
>
> ***instrument to which this section applies*** means —
>
> (a) an award; and
>
> (b) an industrial agreement; and
>
> (c) an employer-employee agreement; and
>
> (d) an order made by the Commission, other than an order made under section 23A, 32, 44(6) or 66.
>
> (3) An application for the enforcement of an instrument to which this section applies shall not be made otherwise than under subsection (1).
>
> …..

9 It is immediately clear from s 81AA, that the *PSM Act* is not a specified statute (nor the *Regulations* made under it) from which the court obtains jurisdiction. Thus, it can only be from s 83 of the *Act* (as referred to in s 81A) that the court may obtain jurisdiction in a case such as the present. There is no doubt that for the purposes of s 83(2)(b), the *Agreement* was an 'instrument to which this section applies' in relation to the court's jurisdiction to enforce such an instrument. However, the court only obtains such jurisdiction and power if a claimant can establish that another person 'contravenes or fails to comply with a provision of an instrument to which this section applies …'.

10 In ***Bluescope Steel (AIS) Pty Ltd and Another v Australian Workers' Union*** (2019) 270 FCR 359, Allsop CJ, in relation to the meaning of the word 'contravention' for the purposes of s 50 of the *Fair Work Act 2009* (Cth), said at [15] to [16]:

> In *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494; 252 ALR 619 at [29]-[30] French CJ discussed the meaning of the word "contravention". His Honour first referred to the *Oxford English Dictionary* meaning as "[t]he action of contravening or going counter to; violation, infringement or transgression". At [30] French CJ said:

> Without essaying an exhaustive definition, the core meaning of "contravention" involves disobedience of a command expressed in a rule of law which may be statutory or non-statutory. It involves doing that which is forbidden by law or failing to do that which is required by law to be done. Mere failure to satisfy a condition necessary for the exercise of a statutory power is not a contravention. Nor would such a failure readily be characterised as "impropriety" although that word does cover a wider range of conduct than the word "contravention".

Whilst the word "contravention" is capable of a wide meaning, in the context of a civil remedy provision which includes the possible imposition of a civil penalty the word includes the notion of violating or infringing a rule or obligation or standard which is required. One would not assume or conclude that Parliament would provide for the imposition of a penalty for doing or not doing something that one was not obliged not to do or not obliged to do. One does not, in my view, contravene a non-obligatory term of an arrangement. Section 51 of the *Fair Work Act* itself links the imposition of an obligation on a person to a contravention of a term of an enterprise agreement by that person.

11 Accordingly, it could only be if the appellant could establish that the respondent 'contravened', in the sense set out above, or failed to comply with the *Agreement*, that the court could grant a remedy. No such contravention or failure to comply was able to be established in this case and the learned Industrial Magistrate was correct to dismiss the appellant's claim as she did.

12 Whilst the appellant's original claim before the court did not specify any particular breach of the *Agreement*, the appellant seems to have fastened onto comments by her Honour in the proceedings, that the only possible involvement of the *Agreement* was cl 51.1, which 'acknowledged' the application of the *PSM Act* and the *Regulations* as being the legislative framework under which matters of redeployment and redundancy will be dealt with. Her Honour expressed the view (at pp 8-9 of the transcript at first instance) that in any event, cl 51.1 appeared not to assist the appellant, but even it if it did, the respondent did 'acknowledge' the *PSM Act*, and the *Regulations*, as the offer of voluntary severance to the appellant was made in accordance with their terms.

13 Relevantly, cl 51.1 of the *Agreement* provided at the material time as follows:

> **51. REDEPLOYMENT AND REDUNDANCY**
>
> 51.1 The parties acknowledge that the *Public Sector Management Act 1994* (PSMA) and the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (Regulations) provide the legislative framework for redeployment and redundancy for all Employees covered by this Agreement. If the provisions of this Agreement and the Regulations are inconsistent, the provision of the Regulations shall prevail.

14 In our view, cl 51.1 created no enforceable rights or entitlements capable of a contravention or failure to comply with the *Agreement*, for the purposes of the court's jurisdiction under ss 81A and 83 of the *Act*. Provisions such as cl 51.1 of the *Agreement*, merely refer to the law applicable to a particular subject matter, which applies irrespective of the parties' 'acknowledgement', however it may be expressed.

15 Clause 51.1 was in similar terms to other clauses in industrial agreements that recognise or acknowledge existing legal obligations that lay elsewhere. This is similar to clauses in industrial agreements that may refer to the intention of the parties to the agreement, as to how they intend to conduct themselves in their dealings with each other, the objectives of the agreement such as promoting cooperation and goodwill between the parties, which have been held to not create enforceable rights and entitlements.

16 In ***Bluescope Steel*** an issue arose as to whether a clause in an award dealing with superannuation, and which did no more than state the application of relevant federal legislation concerning superannuation, created rights and entitlements. Allsop CJ at [9]-[17] considered the text of the clause and said at [13]:

> The words of cl 7 of the 2006 Award are entirely free of any text connoting obligation. There is only a recognition that Commonwealth legislation governs the matter of superannuation. Nor does any language acknowledge any requirement to make contributions. The reference to the Commonwealth legislation does not do that. Such lack of acknowledgement of requirement reflects the legislation in which there is no statutory obligation placed on employers to make superannuation contributions on behalf of employees. Rather, the legislation operates as a tax encouraging employers to pay superannuation contributions to avoid a significantly more expensive imposition of a (non-deductible) superannuation guarantee charge, if deductible contributions are not made. In practical parlance it may be said that employers are required to make contributions for superannuation. That is not the legal form or substance. It is unnecessary at this point to explain the precise working of the superannuation legislation.

17 Collier J, after setting out the relevant authorities in relation to the distinction between agreement clauses that use 'language of recognition' rather than 'language of obligation' at [226]-[234], came to the conclusion that the relevant superannuation clause in the award did not contain any language of obligation. Her Honour said at [235]:

> In light of the text of cl 7.1 of the Awards and the authorities I have just examined, it is clear that the language used in cl 7.1 of the Awards is the language of recognition only. The language of that clause does no more than identify the federal legislative instruments that govern the minimum contributions of superannuation by employers. As I have already said, that legislative regime also does not impose a binding obligation of [sic] the employer. It follows that, insofar as concerns cl 7.1 of the Award, a lawful choice is open to an employer not to make a superannuation contribution, but be liable to pay the charge under the statutory regime.

18 In our view, there is no material difference between the language of recognition used in the award clause the subject of the proceedings in ***Bluescope*** and the language of acknowledgement used in cl 51.1 of the *Agreement* in this case. In neither case was language of obligation used, creating enforceable rights and entitlements.

19 Furthermore, the reference to cl 61 – Dispute Settlement Procedure of the *Agreement*, does not assist the appellant and is misplaced. It deals with the referral of disputes by the Union party to the *Agreement*, or an employer, to the Commission for

resolution. This clause has nothing to do with the enforcement of a right or entitlement before the court under ss 81A and 83 of the *Act*.

20 For the foregoing reasons, the appeal must be dismissed.

2022 WAIRC 00071

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MICHAEL COE

APPELLANT

-and-

DEPARTMENT OF EDUCATION

RESPONDENT

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

DATE THURSDAY, 17 FEBRUARY 2022

FILE NO/S FBA 7 OF 2021

CITATION NO. 2022 WAIRC 00071

Result Appeal dismissed

Appearances

Appellant In person

Respondent Mr R Andretich of counsel

Order

HAVING heard from Mr M Coe on his own behalf, and Mr R Andretich of counsel on behalf of the respondent the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the appeal be dismissed.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2022 WAIRC 00636

INTERPRETATION OF SUB-CLAUSE 48.2 OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2022 WAIRC 00636
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	ON THE PAPERS
DELIVERED	:	MONDAY, 29 AUGUST 2022
FILE NO.	:	APPL 15 OF 2022
BETWEEN	:	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS Applicant AND MINISTER FOR CORRECTIVE SERVICES Respondent

CatchWords	:	Section 46 interpretation – Application for leave to intervene – Proposed intervener does not have sufficient interest to be granted leave to intervene – Application for leave to intervene dismissed
Legislation	:	*Industrial Relations Act 1979* (WA): s 27(1)(k)
Result	:	Application for leave to intervene dismissed
Representation:		
Applicant	:	Mr J Theodorsen (as agent)
Respondent	:	Mr J Carroll (of counsel)
Civil Service Association of Western Australia Incorporated	:	Mr W Claydon (as agent)

Cases referred to in reasons:

Australian Railways Union v Victorian Railway Commissioners [1930] HCA 52

Australian Workers' Union, West Australian Branch, Industrial Union of Workers & others v (Not Applicable) [2016] WAIRC 00966

Fedec v Minister for Corrective Services [2017] WAIRC 00828; (2017) 97 WAIG 1595

Gairns v The Royal Australian Nursing Federation Industrial Union of Workers, Perth (1989) 69 WAIG 2343

Re Ludeke; Ex Parte Customs Officers Association of Australia [1985] HCA 31

Reasons for Decision

1 The Western Australian Prison Officers' Union (**WAPOU**) and the Minister for Corrective Services (**Minister**) are in dispute about the correct interpretation of cl 48.2 of the *Department of Justice Prison Officers' Industrial Agreement 2020* (**Prison Officers' Agreement**). WAPOU filed an application for an interpretation of cl 48.2 under s 46 of the *Industrial Relations Act 1979* (WA) (**IR Act**).

2 WAPOU then informed the Commission and the Minister that it had become aware of the similarity between cl 48.2 of the Prison Officers' Agreement and cl 19(5) of the *Public Service Award 1992* (**Public Service Award**).

3 In circumstances where the Public Service Award applies to a large number of public sector employees, the Commission invited the Civil Service Association of Western Australia Incorporated (**CSA**) and the Minister for Industrial Relations to consider whether they wished to file an application to intervene in application APPL 15 of 2022.

4 The Minister for Industrial Relations did not wish to intervene.

5 The CSA seeks to intervene. It argues that it has sufficient interest to intervene because its industrial instruments cover approximately 39,723 government officers, the wording in cl 48.2 of the Prison Officers' Agreement is almost identical to the wording in cl 19.5 of the Public Service Award, and there are a further nine public sector industrial instruments to which the CSA is a party that also contain clauses with similar wording. Finally, the CSA argues that application APPL 15 of 2022 arises out of a disciplinary matter dealt with under Part 5 of the *Public Sector Management Act 1994* (WA) (**PSM Act**), which applies to its members who are public service officers, juvenile custodial officers and social trainers.

6 WAPOU argues that the CSA should be granted leave to intervene because 'there is a serious question of fact and law' about whether a decision in application APPL 15 of 2022 would affect the interpretation of the other industrial instruments the CSA has identified, and because there would be a risk of multiple proceedings 'if this matter is not decided in the current application'.

7 The Minister objects to the CSA being granted leave to intervene for reasons including that the proper approach to the construction of industrial agreements is not the same as the proper approach to the construction of awards. The proper construction of the Prison Officers' Agreement can have no impact upon the proper construction of the Public Service Award or any other instrument referred to in the CSA's application to intervene. The Minister says that the CSA does not have sufficient interest in application APPL 15 of 2022 to warrant it being granted leave to intervene.

8 The parties agreed that the Commission should decide the CSA's application to intervene on the papers.

What must I decide?

9 I must decide whether the CSA has sufficient interest in the matter to be granted leave to intervene in application APPL 15 of 2022, and if so, on what terms.

Legal principles

10 The Commission's power to grant leave to intervene is set out in s 27(1)(k) of the IR Act:

> **27. Powers of Commission**
>
> Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

…

(k) permit the intervention, on such terms as it thinks fit, of any person who, in the opinion of the Commission has a sufficient interest in the matter; and

11 The Full Bench considered s 27(1)(k) of the IR Act most recently in ***Australian Workers' Union, West Australian Branch, Industrial Union of Workers & others v (Not Applicable)*** [2016] WAIRC 00966 (**AWU v NA**) from [17]-[21]:

[17] The principles for the Commission to consider when determining whether to exercise its discretion to allow a person to intervene in proceedings pursuant to its power to do so under s 27(1)(k) of the IR Act, in particular the determination whether a person has, in the opinion of the Commission, a sufficient interest in a matter that that person should be heard, were considered by Sharkey P in ***Gairns v The Royal Australian Nursing Federation Industrial Union of Workers, Perth*** (1989) 69 WAIG 2343. In ***Gairns*** the substantive application was an application brought before the President's original jurisdiction under s 66 of the IR Act for an interpretation of union rules. The federal nursing union, the Australian Nursing Federation, sought intervention in the proceedings. So, too, did federal and state Academic Unions. President Sharkey found that the most helpful dissertation of principles relating to intervention was set out in ***Re Ludeke; Ex parte Customs Officers' Association of Australia, Fourth Division*** [1985] HCA 31; (1985) 155 CLR 513; (1985) 13 IR 86.

[18] In ***Ludeke***, the matter before the High Court was an application by the Customs Officers' Association of Australia, Fourth Division to make absolute an order nisi for a prerogative writ to quash an order made by Justice Ludeke that leave be granted to the Administrative and Clerical Officers' Association, Australian Government Employment (ACOA) to intervene in the matter subject to limitation on certain questions it raised in its submissions in a demarcation dispute between that union and the ACOA. Chief Justice Gibbs at (519) - (520), with whom Dawson J agreed, observed:

> The critical question is whether the prosecutor will be denied natural justice if it is allowed to intervene in ACOA's application only to the limited extent allowed by Ludeke J. It may be said immediately that it is clear that notwithstanding the wide discretion in matters of procedure given to the Commission by s. 40(1) of the Act, the Commission is bound to observe the rules of natural justice: *Reg. v. Commonwealth Conciliation and Arbitration Commission*; *Ex parte Angliss Group* ((1969) 122 C.L.R. 546, at p. 552); *Reg. v. Moore; Ex parte Victoria* ((1977) 140 C.L.R. 92, at pp. 101-102); *Reg. v. Isaac; Ex parte State Electricity Commission (Vict.)* ((1978) 140 C.L.R. 615, at p. 620). That means that a person whose rights will be directly affected by an order made by the Commission must be given a full and fair opportunity to be heard before the order is made. That requirement will not necessarily be satisfied if the Commission relies only on the fact that the person concerned has been heard on the same question by the same member of the Commission on a previous occasion. In general, the rules of natural justice are not satisfied unless the opportunity to be heard is afforded in the proceeding in question, although the fact that there had been an earlier hearing would be relevant in determining what constituted a full opportunity to be heard. However, natural justice does not require that everyone who may suffer some detriment as an indirect result of an order of the Commission is entitled to be heard before the order is made. Orders made by the Commission may affect many members of the community who are not parties to the proceedings in question but that does not mean that any member of the community who will be indirectly affected by an order of the Commission has a right to be heard in those proceedings. It has been held that a person who is not a party to a dispute, but who may nevertheless be affected, indirectly and consequentially, by an order made in settlement of the dispute is not entitled to be heard before the matter is determined: *Reg. v. Moore; Ex parte Victoria; Reg. v. Isaac; Ex parte State Electricity Commission (Vict.).*

[19] From these observations of Gibbs CJ in ***Ludeke***, the following principles emerge:

(a) Every person whose rights will be directly affected by an order must be given a full and fair opportunity to be heard; and

(b) The principles of natural justice do not require that everyone who may suffer a detriment as an indirect result of an order or who is indirectly affected is entitled to be heard before the order is made.

[20] Justice Mason in ***Ludeke*** made similar observations. He observed that an interest which in its nature is inadequate to support intervention in legal proceedings in a court may be sufficient to support intervention in a matter of industrial arbitration before the Commission (523). His Honour found that if an organisation has a substantial interest sufficient to sustain an application to the court for prohibition then, generally speaking, it is desirable that the Commission should recognise that interest, subject to discretionary considerations, as a basis for intervention (525). In making this observation, his Honour had regard to the decision in ***R v Holmes; Ex parte Public Service Association (NSW)*** [1977] HCA 70; (1977) 140 CLR 63 where it was found that where the prosecutor had relevant coverage under its eligibility rule there could be no doubt that it had a substantial interest sufficient to sustain its intervention and that a lack of coverage would result in the prosecutor's interest being much more tenuous (525). Justice Mason in ***Ludeke*** also said (527):

> Indeed, the principal object of intervention is to ensure that all interested parties will participate in a single resolution of a controversy instead of being relegated to a resolution of the controversy in several proceedings. It is the attainment of this object that justifies intrusion into the litigant's right or interest in pursuing his proceedings as he chooses to constitute them.

[21] Justice Brennan said that he generally agreed with the judgment of the Chief Justice. His Honour then went on to add that in determining whether a repository of a statutory power is bound to hear a person who is not directly involved in proceedings regard must be had (528):

> to all the circumstances of the case, including the language of the statute, the nature of the power and of the body in which the power is reposed, the nature of the proceedings, the procedural rules that govern the proceedings (especially any provision for intervention by a person not directly involved in them), the interests which are likely to be affected, directly or indirectly, by the exercise of the power and the stage the proceedings have reached when the repository of the power learns of those interests. Generally speaking, a decision that will affect adversely a person's legal rights or his proprietary or financial interests or his reputation ought not to be taken without first giving him an opportunity to be heard provided such an opportunity can be reasonably given *(F.A.I. Insurances Ltd. v. Winneke* ((1982) 151 C.L.R. 342, at pp. 411-412)), even if that person is not directly involved in the proceedings which lead to the making of the decision: cf. *Reg. v. Town and Country Planning Commissioner; Ex parte Scott* ([1970] Tas. S.R. 154, at pp. 182-187; 24 L.G.R.A. 108, at pp. 137-141). But that is not an absolute rule.

CSA's submissions

12 The CSA says its right to intervene comes from statute. The Commission does not have inherent jurisdiction to permit intervention so the Commission's decision about the CSA's application to intervene must be made in the statutory context. The CSA says that the Minister is applying the wrong test.

13 The CSA says that when deciding applications for leave to intervene, the Commission 'has generally applied ***Re Ludeke; Ex Parte Customs Officers Association of Australia*** [1985] HCA 31 (***Ludeke***), which followed the reasoning in ***Australian Railways Union v Victorian Railway Commissioners*** [1930] HCA 52.

14 In particular, the CSA draws the Commission's attention to Mason J's reasoning at 331 in ***Ludeke***, where he says:

> I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned', 'an interest which in its nature is inadequate to support intervention in legal proceedings in a court may be sufficient to support intervention in a matter of industrial arbitration before the Commission' and that 'the principal object of intervention is to ensure that all interested parties will participate in a single resolution of a controversy instead of being relegated to a resolution of the controversy in several proceedings.

15 The CSA also relies on [19]-[21] of ***AWU v NA***. It says that the interpretation of clauses with similar wording in industrial instruments that the CSA is a party to 'is a "particular right, power or immunity" as required by [***AWU v NA***] because it is an industrial right that applies to our members'.

16 I understand the effect of the CSA's submission to be that not only is the CSA a party to the Public Service Award, but it is also a party to at least nine other industrial instruments that have provisions with wording similar to cl 48.2 of the Prison Officers' Agreement:

a) *Government Officers Salaries, Allowances and Conditions Award 1989*;

b) *Juvenile Custodial Officers Award*;

c) *Government Officers (Social Trainers) Award 1988;*

d) *Education Department Ministerial Officers Salaries, Allowances and Conditions Award 1983;*

e) *Department of Communities (CSA) Family Resource Workers, Welfare Assistants and Parent Helpers Award 1990*;

f) *Government Officers (Insurance Commission of Western Australia) Award 1987*;

g) *Parliamentary Employees Award 1989;*

h) *WA Health CSA Dental Technicians (Dental Health Services) Award 2016*; and

i) *Dental Health Services – Dental Officers – CSA Industrial Agreement 2021*.

17 In total, the CSA says that it is a party to industrial instruments that collectively cover 39,723 employees. The CSA argues 'the particular higher duties clauses have evolved in the public sector through flow-on, and so any decision on their meaning will be persuasive for similar clauses.'

18 Further, the CSA says that application APPL 15 of 2022 arose out of a dispute about the effect of a demotion under Part 5 of the PSM Act. This section applies to public service officers, juvenile custodial officers and social trainers.

19 The interpretation declared in application APPL 15 of 2022 'may impact as to how the clauses in the CSA's instruments are interpreted, especially where the industrial contexts are similar'. Despite 'any small differences in language or industrial context' the CSA's interest is 'substantial enough to warrant intervention'. It says '[t]he particular higher duties clauses have evolved in the public sector through flow-on, and so any decision on their meaning will be persuasive for similar clauses'.

20 The CSA says that the 'interpretative exercise' for industrial agreements and awards is not as different as the Minister says. In both cases, the Commission must begin with the plain meaning of the words. To not grant the CSA leave to intervene in this matter would be 'contrary to the objective of preventing repetitive litigation on similar clauses and future interventions'. Whether the industrial context of the industrial instruments set out at above is similar to the industrial context of the Prison Officers' Agreement is a question of fact and law 'for which the CSA should be allowed to make submissions on as the CSA has established sufficient interest in the answer to that question'.

21 For these reasons, the CSA says it has sufficient interest in the matter and should be granted leave to intervene.

WAPOU's submissions

22 WAPOU's submissions are brief. It says that s 27(1)(k) of the IR Act 'confers extensive discretion on the Commission to permit intervention, and there is nothing in the statute to support limiting the discretion by reference to considerations that may apply in legal proceedings in court'.

23 It says the primary question is whether the intervener has 'sufficient interest' and it is not an absolute rule that it must be a direct interest: ***Gairns v Royal Australian Nursing Federation Industrial Union of Workers*** (1989) 69 WAIG 2343 at 2347 per Sharkey P.

24 The nature of the proposed intervener's interest need not reach the level required to permit intervention in court proceedings: ***AWU v NA*** at [20]. The principal object of allowing intervention is to resolve disputes in a single proceeding. An intervener may be establish a sound basis for intervention on this point alone: ***AWU v NA*** at [20].

25 The CSA is said to have identified 'many industrial instruments which contain similar language to the provision the subject of these proceedings, which were made in a similar industrial context'. There is a question of fact and law about whether a decision on the current application 'may influence the interpretation of instruments that the CSA has identified' and there is a 'significant risk of multiple proceedings'. The Commission should grant the CSA leave to intervene in this application.

Minister's submissions

26 The Minister opposes the CSA's application for leave to intervene. He says that the proper approach to the construction of industrial agreements is not the same as the proper approach to the construction of awards. Awards are subsidiary legislation made by the Commission or Public Service Arbitrator but agreements are made between negotiating parties and registered by the Commission or Public Service Arbitrator. The proper approach to construing industrial agreements fixes upon the proper approach to construing contracts, which is to determine the objective intention of the parties as understood from the text in the context in which it appears. It is not relevant what the parties objectively intended in the awards referred to by the CSA.

27 The proper construction of industrial agreements turns upon the objective intention expressed in the text and the context in which it appears. The industrial context (public sector employment) is part of the context of the text, but each industrial instrument will also have its own more specific context, for example the specific employees covered by that industrial instrument. Importantly, 'each instrument will have a different context as far as the balance of the text of the instrument is concerned'. The Prison Officers' Agreement stands alone because it does not have the same textual context as any of the industrial instruments referred to by the CSA.

28 Parties to industrial instruments that are not the subject of application APPL 15 of 2022 can make other applications, including under s 46 of the IR Act, about the proper construction of those industrial instruments.

29 Further, the CSA has not provided a summary of what it proposes to say in intervention. It is possible that the CSA could submit that the Prison Officers' Agreement should be construed differently to the industrial instruments that it says has clauses with similar wording to cl 48.2. For example, this could be because of the effect of admissible evidence that the CSA might try to lead about the construction of those industrial instruments.

30 In those circumstances, the CSA should not be granted leave to intervene.

31 The Minister also submits that if the CSA is granted leave to intervene, it should be required to file an outline of the submissions it intends to make as an intervener in relation to application APPL 15 of 2022. Further, if the CSA is granted leave to intervene, then each and every employer party to the industrial instruments referred to by the CSA should properly be invited to intervene. There should also be an assessment of other instruments in the State industrial relations system to see whether there are any other industrial instruments with similar provisions. If there are, the parties to those instruments should also be invited to intervene.

Consideration

32 Having considered the application to intervene and the submissions from the CSA, WAPOU and the Minister, I am not persuaded that the CSA has sufficient interest in this matter.

33 Under section 27(1)(k) of the IR Act, the Commission may permit intervention if the Commission considers that the person has a sufficient interest in the matter.

34 Applying the reasoning in ***Ludeke***, adopted by the Full Bench in ***AWU v NA***, if the CSA's rights or its members' rights would be directly affected by the order/s sought in application APPL 15 of 2022 then clearly the CSA would have sufficient interest in this matter to justify granting leave to intervene.

35 The Prison Officers' Agreement does not apply to the CSA or its members. Declaring the true interpretation of that agreement would not directly affect the rights of the CSA or its members.

36 That cl 19(5) of the Public Service Award may be 'almost identical' to cl 48(2) of the Prison Officers' Agreement does not mean that the CSA has a sufficient interest in this matter. The proper approach to the construction of awards is not identical to that of industrial agreements.

37 The principles that apply to the interpretation of industrial agreements are the principles that apply to interpretation of contracts. The Full Bench said at [21]-[23] of ***Fedec v Minister for Corrective Services*** [2017] WAIRC 00828; (2017) 97 WAIG 1595:

> [21] The approach that is to be applied when interpreting an industrial agreement is well established. This is:
>
> (a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.

(b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: ***City of Wanneroo v Holmes*** [1989] FCA 369; (1989) 30 IR 362.

(c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: ***George A Bond & Co Ltd (in liq) v McKenzie*** [1929] AR (NSW) 498; ***City of Wanneroo v Holmes*** (378 - 379) (French J).

[22] The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement. In ***Re Harrison; Ex parte Hames*** [2015] WASC 247, Beech J said [50] - [51]:

> The general principles relevant to the proper construction of instruments are well-known. In summary:
>
> (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
>
> (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
>
> (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
>
> (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
>
> (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
>
> (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); ***Kidd v The State of Western Australia*** [2014] WASC 99 [122]; ***Red Hill Iron Ltd v API Management Pty Ltd*** [2012] WASC 323 [106] - [112]; ***Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd*** [2014] WASCA 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).

These general principles apply in the construction of an industrial agreement (***Director General, Department of Education v United Voice WA*** [2013] WASCA 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (***Amcor Ltd v Construction, Forestry, Mining & Energy Union*** [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); ***Director General v United Voice*** [81]; see also ***Amcor v CFMEU*** 66 (Kirby J), 129 - 130 (Callinan J)).

[23] To these principles, the following observations made by Pullin J in ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2013) 94 WAIG 1 [18] - [19] should be added:

> The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 [40]; ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22].
>
> Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337, 352; ***McCourt v Cranston*** [2012] WASCA 60 [23].

38 I accept that there may be circumstances where a person has sufficient interest in a matter, even where their interest is indirect and would not support intervention in legal proceedings in a court.

39 The CSA seems to argue that it should be granted leave to intervene so it can be heard at the substantive hearing about whether the interpretation of the Prison Officers' Agreement could impact the awards mentioned by the CSA. That submission is misconceived. The issue of whether the interpretation of the Prison Officers' Agreement could impact the awards and industrial agreement set out at [16] is said to be the basis for the CSA's interest in this matter. The CSA has had an opportunity to be heard about that. The CSA chose to be heard on the basis of its written submissions.

40 In my view, that other awards and one industrial agreement to which the CSA is a party contain clauses with similar wording to cl 48.2 of the Prison Officers' Agreement is too tenuous a connection to amount to a sufficient interest in this matter. The Commission's task in interpreting the true meaning of a clause in an industrial agreement involves considering the objective intention of the parties from the text in the context in which it appears. Industrial agreements each have their own textual context. It therefore does not follow that an interpretation of cl 48.2 of the Prison Officers' Agreement in this matter would affect the interpretation of a clause in a different industrial agreement or award, even if that clause is similarly worded.

41 Accordingly, I do not consider that the 'industrial rights' of the CSA's members under other industrial instruments would suffer, even as an indirect result of an order, if the CSA is not permitted to intervene in this matter. The rights and interests that may be affected by an order in this matter are those of WAPOU, its members and the Minister. In any event, to the extent that the CSA and its members could be indirectly affected by an order made in this matter, such an interest is not substantial. It is not sufficient to entitle the CSA to be heard before the order is made.

42 Contrary to the submission of WAPOU and the CSA, allowing the CSA to intervene in this matter would not have the effect of avoiding multiple proceedings. This is because a resolution in this matter could not be said to settle other disputes about the interpretation of similarly worded clauses in other awards or industrial agreements. A dispute about the interpretation of a clause in an industrial agreement can only be resolved by considering the objective intention of the parties from the text in the context of that particular industrial agreement. Intervention in this matter would not lead to the single resolution of a controversy. It would not settle a dispute about the interpretation of a different industrial agreement or award.

43 As noted by Gibbs CJ in ***Ludeke*** at 520, 'Orders made by the Commission may affect many members of the community who are not parties to the proceedings in question but that does not mean that any member of the community who will be indirectly affected by an order of the Commission has a right to be heard in those proceedings.' That application APPL 15 of 2022 may have arisen out of a dispute in relation to a disciplinary matter dealt with under Part 5 of the PSM Act does not mean that the CSA has an interest in this matter beyond that of the many other public sector employees to whom Part 5 of the PSM Act applies. Such an interest is not sufficient to justify intervention.

44 For these reasons I am not persuaded that the CSA's interest in this matter is sufficient to justify an order under s 27(1)(k) of the IR Act permitting intervention.

45 The CSA's application for leave to intervene in application APPL 15 of 2022 will be dismissed.

2022 WAIRC 00637

INTERPRETATION OF SUB-CLAUSE 48.2 OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPLICANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE MONDAY, 29 AUGUST 2022

FILE NO/S APPL 15 OF 2022

CITATION NO. 2022 WAIRC 00637

Result Application for leave to intervene dismissed

Representation

Applicant Mr J Theodorsen (as agent)

Respondent Mr J Carroll (of counsel)

Civil Service Association of Western Australia Incorporated Mr W Claydon (as agent)

Order

HAVING heard from Mr J Theodorsen (as agent) on behalf of the applicant, Mr J Carroll (of counsel) on behalf of the respondent and Mr W Claydon (as agent) on behalf of the Civil Service Association of Western Australia Incorporated, the Commission, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), orders –

THAT the Civil Service Association of Western Australia Incorporated's application to intervene in application APPL 15 of 2022 filed 23 June 2022 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2022 WAIRC 00643

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2022 WAIRC 00643
CORAM	**:**	INDUSTRIAL MAGISTRATE B. COLEMAN
HEARD	**:**	FRIDAY, 1 JULY 2022
DELIVERED	**:**	WEDNESDAY, 31 AUGUST 2022
FILE NO.	**:**	M 168 OF 2020
BETWEEN	**:**	BRALEA PTY LTD AS THE TRUSTEE FOR THE BRALEA TRUST (COMMONLY KNOWN AS LONE RANGES SHOOTING COMPLEX)

APPLICANT

AND

THE AUSTRALIAN WORKERS UNION

RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Awarding of Costs – Frivolous or Vexatious - Relevant principles applied – Costs Awarded
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA)
Instruments	:	*Amusements, Events and Recreation Award 2010* (Cth)
Case(s) referred to in reasons	**:**	***Denise Brailey v Mendex Pty Ltd T/A Mair and Co Maylands*** *(1992) 73 WAIG 26* ***Adrian Manescu v Baker Hughes Australia Pty. Limited ABN: 20 004 762 050*** *[2021] WAIRC 00558* ***The Western Australian Builders Labourers, Painters and Plasterers Union of Workers v Michael Nelson Clark and Amanda Joy Clark t/as Mike Clark Contracting*** *(1995) 76 WAIG 4* ***The Commissioner of Police of Western Australia v AM*** *[2010] WASCA 163 (S)* ***Jones v Dunkel*** *[1959] HCA 8*
Result	**:**	Application granted
Representation:		
Applicant	**:**	Mr J. Leslie (of Counsel) from Zafra Legal
Respondent	**:**	Mr C. Dunne (of Counsel) from The Australian Workers Union

REASONS FOR DECISION

1 By application lodged on 4 March 2022 the respondent Bralea Pty Ltd as the Trustee of the Bralea Trust, commonly known as Lone Rangers Shooting Complex (the respondent) seeks costs be paid by the claimant, pursuant to reg 11 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (the Regulations).

Background

2 On 2 October 2020, The Australian Worker's Union (the claimant) filed a claim in the Industrial Magistrate's Court (the Court) alleging a failure by the respondent to comply with the *Amusements, Events and Recreation Award 2010* (Cth)(the Award) and alleging contraventions of s 45 and s 323 of the *Fair Work Act 2009* (Cth).

3 The claimant alleged an underpayment of wages in the amount of $4,958.19 and non-payment of superannuation in the amount of $1,157.09, relating to the former employee Mr Jamie Christensen (Mr Christensen).

4 The originating claim attached calculations in the form of a spreadsheet. The spreadsheet was emailed to the respondent's lawyers on 15 October 2020.[1]

5 On 28 October 2020, the respondent filed a response wholly denying the claim. The information within the response placed the claimant on notice that the respondent had undertaken an audit in February 2018 which had identified a shortfall, resulting in a supplementary payment having been made to Mr Christensen.

6 On 25 November 2020, the solicitor for the respondent wrote to the claimant's representative, setting out detailed reasons why the claim would not be successful and attaching amendments to the claimant's spreadsheet. The respondent informed the claimant that the respondent intended to seek costs if the matter proceeded further.[2]

7 On 8 December 2020 the parties attended a pre-trial conference. The respondent was ordered to provide the claimant with the supporting calculations arising from the 2018 audit.

8 On 12 January 2021, the respondent's solicitor emailed the calculations to the claimant's representative.[3]

9 On 31 March 2021, the parties attended a further pre-trial conference. On 1 April 2021, the Clerk of the Court made an order that the claimant lodge with the court an amended statement of claim, to include:

- The quantum of the claim; and
- Detailed calculations of how the quantum was determined specifying the breaches claimed.

10 On 20 April 2021, the claimant filed an amended statement of claim with amended figures for unpaid wages and superannuation, being $5,733.60 and $543.44 respectively.

11 The amended claim also sought an additional 15 minutes payment for each shift that Mr Christensen had worked. The new portion of the claim had not been foreshadowed at either of the two pre-trial conferences.

12 On 13 May 2021 the respondent filed its amended response denying the whole of the amended claim.

13 On 14 June 2021 the parties attended a programming conference and programming orders were made for trial.

14 On 16 July 2021, the respondent lodged a counterclaim seeking an order that Mr Christensen pay the amount of $1,321.92 to the respondent due to an overpayment in wages: it was alleged that Mr Christensen had failed to work the entirety of his allocated shifts.

15 Discussions between the parties then ensued.[4]

16 On 1 September 2021, the claimant lodged a notice of discontinuance of the proceedings.

Determination

17 The Industrial Magistrates Court's power to award costs is set out in reg 11 of the Regulations.

18 The award of costs is discretionary: for a costs order to be made against a party to the proceedings, the Court must be objectively satisfied that 'the case has been frivolously or vexatiously instituted or defended, as the case requires, by that party'.[5]

19 The general policy within industrial jurisdictions is that costs ought only be awarded in extreme cases.[6]

20 In determining 'extreme', consideration must be given to the facts of each case.

21 Examples have included instances where proceedings have been instituted without reasonable cause (either at first instance or on appeal), or where an employee was not in fact subject to the award.[7]

22 In support of its application, the respondent relies upon the originating claim and response, the amended claim and response, along with the affidavits of Mr Joshua James Leslie (Mr Leslie) sworn 2 March 2022 and Mr Bradley John Yates (Mr Yates) sworn 27 May 2022.

23 The claimant has filed one affidavit in response to the application, being that of the legal representative Mr Craig Dunne (Mr Dunne) sworn 6 May 2022.

24 Mr Dunne took carriage of the claim in July 2021, after the retirement of the previous industrial officer Mr Carl Young (Mr Young).

25 Mr Dunne's affidavit describes his involvement in the action from July 2021, including the decision to discontinue the claim: his affidavit is largely consistent with that of Mr Leslie. Mr Dunne did not avow to any events that occurred prior to his commencement of employment with the claimant.

26 No other affidavit material is relied upon by the claimant, nor has the claimant sought to lead viva voce evidence with respect to the application. The claimant seeks only to rely upon Mr Dunne's affidavit, the legal submissions and the supplementary oral submissions made at the hearing on 1 July 2022.

27 No adverse inference should be drawn from the failure to call evidence: the claimant does not bear any onus of proof on this application.[8] The onus lies with the respondent to prove its application based upon the evidentiary material that it may produce to substantiate the application for costs. The fact that the claimant chose not to rely upon any substantial evidentiary material in response to the application does not reverse the onus of proof.

28 Further, the claimant has not, and is not, required to provide any explanation for the discontinuance of the claim.

29 In determining this costs application, I am not required to consider why, as a matter of fact, the claim did not proceed to trial. My focus must be upon the originating claim and whether, objectively, the claim was instituted either frivolously or vexatiously.

30 The Regulations do not define the words 'frivolous' or 'vexatious'.

31 I adopt the review of the case law and conclusions of Buss J in the Full Court decision of ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163 (S) regarding the meaning of the words 'frivolous' and 'vexatious'.

32 Buss J's conclusions are summarised as follows:

1. The discretion to award costs will only arise in circumstances where the party applying for costs establishes that the other party has instituted or defended the proceedings frivolously or vexatiously;[9]
2. Where the discretion is enlivened, it does not automatically follow that costs should be awarded: the court must still have regard to general policy and to all of the circumstances of the case to decide whether to exercise its discretion;[10]
3. The test is not whether in fact the proceedings are frivolous or vexatious but rather, whether the proceedings have been frivolously and vexatiously instituted or defended;[11]
4. 'Frivolous' means to have no reasonable grounds for the claim. The test has been expressed variously as:
   - 4.1. 'so obviously untenable that it cannot possibly succeed';
   - 4.2. 'manifestly groundless';
   - 4.3. 'so manifestly faulty that it does not admit of argument';
   - 4.4. 'discloses a case which the Court is satisfied cannot succeed';
   - 4.5. 'under no possibility can there be a good cause of action';
   - 4.6. 'be manifest that to allow … (the pleadings) to stand would involve useless expense'[12].
5. 'Vexatious' means to institute the claim without sufficient grounds for success in order to cause trouble or annoyance to the other party. Proceedings can be vexatious if they:
   - 5.1. are instituted with the intention of annoying or embarrassing the other party;
   - 5.2. brought for collateral purposes; or,
   - 5.3. irrespective of the motive of the litigant, the proceedings are so untenable or manifestly groundless as to be 'utterly hopeless'.[13]

33 A plain reading of both the originating and amended claims reveals that the claim is patently faulty. This is further cemented upon review of Mr Leslie's affidavit and attachments, along with the relevant provisions of the Award.

34 The originating claim attached a spreadsheet that contained several errors in calculations, including a failure to demonstrate 'offsets', a failure to account for meal breaks and the miscalculation of several monetary figures.

35 The originating claim failed to address clearly how the claim for the monetary amounts arose *vis a vis* the compensatory payment made by the respondent, such that orders were made by the Clerk of the Court at the further pre-trial conference on 1 April 2021 to file an amended claim.

36 At the very least, by 12 January 2021, upon receipt of the audit calculations,[14] the claimant had received the necessary information from the respondent that demonstrated the claim was without merit. It was at that point in time that the claim should have been discontinued.

37 Instead, the claimant's representative Mr Young sought directions from the Clerk of Court[15] and subsequently filed an amended claim.

38 The amended claim sought to introduce an additional claim for monies allegedly owed to Mr Christensen for an earlier start time: in the absence of evidence to the contrary, objectively it appears that the claim was amended as such to bolster an otherwise unsustainable claim.

39 The motives of the claimant's previous representative with respect to the claim are not known, nor is it appropriate to speculate. The application can only be determined upon the documentary evidence filed with the Court.

40 Prior to the engagement of Mr Dunne, the claimant's representative Mr Young did not engage in any meaningful conferral with the respondent, nor - based upon the pleadings and the evidence presented - was there any forensic analysis completed by the claimant to adequately determine whether the originating and amended claims were meritorious. In the absence of evidence from Mr Young, it is difficult to determine otherwise.

41 To continue a cause of action without undertaking such a process was fraught with danger, particularly in circumstances where the claimant was represented by an experienced industrial officer, the respondent disclosed the findings of its own audit at an early stage of the proceeding and, the respondent had placed the claimant on notice at the commencement of the action that the respondent intended to recover costs should the claim fail.

42 Without delving into a minute analysis of the calculations the subject of the claim, on the evidence presented in attachments 4 and 6 of Mr Leslie's affidavit, with reference to the relevant provisions of the Award, it is apparent on its face that there were major defects in both the originating and amended claims, such that the claim in each of its forms was untenable, or in the alternative, that the claim was so frivolous that to allow the claim to continue would involve useless ongoing expense, not only to the parties but to the Court, considering the likely interlocutory applications that would have manifested prior to trial.

43 Due to the lack of foresight and preparation on the part of the claimant's previous industrial officer Mr Young, the respondent has incurred the expense of defending a claim that was destined to fail. The respondent has established that the case was frivolously instituted and the discretion in reg 11 of the Regulations is enlivened.

44 Public policy necessitates that ordinarily, the industrial regime should be a 'no costs' jurisdiction, to allow all members of the community access to justice without fear of incurring excessive legal costs. However, in this instance, the claimant was represented from the outset by an experienced industrial officer who failed in his duty to ensure that the necessary checks and balances were in place to bring a competent claim before the Court.

45 Failure to do so not only wasted the Court's time and resources but required the respondent to incur ongoing, prolonged and unnecessary legal costs. This is an extreme case where costs should be awarded.

46 Having concluded so, there is no need to consider whether the claim was vexatiously instituted.

Result

47 The claimant is to pay the respondent's party-party costs of the proceedings from 12 January 2021, to be assessed if not agreed.

B. COLEMAN

INDUSTRIAL MAGISTRATE

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[1] Affidavit of Joshua James Leslie sworn 2 March 2022 [13].

[2] Affidavit of Joshua James Leslie sworn 2 March 2022 [15].

[3] Affidavit of Joshua James Leslie sworn 2 March 2022 [17].

[4] Affidavit of Joshua James Leslie sworn 2 March 2022 [28], [29].

[5] Regulation 11 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations* 2005 (WA).

[6] ***Denise Brailey v Mendex Pty Ltd T/A Mair and Co Maylands*** (1992) 73 WAIG 26 [27].

[7] ***Denise Brailey v Mendex Pty Ltd T/A Mair and Co Maylands*** (1992) 73 WAIG 26 [27]; ***Adrian Manescu v Baker Hughes Australia Pty. Limited ABN: 20 004 762 050*** [2021] WAIRC 00558; ***The Western Australian Builders Labourers, Painters and Plasterers Union of Workers v Michael Nelson Clark and Amanda Joy Clark t/as Mike Clark Contracting*** (1995) 76 WAIG 4.

[8] ***Jones v Dunkel*** [1959] HCA 8.

[9] ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163 (S) [26].

[10] ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163 (S) [26].

[11] ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163 (S) [27].

[12] ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163 (S) [32].

[13] ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163 (S) [33].

[14] Affidavit of Joshua James Leslie sworn 2 March 2022, annexure JJL6.

[15] Affidavit of Joshua James Leslie sworn 2 March 2022 [20].

2022 WAIRC 00656

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2022 WAIRC 00656
CORAM	:	INDUSTRIAL MAGISTRATE E. O'DONNELL
HEARD	:	WEDNESDAY, 2 MARCH 2022
DELIVERED	:	FRIDAY, 9 SEPTEMBER 2022
FILE NO.	:	M 30 OF 2021
BETWEEN	:	BRIOHNY BARRETT

CLAIMANT

AND

CALLEGARI PROJECTS PTY LTD

RESPONDENT

CatchWords	:	INDUSTRIAL LAW – café workplace – job classification – provision of meal breaks
Legislation	:	*Fair Work Act 2009* (Cth)
Instrument	:	*Restaurant Industry Award 2010* (Cth)
Case(s) referred to in reasons:	:	***Appeal by Restaurant and Catering Association of Victoria*** [2014] FWCFB 1996

Result	:	Claim is proven in part
Representation:		
Claimant	:	Mr P. Mullally (agent) from Workclaims Australia
Respondent	:	Ms V. Callegari-Rudd (director)

REASONS FOR DECISION

Introduction

1 From 19 January 2016 until 4 September 2018 (period of employment), with the exception of a period between 16 February 2016 and 14 March 2016, Briohny Barrett (the Claimant) worked for Callegari Projects Pty Ltd (the Respondent) as a casual employee at a café called Vendetta Café (Vendetta) in West Perth.

2 Vendetta was owned by the Respondent and managed by the Respondent's director, Valerie Callegari-Rudd (Ms Callegari-Rudd).

3 The Claimant's employment was subject to the *Restaurant Industry Award 2010* (Award).

4 The Claimant says that during the period of employment:

a. She should have been classified as a Food and Beverage Attendant Grade 2 (Grade 2) under the Award but, as she was not correctly classified, she was underpaid in that her base hourly rate was too low;

b. The Respondent breached cl 32.1 of the Award; and

c. The Respondent breached cl 32.4 of the Award.[xvi]

5 The Claimant says that as a consequence of the breaches of the Award, the Respondent is in breach of s 44 of the *Fair Work Act 2009* (Cth) (**FWA**). As s 44 of the FWA is a civil remedy provision, the Claimant's case is that the Respondent is liable to pay the amount of the alleged underpayment and is also liable to pay a penalty pursuant to s 539 of the FWA.

6 The Respondent wholly denies the claim.

Preliminary Matters

7 In making my determination as to the claim, I have had regard to the documents filed by the parties and the evidence led at trial.

8 At trial, the Respondent was represented by Ms Callegari-Rudd, who was also Vendetta's manager and the person who employed the Claimant to work at Vendetta.

9 In her evidence at trial, Ms Callegari-Rudd said that during the Claimant's period of employment, she did not formally classify the Claimant in an Award job classification; and that she had been aware of the Award 'as a guide' to the Claimant's job classification. She said that she considered the Claimant to be a Food and Beverage Attendant Grade 1 (Grade 1), but accepted that she had not paid the Claimant the Award rate for that classification.[xvii]

10 By the time of trial, Ms Callegari-Rudd was aware that the Award was not just 'a guide', but rather, was fully applicable to the Claimant's employment at Vendetta.

11 Upon becoming aware of this, Ms Callegari-Rudd acknowledged that even if the Claimant had been properly classified as a Grade 1, she had been underpaid in that she had not been paid the Award rate. Consequently, Ms Callegari-Rudd wrote a cheque for the difference between the rate of pay actually paid to the Claimant, and the rate of pay she should have been receiving as a Grade 1.

12 The Claimant's position is that the cheque does not satisfy her claim, because she should properly have been classified as a Grade 2, and because of the alleged breaches of cl 32.1 and cl 32.4 of the Award.

Job Classification Under The Award

13 The evidence establishes that the Claimant's primary role at Vendetta was that of barista.[xviii] The evidence also establishes that she performed other tasks in the café, and showed initiative in assisting with tasks when other employees were busy.

14 The Claimant's curriculum vitae, which was attached to the Respondent's documents filed in the case, indicates that the Claimant had had managerial experience in at least one other café. The fact that she had managerial experience and might have held more senior positions with more responsibility at other cafés does not assist her in this case. I can only determine her correct job classification based on the duties she carried out at Vendetta.

15 In my view, the Claimant exaggerated the significance of her duties away from the coffee machine. I accept that she performed many different duties in the café, but the evidence does not support a finding that she was regularly waiting on tables. Vendetta was for the most part a coffee shop with takeaway food. Tables were available for customers, but this was not a restaurant with wait staff regularly moving amongst the tables. In that regard, I take into account the evidence of Kirsty Harris (Ms Harris), who said:[xix]

> *And did the claimant - did you see the claimant serving tables as well?---Ah, we didn't directly serve tables, as it was a takeaway, but yeah, clearing tables and serving on the till and, um, you know - - - .*

16 As far as doing shopping for the business and reconciling the till are concerned, I do not accept that the Claimant carried out those duties with any regularity. Even if she had, she was not employed in a managerial position and in my view the Claimant took it upon herself to perform these things.

17 The Claimant's principal function in the café was as a barista.

18 Notwithstanding my finding that the Claimant exaggerated the extent of her duties aside from preparing coffees in a high-volume context, in my view her claim as to classification must succeed. She should properly have been classified as a Grade 2 under the Award.

19 ***Appeal by Restaurant and Catering Association of Victoria*** [2014] FWCFB 1996 was an appeal brought before the Fair Work Commission seeking to overturn the decision of the Deputy President as to several reforms to the Award which had been sought by a group of employers. Referring to the issues raised by employers at first instance, the Commission said:[xx]

> *The third* [issue] *concerned the lack of any reference to the work function of 'barista' in the Restaurant Award's classification structure. The Deputy President said:*
>
> > *'[282] The Award does not list all the various job titles in the industry.*
> >
> > *[283] While I accept that some cafe and restaurant owners may not understand the classification structure and that the description of the tasks does not say barista, there is no doubt that a barista can be classified under the Award as a food and beverage attendant grade 2 or 3.'* (emphasis added)

20 The Commission concluded as follows:[xxi]

> *The third matter concerns the absence of a mention of barista duties in Grades 2 and 3. The title is said to be now a recognised title in the industry and the absence of the mention of it makes the Award difficult to understand and apply. The Deputy President rejected the change by saying that in her view there is no doubt that a barista could be classified as either Grade 2 or 3. In the light of the evidence of confusion it is better that greater clarity be provided by inserting an express reference to barista* ***in these classification grades****.* (emphasis added)

21 In spite of the Commission's conclusion on this issue, it does not appear that any specific reference to 'barista' has been included in any version of the Award since 2014. In my view, given the importance of baristas in modern Australian café culture, the Award should include a specific reference to that role. The absence of such a reference is bizarre.

22 Reading the Award on its face, it would be fairly easy to conclude that the Claimant was not performing any of the roles set out in the Grade 2 classification. However, in considering this case, it sat uneasily with me that an employee performing the regular, customer-facing role of barista in a busy café could possibly be classified only at Grade 1, which appears to be reserved for employees who have almost nothing to do with customers, other than receipt of monies.

23 Although ***Appeal by Restaurant and Catering Association of Victoria*** was not a case concerning an employee's claim as to job classification, in my view it provides important insight into where the role of barista properly fits within the Award classifications.

24 The evidence of the Claimant's role and the observations of the Commission in ***Appeal by Restaurant and Catering Association of Victoria*** lead me to conclude that the Claimant should have been paid as a Grade 2 for the entirety of the period of employment. She is therefore entitled to be paid the difference between her actual pay and what she ought to have been paid, had she been correctly classified at Grade 2.

25 The claim with respect to classification is allowed.

Alleged Contravention Of Clause 32.1 Of The Award

26 Clause 32.1 of the Award provides:

> *If an employee,including a casual employee,is required to work for five or more hours in a day the employee must be given an unpaid meal break of no less than 30 minutes. The break must be given no earlier than one hour after starting work and no later than six hours after starting work.*

27 There is no doubt that the Claimant was almost always required to work for five or more hours. The Respondent was therefore required to give her an unpaid meal break of no less than 30 minutes, in accordance with cl 32.1.

28 The only reference to the Respondent's alleged breach of this clause in the Claimant's witness statement[xxii] is at paragraph 10, where the Claimant says:

> *The respondent consistently failed to allow a lunch break and did not accordingly make payment to me in compliance with the break provisions of the Award.*

29 At trial, the Claimant gave the following evidence during evidence-in-chief:[xxiii]

> *So, Ms Barrett, in the timesheets you have shown, have you, a start time?---Yes.*
>
> *Each day?---Yes.*
>
> *And you have shown the finish time each day?---Yes.*
>
> *And are you able to tell her Honour whether you ever had a 30 minute meal break - - -?---No.*
>
> *- - - in the day?---No. If I did I wrote it down on the timesheet. There was a couple of days when I did take a break but I had written it in.*
>
> *All right?---Handwritten it in, yes.*
>
> *But that will be reflected in the timesheet?---Yes.*
>
> *So only the times that have been written down were the times when you got a 30 minute meal break?---Yes. If I had an appointment or if I called in, yeah, I took a break.*

30 Later in her evidence, when explaining her timesheets, the Claimant said:[xxiv]

> *... ---Am I allowed to say something, is that okay? Am I able to say something?*

Yes, of course?---So on the, um - it's noted on 8/9/2017 in the third column I have also written down that I took a 15 minute break. So when I did take a break I always wrote it down. So it's - in each column it will show where I've taken a break. And I've written the time that I took the break too.

31 The Claimant also explained that in her timesheets for the week ending 3 August 2018 through to the week ending 7 September 2018 (the end of her employment with the Respondent), she wrote in the timesheets whether or not she had a break. She said that she began doing this ‘recently after I had contacted Fair Work in regards to not taking a meal break, so I started writing down that I wasn't taking a break or if I did I - I wrote it down’.[xxv]

32 Most of the Claimant’s work days between 3 August 2018 and 7 September 2018 bear a handwritten notation, which I accept is in the Claimant’s handwriting, which says ‘no brk’. In accordance with the Claimant’s evidence, I accept that ‘no brk’ was an abbreviation for ‘no break’.

33 Under cross-examination, the Claimant disagreed that Ms Callegari-Rudd had told her, upon employing her, that she was entitled to a 30 minute break. When asked if other people had breaks, the Claimant said ‘no’.[xxvi]

34 The Claimant attempted at this point to give some evidence about another employee, ‘Miles’, and she attempted to effectively cross-examine her questioner, Ms Callegari-Rudd. I disregard anything to do with ‘Miles’. ‘Miles’ was not called as a witness, and it is not for a witness to ask questions of the party cross-examining.

35 The following matters are evident from the Claimant’s timesheets (which are part of Exhibit 2) and from her evidence at the trial:

a. The Claimant filled in her own timesheets.

b. Each day on the timesheet contained three things: start time, finish time and total hours worked.

c. From the commencement of her employment in 2016 through to the end of 2017, the Claimant’s total hours worked, as reflected in the timesheets, added up to 30 minutes less than the total number of hours between start time and finish time, suggesting that at some point during the day, she had taken a 30 minute break.

d. In 2018, the Claimant’s total hours worked added up to the exact number of hours between start time and finish time, suggesting no break was taken.

36 During the Claimant’s cross-examination, I asked the following questions with respect to the Claimant’s timesheets:[xxvii]

So if you can find the page that has the very beginning of 2018. So it says ‘New Year 2018’ and then you've got 12/1/18 in the left-hand column?---Ah, just one second, sorry.

That's okay. Let me know when you've got it?---Yes.

Okay, and you can see next to that it says ‘Actual time’?---Actual time.

What does that mean?---Um, when - when I first started Valerie - we - we had to write in the hours we worked and I do remember Valerie saying, um - and that's when I was working with Kirsty, just because I had to check with her, she - she put - we had to put a different time. Um, this is obviously, I'm being very honest here, um, we had to put a different time to what we - the hours that we had written ourselves, like down, and I got - I used to get so confused because I'm like isn't that that time and then, um, it used to make me so confused. But then I figured out, um, obviously I was not sitting right well with that and then clearly on the - when I first came back to work I just thought, no, I'm going to write down the exact hours that I'm working because previously I was confused with how we were writing out the timesheet book cos we - it's like we had to deduct time off but I didn't take a break, that's what I was quite - um, I wasn't happy with that.

So who told you - who misled you? Who do you say misled you?---Um, I think it was the staff and Valerie, that it was - it was very misleading and I was very confused about it. And, um, I don't want to sort of cause any issues but I know Valerie used to get very frustrated with me about writing out the timesheet book because I - I just - I thought we wrote down the times that we worked, that's the - that's the - the actual time that we worked. Yes.

So you can't remember where you got this erroneous impression from?---The what, sorry?

This erroneous impression?---Um, well - - -

That you had to take off 30 minutes when that was wrong?---Yes. That's was - that's correct.

But you can't remember who told you that?---It was - well, Valerie at the end of the day would check our time book and, um, she would - I - I'd actually asked what - what time am I supposed to write in here. Um, and I also had to ask Kirsty, um, the same question because I just used to get confused about the hours cos I - and then that's why I was just like, no, I'm going to start writing exactly the time that I've been working, yeah.

37 I have difficulty accepting that someone with the Claimant’s experience working in cafés prior to Vendetta would have misunderstand or been ‘confused’ about the proper way to fill in a timesheet, even at the beginning of her employment at Vendetta.

38 Even if she had been confused when she first started working at Vendetta, I do not accept that she would have put up with that state of confusion for almost two years, until the beginning of 2018, when her method of filling out the timesheets changed.

39 As Ms Callegari-Rudd pointed out, from the beginning of the period of employment until the beginning of 2018, the Claimant recorded her start time and finish time, and then calculated her hours worked as the time between start and finish, minus 30 minutes. The only logical reason she filled out the sheets in this way is because she worked those hours, with a 30 minute break at some point during the day.

40 As shown in the transcript quoted at paragraph 36 above, the Claimant was unable to give a straight answer when asked how she had come to the impression that she had to account for a – in her view non-existent – 30 minute break.

41 Further, the Claimant's evidence on this point is inconsistent with the evidence of Ms Harris. Ms Harris worked at Vendetta from October 2015 until February 2017, so her period of employment partially overlapped with that of the Claimant.

42 Ms Harris' evidence about breaks at Vendetta is found at pages 96 - 97 of the trial transcript.

43 In summary, Ms Harris said:

a. If she was taking a break, she had to account for it by deducting 30 minutes off her time worked when filling in her timesheet;

b. There were no days when she did not take a break at all;

c. Sometimes she might take a 25 minute break, rather than a 30 minute break;

d. It was necessary for staff to take a break, given that they were on their feet all day;

e. Everybody she worked with, including the Claimant, was offered the break and took their time to have lunch; and

f. Ms Harris did not time the Claimant, but she (the Claimant) got the opportunity to have lunch.

44 I accept Ms Harris as a credible witness. She accepted that she personally did not take a full 30 minute break every day she worked – sometimes it was 'probably 25 minutes'.[xxviii] She was not questioned as to why sometimes her break was shorter than 30 minutes, but I infer from the evidence as a whole that this would have been because the café was busy.

45 Ms Harris saying that sometimes her break was 25 minutes is a far cry from the Claimant's assertion that there were days when she was given no break at all. The Claimant's insistence that she was confused and in fact worked all those hours with no break at all lacks credibility.

46 In making my assessment of the Claimant's credibility, I take into account also that she was at times argumentative in the witness box. At times she attempted to turn the cross-examination onto Ms Callegari-Rudd, and relied upon hearsay to suggest that Ms Callegari-Rudd's questions had no foundation. For example, when being questioned about her return to Vendetta after taking some time to explore floristry, in support of her answer that it was incorrect that Ms Callegari-Rudd had somebody leaving, enabling the Claimant to return, the Claimant asserted that she had been 'informed' by someone else that the other employee had effectively been sacked – in other words, she vehemently asserted that Ms Callegari-Rudd was 'incorrect' on the basis of hearsay information. Such confidence on the basis of a third-hand assertion causes me to have concerns about the accuracy of the Claimant's evidence more generally – and in particular, as to her assertion that she was not told that she was permitted to have a break at work.

47 I do not accept that the Claimant was not permitted to have breaks at any time during her employment at Vendetta, let alone for the entire duration of that employment.

48 There was no set time for a break, but there is no doubt in my mind that the break was available and that Ms Callegari-Rudd made it clear that it should be taken before the lunch rush. That finding is important, because of course the Award does not simply require that employees be given a 30 minute break. It requires that the break be given no earlier than one hour after start time, and no later than six hours after start time. I find that the break was given within those parameters.

49 The totality of the evidence establishes that Ms Callegari-Rudd did not provide specific times for her staff to take their 30 minute break. However, she made it clear that they were entitled to the break and should take it prior to the lunch rush.

50 On my reading of the Award, there is no requirement that the break be given or taken at exactly the same time every day. Indeed, this would be difficult to achieve in a busy café where the 'rush' may happen at a slightly different time each day. Provided that the break is given no later than six hours after starting work, there has been compliance with the Award.

51 Ms Callegari-Rudd did not require the Claimant to work for more than six hours without a 30 minute break, and the timesheets make it clear that the Claimant did take the requisite break.

52 With respect to the timesheets noting no break at all, I reject them as inaccurate. I cannot help but find that the Claimant has misstated the position on those later timesheets (from 2018). It makes no sense that an employee with the Claimant's experience would misunderstand how to fill in timesheets and would do so erroneously for almost two years, before suddenly changing her method of time-keeping toward the end of her employment. I reject that evidence as lacking credibility and I find that the insertion of 'no brk' was done with an outcome in mind, for reasons known only to the Claimant and which I cannot and do not speculate upon.

53 The Claimant was permitted to have a break every day, and was permitted to do so no later than six hours after starting work, as required by cl 32.1 of the Award (it was erroneously claimed that the break had to be given after five hours).

54 The claim of a breach of cl 32.1 of the Award is dismissed.

55 As I have found that the Claimant *was* given meal breaks in accordance with cl 32.1, there was no obligation upon the Respondent to pay the Claimant 150% of her ordinary base rate of pay from the end of six hours until either the meal break was given or her shift ended.

56 Consequently, there has been no breach of cl 32.4 of the Award.

57 The claim of a breach of cl 32.4 of the Award is dismissed.

Order

58 The Respondent shall pay to the Claimant a sum of money, to be calculated, which shall be the difference between the rate she was actually paid and the rate she should have been paid as a Grade 2, for the entirety of the period of employment.

E. O'DONNELL

INDUSTRIAL MAGISTRATE

[xvi] The Claimant's Further and Better Particulars lodged on 12 July 2021 alleged breaches of cl 32.2, cl 32.5 and cl 33.1 of the Award, but it was clarified at trial that the Claimant was in fact alleging breaches of cl 32.1 and cl 32.4 only: Transcript, 2 - 3.

[xvii] Transcript, 76.

[xviii] Exhibit 1 – Witness Statement of Briohny Barrett signed 25 January 2022 and lodged 27 January 2022; Exhibit 6 – Witness Statement of Kirsty Harris signed 6 February 2022 and lodged 10 February 2022; Transcript, 38, 53, 55, 100.

[xix] Transcript, 96.

[xx] ***Appeal by Restaurant and Catering Association of Victoria*** [2014] FWCFB 1996 [35].

[xxi] ***Appeal by Restaurant and Catering Association of Victoria*** [2014] FWCFB 1996 [317].

[xxii] Exhibit 1.

[xxiii] Transcript, 13.

[xxiv] Transcript, 18.

[xxv] Transcript, 19.

[xxvi] Transcript, 21 - 22.

[xxvii] Transcript, 36.

[xxviii] Transcript, 97.

2022 WAIRC 00655

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2022 WAIRC 00655
CORAM	:	INDUSTRIAL MAGISTRATE E. O'DONNELL
HEARD	:	WEDNESDAY, 16 FEBRUARY 2022
DELIVERED	:	FRIDAY, 9 SEPTEMBER 2022
FILE NO.	:	M 120 OF 2021
BETWEEN	:	ROBERT CACCIOLA

CLAIMANT

AND

SERCO AUSTRALIA PTY LTD

RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Interpretation of industrial agreement – consideration of industrial context in which agreement formulated – nature of employment (casual) as against job classification – whether nature of role incorporated into classification
Legislation	:	*Fair Work Act 2009* (Cth)
Instrument	:	*Serco CPSU Acacia Prison General Enterprise Agreement 2017* (Cth) *Corrections and Detention (Private Sector) Award 2010* (Cth)
Case(s) referred to in reasons:	:	***Putland v Royans Wagga Pty Limited*** [2017] FCA 910 ***Construction, Forestry, Mining and Energy Union v Deputy President Hamberger*** [2011] FCA 719 ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries' Union known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*** [2017] FWCFB 3005 ***Australasian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd*** (1998) 80 IR 208
Result	:	Claim dismissed
Representation:		
Claimant	:	Mr C. Fordham (of counsel) from Slater and Gordon Lawyers
Respondent	:	Mr J. Fernon (of counsel) instructed by Mr P. Brown (of counsel) from Baker & McKenzie

REASONS FOR DECISION

Introduction

1 This claim pertains to the employment of the Claimant, Robert Cacciola, with the Respondent, Serco Australia Pty Ltd (Serco), at Acacia Prison (Acacia) from 9 July 2018 to 15 February 2019 (Period of Employment).

2 The claim raises for consideration the following issues:

- The application of an enterprise agreement to an employee and employer;
- The definition or concept of 'job classification';
- The applicability of casual loading to base rates of pay in an enterprise agreement.

3 The parties' positions are relatively straight forward.

4 The Claimant says:

a. During the Period of Employment, the *Serco CPSU Acacia Prison General Enterprise Agreement 2017* (Cth) (Agreement) applied to him;

b. Under the Agreement, he was employed as a 'Trainee Custodial Officer (Induction)' (TCO);

c. He was employed in the role of TCO on a casual basis;

d. The role of TCO as a matter of logic involved the performance of 'custodial functions';

e. He was therefore in a role that was a sub-category of 'Custodial Officer';

f. His rate of pay was therefore governed by sch 2 of the Agreement, which is the only schedule that specifically mentions 'casual' employment as it pertains to Custodial Officers;

g. Schedule 2 of the Agreement provides for one rate of pay for casual Custodial Officers, that rate being $39.60 per hour;

h. The Claimant should therefore have been paid at the rate of $39.60 per hour;

i. As he was in fact paid at the rate of $31.7524 per hour,[xxix] Serco has contravened a term of the Agreement, contrary to s 50 of the *Fair Work Act 2009* (Cth) (FWA), and is liable to pay the difference between the rate paid and the rate claimed.

5 The Respondent says there has been no contravention of the Agreement. It says that during the Period of Employment, the rate of pay in sch 2 of the Agreement cannot have applied to the Claimant because:

a. Schedule 2 of the Agreement pertains to casual Custodial Officers only;

b. By the Agreement's definition, Custodial Officer 'means an Employee performing custodial functions who is working towards completing or has successfully completed a Certificate III in Correctional Practice';[xxx]

c. As the Claimant was a trainee, he was not performing 'custodial functions';

d. The Claimant therefore cannot have been entitled to be paid at a rate reserved for employees who are performing custodial functions.

6 The Respondent further states that the Agreement did not apply to the Claimant at all, and that his employment was governed instead by the *Corrections and Detention (Private Sector) Award 2010* (Cth) (Award).

7 The Claimant accepts that if the Award applied, then he was paid at above award rate and in that case his claim could not succeed.

8 The parties agree that the Claimant was employed on a casual basis. Although I find it somewhat unusual that a person would be engaged to do a training course on a casual basis, I accept that in this case, that is what happened. I am not invited, and there is no reason on the evidence, to question whether the Claimant was in fact employed on some other basis. He was a casual employee during the period in question.

9 Both parties place significant emphasis upon the Claimant's status as a casual employee to contend for very different outcomes:

a. The Claimant submits that because he was casual, his rate of pay must have been governed by sch 2 of the Agreement, and the applicable hourly rate was therefore $39.60.

b. The Respondent submits that because the Claimant was casual, the Agreement did not apply to him at all because there is no such thing as a *casual* TCO under the Agreement. Consequently, the Award automatically applied, and under the Award the Claimant was paid more than the applicable rate for a trainee, as defined in the Award.

10 It is convenient to state the issue for determination in this case by paraphrasing the terms used by Bromwich J in his statement of the issue in the case of ***Putland v Royans Wagga Pty Limited*** [2017] FCA 910 [284], namely: the Claimant claims that he was underpaid during the Period of Employment, in breach of the remuneration set out in the Agreement for an asserted job classification. Determination of this issue requires consideration of the applicable industrial instrument – i.e., the Agreement or the Award – and the appropriate job classification within the applicable instrument, in view of the parties' agreement that the nature of the Claimant's role was casual.

Which Industrial Instrument Applied To The Claimant?

11 The Respondent does not concede a fundamental part of the Claimant's case, namely that the Agreement applied to the Claimant's employment. It submits that the Award was the applicable instrument. I will determine this issue first.

12 Attachment RC-1 to Exhibit 1 is the written offer of employment made by Serco to the Claimant on 28 June 2018 (the Offer of Employment).

13 Relevantly, the offer provided that the Claimant was to work at Acacia:

a. With the job classification of 'Trainee Custodial Officer (Induction)';

b. Commencing on 9 July 2018;

c. On a casual basis;

d. Under the Agreement and any successor instrument;

e. At a 'casual base hourly rate of pay of $25.03 gross per hour, plus a casual loading of 25%'.[xxxi]

14 Having regard to the Offer of Employment, it is clear that Serco intended that the Agreement apply to the Claimant's employment.

15 It should be noted that, as a matter of law, the Award at all times *covered* the Claimant's employment at Acacia.[xxxii] However, if the Agreement *applied* to the employment, then the Award did not apply to it.[xxxiii]

16 Section 52(1) of the FWA provides:

An enterprise agreement **applies** *to an employee, employer or employee organisation if:*

(a) the agreement is in operation; and

(b) the agreement covers the employee, employer or organisation; and

(c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation.

17 Section 53(1) of the FWA provides:

An enterprise agreement **covers** *an employee or employer if the agreement is expressed to cover (however described) the employee or the employer.*

18 Section 57(1) of the FWA provides:

A modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

19 Summarising the effect of the foregoing provisions, in ***Construction, Forestry, Mining and Energy Union v Deputy President Hamberger*** [2011] FCA 719,[xxxiv] Katzmann J said with respect to enterprise agreements:

The core provisions are set out in Division 2 of Part 2-1. Subdivision D of Division 2 deals with the terms and conditions of employment provided by an enterprise agreement. A person must not contravene a term of an enterprise agreement (s 50). Obligations are only imposed on a person if the agreement applies to the person (s 51). An enterprise agreement applies to a person (whether an employee, employer or employee organisation) if the agreement is in operation, covers the person and no other provision of the Act provides or has the effect that the agreement does not apply to that person (s 52). An enterprise agreement covers an employee, employer or employee organisation if it is expressed to 'cover (however described) the employee or employer' (s 53(1)). A reference in the Act to an enterprise agreement applying to or covering an employee is a reference to the agreement applying to the employee <u>in relation to particular employment</u> (ss 52(2), 53(6)). Section 53(4) provides for the circumstances in which an enterprise agreement 'does not cover' an employee, employer or employee organisation ... An enterprise agreement operates from seven days after it has been approved by Fair Work Australia or a later day if that is specified in the agreement (s 54(1)). Section 54(2) provides for the circumstances in which an enterprise agreement ceases to operate (emphasis added).

20 As to whether the Agreement applied to the Claimant's employment:

a. The Agreement was in operation during the Period of Employment; and

b. No other provision of the FWA provided, or had the effect, that the agreement did not apply to the Claimant or the Respondent.

21 Thus, the requirements of s 52(1)(a) and s 52(1)(c) of the FWA were fulfilled.

22 The question is whether the Agreement covered the Claimant, as required by s 52(1)(b) of the FWA.

23 The Claimant submits that the Agreement covered him, but because he was a casual employee he had to be paid pursuant to sch 2 of the Agreement.

24 The Respondent submits that the Agreement did not cover the Claimant. The Respondent does not suggest that the Agreement did not cover the Claimant for a reason contemplated by s 53(4) of the FWA. The Respondent essentially submits that the terms of the Agreement did not contemplate a casual TCO, and therefore the Agreement was not 'expressed to cover (however described)'[xxxv] the employee (Claimant), in relation to this particular employment as a casual TCO.

The Agreement's Coverage Clause

25 The Agreement's coverage clause is cl 2, and specifically cl 2.1, which states:

Except as mentioned within this clause, this Agreement applies to all persons employed by Serco Australia Pty. Ltd. at Acacia Prison in Western Australia, who are engaged in the job classifications set out in the attached schedules.

26 Clause 2.3 of the Agreement provides:

The parties to this Agreement are:

a) Serco Australia Pty. Limited ('the Employer');

b) Employees whose employment is within the scope and application of this Agreement as outlined in the schedules; and

c) CPSU, The Community and Public Sector Union State Public Sector Federation Group.

27 For the agreement to apply to a person, the person must be:

a. Employed by Serco;

b. Employed at Acacia;

c. Engaged in a job classification set out in the schedules attached to the Agreement.

Did The Claimant Fall Within The Agreement's Coverage Clause?

28 In order to determine the answer to this question, it is necessary to look at the terms of the Claimant's employment contract and the work the Claimant performed during the Period of Employment.

29 The Claimant did not give evidence at trial and was not cross-examined, so the only evidence of his job and the work he performed during the Period of Employment comes from Exhibit 1 – i.e., the Claimant's statement and the attachments thereto.

30 I accept Exhibit 1 as an accurate, although not overly detailed, description of the work the Claimant did during the Period of Employment.

31 The Offer of Employment specifies:

a. The contract name as 'Acacia Prison';

b. The work location as Wooroloo in Western Australia – Wooroloo being the Perth suburb in which Acacia is located;

c. The job title to be applied to the Claimant as 'Trainee Custodial Officer'; and

d. The job classification as 'Trainee Custodial Officer (Induction)'.

32 In his statement, the Claimant explains that on starting work with Serco on 9 July 2018, he was initially employed on a casual basis and his job title was 'Trainee Custodial Officer'.[xxxvi] This accords with attachment RC-1.

33 The Claimant does not specifically state that he was working at Acacia, but it has not been suggested that he was working anywhere other than Acacia, and I find that he was working there.

34 The Claimant explains that even though he had attained a Certificate III in Correctional Practice (Cert III) on two previous occasions, in 2014 and 2016,[xxxvii] he was required by Serco to perform training activities to obtain another Cert III. He agreed to undertake the initial training course (ITC).[xxxviii]

35 For three or four weeks after commencing work with Serco, the Claimant participated in the ITC, as arranged.

36 He then suffered a serious knee injury during a first aid training session (that session being part of the ITC).[xxxix] As a result of the injury, the Claimant was not able to continue in the ITC. For about five months while he was recovering from the injury, the Claimant worked in the Intelligence (Intel) Department for Serco at Acacia.[xl] Some of the duties the Claimant performed with the Intel Department were:

a to listening to telephone conversations made by high alert prisoners;

b reading mail correspondence of high alert prisoners;

c performing some work to connect or trace bank account information where it was suspected that transactions involved payment for drugs or other contraband.[xli]

37 Attachment RC-5 shows that from 30 July 2018 until 10 February 2019, the Claimant was in receipt of workers' compensation payments. For most of that period, the Claimant also received pay for ordinary hours worked, but from 13 August 2018 until 7 October 2018, he was only in receipt of workers' compensation. No claim is made for any breach of the FWA by Serco during the period from 13 August 2018 until 7 October 2018.[xlii]

38 Around January 2019, the Claimant resumed the ITC. Upon completion of the ITC, the Claimant was offered a full-time position as a Custodial Officer at Acacia.[xliii]

39 Although the Claimant says that Serco required him to perform training activities 'to obtain another Certificate 3 in Correctional Practice',[xliv] he does not say whether he had in fact attained another Cert III by the time he finished the ITC, or whether he was still working towards one after he accepted the new role as a Custodial Officer in April 2019.

Was The Claimant Engaged In A Job Classification Set Out In The Schedules?

40 Exhibit 1 and its attachments make it clear that during the Period of Employment, the Claimant was employed by Serco at Acacia in Western Australia, fulfilling two out of three requirements for coverage by the Agreement. The part of cl 2.1 of the Agreement in question is whether the Claimant was engaged in a job classification set out in the attached schedules.

41 Clause 6 of the Agreement defines various terms. Relevantly, it defines the following terms:

6.3 Trainee Custodial Officer – means an Employee undertaking the Initial Training Course and has yet to be assessed as successfully completing the Initial Training Course.

6.4 Custodial Officer - means an Employee performing custodial functions who is working towards completing or has successfully completed a Certificate III in Correctional Practice.

6.5 Company - means Serco Australia Pty Limited ABN: 44 003 677 352.

6.9 Employee - means an Employee of the company whose job classification is within the scope and application of this Agreement.

42 Schedule 1 to the Agreement is entitled

Schedule 1 – Custodial Salaries (Annualised)

(Including Custodial Officers engaged on or after the date of approval of this Agreement by the Fair Work Commission)

43 Schedule 1 of the Agreement lists a number of job classifications in the first (left-most) column. They appear under the heading 'Position', but it is clear that these are job classifications.

44 One of the job classifications that appears under the 'Position' heading in sch 1 of the Agreement is 'Trainee Custodial Officer (Induction)'.

45 During the Period of Employment, the Claimant worked for Serco, which is defined as the 'Company' in cl 6.5 of the Agreement. Clearly, he was an employee of Serco. It is also clear that he was working at Acacia. But to be an 'Employee' under the Agreement, he had to be an employee of Serco 'whose job classification [was] within the scope and application of [the] Agreement'.

46 At face value, the Offer of Employment invites the conclusion that the Claimant was covered by the Agreement, because it states that his job classification was 'Trainee Custodial Officer (Induction)' – a job classification that appears in sch 1 of the Agreement.

47 However, it is necessary to go beyond the simple description in the offer of employment and look at what the Claimant actually did. If the Claimant had been engaged in work that bore no relation to the job classification specified in the Offer of Employment, there would be an argument that he was, in reality, engaged in some other type of work. If that were the case, he might fall within a different classification under the Agreement schedules or – as the Respondent suggests, not fall within the classifications at all.

48 Based on the evidence in Exhibit 1, I find that during the Period of Employment the Claimant was undertaking the ITC and had yet to be assessed as successfully completing the ITC. This was the case even though the Claimant had previously attained a Cert III because, as he explains in his statement, Serco required him to undertake training to obtain the Cert III again, and he agreed to do so.

49 The Claimant's time with the Intel Department represented a hiatus in his participation in the ITC. As to whether the duties he performed with the Intel Department were akin to those performed by someone engaged in a different job classification, I have no way of determining because no evidence was led as to what such other job classification might be.

50 Although the Claimant was certainly not physically undertaking the ITC while he was with the Intel Department, once he had sufficiently recovered from his knee injury, he resumed the ITC and was not offered a position as a Custodial Officer until he had completed it. Thus, even while he was in the Intel Department, the Claimant had 'yet to be assessed as successfully completing' the ITC – a circumstance which is part of the definition of a Trainee Custodial Officer.

51 In any event, even if the Claimant's duties in the Intel Department took him outside his own job classification (as to which there is no evidence), there is no basis for me to find that it took him outside *all* job classifications set out in the schedules and thereby removed him from the Agreement's application.

52 The evidence supports a finding that, during the Period of Employment, the Claimant fell squarely within the definition of Trainee Custodial Officer.

53 The Respondent submits that the Claimant's engagement on a casual basis removes him from the scope of the schedules.

54 Whilst employment *type* – full-time, part-time, casual or fixed term – determines rate of pay for a particular job classification, I can find no authority to support the submission that it is an inherent part of job classification. In fact, the authorities I have found suggest to the contrary. For example, to return to the case of ***Putland v Royans Wagga Pty Limited***,[xlv] Bromwich J described the dispute in that case thus:

> *The Putlands claim that they were underpaid during the relevant period in breach of the remuneration set out in an asserted award for an asserted job classification. Determination of this issue requires consideration of the applicable award, the appropriate job classification within the applicable award and the nature of the role (i.e. full-time, part-time or casual) for each of the Putlands* [284].

55 His Honour is not stating a principle of law here; rather, he is straightforwardly setting out the aspects of the Putlands' work that must be determined. Job classification is one thing; nature of the role is another.

56 The LexisNexis, *Encyclopaedic Australian Legal Dictionary* (online at 10 August 2022) defines 'casual employee' as follows:

> *In general usage, a person employed to work on an as-required basis. 'Casual' involves notions of informality, flexibility, uncertainty, and irregularity:* Reed v Blue Line Cruises Ltd*(1996) 73 IR 420. In Australian law, the expression 'casual employee' is not a technical term and has no fixed meaning:* Doyle v Sydney Steel Co Ltd*(1936) 56 CLR 545;* Reed v Blue Line Cruises Ltd*(1996) 73 IR 420. It may be difficult to determine whether somebody is a casual employee:* Williams v MacMahon Mining Services Pty Ltd*(2009) 231 FLR 59; 182 IR 104.Generally, the employee's hours may be*

regular or irregular, and the work may be short-term or extend over a long period. A casual employee differs from a permanent, part-time, or temporary employee. Casuals are paid an additional amount (referred to as a loading) in lieu of benefits such as annual leave and sick leave: for example, the national minimum wage for casual employees specifies a 25 per cent loading, as do many modern awards.

57 By contrast, in industrial theory, 'job classification' is 'a scheme of classifying a job according to the current responsibilities and duties associated with the job'.[xlvi]

58 Based on the foregoing, I can find no basis for the conclusion that employment type determines whether or not an industrial instrument covers an employee – unless of course the instrument says that it does.

59 Given its description in sch 2 of the Agreement, I am prepared to find that Custodial Officer (Casual) is, in itself, a job classification under the Agreement. It is the one example where the Agreement incorporates the *nature* of the role (casual) into the classification and ascribes a rate of pay accordingly.

60 But contrary to the Respondent's submission, this does not mean that where an employee is engaged in a job classification included in sch 1 of the Agreement or sch 3 of the Agreement, and is also employed on a casual basis, the Agreement cannot cover them.

61 That is because the Agreement by its terms applies to all persons employed by Serco at Acacia in Western Australia, who are engaged in the job classifications set out in the schedules.

62 The Claimant was a person employed by Serco at Acacia in Western Australia, who, on the evidence, was engaged in a job classification set out in the schedule – namely, that of TCO. Consequently, during the Period of Employment the Agreement applied to him and he was covered by it.

Which Rate Of Pay Applied To The Claimant?

63 Having found that the Agreement applied to the Claimant during the Period of Employment, I now turn to consider the question whether he was paid at the correct rate. Determination of this issue requires careful consideration of the terms of the Agreement.

64 No evidence was led at trial about the negotiation of the Agreement and what might have been contemplated when certain terms were drafted. In those circumstances, I turn to the principles outlined in the case law as to the construction of industrial agreements.

65 In ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries' Union known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*** [2017] FWCFB 3005, the Fair Work Commission said:[xlvii]

> *There is a long line of authority in support of the proposition that a 'narrow or pedantic' approach to the interpretation of industrial instruments (such as enterprise agreements) is to be avoided, and that 'fractured and illogical prose may be met by a generous and liberal approach to construction'. A consequence of such an approach may be that some principles of statutory construction have less force in the context of construing an enterprise agreement. For example, in Shop, Distributive and Allied Employees' Association v Woolworths Limited, Gray ACJ held that the presumption that a word used in one provision of a statute has the same meaning when it is used in another provision of the same statute, applied with less force in the context of an enterprise agreement:*
>
>> *'Typically, such agreements are the product of hard negotiation, in which wording of particular clauses is often agreed without reference to other provisions of the same document. Provisions are commonly transmitted from one agreement to the next in a series, without regard to whether their terminology sits well with the words used in newly adopted terms. The use of other agreements, and awards, as precedents can often result in the borrowing of provisions, again without regard to whether the words used in them are consistent with the rest of the agreement under consideration. For these and other reasons, consistency will often be absent. It is easy to see that the same word can be used in different provisions with different meanings.'* (footnotes omitted)

66 In ***Australasian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd*** (1998) 80 IR 208, Northrop J said:

> *... In* Kucks v CSR Limited *(1996) 66 IR 182 Madgwick J, sitting as a judge of the Industrial Relations Court of Australia, at 184 expressed his opinion on the legal principles to be applied in construing awards under the Act. I agree with that statement of principles. They have even stronger application to certified agreements. They are set out:-*
>
>> ***'Legal Principles***
>>
>> *It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.*
>>
>> *But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning'.*

67 The schedules to the Agreement set out job classifications with associated rates of pay in three tables.

68 Schedule 1 of the Agreement is entitled 'Schedule 1 – Custodial Salaries (Annualised) (Including Custodial Officers engaged on or after the date of approval of this Agreement by the Fair Work Commission'. The table in this schedule includes 10 job classifications. For each classification, the table sets out:

a. Rates of pay applicable from the date the Agreement was approved by the Fair Work Commission (FWC);

b. Rates of pay applicable from 1 July 2018 (which are 1.5% higher than the rates pre-1 July 2018);

c. For both pre-1 July 2018 and post-1 July 2018, the following for each classification:

i. Hourly rate used to calculate Overtime;

ii. Annualised Hourly Rate; and

iii. Annualised Salary.

69 Schedule 2 of the Agreement is entitled 'Schedule 2 – Casual Custodial Officer (Hourly Rate)'. The table in this schedule includes only one job classification – Custodial Officer (Casual). For that classification, the table sets out:

a. A rate of pay applicable from the date the Agreement was approved by the FWC;

b. A rate of pay applicable from 1 July 2018 (which is 1.5% higher than the rate pre-1 July 2018);

c. For both pre-1 July 2018 and post-1 July 2018, the following:

i. An Ordinary Base Hourly Rate; and

ii. A 25% casual loading on that Ordinary Base Hourly Rate.

70 Schedule 3 of the Agreement is entitled 'Schedule 3 – Non-Custodial Salaries/Wages'. The table in this schedule includes 30 job classifications. For each classification, the table sets out:

a. Rates of pay applicable from the date the Agreement was approved by the FWC;

b. Rates of pay applicable from 1 July 2018 (which are 1.5% higher than the rates pre-1 July 2018);

c. For both pre-1 July 2018 and post-1 July 2018, the following for each classification:

i. Base Hourly Rate; and

ii. Annual Salary.

71 A comprehensive industrial instrument that pertains to a large organisation, like the Agreement, will set out job classifications and the pay rates that apply to them. This includes pay rates pertaining to increased experience within a particular classification. For example, for each of the following classifications: 'Security Shift Custodial Officer', 'Case Management Custodial Officer', 'Canine Handlers' and 'Industries Custodial Officer', sch 1 of the Agreement sets out increasing rates of pay depending on whether an employee within one of those classifications is 'Yr 1', 'Yr 2', 'Yr 3' or 'Yr 4 plus'.

72 This illustrates the point that job classifications are devised according to the skill level, competencies and duties that an employee employed in a particular job classification is expected to have. This ensures that employees are adequately and fairly remunerated for the duties they perform at work.

73 As stated in paragraph 41 of this decision, the Agreement specifically defines the terms 'Trainee Custodial Officer' and 'Custodial Officer', in cl 6.3 and cl 6.4 of the Agreement respectively. They are the only job classifications specifically defined in cl 6 of the Agreement. I infer from the inclusion of separate definitions for those terms that the drafters of the Agreement intended to make a clear distinction between the two job classifications.

74 Clause 6.4 of the Agreement provides that 'Custodial Officer' means (broken down into its components):

a. An 'Employee';

b. Performing custodial functions;

c. Who is working towards completing or has successfully completed a Cert III.

75 In accordance with my finding that the Agreement covered the Claimant during the Period of Employment, I am satisfied that he was an 'Employee' as defined in the Agreement, fulfilling the first characteristic of a Custodial Officer.

76 The Claimant had previously (on two occasions) completed a Cert III in Correctional Practice. It would seem that perhaps Serco did not recognise these prior attainments of a Cert III, since the Claimant states in Exhibit 1 that he 'was still required by Serco to perform training activities to obtain another Certificate 3 in Correctional Practice'.[xlviii] On the basis of that evidence I am satisfied that, during the Period of Employment, the Claimant was 'working towards completing' a Cert III. That fulfils the third characteristic of a Custodial Officer.

77 The issue that arises in this case with respect to the definition of Custodial Officer is whether the Claimant fulfilled the second characteristic – i.e., whether he was 'performing custodial functions'.

78 The Claimant submits that he was performing custodial functions, both while he was participating in the ITC and during his time with the Intel Department. He submits that if a person meets the definition of Trainee Custodial Officer then, 'as a matter of logic', that person falls 'within the umbrella' of Custodial Officer.[xlix]

79 No evidence was led at trial as to what a 'custodial function' is, and the Agreement does not define 'custodial function'.

80 As to what constitutes a custodial function, I consider it is open to me to have regard to the Award to assist me on this point. The Agreement pertains to an employer – Serco – and its employees in a specific custodial setting, namely Acacia. As such, the development of the Agreement would have arisen out of a desire to create an industrial instrument intended to apply to

Serco's employees at Acacia and to ensure that those employees were better off overall than they were under the Award. As both the Award and the Agreement pertain to the same industrial context (albeit the Award is not exclusively relevant to Acacia), it seems to me the essential duties and requirements of Custodial Officers under the Agreement would be similar, if not the same, as those of Correctional Officers are under the Award.

81 Schedule B of the Award is entitled 'Correctional Employee Classifications'. The Award does not use the classification 'Custodial Officer' – rather, it uses 'Correctional Officer'. It is sensible to conclude that a Correctional Officer under the Award is equivalent to a Custodial Officer under the Agreement.

82 Clause B.2 of the Award provides:

B.2 Correctional Officer Level 1 and 2

B.2.1 A Correctional Officer is an employee who has fulfilled the training requirements set down for a Trainee Custodial Officer, or who has been assessed as meeting these requirements through the employer's Recognition of Prior Learning (RPL) program, and whose indicative tasks will be limited to those specified therein.

B.2.2 The primary objective of the Correctional Officer is to ensure, on a day-to-day basis, provision of quality services to prisoners, including prisoner rehabilitation, case management, and to actively participate in the operation and determination of priorities of any one of the assigned areas.

B.2.3 Progression from Correctional Officer Level 1 to Level 2 is based on the satisfactory completion of the equivalent of one year of full-time service in that classification and possession of Certificate III in Correctional Practice.

B.2.4 Indicative tasks of a Correctional Officer are to:

- *Supervise the behaviour and activities of prisoners on a day-to-day basis in accordance with a correctional centre's routine or structured day.*
- *Interact with prisoners and respond to their needs through the provision of services in an appropriate manner in accordance with relevant legislation and the Operating Manual.*
- *Take part in the rehabilitation of prisoners by actively participating in and overseeing their work and program activities, particularly through prisoner rehabilitation involving the use of case management principles.*
- *Monitor and maintain the dynamic and static security requirements of a correctional centre, reporting orally and in writing any unusual behaviour or occurrence, which could result in a breach of security.*
- *Undertake searches and perform escort duties of prisoners both within a correctional centre and externally when required.*
- *Participate in the reception, induction, transfer and discharge of prisoners in accordance with the policy and procedures of the employer.*
- *Supervise and co-ordinate other custodial staff assigned within the area of responsibility.*
- *Participate in quality assurance teams as assigned by management, in order to assist with the implementation of quality standards throughout the centre.*
- *Comply with Occupational Health and Safety and Equal Employment Opportunity (EEO)/Affirmative Action requirements in accordance with relevant legislative requirements and contribute to the maintenance and improvement of safety and equity in the workplace.*

83 The 'indicative tasks' of a Correctional Officer under the Award involve the Correctional Officer dealing directly with prisoners and maintaining the environment directly connected with the physical space the prisoners occupy – for example, '[m]onitor and maintain the dynamic and static security requirements of a correctional centre'.

84 In my view, the drafters of the Agreement would have had in mind the 'indicative tasks' set out at cl B.2.4 of the Award when they referred to 'custodial functions' at Acacia. Practically speaking, custodial functions involve interaction with prisoners

85 There is no evidence that the Claimant was performing custodial functions, and there is no basis for me to infer that he was. Regardless of prior experience, he was a trainee. He was participating in the ITC. I have no doubt that the ITC is designed to ready employees to transition to custodial functions, but it would defy logic to conclude that it involved employees actually performing custodial functions.

86 For these reasons, I find that the Claimant was not performing custodial functions during the Period of Employment.

87 He therefore lacked an essential job function that would have enabled him to be classified as a Custodial Officer. He was not a Custodial Officer.

Nature Of Role As A Part Of Job Classification

88 As I have noted at paragraph 60 of this decision, 'Custodial Officer (Casual)' is a classification under the Agreement.

89 But contrary to the Claimant's submission, this does not mean that if someone is employed on a casual basis, that person can only fall into that job classification.

90 Whereas the Claimant's case relied upon the Claimant falling under the umbrella of Custodial Officer and therefore being entitled to the sch 2 of the Agreement rate of pay, the Respondent pointed to the fact that the Claimant did not perform custodial functions to conclude that the Agreement simply could not apply to him at all.

91 I have found that:

a. The Agreement applied to the Claimant; and

b. The Claimant was *not* performing custodial functions, and therefore could not on any view be considered a Custodial Officer (Casual) for the purposes of sch 2 of the Agreement.

92 Serco paid the Claimant at the rate of $31.7524 per hour. This equates to a rate of $25.40, plus a 25% loading. I infer from this that Serco referred to sch 1 of the Agreement and used the post-1 July 2018 hourly rate to calculate overtime for a TCO, which was $25.40, and added a casual loading of 25% to that rate, as required by cl 7.4 of the Agreement.

93 Both parties seem to have a common belief that a 25% casual loading cannot be applied to any rate in sch 1 of the Agreement.

94 Both parties have been preoccupied with the presence of annualised rates of pay in sch 1 of the Agreement. Both essentially submit that because the Claimant was employed on a casual basis, sch 1 of the Agreement could not apply to him because the rates of pay in that schedule's table are annualised. Because of this, they submit, only full-time, part-time or fixed term employees could be assigned the rates of pay in sch 1 of the Agreement.

95 I acknowledge that cl 7.4 of the Agreement begins by saying:

> *Employees engaged on a casual basis will be employed by the hour and paid the hourly rate of pay in the attached relevant Schedule 2.*

96 On the face of it, this does give the impression that any casual employee will be paid the hourly rate of pay that appears in sch 2 of the Agreement.

97 However, in my view the following factors count against that interpretation of the clause:

a. The first sentence of cl 7.4 of the Agreement uses the phrase '<u>relevant</u> Schedule 2' (emphasis added);

b. Clause 7.4 of the Agreement goes on to say more generally, in relation to casual employees:

> *... Casual Employees are entitled to a 25% loading on their ordinary hourly rate for all hours worked. Casuals are not eligible to paid* [sic] *redundancy, public holidays that they are not working, annual leave, personal leave, maternity leave, paternity leave, bereavement leave or blood donor leave.*

98 I cannot see why the drafters of the Agreement needed to use the word 'relevant' if it was intended that all casual employees should fall within sch 2 of the Agreement. Schedule 2 of the Agreement can only be 'relevant' to casual Custodial Officers. The Claimant, of course, argues that he *was* a casual Custodial Officer and that is why he submits that he fell within sch 2 of the Agreement – i.e., the argument is not merely that he was a casual employee. But as I have found that the Claimant did not perform custodial functions, I also find that sch 2 of the Agreement was not 'relevant' to his employment.

99 The second sentence and following of cl 7.4 of the Agreement establish that any casual employee who is covered by the Agreement is entitled to a 25% loading on their 'ordinary hourly rate'.

100 Schedule 1 of the Agreement refers to the 'Hourly rate used to calculate Overtime', sch 2 of the Agreement refers to 'Ordinary Base Hourly Rate', and sch 3 of the Agreement refers to 'Base Hourly Rate'. In other words, none of the schedules echoes the phrase used in cl 7.4 – 'ordinary hourly rate'.

101 As a matter of common sense, it must be possible for any employee to be employed on a casual basis. The question then arises, what rate of pay does the 25% loading attach to?

102 For casual Custodial Officers, the answer is clear because the employee's status as a casual is part of the job classification itself. If an 'Employee' is a 'Custodial Officer' employed on a casual basis, he or she will be entitled to be paid the rate of pay set out in sch 2 of the Agreement.

103 For employees covered by sch 3 of the Agreement, the 25% loading would attach to the 'Base Hourly Rate'.

104 In spite of the parties' concerns about sch 1 of the Agreement and its references to annualised salaries, I cannot see any reason why Serco was not able to do what it did in this case – that is:

a. Employ someone in a job classification that appears in sch 1 of the Agreement;

b. Choose to employ that person on a casual basis;

c. Apply the 25% casual loading to the 'Hourly rate used to calculate Overtime' which appears alongside the relevant classification in sch 1 of the Agreement.

105 I cannot see why the presence of annualised salaries in sch 1 of the Agreement, which would be applicable to full-time employees and part-time employees (on a pro rata basis), precluded Serco from using the hourly rate which also appears in that schedule as a base rate to which a 25% casual loading could be applied for an 'Employee', like the Claimant, who fell within a job classification in sch 1 of the Agreement.

106 My findings are:

a. The Claimant was covered by the Agreement and the Agreement applied to him;

b. His job classification was TCO;

c. At no time during the Period of Employment did he perform custodial functions;

d. He was not a Custodial Officer – casual or otherwise; and

e. He was paid at the correct rate, being the rate of $25.40 plus a 25% loading.

Orders

107 The claim is dismissed.

E. O'DONNELL

INDUSTRIAL MAGISTRATE

[xxix] Contrary to paragraph 20 of the parties' Statement of Agreed Facts, which mistakenly states that the Claimant was paid $31.2875 per hour – this would be a loading of 25% on a base rate of $25.03. Attachment RC-5 to Exhibit 1 – Witness Statement of Robert Caccioloa lodged on 24 December 2021 shows the rate of pay was $31.7524, which represents a loading of 25% on a base rate of $25.40.

[xxx] Clause 6.4 of the Agreement.

[xxxi] With respect to the rate of pay, the Claimant was in fact paid at a base rate of $25.40 gross per hour, plus a casual loading of 25%, giving a total hourly rate of $31.75 – see Attachment RC-5 to Exhibit 1. The discrepancy is easily explained. The letter of offer was written in June 2018 and it would seem the author had regard to the rates of pay applicable at that time. But as at 1 July 2018, pay rises applied pursuant to the Agreement. As the Claimant commenced work on 9 July 2018, he was paid at the higher rate.

[xxxii] Section 48 of the FWA.

[xxxiii] Section 57 of the FWA.

[xxxiv] ***Construction, Forestry, Mining and Energy Union v Deputy President Hamberger*** [2011] FCA 719 [30].

[xxxv] Section 53(1) of the FWA.

[xxxvi] Exhibit 1 [10].

[xxxvii] Exhibit 1 [5], [8].

[xxxviii] Exhibit 1 [12] - [13].

[xxxix] Exhibit 1 [15].

[xl] Exhibit 1 [18].

[xli] Exhibit 1 [20].

[xlii] Originating Claim lodged on 25 May 2021 [8].

[xliii] Exhibit 1 [22] - [23].

[xliv] Exhibit 1 [12].

[xlv] [2017] FCA 910.

[xlvi] 'Job Classification - Meaning, its Need and Importance' *Management Study Guide* <https://www.managementstudyguide.com/job-classification.htm>.

[xlvii] ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries' Union known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*** [2017] FWCFB 3005 [46].

[xlviii] Exhibit 1 [12].

[xlix] Transcript, 4.

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE—Matters dealt with—

2022 WAIRC 00648

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2022 WAIRC 00648
CORAM	:	SENIOR COMMISSIONER R COSENTINO
HEARD	:	WEDNESDAY, 25 MAY 2022, WEDNESDAY, 13 JULY 2022
DELIVERED	:	MONDAY, 5 SEPTEMBER 2022
FILE NO.	:	APPL 43 OF 2021
BETWEEN	:	CONTRA-FLOW PTY LTD Applicant AND THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD Respondent

CatchWords	:	Industrial Law (WA) - Dispute as to liability to pay long service leave - Whether employee engaged in the construction industry - Definition of employer - Employee engaged as Traffic Controller - Employee's work is 'in the construction industry' - Meaning of 'works' for use on or for building or works - Meaning of 'works for the preparation of sites' - Reviewable decision affirmed
Legislation	:	*Construction Industry Portable Paid Long Service Leave Act 1985* (WA)
		Construction Industry Portable Paid Long Service Leave Regulations 1986 (WA)
		Fair Work Act 2009 (Cth)
		Industrial Legislation Amendment Act 2011 (WA)
		Local Government (Consequential Amendments) Act 1996 (WA)
		Occupational Health, Safety and Welfare Act 1984 (WA) (repealed)
		Occupational Safety and Health Regulations 1996 (WA) (repealed)
		Construction Industry Long Service Leave Act 1983 (VIC) (repealed)
Result	:	Reviewable decision affirmed

Representation:

Applicant	:	Mr R Lewis of counsel
Respondent	:	Mr S Kemp of counsel

Case(s) referred to in reasons:

Aust-Amec Pty Ltd t/a Metlab Mapel & SRC Laboratories v Construction Industry Long Service Leave Payments Board (1995) 15 WAR 150; (1995) 62 IR 412

GHD Pty Ltd v Worksafe Western Australia Commissioner [2021] WAIRC 00655; (2022) 102 WAIG 89

Wallis v The Construction Industry Long Service Leave Payments Board [2020] WAIRC 00791; (2020) 100 WAIG 1331

Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v The Australian Workers' Union of Employees, Queensland (No. 2) (2006) 181 QGIG 202

Mustac v Medical Board of Western Australia [2007] WASCA 128

Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board (PIM Full Bench) [2020] WAIRC 00758; (2020) 100 WAIG 1300

Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board (PIM First Instance) [2019] WAIRC 00843; (2020) 100 WAIG 40

Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board (PIM IAC) [2021] WASCA 208

Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme [2019] WAIRC 00860; (2020) 100 WAIG 125

Re Appeal by Shop Fitting and Building Services (Vic.) Pty. Ltd. (1989) 31 AILR 252

Re His Honour Warden Calder SM; Ex Parte Lee [2007] WASCA 161; (2007) 34 WAR 289

Reece Pty Ltd v The Worksafe Western Australia Commissioner [2015] WAIRC 00057; (2015) 95 WAIG 306

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

Thompson v The Construction Industry Long Service Leave Payments Board 2016 WAIRC 00054; (2016) 96 WAIG 144

Welldrill v Construction Industry Long Service Leave Payments Board [2009] WAIRC 00109; (2009) 89 WAIG 437

Wignall v Commissioner of Police [2006] WASAT 206

Woodside Energy Ltd v Federal Commissioner of Taxation [2006] FCA 1303; (2006) 155 FCR 357

Work Health Authority v Outback Ballooning Pty Ltd [2019] HCA 2; (2019) 266 CLR 428

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Reasons for Decision

1 The applicant, Contra-Flow Pty Ltd, operates a business which specialises in traffic management services. It employs Traffic Controllers who manually direct road traffic and pedestrian flow on, near, or adjacent to roads in a variety of circumstances that result in road closures or part road closures. Mr Nunzio Giglia is one of Contra-Flow's employed Traffic Controllers.

2 A significant part of Contra-Flow's business involves designing, planning for and directing vehicle and pedestrian traffic with the aim of ensuring public safety around the construction, reconstruction, maintenance and repair of public roads (roadworks).

3 The respondent, The Construction Industry Long Service Leave Payments Board (known as MyLeave), has determined that Contra-Flow is liable to pay contributions under the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (the Act) in respect of Mr Giglia. Contra-Flow disputes that determination because it says it is not an 'employer' as defined by the Act. In particular, Contra-Flow says that it does not engage persons as employees in the construction industry for the purposes of the definition of 'employer' in the Act.

4 It is common ground that Contra-Flow is Mr Giglia's employer and that Mr Giglia is an 'employee' as defined in the Act. It is also common ground that a significant proportion of the places where Mr Giglia works are 'sites' for the purpose of the Act's definition of 'construction industry' because they are places where roadworks are carried out.

5 The first issue in this case is what type of work Mr Giglia must perform on these sites to be classified as being engaged 'in the construction industry' for the purposes of the definition of 'employer' in the Act. The second issue is whether as a matter of fact, Mr Giglia performs such work and is therefore engaged 'in the construction industry'.

6 For the reasons that follow, I do not consider that an employee must themself perform the maintenance and repair activities referred to in the definition of 'construction industry' in order to be engaged 'in the construction industry'. Further, I consider Mr Giglia's traffic control work on the sites where roadworks are carried out qualifies him as being engaged 'in the construction industry'. Accordingly, I affirm the reviewable decision.

Review under s 50 of the Act

7 Section 50(2) of the Act permits a person who is aggrieved by a 'reviewable decision' to refer the decision to the Commission for review. The section defines 'reviewable decision' as including a decision by MyLeave 'as to the entitlement of an employee to long service leave'. MyLeave's decision that Contra-Flow is liable to make contributions in respect of Mr Giglia is, therefore, a 'reviewable decision'.

8 By s 50(3) of the Act, on referral of a decision, the Commission is to:

> …inquire into the circumstances relevant to the decision and may —
>
> (a) affirm the decision; or
>
> (b) vary the decision; or
>
> (c) set aside the decision and —
>
> (i) substitute another decision; or
>
> (ii) send the matter back to the Board for reconsideration in accordance with any directions or recommendations that the WAIRC considers appropriate.

9 The review exercise is administrative in nature. When a tribunal acts as an administrative review decision maker, and not as a judicial body, a party aggrieved by the decision, the subject of the review, does not bear a burden of proof. That is because the tribunal is not engaging in a task of fact finding on the basis of the balance of probabilities, but rather is in the shoes of the original decision maker, and is required to make the correct and preferable decision in light of all the information before it. The Commission's task is simply to assess the facts, and apply the provisions of the Act: ***Welldrill v Construction Industry Long Service Leave Payments Board*** [2009] WAIRC 00109; (2009) 89 WAIG 437 per Wood C at [20].

10 Section 50(3) of the Act is in substantially the same terms as the provisions for the Commission's review of decisions under the now repealed *Occupational Health, Safety and Welfare Act 1984* (WA) which was considered by the Industrial Appeal Court in ***Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare*** (1992) 74 WAIG 2. One of the grounds of appeal in ***Wormald*** concerned whether it was for the applicant for review to prove the factual basis of matters contained in the request for review. On this ground, Franklyn J, with whom Ipp J agreed, stated at 4:

> …It seems also, from the provisions of s51(5), that there is no question of the onus being on the person seeking the review to establish that the notice should not have issued, either in the form in which it did or at all, although he would of course be entitled to adduce evidence to that effect. The inquiry being "into the circumstances relating to the notice" it

necessarily, in my view, requires that the Commissioner inquire into and ascertain for himself the validity of the Inspector's opinion and the relevant circumstances giving rise thereto as set out in the notice. That this is so is also supported by the express reference to his right to refer such matters as he thinks appropriate to an expert of his own choosing. It is then for the Commissioner himself to determine, on the basis of "the circumstances relating to the notice" as he finds them to be, whether it can be affirmed as issued or in some modified form or whether it should be cancelled. In other words he must approach the facts and circumstances as found by him on his inquiry as if he were the Inspector determining whether, on those facts and circumstances, he could reasonably form the opinion formed by the Inspector of the particular activity, having regard also to the reasons and matters set out in the notice. If so, he affirms the notice. If not, depending on the opinion formed by him as to such matters, he either affirms it with modifications or cancels it as is appropriate…

11 This approach was followed in ***The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd*** [2007] WAIRC 01273; (2008) 88 WAIG 22; ***Reece Pty Ltd v The Worksafe Western Australia Commissioner*** [2015] WAIRC 00057; (2015) 95 WAIG 306 at [47] and ***GHD Pty Ltd v Worksafe Western Australia Commissioner*** [2021] WAIRC 00655; (2022) 102 WAIG 89 at [31]-[32].

12 While a formal onus of proof on a party may be absent in review proceedings, in some circumstances there may remain a practical onus on one or other party to prove facts in issue: ***Wignall v Commissioner of Police*** [2006] WASAT 206 citing ***Pinesales Pty Ltd v Commissioner of State Revenue*** [2006] WASAT 202 at [279].

13 On this referral, the Commission must investigate for itself the circumstances giving rise to the decision as to Contra-Flow's liability to make contributions in respect of Mr Giglia, and the validity of the conclusion reached by MyLeave. There is no onus on any party.

Contra-Flow's business

14 Mr Myles Ferrell is the owner and a director of Contra-Flow. He provided evidence by affidavit as to the nature of Contra-Flow's business and the activities carried out by Traffic Controllers employed by it.

15 According to Mr Ferrell, the vast majority of Contra-Flow's operations involve the delivery of services under contracts with the Department of Main Roads WA and Local Government Authorities for temporary traffic management services to ensure public and worker safety around roadworks on public roads. As a company that implements traffic management on State controlled roads, Contra-Flow is registered under Main Roads WA's Traffic Management Company Registration Scheme.

16 A small proportion, less than 10%, of Contra-Flow's operations involves vehicle and pedestrian traffic management for the purpose of children's crossings. Mr Ferrell described this as guiding vehicles as to where to stop on the approach side of children's crossings.

17 Contra-Flow also offers services related to the design, planning and implementation of traffic management plans (TMPs) and control systems, as well as parking assistance at and around public events, festivals and concerts and in emergency situations.

18 Contra-Flow employs approximately 170 Traffic Controllers. Traffic Controllers direct vehicle and pedestrian traffic in accordance with TMPs to ensure public safety at the site of roadworks or road repairs, construction zones, accidents, public events and other road disruptions. Traffic Controllers use signs, bollards, cones, barriers and other devices to manage movements of emergency response teams, workers and the general public. Work generally takes place at or around streets, roads and highways, or around infrastructure sites in the Perth metropolitan area.

19 Mr Ferrell regularly attends at the locations where Traffic Controllers perform their work. He monitors the traffic flow to ensure the suitability of the traffic guidance scheme. He also reviews the signage and other devices for compliance with the TMPs and traffic guidance schemes.

20 Mr Giglia's work duties are typical of all other Traffic Controllers Contra-Flow employs.

21 All Traffic Controllers hold a worksite traffic management and traffic control accreditation issued by Main Roads WA. This accreditation covers skills and knowledge in the following areas:

(a) managing traffic on worksites;

(b) conforming to requirements of the TMP and promoting safe and consistent traffic management practices;

(c) controlling traffic at road worksites where a road closure or partial road closure is necessary for controlling traffic at other events where a road closure or partial road closure is necessary;

(d) controlling traffic in other circumstances where traffic control is required on a roadway;

(e) legally stopping and slowing the traffic where traffic speed is reduced to 60 kilometres per hour or less;

(f) reporting motorists who fail to follow reasonable directions to the supervisor or the police; and

(g) implementing and positioning signs, bollards and barriers.

22 Traffic Controllers familiarise themselves with and then implement TMPs. They must have an understanding of site and equipment safety requirements, the relevant reporting lines, responsibilities and authorities. They utilise two-way radios for communications with others, conduct hazard identification, job safety analysis and safe work method statements.

23 Traffic Controllers who hold an accreditation in Advanced Worksite Traffic Management are also authorised to make onsite adjustments to TMPs, prepare and review TMPs and approve temporary speed limit signs within certain parameters. Mr Giglia holds advanced accreditation.

Work done by Mr Giglia

24 Mr Ferrell confirmed in oral evidence that around 96% of Mr Giglia's work was at roadworks sites in the Kalamunda Shire area. While he was also sometimes required to provide traffic control at events, such as market days, this was an insignificant proportion of his work.

25 Mr Ferrell gave evidence of a typical day or shift for Mr Giglia. On such a shift, Mr Giglia is assigned to a particular site. Once on site, Mr Giglia attends a pre-start meeting with other Traffic Controllers on site, during which traffic management accreditations are checked. Mr Giglia is then involved in the setup, installation and management of either site-specific or generic temporary traffic guidance signs such as speed limit zones.

26 Mr Giglia is engaged in directing vehicles and pedestrians on, near, or adjacent to roads to ensure safe access and egress. He might be required to handle a stop-slow sign or other similar traffic control signs and devices to direct traffic. He may have to put barricades or other temporary structures in place to effect lane closures.

27 Mr Giglia will communicate with other traffic control personnel, construction workers and emergency response teams by using a radio to provide and receive updates on traffic conditions and surrounding activities. Communications would also be needed in some instances with the regional network operations centre.

28 At all times whilst working, Mr Giglia must ensure that he is positioned in specific areas that are designated as optimising his and traffic safety, and to ensure that he has a clear escape route away from the traffic control station in the event of an emergency.

29 Instructions may be given to Mr Giglia by Contra-Flow's Operations and Managers as well as from Main Roads WA and government officials.

30 Finally, Mr Giglia needs to close down the traffic control site once all workers have left. This involves some 'aftercare' including installing signs to notify motorists of changes in the road conditions, such as no-lines marked or loose stones.

The parties' approach to the referral application

31 The parties each filed written submissions prior to the hearing of this matter. In their written submissions, the parties informed the Commission that the relevant facts were agreed. The agreed facts consisted of four brief statements of fact.

32 The parties took what at first appeared to be highly divergent positions in relation to the correct construction of the relevant provisions of the Act. Contra-Flow's written submissions took aim at MyLeave's submissions as being unsupported by the text of the Act or decided cases. MyLeave's written submissions contained generalised propositions as to the scheme of the Act and its operation as being consistent with Contra-Flow being liable under it.

33 In the apparent fervour to battle each other's contended for result, both parties steamrolled over the facts and presented little, and tested nothing, in the way of facts, to assist the Commission to determine the dispute between them. The question, in this case, is whether Mr Giglia was engaged in the construction industry. The question raises essentially factual issues.

34 As the parties' submissions were refined in the course of oral closing, it appeared that the dispute as to relevant legal principles and indeed the Act's meaning was relatively narrow, and boiled down to whether a finding that an employee was engaged 'in the construction industry' required that the employee actually be doing the activities of construction of, maintenance of, repairs to, etc roads, or whether there need only be a link between the employee's work and the construction, maintenance, repairs etc of/to roads, and if so, what degree of connection was required.

35 If that issue was resolved, as Contra-Flow contended, on the basis that the definition of 'employer' required that Mr Giglia be engaged to actively *do* construction of, maintenance of or repairs to roads, that would be the end of the matter. There is no dispute that Mr Giglia did not himself perform construction, maintenance or repairs of/to roads.

36 If, however, as MyLeave contended, the correct construction of the Act required something less than engagement in the activities expressly listed in the 'construction industry' definition, there remains an issue of fact for determination, that is, whether Mr Giglia's work had the necessary connection. While the evidence before the Commission described Mr Giglia's traffic control work, there was no evidence before the Commission as to the connection between Mr Giglia's work and the construction, maintenance, repairs etc of/to roads, besides the obvious fact of his presence on or in the vicinity of sites where those activities were being carried out.

37 The hearing was adjourned so that the parties could file further evidence on this factual aspect of the case. This resulted in the following evidence being received.

The role of Traffic Controllers in roadworks

Evidence of Ms Deborah Costello

38 Contra-Flow adduced evidence from Ms Deborah Costello, Contra-Flow's Health, Safety, Environment and Quality Manager. Ms Costello has extensive prior experience as a Traffic Controller, in implementation of TMPs, supervision of Traffic Control teams and traffic control training.

39 Ms Costello set out the variety of industries and circumstances in which Contra-Flow is engaged to provide traffic management services, ranging from street festivals and public events, utility supply, servicing and repair, amenity horticulture and landscaping to building construction and civil construction. She said that regardless of the industry or nature of the works, the tasks of a Traffic Controller remain the same.

40 Ms Costello described traffic control as the supervision of the movement of people, goods or vehicles to ensure efficiency and safety, although she agreed in cross-examination that safety is the predominant purpose of traffic control activities.

41 One of the themes of Ms Costello's evidence was that not all road maintenance and repair work involved Traffic Controllers. Particularly those for large, long-term road work projects do not require the presence of Traffic Controllers on site. Indeed, Ms Costello noted that as of 1 July 2022, manual traffic control would not ordinarily be permitted on main roads.

42 Many large road work projects involve complex traffic management arrangements that are based on 'temporary work zone barriers', that is, the erection of physical barriers between the travelled way and the work area. According to Ms Costello, once the worksite is isolated within a contained barrier system, there is no requirement for Traffic Controllers to be on site during the construction activities. The barriers must be installed by certified installers or engineers, not by Traffic Controllers. For example, the roadworks involved in the Mitchell Freeway widening are contained behind a barrier system. Such barrier systems might be in place for months or years, depending on the project's duration.

43 In instances where these barrier systems are in place, Traffic Controllers are present only to implement temporary traffic management when the barrier system is removed or realigned. Ms Costello described their involvement as 'intermittent traffic management'.

44 Ms Costello gave evidence of other scenarios where roadworks may be carried out without any involvement of Traffic Controllers, for example, road closures and short-term, low-impact works by Local Government Authorities. In this last category, any traffic control activities are undertaken by the road workers themselves.

45 During her oral evidence, Ms Costello described her involvement in pre-start meetings with Contra-Flow's Traffic Controllers. She said that the pre-start meetings often occurred before any other contractors arrived on site, and were generally with only her staff, that is, only with the Traffic Controllers that she supervised. While the roadworks contractors can attend pre-start meetings, Ms Costello's evidence was that they normally do not 'purely because [the Traffic Controllers] get there before anyone else gets there, because they install signs and devices so that the workers can come straight in'.

46 She described the purpose of the pre-start meetings as being to give a briefing to Traffic Controllers about their role for the day, the scope of works taking place, specific risks that have been identified and the ablutions and amenities in the area. If there are changes in the scope of work which impact on the traffic management, then these changes are discussed.

47 Ms Costello said that where Traffic Controllers are part of a TMP, their role is to isolate the worksite, not prepare it.

48 According to Ms Costello, in the course of a typical day, Traffic Controllers are in communication with their Team Leader (from Contra-Flow) and other Traffic Controllers. They are not required to communicate with the roadwork teams. They are all required to have a two-way radio for communications, but only the Traffic Controllers are on channel.

49 Having said that, Traffic Controllers are sometimes supplied with contact numbers for the TMP designer, the Local Government Authority, a supervisor or project manager, or the transport authority, for the purpose of contacting those persons or bodies in relation to the Traffic Controller's operations. The Contra-Flow Team Leader may also have ongoing communications with the roadworks contractor about how the roadworks are progressing.

50 Ms Costello confirmed that in some instances where roadworks are carried out on main roads, Portable Traffic Control Devices would be used to manage traffic conditions. These devices include portable traffic signals. Only accredited Traffic Controllers are able to operate Portable Traffic Control Devices.

Evidence of Mr Donald Nigel Veal

51 MyLeave tendered an affidavit of Mr Donald Nigel Veal, a transport planner, traffic engineer and Director of Donald Veal Consultants Pty Ltd (DVC). Mr Veal has 40 years' experience as a traffic and transport engineer, and has worked 25 of those in Western Australia. In the course of his work, he prepares, approves and reviews TMPs associated with construction sites, roadworks and major events.

52 DVC subcontracts on many large-scale road construction projects in Western Australia.

53 Mr Veal's evidence was focused on the regulatory environment in which public roadworks are carried out in Western Australia. In particular, he set out the mandatory nature of the requirement for TMPs for all public roadworks, as set out in Main Roads WA's Traffic Management for Works on Roads Code of Practice (Code). Mr Veal summarised these requirements:

(a) All roadworks require approval from the agency responsible for the care, control and management of the relevant road.

(b) All approvals for roadworks require the applicant to comply with, amongst other things, the Code and the Austroads Guides.

(c) All applications for approval of roadworks require that the applicant prepare and lodge a TMP for approval.

(d) If an approved TMP requires the presence of Traffic Controllers, roadworks cannot be performed without the presence of Traffic Controllers.

54 Mr Veal's affidavit referred to and attached Part 7 of the Austroads Guide to Temporary Traffic Management (AGTTM). Its Introduction to Traffic Control states:

> Road worksites are particularly hazardous in comparison to normal road operations. Traffic controllers protect road workers and as such, the training, skills and capability of traffic controllers are **critical to the effective operation of worksites where they are used**. Traffic controllers are used when signs and devices for roadworks are considered insufficient to provide traffic control for safety, public convenience and efficient job control and management. Traffic controllers have an important safety role on a worksite as well as being the front-line representative of their organisation and conducting an important public relations role when interacting with road users. (emphasis added)

55 Under the AGTTM, Traffic Controllers are responsible for the safety of fellow workers, motorists and road users and for enabling works at the site to be conducted safely by minimising the risk associated with traffic movement. The full list of Traffic Controller responsibilities is set out at 2.4.3 of the AGTTM:

> Traffic controllers are responsible for the following duties:
>
> - their own safety
> - safety of fellow workers
> - safety of motorists and road users
> - enabling works at the site to be conducted safely by minimising the risk associated with traffic movement
> - notify if any faulty equipment is being used
> - remaining at their station at all times unless directed by the supervisor to leave or if relieved by another traffic controller
> - controlling traffic to enable motorists and road users to negotiate around, through or past the worksite safely
> - dealing with motorists and other road users professionally
> - respond to instructions for traffic control in emergencies and other difficult situations
> - monitor and report on delays to traffic
> - supervising traffic controllers in training, as required
> - reporting incidents and near misses
> - install and remove signs that are required for traffic controllers.

56 Mr Veal also referred in his evidence to pre-start meetings. Traffic Controllers are required by the AGTTM to attend a pre-start meeting. Paragraph 2.7.2 of the AGTTM provides:

> The contractor and the traffic management company must to organise a pre-start meeting, to be attended by the traffic controller/s before commencing traffic control duties. The meeting is vital to ensure everyone on site understands activities that are occurring and the responsibilities and roles of each person working on the site are made clear prior to work commencing. Matters to cover in the pre-start meeting include:
>
> - direct briefing of traffic controller's role
> - details of traffic guidance scheme, including traffic controller escape path
> - contact numbers and details of relevant people
> - breaks (e.g. toilet, water)
> - traffic monitoring instructions
> - details of the works being undertaken
> - locations where workers are on foot
> - site specific risks
> - consideration of an exclusion zone
> - incident management procedures.

57 Mr Veal said that in his experience, pre-start meetings may take place at the traffic management company's compound, or on site before other workers arrive on site. However, on other occasions, the pre-start meetings are conducted on site, and are attended by both Traffic Controllers and the site manager or project manager as well as workers who operate the machinery such as graders. The involvement of the contractors aids the Traffic Controllers to know the scope of the roadworks being carried out, so that the Traffic Controllers have an understanding of how that scope interacts with road users: 'so that everyone knows what's going on and the order of things'. They also discuss issues from the previous day, such as road user compliance.

58 Mr Veal said that roadworks fell into two categories relevant to how a pre-start meeting might be conducted. In the first category, he gave the example of mending a series of four or five potholes, which might take half an hour each. In that example, the pre-start meeting might take place at Contra-Flow's compound, amongst the Traffic Controller team itself. The other type is a large project taking 18 months, where it is not possible to plan everything day-by-day for the entire 18 month period. In this category, things like weather conditions and deliveries mean the site is too complicated to timetable ahead, and on site meetings, and site-wide updates, are more common.

59 To the extent that site conditions or changes to the scope of works are communicated to Traffic Controllers, Mr Veal said that Traffic Controllers need not know the specifics, but should understand the nature of the scope of works. According to Mr Veal, this information is helpful to the extent that it aids Traffic Controllers in understanding traffic conditions and how the work interacts with road users. Specifically, it is helpful to know the duration of the work, whether it will be during peak traffic periods, what queue lengths can be expected and whether there will be delivery of pre-cast units and the like.

60 Mr Veal's evidence was not that roadworks cannot be performed without Traffic Controllers, or that Traffic Controllers are necessary or essential to all roadworks. Indeed, the Code at 6.8.4 annexed to Mr Veal's evidence provides:

> Traffic Controllers are primarily used to manage, control and stop traffic where other signs and devices are considered insufficient. Accredited Traffic Controllers (see section 8) are required to operate in compliance with AGTTM Part 7: Traffic Controllers.

61 It is only when a TMP requires the presence of Traffic Controllers that their presence is a necessary requirement for roadworks to occur.

62 The Code provides at 4.2.1 and 4.2.5 (emphasis added):

> **4.2 TRAFFIC MANAGEMENT PLANS**
>
> **4.2.1 General**
>
> Any party undertaking work on a road shall prepare a Traffic Management Plan (TMP) that adequately provides for the safety of workers and road users while maintaining an adequate level of service to road users. Traffic management planning should be undertaken in accordance with the AGTTM Part 2: Traffic Management Planning…
>
> …
>
> **4.2.5 Traffic Management Implementation and Removal**
>
> **The implementation, operation and/or removal of the temporary traffic management shall be considered part of the works,** therefore the TMP shall provide details on how this activity will be conducted safely (refer to AGTTM Part 5 and Part 6) including order of set up and pack down…

63 Under the heading 'Risk Management' at 4.3, the Code states:

> …The following must be considered when undertaking the risk management process for any activities on or near roads:
>
> - the Work Health and Safety (General) Regulations 2022 identify construction work on or near roads as high risk construction work,
> - AGTTM indicates that all works on roads are considered high risk,
> - Main Roads has corporately identified interaction with live traffic as a critical risk.
>
> Taking this into account it would usually be expected that the pre-treatment risk ratings for works (including traffic management set up and pack down) near live traffic would have a pre-treatment risk rating of high or greater, i.e. it is recognised that it is possible that workers may suffer major injuries or severe permanent disablement when working near traffic with no treatments or controls in place (e.g. engineering, administrative, PPE, etc.)…

64 The Code requires the party undertaking the roadworks to keep a copy of the approved TMP: par 5.3.

65 Neither the Code nor the AGTTM reveals any express requirement that Traffic Controllers interact with workers carrying out the maintenance or repair works on the road, nor that they have knowledge of the methods of maintenance, construction or repair of roads or the operation of plant.

66 Nor do these documents suggest that Traffic Controllers play a part in risk management or ensuring people's safety from risks arising from the construction work itself, such as the operation of plant and machinery. Rather, the focus is on understanding site risks arising from traffic conditions. It could be said that a Traffic Controller's focus is on the external environment, rather than the construction operations.

67 Consistent with Ms Costello's evidence, Mr Veal described instances where semi-permanent barrier systems provide the necessary worksite isolation rather than Traffic Controllers. Like Ms Costello, he confirmed that where such barrier systems are in place, there is usually a requirement for Traffic Controllers at some stage during the project, particularly for decommissioning and realignment. In relation to a project Mr Veal is currently involved in, barriers are in place, the works have been ongoing for 18 months, and Traffic Controllers are on site frequently during barrier realignment works. When pressed on the extent of Traffic Controller involvement in works like this example, Mr Veal said they may be present daily, setting out traffic cones and moving signs.

68 Also consistent with Ms Costello's evidence, Mr Veal explained that Traffic Controllers report to their shift manager or shift supervisor. He explained that if a contractor wants to, for example, regrade a section of the road further down from the current works, they tell the shift supervisor, who will then instruct the Traffic Controllers to 'set up camp down there to allow the works to proceed'.

The statutory scheme for portable paid long service leave

69 In ***Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board (PIM Full Bench)*** [2020] WAIRC 00758; (2020) 100 WAIG 1300, Kenner SC (as he then was) set out a brief history of the Act and the statutory scheme at [21]-[29]. It is not necessary for me to repeat what was stated there. Relevant to the issues in this matter, the scheme of the Act provides portable long service leave entitlements to employees engaged in the 'construction industry' as defined. An employer of such employees is required to make contributions by way of a levy into a fund administered by MyLeave.

70 The obligation upon an employer to register under s 30(1) of the Act is not dependent on the employer being engaged in the construction industry. It is dependent on the employer employing persons as employees, who are engaged in the construction industry: ***Aust-Amec Pty Ltd t/a Metlab Mapel & SRC Laboratories v Construction Industry Long Service Leave Payments Board*** (1995) 15 WAR 150; (1995) 62 IR 412.

71 It is convenient at this point to also set out the relevant definitions of 'construction industry', 'employee' and 'employer' contained in s 3 of the Act:

…

construction industry means the industry —

(a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —

(i) buildings; and

(iia) swimming pools and spa pools; and

(ii) roads, railways, airfields or other works for the passage of persons, animals or vehicles; and

(iii) breakwaters, docks, jetties, piers, wharves or works for the improvement or alteration of any harbour, river or watercourse for the purposes of navigation; and

(iv) works for the storage or supply of water or for the irrigation of land; and

(v) works for the conveyance, treatment or disposal of sewage or of the effluent from any premises; and

(vi) works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from materials; and

(vii) bridges, viaducts, aqueducts or tunnels; and

(viii) chimney stacks, cooling towers, drilling rigs, gas-holders or silos; and

(ix) pipelines; and

(x) navigational lights, beacons or markers; and

(xi) works for the drainage of land; and (xii) works for the storage of liquids (other than water) or gases; and

(xiii) works for the generation, supply or transmission of electric power; and

(xiv) works for the transmission of wireless or telegraphic communications; and

(xv) pile driving works; and

(xvi) structures, fixtures or works for use on or for the use of any buildings or works of a kind referred to in subparagraphs (i) to (xv); and

(xvii) works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi); and

(xviii) fences, other than fences on farms;

(b) of carrying out of works on a site of the construction, erection, installation, reconstruction, re-erection, renovation, alteration or demolition of any buildings or works of a kind referred to in paragraph (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings or works;

(c) of carrying out of work performed by employees engaged in the work referred to in paragraph (a) or (b) and that is normally carried out on site but which is not necessarily carried out on site,

but does not include —

(d) the carrying out of any work on ships; or

(e) the maintenance of or repairs or minor alterations to lifts or escalators; or

(f) the carrying out of maintenance or repairs of a routine or minor nature by employees for an employer, or another person under an arrangement with a labour hire agency, who is not substantially engaged in the industry described in this interpretation;

…

employee means —

(a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or

(b) an apprentice;

employer means —

(a) a natural person, firm or body corporate who or which engages persons as employees in the construction industry; or

(b) a labour hire agency which arranges for a person who is a party to a contract of service with the agency (***person A***) to do work in the construction industry for another person (***person B***), even though person A is working for person B under an arrangement between the agency and person B,

but does not include a Minister, authority or local government prescribed under subsection (4)(c);

…

72 As observed by Kenner SC (as he then was) in ***Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme*** [2019] WAIRC 00860; (2020) 100 WAIG 125 two steps are required for the conclusion to be reached that a person is engaged 'in the construction industry' for the purposes of the Act. The first is that they are employed in a classification of work in one of the prescribed industrial instruments under the Act. The second is that the work the employees do can be characterised as work in the construction industry, as defined: [17].

73 As stated above, it is common ground that the first step is satisfied in Mr Giglia's case. He is employed in the classification of Traffic Controller, a classification which is named in each of the *Australian Workers' Union Construction and Maintenance Award 1989*, the *Transport Workers Spraypave Pty Ltd Award 1990*, the *Western Australian Civil Contracting Award 1998* and the *Australian Workers' Union Construction and Maintenance (Consolidated) Award 1987*. These awards are all industrial instruments which are prescribed under the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA).

74 As to the significance of the award classifications to the definition of 'employer' in the Act, in ***Aust-Amec***, Ipp J said at [152]:

> Accordingly, an "employer" is not defined simply to mean a person who employs an "employee" as defined. An employer is a person who engages persons as employees "in the construction industry" but does not include a Minister, authority or council as prescribed. Thus while employees are defined by reference to prescribed awards "relating to the construction industry", the definition of "employer" imports the additional qualification that the employees must be "in the construction industry". The definition of "employee" therefore has a different ambit to that of "employer". The consequence of this is that there may be persons who are "employees" within the meaning of the Act who are not employed by "employers" within the meaning of the Act.

MyLeave's submissions

75 MyLeave's initial written submissions were quite generalised. Its initial written submissions did not accurately reflect MyLeave's case as it was elucidated in the course of the hearing.

76 MyLeave's initial written submissions stated:

> The sites at which [Mr Giglia's] work is performed would fall within the definition of "construction industry" in the Act, meeting the description in par (a)(ii) of the definition.

77 The initial submission further stated:

> …[I]t is sufficient for the employee to perform work that is the work of a prescribed classification on a site that falls within the definition of "construction industry".

and:

> The industry is essentially defined by reference to sites, not by reference to the businesses that are the participants in the industry.

78 Granting that these submissions were introductory and generalised, they nevertheless point to an erroneous approach to the definition of 'construction industry' in that MyLeave seeks to supplement it with an enquiry as to whether a work location is 'a site'.

79 Later in the initial submissions, MyLeave contradicts these statements by recognising that there are three relevant elements to part (a) of the definition of 'construction industry'. Namely:

(a) there is a site (away from the employer's usual business premises);

(b) construction, erection, installation etc is undertaken on the site; and

(c) that work occurs of or to one of the structures set out in subpars (i) to (xviii) in subpar (a) of the definition.

80 As to the meaning of 'employer' and when an employer engages an employee 'in the construction industry', MyLeave made the following submissions:

> Once **a site** meets the requirements, **any person working on the site is working in the construction industry** as that term is defined in the Act.
>
> …
>
> A person who engages an employee to perform **the usual work of a prescribed classification on a site** will be engaging that person in the construction industry and be an employer for the purposes of the Act. (emphasis added)

81 By the time MyLeave closed its case, it had walked back from these submissions, perhaps in recognition of their departure from the words in the Act. In supplementary written submissions, MyLeave takes up the statements of Kenner SC (as he then was) in ***Wallis v The Construction Industry Long Service Leave Payments* Board** [2020] WAIRC 00791; (2020) 100 WAIG 1331, to the effect that for an employee to be engaged in the construction industry requires that they be *involved* in the construction, maintenance, repairs etc of/to roads. MyLeave accepts that work that is 'one-step removed' from such involvement will not qualify. MyLeave says that this does not mean an employee must perform the specific types of activities expressed in the definition of 'construction industry' to so qualify.

82 MyLeave emphasises that to construe the Act as requiring an employee to perform the specific construction or building work referred to in the definition of construction industry would render superfluous the provisions of the Act concerning the definition of 'employee' by reference to prescribed award classifications. It notes that s 3(4) defines 'prescribed classification' as a classification contained in any industrial instrument made with respect to 'employment in the construction industry'.

83 In essence, MyLeave says there must be a sufficient degree of connection, or a lack of remoteness, between the work done by a Traffic Controller and the particular construction industry activity in order for the employee to be engaged 'in the construction industry'. Counsel for MyLeave stated:

> …I suppose you could call it a question of remoteness. It's not a question of what type of work is being performed, its whether or not there is a reasonable link between the work and the construction industry definition and the work that is being carried on at the site otherwise in the form of construction work.

84 MyLeave maintains, though, that '[t]he fact that you're doing the work of a prescribed classification is really sufficient, in our submission, to justify a finding that you're working in the construction industry if you're doing that work on a site…'.

85 MyLeave says that its approach is:

> …consistent with the usual concept of working in an industry, namely, the person need not be performing the core work of the industry in order to be employed in the industry. For example, a factory cleaner is still employed in the manufacturing industry despite not undertaking any manufacturing work.

86 It says that the evidence in this case establishes a sufficient degree of connection between Mr Giglia's work and the construction industry activities. In particular:

(a) The construction, maintenance and repair of roads in Western Australia is a highly regulated activity.

(b) If a TMP requires the presence of Traffic Controllers on the site of roadworks, roadworks cannot be commenced or completed without the presence of Traffic Controllers and compliance with the TMP.

(c) Where Traffic Controllers are engaged, their role and work enables the construction to be carried out safely. The work of Traffic Controllers is important to the construction, maintenance and repair of roads.

(d) Traffic Controllers are, therefore, an essential component of such roadwork projects whenever a TMP stipulates Traffic Controllers as a requirement.

(e) MyLeave also points out that the Code requires that Traffic Controllers be issued with a valid WorkSafe WA Construction Induction Training Card (White Card), which is issued following completion of a recognised construction industry training course: *Occupational Safety and Health Regulations 1996* (WA) (OSH Regulations) (now repealed), reg 3.136.

87 In its supplementary written submissions, MyLeave also raised an alternative argument that Mr Giglia is engaged 'in the construction industry' as defined by s 3(1)(a)(xvi) or (xvii) of the Act. MyLeave argues that Traffic Controllers' involvement in TMPs are 'works' for the use of roadworks or for the preparation of sites for roadworks.

Contra-Flow's submissions

88 Contra-Flow agrees that, on the basis of the uncontentious facts:

(a) Mr Giglia is an 'employee' as defined by the Act; and

(b) the majority of places at which Mr Giglia works are 'sites' within the definition of 'construction industry'.

89 Contra-Flow submits that as Mr Giglia was performing traffic management, an activity which is not listed in the definition of 'construction industry' within the Act, he was not engaged 'in the construction industry'. It follows that Contra-Flow is not an 'employer' as defined.

90 Contra-Flow points out the distinction in the definitions of 'employee' and 'employer' identified by Ipp J in ***Aust-Amec*** and further recognised by Kenner SC (as he then was) in ***PIM Full Bench*** at [114]-[115]. The distinction is that the definition of employer does not require that the employer itself be in the construction industry, but is qualified by the requirement that its employee(s) be engaged in the construction industry.

91 Contra-Flow submits that the authorities have a consistent theme that in order for activities that an employee engages in to be captured by the definition of 'construction industry', those activities must fall within the description set out in that definition: construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance to one of the things listed in subpars (i) through (xiii).

92 Contra-Flow says that the authorities, particularly ***PIM Full Bench***, indicate that the definition of 'construction industry' is a strict definition. For activities to be captured by the definition they must be capable of being found in the words of the definition. The reference in the definition of 'construction industry' to 'a site' is a pre-qualifier to what follows in regard to the requirement of the activities carried out. The work activities that the employee is engaged in, by the employer, must fall within those set out in the definition of 'construction industry'.

93 Contra-Flow submits that the requirement that an employee be engaged in the construction industry is the final hurdle for the employee to overcome in order to be entitled to receive benefits under the scheme. It submits that the issue of whether or not a person is engaged as an employee 'in the construction industry' depends on whether they engage in work falling within the definition in s 3(1) of the Act.

94 Contra-Flow points to the fact that in ***Wallis*** the employee was both an employee within the meaning of the Act and working on a site for the purposes of the Act, but was not ultimately found to be working 'in the construction industry', to demonstrate that the test involves this severable and separate element.

95 Contra-Flow relies upon a decision of Deputy President Bloomfield in ***Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v The Australian Workers' Union of Employees, Queensland (No. 2)*** (2006) 181 QGIG 202. In this case, the applicant Union argued that employees whose substantial functions were traffic control were providing security services, and thus were covered by the *Security Industry (Contractors) Award* and not the *Civil Construction, Operations and Maintenance General Award.* In the course of determining award coverage, the Deputy President analysed the relationship between the role of Traffic Controllers and road construction and maintenance.

96 The following summary of Traffic Controller's duties in that case aligns with the evidence given in this case:

> A traffic controller performing traffic control duties is not permitted to perform any other duties whilst performing that role. That is the only activity they should be undertaking, unless relieved from performing traffic control functions. If they noticed something amiss on a construction site, for example a crane was about to topple for some reason, their duty was to stop the public from entering the worksite and to control the traffic by stopping it. It would not be their function to become involved in the site activities. That would be the responsibility of the crane driver and other construction workers.

97 The *Civil Construction, Operations and Maintenance General Award* was expressed to cover 'Employees engaged in Making Roads' defined as '…the construction and/or maintenance of roads and clearing or doing work in or in connection with the construction and/or maintenance of roads'. In finding that Traffic Controllers were not covered by the *Civil Construction, Operations and Maintenance General Award*, the Deputy President characterised the evidence as demonstrating that Traffic Controllers act independently of other persons engaged at worksites, and are not permitted to become involved in the activities on site.

98 Mention is made in Contra-Flow's written submissions of the coverage of the *Building and Construction General On-Site Award 2020*, a modern award under the *Fair Work Act 2009* (Cth). Contra-Flow suggests its coverage expressly excludes Traffic Controllers working on public roads because it contains a definition of 'general building and construction', which includes construction in connection with civil and/or mechanical engineering projects only (not road making). Contra-Flow did not really elaborate on why this is relevant to determining the meaning of the term 'in the construction industry' in the Act.

99 Contra-Flow submits that the fact that Traffic Controllers must hold a White Card does not assist in determining whether they are 'in the construction industry', because the application of the now repealed OSH Regulations is broader than the definition of 'construction industry' under the Act, in particular because the now repealed OSH Regulations extend to work 'adjacent to' roadworks.

100 Contra-Flow submits that whether an employee is engaged 'in the construction industry' is a matter of fact and degree, depending not only on whether some of the work performed by that employee is within the construction industry, but also the degree to which that work forms part of the overall duties of the person concerned. Applying this test, Mr Giglia, and other Traffic Controllers engaged by Contra-Flow, are not engaged in the construction industry.

Meaning of 'in the construction industry'

101 The meaning of 'in the construction industry' for the purpose of the definition of 'employer' in the Act was considered by the Supreme Court of Western Australia in ***Aust-Amec***, and by the Commission in ***Wallis***. To the extent that the determination of the meaning of that term constitutes the essential reasoning in ***Aust-Amec,*** it is binding on me: ***Mustac v Medical Board of Western Australia*** [2007] WASCA 128 at [48]. Further, I should follow any construction adopted by the Commission in its earlier decision, unless it is clearly wrong: ***Mustac*** at [38]. In ***Mustac***, the Supreme Court observed at [46] that the application of the practice of judicial comity involves a flexible approach. That may require independently reaching a view as to the correct construction as a starting point.

102 If the construction issue:

(a) has not been authoritatively decided by binding precedent; and

(b) cannot be resolved by application of the practice of judicial comity;

then my task is to construe the provisions of the Act in accordance with the well-established principles of statutory construction. The principles of statutory construction were recently described by the Full Bench in ***GHD*** at [53] and [54] citing ***Australian Unity Property Ltd v City of Busselton*** [2018] WASCA 38, ***Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board (PIM IAC)*** [2021] WASCA 208 and ***Work Health Authority v Outback Ballooning Pty Ltd*** [2019] HCA 2; (2019) 266 CLR 428.

103 The task involves giving the words of the statutory provision the meaning which the legislature is taken to have intended it to mean. The focus of the exercise is to find guides to meaning in the text and structure of the legislation, consistency within it, its context and general purpose.

Is *Aust-Amec* binding authority on point?

104 ***Aust-Amec*** involved two issues. The first was whether the plaintiff companies were obliged to be registered under s 30(1) of the Act, which, as it then stood, obliged 'employers in the construction industry' to register under the Act. As the Act then stood, the element of being 'in the construction industry' was contained in the definition of 'employer' and in s 30(1). The second issue was whether, if the plaintiffs were not themselves 'in the construction industry' and required to be registered for the purpose of s 30(1), they were nevertheless required to make contributions in respect of employees under s 34(1).

105 Section 34(1) provided that an 'employer' was required to pay contributions for employees employed by the employer.

106 The definition of 'employer' for the purpose of s 34(1) was the definition contained in s 3: 'a natural person or firm or body corporate, as the case may be, who or which engages persons as employees in the construction industry; but does not include a Minister, authority or council prescribed under subsection (4)(c)'.

107 In considering the second issue, His Honour Ipp J said at 161:

> …an employer is defined to be a person who engages persons who are not only employees (as defined), but who are also employees "in the construction industry". This, together with the distinction to which I have already referred between an employer who is required to be registered and an employer who is not, contemplates that a mere employer (ie an employer who is not required to be registered) may not itself be "in the construction industry" but may employ employees (as defined) in the construction industry. Such an employee may be a person, employed by an organisation falling outside the construction industry, who performs work within the construction industry. An example of this would be, say, a

bricklayer employed by a university or a similar institution to maintain and repair existing buildings on a site, and to lay bricks on a site for new buildings.

108 The defendant in ***Aust-Amec*** had submitted that the words 'in the construction industry' in the definition of 'employer' had no real work to do. His Honour rejected that contention, concluding that an employer as defined is a person who engages persons who, first, fall within the definition of 'employee' and, second, are employees 'in the construction industry'. Ipp J observed the element relating to being engaged 'in the construction industry' was an integral part of the definition of 'employer': 153.

109 As to the application of this latter element, His Honour stated at 162:

> Whether a person is an employee in the construction industry depends not only on whether some of the work carried out by him or her is in the construction industry, but, also, on the degree to which that work forms part of the overall duties of the person concerned…

110 His Honour then proceeded to consider, as a matter of fact and degree, whether certain employees (as defined by the Act) were engaged 'in the construction industry'. There were several categories of employees His Honour considered. Several categories of employees were not engaged 'in the construction industry' because their work was performed wholly or predominantly at the employer's premises and not on a site.

111 On site heat treatment employees and mechanical testing employees were found not to be 'in the construction industry' because the nature of the services was found to be outside of construction, for example, services to manufacturing. His Honour considered it was open that employees in welding inspection services on site, and whose work was supervisory, may be 'in the construction industry', but the evidence was insufficient to reach that conclusion. His Honour considered such employees were possibly akin to foremen, although they had no authority over those persons performing the construction work. Employees engaged in the extraction of samples from site for testing by means of drilling were likely in the construction industry.

112 ***Aust-Amec*** establishes that the requirement for an employee to be engaged 'in the construction industry' is a separate element of the definition of employer, and that whether the requirement is met is to be determined as a matter of fact and degree.

113 Justice Ipp does not explicitly state that an employee need not be actually doing, by their own hands, construction, maintenance, repairs etc, in order for their work to be 'in the construction industry' as defined. However, His Honour considered work that was supervisory and involved inspection of works, work that was not itself creating or making the particular structures, could fall within the words 'in the construction industry'. His Honour's approach could not be characterised as requiring that the employee actually be doing the activities of construction, maintenance, repairs, etc. His Honour's willingness to entertain the possibility that a welding inspector's work was 'in the construction industry' but work in the sphere of mechanical testing was not, demonstrates His Honour's approach.

114 On the other hand, it cannot be said that ***Aust-Amec*** provides support for a broad approach to the meaning of 'in the construction industry'. On this point, when considering the first issue for determination, that is, the requirement for registration of employers 'in the construction industry' under s 31, Ipp J observed at 159 that the Act's use of the word 'in the construction industry' has a narrower meaning than the words 'relating to' found in the definition of employee, and that this difference in wording is significant, indicating a legislative intention that the obligation to register would be imposed on a more limited class of persons than those whose business might merely 'relate to' the construction industry.

115 These observations are also apposite in relation to the words 'in the construction industry' in the definition of 'employer'. The phrase can be contrasted with the common formula of scope clauses in awards, referring to '…employment of persons engaged in or in connection with the industries of…' or '…work done in or in connection with [listed activities and works]…'. Words of connection like these in legislation have been described as being of wide import, indicating a legislative intention to involve as broad a connection as is permitted by their context and legislative purpose: ***Re His Honour Warden Calder SM; Ex Parte Lee*** [2007] WASCA 161; (2007) 34 WAR 289 at 297-298 and ***Woodside Energy Ltd v Federal Commissioner of Taxation*** [2006] FCA 1303; (2006) 155 FCR 357 at 374.

116 MyLeave urged that Ipp J's decision be treated with caution because the Act has since been extensively amended. MyLeave did not state which aspect of the reasoning was unreliable. If the decision is authority for a particular meaning of 'in the construction industry', the Act's amendment does not detract from the decision's authority. The definition of 'employer' was amended by the *Local Government (Consequential Amendments) Act 1996* (WA) to substitute the term 'council' with 'local government' and then in 2012 by the *Industrial Legislation Amendment Act 2011* (WA) to insert a new subpar (b) dealing with labour hire agencies. Neither amendment affects any substantive change to the definition in subpar (a). The re-enactment principle is that where Parliament re-enacts a provision in words that are almost identical to those which have been judicially considered, the legislature is presumed to have intended the words to bear the meaning already judicially attributed to them: ***Re Alcan Australia Limited; Ex Parte Federation of Industrial Manufacturing and Engineering Employees*** [1994] HCA 34; (1994) 123 ALR 193 at 100.

117 On this analysis of the reasoning in ***Aust-Amec*** I consider it authoritatively decides that being engaged 'in the construction industry' does not mean performing work that is precisely the activities listed in the 'construction industry' definition.

Commission's decisions on point

118 Chief Commissioner Scott touched upon the requirement for employees to be engaged 'in the construction industry' in ***Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board (PIM First Instance)*** [2019] WAIRC 00843; (2020) 100 WAIG 40. She said:

> [60] …For the purposes of the Act, the issue is whether the employees are in the construction industry. The meaning of that term does not rely on common understandings or dictionary definitions of construction industry. It means, for the purposes of the Act, what the Act says it to mean…
>
> …

[68] Therefore, the preliminary words in the definition of construction industry mean that of the industry of carrying out, *at a position, area, location, place or situation*, a range of activities being the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to a range of buildings, structures, works etcetera, and for specified purposes or works.

[69] The definition of construction industry is in two parts which need to be read together. The first part, disjunctively, includes the activities of construction, erection, installation etcetera in the preamble of paragraphs (a) and (b). The second part is made up of types of things to which those activities are performed, such as buildings, swimming pools, roads, etcetera. These, too, are described disjunctively. I propose to set out a number of examples of what is included in the construction industry when one item from the first part and one from the second are read together as the structure of the definition requires. The first example is the construction of buildings; the second, the erection of a breakwater; the third, the renovation of works for the storage or supply of water.

…

[77] The scope of the construction industry as defined in s 3 is very broad. It encompasses those activities normally considered to be construction work such as, explicitly, construction, erection, reconstruction, re-erection and demolition. However, it also encompasses installation, renovation, alteration and maintenance of or repairs to items. All of those activities form part of the construction industry where they are done to buildings; swimming pools and spa pools; roads, railways etcetera; breakwaters; works for the storage of water etcetera.

119 These observations were affirmed by the Full Bench in ***PIM Full Bench*** at [45] and by the Industrial Appeal Court in ***PIM IAC***. His Honour Kenneth Martin J observed at [38]:

…Within subpar (a) of the definition of 'construction industry' two essential components of the definition are seen. The first is the wide-ranging work **activities** identified in the preface of subpar (a), embracing there not merely activities of construction, erection and installation, but extending to capture what might be described as lesser magnitude activities such as alteration, maintenance or repairs. The second component of subpar (a) emerges in the breadth of the 19 mentioned **places or subject matters** identified by Roman Numerals (i) to (xviii) - at which the as mentioned work activities might be performed. It will also be noticed that only one of the subjects (identified by (i)) is in relation to 'buildings'…

120 In ***PIM Full Bench***, the Full Bench comprehensively reviewed the statutory scheme of the Act with a view to construction of the words 'on a site' in the definition of 'construction industry'. By one ground of appeal, the appellant contended that for an employee to be engaged 'in the construction industry' required a consideration of whether the employer itself is also engaged in the construction industry. This contention was dismissed by the Full Bench, by reference to the reasoning in ***Aust-Amec***. Aside from generally affirming Ipp J's approach in ***Aust-Amec***, the Full Bench decision does not take matters further in relation to the meaning of 'in the construction industry'.

121 Senior Commissioner Kenner's (as he then was) decision in ***Wallis*** is on point. It was decided after ***PIM Full Bench***.

122 As in this case, in ***Wallis*** there was no dispute that the employee was engaged in a classification of work in a prescribed industrial instrument, and was an 'employee' as defined by the Act. The issue for the Commission was whether the employee was employed 'in the construction industry'. The employee was a mechanical fitter who performed repairs and servicing work on mechanical equipment used to maintain and repair the Rio Tinto railway network. Half his time was spent in the workshop, and the other half was in the field, doing diagnostic testing, maintenance and repairs to track maintenance machinery. The employee did not perform repairs or maintenance work on the railway itself.

123 In finding the employee was not engaged 'in the construction industry', the Senior Commissioner stated:

[32] To conclude that the applicant was employed in the construction industry, requires the conclusion that the applicant was engaged on work involving "the maintenance of or repairs *to* … railways …". This is so, as affirmed by the Full Bench in ***Programmed Industrial Maintenance***, because the activities of the first part of the definition in s 3(1), all expressed disjunctively, are to be performed on the things, structures or works, set out in pars (i) - (xviii) of the definition. The words "the industry" after the words "construction industry means" do not enlarge or otherwise alter the scope of the words following, setting out the activities in the first part of the definition in s 3(1).

[33] Importantly also, the definition means the performance of these activities "to" the matters set out in pars (i) - (xviii). Whilst this simple word has many meanings, in the context in which it is used, according to the Shorter Oxford Dictionary it means relevantly:

"**(III)**. Expressing the relation of purpose, destination, result, effect, resulting condition or status. **(1)**. Indicating aim, purpose, intention, or design … **(2)**. Indicating destination, or an appointed or expected end or event. **(3)**. Indicating result, effect, or consequence: So as to produce, cause or result in. **(4)**. Indicating a state or condition resulting from some process: So as to become …".

[34] In applying this part of the definition to the work of the applicant, he was not engaged on work for either Fluor or Monadelphous, involving maintenance of or repairs to railways themselves, as the definition requires. He was engaged on work better described as maintaining and repairing machines and other equipment, that is used to repair or maintain railways. The work that the applicant was performing was one step removed from the work to be performed "to" railways in the required sense. If one wishes to describe the work as an industry, it could be part of the industry of mechanical or machinery maintenance. However, one describes the applicant's work, it was not work in the "construction industry" for the purposes of the Act.

124 The Senior Commissioner's conclusions rest on three antecedents: first, the definition of 'construction industry', while expansive, is also exhaustive. It is a strict definition and there is no room within it to imply common understandings of what is

the construction industry. The definition of 'construction industry' embodies certain activities performed on certain things, structures or works. See also ***PIM Full Bench*** at [45] and [61], and ***PIM IAC*** at [13], [38] and [156].

125 The second is that the reference in the definition of 'construction industry' to 'to' introduces a causative connection between the performance of the activity mentioned in the definition and the thing, structure or works mentioned. The activity must be aimed at, and produce an effect or result upon the thing, structure or works. While the Senior Commissioner does not mention the word 'of' in the definition, the same reasoning applies.

126 Finally, that the work of an employee may be essential or integral to the resulting thing, structure or works, is not, on its own, sufficient to satisfy the requisite causative connection.

127 MyLeave submits that ***Wallis*** should not be followed to the extent that, at [32], it suggests an employee must perform specific types of work to be regarded as being engaged in the 'construction industry'. It is clear that the reasoning in ***Wallis*** means that the focus must be on the work the employee performs, and whether it is part of the 'construction industry' as defined. However, I do not see any part of the reasoning requiring the employee to do the specific activities listed in the definition of 'construction industry'. The Senior Commissioner's discussion of the connection required and particularly his references to 'work involving' and 'part of the industry', leave room for the work to be something other than construction, maintenance, repairs, etc, provided the work is part of the activity that produces an effect on the works that are under construction, maintenance, repairs etc.

128 Further, it is clear from the Senior Commissioner's reasons read as a whole, that it is entirely consistent with ***Aust-Amec***. It does not take an expansive or broad view of the connection between an employee's work and the 'construction industry' as defined. Nor does it require total correspondence between the employees' work performed and the activities listed in the construction industry definition.

129 It appears then that ***Wallis*** does not decide between any alternative constructional choices as to the meaning of 'in the construction industry'. At the same time, it does not support a construction:

(a) requiring the employee's work be the precise activities in the definition of 'construction industry'; nor

(b) requiring a mere connection between the employee's work and the 'construction industry', which is not too remote.

130 In both ***Aust-Amec*** at [164] and ***Wallis***, Ipp J and Kenner SC respectively acknowledge that characterising the employer as operating in another industry is not a disqualifier for the work of an employee being in the 'construction industry' as defined. Nevertheless, both characterised the employee's work as within another recognised industry: the manufacturing industry and the mechanical maintenance industry. Such characterisation may have a useful role to play in resolving the question of when an employee is engaged in the 'construction industry' as defined. It is consistent with the view that the 'construction industry', like other industries, is an aggregate and multi-dimensional concept.

Other textual and contextual considerations

131 The conclusion that ***Aust-Amec*** authoritatively decides that there need not be total correspondence between the work done by an employee and the activities in the 'construction industry' definition, is perhaps sufficient for the disposition of this matter.

132 ***Wallis*** applies the meaning attributed to that term in accordance with ***Aust-Amec*** and takes the matter slightly further by reference to the concepts of being 'involved in' or 'part of' the industry. To the extent that ***Wallis*** does so, I respectfully consider that approach to be sound, being consistent with the natural and ordinary meaning of the words 'in the construction industry' and for the further reasons set out below. I have no reason to treat the decision or reasoning as erroneous or to depart from it.

133 The approach in ***Wallis***, that is, the absence of a requirement for total correspondence between an employee's work and the construction industry activities, finds support in other textual and contextual considerations.

134 The definition of 'construction industry' commences with the words 'the industry — (a) of…'. These words do not enlarge or alter the scope of the words following.

135 However, nor should the words be disregarded or viewed as superfluous or insignificant. They must be taken as having some meaning and effect. Their effect is to ensure the 'construction industry' as defined is not merely a list of all the possible individual permutations that result from combining the activities listed in subpar (a) with the places, things or subject matters listed in (i) to (xviii). Indeed, as Buss and Murphy JJ observed in ***PIM IAC*** at [4] and [13], the definition sets out three industries: the industry in subpar (a), the industry in subpar (b) and the industry in subpar (c). The individual elements of the definition should be viewed as sketching out the limits of the spheres that are, in aggregate, the 'construction industry'.

136 To view the definition otherwise would be inconsistent with the concept of an employee being engaged 'in' the industry. To be 'in' an industry is to be located within a space, or a sphere. An employee cannot be 'in' something that is merely a combination of their own work activity done to a subject matter.

137 This point is perhaps most plainly illustrated by rephrasing the definition of 'employer' as if 'construction industry' was simply an activity included in the definition done to a subject matter included in the definition and omitting the words 'the industry of':

> …[a person] who or which engages persons as employees **in** … [carrying out on a site the construction of buildings]…

138 Grammatical problems aside, it is immediately apparent from this exercise, that it is improbable that an employee could ever be engaged in carrying out the construction of buildings. Employees are engaged in work that contributes to the construction of buildings: by excavating and levelling, or laying a foundation, or constructing walls or roofing, for example. But no single employee, however highly skilled and qualified, is likely to undertake the activity of construction of buildings as their work for an employer.

139 Contrast this exercise with the effect that inserting the words 'the industry of' has for the meaning of 'employer':

> …[a person] who or which engages persons as employees **in the … industry [of** carrying out on a site the construction of buildings]…

140 The words 'the industry of' in the definition of 'construction industry' have a role to play. That role is not to expand the definition beyond the elements set out in subpar (a), but to give the definition multi-dimensional content: the space or sphere within which an employee's work can be within.

141 In both ***Aust-Amec*** and ***PIM IAC,*** when describing the definition of 'construction industry', the first component of the definition is referred to as 'activities'. On the other hand, when considering whether an employee is 'in' the industry, the term 'work performed' by the employee is used. This reveals a distinction being drawn between the activities in the definition of 'construction industry' and the work performed by an employee.

142 The activities listed in the 'construction industry' definition must obviously and as a matter of common sense, involve myriad steps, processes and tasks. The activities are done to or for the subject matters listed in subpars (i) to (xviii) of the definition. The work done by an individual employee, on the other hand, are not the activities listed, but part of the steps, processes and tasks that, usually in combination with a host of other steps, processes and tasks, in aggregate, amount to the activity of construction, maintenance, repairs etc.

143 Accordingly, an employee need not themselves be engaged to do something that is described as construction, maintenance, repairs, etc, to be engaged 'in the construction industry'. Rather, an employee must be doing work that is part of the steps, processes and tasks that amount to those activities. If doing such work, the employee is 'in' the construction industry.

144 Although not expressed in this way in ***Aust-Amec*** or ***Wallis***, it is consistent with the effect of the way in which the analysis was approached in both decisions. The established and expressed principle is that the question involves an assessment as a matter of fact and degree as to whether an employee is engaged 'in the construction industry'. An employee need not necessarily themselves do an activity that can be described as construction, maintenance, repairs, etc to be so engaged.

145 For completeness, I do not agree with MyLeave's contention that it is enough for an employee to be performing the work of a prescribed classification of a prescribed industrial instrument in order to find the employee is engaged 'in the construction industry'. Most obviously, this formulation is not found anywhere in the language of the Act. The fact that an employee is performing such work may mean the employee is engaged 'in the construction industry' as the result of applying the correct test. For example, if the classification is bricklayer, and the employee is laying bricks on a site for the purpose of the construction of a building, then the employee will be engaged 'in the construction industry'. But that is the result of the application of the test as properly articulated, that is, that laying bricks is a step or task that is part of the construction industry.

146 Another reason why MyLeave's contention must be rejected is that, while s 3(4) of the Act refers to the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA) prescribing industrial instruments 'with respect to employment in the construction industry', an industrial instrument may be prescribed which has a scope that includes all or part of the 'construction industry' as defined, but is also beyond the 'construction industry' as defined. In other words, s 3(4) does not require total correspondence or alignment between the scope of the prescribed industrial instruments and the 'construction industry' as defined.

147 In conclusion:

(a) ***Aust-Amec*** establishes authoritatively that the correct meaning of 'in the construction industry' does not require that an employee must themselves be doing the activities listed in the 'construction industry' definition. The reasoning in ***Wallis*** is consistent with ***Aust-Amec*** in this regard; and

(b) the ordinary and natural meaning of 'in the construction industry' means that the employee's work that the employee is engaged to perform for the employer is part of the steps, processes or tasks that, are or in combination with other steps, processes or tasks, amount to, the 'construction industry' as defined.

Is Mr Giglia's work in the roadworks industry?

148 The parties agree that the carrying out of roadworks is a part of the 'construction industry' as defined. There is also no dispute the vast majority of Mr Giglia's work is performed around and for roadworks. What is left for me to assess, in light of my conclusions above, is whether, as a matter of fact and degree, the evidence establishes that Mr Giglia's work as a Traffic Controller is part of the steps, processes or tasks that, together with other steps, processes or tasks amount to the industry of roadworks.

149 The following assessment is limited to Traffic Controllers' work when it is associated with roadworks. The present application concerns the position of Contra-Flow in respect of Mr Giglia only. Mr Ferrell's evidence was that Mr Giglia's duties are typical of all Traffic Controllers employed by Contra-Flow. However, that evidence does not allow me to draw any conclusion as to the extent of any other Traffic Controllers' involvement in roadworks, as opposed to, for example, traffic management at festivals and events.

150 Limiting the assessment, then, to roadworks, the focus of Traffic Controllers is managing traffic on worksites to ensure the safety of public road users and construction workers. Traffic controllers use a variety of methods to direct vehicles and pedestrians on, near or adjacent to roads. They use and position signs, bollards and barriers, and operate Portable Traffic Control Devices.

151 Traffic Controllers are not required to have knowledge of 'the specifics' of the scope of roadworks that are occurring on site. There is no requirement for them to have skills in or knowledge of the methods employed to carry out roadworks. To the extent that their role is to facilitate safety on site, it is directed at the risks posed by vehicles and traffic using the road, rather than risks arising out of the roadworks themselves.

152 Traffic Controllers do not ordinarily interact with the roadworks crews in relation to operational matters. Their day-to-day work related interactions are with other Traffic Controllers and their shift manager or supervisor. However, there may be

exceptional situations in which they must communicate with construction workers, emergency response teams, Main Roads WA or Local Government Authority personnel.

153 Traffic Controller's involvement in a roadworks project may be intermittent, limited to implementation of temporary traffic management in periods when barrier systems are being erected, decommissioned or realigned. Being intermittent does not detract from whether it is a step in the roadworks process. The grading of a road may also be for a short period in the totality of the construction of a road, but that does not make it less a part of the construction.

154 The evidence before the Commission concerning the pre-start meetings which Traffic Controllers are required to attend is elucidating in relation to the relationship between traffic control work and roadworks. The purpose of the pre-start meetings is to check accreditations, to brief Traffic Controllers about the scope of the roadworks taking place, and communicate any changes in the scope of work to the extent that they impact on traffic management. I accept that, within the Contra-Flow workforce, representatives of the contractors undertaking the roadworks will not ordinarily attend pre-start meetings.

155 As Mr Veal explained, communication to Traffic Controllers about the nature of the scope of works scheduled for the day is helpful, not to the roadworks process, but rather to the traffic management process. That is, it helps Traffic Controllers understand how the work will impact road users, not how road use will impact roadworks.

156 The regulatory environment in which roadworks are carried out is also telling of whether traffic control work is in the construction industry. The effect of the evidence is that before any roadworks are carried out, an approval process must be undertaken, which involves the submission of a TMP.

157 While clearly roadworks can be undertaken without the involvement of the work of Traffic Controllers, wherever a TMP does require Traffic Controllers to do traffic control work, that work becomes a necessary condition of the roadworks occurring. It is part of the process of roadworks being carried out, in the sense that it is the fulfilment of a condition to which the approval of roadworks is attached.

158 This theme is best illustrated at 4.2.5 of the Code, extracted above at [62], which expressly states that the implementation and operation of traffic management is considered *part of the roadworks*.

159 While Traffic Controllers may not themselves interact with the construction or roadworks crews, their shift manager or supervisor does. Information is passed on to Traffic Controllers about the scope of the roadworks, and activities of the roadworks crews, via the shift manager or supervisor. The traffic control and roadwork crews do not work in complete isolation from each other. Nor do they work without regard for what each other is doing. To take an obvious example, if a road construction crew were ready to grade a different section of road, the Traffic Controllers could not continue to direct traffic in their present location, but naturally move their activities to the area where the grading activities are to be carried out.

160 It is also significant that the contractor undertaking roadworks must keep records relating to the approved TMP. This is evidence of the integration between TMP processes and the construction processes.

161 There is, of course, a close physical and geographical association between Traffic Controller's work and the roadworks that they provide traffic management for. The presence of Traffic Controllers on a road is a visible signal to the lay user of a road that roadworks are occurring, unless there is some other obvious indication of an event, emergency or other cause for traffic management.

162 Finally, the work of Traffic Controllers is a fundamental element of the management of site risks. As the Code recognises, construction work on or near roads is high risk. Main Roads WA classifies interaction with live traffic as a 'critical risk'. That it plays a significant role in ensuring the safety of both road users and construction workers places it very centrally in the industry of carrying out roadworks. Site safety cannot be regarded merely as a service to the roadworks industry. Rather it should be seen as an integral part of carrying out roadworks, and an integral step in that process.

163 In the final assessment, the work of Traffic Controllers must be considered to be part of the steps, processes and tasks that, in combination with other steps, processes and tasks, amount to the construction, reconstruction, maintenance of or repairs to roads. Contra-Flow therefore engages Mr Giglia in the construction industry for the purpose of the definition of 'employer' and Contra-Flow is an 'employer' for the purpose of the Act.

164 This means that MyLeave's decision should be affirmed.

165 I should make it clear that my conclusion that Contra-Flow is an 'employer' in respect of Mr Giglia does not mean that it is an 'employer' under the Act in respect of all its employees, or indeed all of its Traffic Controller employees. Whether Contra-Flow is an 'employer' of any other employee will depend on the nature of the individual employee's work and their degree of involvement in the 'construction industry'.

Alternative Route One: Is Mr Giglia engaged in the s 3(1)(a)(xvi) industry?

166 Given my conclusion that Mr Giglia is employed 'in the construction industry' as defined by reference to subpar (a)(ii) of the definition of 'construction industry', it is not strictly necessary for me to deal with MyLeave's alternative arguments. I will nevertheless set out my provisional views.

167 The parties paid scant attention to MyLeave's alternative argument that Contra-Flow was an employer for the purpose of the Act's definition because Mr Giglia was engaged in the construction industry as defined by s 3(1)(a)(xvi) or s 3(1)(a)(xvii).

168 Contra-Flow submitted that the 'works' for the purpose of (xvi) are the roadworks, and a Traffic Controller performs 'works' for the use of roadworks.

169 As to subpar (xvii), Contra-Flow says that Traffic Controllers perform works for the preparation of sites at which roadworks are carried out, those works being performed by establishing and maintaining the traffic management system or plan.

170 Counsel for Contra-Flow then also submitted that the use of the word 'works' is not defined as being works of the kind referred to, and that 'works' in these subparagraphs simply means undertaking some form of work. In other words, the 'works'

need only be the work undertaken by the employee in the prescribed classification as part of the preparation of sites for construction work.

171 No attempt was otherwise made to point to the particular elements of the bundled up, multifarious listings in the definition that would apply in this case, nor to argue why any or all do or do not apply. I can sympathise with the inclination to avoid an attempt to comprehensively step through the elements of these parts of the 'construction industry' definition. The circularity and tendrillar parts are nightmarish.

172 With some foreboding, I repeat the relevant parts of the definition:

construction industry means the industry —

(a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —

…

(ii) roads, railways, airfields or other words for the passage of persons, animals or vehicles; and

…

(xvi) structures, fixtures or works for use on or for the use of any buildings or works of a kind referred to in subparagraphs (i) to (xv); and

(xvii) works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi); and

…

173 I do not accept Contra-Flow's after-thought submission that 'works' in these parts of the definition means the work that an employee performs to satisfy the relevant industrial instrument classification, that is, traffic control work. The word 'works' is used frequently throughout the definition of 'construction industry'. In the context in which it is used, it refers to things that are the product of work or created by work. This is apparent because:

(a) The word is used either before a purpose is described, such as 'works for the generation, supply or transmission of electric power' or following references to specific things: 'roads, railways, airfields or other works'. Where it is used following reference to specific things, the ejusdem generis principle applies, so that the works are things of a like kind. Relevantly here, like roads, railways, arifields, structures, or fixtures, etc.

(b) As Scott CC observed in ***Thompson v The Construction Industry Long Service Leave Payments Board*** 2016 WAIRC 00054; (2016) 96 WAIG 144 at [53], the first part of the definition refers to activities performed 'of' and 'to' the structure or works. These connectors make no sense if 'works' refers to the activity an employee performs.

(c) The definition also uses the word 'work'. In subpars (c) and (d) the phrase 'carrying out of work performed' and 'carrying out of any work' is used. In these instances, it is clear that what is referred to is the performance of work, rather than the product of work. Had the legislature intended to mean the work an employee performs, it would have used the word 'work', consistent with its use in these other places, rather than the word 'works'.

174 MyLeave referred the Commission to a decision of the Victorian Industrial Relations Commission in ***Re Appeal by Shop Fitting and Building Services (Vic.) Pty. Ltd.*** (1989) 31 AILR 252. The case concerned an appeal against a decision that assessed that an employer was liable to make payments under the now repealed Victorian *Construction Industry Long Service Leave Act 1983.* That Act contained a definition of 'construction industry' in similar terms to the Act (but omitting reference to 'on a site') and which included:

(xvi) Structures fixtures or works for the use of any buildings or works of a kind referred to in sub-paragraphs (i) to (xv); and

(xvii) Works for the preparation of sites for any buildings or other works of a kind referred to in sub-paragraphs (i) to (xvi); and…

175 At [16], Marshall P observed:

> It is a general rule that a word used in the same section of an Act, and particularly when it is used in a paragraph of a section, is given the same meaning. It seems to me that what is envisaged by the word "works" in sub-paragraph (xvi) is some minor, or subsidiary or complementary works undertaken in the context of associated or larger works. In my opinion, the manufacture of the various units in the present case are not "works" within the meaning of the definition of "construction industry."

176 As to the words "for the use of any buildings or works", the Marshall P stated at [18]:

> …I have no intention in this case of trying to explore the extent of the meaning of the phrase, if indeed it is capable of having some meaning. All that I am prepared to say is that, to take one of Dr Jessup's illustrations, a verandah (or perhaps an awning) might be something that is covered by the phrase…

177 In ***PIM Full Bench*** at [45] and [48], Kenner SC (as he was then) briefly referred to subpar (xvi) of the definition as 'incidentally' involving buildings, explaining that lifts and escalators are examples of the things that might fall within subpar (xvi) of the definition, if not for the exclusion in subpar (e).

178 As I have concluded that the reference to 'works' in subpar (xiv) does not mean traffic control work, but rather means, relevantly, roads, this part of the definition of 'construction industry' does not assist MyLeave in reaching its desired destination. Joining subpars (ii) and (xvi) results in the 'construction industry' including, relevantly:

carrying out on a site the construction, reconstruction, erection, installation, alteration, maintenance of or repairs to roads and works for the use on or for the use of roads.

179 Traffic Controllers place signs, cones, bollards and temporary barriers in location on sites in accordance with TMPs. They also operate Portable Traffic Control Devices. Those things are neither roads, nor 'works' for the use of roads. Like Marshall P, I struggle to conceptualise what works a road might use. Perhaps a supporting structure such as a bridge or a traffic calming device. Whatever the phrase means, signs, temporary barriers and Portable Traffic Control Devices are not 'works' in the correct sense of that word.

180 Mr Giglia is not engaged in the industry of carrying out any activity of or to the works referred to in subpar (xvi).

Alternative Route Two: Is Mr Giglia engaged in the s 3(1)(xvii) part of the construction industry?

181 A similar roadblock is reached in relation to subpar (xvii).

182 Consistent with what I have said in relation to subpar (xvi), the relevant 'works of a kind referred to in subpars (i) to (xvi)' are roads. Subparagraph (xvi) refers to the thing, not the activity on the thing. It does not refer to 'roadworks'.

183 This part of the definition of 'construction industry' was briefly considered by Wood C in ***Welldrill*** at [24]. Commissioner Wood described the subparagraph as covering 'preparation of a site for that purpose'; where 'that purpose' is constructing, erecting or installing a drilling rig as per subpar (vi). He noted that the first part of the definition reads such that the construction, installation, or maintenance etc must apply to one of the items in the subclauses.

184 I understand Wood C to say the subparagraph stands alone as a part of the 'construction industry' and the preparation of sites for any of the things in (i) to (xviii) is enough. This proposition is appealing. It certainly avoids potential gridlock. The problem is that, on close analysis, it is at odds with the definition's text. The structure of the definition is such that the first part, the activities listed in (a), applies to subpar (xvii), and the activities in subpar (xvii) must be performed to the items in the subclauses. It also does not heed the inclusion of the words 'works for' in (xvii).

185 Commissioner Wood's approach is at odds with the Full Bench's description in ***PIM Full Bench*** of the structure of the definition of 'construction industry'. Senior Commissioner Kenner (as he was then) says at [45]:

> …the structure of the definition in s 3(1)(a) comprises a range of activities set out. These activities are all expressed disjunctively. They include, "maintenance of or repairs to"…There follows in pars (i) – (xviii) a range of **structures and works upon which the activities in the first part of the definition are to be performed**… (emphasis added)

186 In the same paragraph, Kenner SC (as he was then) also notes that subpars (xvi) and (xvii) incidentally involve buildings.

187 The joint judgment of Buss and Murphy JJ in ***PIM IAC*** at [5]-[6] describes subpar (xvii) as '…extend[ing] the scope of the definition of 'construction industry' in subpar (a) by adding, in effect, reference to the preparation of such sites for any buildings or infrastructure works referred to in subpars (i) - (xvi)…" where the site is the location at which the activities mentioned in subpar (a) take place in respect of the buildings and other infrastructure works referred to in the subparagraphs. Unlike Wood C, their Honours, with respect, correctly do not suggest subpar (a) should be incorporated in (i) to (xvi) before applying (xvii). Rather, they say only that (xvii) extends the definition in subpar (a). Nor does the description of the effect of subpar (xvii) give a meaning to 'works' that equates it to performing work. Their Honour's description is consistent with 'works' being things such as buildings, structures, roads, etc.

188 So, the question in this instance is whether Mr Giglia's work is in the industry of carrying out any construction industry activity for or to 'works' for the preparation of sites for roads.

189 It might be that the semi-permanent barrier systems installed on sites of major roadworks, which Ms Costello and Mr Veal each described in their evidence, fall within the description 'works' for the preparation of sites for roads. This would mean that employees who construct, erect and install those barrier systems would be engaged 'in the construction industry' as defined under (xvii). However, the evidence was that Traffic Controllers do not construct, erect, or install these barrier systems.

190 MyLeave has not identified any other works, in the correct sense of that word, which the evidence shows Mr Giglia performs any work on, such that he could be said to work in the 'construction industry' under (xvii).

Result

191 The reviewable decision is affirmed.

2022 WAIRC 00649

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CONTRA-FLOW PTY LTD

APPLICANT

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE MONDAY, 5 SEPTEMBER 2022
FILE NO/S APPL 43 OF 2021
CITATION NO. 2022 WAIRC 00649

Result Reviewable decision affirmed
Representation
Applicant Mr R Lewis of counsel
Respondent Mr S Kemp of counsel

Order

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

1. THAT the respondent's decision that the applicant is liable to pay contributions in respect of Mr Nunzio Giglia under the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) be affirmed.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2022 WAIRC 00612

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOANNE WILSON

APPLICANT

-v-

SHELL AUSTRALIA (FLNG) PTY LTD

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE FRIDAY, 12 AUGUST 2022
FILE NO/S B 25 OF 2021
CITATION NO. 2022 WAIRC 00612

Result Application discontinued
Representation
Applicant Mr L Edmonds (of counsel)
Respondent Mr N Ellery (of counsel)

Order

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

AND WHEREAS on 12 May, 27 July and 15 October 2021 the Commission convened conciliation conferences in this application;

AND WHEREAS at the conciliation conference on 15 October 2021, the parties reached an agreement to settle application B 25 of 2021;

AND WHEREAS on 11 August 2022 the applicant's representative informed the Commission by email that he had instructions to discontinue application B 25 of 2021 and asked that his email be taken as the discontinuance;

AND WHEREAS on 12 August 2022 the respondent's representative confirmed by email that the respondent consented to application B 25 of 2021 being discontinued;

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

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

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2022 WAIRC 00664

UNFAIR DISMISAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2022 WAIRC 00664
CORAM	:	COMMISSIONER T KUCERA
HEARD	:	WEDNESDAY, 7 SEPTEMBER 2022
DELIVERED	:	TUESDAY, 13 SEPTEMBER 2022
FILE NO.	:	U 89 OF 2022, B 89 OF 2022
BETWEEN	:	KARL WILLIAMS Applicant AND WA MAIN ROADS Respondent

CatchWords	:	Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Entitlements under contract of employment - Whether Commission has jurisdiction - Principles applied - Claim beyond Commission's jurisdiction - Application dimissed
Legislation	:	*Industrial Relations Act 1979*
Result	:	Dismissed for want of jurisdiction
Representation:		
Applicant	:	In person
Respondent	:	Mr S Lawton

Case(s) referred to in reasons:

Fair Work Ombudsman v Ramsey Food Processing Pty Ltd 198 FCR 174

Reasons for Decision

Background

1 On 7 September 2022, a hearing was held in relation to two separate applications, U 29 and B 89 of 2022, for the purposes of determining whether the Commission has the jurisdiction to deal with these matters.

2 For the reasons set out, the Applications are dismissed for want of jurisdiction.

The applications

3 On 4 July Karl Williams (applicant) filed two applications with the Commission:

(a) U 29 of 2022; an unfair dismissal application under s 29(1)(c) of *the Industrial Relations Act 1979* (IR Act); and

(b) B 29 of 2022; denied contractual benefits claim under s 29(1)(d) of the IR Act.

I will refer to these matters together as the applications.

4 The respondent that was named as the employer in the applications was Main Roads WA (Main Roads).

Responses

5 On 28 July 2022 Main Roads filed Form 2A responses to the applications (responses).

6 In the responses, Main Roads opposed the applications on the grounds that it was not the applicant's employer.

7 Main Roads contends that at all material times, it did not employ the applicant, rather the Applicant was employed by a separate entity, Labsav Pty Ltd (Labsav).

8 Main Roads contends that as the applicant was an employee of Labsav, the Commission does not have jurisdiction to hear and determine the applications.

Directions on jurisdictional point

9 On 10 August 2022, Senior Commissioner R Cosentino issued an order [2022] WAIRC 00338 which provided the following programming directions (directions):

1. The application is listed for hearing on 7 September 2022 at 10:00am to determine the respondent's jurisdictional objections, namely,
   a. Whether the applicant was employed by the respondent;
   b. Whether the applicant is a national system employee; and
   c. Whether there was a dismissal.
2. The applicant is to file an outline of the evidence of any witness whose evidence he intends to rely upon in relation to the jurisdictional objections together with any documents upon which he intends to rely by 17 August 2022. Any outlines of witness evidence must comply with Practice Note 9 of 2021.
3. The respondent is to file an outline of the evidence of any witness whose evidence it intends to rely upon in relation to the jurisdictional objections together with any documents upon which it intends to rely by 31 August 2022. Any outlines of witness evidence must comply with Practice Note 9 of 2021.

10 The applicant did not file any materials as required under direction 2.

11 On 1 September 2022 Main Roads filed an outline of submissions (respondent's outline) with three annexures.

Jurisdictional hearing

12 The applicant, (representing himself) appeared at the jurisdictional hearing by video link from Kalgoorlie. Mr Lawton appeared for Main Roads.

13 At the start of the hearing, I advised the parties that as the only materials lodged pursuant to the directions were those the respondent had filed, I would be determining the matter on the filed documents.

14 The respondent's outline was tendered and admitted into evidence as exhibit R1.

15 I advised the applicant I would be asking him some questions about R1, thereby giving him an opportunity to respond to the points advanced in the respondent's outline.

16 During the hearing, I also referred to a number of the documents that were attached to the applications. Specifically, I questioned the applicant about copies of the text messages that were attached to the applications.

17 After questioning the applicant, I invited Mr Lawton to ask the Applicant any questions about the answers I put to the applicant.

18 As Mr Lawton was content to rely upon the arguments advanced in the respondent's outline, he respectfully declined to ask the applicant any questions.

The applicant's employment

19 During the hearing, I asked the applicant a number of questions about his employment. In summary the applicant variously stated the following:

(a) he was employed by Ian Weary of Labsav on 4 February 2018, to work as a laboratory technician in the Main Roads Kalgoorlie-Esperance Laboratory.

(b) he signed the "Offer of Employment" that is attached to the respondent's outline and marked Annexure B.

(c) he signed the "New Employee Checklist" that is attached to the respondent's outline marked Annexure C.

(d) He was paid fortnightly by Labsav for the work he performed into his bank account.

(e) Main Roads "paid Ian Leary for my work".

(f) Labsav paid superannuation contributions into his "Sunsuper" account.

20 Regarding his daily duties and his work for Main Roads, the applicant also variously stated that:

(a) he worked in the Main Roads laboratory for four and a half years.

(b) he took his directions from Dave King and Brad Salmon, both of whom worked for Main Roads.

(c) Brad Salmon assigned his daily duties.

(d) he emailed his time sheets for the work he performed to Main Roads.

(e) If he was sick, he called someone from Main Roads.

(f) he had very limited contact with Ian Leary.

(g) he did not have an HR department, there was no one he could talk to with any complaints, "even Ian".

(h) The decision to cease his work at Main Roads did not come from Ian Leary.

(i) It was Main Roads that prevented him from finishing his contract.

21 The text messages referred to were evidence of the directions he received and communications with Main Roads, who directed and supervised him in his work.

Issue to be decided

22 Although the Commission has a wide jurisdiction under s 23 of the IR Act, to enquire into and deal with any industrial matter as defined, the Commission's powers on claims of unfair dismissal and denied contractual benefits, may only be exercised in respect of a relationship between the employee making the claim and that employee's employer.

23 As I indicated to the parties during the jurisdictional hearing, the question of whether the Commission has jurisdiction to deal with the applications depends upon a finding as to who the applicant's employer was.

Determination

24 Having heard from both parties on this issue I find the applicant's employer was not Main Roads but was in fact Labsav.

25 The evidence I have set out in the preceding paragraph 19, particularly the documents the applicant admitted he signed and his evidence about who paid him for his work, supports a finding the applicant was by employed by Labsav.

26 During the jurisdictional hearing, the applicant conceded as much when he said, "I can't submit that Ian was not my employer".

27 At paragraph 1.5 of his Form 2 Unfair Dismissal Application, the applicant described his occupation as a "Construction Materials Contractor".

28 The applicant described his occupation at paragraph 1.3 of his Form 3 -Contractual Benefits Claim as a "Construction Materials Contractor" too.

29 Despite these matters, I can understand why the applicant has taken the view his employer was Main Roads.

30 From the evidence I have set out in the preceding paragraph 20, the applicant took his daily instructions and direction from Main Roads, he worked in a Main Roads workplace and performed work for Main Roads, continuously, for close to four and a half years, having minimal contact with Labsav's director, Ian Leary.

31 However, whilst the applicant may have been supervised by, taken his direction from and performed work for Main Roads, it did not mean Main Roads became the employer.

32 The applicant's relationship with Main Roads was consistent with that of a labour hire arrangement or a contract to provide labour, whereby Main Roads utilised the labour the applicant provided by engaging Labsav, in respect of which Labsav paid the applicant as it's employee.

33 Labour hire arrangements whereby a principal (in this case Main Roads) engages a separate contractor, that in turn provides its employees to perform duties for the principal, albeit under the supervision, direction and control of the principal, are not unusual and have become accepted practice *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* 198 FCR 174 at [61].

34 Having concluded the applicant was not employed by Main Roads, I am unable to and make no findings on the merits of the applicant's claims. This is because the Commission lacks the jurisdiction to hear and determine those matters.

Conclusion

35 Accordingly for the reasons set out in the preceding paragraphs, the applications are dismissed for want of jurisdiction.

2022 WAIRC 00663

UNFAIR DISMISAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KARL WILLIAMS

APPLICANT

-v-

WA MAIN ROADS

RESPONDENT

CORAM COMMISSIONER T KUCERA

DATE TUESDAY, 13 SEPTEMBER 2022

FILE NO/S U 89 OF 2022, B 89 OF 2022

CITATION NO. 2022 WAIRC 00663

Result Applications dismissed

Representation

Applicant In person

Respondent Mr S Lawton

Order

HAVING heard from the applicant on his own behalf and Mr S Lawton on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the applications be dismissed for want of jurisdiction.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

UNIONS—Matters dealt with under Section 66

2022 WAIRC 00325

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CHIEF COMMISSIONER

CITATION	:	2022 WAIRC 00325
CORAM	:	CHIEF COMMISSIONER S J KENNER
HEARD	:	WEDNESDAY, 27 JULY 2022, WRITTEN SUBMISSIONS MONDAY, 1 AUGUST 2022
DELIVERED	:	WEDNESDAY, 3 AUGUST 2022
FILE NO.	:	PRES 6 OF 2022
BETWEEN	:	MICHAEL BARRIE CLANCY Applicant AND THE AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH Respondent

Catchwords	:	Industrial Law (WA) - Application under s 66 - Alleged failure to comply with Union Rules - Delay in request by Secretary to Registrar for an election to be held - Electoral Commission unable to meet requirement to conduct election in prescribed period - Extension of time sought - Application to intervene in proceedings by union member and Registrar - Consideration of principles for intervention - Applications for leave to intervene refused - Waiver of Rules and extension of time granted - Order issued
Legislation	:	*Conciliation and Arbitration Act 1904* (Cth) *Electoral Act 1907* *Industrial Relations Act 1979* (WA) s 6(f), s 27(1)(k), s 66, s 66(1), s 66(1)(c), s 66(2)
Result	:	Order issued
Representation:		
Counsel:		
Applicant	:	In person
Respondent	:	Ms B Burke of counsel
Intervenors	:	Ms S Fenn in person
	:	Mr J Carroll of counsel on behalf of the Registrar

Case(s) referred to in reasons:

Mr Kevin Reynolds v (Not applicable) [2011] WAIRC 00989; (2011) 91 WAIG 2212

R v Ludeke; Ex parte Customs Officers Association of Australia (1985) 155 CLR 513

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1

Reasons for Decision

The application

1 The applicant, Mr Clancy, is a member of the respondent, the Australian Nursing Federation Industrial Union of Workers Perth, an organisation registered under Division 4 of Part II of the *Industrial Relations Act 1979* (WA).

2 The applicant brings this application under s 66 of the *Act* for a waiver of rule 20 of the respondent's Rules, in relation to the timetable for the conduct of elections for office bearers. Rule 20 requires elections for office bearers of the respondent to be conducted between the dates of 1 July and 31 August in the year in which the relevant elections are due. An election is due this year.

3 I am satisfied that the applicant has standing to bring this application under s 66(1)(a) of the *Act.* The application is not opposed by the respondent.

4 The grounds of the application are referred to in both the application and in an affidavit in support of Mr Mark Anthony Olson, the respondent's then Secretary. Mr Olson gave evidence that:

(a) He wrote to the Registrar of the Commission, Ms Bastian, by letter dated 12 July 2022, to request that an election be conducted for several positions on the respondent's Council;

(b) In response, by letter of 14 July 2022, Ms Bastian informed Mr Olson that his request for an election had been duly made for the purposes of s 69(2) of the *Act*. Ms Bastian also informed Mr Olson that she had requested the Western Australian Electoral Commission to conduct the election in accordance with the *Electoral Act 1907*. A Decision Notice to this effect, made under s 69 of the *Act* and dated 14 July 2022, was provided to the respondent;

(c) By further letter dated 21 July 2022, Ms Bastian wrote to Mr Olson and informed him that following her request to the Electoral Commission to conduct the election, the Electoral Commissioner had informed her in writing that it was unable to meet the requirement to conduct the election within the prescribed election period, being between 1 July and 31 August, given the late timing of the request. Ms Bastian also noted that two previous requests for elections in 2016 and 2018 by the respondent, were made in mid-June of those years, to enable sufficient time for the elections to be held in accordance with the respondent's Rules. It was further noted that in August 2020, following a late request for the conduct of an election, not able to be accommodated by the Electoral Commission, an application was made under s 66 of the *Act* to waive compliance with the respondent's Rules to enable the election in that year to be held. It was suggested to Mr Olson that the respondent may wish to consider any necessary application to address matters of non-compliance with the respondent's Rules.

5 Consequently, Mr Olson gave evidence that on 21 July 2022, the present application was made. Mr Olson said the reason for the respondent's non-compliance with rule 20 of its Rules was due to several factors including:

(a) The relevant staff member of the respondent appointed to ensure that all future elections were conducted in accordance with the respondent's Rules, had left their employment;

(b) Several issues associated with the ongoing COVID-19 pandemic have impacted on the organisation, including staff absences;

(c) An increase in demands on the organisation caused by concerns of members of the respondent regarding their increasing workloads because of the pandemic; all of which have led to an increase in workload for staff of the respondent, in particular Mr Olson; and

(d) The announcement on 30 May 2022 by Mr Olson that he would be retiring at the end of his current term of office on 29 September 2022, has created a significant further amount of extra work for him in relation to administration in the respondent.

Intervention applications

6 Two applications are before the Commission for leave to intervene in the proceedings under s 27(1)(k) of the *Act.* The first was made by Ms Fenn, a member of the respondent who intends to stand as a candidate at the elections for the office of Secretary of the respondent. The second, is made by the Registrar of the Commission.

7 As I understood it, Ms Fenn is concerned that because of any delay in the election, existing office-holders would continue in office and make decisions affecting the respondent's members. There was also some reference in Ms Fenn's application to the applicant, Mr Clancy, having been privy to information relevant to the re-election of his position on the respondent's Council, with such information not having been received by the respondent's members. Ms Fenn did not elaborate further on this in her oral submissions in support of her application. Ms Fenn appeared to be concerned about matters of equity and transparency for members of the respondent in relation to the election process.

8 The application to intervene by Ms Fenn was opposed by the respondent. Whilst acknowledging that Ms Fenn had declared her intention to be a candidate at the election, the respondent submitted that as the election has not yet been commenced by the Electoral Commission, Ms Fenn is not yet a candidate. As a member of the respondent, it was submitted that Ms Fenn is entitled to nominate for an office in the election, the same as every other member of the respondent is entitled to do so. Furthermore, the respondent submitted that all members of the respondent will be provided with information regarding the timetable for the election and nomination forms, when the same is provided to the respondent by the Electoral Commission.

9 The respondent contended that based upon the relevant principles, as set out and discussed in ***R v Ludeke; Ex parte Customs Officers Association of Australia*** (1985) 155 CLR 513, Ms Fenn has no direct interest in the proceedings beyond that of any other member of the respondent. If Ms Fenn's application were granted, the respondent submitted that this would have the potential to interfere with and slow down the election timetable, in circumstances where the applicant and the respondent are, by the present application, now attempting to expedite it.

10 After the hearing of the present matter was adjourned on 27 July 2022 to enable me to consider the application for orders, the Registrar made an application on 29 July 2022, for leave to intervene in these proceedings. The application to intervene is made on the basis that if I am persuaded to make orders of the kind sought by the applicant, then an additional order should be made to the effect that those officeholders remaining in office because of the order, not make any "significant decisions" that bind the respondent beyond 30 September 2022, except for those reasonably necessary to enable the day to day running of the respondent. As the Commission is not functus officio, and has not finally determined the application by order, such an application can be entertained. I say this subject to consideration of matters raised by the respondent, in opposition to the intervention application, which I set out further below.

11 The Registrar's grounds for seeking leave to intervene are that as the Registrar, she has the standing to make an application under s 66(1)(a) of the *Act* in relation to no-compliance by an organisation with its Rules and a role under the *Act* in relation to organisations observing their Rules, which constitutes a direct and sufficient interest in these proceedings. This is so given the

issues underlying the present application. Additionally, it is more efficient for the Chief Commissioner to deal with all relevant issues concerning the present proceedings, now they are before the Commission.

12 As to the additional order sought, the Registrar submitted that the rationale for it is to ensure that those remaining in office for any extended time that may be ordered by the Commission, do not take any advantage by their extended time in office. It is contended that such an order is consistent with the objects of the *Act*, in particular s 6(f), relating to the democratic control of organisations and the ability of members to fully participate in the affairs of an organisation. Whilst accepting that given the current circumstances, orders sought by the applicant are likely necessary to enable the organization to function, that does not detract from the fact that any such extension is undemocratic, as not resulting from an election process under the respondent's Rules.

13 In its response and written submissions filed on 1 August 2022, the respondent opposes the Registrar's intervention application. In summary, it is contended that the intervention application is late, having been brought after the directions hearing listed on 27 July 2022, and my indicating to the parties that I would consider their submissions and the application for orders. The present application for intervention followed observations by me as to potential difficulties with an order sought by the Registrar in the same terms as is now sought, in application PRES 7 of 2022.

14 It was contended that, as I was advised during the directions hearing on 29 July 2022 in application PRES 7 of 2022, the Secretary of the respondent, Mr Olson, resigned from this position the prior day on 28 July 2022. Ms Reah has been appointed the Secretary, through the filling of a casual vacancy under the respondent's Rules. The respondent submitted that for the same reasons identified in relation to application PRES 7 of 2022, that being little time to provide a briefing to the new Secretary on those proceedings, and the need to consult with the Council of the respondent, this places the respondent in a difficult position concerning the Registrar's intervention application. Despite this, the respondent made further submissions, which are summarized as follows.

15 First, in reliance upon ***Ludeke***, the respondent submitted that it was unclear what the direct interest that was being advanced, to import the notion of 'a caretaker convention' into elections for a registered organisation. The respondent submitted that this concept, for the purposes of proceedings of the present kind, is a novel one and for those reasons should not be dealt with urgently, in the context of an application for an election to be conducted, when alternative options are available.

16 Second, the respondent contended that there would be no barrier to the Registrar bringing a further substantive application under s 66(1)(c) of the *Act*, to seek the order which she does in these proceedings. Given this circumstance, the respondent maintained there is no need for an urgent consideration of this matter, when such an application may be able to be considered in a timelier way and well prior to the cessation of the terms of office of officeholders whose terms will expire on 29 September 2022.

17 Third, the submission was made by the respondent that the proposed intervention, and the additional order sought by the Registrar, have the potential to further delay the final disposition of the present application to seek a waiver of rule 20 of the Rules of the respondent, in order that an election can be conducted. Reference was made by the respondent to the decision of the Commission in Court Session in ***Mr Kevin Reynolds v (Not applicable)*** [2011] WAIRC 00989; (2011) 91 WAIG 2212, where the Commission refused a member of the relevant organisation leave to intervene at a late stage, and after the substantive proceedings had been concluded and the Commission's decision reserved.

18 Fourth, given the breadth of the additional order sought and the restrictions that it may impose on officeholders, those who may be affected by such an order should be entitled, as a matter of natural justice, to be heard as to whether such an order should be made. It was submitted that the effect of an order in the terms sought could unduly hinder the operation of the respondent and could be punitive. It may have the unintended consequence of negatively impacting members of the respondent, in terms of protection of their interests and the provision of industrial leadership in the nursing industry and health sector more generally. It was contended that given the Council of the respondent, which includes those officeholders whose terms of office will expire on 29 September 2022, is not able to meet until 12 August 2022, then they should be provided with that opportunity and to consider any proposed restraint on their powers.

19 On behalf of the applicant, the Registrar's application for leave to intervene is also opposed, on similar grounds to those advanced by the respondent. In particular, the applicant draws attention to several significant industrial matters being presently dealt with, which may involve the members of the respondent's Council taking decisions in the industrial interests of members. If the order sought in the intervention application is made, then those Council members' capacity to act may be significantly constrained. As with the respondent, the applicant drew attention to the requirement of procedural fairness, and the need for those who may be affected by the proposed order to have due notice of it and an opportunity to respond: ***Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*** [2003] HCA 6; (2003) 214 CLR 1.

20 In particular, the applicant submitted that it was unclear as to how the proposed order sought may affect the members of the respondent's Council, whose terms are not expiring on 29 September 2022 and who have two years left to serve in their current terms of office.

Consideration

Intervention applications

21 I first deal with the application by Ms Fenn for leave to intervene in these proceedings. Section 27(1)(k) of the *Act* provides as follows:

> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> …

(k) permit the intervention, on such terms as it thinks fit, of any person who, in the opinion of the Commission has a sufficient interest in the matter; and

…

22 Whilst this confers a broad power on the Commission to grant leave to intervene, as is made clear from its terms, the Commission must be satisfied that the person seeking leave to intervene has a 'sufficient interest' in the matter. Consideration of what this means, has been dealt with in many cases before this Commission, which have applied the leading authority, being the decision of the High Court in ***Ludeke. Ludeke*** involved consideration of a similar provision to s 27(1)(k) of the *Act*, in the former *Conciliation and Arbitration Act 1904* (Cth). In the judgment of the Court, whilst it is a lengthy passage, Gibbs CJ said at 421:

> The critical question is whether the prosecutor will be denied natural justice if it is allowed to intervene in ACOA's application only to the limited extent allowed by Ludeke J. It may be said immediately that it is clear that notwithstanding the wide discretion in matters of procedure given to the Commission by s.40(1) of the Act, the Commission is bound to observe the rules of natural justice: Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546, at p 552; Reg. v. Moore; Ex parte Victoria (1977) 140 CLR 92, at pp 101-102; Reg. v. Isaac; Ex parte State Electricity Commission (Vict.) (1978) 140 CLR 615, at p 620 That means that a person whose rights will be directly affected by an order made by the Commission must be given a full and fair opportunity to be heard before the order is made. That requirement will not necessarily be satisfied if the Commission relies only on the fact that the person concerned has been heard on the same question by the same member of the Commission on a previous occasion. In general, the rules of natural justice are not satisfied unless the opportunity to be heard is afforded in the proceeding in question, although the fact that there had been an earlier hearing would be relevant in determining what constituted a full opportunity to be heard. However, natural justice does not require that everyone who may suffer some detriment as an indirect result of an order of the Commission is entitled to be heard before the order is made. Orders made by the Commission may affect many members of the community who are not parties to the proceedings in question but that does not mean that any member of the community who will be indirectly affected by an order of the Commission has a right to be heard in those proceedings. It has been held that a person who is not a party to a dispute, but who may nevertheless be affected, indirectly and consequentially, by an order made in settlement of the dispute is not entitled to be heard before the matter is determined: Reg. v. Moore; Ex Parte Victoria; Reg. v. Isaac; Ex parte State Electricity Commission (Vict.). Those were cases where the person affected sought to be heard as a party; the reasoning in those judgments supports the view that the rules of natural justice do not require the Commission to allow a person who is not a party to the proceedings in question and whose rights will not be directly affected by them to be heard in those proceedings, and therefore do not require the Commission to grant such person leave to intervene. The Commission has power - which, like other powers to which reference has already been made, allows it a wide discretion - to allow any person or organization to intervene in any matter, provided that the Commission is of the opinion that it is desirable that the person or organization should be heard: s.36(2) of the Act. The provisions of that subsection reinforce the view that a person whose rights are not directly affected by a proceeding is not entitled to intervene in the proceeding, although in many cases considerations of fairness may incline the Commission to allow someone who is likely to be indirectly affected by the outcome of the proceedings to intervene in them.

(See too Mason J at pp 422 – 423)

23 Thus, for present purposes, I must be satisfied that Ms Fenn has a direct interest in the outcome of these proceedings and is not merely to be affected by them. For the following reasons, I am not satisfied that Ms Fenn has established a sufficient interest to warrant the grant of leave to intervene in these proceedings.

24 As a member of the respondent, Ms Fenn has no greater interest in these proceedings than any other member of the respondent. However, she may, as a member of the respondent, if she has concerns about the respondent's compliance with its Rules, bring an application under s 66 of the *Act*: s 66(1)(a). As a person who intends to nominate for an office in the respondent when the election for office-holders is called and is conducted by the Electoral Commission, then Ms Fenn may do so, in accordance with rule 19 of the respondent's Rules. In this regard, Ms Fenn is in the same position as any other member of the respondent who may also nominate for office, if they meet the requirements of rule 19.

25 While Ms Fenn expressed concern as to the delay in the calling of the election and why the Secretary, Mr Olson, had not done so at a much earlier time in accordance with the Rules, again, this concern puts Ms Fenn in no different a position to any other member of the respondent who may share her views on this issue. There is also something to be said for the view expressed by the respondent that if Ms Fenn's intervention application were to be granted, this may cause some delay to the already delayed election process. Based on the relevant authorities regarding intervention however, I do not place much weight on this consideration.

26 In all the circumstances, I am not persuaded that Ms Fenn has any particular right or interest that may be directly affected by the outcome of these proceedings.

27 As to the application for leave to intervene by the Registrar, for the following reasons, which reasons I can shortly state, prima facie, she has a sufficient interest in the proceedings, for the purposes of s 27(1)(k) of the *Act*. Section 66 of the *Act*, in addition to enabling members, past or present, or those denied membership, standing to commence proceedings, also confers standing on the Registrar to initiate proceedings on her own motion or on the complaint of a present or former member of an organization. The ability to do so is reflective of the position the Registrar has under the scheme of the *Act* concerning registered organization matters.

28 The Registrar has statutory responsibilities under Part II Division 4 of the *Act* in relation to matters concerning organisations including the registration process; the alteration of rules; the receipt of audited accounts; the maintenance of registers of members; and matters concerning elections for offices, amongst others. In relation to these functions and powers, the Registrar

has, given the terms of s 66(1)(c), read with s 66(2) of the *Act*, the capacity to seek remedies in relation to compliance and non-compliance with an organisation's rules.

29 The respondent seeks a waiver of its Rules for a second time, concerning the timing of elections for officeholders within the organization. In my view, given her statutory responsibilities, the Registrar's direct interest in the respondent's observance of its Rules, in the context of the present application, is self-evident. The specific circumstances of compliance on the current facts, is however, as noted below, the subject of separate proceedings in PRES 7 of 2022, in relation to which programming directions have been made. However, as it is apparent that leave to intervene in these proceedings by the Registrar is sought for the sole purpose of seeking the additional order referred to above, whether the Commission's broad discretion to grant leave should be exercised in these circumstances, requires consideration of the terms of the order sought and its possible impact; those sought to be covered by it; their legitimate interest in terms of being heard; and whether these matters can be ventilated at a later time, to enable fulsome argument and consideration, without unduly delaying the present matter.

30 For the following reasons, now having had some opportunity to consider the issues arising, and the parties' submissions, there is force in the respondent's contentions that I should not exercise my broad discretion at this stage of the proceedings. I accept the respondent's submissions that the proposed order sought in the present context is a novel one. In the limited time available to me, I have not been able to identify a similar order having been made in proceedings of this kind. That is not to say, given the breadth of the Chief Commissioner's powers under s 66 of the *Act*, such an order could not be made. However, given the scope of the powers and responsibilities of the respondent's Council under Rule 11 - Powers of the Council of the respondent's Rules, some caution would need to be exercised in imposing a restraint of the kind sought, lest it have unintended consequences to the detriment of members of the respondent.

31 Furthermore, given the breadth of the additional order sought, for the reasons identified by the respondent, natural justice requires that the present members of the Council who would be affected by the order be given due notice of it, and be provided a reasonable opportunity to respond. I am concerned that should such an order be made in the context of these proceedings, which have been brought on an urgent basis to enable the respondent's election timetable to commence, then the legitimate interests of some members of the Council, and in turn the respondent's members, may be adversely affected.

32 Relevant too, is my view that, having considered the matter further, there appears no good reason why the order sought on the intervention application could not be the subject of a separate application under s 66(1)(c) of the *Act* on the Registrar's own motion, or at the behest of a member of the respondent. I also must take into consideration whether the grant of the intervention in the present circumstances may, as with the application by Ms Fenn, lead to a delay in these proceedings being concluded, which may be adverse to the interests of the respondent's members.

33 For these brief reasons, the Registrar's intervention application is refused.

Application under s 66

34 As to the orders sought by the parties, s 66(2) of the *Act* confers a broad power on the Chief Commissioner to make such orders as the Chief Commissioner considers appropriate in relation to the rules of an organisation, their observance or non-observance or the manner of their observance, either generally or in a particular case. Section 66 of the *Act* must be applied consistently with the objects of the *Act* in s 6, in particular s 6(f), which encourages the democratic control of registered organisations and the full participation by members of registered organisations in the affairs of the organisation. A crucial means by which this object of the *Act* is achieved is the conduct by registered organisations of free, fair, and timely elections for officeholders to represent the interests of members.

35 I have some concerns regarding the delay in the request by the Secretary of the respondent to Ms Bastian for an election to be held under s 69 of the *Act*, where, as noted above, this is the second occasion on which orders have been sought of the present kind. However, as there are separate proceedings on foot commenced by the Registrar in relation to this issue, and the alleged non-compliance by the respondent with its Rules, I say nothing further about that matter for present purposes.

36 It is important that the election for office bearers in the respondent take place as soon as possible. Whilst the application filed by the applicant sought that the time within which the election be conducted under rule 20 of the respondent's Rules be extended to 30 September 2022, I will make an order in the following terms:

(a) That the observance of the requirement in rule 20 of the respondent's Rules to hold an election for office bearers between 1 July and 31 August 2022 be waived;

(b) Until the Returning Officer has declared the result of the election, those officers holding office due for election between 1 July and 31 August 2022, the subject of Rule 20 - Elections of the respondent's Rules, are hereby deemed to continue to hold office and have authority to exercise the powers, duties, and functions of their respective offices;

(c) Unless this order is extended, varied, or revoked, it shall operate until 30 November 2022; and

(d) There be liberty to apply on short notice.

37 The effect of my order in these terms is that the election is to be conducted and concluded by 30 November 2022. However, my expectation is the election process will commence forthwith. A minute of proposed order now issues.

NOTE: Representation for the respondent amended by Corrigendum issued 4 August 2022 (2022 WAIRC 00330)

2022 WAIRC 00330

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL BARRIE CLANCY **APPLICANT** **-v-** THE AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH **RESPONDENT**
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	(CORRIGENDUM THURSDAY, 4 AUGUST 2022)
FILE NO/S	PRES 6 OF 2022
CITATION NO.	2022 WAIRC 00330

CORRIGENDUM

In the reasons for decision dated 3 August 2022 ([2022] WAIRC 00325), under the heading setting out Representation, delete “Ms B Bourke of counsel” and insert “Ms B Burke of counsel” in lieu thereof.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

Dated: 4 August 2022

2022 WAIRC 00331

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL BARRIE CLANCY **APPLICANT** **-and-** THE AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH **RESPONDENT**
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	THURSDAY, 4 AUGUST 2022
FILE NO/S	PRES 6 OF 2022
CITATION NO.	2022 WAIRC 00331

Result	Order issued
Appearances	
Applicant	In person
Respondent	Ms B Burke of counsel

Order

THIS matter, having come on for a directions hearing before me on 27 July 2022, and having heard Mr M Clancy on his own behalf, and Ms B Burke of counsel on behalf of the respondent, the Chief Commissioner pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders —

1. THAT the observance of the requirement in rule 20 of the respondent’s Rules to hold an election for office bearers between 1 July and 31 August 2022 be waived.
2. THAT until the Returning Officer has declared the result of the election, those officers holding office due for election between 1 July and 31 August 2022, the subject of Rule 20 - Elections of the respondent’s Rules, are hereby deemed to continue to hold office and have authority to exercise the powers, duties, and functions of their respective offices.
3. THAT unless this order is extended, varied, or revoked, it shall operate until 30 November 2022.
4. THAT there be liberty to apply on short notice.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2022 WAIRC 00659

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOANNE HENRICKSON
	APPLICANT
	-v-
	WESFARMERS LTD
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 9 SEPTEMBER 2022
FILE NO/S	B 47 OF 2022
CITATION NO.	2022 WAIRC 00659

Result	Name of respondent amended
Representation	
Applicant	Mr R Jones (as agent)
Respondent	Ms V Grove and Mr A Vojkovic

Order

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

AND WHEREAS the Commission convened a conference on Friday, 9 September 2022 for the purpose of conciliation;

AND WHEREAS at the conference, the parties agreed that the name of the respondent be amended to 'Wesfarmers Chemicals, Energy & Fertilisers Limited';

AND WHEREAS the Commission is of the opinion that an order should issue to amend the name accordingly;

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

> THAT the name of the respondent in the application be amended to 'Wesfarmers Chemicals, Energy & Fertilisers Limited'.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2022 WAIRC 00665

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEIL MORTIMORE
	APPLICANT
	-v-
	ALOSCA TECHNOLOGIES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 13 SEPTEMBER 2022
FILE NO.	B 68 OF 2022
CITATION NO.	2022 WAIRC 00665

Result	Direction issued
Representation	
Applicant	Mr N Mortimer
Respondent	Mr S Crockett

Direction

HAVING heard from Mr Mortimer on his own behalf and Mr Crockett on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the applicant file and serve any outlines of witness evidence and documents upon which he intends to rely by no later than 27 September 2022;
2. THAT the respondent file and serve any outlines of witness evidence and documents upon which they intend to rely by no later than 11 October 2022;
3. THAT both parties file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 25 October 2022;
4. THAT the matter be listed for hearing for one day, on a date to be determined; and
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2022 WAIRC 00635

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 4 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER O'CALLAGHAN

APPELLANT

-v-

METROPOLITAN CEMETERIES BOARD

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON - CHAIR
MR G BROWN - BOARD MEMBER
MS V ZUPANOVICH - BOARD MEMBER

DATE FRIDAY, 26 AUGUST 2022

FILE NO. PSAB 10 OF 2022

CITATION NO. 2022 WAIRC 00635

Result Direction Issued

Representation

Appellant Mr P O’Callaghan

Respondent Mr B Di Girolami (of counsel)

Direction

HAVING heard from the appellant on his own behalf and Mr Di Girolami (of counsel) on behalf of the respondent, the Public Service Appeal Board pursuant to the powers conferred on it under the *Industrial Relations Act 1979,* hereby directs:

1. THAT the appellant confirm to the Board, in writing, whether he continues to seek reemployment or whether he seeks a different remedy and seeks leave to amend his *Form 8B – Notice of Appeal,* by no later than 8 September 2022;
2. THAT the appellant file and serve upon the respondent any outlines of witness evidence and any documents, upon which they intend to rely by no later than 8 September 2022;
3. THAT the respondent file and serve upon the appellant any outlines of witness evidence and any documents, upon which it intends to rely by no later than 6 October 2022;
4. THAT the appellant file and serve upon the respondent an outline of submissions and any list of authorities, by no later than 27 October 2022;
5. THAT the respondent file and serve upon the appellant an outline of submissions and any list of authorities, by no later than 17 November 2022;
6. THAT the matter be listed for hearing on a date to be fixed; and
7. THAT the parties have liberty to apply on short notice.

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

[L.S.]

2022 WAIRC 00634

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 4 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER O'CALLAGHAN

APPELLANT

-v-

METROPOLITAN CEMETERIES BOARD

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T B WALKINGTON - CHAIR
MR G BROWN - BOARD MEMBER
MS V ZUPANOVICH - BOARD MEMBER

DATE FRIDAY, 26 AUGUST 2022

FILE NO PSAB 10 OF 2022

CITATION NO. 2022 WAIRC 00634

Result Application for dismissal refused

Representation

Appellant Mr P O'Callaghan

Respondent Mr B Di Girolami (of counsel)

Order

HAVING heard from Mr O'Callaghan on his own behalf and Mr Di Girolami on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT the respondent's application for this appeal to be dismissed under sections 27(1)(a)(ii),(iv) and 80L(1) of the *Industrial Relations Act 1979* (WA), be and by this order is, refused.

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

[L.S.]

2022 WAIRC 00666

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 28 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KATE GRIFFIN

APPELLANT

-v-

SOUTH METROPOLITAN TAFE

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER C TSANG – CHAIR
MR G LEE – BOARD MEMBER
MS H MOIR – BOARD MEMBER

DATE TUESDAY, 13 SEPTEMBER 2022

FILE NO PSAB 21 OF 2022

CITATION NO. 2022 WAIRC 00666

Result Direction issued

Representation

Appellant On her own behalf

Respondent Mr R Andretich (of counsel)

Direction

HAVING heard from the appellant on her own behalf and Mr R Andretich (of counsel) on behalf of the respondent, the Public Service Appeal Board pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the Directions [2022 WAIRC 00286] issued on 30 June 2022 be vacated;
2. THAT the parties file a joint statement of agreed facts and bundle of agreed documents by no later than 22 September 2022;
3. THAT the appellant file and serve upon the respondent any outlines of witness evidence and any documents, other than the agreed documents, upon which they intend to rely by no later than 6 October 2022;
4. THAT the respondent file and serve upon the appellant any outlines of witness evidence and any documents, other than the agreed documents, upon which they intend to rely by no later than 20 October 2022;
5. THAT the matter be listed for hearing on a date to be fixed; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) C TSANG,
Commissioner,
On behalf of the Public Service Appeal Board.

[L.S.]

2022 WAIRC 00657

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 25 MARCH 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIANNA CONTI-NIBALI **APPELLANT** **-v-** MAIN ROADS **RESPONDENT**
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIRPERSON MS R BARROW - BOARD MEMBER MR G THOMPSON - BOARD MEMBER
DATE	FRIDAY, 9 SEPTEMBER 2022
FILE NO.	PSAB 31 OF 2022
CITATION NO.	2022 WAIRC 00657

Result	Directions issued
Representation	
Appellant	On her own behalf
Respondent	Mr R Andretich (of counsel)

Direction

HAVING heard from the appellant on her 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), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 10 October 2022;
2. THAT the appellant file outlines of evidence and documents (other than the agreed documents) on which she intends to rely by 24 October 2022;
3. THAT the respondent file outlines of evidence and documents (other than the agreed documents) on which it intends to rely by 7 November 2022;
4. THAT the appellant file written submissions by 21 November 2022;
5. THAT the respondent file written submissions by 5 December 2022; and
6. THAT discovery be informal.

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

[L.S.]

2022 WAIRC 00652

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 24 NOVEMBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER SHANE MASEYK
	APPELLANT
	-v-
	DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON - CHAIR MS L BROWN - BOARD MEMBER MS P CHAUHAN - BOARD MEMBER
DATE	TUESDAY, 6 SEPTEMBER 2022
FILE NO.	PSAB 35 OF 2021
CITATION NO.	2022 WAIRC 00652

Result	Direction Issued
Representation	
Appellant	Ms C Donald (of counsel)
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from Ms C Donald on behalf of the appellant and Mr M McIlwaine on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT directions 3 to 6 of 2022 WAIRC 00609 are vacated;
2. THAT the appellant file and serve upon the respondent an outline of submissions by no later than 14 September 2022;
3. THAT the respondent file and serve upon the appellant an outline of submissions by no later than 21 September 2022;
4. THAT the matter remains listed for hearing on 28 September 2022 to 30 September 2022; and
5. THAT the parties have liberty to apply on short notice.

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

[L.S.]

2022 WAIRC 00633

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 24 NOVEMBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER SHANE MASEYK
	APPELLANT
	-v-
	DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIR MS L BROWN - BOARD MEMBER MS P CHAUHAN- BOARD MEMBER
DATE	FRIDAY, 26 AUGUST 2022
FILE NO	PSAB 35 OF 2021
CITATION NO.	2022 WAIRC 00633

Result	Application for formal discovery orders granted in part
Representation	
Appellant	Mr T Power (of counsel)
Respondent	Mr M McIlwaine (of counsel)

Order

HAVING heard from Mr Power on behalf of the appellant and Mr McIlwaine 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 respondent's application for formal discovery orders be, and by this order is, granted in part as follows:
2. THAT within 14 days of the date hereof, the appellant discover and produce to the respondent tax returns of the Business for the financial years ending 30 June 2021 and 30 June 2022, if and when they are available; and
3. THAT within 14 days of the date hereof, the appellant discover and produce to the respondent all invoices provided to the Business by employees and/or contractors of the Business for the financial years ending 30 June 2020 and 30 June 2021.

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

2022 WAIRC 00645

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 12 MAY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STUART YOUNG **APPELLANT** **-v-** DEPARTMENT OF JUSTICE **RESPONDENT**
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T KUCERA - CHAIRPERSON MR G THOMPSON - BOARD MEMBER MS M MAHER - BOARD MEMBER
DATE	FRIDAY, 2 SEPTEMBER 2022
FILE NO	PSAB 43 OF 2022
CITATION NO.	2022 WAIRC 00645

Result	Order issued
Representation	
Appellant	Mr S Hicks of Counsel
Respondent	Mr J Carroll of Counsel

Order

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

AND WHEREAS on 8 August 2022, an Order ([2022] WAIRC 00335) issued in respect of programming the appeal;

AND WHEREAS on 1 September 2022, the appellant advised that the parties have conferred and sought an extension of time to comply with order 3 of the Order ([2022] WAIRC 00335);

AND WHEREAS the Public Service Appeal Board (Board) has considered the correspondence;

NOW THEREFORE the Board, pursuant to the powers conferred under the IR Act, and by consent, hereby orders –

1. THAT the filing date in order 3 of ([2022] WAIRC 00335) be extended to 15 September 2022.

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

2022 WAIRC 00660

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SATISH BALAGOPALAN
	APPLICANT
	-v-
	SOUTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 12 SEPTEMBER 2022
FILE NO/S	U 64 OF 2022
CITATION NO.	2022 WAIRC 00660

Result	Order issued
Representation	
Applicant	Mr S Balagopalan on his own behalf
Respondent	Mr M Aulfrey

Order

HAVING heard from Mr S Balagopalan on his own behalf and Mr M Aulfrey 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 applicant is granted leave to re-open his case to tender the document 'T1 - Termination / Cessation Form'.
2. THAT the respondent is granted leave to re-open its case and to re-call Ms Genaveve Palmer.
3. THAT the parties are granted leave to file any written submissions in relation to the Fair Work Commission decision *Royall v Aussie Kids Pty Ltd* [2022] FWC 2301 by no later than Monday, 19 September 2022.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

2022 WAIRC 00650

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYNDA MARZIA GENOVESI
	APPLICANT
	-v-
	THE PATRICIA GILES CENTRE INC
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	MONDAY, 5 SEPTEMBER 2022
FILE NO.	U 81 OF 2022
CITATION NO.	2022 WAIRC 00650

Result	Direction Issued
Representation	
Applicant	Ms Lynda Genovesi
Respondent	Ms Jodie Beeson and Ms Debbie Cameron

Direction

HAVING heard from the applicant on her own behalf and Ms J Beeson and Ms D Cameron on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby directs –

1. THAT the jurisdictional issue of whether the respondent is a national system employer be heard on the papers as a preliminary matter;
2. THAT the respondent file and serve upon the applicant any affidavit(s) or statutory declaration(s) and submissions; addressing the jurisdictional issue, which may include the respondent's constitution, its activities, the nature of its funding arrangements and any contracts entered into, by no later than 16 September 2022;
3. THAT the applicant may file and serve upon the respondent any affidavit(s) or statutory declaration(s) and submissions; addressing the jurisdictional issue, by no later than 23 September 2022;
4. THAT the respondent may file and serve any further affidavit(s) or statutory declaration(s) and submissions in reply by 30 September 2022; and
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2022 WAIRC 00338

UNFAIR DISMISAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KARL WILLIAMS

APPLICANT

-v-

WA MAIN ROADS

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE WEDNESDAY, 10 AUGUST 2022
FILE NO/S U 89 OF 2022
CITATION NO. 2022 WAIRC 00338

Result Order issued
Representation
Applicant KARL WILLIAMS
Respondent WA MAIN ROADS

Order

1. The application is listed for hearing on 7 September 2022 at 10:00am to determine the respondent's jurisdictional objections, namely,
   a. Whether the applicant was employed by the respondent;
   b. Whether the applicant is a national system employee; and
   c. Whether there was a dismissal.
2. The applicant is to file an outline of the evidence of any witness whose evidence he intends to rely upon in relation to the jurisdictional objections together with any documents upon which he intends to rely by 17 August 2022. Any outlines of witness evidence must comply with Practice Note 9 of 2021.
3. The respondent is to file an outline of the evidence of any witness whose evidence it intends to rely upon in relation to the jurisdictional objections together with any documents upon which it intends to rely by 31 August 2022. Any outlines of witness evidence must comply with Practice Note 9 of 2021.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2022 WAIRC 00337

CONTRACTUAL BENEFITS CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KARL WILLIAMS
	APPLICANT
	-v-
	WA MAIN ROADS
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	WEDNESDAY, 10 AUGUST 2022
FILE NO/S	B 89 OF 2022
CITATION NO.	2022 WAIRC 00337

Result	Order issued
Representation	
Applicant	KARL WILLIAMS
Respondent	WA MAIN ROADS

Order

1. The application is listed for hearing on 7 September 2022 at 10:00am to determine the respondent's jurisdictional objection, namely, whether the applicant was employed by the respondent.
2. The applicant is to file an outline of the evidence of any witness whose evidence he intends to rely upon in relation to the jurisdictional objections together with any documents upon which he intends to rely by 17 August 2022. Any outlines of witness evidence must comply with Practice Note 9 of 2021.
3. The respondent is to file an outline of the evidence of any witness whose evidence it intends to rely upon in relation to the jurisdictional objections together with any documents upon which it intends to rely by 31 August 2022. Any outlines of witness evidence must comply with Practice Note 9 of 2021.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2022 AG 9/2022	09/14/2022	Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner T Kucera	Order issued
WA Health System - Medical Practitioners - AMA Industrial Agreement 2022 PSAAG 5/2022	02/09/2022	The Health Service Providers established pursuant to section 32(1)(b) of the Health Services Act 2016 (WA) and Others	Australian Medical Association (WA) Incorporated	Commissioner T Emmanuel	Order issued

PUBLIC SERVICE APPEAL BOARD—

2022 WAIRC 00644

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 31 MARCH 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYLIE SUZANNE OLIVER
	APPELLANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIR MR G RICHARDS - BOARD MEMBER MS N PYNE - BOARD MEMBER
DATE	FRIDAY, 2 SEPTEMBER 2022
FILE NO	PSAB 32 OF 2022
CITATION NO.	2022 WAIRC 00644

Result	Appeal discontinued by leave
Representation	
Appellant	Ms K Oliver
Respondent	Mr M McIlwaine (of counsel)

Order

WHEREAS on 26 August 2022, the appellant sought leave to discontinue this appeal;

AND WHEREAS on 1 September 2022, the respondent advised it has no objection to the appellant discontinuing this appeal;

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

THAT the appeal be and by this order is discontinued by leave.

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

[L.S.]

2022 WAIRC 00640

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 10 JANUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHELLE ANNE DAWSON CRESDEE
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIR MR G BROWN - BOARD MEMBER MS VAN DEN HERIK - BOARD MEMBER
DATE	MONDAY, 29 AUGUST 2022
FILE NO	PSAB 8 OF 2022
CITATION NO.	2022 WAIRC 00640

Result Appeal Discontinued

Representation

Appellant Ms M Cresdee

Respondent Mr R Andretich (of counsel)

Order

WHEREAS on 29 August 2022 the parties advised the Board that they have resolved this appeal and requested that the Board vacate the Hearing of this appeal;

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

1. THAT the Hearing listed for 30 August 2022 is vacated; and
2. THAT appeal PSAB 8 of 2022, be and by this order is, discontinued.

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

2022 WAIRC 00661

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 17 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2022 WAIRC 00661
CORAM	:	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON MR D HILL - BOARD MEMBER MR P HESLEWOOD - BOARD MEMBER
HEARD	:	TUESDAY, 23 AUGUST 2022
DELIVERED	:	TUESDAY, 13 SEPTEMBER 2022
FILE NO.	:	PSAB 17 OF 2022
BETWEEN	:	MICHELLE NOBLE Appellant AND NORTH METROPOLITAN HEALTH SERVICE Respondent

CatchWords	:	Industrial Law (WA) - Public Service Appeal Board - Appeal under s 172 of the *Health Services Act 2016* and s 80I(1)(c) of the *Industrial Relations Act 1979* - Review of decision de novo - Misconduct findings - Disciplinary action - Penalty imposed in the form of a reprimand and a transfer - Email sent to senior managers expressing concerns with restructure - Appellant found not to have acted inappropriately so as to amount to misconduct - Finding of no misconduct that the decision should be adjusted - Whether reinstatement impracticable - Appeal upheld
Legislation	:	*Industrial Relations Act 1979* (WA) *Health Services Act 2016* (WA) *WA Health System - HSUWA - PACTS Industrial Agreement 2020*
Result	:	Appeal upheld
Representation:		
Appellant	:	Ms M Noble on her own behalf
Respondent	:	Mr C Cameron on behalf of the respondent

Case(s) referred to in reasons:

Blyth Chemicals Ltd v Bushnell [1933] HCA 8; (1933) 49 CLR 66

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

Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter [2014] FWCFB 7198

Perkins v Grace Worldwide (Aust) Pty Ltd [1997] IRCA 15; (1997) 72 IR 186

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

Thavarasan v The Water Corporation [2006] WAIRC 04089; (2006) 86 WAIG 1434

Reasons for Decision

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

2 The appellant, Ms Michelle Noble, is employed by the North Metropolitan Health Service (Health Service). She was appointed to the role of Director, Finance and Business Partnering, Sir Charles Gairdner Osborne Park Health Care Group (SCGOPHCG) in July 2018. The Executive Director, SCGOPHCG, who was, at relevant times, Ms Janet Zagari, was the position's direct line manager.

3 On 8 July 2020, Ms Noble was formally notified that the Health Service would be centralising the Finance functions, which would result in Ms Noble's position's reporting lines changing so that it reported directly and only to the Health Service's Chief Financial Officer (CFO).

4 On 9 July 2020 Ms Noble sent an email to the five Business Managers who reported directly to her. Her email related to the reporting line restructure. Her email became the catalyst for an allegation that Ms Noble had engaged in misconduct, a disciplinary process and ultimately the imposition of a penalty in the form of a reprimand and transfer to another position at level.

5 Ms Noble appeals the disciplinary action 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 a transfer. The Board must decide whether it should adjust those matters.

Board's jurisdiction and nature of the appeal

6 The appeal is brought under s 172 of the *Health Services Act 2016* (WA) (HSA) and s 80I(1)(c) of the Act.

7 Section 172 of the HSA provides:

> **172. Certain decisions and findings may be appealed or referred**
>
> (1) In this section —
>
> ***disciplinary decision or finding*** means —
>
> (a) a decision made under section 159(1)(b) or (c); or
>
> (b) a finding made in the exercise of a power under section 165(5)(a)(ii); or
>
> (c) a decision made under section 147, 148 or 164 to suspend a government officer or other employee on partial pay or without pay; or
>
> (d) a decision to take disciplinary action made under section 150(1), 163(3)(b) or 166(b); or (e) a decision to terminate the employment of a government officer or other employee under section 168(1).
>
> (2) Subject to sections 118 and 173, an employee or former employee who —
>
> (a) is, or was, a government officer; and
>
> (b) is aggrieved by a disciplinary decision or finding made in respect of the government officer, may appeal against that decision or finding to the Industrial Commission constituted by a Public Service Appeal Board appointed under the *Industrial Relations Act 1979* Part IIA Division 2.
>
> …

8 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 —
>
> …
>
> (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;
>
> …
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).
>
> …

9 Ms Noble is a government officer and the decision against which she appeals is one referred to in s 172(1)(b) of the HSA.

10 The appeal involves the review of the Health Service'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 Health Service made the right decision available to it at the time. The Board has greater scope to substitute its own view for that of the Health Service. In the case of 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 and ***Thavarasan v The Water Corporation*** [2006] WAIRC 04089; (2006) 86 WAIG 1434.

11 The Health Service'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] and [29].

12 The key facts in this appeal are not in dispute. Ms Noble admits she authored and sent the 9 July 2020 email. The key area of dispute is whether, by sending the email, Ms Noble committed misconduct. The answer turns principally on the text of the email viewed in the relevant context.

The misconduct findings

13 The relevant misconduct findings against Ms Noble are set out in the Health Service's letter to her dated 28 January 2022, although the finding of breach of discipline was made on 17 February 2022. The finding was:

…

2. In 2020, at Sir Charles Gairdner Hospital (SCGH), you committed a breach of discipline pursuant to section 161(c) of the *Health Services Act 2016* in that you committed an act of misconduct.

Particulars

a) You are employed as the Director, Finance and Business Partnering, Sir Charles Gairdner Osborne Park Health Care Group (SCGOPHCG), North Metropolitan Health Service (NMHS).

b) In 2020, you sent an email to [SCGOPHCG Business Managers email address] titled *'SCGOPHCG Finanace & Business Partnering – Change'.*

c) The email was openly critical of the impending change to the structure and reporting lines for your position and business area.

d) You criticised the Executive Director, Business and Performance, NMHS, intention to communicate the changes to your department via email.

e) You claimed the impending change in reporting lines, 'demonstrates disregard for our FBP [Finance and Business Partnering] team, our Divisions and Areas, and for us as people'.

f) You stated your intent to write to the Health Service Union, although not a member, to *'express my concerns in relation to the approach to this change'.*

g) You used the phrases *'inherent discourtesy'* and *'demonstrates disregard'* which portrayed the impending change in a negative way.

h) Your behaviour does not meet the expected standards of conduct for a NMHS employee in the workplace.

…

14 The penalty imposed by the 17 February 2022 letter was a reprimand and a transfer to another position. In proposing that penalty, the decision maker, Ms Tanya Adair notes:

- The content of the email evidences a serious error of judgment for a person in a senior managerial role in the organisation and I have significant concerns as to your ability to remain in such a senior role in the organisation.
- The content of your response to the allegation and proposed findings and actions, which focusses on the merits of the decision to change your reporting line but fails to acknowledge or appreciate the gravity of your conduct, and demonstrates a lack of insight into the inappropriateness of your conduct.
- The obvious lack of trust and dissatisfaction that you have with the Chief Financial Officer and Executive Director, B&P, tends to suggest that it would be impracticable for you to remain in a position that reports directly to the Chief Financial Officer, who then reports to the Executive Director, B&P.

Grounds of appeal

15 Ms Noble's Notice of Appeal contends that the disciplinary action taken, in the form of removal from her substantive role of Director, Finance and Business Partnering, was made without consideration of the full context in which the email was sent, and was disproportionate to the seriousness of her conduct.

Evidence: context to the 9 July 2020 email

16 The following documents were tendered in the course of the appeal hearing, and considered by the Board:

(a) Email chain between Mr Alasdair Smollett and Ms Zagari between 13 May 2021 and 1 June 2021;

(b) NMHS Budgeting & Forecasting Internal Audit Draft Report April 2020;

(c) NMHS Budgeting & Forecasting Internal Audit Final Report August 2020;

(d) Minister for Health Employee Engagement Survey 2020 - Finance & Business (Unit) Results Report;

(e) Ms Noble's October 2020 Statement;

(f) Letter to Ms Noble headed 'Allegations of Misconduct' dated 23 February 2021;

(g) Letter to Ms Noble headed 'Alleged Breach of Discipline - Opportunity to Respond' dated 5 August 2021;

(h) Ms Noble's August 2021 Statement;

(i) Transcript of the interview between Mr Smollett and Ms Noble dated 28 October 2021;

(j) Letter to Ms Noble headed 'Breach of Discipline - Proposed Finding and Action' dated 28 January 2022;

(k) Integrity Directorate Investigation Report - Ms Noble

(l) Email to from Ms Noble to Mr Mike Cullen headed 'RE: Letter - Proposed Finding and Action' dated 11 February 2022;

(m) Letter to Ms Noble headed 'Breach of Discipline - Finding and Action' dated 17 February 2022;

(n) Department of Health Code of Conduct; and

(o) Letter (by email) to Ms Noble headed 'RE: Notification of Change', undated.

17 Ms Noble gave oral evidence at the hearing of the appeal. The Health Service cross-examined Ms Noble but did not call any witnesses. Ms Noble's version of events was largely uncontentious, and in relation to contentious matters, her evidence was not in any way undermined in cross-examination. There is no reason for the Board not to accept Ms Noble's version of the relevant events.

18 The position of Director, Finance and Business Partnering is classified as a Level G12 position under the *WA Health System - HSUWA - PACTS Industrial Agreement 2020.*

19 The position leads the Finance and Business Partnering team, a team of 20 people including five Business Managers reporting directly to the position. Their classification is Level G10. In turn, a number of Analysts report to the Business Managers. An administrative officer, and other officers or clerks also comprise of the Finance and Business Partnering team.

20 Ms Noble was responsible for budgeting activities, in which she was required to work with the CFO. Ms Noble described her job as having a 'dotted line' reporting structure to the CFO. Her evidence in this regard was not challenged.

21 The Health Service had, at some date prior to June 2020, engaged in a broad review of the structure of Finance Services. The details of that process were not before the Board. However, Ms Noble's evidence was that a dispute with the Health Services Union of Western Australia (Union of Workers) (HSU) had arisen in the course of the restructure. That dispute related to the consultation process, or more accurately, the HSU's concerns about deficiencies in the consultation process, and was the subject of an application to the Commission PSAC 18 of 2019.

22 Ms Noble became aware of PSAC 18 of 2019 in January 2020 because a result of that application was that a consultation liaison group was formed consisting of Executive Directors, the HSU and representatives of the Health Service's Industrial Relations team. When Ms Janet Zagari was on leave, Ms Noble was asked to attend the consultation liaison group in her stead.

23 In June 2020, Ms Zagari informed Ms Noble that there was a proposal to centralise the finance functions across the Health Service's divisions, and that Ms Noble's reporting line would change. This was separate to the process the subject of the review discussed at par [21] of these reasons.

24 On 8 July 2020, Ms Noble was provided with a Notification of Change letter, signed by Ms Zagari, confirming the reporting line restructure.

25 The Notification of Change letter (Exhibit R2) advised that the reporting line for Ms Noble's position would change from the Executive Director, SCGOPHCG to the Chief Financial Officer, North Metropolitan Health Service.

26 The Notification of Change letter also referred to an internal audit into the Health Service's systems and processes for financial forecasting and budgeting (referred to as the Ernst & Young Review). It commences by reference to the audit as 'facilitating review of the NHMS Finance Structure'. It goes on:

> …
>
> Arising from the review, a decision has been made to centralise the NMHS Finance structure reporting lines to form a single finance team that will enable the improvements required and increase value to the business…
>
> The changes to the structure are designed to support the standardisation of financial systems and processes across the organisation and to enhance communication and knowledge sharing across the team.
>
> …

27 Ms Noble has access to the April 2020 draft of the Ernst & Young Review prior to 8 July 2020. The review was finalised in August 2020. The finalised report contained substantial amendments to the April 2020 draft.

28 After formal notification was given to Ms Noble of the reporting line restructure, she sought, in accordance with an invitation contained in the notice, a meeting to discuss how the change would impact upon her. A meeting was arranged by Ms Zagari for 23 July 2020. It was attended by:

(a) Mr Tony Dolan - Chief Executive;

(b) Ms Cynthia Seenikatty - Area Director Workforce;

(c) Ms Noble; and

(d) Dr David Mountain, Ms Noble's support person.

29 During the 23 July 2020 meeting Ms Noble expressed her concerns about the finance restructure. It is unnecessary to set out the detail of what was discussed at the meeting, except to say that Ms Noble expressed concerns around three themes: first, the absence of a justification for the change based on the Ernst & Young Review; second her concerns about the CFO's leadership style and his behaviour towards her and others and third, the process of communication and implementation of the proposed change.

30 An outcome of the 23 July 2020 meeting was that a 'grievance investigation process' was commenced to investigate Ms Noble's concerns about the CFO. Ms Noble was invited to participate in that investigation.

31 At the same time as the grievance investigation process commenced, Ms Noble was transferred to the position of Project Director within Procurement, Infrastructure and Contract Management, while the grievance investigation process was being conducted.

32 Ms Noble provided the investigator with a written statement dated October 2020 (October 2020 Statement). Her October 2020 Statement included, amongst other things, a copy of her email of 9 July 2020 and details of the circumstances in which she sent it. These details appear under the heading 'Change in reporting Lines - Communication of the Change'.

33 It is unclear why Ms Noble included these matters in her October 2020 Statement, which was to investigate concerns about the CFO's conduct. However, this is what she said in her October 2020 Statement about the 9 July 2020 email:

> …
>
> 793. On or around 6.00pm on Thursday 9 July 2020, Ms Janet Zagari came to my office to advise that Mr Jordan Kelly intended to send an email to NMHS Finance advising them of the change to the reporting line for Site Finance Directors.
>
> 794. I was aware that this would be a surprise to the SCGOPHCG FBP Team, and that they may have concerns in relation to this change and the impact to them.
>
> 795. I was also aware that although the change in reporting line was being communicated as only impacting two staff (being myself and the Acting Director Finance, WNHS/AMH), this had implications for all FBP staff who reported to me.
>
> 796. I asked Ms Zagari when Mr Kelly intended to send the email and advised Ms Zagari that I would like to call my team together to explain this to them in a meeting.
>
> 797. I felt that the Business Managers, as my direct reports, would be concerned by not hearing this personally, and that an email advising of this significant change was not the best approach to communicate this change.
>
> 798. I advised Ms Zagari that I could call a meeting of my team first thing tomorrow morning and ask that the team make themselves available for that meeting.
>
> 799. Ms Zagari was understanding of my request to advise my team in a meeting, rather than them receiving an email from Mr Kelly. I believe that following that discussion, Ms Zagari contacted Mr Kelly.
>
> 800. Ms Zagari came back to my office a short time later and advised that Mr Kelly would not delay his email to allow me the opportunity to meet and discuss this with the SCGOPHCG FBP Team.
>
> 801. In my view, there was no rationale, nor any organisational or operational impact if Mr Kelly were to delay sending the email until mid-morning the following day, which was the timeframe I had requested. I had advised Ms Zagari that I could call a meeting of all available SCGOPHCG FBP staff for 9.00am the following morning.
>
> 802. I felt that this was an inconsiderate action, and one that was taken to demonstrate to me how Mr Kelly intended to behave towards myself and the SCGOPHCG FBP Team.
>
> 803. I was concerned Mr Kelly's response to my request was a demonstration of what I would characterise as a heavy-handed approach. Behaviour such as this from [the CFO] was one of the key concerns I had in relation to the proposed change in reporting line.
>
> 804. I sent an email to the FBP Business Managers at 1929 hrs 9 July 2020 ***[Document Ref: 20200709 E1929]*** advising that they would receive an email from Mr Kelly in relation to a change in reporting line.
>
> …

34 At this point, we note that:

(a) the email was sent only to the five Business Managers who reported directly to Ms Noble;

(b) there is no evidence nor any suggestion that the email was distributed more widely; and

(c) there is no evidence nor any suggestion that anyone complained about the content of the email nor receiving the email.

The 9 July 2020 email

35 The 9 July 2020 email is reproduced in full below:

> Good evening all,
>
> I have been advised that NMHS intend to change my reporting line from the Executive Director SCGOPHCG to the NMHS CFO. The change to my reporting line unfortunately has ramifications for our entire SCGOPHCG Finance & Business Partnering Team.
>
> Over the past few days, since being made aware that a letter advising of this change would be provided to me, I had been asking for the rationale for removing the entire Finance & Business Partnering function from the current reporting line to the Executive Director SCGOPHCG. A key concern I have is that the Executive Director and other members of SCGOPHCG Executive have accountability for SCGOPHCG's financial and operational performance, and the FBP team plays a critical role in supporting SCGOPHCG Executive and service areas in this accountability.
>
> I had expected there would be consultation and explanation for this proposed change. However, there has been none. I have been advised that the intention is to consult on the implementation. There is an important distinction between consulting on an implementation and consulting on a change that fundamentally affects the accountability relationship between our team and our Executive. A consultation on an implementation is effectively presenting a fait accompli which,

in my view is a disingenuous form of consultation. There is no consideration or rationale for this change, nor what the impact would be to our Group, to our stakeholders and to the areas we provide business partnering services to. There also appears to be a significant lack of understanding between business partnering finance professionals and group/corporate reporting at Area Health Service level. These are two very different disciplines, with very different skills and experience - I know you all appreciate and understand the distinction between the expertise we bring to our service areas and a corporate reporting function; however, it appears that this important distinction has been disregarded by NMHS.

The letter advises that this change takes effect from 3 August 2020.

I am very sorry for springing this on you via email, but I was told late this afternoon that it is the NMHS Executive Director, Business & Performance's intention to send an email to the entire SCGOPHCG Finance Team today advising all SCGOPHCG Finance team members of this change. There is an inherent discourtesy and lack of regard in sending an email to a team to advise them of a change of this type, particularly at a time of year when we are all working incredibly hard to meet key deadlines, and it distressed me to think that the SCGOPHCG FBP leadership team would be advised of this change via an email from NMHS. However, despite me having expressed these concerns, I have just been advised that the NMHS Executive Director Business & Performance does not intend to delay sending his email to the SCGOPHCG Finance team, which does not give me an opportunity to have an FBP team meeting and advise the team in person.

I have concerns about this approach to communicating and understanding the impact and ramifications to our FBP team, together with many other concerns about this change. I have concerns about an organisation that does not understand or feel that even a token gesture to consultation and change processes is warranted. I believe that what has happened to date demonstrates disregard for our FBP team, our Divisions and Areas, and for us as people.

I have been advised that this change has been notified to the HSU and, although I am not a member of the HSU, it would be my intention to support any members of the Finance & Business Partnering Team who have any concerns. I will be writing to the HSU to express my intention to support my team and express my concerns in relation to the approach to this change.

I am uncertain what the next steps will be. However, out of respect and consideration for you all, I wanted to ensure that you heard this news from me. I am very sorry that I am not able to provide you with any answers about the rationale for the change, why this would not follow any form of genuine consultation and - mostly - I am very sorry that you are receiving this news via email; however, hopefully it is slightly better that you hear it from me, as I acknowledge and understand any concerns you may have.

I have asked that the SCGOPHCG Executive and other senior Divisional and Department staff with whom we work closely with, be offered the courtesy of expressing their views on this change, and I will continue to press for this.

I will give you a bit of time to digest this tomorrow morning and - in the busyness that we are all in at the moment - will find a moment for us to get together.

Other Contextual Matters: The Ernst & Young Review

36 Ms Noble’s evidence was to the effect that she was concerned about the proposed restructure, in part because the Notification of Change letter stated that the decision ‘arose from’ the Ernst & Young Review. Ms Noble met with Ernst & Young in the course of the review, and with Ms Zagari, made comments on a draft of the report in the course of May 2020. On her reading of the draft report, it did not recommend or indicate such a change to reporting lines. Indeed, she submitted that organisational restructure was not within the review’s scope.

37 Ms Noble’s evidence was that she was doubtful that centralising the reporting lines to the CFO would address the findings of the Ernest & Young Review, which were primarily deficiencies with Area Finance, and this was in her mind when she wrote the email.

38 The resolution of this matter does not require the Board to make any finding about whether the restructure decision had merit, or whether it was properly based on the Ernst & Young Review. However, the stated rationale for the restructure decision is one of the factors Ms Noble said was on her mind when she sent the email. We have had regard to the Ernst & Young Review April 2020 report with a view to whether it reveals anything that would mitigate Ms Noble’s actions in sending the email. It does not.

39 It may be that Ms Noble genuinely held concerns about the rationale for and merits of the reporting line restructure decision. However, if her concerns arose from her understanding of what the Ernst & Young Review did and did not recommend in relation to the structuring of finance operations, her concerns were misguided.

40 The objective of the Ernst & Young Review was to ‘…provide an assessment of the effectiveness of the [Health Service’s] budgeting and forecasting practices, including … cash-flow…’. That objective included identifying improvement opportunities. The April 2020 draft report indicates that the review identified as issues, amongst others:

- Lack of standardisation in budgeting and forecasting practices across the organisation;
- Accountability for financial performance not being devolved to the appropriate levels;

…

- Strained working relationships and reduced levels of consultation and engagement across the business; and

…

41 The Ernst & Young Review does not identify any particular part of the business as deficient in these respects. It must be borne in mind that, at the time of the review, SCGOPHCG was one of several sites performing budgeting functions under a

decentralised finance operating model. The Ernst & Young Review's findings do not identify any particular sites or teams as the source of the issues. Rather, it makes generalised observations as to areas to improve governance and accountability.

42 In this regard, '… [i]nsufficient clarity of team roles and responsibilities…' was clearly an important theme of the draft Ernst & Young Review report. It states, for example:

> …
>
> Through discussions with key stakeholders, we identified that the sites and BS&R interpret their budgeting and forecasting roles inconsistently. This often results in a lack of agreement and/or understanding of the key responsibilities of each team (e.g. who owns financial information and is responsible for the provision of certain information).
>
> We also identified confusion and at time apparent overlap in the role individual Business and Performance teams take in budgeting and forecasting at NMHS…

43 The implication of these issues is identified as '…the risk that processes may not be performed consistently, efficiently and/or effectively…' leading to a recommendation that the Health Service:

> …
>
> Consider introducing more formal communication/reporting lines through to the CFO to assist the CFO in discharging their accountabilities under the FMM, promote standardisation across NMHS and improve levels of collaboration. Increased formalisation could include adjustments to relevant Job Description Forms to formalise communication and other requirements and/or more formal organisational structure "dotted line" reporting through to the CFO.
>
> …

44 Ms Noble emphasised that a 'dotted line' reporting structure between her position and the CFO already existed. We do not know whether that was the case for the other sites' finance teams. Even if it was, the point of the recommendation is that 'increased' formality and clearer reporting lines should be established. The draft report's reference to a dotted line reporting line is given as an example but is not prescriptive of what changes could be made to achieve closer communications, collaboration and accountability between the sites and the CFO. Indeed, if a 'dotted line' reporting structure already existed, then it was all the more reasonable to address this recommendation by introducing a direct, unbroken line reporting structure.

The Breach of Discipline Process

45 On 25 February 2021, Ms Noble was given a letter, dated 22 February 2021, which informed her that 'a review of your complaint' about the CFO's conduct had been completed and the review reached a consensus view that a reasonable suspicion of misconduct by the CFO could not be formed.

46 The same letter also stated:

> **Evidence Relating to Your Conduct**
>
> During the course of this review, evidence was obtained which raised concerns regarding your conduct towards employees of NMHS. The MDAC was of the view that the information obtained during the review relating to your alleged conduct warrants a disciplinary investigation. I will provide further correspondence to you in relation to this in due course.
>
> …

47 A second letter was given to Ms Noble on 25 February 2021, dated 23 February 2022. It informed Ms Noble that a disciplinary investigation would commence into her alleged conduct pursuant to s 162(a) of the HSA and that the specific allegations against her would be provided in due course.

48 In the meantime, Ms Zagari approached Ms Noble proposing that she take up an Executive role within SCGHOPH in the role of Project Director, Procurement, Infrastructure and Contract Management. She fulfilled this role as a secondment from her substantive role of Director, Finance Business Partnering.

49 On 5 August 2021, almost six months after Ms Noble was informed, in the most generalised manner possible, that a disciplinary investigation was being conducted, Ms Noble was finally provided with the details of two allegations of misconduct against her.

50 The reasons for the delay in progressing the process were not explored at the hearing of the appeal, and no evidence was provided about it. Bearing in mind that:

(a) it was Ms Noble that first brought her conduct in sending the emails the subject of the allegations to the attention of the Health Service's Integrity division, and

(b) she did so in October 2020, and

(c) her evidence of October 2020 was virtually the only evidence that formed the basis of the allegations;

the hiatus provides a highly unflattering impression of the Health Service's Integrity Directorate.

51 The first allegation, which is not the subject of this appeal, related to an email Ms Noble sent to Ms Zagari on 15 June 2020 in which she referred to the CFO in derogatory terms. The second allegation is set out under par [13] above of these reasons.

52 Ms Noble was invited to provide her response to the allegations. She provided a response, in the form of a written statement dated August 2021 (August 2021 Statement) (Exhibit A8).

53 In response to Allegation Two, Ms Noble stated that she did not deny sending the 9 July 2020 email. She provided context as to the events leading up to the email, consistent with the October 2020 Statement. She additionally, stated:

…

30. I recall either asking Ms Zagari, or Ms Zagari informing me, that Mr Kelly intended to send the email immediately, and I recall that both Ms Zagari and I had the impression that the email would be sent that night.

31. It was not uncommon for senior members of the FBP team, to read emails in the evening, and I felt concerned that they would be anxious being advised by an email, leading to a night of worry and no opportunity to ask questions of me - as a known and trusted manager.

32. I recall asking Ms Zagari if she would contact Mr Kelly and ask him to delay the email, so that I could call an FBP Team meeting at 9.00am the following morning, to communicate this decision to my team.

33. I recall advising Ms Zagari that I would call the meeting for that time, and give whoever was available the opportunity to attend. Some team members may not have been available, and I recall advising Ms Zagari that I would just call the meeting for whoever was available. I recall saying I could have the meeting concluded by 10.00am, so that Mr Kelly could then send his email mid-morning.

34. I recall specifically expressing the concern to Ms Zagari that the team did not deserve to hear this by email. I recall some discussion of the fact that we were very understaffed, the Business Managers were working long hours, that it was end of financial year - a time when any Finance team is under considerable pressure, and more so at SCGOPHCG that year due to our understaffing. I recall saying words to the effect of "these are people, and they deserve to be treated as people and not hear this news via email".

35. I recall Ms Zagari responding to me that my request sounded very reasonable, and I recall her returning to her office to telephone Mr Kelly.

36. A short time later, Ms Zagari returned to my office. Ms Zagari advised me that Mr Kelly would not agree to defer his email until mid-morning.

37. I recall being disappointed by this, and I recall Ms Zagari's demeanour as being what I would describe as apologetic. I recall being appreciative that Ms Zagari had considered my request reasonable and that she had approached Mr Kelly.

38. I recall during the discussion with Ms Zagari saying that I did not understand the harm in holding off until mid-morning the following day, and I recall Ms Zagari being unable to answer that.

39. I recall advising Ms Zagari that I would communicate by email to my team. I recall asking Ms Zagari either if she wanted to be included in the email or if she wanted me to send her that email. Ms Zagari indicated that was not necessary, and I took this to be that she was comfortable that I would communicate with my team.

…

54 In her response to the allegations, Ms Noble stood by her description of the proposal to send an email to the team to advise them of the change as discourteous and lacking in regard, because:

76. I was disappointed by the lack of regard for a team that was significantly understaffed, and in the middle of end of financial year, a busy and stressful time for any Finance team and more so when the team is operating short-staffed.

77. The two key elements that have not been set out in Allegation 2 are that it was end of financial year and that communicating a change of this nature via email to Level 10 Business Managers, who I would considered to be the senior FBP leadership team and treated as such, would not be a customary approach to communication of a significant change.

55 Ms Noble also referred to the fact that she had concerns that the Health Service had previously found itself party to an application to the Commission due to a dispute about a failure to consult in relation to changes, and that it was 'about to repeat the missteps in their approach to the very next change process they were undertaking'.

56 She says she is not the only person who had or expressed those concerns, but to the best of her knowledge, is the only person facing misconduct allegations as a result of expressing the concerns. She referred in particular to the minutes of an Executive Committee meeting of 14 July 2020 which expressed concern on behalf of the Executive Committee in relation to the absence of a rationale for the change, and the lack of consultation in relation to it.

57 Finally of relevance, Ms Noble referred to the Minister for Health Employee Engagement 2020 Survey results as justifying her subjective concerns about the change to the reporting lines which would require her, and her team, to integrate centrally with the Health Service's Finance team. Ms Noble noted that SCHOPHCG FBP team scored consistently higher than the Health Service's Finance team on indicators of employee engagement, which, Ms Noble argued, demonstrated a significant difference in culture which would impact performance and relationships. Her comments culminated in the statement:

I was extremely concerned about subsuming a 'safe' and highly productive SCGOPHCG FBP team into the NMHS Finance team, given the behaviours I experienced and the Minister for Health Survey results.

Decision to take disciplinary action

58 The Investigation Report is Exhibit A11.

59 According to the Investigation Report:

(a) Mr Smollett, Senior Consultant, Investigation, Integrity Directorate, was appointed to conduct the investigation on 26 February 2021.

(b) Ms Noble responded to the allegations with a lengthy written statement on 19 August 2021.

(c) Ms Noble was interviewed by Mr Smollett and another person from the Integrity Directorate on 28 October 2021.

60 The transcript of the 28 October 2021 interview was in evidence before the Board (Exhibit A9). In the course of the interview, the investigator, Mr Smollett did not ask Ms Noble any questions about the allegations or her response. An example of the interactions typical of the interview is extracted below:

MN: I'm assuming that you will answer that question through the process of this investigation, though, if you felt that there was additional evidence needed in relation to any of the matters that I've raised. That you would ask me for that?

AS: As I say, this is your opportunity to provide the extra information that you want to be considered

MN: OK

AS: So that's what it is.

MN: So I can take it that your response is that you don't need any additional evidence from in relation to the matters that I put forward in my statement …

AS: As I've said …

MN: … or that if you did that …

AS: It's your opportunity to …

MN: … that you would specifically ask me for that before relying on that assertions by others as evidence.

AS: But the risk of repeating Michelle, it's, it's your opportunity to provide information that you wish to be considered.

MN: Alright. Thank you.

…

MN: Yes, and that's why I'm asking you at this point what additional evidence you require, because I think in my experience with going through the previous interview was that I wasn't asked for supplementary information and that certain facts then came to be evidence.

…

MN: OK. Perhaps if you speak out if you raise concerns, if you seek to challenge poor processes and poor behaviour you are removed from your role.

That's what … that is exactly what happened to me, and it is not indicative of a healthy or transparent organisation.

Do you accept that there is evidence that I made numerous endeavours to address issues within the North Metro Finance team, and why has that evidence been disregarded?

AS: I'll refer you to my previous answer, Michelle.

MN If you don't accept the information I provided as evidence, what additional evidence, what additional information would you feel necessary to accept the information I provided as being an accurate account of events?

AS: I'll refer you to my previous answer.

…

MN: Since when did liaising with the Union become misconduct at North Metro?

So will you be interviewing Dr Mountain in relation to his views of the meeting of the 23rd of July 2020.

AS: I'll just refer you to my previous answer, Michelle.

61 Procedural fairness issues have no role to play in this appeal, because the Board is deciding whether there was misconduct based on the evidence before it. However, we do consider it remarkable that the investigator conducted the interview in this way. The investigator asked virtually no substantive questions of Ms Noble. The interview cannot be described as an investigative process at all. It was a mere 'going through the motions', playing lip service to procedural fairness. Further, the investigator's refusal to answer Ms Noble's questions combined with his failure to put to her any of the inferences which would ultimately be drawn meant that Ms Noble remained ignorant of what considerations were regarded as relevant and irrelevant to the allegations, potentially denying Ms Noble a reasonable opportunity to be heard.

62 No one else was interviewed.

63 The documents which were examined for the investigation included:

(a) The minutes of the 23 July 2020 meeting;

(b) Ms Noble's email to Ms Zagari of 15 June 2020;

(c) Ms Noble's email to Business Managers of 9 July 2020;

(d) Letter from Mr Cullen, Director, Integrity Directorate to Ms Noble dated 22 February 2021;

(e) Ms Noble's August 2021 Statement; and

(f) Transcript of the interview between Mr Smollett and Ms Noble dated 28 October 2021, referred to above at par [61] of these reasons.

64 Significantly, the only information provided to the investigation by Ms Zagari was a brief email answering (incorrectly) a question about the date of the email (Exhibit A1).

65 By letter dated 28 January 2022, Ms Adair, informed Ms Noble that she had been appointed decision maker in respect of the disciplinary process. In relation to the 9 July 2020 email allegation, the letter stated:

> …
>
> In relation to particular (g), I accept that the words in your email "inherent discourtesy" and "demonstrates disregard" were not directed towards portraying the impending change itself in a negative way, but rather were directed towards being critical of the Executive Director, Business and Performance (B&P), proposal to communicate the changes by email.
>
> It is not clear to me whether you accept that your conduct in sending the email constituted behaviour that does not meet the expected standards of conduct for a NMHS employee in the workplace. From your response, I believe that you consider, in context, your email was not inappropriate. If that is your view, I am currently inclined to disagree.
>
> I propose to find that in sending the email, your behaviour fell short of the expected standards of conduct for a NMHS employee in the workplace and constituted a breach of discipline. In coming to this view, I consider the email speaks for itself. Critical features of the email in this regard are:
>
> - The email is sent to your subordinates.
> - The email is not merely notifying the recipients of the decision to change your reporting line, rather, the email is openly and significantly critical of both the decision itself and the process leading to the decision.
> - The email singles out the Executive Director, B&P, and is openly critical of his intention to inform the team by email of the decision to change reporting lines.
> - The email is openly critical of the NMHS as an organisation.
>
> It appears from your response to the allegation that you state your purpose in sending the email was to provide a more sensitive way to communicate to your team the change in reporting lines than that which had been proposed by the Executive Director, B&P.
>
> However, I currently cannot accept that was your sole, or even primary, purpose. If that had been your sole or primary purpose, I would not expect the email to have contained the clear and significant criticisms of the decision and the decision-making process.
>
> To the contrary, I currently consider I can infer that your intention in sending the email was to garner support for your own views regarding the decision, and to create dissent amongst your subordinates in relation to the decision. Such conduct amounts to insubordination and has the capacity to bring NMHS and its executive management into disrepute.
>
> I also currently consider that your conduct is aggravated by the fact that, as you state, you are "a senior leader and Executive member in a large hospital group". In holding such a senior position, you ought to have known that sending such an email to your subordinates was inappropriate and would have the capacity to seriously undermine the decision made by your superiors, and seriously undermine the authority of your superiors.
>
> I understand you suggest, in your response to the allegation, that you understood Ms Zagari was "comfortable" with you communicating the change to your team by email that evening.
>
> I currently consider that you had no reasonable basis to believe Ms Zagari was "comfortable" with the terms of the email you actually sent, critical as it was of the decision, the decision-making process, and NMHS more generally. At its highest, your response indicates Ms Zagari may have had no concern with you merely informing your team of the decision to change your reporting line, but the explanation that you have set out in your response does not provide a basis to believe that Ms Zagari was "comfortable" with you sending an email in the terms that you actually sent.
>
> Having read your response to the allegation I understand that you continue to be significantly dissatisfied with the decision to change your reporting line and the rationale behind that decision. I do not consider those matters are relevant to the question as to whether you engaged in a breach of discipline, and if so, what penalty is appropriate for your conduct.
>
> …

66 On about 3 May 2022, the Health Service implemented the penalty by transferring Ms Noble from her substantive role of Director, Finance and Business Partnering to the role of Project Director within Procurement, Infrastructure and Contract Management.

Did Ms Noble commit a breach of discipline by sending the 9 July 2020 email?

67 Section 161 of the HSA provides that the following conduct constitutes a beach of discipline:

161. What is a breach of discipline

An employee commits a breach of discipline if the employee —

(a) disobeys or disregards a lawful order; or

(b) contravenes —

(i) any provision of this Act applicable to that employee; or

(ii) any public sector standard or code of ethics; or

(iii) a policy framework;

or

(c) commits an act of misconduct; or

(d) is negligent or careless in the performance of the employee's functions; or

(e) commits an act of victimisation within the meaning of the *Public Interest Disclosure Act 2003* section 15.

68 'Misconduct' is a general term used for a wide spectrum of unacceptable behaviour, including behaviour that is unlawful, inappropriate, improper or unreasonable. Whether there is misconduct, and the degree that will justify disciplinary action, are questions of fact: ***Blyth Chemicals Ltd v Bushnell*** [1933] HCA 8; (1933) 49 CLR 66 citing ***Clouston & Co v Corry*** (1906) AC 122.

69 Ordinarily, an employer's policies and Codes of Conduct will set out the expected standards of workplace behaviours.

70 The Health Service points to the following provisions of the Code of Conduct (Exhibit R1) which it says Ms Noble breached by sending the 9 July 2020 email:

…

Principles of Conduct

The WA health system CORE values underpin the Principles of Conduct. Staff must comply with the Principles of Conduct.

The Principles of Conduct are:

….

3. Promote a positive work environment

Staff must:

3.1. Collaborate and treat each other in a way that promotes harmonious and productive working relationships.

3.2. Treat each other, patients, clients and members of the public with courtesy and respect.

3.3. Not bully or harass, or support colleagues to bully or harass, each other, patients, clients or members of the public.

3.4. Take reasonable care to ensure their own safety and that of others in the workplace.

3.5. Not discriminate against each other, patients, clients or members of the public on the basis of age, breastfeeding, family responsibility, family status, gender history, impairment, marital status, political conviction, pregnancy, religious conviction, race, sex or sexual orientation.

3.6. Familiarise themselves and act in accordance with the *Equal Opportunity, Discrimination and Harassment Policy*.

71 The CORE Values referred to as underpinning the above Principles of Conduct state:

…

The WA health system CORE values are:

1. Collaboration
2. Openness
3. Respect
4. Empowerment.

Collaboration

- We value the contribution of our Staff, who work together as a cohesive team to deliver an excellent level of care to all Western Australians.
- Our teams are strong and successful because we collaborate and always seek ways to improve.
- Our leaders are role models of our CORE values and trust their teams.

Openness

- We display confidence and cooperation through open and honest communication.

- We communicate clearly and with integrity.
- Our performance is open to public scrutiny and we welcome feedback to perform better.
- We value open communication and encourage those around us to voice their ideas as well as their concerns.

Respect

- We treat each other, patients, clients and members of the public with respect, compassion and fairness.
- We have zero tolerance for bullying, harassment and discrimination.

Empowerment

- We encourage and support local decision making and accept responsibility and accountability.
- We encourage and recognise outstanding performance and innovation.
- We are all responsible for workplace culture and performance.
- We empower everyone to make a difference and strive to improve our workplace culture and performance.
- We provide high quality, accessible and safe health care services to all Western Australians.

72 Read together with the CORE Values, the Principles of Conduct, which require staff to promote harmonious and productive working relationships, cannot equate to a blanket ban on criticism of decisions, the organisation, or individuals. Indeed, the Principles of Conduct, read in light of the CORE Values, encourage employees to voice concerns, and provide open and honest feedback for the purpose of improving performance. Statements that are critical of behaviours, performance and decisions of the organisation may be misconduct if they are unfair, disrespectful or, damage the workplace culture or performance.

73 The Health Service says that Ms Zagari was not aware of the content of the email, and that it is reasonable to infer that Ms Zagari would not have approved of the content had she been made aware. We disagree. Ms Noble offered to send Ms Zagari a copy of the email before she sent it. Ms Zagari declined that offer. She did so knowing the depth of Ms Noble's concerns about the reporting line restructure, her views of the CFO (for instance, she had earlier received Ms Noble's email which is the subject of the first allegation), and her concerns about the means by which the structure change was proposed to be communicated to her team. The more reasonable inference is that Ms Zagari knew that Ms Noble's email would refer to those concerns.

74 The decision maker found the email was 'openly and significantly' critical of the reporting line restructure itself.

75 The parts of the 9 July 2020 email which concern the merits of the reporting line restructure are the bland and unspecific statements:

> …unfortunately has ramifications for our entire … [t]eam
>
> …There is no consideration or rationale for this change, nor what the impact would be…
>
> …There also appears to be a significant lack of understanding … [of the] two very different disciplines … this important distinction has been disregarded by NMHS…

76 We cannot accept that expressions of concern about a management decision in these terms can be misconduct. In reality, decisions like the reporting line restructure decision are invariably underpinned by competing considerations and tensions. They rarely involve all relevant considerations being stacked on the side of the decision's merit. To state that there are potential negative ramifications of such a decision is doing no more than stating the obvious.

77 When referring to 'discourteous' and 'disregard', the email is clearly critical of the process by which the decision was to be communicated to staff, and the consultation process. Indeed, the whole purpose of sending the email was to remedy what Ms Noble considered were problems in the communication process, to the extent she could.

78 Ms Noble's email was sent only to the five Business Managers that report to her. The change email from Mr Kelly was to be sent to them, and the teams of staff who report to them. Without having first received Ms Noble's email, the Business Managers would have received notification of the change at the same time, and by the same means, as their direct reports. Ms Noble wanted to ensure that they were pre-warned, including that they were aware that the process itself might be the source of queries and concerns from their teams.

79 In this context, we consider that by conveying criticism of the process and concerns about the change to her Business Managers, Ms Noble was not acting inappropriately so as to amount to misconduct. In this regard, it is significant that the expression of criticism is in terms that are slight and benign, perhaps even genteel. The email does not seek to undermine any person, but rather is aimed primarily at the process of communicating and implementing the decision.

80 The Health Service submits that the language used in the email was critical of Mr Kelly (who was identifiable by his title) and the Health Service. Ms Noble agrees that her email was critical of the proposal that the entire finance department be advised of the change by email. It was critical because it described that course as 'inherently discourteous' and as demonstrating disregard for people.

81 To the extent that the email conveyed criticism, it might constitute misconduct if it was widely circulated. But in this instance, it was made to five Business Managers: members of Ms Noble's senior management team: senior, experienced and professional individuals. Managers at this level can be expected to be frank with one another. It is difficult for managers to retain authenticity and credibility without being frank and open. To the extent that the email is critical of the means by which the change is to be communicated, it is, in our view, consistent with the frank and open communications that might ordinarily be expected amongst a small, close group of senior managers.

82 Ultimately, the tone and content of the 9 July 2020 email, in the context in which it was sent, does not tend to undermine or damage the workplace culture or its performance. It is more accurate to describe it as respectful, perhaps even fair criticism and expression of concerns.

83 We are invited to infer that Ms Noble sent the email to garner support for her views as to the merits of the reporting line restructure decision. We do not consider that inference is reasonably open.

84 Ms Noble explained the purpose of sending the email. That purpose is plausible: it was to ensure the managers in her team had notice of the change before a broadcast email was sent, to ensure they heard it from her as their manager, and that they could have confidence that she, as their manager, would support them in seeking meaningful consultation in relation to the change or if they had concerns. The email was sent to maintain cohesiveness and engagement in her team. There is nothing implausible about this explanation. It is consistent with the text of the email and the context in which it was sent. Therefore, the Board declines to draw the inference that Ms Noble's purpose was improper.

85 Finally, the Health Service said that the email constitutes misconduct because Ms Noble expresses an intention to write to the HSU to express her concerns regarding the organisation's approach to change.

86 Ms Noble was not a member of the HSU as at 9 July 2020. There is no suggestion that in her role as Finance Director, she had authority to represent the Health Service in communications with the HSU or for the purpose of consultation in relation to this particular change. It is one thing for a manager to support their team members' exercise of rights of freedom of association. However, Ms Noble has gone beyond simply stating an intention to support the team in this way. Nor has she merely stated that she would cooperate with the HSU if the HSU sought to consult with her. Rather, she indicated that she would, 'express her concerns' about the Health Service's processes to the HSU without prompting from any other source.

87 This was an error of judgment on Ms Noble's part. Had Ms Noble done what she said she would do, she may have been acting inconsistently with her duties to the Health Service.

88 Ms Noble was not disciplined for communicating with the HSU, though. She was disciplined for the content of the 9 July 2020 email. The email does not say what Ms Noble intended to say to the HSU about the process. Ms Noble was not asked during the investigation what she meant when she said that she would 'express concern'.

89 What is meant by 'expressing concern' is utterly vague. It reasonably implies that Ms Noble will be critical of the process, but that might be anything from a statement of regret as to timing, to, at the other extreme, a broad allegation that the Health Service acted in an illegal manner in giving effect to the change.

90 The fact Ms Noble made the statement in her email about expressing concern to the HSU simply reinforces the message that the email generally conveyed that she was disappointed with the process that the Health Service had undertaken and that she disagreed with it. It added emphasis to the email. The recipients would have been left in no doubt that Ms Noble disagreed with the Health Service's approach to consultation.

91 Accordingly, even this statement in the email ultimately does not meet the degree of seriousness required to be characterised as misconduct.

92 For these reasons, we consider that the Health Service was wrong to conclude that Ms Noble had committed misconduct by sending the 9 July 2020 email to the Business Managers. We would therefore set aside the misconduct finding.

Remedy: Should the decision be adjusted?

93 It follows from our finding of no misconduct that the decision should be adjusted. The Health Service argued that the Board should decline to order reinstatement of Ms Noble to her Finance Director role because it reports to the CFO and that position is currently filled by the same individual who was the subject of Ms Noble's complaints. The Health Service submits that it is untenable to return Ms Noble to a role reporting to the CFO.

94 The Health Service bears the onus of establishing that 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.

95 Ms Noble clearly has strong adverse views about the CFO. This is succinctly demonstrated by the email she sent to her line manager on 15 June 2020 in which she described the CFO in brief but strong derogatory terms. On the opposite end of the conciseness scale, Ms Noble's October 2020 Statement details a litany of concerns about the CFO arising from events from August 2019 onwards. The Statement runs to 123 pages, 830 paragraphs and has 123 annexures.

96 Ms Noble interacted with the CFO in her role as Finance Director before the restructure for the period from July 2018 to August 2020.She had a 'dotted line' reporting structure to the CFO.

97 In her October 2020 Statement (Exhibit A5), Ms Noble said that the reason for her expressing her concerns about the CFO's behaviour was (emphasis added):

> …I believed that the **escalation** of this behaviour would have an **increasingly** negative impact on me, personally and professionally, and also on the financial affairs of SCGOPHCG.
>
> …
>
> ...I was concerned that with the change in reporting line, [the CFO's] behaviour would **escalate** and he would have greater opportunity to target me…
>
> …
>
> …I was concerned that once I was directly 'under his control' I would be subjected to **worse** behaviour than that I had already experienced to date.

98 We note that these statements are an expression of what Ms Noble expected may happen **if** the CFO's described behaviour **escalated**, and if there was no intervention to prevent this from happening. The point of her documenting her complaints was so that an escalation could be prevented.

99 Ms Noble's Statement generally describes her interactions with the CFO, in terms such as 'unpleasant', 'professionally embarrassed', 'concerned', 'conflicted' and 'extremely frustrated'.

100 Describing the circumstances leading to her sending the 15 June 2020 email, Ms Noble says the CFO:

> was undertaking what I described as a 'sustained attack' on me, which was significantly impacting my workload and was causing me distress: par 432 of the October 2020 Statement

101 In two other places she describes adverse effects she attributes to the CFO's behaviour:

> detrimental to an effective working relationship between the most senior Finance staff in each of the groups within NMHS, and caused further deterioration to the overall finance function across NMHS: par 464 of the October 2020 Statement; and
>
> was generally difficult and unreasonable, and this impacted my work and the work of the SCGOPHCG FBP Team: par 701 of the October 2020 Statement.

102 These generalised statements were not elaborated upon or explored during the hearing. We do not know what detrimental impacts are referred to, nor their severity.

103 In cross-examination Ms Noble was asked if she agreed that the CFO's behaviour was 'revolting'. She agreed but explained this was because she considered he had been untruthful. She maintained that she could not condone his behaviour. She also agreed that she had experienced distress and feeling beaten down.

104 When asked how she would, in such circumstances, be able to return to work productively while reporting to the CFO, her response was 'I would hope [that the environment] has changed'. She said it would be difficult for her, but that she would 'just have to live with it.' Noting that it would be far more difficult for her to lose her job 'than putting up with [the CFO's] nonsense'. She identified the main source of the difficulty in returning to the role as being the passage of time that has passed since she last performed it.

105 There is no evidence before the Board to indicate that the CFO is aware of the contents of Ms Noble's email to Ms Zagari, or the contents of her October 2020 Statement. The Board was informed that the grievance investigation did not result in misconduct allegations being made against the CFO.

106 While Ms Noble was clearly unhappy about her relationship with the CFO, there is no evidence that it was preventing her from performing her duties effectively, nor that it was impacting the CFO or finance functions in any way.

107 The Health Service did not call evidence from the CFO nor any other witness to give evidence of how Ms Noble's return to the Finance Director role would impact operations, relationships or the work environment generally.

108 It would be naïve for the Board to assume that a resumed relationship between the CFO and Ms Noble will be all rosy. Knowing that there will be difficulties between Ms Noble and the CFO, is not a sufficient reason to decline to order reinstatement. The key question is whether trust can be restored, such as to enable operations to viably continue: ***Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter*** [2014] FWCFB 7198 at [27] and ***Perkins v Grace Worldwide (Aust) Pty Ltd*** [1997] IRCA 15; (1997) 72 IR 186 at 191.

109 Having acknowledged that restoring trust would be difficult, Ms Noble also noted that she had previously worked with the CFO in a 'dotted line' reporting structure, without any adverse impact on operations. She is determined to continue to do so.

110 We consider it reasonable to expect that both Ms Noble and the CFO, as experienced professionals and senior managers, will be able to find a way to ensure any personal conflicts do not interfere with the efficient and effective execution of their duties to the Health Service.

111 The Health Service has not established that reinstatement is impracticable.

112 We note that the Health Service's letter containing notice of the disciplinary action does not specify the role from which Ms Noble is being transferred. The Board understands that at the time Ms Noble was given the notice, she was performing the role of Project Director within Procurement, Infrastructure and Contract Management, but on a temporary, secondment basis. Her substantive role remained the role of Finance Director. The orders the Board will make are therefore intended to have the effect, upon implementation, that there be no impediment, arising from disciplinary action to Ms Noble returning to the role of Finance Director at the end of the secondment.

113 Accordingly, the Board orders:

(a) That the finding of misconduct in relation to Allegation Two be quashed; and

(b) That the decision to take disciplinary action in the form of a reprimand and transfer to an alternative position in relation to Allegation Two be quashed.

2022 WAIRC 00662

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 17 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHELLE NOBLE **APPELLANT** **-v-** NORTH METROPOLITAN HEALTH SERVICE **RESPONDENT**
CORAM	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON MR D HILL - BOARD MEMBER MR P HESLEWOOD - BOARD MEMBER
DATE	TUESDAY, 13 SEPTEMBER 2022
FILE NO	PSAB 17 OF 2022
CITATION NO.	2022 WAIRC 00662

Result	Appeal upheld
Representation	
Appellant	Ms M Noble on her own behalf
Respondent	Mr C Cameron

Order

HAVING heard from Ms M Noble on her own behalf and Mr C Cameron 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 finding of misconduct in relation to Allegation Two be quashed.
2. THAT the decision to take disciplinary action in the form of a reprimand and transfer to an alternative position in relation to Allegation Two be quashed.

(Sgd.) R COSENTINO,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2022 WAIRC 00638

REVIEW OF NOTICE - S.51A - OSH ACT

THE WORK HEALTH AND SAFETY TRIBUNAL

CITATION	:	2022 WAIRC 00638
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	WEDNESDAY, 17 AUGUST 2022
DELIVERED	:	MONDAY, 29 AUGUST 2022
FILE NO.	:	OSHT 4 OF 2021
BETWEEN	:	CONSOLIDATED PASTORAL COMPANY PTY LTD Applicant AND WORKSAFE WESTERN AUSTRALIA COMMISSIONER Respondent

CatchWords	:	Work Health and Safety Tribunal – Objection to discovering documents – Document categories requested too broad and relate to matters not yet before the Tribunal – Objection to discovery upheld
Legislation	:	*Industrial Relations Act 1979* (WA): s 27(1)(o)
		Work Health and Safety Act 2020 (WA): Schedule 1, cl 29
Result	:	Objection to discovery upheld
Representation:		
Applicant	:	Mr S Vandongen SC (of counsel)
Respondent	:	Mr T Pontre (of counsel)

Cases referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Company (1882) 11 QBD 55

GHD Pty Limited v WorkSafe Western Australia Commissioner [2021] WAIRC 00655

Reasons for Decision

1 On 2 September 2020, a WorkSafe Western Australia inspector (**Inspector**) issued Improvement Notice 90014939 (**Notice**) to Consolidated Pastoral Company Pty Ltd (**CPC**).

2 The Notice identified that CPC employees are 'exposed to a hazard, namely riding a horse without a helmet which may result in the rider falling from a horse and receiving impact to the head which could lead to serious injury or death.'

3 On 7 May 2021, CPC referred the Notice to the Tribunal for further review. The Tribunal issued programming orders, including that each party provide documents or materials requested by the other, unless the party objects to provision of any of the documents requested, in which case such an objection should be made by that party filing a Form 1A application with the Tribunal.

4 The parties requested and were granted multiple extensions of time to comply with the programming orders. In March 2022, CPC filed a Form 1A, objecting to the provision of documents requested by the WorkSafe Commissioner. In April 2022, this application was reallocated to me and the discovery question was programmed for hearing. After the parties requested and were granted several extensions of time to comply with these programming orders, the discovery question was listed for hearing on Wednesday 17 August 2022 to accommodate the parties' availability.

5 The WorkSafe Commissioner requested discovery of four categories of documents from CPC.

6 There is a dispute about the breadth of documents sought. CPC objects to providing documents in category number 1, which is:

> All records or documents relating to injuries sustained by any of the Applicant's staff in the course of working with horses since 1 January 2016.

Relevant discovery principles

7 Under s 27(1)(o) of the *Industrial Relations Act 1979* (WA) (**IR Act**), the Commission has the power to 'make such orders as may be just' with respect to the discovery, inspection or production of documents. Section 27 of the IR Act applies to the exercise of the jurisdiction of this Tribunal: cl 29 of Schedule 1 of the *Work Health and Safety Act 2020* (WA).

8 Discovery is not available as of right. The party seeking discovery must establish that it is just for the order to be made and necessary for the fair disposal of the case. 'Just' means 'right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right': ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd*** (1995) 75 WAIG 1801, 1805.

9 At common law a document will be discoverable if it relates to a matter in question, as set out in ***Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Company*** (1882) 11 QBD 55 at 63:

> It seems to me that every document relates to matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable to the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences…

10 The Tribunal must consider:

1. do the documents relate to a matter in question, and if so;
2. would it be just to order discovery?

Substantive application before the Tribunal

11 CPC has made an application to the Tribunal under s 51A of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**). It seeks a review of the Inspector's decision to issue the Notice and of the WorkSafe Commissioner's decision to affirm the Notice.

12 As set out in the reasons of the Full Bench in ***GHD Pty Limited v WorkSafe Western Australia Commissioner*** [2021] WAIRC 00655 (**GHD**) at [31]:

> This requires, as the Tribunal correctly posited, that the Tribunal examine whether, on the facts and circumstances in existence at the material time, [the Inspector] was justified in forming the opinion that he did, in issuing the Improvement Notice to the appellant. In effect, the Tribunal "stands in the shoes" of the Inspector. Based on the evidence before the Tribunal, including any expert evidence a party may adduce, or the Tribunal itself arranges to be placed before it, the Tribunal is required to find for itself, whether it can form the opinion formed by the Inspector, that led to the issuance of the Improvement Notice: ***Wormald Security Australia Pty Ltd v Peter Rohan Department of Occupational Health, Safety and Welfare*** (1994) 74 WAIG 2 at 4 per Franklyn J (Ipp J agreeing). In proceedings before the Tribunal, there is no onus on the recipient of a notice issued under the *OSH Act*, on an application to review, to establish that the notice should not have been issued and should be revoked: ***Wormald*** per Franklyn J at 4 and Nicholson J at 11.

13 At this early stage of proceedings there is limited material before the Tribunal in relation to the substantive application. Only CPC's Form 6 Referral has been filed. The referral has seven attachments, including the Notice, a Prohibition Notice and its review, the requests to the WorkSafe Commissioner for a review of the Notice, correspondence between the parties about the WorkSafe Commissioner's review and a letter from the WorkSafe Commissioner explaining his decision to affirm the Notice with modifications.

14 In the substantive application, the Tribunal must decide whether the Inspector was justified in forming the opinion that she did in issuing the Notice to CPC. That is the matter in question. In the circumstances, a document will be discoverable if it relates to the Inspector's opinion.

What is the Inspector's opinion?

15 The Inspector issued the Notice on 2 September 2020. The Notice is two pages long. The Inspector completed page one as follows:

> 1. In relation to: Riding of horses without wearing equestrian safety helmets at CARLTON HILL STATION KUNUNURRA 6743 on 02 Sep 2020.
>
> I have formed the opinion that in circumstances that make it likely that the contravention will continue or be repeated, you have contravened section 19(1) of the Occupational Safety and Health Act 1984 and the grounds for my opinion are: See Attachment Improvement Notice.
>
> You are required to remedy the above by no later than 14 Oct 2020 at 1700 hours.
>
> 2. You are directed to take the following measures: It is practicable to provide all employees who ride horses with an Australian Standard approved equestrian helmet [or an equestrian helmet equalling or exceeding AS/NZS3838:2006], and require those employees to wear such a helmet at all times when riding a horse.

16 Page two is headed 'Attachment Improvement Notice'. It says:

> My discussions with Mr Ian Florence, WHS Manager, identified that Consolidated Pastoral Company Pty Ltd (CPC) is the employer of employees at this workplace. I have read the CPC Horse Handling Operational Policy dated 11 November 2019 which states a rider may be assessed by a Manager as being competent to ride without wearing an equestrian safety helmet when undertaking work activities on horseback. My discussions with Mr Florence on 1 September 2020 also confirmed that since the cancellation of Prohibition Notice P90014635 by the WorkSafe Commissioner, CPC has returned to the application of the CPC Horse Handling Operational Policy where currently some riders are not wearing helmets while riding. As a result of this policy implementation, these employees are being exposed to a hazard namely riding a horse without a helmet which may result in the rider falling from a horse and receiving impact to the head which could lead to serious injury or death. Based on my industry experience and my research into the use of equestrian safety helmets during horse related activities, I have formed the opinion that the company has failed to provide a working environment where employees are not exposed to the hazard and it would be practicable for CPC to require all employees to wear a helmet at all times whilst riding a horse in the workplace.

17 The parties agree that the Inspector's opinion is:

> As at 2 September 2020, at Carlton Hill Station, CPC has contravened s19(1) of the Occupational Safety and Health Act 1984 (Act), in circumstances that make it likely that the contravention will continue or be repeated. The contravention arises because some employees of CPC are being exposed to a hazard, namely "riding a horse without a helmet which may result in the rider falling from a horse and receiving impact to the head which could lead to serious injury or death", in circumstances in which it is reasonably practicable to provide a working environment such that those employees are not exposed to that hazard, in particular by requiring all employees to wear a helmet at all times whilst riding a horse in the workplace.

Category number 1

CPC's submissions

18 CPC says that this category of documents is too broad. There is no logical link between all horse-related injuries and the hazard. The WorkSafe Commissioner seeks documents relating to all of CPC's employees, not just those employed at Carlton

Hill Station where the contravention of s 19(1) of the OSH Act is said to have taken place. Documents that relate to workplaces other than Carlton Hill Station are irrelevant.

19 This is because at its core, the Inspector's opinion is about:

a. contravention of s 19(1) of the OSH Act;

b. at Carlton Hill Station;

c. based on the hazard;

d. in circumstances where practicable measures could have been taken but were not taken.

20 CPC says the hazard is said to arise at a particular workplace and in particular ways (in all of those ways), namely:

a. riding a horse;

b. falling from a horse while riding;

c. impact to the head as a result of falling from the horse;

d. at Carlton Hill Station.

21 From the Inspector's opinion, the practicable measures involve:

a. all employees;

b. wear a helmet;

c. at all times when riding a horse at Carlton Hill Station.

22 Accordingly, CPC argues that whether a document is discoverable will depend on whether it relates to the issues set out from [19] – [21].

23 CPC accepts that records and documents relating to head injuries sustained by employees as a result of falling from horses while riding horses at Carlton Hill Station are discoverable. The Tribunal understands that CPC agrees to discover records and documents of that type.

24 CPC says it is impossible to see how records or documents relating to any injuries sustained by any of its staff in the course of working with horses could inform the Tribunal's assessment of the particular hazard and impacts of practicable measures in the context of the question before the Tribunal. Because of how the hazard is identified in the Notice, it is limited to impacts caused directly by a fall and CPC should not be required to discover documents that are beyond the confines of the specific hazard and practicable measures. The Tribunal should not order discovery of the documents in category number 1.

The WorkSafe Commissioner's submissions

25 I understand the WorkSafe Commissioner's submission to be that he broadly agrees with CPC's submission set out from [19] – [21] except in relation to [20c]. He says that the Inspector's opinion contemplates that there be a fall from a horse and impact to the head, but it is not clear from the Inspector's opinion that impact to the head must be as a result of falling. Impact to the head could be in association with a fall, for example being kicked or trampled.

26 The WorkSafe Commissioner says that records or documents about injuries sustained generally in the course of working with horses are relevant because they demonstrate the unpredictability of horses and in turn the prevalence of falls from horses. At the hearing the WorkSafe Commissioner said:

> The Tribunal will be helped in determining the risk of a head injury resulting from a fall if the Tribunal knows something about the total number of injuries because it must be smaller than that total number. So there is some relevance in that very direct way… the Tribunal might be assisted by knowing about the causes of those broader injuries. So those broader injuries might be caused by reasons which are relevant to the kinds of injuries that are specifically an issue, that is head injuries or falls. If for instance those broader injuries are caused by unpredictability of horses, that may tell the Tribunal something about the risk of specifically falls from horses and specifically head injuries if they result from that same cause. Similarly, the documentation may reveal whether or not the injuries are the result of operator error or operator inexperience, and again that may assist the Tribunal to determine the risk of head injury and head injuries resulting from falls.

27 The WorkSafe Commissioner says that because CPC says that it manages the hazard by taking a holistic approach across its workplaces, documents and records that relate to other CPC stations are relevant to assessing the effectiveness of CPC's mitigation efforts at Carlton Hill Station. As a result, the Tribunal should order discovery of the documents in category number 1.

Consideration

Are the documents discoverable?

28 The substantive application is a reference to the Tribunal under s 51A of the OSH Act of the WorkSafe Commissioner's decision made under s 51(6) of the OSH Act to affirm the Notice (with modification in relation to the date for compliance).

29 Section 51A(1) of the OSH Act refers to a person being issued with 'notice of a decision under s 51(6)', being the WorkSafe Commissioner's decision. It is not in dispute that s 51A(5) requires the Tribunal to inquire into the circumstances relating to 'the notice'. It would seem that 'notice' in s 51A(5) refers to the improvement notice or prohibition notice that is the subject of the referral.

30 Section 51(3) of the OSH Act says 'A review of a decision made under section 51 shall be in the nature of a rehearing.' The parties agree that the task for the Tribunal is as set out by the Full Bench in [31] of ***GHD***. That is, to decide whether the

Inspector was justified in forming the opinion that she did in issuing the Notice to CPC. That is the matter in question. A document will be discoverable if it relates to the Inspector's opinion.

Category number 1

31 Matters raised in materials that were considered by the WorkSafe Commissioner may be relevant to whether his decision ought to be upheld. However, considering the limited material currently before the Tribunal (see [13]), it is not apparent that the Inspector's opinion relates to all CPC staff. Neither the Inspector's opinion nor the WorkSafe Commissioner's reasons for decision dated 30 April 2021 refer to workplaces other than Carlton Hill Station. At this stage, on what is before the Tribunal, documents that relate to workplaces other than Carlton Hill Station do not relate to the matter in question.

32 Again, based on the limited material currently before the Tribunal, it is unclear why documents about injuries generally sustained in the course of working with horses could or would demonstrate the prevalence of falls from horses or why they are necessary for the fair disposal of the case.

33 Considering the limited arguments currently before the Tribunal on this issue, it does not appear to me that the Inspector's opinion is framed so as to relate to the unpredictability of horses. It does not relate to injuries generally sustained in the course of working with horses. The Inspector's opinion is limited to serious injury or death resulting from a rider falling from a horse and receiving impact to the head at Carlton Hill Station.

34 At this stage, I consider that the documents sought in category number 1 are not discoverable to the extent that they go beyond serious injury or death resulting from a rider falling from a horse and receiving impact to the head at Carlton Hill Station since 1 January 2016.

Would it be just to order discovery?

35 For these reasons, I consider at this stage that the documents in category number 1 (except as set out in [34]) are not necessary for the fair disposal of the case and it would not be just to order they be discovered.

Conclusion

36 CPC's objection to discovery is upheld.

37 The Tribunal will ask the parties to confer and write to the Tribunal's Associate by 3pm on Wednesday 31 August 2022 proposing any orders the parties say the Tribunal should make to give effect to these reasons.

2022 WAIRC 00653

REVIEW OF NOTICE - S.51A - OSH ACT

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES CONSOLIDATED PASTORAL COMPANY PTY LTD

APPLICANT

-v-

WORKSAFE WESTERN AUSTRALIA COMMISSIONER

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE THURSDAY, 8 SEPTEMBER 2022

FILE NO/S OSHT 4 OF 2021

CITATION NO. 2022 WAIRC 00653

Result Objection to discovery upheld

Representation

Applicant Mr S Vandongen SC (of counsel)

Respondent Mr T Pontre (of counsel)

Order

HAVING heard from Mr S Vandongen SC (of counsel) on behalf of the applicant and Mr T Pontre (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred by the *Work Health and Safety Act 2020* (WA), orders –

1. THAT the applicant's objection to the respondent's request for production of documents dated 31 August 2021 is upheld;
2. THAT the applicant discover all records or documents relating to serious injury or death resulting from a rider falling from a horse and receiving impact to the head at Carlton Hill Station since 1 January 2016 within 21 days of the date of this order;
3. THAT the respondent's request for production of documents dated 31 August 2021 is otherwise dismissed; and
4. THAT by consent, the name of the respondent is amended to 'WorkSafe Commissioner'.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2022 WAIRC 00639

REVIEW OF NOTICE - S.51A - OSH ACT

THE WORK HEALTH AND SAFETY TRIBUNAL

CITATION	:	2022 WAIRC 00639
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	WEDNESDAY, 17 AUGUST 2022
DELIVERED	:	MONDAY, 29 AUGUST 2022
FILE NO.	:	OSHT 5 OF 2021
BETWEEN	:	HANCOCK PROSPECTING PTY LTD Applicant AND WORKSAFE WESTERN AUSTRALIA COMMISSIONER Respondent

CatchWords	:	Work Health and Safety Tribunal – Objection to discovering documents – Document categories requested too broad and relate to matters not yet before the Tribunal – Objection to discovery upheld
Legislation	:	*Industrial Relations Act 1979* (WA): s 27(1)(o) *Work Health and Safety Act 2020* (WA): Schedule 1, cl 29
Result	:	Objection to discovery upheld
Representation:		
Applicant	:	Mr S Vandongen SC (of counsel)
Respondent	:	Mr T Pontre (of counsel)

Cases referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Company (1882) 11 QBD 55

GHD Pty Limited v WorkSafe Western Australia Commissioner [2021] WAIRC 00655

Reasons for Decision

1 On 24 September 2020, a WorkSafe Western Australia inspector (**Inspector**) issued Improvement Notice 90015070 (**Notice**) to Hancock Prospecting Pty Ltd (**Hancock Prospecting**).

2 The Notice identified that Hancock Prospecting employees are ‘exposed to a hazard; namely riding a horse without a helmet which may result in the rider falling from a horse and receiving impact to the head which could lead to serious injury or death.’

3 On 7 May 2021, Hancock Prospecting referred the Notice to the Tribunal for further review. The Tribunal issued programming orders, including that each party provide documents or materials requested by the other, unless the party objects to provision of any of the documents requested, in which case such an objection should be made by that party filing a Form 1A application with the Tribunal.

4 The parties requested and were granted multiple extensions of time to comply with the programming orders. In March 2022, Hancock Prospecting filed a Form 1A, objecting to the provision of documents requested by the WorkSafe Commissioner. In April 2022, this application was reallocated to me and the discovery question was programmed for hearing. After the parties requested and were granted several extensions of time to comply with these programming orders, the discovery question was listed for hearing on Wednesday 17 August 2022 to accommodate the parties’ availability.

5 The WorkSafe Commissioner requested discovery of four categories of documents from Hancock Prospecting.

6 There is a dispute about the breadth of documents sought. Hancock Prospecting objects to providing documents in category number 1, which is:

> All records or documents relating to injuries sustained by any of the Applicant’s staff in the course of working with horses since 1 January 2016.

Hancock Prospecting also objects to providing documents in category number 3, which is:

> Documents setting out the Applicant's policies and procedures regarding the use of motor bikes.

Relevant principles

7 Under s 27(1)(o) of the *Industrial Relations Act 1979* (WA) (**IR Act**), the Commission has the power to 'make such orders as may be just' with respect to the discovery, inspection or production of documents. Section 27 of the IR Act applies to the exercise of the jurisdiction of this Tribunal: cl 29 of Schedule 1 of the *Work Health and Safety Act 2020* (WA).

8 Discovery is not available as of right. The party seeking discovery must establish that it is just for the order to be made and necessary for the fair disposal of the case. 'Just' means 'right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right': ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd*** (1995) 75 WAIG 1801, 1805.

9 At common law a document will be discoverable if it relates to a matter in question, as set out in ***Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Company*** (1882) 11 QBD 55 at 63:

> It seems to me that every document relates to matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable to the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences…

10 The Tribunal must consider:

1. do the documents relate to a matter in question, and if so;
2. would it be just to order discovery?

Substantive application before the Tribunal

11 Hancock Prospecting has made an application to the Tribunal under s 51A of the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**). It seeks a review of the Inspector's decision to issue the Notice and of the WorkSafe Commissioner's decision to affirm the Notice.

12 As set out in the reasons of the Full Bench in ***GHD Pty Limited v WorkSafe Western Australia Commissioner*** [2021] WAIRC 00655 (**GHD**) at [31]:

> This requires, as the Tribunal correctly posited, that the Tribunal examine whether, on the facts and circumstances in existence at the material time, [the Inspector] was justified in forming the opinion that he did, in issuing the Improvement Notice to the appellant. In effect, the Tribunal "stands in the shoes" of the Inspector. Based on the evidence before the Tribunal, including any expert evidence a party may adduce, or the Tribunal itself arranges to be placed before it, the Tribunal is required to find for itself, whether it can form the opinion formed by the Inspector, that led to the issuance of the Improvement Notice: ***Wormald Security Australia Pty Ltd v Peter Rohan Department of Occupational Health, Safety and Welfare*** (1994) 74 WAIG 2 at 4 per Franklyn J (Ipp J agreeing). In proceedings before the Tribunal, there is no onus on the recipient of a notice issued under the *OSH Act*, on an application to review, to establish that the notice should not have been issued and should be revoked: ***Wormald*** per Franklyn J at 4 and Nicholson J at 11.

13 At this early stage of proceedings there is limited material before the Tribunal in relation to the substantive application. Only Hancock Prospecting's Form 6 Referral has been filed. The referral has six attachments, including the Notice, the requests to the WorkSafe Commissioner for a review of the Notice, correspondence between the parties about the WorkSafe Commissioner's review and a letter from the WorkSafe Commissioner explaining his decision to affirm the Notice with modifications.

14 In the substantive application, the Tribunal must decide whether the Inspector was justified in forming the opinion that she did in issuing the Notice to Hancock Prospecting. That is the matter in question. In the circumstances, a document will be discoverable if it relates to the Inspector's opinion.

What is the Inspector's opinion?

15 The Inspector issued the Notice on 24 September 2020. The Notice is two pages long. The Inspector completed page one as follows:

> 1. In relation to: Riding of horses without wearing equestrian safety helmets at FOSSIL DOWNS STATION GREAT NORTHERN HWY FITZROY CROSSING 6765 ON 24 Sep 2020.
>
> I have formed the opinion that you are contravening section 19(1) of the Occupational Safety and Health Act 1984 and the grounds for my opinion are: See Attachment Improvement Notice.
>
> You are required to remedy the above by no later than 05 Nov 2020 at 1700 hours.
>
> 2. You are directed to take the following measures: It is practicable to provide all employees who ride horses with an Australian Standard approved equestrian helmet [or an equestrian helmet equalling or exceeding AS/NZS3838:2006], and require those employees to wear such a helmet at all times when riding a horse.

16 Page two of the Notice is headed 'Attachment Improvement Notice'. It says:

> My discussions with Mr Christopher Stacey, WHS Advisor, identified that Hancock Prospecting Pty Limited (HPPL) is the employer of employees at this workplace. Dr. Bruce Butcher, a representative of HPPL, supplied me with documentation including (i) the company's Horse Riding Risk Assessment (dated 09/08/2019), and (ii) the company's Working With Horses Policy (dated 27.03.2019) which do not require that all riders at all times when on a horse undertaking work activities should be wearing an approved helmet which meets AS/NZS3838 Helmets for horse riding and horse related activities. As a result of this risk assessment and policy implementation, employees are being exposed to a hazard; namely riding a horse without a helmet which may result in the rider falling from a horse and receiving impact to the head which could lead to serious injury or death. I was advised on 21.09.2019 through email from Mr Stacey that employee Ross Job fell from a horse while undertaking mustering at Fossil Downs on 26.08.2020, and who was not at the time wearing an equestrian safety helmet. Mr Job was assessed on 14.05.2019 by Adam Knowles through use of the HPPL Horse Rider Assessment system as a competent rider. Based on my industry experience and my research into the use of equestrian safety helmets during horse related activities, I have formed the opinion that the company has failed to provide a working environment where employees are not exposed to the hazard and it would be practicable for HPPL to require all employees to wear a helmet at all times whilst riding a horse in the workplace.

17 The parties agree that the Inspector's opinion is:

> As at 24 September 2020, at Fossil Downs Station, Hancock Prospecting is contravening s19(1) of the OSH Act. The contravention arises because some employees of Hancock Prospecting are being exposed to a hazard, namely "riding a horse without a helmet which may result in the rider falling from a horse and receiving impact to the head which could lead to serious injury or death", in circumstances in which it is reasonably practicable to provide a working environment such that those employees are not exposed to that hazard, in particular by requiring all employees to wear a helmet at all times whilst riding a horse in the workplace.

Category number 1

Hancock Prospecting's submissions

18 Hancock Prospecting says that this category of documents is too broad. There is no logical link between all horse-related injuries and the hazard. The WorkSafe Commissioner seeks documents relating to all of Hancock Prospecting's employees, not just those employed at Fossil Downs Station where the contravention of s 19(1) of the OSH Act is said to have taken place. Documents that relate to workplaces other than Fossil Downs Station are irrelevant.

19 This is because at its core, the Inspector's opinion is about:

a. contravention of s 19(1) of the OSH Act;

b. at Fossil Downs Station;

c. based on the hazard;

d. in circumstances where practicable measures could have been taken but were not taken.

20 Hancock Prospecting says the hazard is said to arise at a particular workplace and in particular ways (in all of those ways), namely:

a. riding a horse;

b. falling from a horse while riding;

c. impact to the head as a result of falling from the horse;

d. at Fossil Downs Station.

21 From the Inspector's opinion, the practicable measures involve:

a. all employees;

b. wear a helmet;

c. at all times when riding a horse at Fossil Downs Station.

22 Accordingly, Hancock Prospecting argues that whether a document is discoverable will depend on whether it relates to the issues set out from [19] – [21].

23 Hancock Prospecting accepts that records and documents relating to head injuries sustained by employees as a result of falling from horses while riding horses at Fossil Downs Station are discoverable. The Tribunal understands that Hancock Prospecting agrees to discover records and documents of that type.

24 Hancock Prospecting says it is impossible to see how records or documents relating to any injuries sustained by any of its staff in the course of working with horses could inform the Tribunal's assessment of the particular hazard and impacts of practicable measures in the context of the question before the Tribunal. Because of how the hazard is identified in the Notice, it is limited to impacts caused directly by a fall and Hancock Prospecting should not be required to discover documents that are beyond the confines of the specific hazard and practicable measures. The Tribunal should not order discovery of the documents in category number 1.

The WorkSafe Commissioner's submissions

25 I understand the WorkSafe Commissioner's submission to be that he broadly agrees with Hancock Prospecting's submission set out from [19] – [21] except in relation to [20c]. He says that the Inspector's opinion contemplates that there be a fall from a

horse and impact to the head, but it is not clear from the Inspector's opinion that impact to the head must be as a result of falling. Impact to the head could be in association with a fall, for example being kicked or trampled.

26 The WorkSafe Commissioner says that records or documents about injuries sustained generally in the course of working with horses are relevant because they demonstrate the unpredictability of horses and in turn the prevalence of falls from horses. At the hearing the WorkSafe Commissioner said:

> The Tribunal will be helped in determining the risk of a head injury resulting from a fall if the Tribunal knows something about the total number of injuries because it must be smaller than that total number. So there is some relevance in that very direct way… the Tribunal might be assisted by knowing about the causes of those broader injuries. So those broader injuries might be caused by reasons which are relevant to the kinds of injuries that are specifically an issue, that is head injuries or falls. If for instance those broader injuries are caused by unpredictability of horses, that may tell the Tribunal something about the risk of specifically falls from horses and specifically head injuries if they result from that same cause. Similarly, the documentation may reveal whether or not the injuries are the result of operator error or operator inexperience, and again that may assist the Tribunal to determine the risk of head injury and head injuries resulting from falls.

27 The WorkSafe Commissioner says that because Hancock Prospecting says that it manages the hazard by taking a holistic approach across its workplaces, documents and records that relate to other Hancock Prospecting stations are relevant to assessing the effectiveness of Hancock Prospecting's mitigation efforts at Fossil Downs Station. As a result, the Tribunal should order discovery of the documents in category number 1.

Category number 3

Hancock Prospecting's submissions

28 Hancock Prospecting says that in reviewing the Notice, the Tribunal must be satisfied that 'it is reasonably practicable for the Applicant to require all employees who ride horses at Fossil Downs Station to wear a helmet at all times whilst riding a horse'. The documents sought in category number 3 are too broad given the context of the hazard and practicable measures. Whether Hancock Prospecting does or does not have policies relating to the use of motorbikes is not relevant to determining that issue and the Tribunal should not order the discovery of documents in category number 3.

The WorkSafe Commissioner's submissions

29 The WorkSafe Commissioner argues that, in circumstances where Hancock Prospecting relies on a requirement to retire motorbikes at certain times of the year because of high temperatures when wearing helmets (in the materials provided by Hancock Prospecting to the WorkSafe Commissioner in support of its referral for review of the Notice by the WorkSafe Commissioner), it is necessary for the fair disposal of the case that the Tribunal order discovery of the documents in category number 3.

30 The WorkSafe Commissioner says that materials that were considered by him will be relevant to whether his decision ought to be upheld.

Consideration

Are the documents discoverable?

31 The substantive application is a reference to the Tribunal under s 51A of the OSH Act of the WorkSafe Commissioner's decision made under s 51(6) of the OSH Act to affirm the Notice (with modification in relation to the date for compliance).

32 Section 51A(1) of the OSH Act refers to a person being issued with 'notice of a decision under s 51(6)', being the WorkSafe Commissioner's decision. It is not in dispute that s 51A(5) requires the Tribunal to inquire into the circumstances relating to 'the notice'. It would seem that 'notice' in s 51A(5) refers to the improvement notice or prohibition notice that is the subject of the referral.

33 Section 51(3) of the OSH Act says 'A review of a decision made under section 51 shall be in the nature of a rehearing.' The parties agree that the task for the Tribunal is as set out by the Full Bench in [31] of ***GHD***. That is, to decide whether the Inspector was justified in forming the opinion that she did in issuing the Notice to Hancock Prospecting. That is the matter in question. A document will be discoverable if it relates to the Inspector's opinion.

Category number 1

34 Matters raised in materials that were considered by the WorkSafe Commissioner may be relevant to whether his decision ought to be upheld. However, considering the limited material currently before the Tribunal (see [13]), it is not apparent that the Inspector's opinion relates to all Hancock Prospecting staff. Neither the Inspector's opinion nor the WorkSafe Commissioner's reasons for decision dated 30 April 2021 refer to workplaces other than Fossil Downs Station. At this stage, on what is before the Tribunal, documents that relate to workplaces other than Fossil Downs Station do not relate to the matter in question.

35 Again, based on the limited material currently before the Tribunal, it is unclear why documents about injuries generally sustained in the course of working with horses could or would demonstrate the prevalence of falls from horses or why they are necessary for the fair disposal of the case.

36 Considering the limited arguments currently before the Tribunal on this issue, it does not appear to me that the Inspector's opinion is framed so as to relate to the unpredictability of horses. It does not relate to injuries generally sustained in the course of working with horses. The Inspector's opinion is limited to serious injury or death resulting from a rider falling from a horse and receiving impact to the head at Fossil Downs Station.

37 At this stage, I consider that the documents sought in category number 1 are not discoverable to the extent that they go beyond serious injury or death resulting from a rider falling from a horse and receiving impact to the head at Fossil Downs Station since 1 January 2016.

Category number 3

38 Matters raised in materials that were considered by the WorkSafe Commissioner may be relevant to whether his decision ought to be upheld. However, considering the limited material currently before the Tribunal (see [13]), it is not apparent that the use of motorbikes is yet relied upon or in issue. Neither the Inspector's opinion nor the WorkSafe Commissioner's reasons for decision dated 30 April 2021 refer to or appear to rely on Hancock Prospecting's policies and procedures about the use of motorbikes. At this stage, I do not consider that documents setting out Hancock Prospecting's policies and procedures regarding the use of motorbikes relate to the matter in question. They do not relate to the Inspector's opinion.

39 Accordingly, the documents sought in category number 3 are not discoverable.

Would it be just to order discovery?

40 For these reasons, I consider at this stage that the documents in category number 1 (except as set out in [37]) and category number 3 are not necessary for the fair disposal of the case and it would not be just to order they be discovered.

Conclusion

41 Hancock Prospecting's objection to discovery is upheld.

42 The Tribunal will ask the parties to confer and write to the Tribunal's Associate by 3pm on Wednesday 31 August 2022 proposing any orders the parties say the Tribunal should make to give effect to these reasons.

2022 WAIRC 00654

REVIEW OF NOTICE - S.51A - OSH ACT

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	HANCOCK PROSPECTING PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 8 SEPTEMBER 2022
FILE NO/S	OSHT 5 OF 2021
CITATION NO.	2022 WAIRC 00654

Result	Objection to discovery upheld
Representation	
Applicant	Mr S Vandongen SC (of counsel)
Respondent	Mr T Pontre (of counsel)

Order

HAVING heard from Mr S Vandongen SC (of counsel) on behalf of the applicant and Mr T Pontre (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred by the *Work Health and Safety Act 2020* (WA), orders –

1. THAT the applicant's objection to the respondent's request for production of documents dated 31 August 2021 is upheld;
2. THAT the applicant discover all records or documents relating to serious injury or death resulting from a rider falling from a horse and receiving impact to the head at Fossil Downs Station since 1 January 2016 within 21 days of the date of this order;
3. THAT the respondent's request for production of documents dated 31 August 2021 is otherwise dismissed; and
4. THAT by consent, the name of the respondent is amended to 'WorkSafe Commissioner'.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]