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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Industrial Magistrate—

2022 WAIRC 00728

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 178/2021 GIVEN ON 25
NOVEMBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2022 WAIRC 00728
CORAM	:	CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	:	MONDAY, 27 JUNE 2022
DELIVERED	:	WEDNESDAY, 19 OCTOBER 2022
FILE NO.	:	FBA 9 OF 2021
BETWEEN	:	Y.D HUI Appellant AND BRIAN EDWARD RAVENSCROFT Respondent

ON APPEAL FROM:

Jurisdiction	:	INDUSTRIAL MAGISTRATES COURT
Coram	:	INDUSTRIAL MAGISTRATE E O'DONNELL
Citation	:	-
File No	:	M 178 OF 2021

Catchwords	:	Industrial law (WA) - Appeal against decision of Industrial Magistrate to enter default judgment - Proper parties to appeal - Legal personality of unincorporated partnership - Whether proceedings can be brought in name of partnership - Jurisdiction of Full Bench limited to decision that is subject of appeal - No power of Full Bench to substitute decision under appeal for another decision - Appeal of interlocutory order not competent - Appeal dismissed
Legislation	:	<i>Industrial Magistrate's Court (General Jurisdiction) Regulations 2005</i> (WA) reg 4, reg 8, reg 9, reg 41 <i>Industrial Relations Act 1979</i> (WA) s 7, s 49, s 83(5), s 83(7), s 83E, s 83E(2), s 83E(5), s 84, s 84(1) <i>Rules of the Supreme Court 1971</i> (WA) O 71 r 13
Result	:	Appeal dismissed

Representation:

Counsel:

Appellant : In person and with her Dr A E Imam
 Respondent : Mr J Carroll of counsel and with him Ms I Inkster of counsel
 Solicitors:
 Respondent : State Solicitor's Office

Case(s) referred to in reasons:

Anderson v Pope (1986) 66 WAIG 1563
 Bienstein v Bienstein [2003] HCA 7; (2003) 195 ALR 225
 Casino Picture Garden Co v Hewitt [1914] VLR 192
 Commissioner of State Taxation v Cyril Henschke [2010] HCA 43; (2010) 272 ALR 440
 The Governing Council of North Metropolitan TAFE v State School Teachers Union of WA [2018] WAIRC 00746; (2018) 98 WAIG 1210
 Income Tax Commissioners for City of London v Gibbs [1942] AC 402; [1942] 1 All ER 415
 Permanent Custodians Ltd v Elite Grains Pty Ltd [No.2] [2016] WASC 23
 SJ Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd [1989] 2 Qd R 87
 Tobin v Dodd [2004] WASCA 288

*Reasons for Decision***THE FULL BENCH:****Background**

1 This appeal was purportedly brought by Ms Hui and Dr Imam as the appellants, against a decision of the Industrial Magistrates Court constituted by Industrial Magistrate O'Donnell. Her Honour granted an application by the respondent at first instance, for default judgement under reg 8 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) on 25 November 2021. The order of the court was made against Ms Hui and her husband, Dr Imam, as partners in the business conducted by them. The orders made by Her Honour on 25 November 2021, were made against both Ms Hui and Dr Imam individually, to the effect that default judgement was entered in favour of the respondent and that the determination of penalties and consequential orders was to be adjourned to a date to be fixed. On 8 December 2021, one day prior to the day on which contravention and penalty orders were made by the learned Industrial Magistrate, the present appeal to the Full Bench under s 84 of the *Industrial Relations Act 1979* (WA) was filed. Ms Hui and Dr Imam seek an order quashing the default judgement order made on 25 November 2021 and the remittal of the proceedings back to the Industrial Magistrates Court.

Proceedings at first instance

- 2 Ms Hui and Dr Imam were, at the material times, partners in a café business trading as Sinamon (ABN 118 6655 2941) on Albany Highway in East Victoria Park. The unincorporated partnership was described as 'Y.D Hui & A.E Imam'. The respondent is an industrial inspector appointed under s 98(1) of the *Act* and is employed by the Department of Mines, Industry, Resources and Safety. Ms Hui and Dr Imam also conduct another café business trading under the same name, in Mount Lawley.
- 3 The following background is from the materials filed in support of the originating claim and the transcript of proceedings at first instance. As a result of a compliance audit conducted by DMIRS in relation to businesses covered by the *Restaurant, Tearooms and Catering Workers Award*, the respondent, in the company of another industrial inspector, Inspector Suppiah, visited the premises of Sinamon in East Victoria Park on 18 February 2021. A Notice To Produce addressed to 'Y.D Hui & A.E. Imam, Sinamon, 732 Albany Highway East Victoria Park WA 6101' was served on a staff member of the business at the premises. The notice sought the production of various employment records for the employees of the business, over the period 30 November 2020 to 14 February 2021, by 5 March 2021.
- 4 Whilst on the premises, the industrial inspectors requested to view the employees' timesheets. While doing so, the respondent alleged that Ms Hui approached the industrial inspectors and prevented them from inspecting the records. The industrial inspectors then said they made a request for production of records for the period 17 and 18 February 2021 and were told by Ms Hui that the records were kept at her home, and she was not the owner of the business, but an employee.
- 5 The respondent contended that there was no request for an extension of time and there was no compliance with the Notice.
- 6 On 8 April 2021, the respondent visited the Sinamon premises in East Victoria Park in the presence of another industrial inspector, Inspector Callaghan. They spoke to Dr Imam and asked whether he had seen the first Notice. Dr Imam was alleged to have said that he had seen the Notice but had 'thrown it in the bin'. On the same visit, the respondent served a second Notice on Dr Imam, requesting the production of employment records for staff of both cafés at East Victoria Park and Mount Lawley over the period 30 November 2020 to 14 February 2021. The respondent contended that Dr Imam said he had read but did not respond to the Notice and that he would not provide information about his business. Whilst the second Notice enabled a request for an extension of time to comply, none was made by the due date of 16 April 2021 and the records were not produced.

- 7 Because of these events, on 13 September 2021 the respondent commenced proceedings against Dr Imam (as the first respondent) and Ms Hui (as the second respondent) separately and as individuals under s 83E of the *Act*. As set out in the statement of claim, it was alleged that:
27. The First Respondent:
- a. contravened section 102(1)(a) of the Act on 5 March 2021 when, being lawfully required to do so, he failed to produce records for examination by an industrial inspector; and
 - b. contravened section 102(1)(a) of the Act on 16 April 2021 when, being lawfully required to do so, he failed to produce records for examination by an industrial inspector.
28. The Second Respondent:
- a. contravened section 102(1)(a) of the Act on 5 March 2021 when, being lawfully required to do so, she failed to produce records for examination by an industrial inspector; and
 - b. contravened section 102(2)(a) of the Act between 18 February 2021 and 17 March 2021 by resisting or obstructing industrial inspectors in the performance of their statutory duties.
- 8 Interim orders were sought under ss 83E(2) and (5) of the *Act*, to produce employment records, from 1 January 2019 to the date of order. Final orders were sought for contraventions and the production of employee records.
- 9 Ms Hui and Dr Imam did not file a response to the claims commenced against them in accordance with the *Regulations*. On 25 October 2021 the respondent made an application for default judgement under reg 8 of the *Regulations*. The orders sought on default were in the same terms as the orders sought in the originating claim.
- 10 In an affidavit filed on 26 October 2021, the respondent said that two industrial inspectors, Inspectors Suppiah and Neville, attended the premises of Sinamon in East Victoria Park on 17 September 2021. Inspector Neville telephoned the respondent to inform him that two copies of the originating claim were served on Dr Imam, each of which was in a sealed envelope, however he had thrown both copies out of the front door of the premises. One copy was on the footpath and the other was on Albany Highway.
- 11 Inspector Neville, in her affidavit filed on 22 November 2021, said she saw Inspector Suppiah speak to a person who identified himself as 'Ahmed'. She said that once he was told that they were at the premises to serve some documents on him and 'Yan', he said words to the effect he would not accept them. The documents were left on the counter and both inspectors then proceeded to leave the premises. She then said Ahmed followed them out of the premises and threw the documents out of the front door, with one envelope landing on the shop veranda and the other on the road.
- 12 The respondent then gave instructions that the documents were to be left at the door of the business premises. Inspector Neville said she saw Inspector Suppiah pick up both envelopes and leave them at the front door of the café. They both returned to their vehicle parked across the road. She said that Dr Imam came out of the café, picked up the documents and, in an agitated state and yelling, walked over to their vehicle and put both envelopes under the windscreen wipers. Photographs were taken of the documents left at the front door of the premises and on the windscreen of the vehicle.
- 13 The respondent further said that on their return to the office, the industrial inspectors informed him of these events. Contemporaneous file notes and photographs, evidencing what occurred, were annexed to the respondent's affidavit, along with the affidavit of service of Inspector Suppiah.
- 14 Despite service being effected as above, in addition, the respondent referred to steps taken to also have Ms Hui and Dr Imam served with copies of the originating claim by process servers, between 23 September and 6 October 2021 and on 7 October 2021. These steps were not successful. Furthermore, a copy of the originating claim was sent to both Ms Hui and Dr Imam by email at the business email address on 12 October 2021. It was also posted to a residential address, as identified in an Australian Business Register search extract, annexed to Inspector Suppiah's affidavit of 22 November 2021.
- 15 The respondent said he received a copy of an unsigned email in reply on 12 October 2021 and subsequent email correspondence which took place on 13 and 14 October 2021 between the State Solicitor's Office and Dr Imam. This correspondence suggested that copies of the originating claim were served and received. Despite the time for the filing of a response expiring on 8 October 2021, the respondent, through the State Solicitor's Office, indicated that it would not seek default judgement for a further 14 days to enable a response to be filed. No response was filed.
- 16 As noted the default judgment application was heard before her Honour on 25 November 2021. Dr Imam appeared before the court. The respondent, through its counsel, noted that no response had been filed by either Ms Hui or Dr Imam. The court was informed that the respondent would not oppose an adjournment to provide further time for a response to be filed. Dr Imam told her Honour that both he and Ms Hui work and run the café business and didn't have time to respond to the originating claim. He requested the matter be adjourned until the second quarter of 2022.
- 17 The learned Industrial Magistrate was not satisfied that insufficient time had been provided to respond and noted from the material before the court, that both Dr Imam and Ms Hui had continued to make excuses as to why they had not complied with the respondent's requests. Her Honour found that based on the evidentiary material before the court, Dr Imam's explanation lacked credibility. The learned Industrial Magistrate entered default judgment for the respondent. Dr Imam accused the court of bias and left the courtroom whilst the court was still sitting. The matter was adjourned to 9 December 2021 for the determination of penalties and other orders. On that date, orders were made in the terms as sought in the statement of claim. The total penalty imposed on Dr Imam was \$7,300 and on Ms Hui the total penalty imposed was \$7,000.

The appeal

- 18 The notice of appeal was filed on 8 December 2021. As noted above, this was the day prior to the learned Industrial Magistrate making the final orders in relation to the contraventions and penalties, which were made on 9 December 2021. The

Form 8 Notice of Appeal has the name ‘Ms Desiree Hui’ as the appellant. The ‘Legal name of organisation or business’ and the ‘Business trading name’ on the Form 8 are both completed as ‘Y.D. HUI & A.E. IMAM’ the ACN or ABN number field completed is ‘1186652941’. The postal address is ‘732 Albany Highway East Victoria Park’, which is the address of the Sinamon café at that location.

- 19 The appeal refers to ‘Claim No 178/2021’ and the date cited is 25 November 2021, being the date of the hearing before the learned Industrial Magistrate to determine the default judgment application and the date the default judgment order was made. The first paragraph of the appeal grounds, which are not expressed as grounds but rather as a narrative, commences ‘On the 25th of November 2021 *my partner Ahmed Imam has represented himself and me* in a case against the department of mines (industrial relations) ...’ (emphasis added). That is not accurate. Ms Hui was a respondent in her own right and did not appear in the proceedings. The narrative then refers to various complaints about the conduct of the industrial inspectors and the use of ‘fake affidavits’, alleged ineffective service and that they (Ms Hui and Dr Imam) had not been given enough time to respond.
- 20 Also, complaints were made that in attempting to explain these matters to the court, the learned Industrial Magistrate was dismissive and had appeared to have made up her mind. Ms Hui asserted her husband became frustrated, and confronted the learned Industrial Magistrate and then walked out of court. It was also contended by Ms Hui that her husband has Aspergers and can be outspoken, which may give the appearance of aggression or confronting behaviour. The narrative then explains that both she and her partner work as an accountant and physicist respectively, and along with running both cafés that operate approximately 100 hours per week, including staff shortages, neither have time for ‘extracurricular’ activities. It is open to infer, and we do infer, that this latter reference means responding to the respondent’s originating claim at first instance and to participate in the proceedings.
- 21 The narrative concludes by referring to complaints made by Ms Hui and Dr Imam to various bodies. In terms of relief, the orders sought are to ‘quash default judgement – remit the matter back to the Industrial Magistrates Court for further hearing and determination’.
- 22 The notice of appeal, filed electronically, is in the name of ‘D. Hui’. There is no reference to Dr Imam as an appellant in the notice or the narrative. The notice of appeal does not bear his name or signature. On the contrary, the narrative refers to Ms Hui in the first person, as the person instituting, completing and signing the appeal notice. In addition, the notice of appeal attaches a document entitled ‘Background and Initial Events According to Parties at Sinamon’. This is referred to by Ms Hui as a ‘report’ of some kind in relation to the interactions between the respondent and Ms Hui and Dr Imam, in relation to the relevant events set out above.
- 23 Whilst the appeal was originally listed to be heard on 2 May 2022, shortly before that date on 26 April 2022, an application was made by Tan and Tan Lawyers, who had filed a Notification of Representative Commencing or Ceasing to Act, to adjourn the appeal hearing and to seek leave to amend the grounds of appeal. This application was granted despite opposition from the respondent, to enable Ms Hui and Dr Imam to take legal advice, to amend the grounds of appeal and to be represented on the appeal. After the amendment to the grounds of appeal were filed, Tan and Tan Lawyers ceased to act and did not appear on the appeal.
- 24 Several issues arise on this appeal. They include:
- (a) Who the proper parties to the appeal are;
 - (b) The relevant ‘decision’ that is the subject of the appeal;
 - (c) Whether the appeal is competent;
 - (d) The admission of ‘new evidence’; and
 - (e) The merits of the appeal itself.
- 25 We turn now to consider these various issues.

Proper parties to the appeal

- 26 The respondent submitted that the only appellant is Ms Hui, and Dr Imam has no appeal before the Full bench. Section 84 of the *Act* in relation to appeals to the Full Bench from a decision of the Industrial Magistrates Court is relevantly as follows:

84. Appeal from industrial magistrate’s court to Full Bench

- (1) In this section decision includes a penalty, order, order of dismissal, and any other determination of an industrial magistrate’s court, but does not include a decision made by such a court in the exercise of the jurisdiction conferred on it by section 96J.
- (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of an industrial magistrate’s court.
- (3) An appeal under this section must be instituted within 21 days from the date of the decision against which the appeal is brought and may be instituted by any party to the proceedings in which the decision was made.

...

- 27 It is clear from s 84(3), that for a person to have standing to appeal, they must have been ‘a party’ to the proceedings before the court. The originating claim at first instance, filed on 10 September 2021 alleging contraventions of the *Act*, was commenced against ‘Ahmed El Sayed Imam’ as first respondent, and ‘Yan Won Desiree Hui’ as the second respondent (see respondent’s supplementary bundle of materials at pp 1-10).

- 28 As noted above, at the material time, Ms Hui and Dr Imam were operating the business of Sinamon cafés as an unincorporated partnership with the business name of ‘Sinamon’ (see annexure 1 to the affidavit of Industrial Inspector Suppiah made and filed on 22 November 2021 in the respondent’s supplementary bundle of materials at pp 15-24).
- 29 A partnership has no separate legal personality distinct from the individual partners who constitute it: *Commissioner of State Taxation v Cyril Henschke* [2010] HCA 43; (2010) 272 ALR 440 at [10] per French CJ, Gummow, Hayne, Heydon and Keifel JJ (citing *Income Tax Commissioners for City of London v Gibbs* [1942] AC 402; [1942] 1 All ER 415 and *SJ Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87). Despite this, legal proceedings may be commenced or defended by a firm of partners, in the firm name, if the relevant rules of court provide for this. For example, the *Rules of the Supreme Court 1971* (WA) O 71 r 13, provides that partners may sue or be sued in the name of the firm of which they are partners and an action against or by a firm in its name, includes all partners constituting the firm. The *Federal Court Rules 2011* (Cth) rule 9.41 is along the same lines (see too *Casino Picture Garden Co v Hewitt* [1914] VLR 192). As to the advantages of this course, in *Tobin v Dodd* [2004] WASCA 288 Murray J at [49] observed:

Where partners of a firm are sued in their individual names, rather than in the firm name, the obligation is on the plaintiff to ascertain who were the individual members of the partnership at the date of the accrual of the cause of action and to sue them all in their own names - *Harris v Beauchamp Bros* [1893] 2 QB 534 at 536. The practical difficulties which this entails, not least of which are difficulties of service, could be overcome if the partners are sued in the firm name. Other advantages of suing in the firm name include the ability to enforce any ensuing judgment against partnership property - see Partnership Act 1895, s 28. As the appellant has sued some, but not all, of the partners in the firm at the date of the alleged breach of duty he may have to face these procedural difficulties, and may even be forced to join all the partners before proceeding further with the action. This is because the liability of partners is joint - Partnership Act 1895, s 16 - and the consequent ability of those partners who have been joined in the action to apply to the court for an order staying the proceedings until all other persons so jointly liable with them are added as defendants - RSC O 18, r 4(3).

- 30 However, that is not what occurred in this case. The proceedings were commenced against both Ms Hui and Dr Imam, in their individual capacities. There is no equivalent of the above rules of court in either the *Regulations* or the *Industrial Relations Commission Regulations 2005*.
- 31 We are satisfied that only Ms Hui is the appellant. No appeal is before the Full Bench filed by Dr Imam. That is the plain effect of s 84(3) of the *Act*, read with the originating claim and the notice of appeal. Any appeal by Dr Imam would need to be brought separately, accompanied by an application for an extension of time to appeal under the *Act*.

The relevant ‘decision’ the subject of the appeal

- 32 The decision from which the present appeal is brought, for the purpose of ss 84(1), (2) and (3) of the *Act* as set out above, is the order dated 25 November 2021 of the learned Industrial Magistrate, granting the respondent’s application at first instance for default judgement. So much is plain from the notice of appeal and the remedy sought. Additionally, is the fact the date the appeal was filed (8 December 2021), was the *day prior* to the date the final orders were made by the learned Industrial Magistrate, on 9 December 2021.
- 33 As set out earlier in these reasons in relation to the history of the appeal, on 29 April 2022 the Full Bench granted an application to adjourn the appeal, which had been listed for hearing on 2 May 2022. Amended grounds of appeal were to be filed by 19 May 2022. On 19 May 2022, purported amended grounds of appeal were filed. Whilst the application to amend cited both Ms Hui and Dr Imam as first and second appellants respectively, for the reasons set out above, the only appellant before the Full Bench on the present appeal, is Ms Hui.
- 34 There are several difficulties with the amended grounds of appeal. First and foremost, is that the preamble to the amendment states that ‘The Appellants appeal from the decision of Magistrate E O’Donnell delivered on 9th December 2021 at the Western Australian Industrial Magistrates Court’. Further, the amended grounds of appeal then continue ‘The Appellants appeal the following decisions made by the Honourable Court ...’. The amended grounds then go on in pars 1 to 5, to purport to appeal against the contravention and the penalty orders made by her Honour on 9 December 2021. The decision of the learned Industrial Magistrate made on 9 December 2021, which decision comprised final orders establishing the relevant contraventions and the imposition of penalties, is not the ‘decision’ which is before the Full Bench on this appeal, for the purposes of ss 84(1), (2) and (3) of the *Act*.
- 35 The grant of leave to amend the grounds of appeal made by the Full Bench on 29 April 2022 did, and could only, enable an amendment to the grounds of appeal filed on 8 December 2021 by Ms Hui, that being the appeal against the order of the learned Industrial Magistrate made on 25 November 2021, to grant the respondent’s default judgement application. This is no matter of mere technicality. It is fundamental to the jurisdiction and powers of the Full Bench on appeal that it is limited to a review of the decision which is the subject of the appeal under s 84 of the *Act*. The Full Bench has no jurisdiction or power to review any other decision, such as the later decision made by the learned Industrial Magistrate on 9 December 2021, unless a competent appeal against that decision is before the Full Bench. Any challenge against those orders would need to be the subject of a separate appeal under s 84 of the *Act*, accompanied by an application for an extension of time to bring such an appeal. It is not open to the Full Bench in the exercise of powers under s 27(1) of the *Act* to amend an appeal that has the effect of substituting the decision under appeal for another decision.
- 36 Accordingly, in terms of the purported amended grounds of appeal, subject to what follows, it is only ground E, to the effect that Ms Hui contends that the learned Industrial Magistrate erred in not granting an adjournment on the hearing of the default judgement application, and the assertion of a denial of procedural fairness, that can be considered by the Full Bench.

The competency of the appeal

- 37 In view of our conclusion regarding the ‘decision’ which is the subject of this appeal, being the decision of the learned Industrial Magistrate to grant default judgment, the issue that arises is whether such a decision may be the subject of an appeal

under s 84 of the *Act*. The respondent contended that given the decision appealed against is the default judgment decision, which is, by its nature, interlocutory and not a final decision, the appeal is incompetent and should be dismissed. Reliance was placed in this regard on the decision of the Industrial Appeal Court in *Anderson v Pope* (1986) 66 WAIG 1563.

- 38 The decision of the learned Industrial Magistrate made on 25 November 2021 was to enter judgment for the respondent in default of a response filed by Ms Hui and Dr Imam. The provisions of the *Regulations* dealing with default judgments are found in regs 4, 8, 9 and 41 which are in the following terms:

...

4. Terms used

...

default judgment means a judgment without trial given against a party for a failure by the party to comply with these regulations or an order made by the court, and includes a dismissal of a claim for want of service without consideration of its merits;

...

8. Court's powers to deal with default by party

- (1) This regulation does not apply to a failure to comply with the judgment of the court in a case or any order made in or as a consequence of the judgment.
- (2) If a party does not comply with these regulations, or an order made by the court, the court may give default judgment against the party.
- (3A) Without limiting regulation 6, the court may exercise its powers under subregulation (2) on the application of a party or on its own initiative.
- (3) The court may set aside a default judgment and may do so on any conditions it thinks fit.

9. Procedural orders may be made conditional

- (1) When making an order under regulation 7 or 8 the court may order that the order will take effect unless the party complies with a particular regulation or order, within a particular time, as specified by the court.
- (2) The court may vary or cancel an order made under subregulation (1).

...

41. Setting aside default judgment

- (1) When the court gives a default judgment, the party may, within 14 days after the judgment was given, make an application for the judgment to be set aside.
- (2) When the court sets aside the judgment in relation to a case other than a CIPPLSL case it must list the case for a pre-trial conference and notify the parties in writing.
- (3) When the court sets aside the judgment in relation to a CIPPLSL case it must list the case for hearing and notify the parties in writing.

...

- 39 The power conferred on the court by reg 8 is plainly discretionary. As set out above, by reg 8(3) of the *Regulations*, the court has the power, as an exercise of discretion, to set aside a default judgment on conditions that it thinks fit. After her Honour ordered default judgment to be entered on 25 November 2021, no application was made by either Ms Hui or Dr Imam to set aside the order.

- 40 In general, an order to enter default judgment in favour of a party is not a final order, in the sense that it is open to the party against whom such an order is made, to apply to have the order set aside. Different considerations arise, depending upon whether the default judgment is regularly or irregularly entered (see generally *Australian Civil Procedure*, Bernard Cairns 12th Edition, Chapter 13).

- 41 The nature of a default judgment was considered in *Permanent Custodians Ltd v Elite Grains Pty Ltd [No.2]* [2016] WASC 238. These proceedings concerned an application to set aside default judgement obtained in default of the filing of a memorandum of appearance. The default judgement had been on foot for more than three years. When considering the application to set aside default judgement, Kenneth Martin J addressed the nature of default judgement entered under the *Rules of the Supreme Court 1971* (WA). His Honour observed at [11]:

A default judgment entered under RSC O 13 or O 22 stands in strong contrast, for instance, to a summary judgment of the court obtained under RSC O 14 or O 16, or with a final judgment given after a substantive trial: see RSC O 34 r 8. As regards the interlocutory character of default judgments, see generally *Carr v Finance Corporation of Australia Ltd (No 1)* [1981] HCA 20; (1981) 147 CLR 246, 248 (Gibbs CJ), 256 (Mason J). Ruling that the attempted appeal there to the High Court was incompetent (as the default judgment sought to be appealed against was interlocutory, not final, in character), Sir Harry Gibbs observed at 248:

... An order refusing to set aside a default judgment does not as a matter of law finally dispose of the rights of the parties, for it is open to the disappointed defendant to apply again to have the judgment set aside.

His Honour was referring to *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423, 440.

- 42 In *Bienstein v Bienstein* [2003] HCA 7; (2003) 195 ALR 225, McHugh, Kirby and Callinan JJ commented on the issue of whether, for the purposes of an appeal, an order is final or interlocutory at [25]:

The usual test for determining whether an order is final or interlocutory is whether the order, as made, finally determines the rights of the parties. The test requires the appellate court to look at the consequences of the order itself and to ask whether it finally determines the rights of the parties in a principal cause pending between them. Accordingly, orders refusing to set aside a default judgment or refusing to grant an extension of time are not final judgments because the unsuccessful party could make a further application for the same relief, even though such an application might have very little prospect of success.

- 43 The issue of whether an interlocutory, as opposed to a final order, may be the subject of an appeal to the Full Bench arose for consideration in the decision of the Industrial Appeal Court in *Anderson*. In that case, it was held that s 84 (as it was then) precluded an appeal to the Full Bench from a decision that did not finally determine the proceedings. The court (Olney and Rowland JJ; Franklin J agreeing), held that in s 84(1) of the *Act*, 'decision' did not include a finding, ruling or determination by the Industrial Magistrates Court that did not finally determine the matter between the parties to the proceedings. In doing so, the court held that a 'finding' as defined in s 7 of the *Act*, which applies to appeals to the Full Bench from decisions of the Commission under s 49 of the *Act*, had no application to appeals from decisions of the Industrial Magistrates Court under s 84 of the *Act*.
- 44 In *The Governing Council of North Metropolitan TAFE v State School Teachers Union of WA* [2018] WAIRC 00746; (2018) 98 WAIG 1210, the Full Bench considered an appeal from a decision of an Industrial Magistrate where an interim order was made under ss 83(5) and (7) of the *Act*, in relation to proceedings brought by the union alleging that the employer had contravened an industrial agreement when taking disciplinary action against an employee. The employer lodged an appeal under s 84 of the *Act* to the Full Bench, seeking to overturn the order made by the court. The Union made an application to the Full Bench to the effect that the appeal was incompetent and sought its dismissal. The grounds of the application to dismiss being that the interim order made at first instance was not a 'decision' for the purposes of s 84, as only orders finally disposing of the proceedings may be the subject of such an appeal.
- 45 After considering *Anderson* and subsequent amendments to the *Act* to insert ss 83(5) and (7), Smith AP (as she then was) said at [37] - [46] as follows:
- 37 The subsequent enactment of s 83(5) and s 83(7) (by s 155(1) of the *Labour Relations Reform Act 2002* (WA)) conferring the power to make orders for the purpose of preventing any further (future) contravention or failure to comply with a provision of an instrument does not, in my respectful opinion, materially affect the role of the Industrial Magistrate's Court from the role of the Industrial Magistrate considered in *Anderson v Pope* in 1986. The role of the Industrial Magistrate's Court in 2018 continues as a court vested with the power to enforce instruments by making limited coercive orders.
- 38 Section 83 confers jurisdiction on the Industrial Magistrate's Court to enforce instruments, including an industrial agreement. The power to enforce under s 83 is not a power at large to resolve disputes between parties. It is notable that proceedings instituted by way of an originating claim are penal in nature; that is they are claims for civil enforcement of provisions of instruments by primarily the imposition of a penalty.
- 39 The mere filing of a discrete application for an interim order does not have the effect at law of the creation of a substantive application. An application for an interim order under s 83(7) cannot be made unless a substantive application has been instituted under s 83(1).
- 40 Although the interim order in this matter was made following a separate application made by the union in M 123 of 2018 and the Industrial Magistrate's Court determined the application by making an interim order on 9 August 2018, it cannot be said that the interim order does not constitute a 'finding' within the meaning of s 7(1) of the IR Act:
- (a) Firstly, pursuant to s 83(7) an interim order can only be made pending final determination of an application made under s 83(1) (that is the substantive application for enforcement). A decision on an application for an interim order by operation of s 83(7) made in the course of proceedings does not and cannot operate to finally decide the matter in s 83(1). Consequently, it follows therefore that an interim order made pursuant to s 83(7) is a 'finding' within the meaning of s 7(1) of the IR Act.
- (b) Secondly, the primary function of the Industrial Magistrate's Court under s 83 is to decide and determine the substantive application by making final orders. An interim order made under s 83(7) cannot operate as a final order.
- 41 The test for determining whether an order is final is whether an order finally determines the rights of the parties and requires a court or tribunal in determining this question to have regard to the legal rather than the practical effect of the order: *Carr v Finance Corporation of Australia Ltd* (1980) 147 CLR 246, 248 (Gibbs, J); *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767; *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232.
- 42 In *Metcalf v Permanent Building Society (in liq)* (1993) 10 WAR 145, Murray J, with whom Rowland and Seaman JJ agreed, observed in relation to the distinction between final and interlocutory orders (149):

It is clear I think, that such an order is not final, but merely interlocutory, because it is not such as to finally determine the rights of the parties in a principal, rather than subsidiary, cause pending between them. It is clear that more remains to be done before the final resolution of the issues between the parties is achieved. This is not a case which requires attention to any fine distinctions or which requires any refinement of the test broadly formulated above. Expressed in those terms the test has

been accepted as flowing from decisions of the High Court in a number of recent decisions in this Court: see *Ex parte Stiles* (1989) 2 WAR 270 at 274-275; *Biala Pty Ltd v Mallina Holdings Ltd* (1989) 2 WAR 381 at 387-388; *Michael v Freehill Hollingdale & Page* (1990) 3 WAR 223 at 228; *Lewandowski v Lovell* (1991) 4 WAR 311 at 312-314.

43 Thus, it is immaterial that whilst an interim order is in force it has force and effect which if steps are required to be taken to comply with an order could result in expense to be paid by a person, such as the payment of wages to an employee.

44 As the respondent points out in its supplementary submissions filed on 7 September 2018, the order made by the Industrial Magistrate was plainly not an order to finally determine the rights of the parties. The orders:

- (a) were expressed to apply only 'until the hearing and determination of the claimant's claim for relief or further order';
- (b) provided the parties with liberty to apply;
- (c) were made pursuant to the power in s 83(7) to make interim orders 'pending the final determination of the application';
- (d) included procedural orders programming the matter to a final hearing, such as by listing the matter for a pre-trial conference and a final hearing.

45 It would be an odd result if an appeal to the Full Bench would lie as of right to the Full Bench of the Commission against an interim order made by the Industrial Magistrate's Court, pursuant to s 83(7) of the IR Act, whereas an appeal against an interim order against a decision of the Commission does not lie as of right under s 49 of the IR Act. This is because pursuant to s 49(2a) an appeal does not lie to the Full Bench from a decision of the Commission that is a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.

46 For these reasons, I am of the opinion that the appeal is incompetent and an order should be made that the appeal be dismissed.

46 Senior Commissioner Kenner (as he then was) came to the same conclusion as Smith AP at [72] - [88]. Commissioner Matthews dissented.

47 The decision of the Full Bench was taken on appeal to the Industrial Appeal Court by the employer: *The Governing Council of North Metropolitan TAFE v State School Teachers Union of WA* [2019] WASCA 120; (2019) 99 WAIG 1378. A ground of appeal was that the Full Bench was in error in concluding that an interim order made by the Industrial Magistrates Court under s 83(5) and (7) of the *Act*, may not be the subject of an appeal to the Full Bench under s 84 of the *Act*. However, after the decision of the Full Bench was delivered, but before the appeal to the Industrial Appeal Court was commenced, the underlying dispute between the parties was settled. The Union discontinued its claim at first instance and took no part in the proceedings before the court.

48 Justice Le Miere (Buss and Murphy JJ agreeing) held that the appeal was moot for these reasons and that in the absence of a contradictor, the court should not finally decide the appeal and that it should be dismissed. In doing so however, Le Miere J suggested, in considering the appellant's arguments, that they had some substance and that an interim order made under ss 83(5) and (7) of the *Act*, on its face was an 'order' for the purposes of s 84(1) of the *Act*. Given the majority decision of the Full Bench however, the court declined to decide the issue as there was no opposing argument before it.

49 The issue arising before the Full Bench and the Industrial Appeal Court in the *North Metropolitan TAFE* cases is not on all fours with the present matter. However, in the absence of the decision of the court in *Anderson* being reconsidered, it is binding on the Full Bench and must be followed. As was emphasized by Smith AP in *North Metropolitan TAFE* at [41], when considering the nature of orders under appeal, it is the legal rather than the practical effect of an order that is to be considered when characterizing an order as interlocutory or final. Given that a default judgment order may be set aside by the court under reg 8 of the *Regulations*, and even if such application is refused, it may be met with a further, subsequent application to set it aside, such orders cannot be regarded as a final decision for the purposes of s 84(1) of the *Act*. Accordingly, the decision of the learned Industrial Magistrate, the subject of the appeal in this matter must be regarded as interlocutory, and one that does not finally decide the rights of the parties. Applying *Anderson*, as adopted and applied by the Full Bench in *North Metropolitan TAFE*, the appeal is incompetent, and it must be dismissed.

50 The respondent made detailed written submissions on the merits of setting aside the default judgment, in the event the Full Bench was not persuaded on the jurisdictional issue, and if the appeal were to be taken as an application to set the decision aside. We refrain from considering and determining these issues, lest there be further proceedings between the parties, especially in circumstances where Ms Hui is not represented. Those matters are best left to another occasion. Similarly, the application by Ms Hui to tender new evidence is also unnecessary to determine.

Conclusion

51 The appeal is dismissed.

2022 WAIRC 00729

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	Y.D HUI	APPELLANT
	-and-	
	BRIAN EDWARD RAVENSCROFT	RESPONDENT
CORAM	FULL BENCH	
	CHIEF COMMISSIONER S J KENNER	
	COMMISSIONER T EMMANUEL	
	COMMISSIONER T B WALKINGTON	
DATE	WEDNESDAY, 19 OCTOBER 2022	
FILE NO/S	FBA 9 OF 2021	
CITATION NO.	2022 WAIRC 00729	
Result	Appeal dismissed	
Appearances		
Appellant	In person and with her Dr A E Imam	
Respondent	Mr J Carroll of counsel and with him Ms I Inkster of counsel	

Order

HAVING heard Ms Y D Hui on her own behalf, and with her Dr A E Imam and Mr J Carroll 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.]

COMMISSION IN COURT SESSION—Awards/Agreements—Variation of—

2022 WAIRC 00716

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	COMMISSION'S OWN MOTION	APPLICANT
	-v-	
	(NOT APPLICABLE)	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER	
	SENIOR COMMISSIONER R COSENTINO	
	COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 14 OCTOBER 2022	
FILE NO/S	CICS 23 OF 2022	
CITATION NO.	2022 WAIRC 00716	
Result	Order issued	
Representation		
	Mr B Entrekin on behalf of the Hon Minister for Industrial Relations	
	Mr M Lee on behalf of the Health Services Union of Western Australia	
	Mr C Dunne on behalf of the Australian Workers Union, Western Australian Branch, Industrial Union of Workers	
	Dr T Dymond on behalf of UnionsWA	

Order

HAVING heard Mr B Entrekin on behalf of the Hon Minister for Industrial Relations, Mr M Lee on behalf of the Health Services Union of Western Australia, Mr C Dunne on behalf of the Australian Workers Union, Western Australian Branch and Dr T Dymond on behalf of UnionsWA, the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the herein application be joined and be heard and determined with applications CICS 5 of 2022 to CICS 22 of 2022.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.] For and On behalf of the Commission In Court Session.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2022 WAIRC 00750

TEACHERS (PUBLIC SECTOR PRIMARY AND SECONDARY EDUCATION) AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DEPARTMENT OF EDUCATION

APPLICANT

-v-

STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

THURSDAY, 27 OCTOBER 2022

FILE NO/S

APPL 30 OF 2022

CITATION NO.

2022 WAIRC 00750

Result

Award varied

Representation

Applicant

Mr P McCarney (as agent)

Respondent

Ms P Byrne (as agent)

Order

HAVING heard Mr P McCarney as agent on behalf of the applicant and Ms P Byrne as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the *Teachers (Public Sector Primary and Secondary Education) Award 1993* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the earliest possible time from the date of this Order.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

SCHEDULE

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

2. – ARRANGEMENT

PART 1. – APPLICATION OF AWARD

1. – Title
- 1B. – Minimum Adult Award Wage
2. – Arrangement
3. – Area of Operation and Scope
4. – Term of Award
5. – Definitions

PART 2. – CONTRACT AND MODES OF EMPLOYMENT

6. – General Employment
7. – Permanency and Tenure
8. – Probation
9. – Part-Time Employment
10. – Casual Employment
11. – Termination of Employment

PART 3. – TEACHERS

12. – Teachers – Duties, Responsibilities and Attendance Hours

- 13. – Teachers – Face to Face Teaching
- 14. – Teachers – Duties Other Than Teaching (DOTT) Time
- 15. – Teacher Career/Classification Structure

PART 4. – SCHOOL ADMINISTRATORS

- 16. – School Administrators – Duties And Responsibilities
- 17. – Commencement of School Year

PART 5. – DIRECTORS SCHOOLS

- 18. – Directors Schools

PART 6. – EDUCATION AND SCHOOL DEVELOPMENT OFFICERS

- 19. – Education and School Development Officers

PART 7. – SCHOOL PSYCHOLOGISTS, SENIOR SCHOOL PSYCHOLOGISTS AND ADVANCED SKILLS SCHOOL PSYCHOLOGISTS

- 20. – School Psychologists

PART 8. – SWIMMING INSTRUCTORS

- 21. – Swimming Instructors

PART 9. – SALARIES AND INCREMENTS

- 22. – Salaries
- 23. – Payment of Salaries
- 24. – Recovery of Overpayments
- 25. – Salary Packaging
- 26. – Annual Increments
- 27. – Annualisation of Summer Vacation Loading

PART 10. – PUBLIC HOLIDAYS AND LEAVE OF ABSENCE

- 28. – Public Holidays
- 29. – Bereavement Leave
- 30. – Candidates for Parliament
- 31. – Carer's Leave
- 32. – Cultural/Ceremonial Leave
- 33. – Defence Force Reserve Leave
- 34. – Emergency Services Leave
- 35. – International Sporting Events Leave
- 36. – Leave Without Pay
- 37. – Local Government Leave
- 38. – Long Service Leave
- 39. – Parental Leave
- 40. – Short Leave
- 41. – Sick Leave
- 42. – Student Vacation Periods and Annual Leave
- 43. – Study/Examination Leave
- 44. – Witness and Jury Service
- 45. – Workers' Compensation – Effect on Leave
- 46. – Blood and Plasma Leave

PART 11. – ASSOCIATED ALLOWANCES

- 47. – Acting Appointments for Salary Increments
- 48. – Allowances Payable on Appointment, Promotion or Transfer
- 49. – Camping Allowance
- 50. – Country Incentives Allowance
- 51. – Disturbance Allowance
- 52. – Excess Travelling Allowance
- 53. – Higher Duties Allowance
- 54. – Locality Allowance
- 55. – Motor Vehicle Allowance
- 56. – Property Allowance
- 57. – Relieving Allowance
- 58. – Removal Allowance
- 59. – Student Vacation Travel Concessions
- 60. – Travelling Allowance

PART 12. – CONSULTATION AND DISPUTE RESOLUTION

- 61. – Notification of Change
- 62. – Union Facilities for Union Representatives
- 63. – Leave to Attend Union Business

- 64. – Trade Union Training Leave
- 65. – Right of Entry and Inspection by Authorised Representatives
- 66. – Keeping of and Access to Employment Records
- 67. – Dispute Settlement Procedure

PART 13. – SCHEDULES

- Schedule A – Parties
- Schedule B – Salaries
- Schedule C – Travelling, Transfer and Relieving Allowance
- Schedule D – Camping Allowance
- Schedule E – Locality Allowance
- Schedule F – Motor Vehicle Allowance
- Schedule G – Student Vacation Travel Concessions

2. Clause 5. – Definitions:

A. Delete the definition of “Dependant” and insert the following in lieu thereof:

“Dependant” means:

- (a) for the purposes of Clause 54. – Locality Allowance of this Award, in relation to an employee:
 - (i) a partner who is resident within the State and is not in receipt of an income exceeding the Dependent (Invalid and Carer) Tax Offset (DICTO), as set by the Australian Taxation Office, or its replacement as determined by the Australian Taxation Office, for the purposes of the dependent spouse tax offset; and/or
 - (ii) a student child under the age of eighteen (18) years who is not in receipt of income exceeding the Dependent (Invalid and Carer) Tax Offset (DICTO), as set by the Australian Taxation Office, or its replacement as determined by the Australian Taxation Office, for the purposes of the dependent spouse tax offset.
- (b) for the purpose of the remainder of the Award in relation to an employee:
 - (i) a partner;
 - (ii) child/children; and/or
 - (iii) other dependent family
 who reside with the employee and who rely on the employee for support.

B. Delete the definition of “Locality” and insert the following in lieu thereof:

“Locality” means:

- (a) for the purpose of Clause 54. – Locality Allowance, a locality specified in Schedule E – Locality Allowance of this Award;
- (b) for the purpose of Clause 48. – Allowances Payable on Appointment, Promotion or Transfer and Clause 56. – Property Allowance of this Award, in relation to an employee:
 - (i) the Metropolitan Schools District; or
 - (ii) outside the Metropolitan Schools District, that area within a radius of fifty (50) kilometres from an employee’s headquarters.

C. Delete the definition of “Untrained Teacher” and insert the following in lieu thereof:

“Untrained Teacher” means a person who does not have a Teacher training qualification as determined by the Employer.

3. Clause 12. – Teachers – Duties, Responsibilities and Attendance Hours: Delete subclause (6) and insert the following in lieu thereof:

- (6) Arrangements for the undertaking of duties outside the normal school day or normal operating hours will be the subject of consultation. Any Teacher who is aggrieved about any requirement to undertake duties outside the normal school day or normal operating hours may choose to access Clause 67 – Dispute Settlement Procedure of this Award.

4. Clause 19. – Education and School Development Officers: Delete paragraph (b) of subclause (2) and insert the following in lieu thereof:

- (b) The Department has the discretion to close the workplaces of Education Officers over the Christmas – New Year period.

5. Clause 20. – School Psychologists: Delete subclause (3) of this clause and insert the following in lieu thereof:

- (3) Travel
Travel will be paid at rates as per Clause 60. – Travelling Allowance of this Award.

6. Clause 41. – Sick Leave:

A. Delete subparagraph (iv) of paragraph (a) of subclause (7) and insert the following in lieu thereof:

- (iv) The implementation of subclause (7) of clause 41 involves the following steps:

B. Delete paragraph (c) of subclause (7) and insert the following in lieu thereof:

- (c) Written notice as to the medical appointment will be provided to the employee following the expiry of the notice period as provided in clause 41(7)(a)(iv)(cc) or following the conclusion of the review process as provided by clause 41(7)(iv).

7. Clause 46. – Blood and Plasma Leave: Insert a new clause “46. – Blood and Plasma Leave” as follows:

46. – BLOOD AND PLASMA LEAVE

- (1) Subject to operational requirements, officers shall be entitled to absent themselves from the workplace in order to donate blood or plasma in accordance with the following general conditions:
- (a) prior arrangements with the supervisor have been made and at least two (2) days’ notice has been provided; or
- (b) the officer is called upon by the Red Cross Blood Centre.
- (2) The notification period shall be waived or reduced where the supervisor is satisfied that operations would not be unduly affected by the officer’s absence.
- (3) The officer shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.
- (4) Officers shall be entitled to two (2) hours of paid leave per donation for the purpose of donating blood to the Red Cross Blood Centre.

8. Clause 46. – Acting Appointments for Salary Increments: Delete this clause and insert the following in lieu thereof:

47. – ACTING APPOINTMENTS FOR SALARY INCREMENTS

- (1) This clause provides for the recognition of higher duties allowance in the 18 months prior to substantive appointment (commonly referred to as the 12 in 18 month principle), as follows:
- (a) Where a employee has relevant acting service which aggregates less than 12 months, as at the date of promotion, on the completion of a further period of service which when added to the aggregate of the relevant acting service totals a period of 12 months, that employee may progress to the second or subsequent salary increment as the case may be.
- (b) Where a employee has completed 12 months acting in 18 months at a particular increment point, the employee may be appointed to the next higher increment point at the date of promotion.
- (c) Where a employee has only acted in a position classified higher than that to which the employee is being promoted, that acting may be aggregated using the principle outlined in clause 47(1)(b) above to allow the promotion to take effect at the equivalent incremental point in the level within the salary range applicable to the promotion.

9. Clause 47. – Allowances Payable on Appointment, Promotion or Transfer: Delete this clause and insert the following in lieu thereof:

48. – ALLOWANCES PAYABLE ON APPOINTMENT, PROMOTION OR TRANSFER

- (1) An employee who is required to travel to take up a position in another locality will be reimbursed reasonable accommodation and meal expenses for the employee, partner and dependants during the course of travelling from one locality to another in accordance with the rates prescribed in Column A, Items (4), (5), (6), (9) or (10) of Schedule C – Travelling, Transfer and Relieving Allowance of this Award as the case may require, provided that:
- (a) Where the locality of the new position is situated at a radius of 50 kilometres or less from the locality where the employee was previously stationed, or usually resident in the case of an initial appointment, reimbursement of the abovementioned expenses, if any, is at the discretion of the Employer.
- (b) Where a partner referred to in this clause is also an employee who was appointed, transferred or promoted to the same locality as the employee, such partner may not claim for reimbursement of expenses incurred on behalf of the partner and dependents and claimed by the employee.
- (2) An employee who takes up a position in another locality where Government or private residential accommodation is unavailable and hotel or motel accommodation is utilised, will be paid an allowance in accordance with the rates prescribed in Column A, Items (4), (5) or (6) in Schedule C. – Travelling, Transfer and Relieving Allowance of this Award as the case may require up to a maximum period of 14 days after arrival at the new locality.
- (3) When Government residential accommodation is unavailable in a locality and an employee is unable to obtain suitable alternative accommodation within the period of 14 days mentioned in clause 48(2), the Employer is to determine an appropriate rate of reimbursement for accommodation, meal expenses and incidental expenses, having regard for the cost of hotel or motel accommodation and normal reasonable living expenses for the employee and the employee’s partner and dependants.
- (4) An employee who takes up a position in a locality where Government residential accommodation is available is not entitled to reimbursement under clauses 48(2) and 48(3) of this clause except where entry or re-entry into such Government residential accommodation is delayed through circumstances beyond the employee’s control. Such employee will, subject to the production of receipts, be reimbursed actual reasonable accommodation and meal expenses for the employee, partner and dependants less a deduction for normal living expenses prescribed in Items (15) and (16) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award.
- (5) Where an employee’s Government residential accommodation is not available at the date of appointment, transfer or promotion, the Employer will reimburse the employee for any cost of storage and insurance of the employee’s furniture made reasonably necessary because of such delay.

- (6) Payment of the allowances under this clause does not apply to employees transferred at their own expense in accordance with the provisions of *Part 5 of the Public Sector Management Act 1994*, or to an employee who seeks a transfer after a period of service of less than two (2) years in a particular locality, unless payment of an allowance is approved by the Employer.
- (7) Where it can be shown by the employee that the allowances payable under clauses 48(1), 48(2) and 48(3) are insufficient to meet the actual costs incurred by the employee, a higher rate of reimbursement appropriate to the circumstances as determined by the Employer applies.
- (a) Claims under this clause must be submitted to the Employer within 12 months of the date the costs or expenses are incurred by the employee.
- (b) Any dispute arising out of the rate of reimbursement fixed pursuant to clause 48(7) of this clause may be referred to the Commission.

10. Clause 48. – Camping Allowance: Delete this clause and insert the following in lieu thereof:

49. – CAMPING ALLOWANCE

- (1) For the purposes of this clause the following expressions mean:
- “Camp of a permanent nature” means single room accommodation in skid mounted or mobile type units, caravans, or barrack type accommodation where the following are provided in the camp:
- (a) Water is freely available;
- (b) Ablutions including a toilet, shower or bath, and laundry facilities;
- (c) Hot water system;
- (d) A kitchen, including a stove and table and chairs, except in the case of a caravan equipped with its cooking and messing facilities;
- (e) An electricity or power supply; and
- (f) Beds and mattresses except in the case of caravans containing sleeping accommodation.
- For the purpose of this definition, caravans located in caravan parks or other locations where the above are provided are deemed a camp of a permanent nature;
- “House” means a house, duplex or cottage including transportable type accommodation, which is self contained and in which the facilities prescribed for “camp of a permanent nature” are provided;
- “Other than a Permanent Camp” means a camp where any of the above are not provided.
- (2) An employee who is stationed in a camp of a permanent nature, where facilities of a good standard are provided, will be paid the appropriate allowance prescribed by Item (1) or Item (2) of Schedule D – Camping Allowance for each day spent camping, provided that no such allowance is paid when an employee occupies a government house within or near the precincts.
- (3) An employee who is stationed in a camp – other than a permanent camp – or is required to camp out, will be paid the appropriate allowance prescribed by Item (3) or Item (4) of Schedule D – Camping Allowance for each day spent camping.
- (4) This clause is read in conjunction with Clause 48. – Allowances Payable on Appointment, Promotion or Transfer and Clause 57. – Relieving Allowance of this Award for the purpose of paying allowances.
- (5) The camping allowance is not paid for any period in respect of which travelling, transfer or relieving allowances are paid.
- (6) Where portions of a day are spent camping, the formula contained in Clause 60 – Travelling Allowance of this Award is used for calculating the portion of the allowance to be paid for the day.
- (7) For the purposes of this clause, arrival at headquarters means the time of actual arrival at camp and departure from headquarters means the time of actual departure from camp or the time of ceasing duty in the field subsequent to breaking camp, whichever is the later.
- (8) Whenever an employee provided with a caravan is obliged to park the caravan at a caravan park, the employee will be reimbursed the rental charges paid to the authority controlling the caravan park, in addition to the payment of camping allowance.

11. Clause 49. – Country Incentives Allowance: Delete the title of this clause and insert the following in lieu thereof:

50. – COUNTRY INCENTIVES ALLOWANCE

12. Clause 50. – Disturbance Allowance: Delete the title of this clause and insert the following in lieu thereof:

51. – DISTURBANCE ALLOWANCE

13. Clause 51. – Excess Travelling Allowance: Delete this clause and insert the following in lieu thereof:

52. – EXCESS TRAVELLING ALLOWANCE

- (1) An employee, who is appointed, promoted or transferred to a school outside the Metropolitan Schools District, and is unable to obtain suitable residential accommodation within 42 kilometres of the school, will be reimbursed for any travel to and from the school in excess of 42 kilometres each way undertaken in the employee’s own motor vehicle in accordance with Clause 55 and Schedule F – Motor Vehicle Allowance of this Award.

- (2) The Employer, where written grounds are provided by the employee, may put into place arrangements to address the particular extenuating circumstances surrounding suitable residential accommodation.

14. Clause 52. – Higher Duties Allowance: Delete this clause and insert the following in lieu thereof:

53. – HIGHER DUTIES ALLOWANCE

- (1) An employee continuously employed for more than five (5) consecutive days acting in a position and required to perform the full duties and responsibilities that are higher than prescribed for the employee's substantive position is paid, subject to clause 53(2), for the full period of acting the salary to which the employee would be entitled if the employee held the position permanently.
- (2) Subject to clause 53(3), an employee referred to in clause 53(1) above who is employed in an acting capacity:
- (a) where an employee is required by the Department to undertake such higher duties before or after the appointment period the higher duties allowance will be paid.
 - (b) within two (2) weeks of the commencement of the school year and remains so employed for the remainder of the full school year, will be paid the higher salary from the date of taking up the position.
 - (c) within two (2) weeks of the commencement of the school year and for a lesser period than the remainder of the full school year, will be paid the higher salary for the total period, including any student vacations which may fall within that period.
 - (d) more than two (2) weeks after the commencement of the school year, will be paid the higher salary for the total period, including any student vacations which may fall within that period.
 - (e) in all instances above there is an entitlement to payment of higher salary over the summer student vacation period at a pro-rata rate.
 - (f) from term four (4) and continues into term one (1) of the following year, will continue to be paid higher duties over the summer student vacation period.
- (3) An employee referred to in clause 53(1) will not be paid the higher salary for any period of absence, on long service leave or for sick leave, of more than two (2) weeks duration.
- (4) Where the full duties of a higher position are performed by two (2) or more employees on an acting basis, each must be paid an allowance determined by the Employer.
- (5) Subject to clause 53(6), an employee who is directed to act in a higher position but who is not required to carry out the full duties of the position and/or accept the full responsibilities, must be paid such proportion of the higher duties allowance as the duties and responsibilities performed by him/her bear to the full duties and responsibilities of the higher position.
- (6) The employee must be informed, prior to the commencement of acting in the higher position, of the duties and responsibilities to be performed and the allowance to be paid.

15. Clause 53. – Locality Allowance: Delete the title of this clause and insert the following in lieu thereof:

54. – LOCALITY ALLOWANCE

16. Clause 54. – Motor Vehicle Allowance: Delete this clause and insert the following in lieu thereof:

55. – MOTOR VEHICLE ALLOWANCE

- (1) For the purposes of this clause the following expressions mean:
- “A year” means 12 months commencing on the first day of July and ending on the thirtieth day of June next following;
- “Metropolitan Area” means that area within a radius of 50 kilometres from the Perth City Railway Station;
- “Qualifying Service” includes all service in positions where there is a requirement as a term of employment to supply and maintain a motor vehicle for use on official business but excludes all absences which effect the entitlements prescribed in Clause 59 – Student Vacation Travel Concessions of this Award.
- “Rest of the State” means that area South of 23.5° south latitude, excluding the metropolitan area and the South West land division.
- “Southwest Land Division” means the southwest land division as defined by section 6 – schedule 1 of the *Land Administration Act 1997* excluding the area contained within the metropolitan area;
- “Term of Employment” means a requirement made known to the employee at the time of applying for the position by way of publication in the advertisement for the position, written advice to the employee contained in the offer for the position or oral communication at interview by an interviewing employee and such requirement is accepted by the employee either in writing or orally;
- (2) Allowance for Employees Required to Supply and Maintain a Vehicle as a Term of Employment
- (a) An employee who is required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment will be reimbursed in accordance with the appropriate rates set out in Part 1 of Schedule F – Motor Vehicle Allowance of this Award for journeys travelled on official business and approved by the Employer.
 - (b) For the purposes of this clause, school business includes: measuring bus routes, travelling between dispersed schools for the purpose of teaching when not part of the usual duties of the employee, transporting sick school

children, collecting official mail and stock, school banking, school sports meetings, school camps, field trips, site visits and in-service training courses.

- (c) An employee who is reimbursed under clause 55(2) will also be subject to the following conditions:
- (i) an employee will be reimbursed with the appropriate rates set out in Part 1 of Schedule F. – Motor Vehicle Allowance of this Award for the distance travelled from the employee’s residence to the place of duty and for the return distance travelled from place of duty to residence except on a day where the employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day;
 - (ii) where an employee in the course of a journey travels through two or more separate areas, reimbursement will be made at the appropriate rate applicable to each of the areas traversed as set out in Part 1 of Schedule F – Motor Vehicle Allowance of this Award;
 - (iii) where an employee does not travel in excess of 4,000 kilometres in a year an allowance calculated by multiplying the appropriate rate per kilometre by the difference between the actual distance travelled and 4,000 kilometres will be paid to the employee provided that where the employee has less than 12 months qualifying service in the year then the 4,000 kilometre distance will be reduced on a pro rata basis and the allowance calculated accordingly;
 - (iv) where a part time employee is eligible for a payment of an allowance under subparagraph (iii) of this clause such allowance is calculated on the proportion of total hours worked in that year by the employee to the annual standard hours had the employee been employed on a full time basis for the year;
 - (v) an employee who is required to supply and maintain a motor vehicle for use on official business is excused from this obligation in the event of their vehicle being stolen, consumed by fire, or suffering a major and unforeseen mechanical breakdown or accident, in which case all entitlement to reimbursement ceases while the employee is unable to provide the motor vehicle or a replacement; and
 - (vi) the Employer may elect to waive the requirement that an employee supply and maintain a motor vehicle for use on official business, but three (3) month’s written notice of the intention to do so must be given to the employee concerned.

(3) Allowance for Employees Relieving Employees Subject to Clause 55(2)

- (a) An employee not required to supply and maintain a motor vehicle as a term of employment who is required to relieve an employee required to supply and maintain a motor vehicle as a term of employment will be reimbursed all expenses incurred in accordance with the appropriate rates set out in Part 1 of Schedule F – Motor Vehicle Allowance of this Award for all journeys travelled on official business and approved by the Employer where the employee is required to use the vehicle on official business whilst carrying out the relief duties.
- (b) For the purposes of clause 55(3)(a) an employee will be reimbursed all expenses incurred in accordance with the appropriate rates set out in Part 1 of Schedule F – Motor Vehicle Allowance of this Award for the distance travelled from the employee’s residence to place of duty and the return distance travelled from place of duty to residence except on a day where the employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day.
- (c) Where an employee in the course of a journey travels through two or more separate areas, reimbursement will be made at the appropriate rate applicable to each of the areas traversed as set out in Part 1 of Schedule F. – Motor Vehicle Allowance of this Award.
- (d) For the purpose of this clause the allowance provided in clause 55(2)(c) (iii) and (iv) does not apply.

(4) Allowance for Other Employees Using Vehicle on Official Business

- (a) An employee who is not required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment, but when requested by the Employer voluntarily consents to use the vehicle for journeys travelled on official business approved by the Employer will be reimbursed all expenses incurred in accordance with the appropriate rates set out in Part 2 and Part 3 of Schedule F. – Motor Vehicle Allowance of this Award.
- (b) For the purpose of clause 55(4)(a) an employee is not entitled to reimbursement for any expenses incurred in respect to the distance between the employee’s residence and headquarters and the return distance from headquarters to the residence.
- (c) Where an employee in the course of a journey travels through two (2) or more separate areas, reimbursement will be made at the appropriate rate applicable to each of the areas traversed as set out in Part 2 and Part 3 of Schedule F. – Motor Vehicle Allowance of this Award.

(5) Allowance for Towing Departmental Caravan or Trailer

In cases where employees are required to tow Departmental caravans on official business, the additional rate is 6.5 cents per kilometre. When Departmental trailers are towed on official business the additional rate is 3.5 cents per kilometre.

- (6) An employee who is required to accompany school groups attending education and sporting functions when public transport is used will be reimbursed the cost of the fare incurred.

- (7) Employees will be reimbursed all expenditure outlaid while using a Government vehicle on approved Departmental business.
17. **Clause 55. – Property Allowance: Delete this clause and insert the following in lieu thereof:**
56. – PROPERTY ALLOWANCE
- (1) For the purposes of this clause:
“Prescribed Expenses” means:
- (a) Legal fees paid to a solicitor or in lieu thereof fees charged by a settlement agent, for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed will be as set out in the non-contentious business cost determination made under section 210 of the *Legal Practice Act 2003*.
 - (b) Disbursements duly paid to a solicitor or a settlement agent necessarily incurred in respect of the sale or purchase of the residence.
 - (c) Real estate agent’s commission in accordance with that fixed by the Real Estate and Business Agents’ Supervisory Board, acting under section 61 of the *Real Estate and Business Agents’ Act 1978*, duly paid to an agent for services rendered in the course of and incidental to the sale of the property, the maximum fee to be claimed is 50 per cent as set out under Items (1) or (2) – Sales by Private Treaty or Items (1) or (2) – Sales by Auction of the Maximum Remuneration Notice.
 - (d) Stamp Duty.
 - (e) Fees paid to the Registrar of Titles or to the employee performing duties of a like nature and for the same purpose in another State of the Commonwealth.
 - (f) Expenses relating to the execution or discharge of a first mortgage.
 - (g) The amount of expenses reasonably incurred by the employee in advertising the residence for sale.
- (2) Subject to the exclusions expressed in this clause, when an employee is transferred or promoted from one locality to another, the employee is entitled to be paid a property allowance for reimbursement of prescribed expenses, as defined in clause 56(1) incurred:
- (a) in the sale of a residence in the employee’s former locality which, at the date on which the employee received notice of transfer to the new locality:
 - (i) the employee owned and occupied; or
 - (ii) the employee was purchasing under a contract of sale and occupying; or
 - (iii) the employee was constructing for personal occupation on a permanent basis on completion of construction;
 and
 - (b) in the purchase of a residence or land for the purpose of erecting a residence thereon for personal occupation on a permanent basis in the new locality.
- (3) An employee transferred at their own expense in accordance with the provisions of Part 5 of the *Public Sector Management Act 1994* and an employee who applies for and is granted a transfer after periods of service of less than two (2) years in a particular locality is not entitled to be paid a property allowance under this clause unless such payment is expressly approved by the Director General.
- (4) An employee is not entitled to the payment of a property allowance in respect of a sale or purchase within the terms of clause 56(2) that is effected more than 12 months after the date on which the employee took up duty in the new locality or after the date on which the employee received notification of transfer back to the former locality, provided that the Employer may in exceptional circumstances grant an extension of time for such period as is deemed reasonable.
- (5) An employee is not entitled to be paid a property allowance under clause 56(2)(b) unless that employee is entitled to be paid a property allowance under clause 56(2)(a) unless the employee can show that it is necessary to purchase a residence or land for the purpose of erecting a residence thereon in the new locality because of the transfer or promotion of the employee.
- (6) For the purposes of this clause, it is immaterial that the relevant transaction is made or entered into:
- (a) in the case of an employee with a partner solely, jointly or as a tenant in common with:
 - (i) the employee’s partner; or
 - (ii) a dependent relative; or
 - (iii) the employee’s partner and a dependent relative.
 - (b) in the case of any other employee solely or jointly or as a tenant in common with a dependent relative living with the employee.
- (7) Where an employee sells or purchases a residence jointly or as a tenant in common with another person or other persons, not being a person referred to in the immediately preceding clause, such employee will be reimbursed only the proportion of the prescribed expenses for which the employee is responsible.
- (8) An application by an employee for a property allowance must be accompanied by satisfactory evidence of the payment by the employee of the prescribed expenses.

- (9) The Employer is only liable for prescribed expenses in clause 56(1) as applicable to the Perth Median Price for housing. This amount is to be annually adjusted as of 30 September each year.

18. Clause 56. – Relieving Allowance: Delete this clause and insert the following in lieu thereof:

57. – RELIEVING ALLOWANCE

- (1) An employee who is required to take up duty away from headquarters on relief duty or to perform special duty, and necessarily resides temporarily away from the employee's usual place of residence will be reimbursed reasonable expenses on the following basis:
- (a) Where the employee:
- (i) is supplied with accommodation and meals free of charge; or
- (ii) is accommodated at a government institution, hostel or similar establishment and supplied with meals, reimbursement will be in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award.
- (2) Where employees are fully responsible for their own accommodation, meals and incidental expenses and hotel or motel accommodation is utilised:
- (a) For the first 42 days after arrival at the new locality, reimbursement will be in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award.
- (b) For periods in excess of 42 days after arrival in the new locality, reimbursement will be in accordance with the rates prescribed in Column B, Items (4) to (8) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award for employees with dependents or Column C, Items (4) to (8) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award for other employees - provided that the period of reimbursement under this clause can not exceed 49 days without the approval of the Employer.
- (3) Where employees are fully responsible for their own accommodation, meals and incidental expenses and other than hotel or motel accommodation is utilised, reimbursement will be in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award.
- (4) If an employee whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the employee will be paid in accordance with the appropriate rates prescribed in Clause 49 and Schedule D. – Camping Allowance of this Award for the duration of the period spent in camp and, in addition, will be paid a lump sum of \$157.00 to cover incidental personal expenses - provided that an employee cannot receive more than one lump sum of \$157.00 in any one period of three (3) years.
- (5) Reimbursement of expenses will not be suspended should an employee become ill whilst on relief duty, provided leave for the period of such illness is approved in accordance with the provisions of this Award and the employee continues to incur accommodation, meal and incidental expenses.
- (6) When an employee who is required to relieve or perform special duties, in accordance with clause 57(1) is authorised by the Employer to travel to the new locality in the employee's own motor vehicle, reimbursement for the return journey is as follows:
- (a) Where the employee will be required to maintain a motor vehicle for the performance of the relieving or special duties, reimbursement is in accordance with the appropriate rate prescribed by clause 55(2) of this Award.
- (b) Where the employee will not be required to maintain a motor vehicle for the performance of the relieving or special duties, reimbursement is on the basis of one half (½) of the appropriate rate prescribed by clause 55(2) of this Award - provided that the maximum amount of reimbursement cannot exceed the cost of the fare by public conveyance which otherwise would be utilised for such return journey.
- (7) Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred, an appropriate rate of reimbursement will be determined by the Employer.
- (8) The provisions of Clause 60. – Travelling Allowance of this Award does not operate concurrently with this clause to permit an employee to be paid allowances in respect of both travelling and relieving expenses for the same period - provided that, where an employee is required to travel on official business which involves an overnight stay away from the employee's fixed-term contract headquarters, the Employer may extend the periods specified in clause 57(2) by the time spent in travelling.
- (9) An employee who is directed to relieve another employee or to perform special duties away from the employee's usual headquarters and is not required to reside temporarily away from their usual place of residence will, if the employee is not in receipt of a higher duties or special allowance for such work, be reimbursed the amount of additional fares paid by the employee travelling by public transport to and from the place of fixed-term contract duty.

19. Clause 57. – Removal Allowance: Delete this clause and insert the following in lieu thereof:

58. – REMOVAL ALLOWANCE

- (1) An employee who is relocated in the ordinary course of appointment, promotion or transfer or on account of illness due to causes over which the employee has no control will be reimbursed:
- (a) the actual reasonable cost of conveyance of the employee, the employee's partner and dependants;

- (b) the actual reasonable cost of the packing and the conveyance of the employee's furniture, effects and appliances including insurance of such property whilst in transit;
 - (c) an allowance of \$525.00 for accelerated depreciation and extra wear and tear on furniture, appliances and effects.
Payment of this allowance to employees will be made on every appointment, promotion or transfer, provided that the Employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least \$3,143.00.
 - (d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of \$157.00.
Pets are defined as dogs, cats, birds or other domestic animals kept by the employee or the employee's dependants for the purpose of household enjoyment.
Pets do not include domesticated livestock, native animals or equine animals.
 - (e) Where in the circumstances it is reasonable to do so, the furniture, effects and appliances of the employee may be transported on two (2) separate dates not more than six (6) months apart.
- (2) An employee located outside the Metropolitan Schools District who resigns after serving not less than two (2) years in the locality is entitled to reimbursement of costs incurred in moving to the Metropolitan Schools District as provided in clause 58(1)(a) and (b) and to the allowance for accelerated depreciation prescribed in clause 58(1)(c). Where an employee has served for one (1) year in the locality and the employee's resignation takes effect at the end of the school year, such employee is entitled to reimbursement of costs in moving to the Metropolitan Schools District as prescribed in clause 58(1)(a) and (b). Otherwise an employee who resigns is not be entitled to any benefits under this clause unless the Employer so determines.
- (3) (a) An employee will be reimbursed the full freight charges necessarily incurred in respect of the removal of the employee's vehicle. If authorised by the Employer to travel to the new locality in the employee's own motor vehicle, the employee is, for all purposes, deemed to be in the course of their employment and will be reimbursed for the distance necessarily travelled outside the Metropolitan Schools District at the following rates.
- (i) Within District 1 at the rate of 0.5 of the appropriate rate of hire prescribed by Clause 55 – Motor Vehicle Allowance of this Award.
 - (ii) Within District 2 at the rate of 0.625 of the appropriate rate of hire so prescribed.
 - (iii) Within Districts 3 – 6 inclusive at the appropriate rate of hire so prescribed.
- (b) Subject to clause 58(3)(a) the employee is also entitled, where the Employer has authorised, to reimbursement as follows:
- (i) Where an employee or their dependants have more than one vehicle, and all the vehicles are to be relocated to the new residence, the cost of transporting or driving up to two vehicles is deemed to be part of the removal costs.
 - (ii) Where only one vehicle is to be relocated to the new residence, the employee may choose to transport a trailer, boat or caravan in lieu of the second vehicle. The employee may be required to show evidence of ownership of the trailer, boat or caravan to be transported.
- (4) The rates prescribed in clause 58(3) are paid subject to the following conditions:
- (a) the journey is by the shortest practical route;
 - (b) the reimbursement does not exceed the cost of the airfare for the employee, partner and dependants; and
 - (c) the reimbursement does not exceed the cost of the employee's airfare when the employee's family travels by other means.
- (5) Receipts must be produced for all sums paid.
- (6) The Employer may, in lieu of the cost of conveyance, authorise payment of an amount to compensate for loss in any case where an employee with prior approval disposes of the employee's furniture, appliances and effects instead of removing them to the employee's new headquarters, provided that such payment must not exceed the sum which would have been paid if such furniture, appliances and effects had been removed by the cheapest form of transport available.
- (7) Where an employee is transferred or promoted and the accommodation provided is furnished and, as a consequence, it is reasonably necessary for the employee to store all or part of the furniture owned by the employee, the actual cost of such storage and insurance as approved and authorised by the Employer will be reimbursed.
- (8) Where an employee of single status is transferred or appointed to a locality and such status is subsequently changed, the employee will be reimbursed for reasonable freight charges for any reasonable additional furniture movement required by the employee.
- (9) All employees appointed, promoted or transferred to localities north of 30 degrees latitude must have included in the air ticket both to and from the locality:
- (a) an allowance for 25 kilograms excess baggage. An excess baggage allowance of 16 kilograms is to be provided for children under three (3) years of age who are not fare paying passengers.

(b) in addition, employees appointed, promoted or transferred to isolated schools specified in Schedule C. – Travelling, Transfer and Relieving Allowance of this Award are granted an additional five (5) kilograms excess baggage allowance.

(10) Where a partner referred to in this clause is also an employee who is appointed, promoted or transferred to the same locality as the employee, a partner may not claim allowances for reimbursement of expenses incurred on behalf of the partner and dependants and claimed for by the employee.

(11) Payment of the allowances under this clause does not apply to employees transferred at their own expense in accordance with the provisions of Part 5 of the *Public Sector Management Act 1994*, or to employees who seek transfers after periods of service of less than two (2) years in a particular locality unless payment of an allowance is approved by the Employer.

(12) Claims under this clause must be made within 12 months of the appointment, promotion or transfer.

20. Clause 58. – Student Vacation Travel Concession: Delete this clause and insert the following in lieu thereof:

59. – STUDENT VACATION TRAVEL CONCESSIONS

(1) Subject to clause 59(2), employees employed in Districts 3, 4, 5 and 6 are entitled to the concessions specified in Schedule G. – Student Vacation Travel Concessions of this Award once per year when proceeding to either Perth or Geraldton in the Summer Student Vacation Period.

(2) Employees who have served a full school year or an equivalent period in the district may defer taking the concession until the following Term 1, Term 2 or Term 3 student vacation period.

(3) An employee may elect to travel elsewhere than to a centre referred to in clause 59(1) and, in that event, will be paid the cost of that travel up to an amount not exceeding the value of benefits to which the employee is entitled under that clause.

(4) Employees employed in District 2 will be paid fares by road and/or rail to Perth for the employee, dependent partner and dependants once every two (2) years. An employee who elects to travel by road in the employee's own vehicle will be paid at 0.625 of the appropriate rate prescribed by Clause 55. – Motor Vehicle Allowance of this Award.

(5) The mode of travel used by employees under this clause is subject to the approval of the Employer.

(6) When an employee and the family of the employee travel together by rail, first class rail fare is allowed for the employee, the employee's dependent partner and dependants.

(7) An employee who is eligible for a travel concession in accordance with clause 59(1) and who travels by private motor vehicle will be paid the full rates in accordance with the appropriate rate prescribed by Clause 55 and Part 2 of Schedule F. – Motor Vehicle Allowance of this Award provided that the amount of payment must not exceed the cost:

(a) of a return air fare by public air services of an employee when travelling alone or the return air fares of the employee, employee's dependent partner and dependants when travelling together; and

(b) where air travel is inappropriate, of a return first class rail fare of an employee when travelling alone or the return first class rail fares of the employee, employee's dependent partner and dependants when travelling together.

(8) Where an employee, subject to clause 59(4) of this clause, travels by private motor vehicle and through no fault of the employee is prevented by natural disaster, such as flood or cyclone, from returning to the locality in which the employee is employed after the student vacation, the employee will be paid any reasonable costs incurred in transporting the employee, the family of the employee and the motor vehicle to that locality by alternative means approved by the Employer.

21. Clause 59. – Travelling Allowance: Delete this clause and insert the following in lieu thereof:

60. – TRAVELLING ALLOWANCE

(1) An employee who travels on official business will be reimbursed reasonable expenses in accordance with the provisions contained in this clause provided that such travelling is authorised by an employee approved by the Employer.

(2) When a trip necessitates an overnight stay away from headquarters and the employee:

(a) is supplied with accommodation and meals free of charge; or

(b) attends a course, conference, etc, where the fee paid includes accommodation and meals; or

(c) travels by rail and is provided with a sleeping berth and meals; or

(d) is accommodated at a Government institution, hostel or similar establishment and is supplied with meals, reimbursement is in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award.

(3) When a trip necessitates an overnight stay away from headquarters and the employee is fully responsible for their own accommodation, meals and incidental expenses:

(a) where hotel or motel accommodation is utilised reimbursement is in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award; and

(b) where other than hotel or motel accommodation is utilised reimbursement is in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award.

(4) When a trip necessitates an overnight stay away from headquarters and accommodation only is provided at no charge to the employee, reimbursement will be made in accordance with the rates prescribed in Column A, Items 1, 2 or 3 and

- Items 12, 13 or 14 of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award, subject to the employee’s certification that each meal claimed was actually purchased.
- (5) To calculate reimbursement under clauses 60(2) and 60(3) for a part of a day, the following formula will apply:
- (a) If departure from headquarters is:
 - before 8.00am – 100% of the daily rate.
 - 8.00am or later but prior to 1.00pm – 90% of the daily rate.
 - 1.00pm or later but prior to 6.00pm – 75% of the daily rate.
 - 6.00pm or later – 50% of the daily rate.
 - (b) If arrival back at headquarters is:
 - 8.00am or later but prior to 1.00pm – 10% of the daily rate.
 - 1.00pm or later but prior to 6.00pm – 25% of the daily rate.
 - 6.00pm or later but prior to 11.00pm – 50% of the daily rate.
 - 11.00pm or later – 100% of the daily rate.
- (6) When an employee travels to a place outside a radius of 50 km measured from the employee’s headquarters and the trip does not involve an overnight stay away from headquarters, reimbursement for all meals claimed will be at the rates set out in Column A, Items (12) or (13) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award subject to the employee’s certification that each meal claimed was actually purchased - provided that when an employee departs from headquarters before 8.00 am and does not arrive back at headquarters until after 11.00 pm on the same day the employee will be paid at the appropriate rate prescribed in Column A, Items (4) to (8) of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award.
- (7) When it can be shown to the satisfaction of the Employer by the production of receipts that reimbursements in accordance with Schedule C. – Travelling, Transfer and Relieving Allowance of this Award does not cover an employee’s reasonable expenses for a whole trip, the employee will be reimbursed the excess expenditure.
- (8) In addition to the rates contained in Schedule C. – Travelling, Transfer and Relieving Allowance of this Award an employee will be reimbursed reasonable incidental expenses such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses on production of receipts.
- (9) If, on account of lack of suitable transport facilities, an employee necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the employee will be reimbursed the actual cost of such accommodation.
- (10) Reimbursement of expenses will not be suspended should an employee become ill whilst travelling, provided leave for the period of such illness is approved in accordance with provisions of Clause 41. – Sick Leave of this Award and the employee continues to incur accommodation, meal and incidental expenses.
- (11) Reimbursement claims for travelling in excess of 14 days in one (1) month can not be passed for payment by a certifying employee unless the Director General has endorsed the account.
- (12) An employee who is relieving at or temporarily transferred to any place within a radius of 50 kilometres measured from the employee’s headquarters will not be reimbursed the cost of midday meals purchased, but an employee travelling on duty within that area which requires absence from the employee’s headquarters over the usual midday meal period will be paid at the rate prescribed by Item 17 of Schedule C. – Travelling, Transfer and Relieving Allowance of this Award, for each meal necessarily purchased, provided that:
- (a) such travelling is not a normal feature in the performance of the employee’s duties; and
 - (b) such travelling is not within the suburb in which the employee resides; and
 - (c) the employee’s total reimbursement under this clause for any one (1) pay period can not exceed the amount prescribed by Item 18 of Schedule C of this Award.

22. Clause 60. – Notification of Change: Delete this clause and insert the following in lieu thereof:

61. – NOTIFICATION OF CHANGE

- (1) Where the Employer has made a definite decision to introduce major changes that are likely to have a significant effect on employees’ conditions of employment, the Employer must notify the employees who may be affected by the proposed changes and the relevant Union/s.
- (2) Where the employee is eligible to be a member of the SSTUWA and the PFWA, both Unions must be notified.
- (3) For the purpose of this clause, “Significant Effects” includes: termination of employment, major changes in the composition; operation or size of the Employer’s work force or in the skills required; elimination or diminution of the job opportunities; promotion opportunities or job tenure; the need for retraining or transfer of employees to other work or locations and restructuring of jobs.
- (4) The Employer must discuss with the employees affected and the relevant Union/s, inter alia, the introduction of the changes referred to in clause 61(1) of this clause; the effects the changes are likely to have on employees; measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or the relevant Union/s in relation to the changes.

- (5) The discussion must commence as early as practicable after a firm decision has been made by the Employer to make the changes referred to in clause 61(1), unless by prior arrangement, the relevant Union/s is/are represented in formulating recommendations for change to be considered by the Employer.
- (6) For the purposes of such discussion the Employer is to provide to the employees concerned and the relevant Union/s all relevant information about the changes; including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees; provided the Employer is not required to disclose confidential information, the disclosure of which would be inimical to the Employer's interests.

23. Clause 61. – Union Facilities for Union Representatives: Delete this clause and insert the following in lieu thereof:

62. – UNION FACILITIES FOR UNION REPRESENTATIVES

- (1) The Employer recognises the rights of the SSTUWA and PFWA to organise and represent its members.
- (2) The Employer will recognise SSTUWA representatives and the members of the PFWA Council as the representatives of the PFWA and will allow them to carry out their roles and functions.
- (3) SSTUWA representatives in the Department have a legitimate role and function in assisting the SSTUWA in the tasks of recruitment, organising, communication and representing members' interests in the workplace, Department and SSTUWA branch.
- (4) The Employer recognises that, under the SSTUWA's rules, SSTUWA representatives are members of a branch representing members within a SSTUWA electorate. A SSTUWA branch may cover more than one workplace.
- (5) The SSTUWA will advise the Employer in writing of the names of the SSTUWA representatives in the Department.
- (6) The Employer must recognise the authorisation of each the SSTUWA and PFWA representatives in the Department and must provide them with the following.
- (a) Paid time off from normal duties to perform their functions as a Union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the branch and to attend Union business in accordance with this clause and the Department's Industrial Relations Advice 6 of 2009. The Department will consult with the Unions regarding any proposed changes to this Industrial Relations Advice.
 - (b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities must not unreasonably affect the operation of the organisation and is in accordance with normal Departmental protocols.
 - (c) A noticeboard for the display of Union materials including broadcast email facilities.
 - (d) Paid access to periods of leave for the purpose of attending Union training courses in accordance with Clause 63. – Leave to Attend Union Business of the Award. Country representatives will be provided with appropriate travel time.
 - (e) Notification of the commencement of new employees, and as part of their induction, time to discuss the benefits of Union membership with them.
 - (f) Access to awards, agreements, policies and procedures.
 - (g) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.
- (7) The Employer recognises that it is paramount that Union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a Union representative.

24. Clause 62. – Leave to Attend Union Business: Delete this clause and insert the following in lieu thereof:

63. – LEAVE TO ATTEND UNION BUSINESS

- (1) The Employer must grant paid leave at the ordinary rate of pay during normal working hours to an employee:
- (a) who is required to attend or give evidence before any Industrial Tribunal;
 - (b) who as a Union-nominated representative is required to attend any negotiations and/or proceedings before an Industrial Tribunal and/or meetings with Ministers of the Crown, their staff or any other representative of Government;
 - (c) when prior arrangement has been made between the relevant Union and the Employer, for the employee to attend official Union meetings preliminary to negotiations and/or Industrial Tribunal proceedings; and
 - (d) who as a Union-nominated representative is required to attend joint Union/management consultative committees or working parties.
- (2) The granting of leave is subject to convenience and must only be approved:
- (a) where reasonable notice is given for the application for leave;
 - (b) for the minimum period necessary to enable the Union business to be conducted or evidence to be given; and
 - (c) for those employees whose attendance is essential.
- (3) The Employer is not liable for any expenses associated with an employee attending to Union business.
- (4) Leave of absence granted under this clause must include any necessary travelling time in normal working hours.

- (5) An employee is not entitled to paid leave to attend to Union business other than as prescribed by this clause.
- (a) An employee who successfully gains employment with either Union will be granted leave without pay for the duration of any such appointment up to a period of four (4) years. Further leave without pay beyond this period is at the discretion of the Employer.
- (b) An employee who is elected to the role of President, Senior Vice President or General Secretary of either Union or Vice President of the SSTUWA will be granted leave without pay for the duration of that term.
- (c) Arrangements prescribed in clause 63(5)(a) and (b) are subject to written notification of the relevant Union.
- (6) The Employer is not liable for any expenses incurred by the employee attending to Union business.
- (7) Clause 63 does not apply to:
- (a) special arrangements made with the Union which provide for unpaid leave for employees to conduct Union business;
- (b) when an employee is absent from work without the approval of the Employer; and
- (c) casual employees.

25. Clause 63. – Trade Union Training Leave: Delete the title of this clause and insert the following in lieu thereof:

64. – TRADE UNION TRAINING LEAVE

26. Clause 64. – Right of Entry and Inspection by Authorised Representatives: Delete the title of this clause and insert the following in lieu thereof:

65. – RIGHT OF ENTRY AND INSPECTION BY AUTHORISED REPRESENTATIVES

27. Clause 65. – Keeping of and Access to Employment Records: Delete the title of this clause and insert the following in lieu thereof:

66. – KEEPING OF AND ACCESS TO EMPLOYMENT RECORDS

28. Clause 66. – Dispute Settlement Procedure: Delete this clause and insert the following in lieu thereof:

67. – DISPUTE SETTLEMENT PROCEDURE

- (1) Any questions, difficulties or disputes arising under this Award of employees bound by the Award shall be dealt with in accordance with this clause.
- (2) The employee/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution, within three (3) working days.
- (3) If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager's superior and an attempt made to find a satisfactory solution, within a further three (3) working days.
- (4) If the dispute is still not resolved, it may be referred by the officer/s or Union representative to the Employer or their nominee.
- (5) Where the dispute cannot be resolved within five (5) working days of the Union representative's referral of the dispute to the Employer or their nominee, either party may refer the matter to the Western Australian Industrial Relation Commission.
- (6) The period for resolving a dispute may be extended by agreement between the Parties.
- (7) At all stages of the procedure the employee may be accompanied by a Union representative.
- (8) Subject to clause 67(9), where the dispute affects only a member of one of the Unions, the other Union will not be involved in the procedure.
- (9) Where a dispute has the potential to affect members, or persons eligible to be members of both Unions, both Unions will be involved in the procedure.

29. Schedule G – Student Vacation Travel Concessions: Delete this schedule and insert the following in lieu thereof:

SCHEDULE G – STUDENT VACATION TRAVEL CONCESSIONS

Mode Of Travel To Be Allowed		Concessions
(a)	Air – employee and family travelling together	Free Passes for the employee and dependants.
(b)	Sea – employee and family travelling together	Free passes for the employee and dependants.
		Full rates for use of private motor vehicle in accordance with clause 59(7) of this Award.
(c)	Road – employees travelling together	Full rates for use of private motor vehicle in accordance with clause 59(7) of this Award.
		Full rates for use of private motor vehicle in accordance with clause 59(7) of this Award. Free passes for the employee's dependent partner and dependants.
(d)	Air – employee travelling by air and remainder of family by sea	Free passes in each case for the employee, the employee's dependent partner and dependants.

CANCELLATION OF—Awards/Agreements/Respondents—Under Section 47—

2022 WAIRC 00744

	CLERKS (UNIONS AND LABOR MOVEMENT) AWARD 2004	
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	COMMISSION'S OWN MOTION	APPLICANT
	-v- (NOT APPLICABLE)	
		RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER	
DATE	MONDAY, 24 OCTOBER 2022	
FILE NO/S	APPL 24 OF 2021	
CITATION NO.	2022 WAIRC 00744	

Result	Award varied
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Order

WHEREAS on 19 January 2021 the Commission in Court Session cancelled the registration of the Seamen's Union of Australia, West Australia Branch: [2021] WAIRC 00012; (2021) 101 WAIG 100;

AND WHEREAS the Registrar identified that the Seamen's Union of Australia, West Australia Branch is a named party to the Clerks (Unions and Labor Movement) Award 2004;

AND WHEREAS the Registrar also identified that a number of other unions currently identified as a named employer party to the Award have also had their registration cancelled and these include the Mining Unions Association of Employees of Western Australia (Iron Ore Industry); The Australian Collieries Staff Association, Western Australian Branch; The Boot Trade of Western Australia Union of Workers, Perth; The Disabled Workers Union of Western Australia; and the Western Australian Gold and Nickel Mines Supervisors Association Industrial Union of Workers;

AND WHEREAS the Registrar has also identified that the Food Preservers Union of Western Australia Union of Workers, also a named employer party to the Award, has amalgamated with the Australian Workers Union, West Australian Branch, Industrial Union of Workers;

AND WHEREAS the Commission directed the Registrar in accordance with s 47(3) of the *Act* to undertake an investigation to review the named employer respondents in Schedule A of the Award and the Registrar has reported the findings of the review;

AND WHEREAS by notice served on the named employer respondents in Schedule A and the named union party to the award in Schedule B, and by notice published in the Western Australian Industrial Gazette and on the Commission website on 23 March 2022, notice of the proposed deletion of the named employer respondents from Schedule A of the Award was given;

AND WHEREAS the parties were advised that if they wished to be heard they had 30 days from the publication of the notice to do so and no objections were received by the Registrar;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Act* hereby order –

THAT the *Clerks (Unions and Labor Movement) Award 2004* be varied in accordance with the following schedule and that such variation shall have effect on and from the date of this order.

CHIEF COMMISSIONER S J KENNER

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

NOTE: Date of Order amended by Correction Order issued 24 October 2022 ([2022] WAIRC 00745).

SCHEDULE

1. Schedule "A" – Respondents: Delete this schedule and insert the following in lieu thereof:

SCHEDULE "A" – RESPONDENTS

Union Employers registered under Industrial Relations Act 1979

Australian Institute of Marine and Power Engineers, Western Australian Union of Workers

1/169 Stock Road
PALMYRA WA 6157

Australian Medical Association (WA) Incorporated

14 Stirling Highway
NEDLANDS WA 6009

Building Trades Association of Unions of Western Australia (Association of Workers)

82 Royal Street
EAST PERTH WA 6004

Electrical Trades Union WA

Unit 24, 257 Balcatta Road
BALCATTWA WA 6021

Health Services Union of Western Australia (Union of Workers)

8 Coolgardie Terrace
PERTH WA 6000

The Association of Professional Engineers, Australia (Western Australian Branch)

Organisation of Employees

Suite 1/12-14 Thelma Street
WEST PERTH WA 6005

The Australian Maritime Officers Union - Western Area Union of Employees

1 High Street
FREMANTLE WA 6160

The Australian Nursing Federation, Industrial Union of Workers Perth

260 Pier Street
PERTH WA 6000

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch

2/10 Nash Street
PERTH WA 6000

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers

Level 3, 25 Barrack Street
PERTH WA 6000

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch

121 Royal Street
EAST PERTH WA 6004

The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia

Unit 11, 64 Bannister Road
CANNING VALE WA 6155

The Civil Service Association of Western Australia Incorporated

Level 5, 445 Hay Street
PERTH WA 6000

The Coal Miners' Industrial Union of Workers of Western Australia, Collie

c/- Mineworkers Institute, 75 Throssell Street
COLLIE WA 6225

The Construction, Forestry, Mining and Energy Union of Workers

80 Beaufort Street
PERTH WA 6000

The Independent Education Union of Western Australia, Union of Employees

PO Box 739
BELMONT WA 6984

The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers

Unit 24, 257 Balcatta Road
BALCATTWA WA 6021

The Shop, Distributive and Allied Employees' Association of Western Australia

5th Floor, 25 Barrack Street
PERTH WA 6000

The State School Teachers' Union of W.A. (Incorporated)

150-152 Adelaide Terrace
EAST PERTH WA 6004

The Western Australian Clothing and Allied Trades' Industrial Union of Workers, Perth

c/- Textile Clothing and Footwear Union of Australia (National Office) 359 Exhibition Street
MELBOURNE VIC 3000

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

Suite 302, 3rd Floor 82 Beaufort Street
PERTH WA 6000

United Firefighters Union of Australia West Australian Branch

21 View Street
NORTH PERTH WA 6006

University of Western Australia Academic Staff Association

W2 Winthrop Tower, University of Western Australia, 35 Stirling Highway
CRAWLEY WA 6009

Western Australian Grain Handling Salaried Officers Association (Union of Workers)

30 Delhi Street
WEST PERTH WA 6005

Western Australian Municipal, Administrative, Clerical and Services Union of Employees

Kenafick House, 102 East Parade
EAST PERTH WA 6004

Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth

112 Charles Street
WEST PERTH WA 6005

Western Australian Police Union of Workers

639 Murray Street
WEST PERTH WA 6005

Western Australian Prison Officers' Union of Workers

63 Railway Parade
MT LAWLEY WA 6050

Union Employers registered under *Fair Work (Registered Organisations) Act 2009***Australian Education Union**

150-152 Adelaide Terrace
PERTH WA 6000

Australian Municipal, Administrative, Clerical and Services Union

102 East Parade
EAST PERTH WA 6004

Australian Nursing and Midwifery Federation

260 Pier Street
PERTH WA 6000

Australian Rail, Tram and Bus Industry Union

2/10 Nash Street
PERTH WA 6000

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union

121 Royal Street
EAST PERTH WA 6004

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Communication Workers Union Division

196 Lord Street
PERTH WA 6000

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical, Energy & Services Division

Unit 24, 257 Balcatta Road
BALCATTWA WA 6021

Construction, Forestry, Mining and Energy Union

80 Beaufort Street
PERTH WA 6000

CPSU, the Community and Public Sector Union

1/445 Hay Street
PERTH WA 6000

Finance Sector Union of Australia

3rd Floor, 165 Adelaide Terrace
EAST PERTH WA 6004

Health Services Union

8 Coolgardie Terrace
PERTH WA 6000

Independent Education Union of Australia

Suite 20, 63 Knutsford Avenue
RIVERVALE WA 6103

Media, Entertainment and Arts Alliance

Suite 1, 12 – 14 Thelma Street
WEST PERTH WA 6005

Musicians' Union of Australia

10 Black Street
MONT ALBERT VIC 3127

National Tertiary Education Industry Union

Level 3, 27 Railway Road (Corner of Alvan Street)
SUBIACO WA 6008

Plumbing Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

2nd Floor, 52 Victoria Street
CARLTON SOUTH VIC 3053

Shop, Distributive and Allied Employees Association

5th Floor, 25 Barrack Street
PERTH WA 6000

Textile, Clothing and Footwear Union of Australia

359 Exhibition Street
MELBOURNE VIC 3000

The Association of Professional Engineers, Scientists and Managers, Australia

Suite 1 12-14 Thelma Street
WEST PERTH WA 6005

The Australasian Meat Industry Employees Union

227 Henley Beach Road
TORRENSVILLE SA 5031

The Australian Institute of Marine and Power Engineers

1/169 Stock Road
PALMYRA WA 6157

The Australian Maritime Officers' Union

1 High Street
FREMANTLE WA 6160

The Australian Workers' Union

Level 3, 25 Barrack Street
PERTH WA 6000

The Maritime Union of Australia

Level 2, 2-4 Kwong Alley
NORTH FREMANTLE WA 6159

Transport Workers' Union of Australia

Suite 302, 3rd Floor Labour Centre
82 Beaufort Street
PERTH WA 6000

Union of Christmas Island Workers

PO Box 84
Christmas Island
INDIAN OCEAN WA 6798

United Firefighters' Union of Australia

21 View Street
North Perth WA 6006

United Voice

54 Cheriton Street
PERTH WA 6000

Western Australian Shire Councils, Municipal Road Boards, Health Boards, Parks, Cemeteries and Racecourse, Public Authorities Water Boards Union

112 Charles Street
WEST PERTH WA 6005

2022 WAIRC 00745

CLERKS (UNIONS AND LABOR MOVEMENT) AWARD 2004
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COMMISSION'S OWN MOTION

PARTIES**APPLICANT**

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE MONDAY, 24 OCTOBER 2022
FILE NO. APPL 24 OF 2021
CITATION NO. 2022 WAIRC 00745

Result Correction Order issued

Correction Order

Pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), the Commission hereby orders –

THAT the order issued by the Commission in respect of APPL 24 of 2021 on the 24th day of October 2022 shall be corrected by deleting the date of MONDAY, 10 OCTOBER 2022 in the heading of the Order ([2022] WAIRC 00744) and substituting in lieu thereof:

MONDAY, 24 OCTOBER 2022

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

NOTICES—Award/Agreement matters—

2022 WAIRC 00772

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 19 OF 2022

APPLICATION FOR A NEW AGREEMENT TITLED

“SHIRE OF YORK OUTSIDE STAFF COLLECTIVE ENTERPRISE AGREEMENT 2022”

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

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

1. TITLE

1.1 This agreement shall be known as the Shire of York Outside Staff Collective Enterprise Agreement 2022.

4. PARTIES BOUND / INTERACTION OF AWARDS, INDUSTRIAL INSTRUMENTS

4.1 This agreement shall cover the following Parties:

4.1.1 the Shire of York, 1 Joaquina Street, YORK, WA, 6302 ('the Employer;' 'the Shire');

4.1.2 The Western Australian Municipal, Administrative, Clerical and Services Union of Employees ('WASU'), 102 East Parade, EAST PERTH, WA, 6004 ("the union").

4.1.3 All Employees employed by the Employer, who are members of, or eligible to be members of WASU, will be covered by the scope of this Agreement and will be bound by its terms. The type of Employees covered by this Agreement are 'outside worker' Employees of the Shire of York, including parks and gardens Employees and the construction and town crews ('the Employee(s)').

4.1.4 The estimated number of Employees covered by this Agreement is 30.

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

[L.S.]

(Sgd.) S BASTIAN,
Registrar.
2 November 2022

INDUSTRIAL MAGISTRATE—Claims before—

2022 WAIRC 00771

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2022 WAIRC 00771
CORAM : INDUSTRIAL MAGISTRATE B. COLEMAN
HEARD : WEDNESDAY, 15 JUNE 2022
DELIVERED : THURSDAY, 3 NOVEMBER 2022
FILE NO. : M 59 OF 2021
BETWEEN : MR RUFUS SADAT ANWAR GILL

CLAIMANT

AND

GOLDFIELDS BAPTIST COLLEGE INCORPORATED

FIRST RESPONDENT

AND

MR CRAIG DREDGE

SECOND RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Interpretation of industrial agreement – consideration of whether extraneous materials should inform the interpretation of definitions within the agreement – whether the respondents accurately assessed qualifications and experience at the commencement of employment – whether the respondents correctly transitioned between levels of employment
Legislation	:	<i>Fair Work Act 2009</i> (Cth) <i>Teacher Registration Act 2012</i> (WA) <i>Industrial Relations Act 1979</i> (WA)
Instrument	:	<i>Goldfields Baptist College Staff Agreement 2016 to 2018</i> <i>Educational Services (Teachers) Award 2020</i>
Case(s) referred to in reasons:	:	<i>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd</i> [2013] FCA 638 at 53 <i>Mildren v Gabbusch</i> [2014] SAIRC 15 <i>Miller v Minister of Pensions</i> [1947] 2 All ER 372 <i>Briginshaw v Briginshaw</i> [1938] HCA 34
Result	:	Claim dismissed
Representation:		
Claimant	:	Ms M. Girgis (of Counsel) from the Independent Education Union of Australia - WA Branch
Respondent	:	Mr J. Wood (of Counsel) from Clyde and Co

REASONS FOR DECISION

- 1 By application lodged on 19 March 2021, the claimant, Rufus Sadat Anwar Gill (Mr Gill) alleges a breach of clauses of the Goldfields Baptist College Staff Agreement 2016 to 2018 (the Agreement), along with alleged contraventions of the *Fair Work Act 2009* (the FW Act) by the first respondent employer, Goldfields Baptist College Incorporated (the College) and the second respondent, Mr Craig Dredge (Mr Dredge).
- 2 Mr Gill seeks payment of an amount of money for unpaid salary and superannuation plus interest, along with the payment of penalties pursuant to s 545(3) of the FW Act.

Background

- 3 It is not in dispute that the first respondent operates the Goldfields Baptist College, which is an educational venue within the meaning of the *Teacher Registration Act 2012* (WA) (the Act). The College is in Kalgoorlie-Boulder in Western Australia.
- 4 Mr Gill has completed the following qualifications in Science, Language and Teaching:
 - (a) Bachelor of Science from the University of Karachi completed in 1999;
 - (b) Master of Science in Botany from the University of Karachi completed in 2000;
 - (c) Post Graduate Diploma in French from the University of Karachi completed in 2006; and
 - (d) Graduate Diploma of Education (Secondary) Monash University completed in March 2012.
- 5 It is accepted that Mr Gill has not completed any of the following qualifications:
 - (a) A two-year full-time course in early childhood education;
 - (b) A degree in education or early childhood education that requires three years of full-time study; or
 - (c) A degree in education or early childhood education that requires four years of full-time study.
- 6 On or about 5 April 2017, Mr Gill submitted an Expression of Interest to the College for a teaching role.
- 7 He entered into a contract of employment with the College on 12 April 2017.
- 8 Mr Gill was employed by the College on two successive contracts of employment, between approximately 24 April 2017 and 31 December 2019.
- 9 He was employed as a teacher within the meaning of the Agreement. At all material times, the Agreement applied to the College and to Mr Gill as an employee of the College.
- 10 During the period of employment, the second respondent, Mr Dredge, was employed by the College as the Principal.
- 11 When he commenced employment with the College, Mr Gill provided the College with evidence that he had been granted provisional registration by the Teacher Registration Board of Western Australia (TRBWA).
- 12 At the time that Mr Gill entered into the first contract in April 2017, he had previously been employed to work as a teacher by various schools.
- 13 Prior to completion of his Graduate Diploma of Education (Dip Ed) at Monash University, Mr Gill was employed at:
 - (a) Lillydale Adventist Academy in Victoria between 2008 and 2010; and
 - (b) Seventh Day Adventist Schools Tasmania between 2010 and 2012.
- 14 After Mr Gill had completed his Dip Ed he was employed by:
 - (a) Marist Regional College in Tasmania between 2014 and 2015;

- (b) The Tasmanian Department of Education to work at various schools including Devonport High School and Yolla District High School between 2014 and 2015;
 - (c) Karalundi Aboriginal Education Community Inc to work at Karalundi College in 2016;
 - (d) The Western Australian Department of Education to work at Hedland Senior High School in 2017.
- 15 The first contract with the College provided the following relevant conditions of employment:
- (a) Mr Gill's salary was to be set according to cl 15.4 of the Agreement, depending upon his qualifications and years of experience;
 - (b) Mr Gill was to be employed at the College on a full-time basis, based upon average ordinary contact hours of 37.5 hours per week, averaged over a period of 12 months;
 - (c) Subject to extension by the College, the period of the contract was to be from 24 April to 16 December 2017; and
 - (d) Mr Gill was to be paid an annualised salary equivalent to 'Step 7' pursuant to cl 15.4 of the Agreement.
- 16 On 15 December 2017, Mr Gill entered into a further contract of employment with the College.
- 17 The second contract of employment provided that Mr Gill would continue to perform all required duties at the College (as set out in cl 5.3.2 of the Agreement) and referred to Mr Gill's reduced 'face to face' teaching load as a graduate teacher.
- 18 Over the course of his employment, Mr Gill received a salary in line with the rates of salary set out in s 15.4, Table 1D of the Agreement:
- (a) From 24 April 2017 to 6 May 2018 Mr Gill received a salary in line with Step 7;
 - (b) Between 7 May 2018 to 19 May 2019 Mr Gill received a salary calculated at Step 8;
 - (c) Between 20 May 2019 and 12 January 2020 Mr Gill received a salary calculated at Step 9.
- 19 Mr Gill resigned his position with the College on 31 December 2019.

The Claimant's Position

- 20 The claimant asserts that he was not paid correctly by the College for the duration of his employment and that his salary should have been assessed by Mr Dredge at the commencement of his employment as at least Step 11 rather than Step 7.
- 21 The claimant pleads that he had amassed the equivalent of 6.84 years of prior service as a full-time teacher at the time of commencement with the College, and further, that he met the criteria to be classified as either a "Four Years Trained Teacher" or "Five Years Trained Teacher" within the meaning of cl 4.1.23, cl 4.1.24, cl 6.3.2.1.2 and cl 6.3.2.1.1 of the Agreement.
- 22 The claimant argues that the Agreement must be read in conjunction with the federal *Educational Services (Teachers) Award 2020* (the Award), along with the national teaching standards and registration framework set by the Australian Institute for Teaching and School Leadership (AITSL Framework).
- 23 The claimant also asserts that the College was required to progress him to the next stepped salary as of 21 June 2017, then thereafter every 12 months to the next stepped salary.

The Respondents' Position

- 24 The respondents argue that the AITSL Framework and the Award have no bearing upon the interpretation of the Agreement.
- 25 Their position is that the College and Mr Dredge complied with all obligations pursuant to the Agreement when setting the claimant's starting salary.
- 26 The respondents assert that the College paid more salary to Mr Gill than was required under the Agreement, that both respondents acted in good faith and that the claimant's salary was determined fairly and reasonably, based upon the information that was available at the time.
- 27 The respondents also assert that the College increased Mr Gill's wage at the appropriate dates, pursuant to the Agreement.
- 28 The respondents argue that cl 3.4 of the Agreement expressly excludes the application of any other industrial instrument (including the Award) that might otherwise apply to the employment of teachers at the College, although it is accepted that the relevant definitions related to trained teachers within the Agreement and the Award are identical.

Determination

- 29 Schedule 1 attached sets out the jurisdiction, practice and procedure of the Western Australian Industrial Magistrates Court (IMC) and the relevant legislation.
- 30 The issues to be determined in this trial are as follows:
- (i) At the commencement of his employment with the College, did Mr Gill qualify as a 'Four Year Trained Teacher' or a 'Five Year Trained Teacher' pursuant to cl 4.1.23 and cl 4.1.24 of the Agreement?
 - (ii) Did the College accurately assess Mr Gill's qualifications and experience at the commencement of his employment?
 - (iii) Did the College correctly transition between levels of salary throughout Mr Gill's employment?
 - (iv) Does any liability arise with respect to underpayment? If yes, was the second respondent knowingly concerned in the underpayment, such that he has contravened s550(2)(c) of the FW Act?
- 31 The interpretation of an award or agreement will always begin by a consideration of the ordinary meaning of its words. Regard must be had to the context and purpose of the provision or expression being construed. The context of the provision may

appear from the text of the instrument as a whole, its arrangement and the place of the provision within the agreement. If the plain meaning is clear, as it is in this case, the Court will have no need to refer to extrinsic materials.¹

Issue 1: Did the claimant qualify as a ‘Four Year Trained Teacher’ or a ‘Five Year Trained Teacher’?

- 32 Pursuant to cl 4.1.23 of the Agreement, a teacher will fit within the definition of a **“Four Years Trained Teacher”** if the teacher:
- (i) ‘has completed a degree in education or early childhood education requiring three years of full-time study at an Australian university’ [emphasis added]; or
 - (ii) ‘the equivalent as determined by the National Office of Overseas Skills Recognition’, or
 - (iii) equivalent as determined by ‘the relevant State or Territory teacher registration authority’, or
 - (iv) ‘in the case of early childhood teachers’, the equivalent as determined by ‘the relevant licensing and accreditation authority’.
- 33 Pursuant to cl 4.1.24 of the Agreement, a teacher will fit within the definition of a **“Five Years Trained Teacher”** if the teacher:
- (i) ‘has completed a degree in education or early childhood education that requires four years of full-time study at an Australian university and in addition has completed a postgraduate degree at an Australian university requiring at least one year of full-time study’ [emphasis added]; or
 - (ii) ‘the equivalent as determined by the National Office of Overseas Skills Recognition’, or
 - (iii) the equivalent as determined by ‘the relevant State or Territory teacher registration authority’, or
 - (iv) ‘in the case of early childhood teachers’, the equivalent as determined by ‘the relevant licensing and accreditation authority’.
- 34 Clause 6.3.2 of the Agreement sets out the minimum rates of salary payable to full-time teachers and refers to the stepped salaries within Table 1D of cl 15 of the Agreement.
- 35 A five-year trained teacher is entitled to commence on Step 6 of the scale and progress according to normal years of service to Step 13 of the scale.
- 36 A four-year trained teacher is entitled to commence on Step 5 of the scale and progress according to normal years of service to Step 13 of the scale.
- 37 A two/three-year trained teacher is entitled to commence on Step 3 of the scale and progress according to normal years of service to Step 9, except if the teacher has full registration under the current Western Australian teacher registration authority.
- 38 A teacher that does not fall within the other categories within cl 6.3.2 of the Agreement commences on Step 1 of the scale and thereafter progresses according to normal years of service to Step 9 of the scale. This category of teacher is referred to in the clause as a *“not otherwise classified teacher”*.
- 39 Clause 6.3.2.2 of the Agreement allows for credit of an extra year for obtaining an additional qualification related to the teacher’s teaching role at the College. There is no evidence that Mr Gill had obtained any additional qualification while teaching at the College.
- 40 Mr Gill accepts that he has not completed a three-year full-time degree in education or early childhood education at an Australian university.²
- 41 Nor has he completed a four-year full-time degree in education or early childhood education at an Australian university, coupled with a one year full-time postgraduate degree at an Australian university.³
- 42 Mr Gill has no educational qualifications relating to early childhood education at all.⁴
- 43 Therefore, the only way in which Mr Gill could be characterised as either a four or five-year teacher pursuant to the Agreement is if the National Office of Overseas Skills Recognition (NOOSR) has determined that he has completed an equivalent degree, or, the relevant State or Territory teacher registration authority has determined that Mr Gill has completed the equivalent educational requirements.
- 44 Evidence tendered at trial reveals that Mr Gill’s University of Karachi qualifications have been assessed by the NOOSR.
- 45 In September 2007, the Overseas Qualifications Unit of the Department of Innovation Industry and Regional Development advised Mr Gill, via three assessment notices dated 19 September 2007, that based on assessment guidelines published by the NOOSR:
- a. his Post Graduate Diploma in French had been assessed as comparable to the educational level of an Australian Graduate Diploma;⁵
 - b. his Degree of Master of Science in Botany had been assessed as comparable to the educational level of an Australian Bachelor Degree;⁶ and
 - c. his Degree of Bachelor of Science (Awarded in the First Class) had been assessed as comparable to the educational level of an Australian Bachelor Degree.⁷
- 46 None of the assessment advices indicate that any of Mr Gill’s Karachi qualifications were the equivalent to:
- (1) a three-year, full-time ‘degree in education or early childhood education’ at an Australian university; or

- (2) a four-year full-time *degree in education or early childhood education* at an Australian university, and in addition, a one-year full-time postgraduate degree at an Australian university.
- 47 The Overseas Qualifications Unit assessed Mr Gill as having the equivalent of two Australian Bachelor degrees, along with an Australian Graduate Diploma.
- 48 The evidence clearly does not support the proposition that Mr Gill fell within the definition of a four-year or five-year trained teacher pursuant to the Agreement because the assessment advices issued by the Unit failed to assess any of his Karachi qualifications as being equivalent to a degree in education or early childhood education. Indeed, the transcripts of results from the University of Karachi do not reveal the completion of any subjects that could be considered as qualifications related to teaching.⁸
- 49 The sole remaining criterion within the definition relates to a determination by a “*relevant State or Territory teacher registration authority*”: this phrase is not defined in the Agreement but it is clear on a plain reading of the clause, read in conjunction with the entirety of the Agreement, that the determination must be made by a teacher registration authority within an Australian State or Territory.
- 50 Mr Gill asserts that his evidence of provisional registration by the TRBWA constituted a determination that he has completed the equivalent educational requirements to fall within the four or five-year trained teacher definition.
- 51 He argues that the TRBWA utilises the AITSL Framework for Teacher Registration in Australia.
- 52 The AITSL Framework states that ‘*the [minimum] qualifications requirement for registration is completion of at least four years of higher education (full-time or equivalent) study, including an initial teacher education program accredited in Australia, leading to the achievement of a recognised qualification; or an overseas qualification assessed as equivalent.*’
- 53 Mr Gill argues, by reason of his grant of provisional registration, that the minimum educational requirements under the framework for registration as a teacher in Western Australia (as assessed by the TRBWA) were equivalent to the educational criteria required to qualify as a four-years trained teacher.⁹
- 54 Mr Gill further argues that his equivalent qualifications, combined with his Graduate Diploma in French, were equivalent to the educational criteria required to qualify as a five-years trained teacher.¹⁰
- 55 However, such arguments fail to consider the legislative regime for teacher registration in Western Australia.
- 56 As set out in the letter from the TRBWA to Mr Gill,¹¹ provisional and full registration as a teacher in Western Australia is governed by the Act.
- 57 Pursuant to s 16 of the Act:
- A person is eligible for provisional registration as a teacher if the person –*
- (a) has a teaching qualification –*
 - (i) from an accredited initial teacher education programme; or*
 - (ii) that the Board recognises as equivalent to such qualification; and*
 - (b) meets the professional standards approved by the Board for provisional registration, or has done so within previous 5 years; and*
 - (c) is a fit and proper person to be a registered teacher; and*
 - (d) has the English language skills, both written and oral, prescribed as suitable for registration as a teacher [emphasis added].*
- 58 Section 3 of the Act defines **Board** as:
- The Teacher Registration Board of Western Australia established by Section 86.*
- 59 Section 3 of the Act defines **Professional Standards** as:
- The professional standards developed by the Board and approved by the Minister under section 20.*
- 60 Section 20 of the Act states:
- (1) Professional standards are to be developed by the Board and approved by the Minister.*
 - (2) The purpose of the professional standards is to detail the abilities, experience, knowledge or skills expected of registered teachers.*
 - (3) The professional standards may adopt the text of any code, rules, specifications, standard or other document issued, published or approved by another person or body.*
 - (4) The text referred to in subsection (3) may be adopted –*
 - (a) wholly or in part or as modified by the professional standards; and*
 - (b) as it exists at a particular date or as amended from time to time.*
 - (5) The Board is to make the professional standards available for inspection on a website maintained by the Board.*
- 61 The argument espoused by Mr Gill may perhaps have been persuasive had there been evidence presented that demonstrates that the TRBWA actually utilises, either in part or in full, the AITSL Framework as part of their professional standards for registration.
- 62 No such evidence has been presented, nor was a copy of the TRBWA professional standards tendered at trial.
- 63 No evidence has been tendered regarding the TRBWA website maintained by the Board, nor the professional standards that are available for inspection on the site.

- 64 The letter from TRBWA to Mr Gill merely demonstrates that at the time of his employment with the College, he had been granted provisional registration to teach in Western Australia. He had met the minimum requirements pursuant to s 16 of the Act.
- 65 In no way does the letter support the proposition that the TRBWA had determined that Mr Gill had qualifications equivalent to either:
- (i) a three-year, full-time '*degree in education or early childhood education*' at an Australian university; or
 - (ii) a four-year full-time '*degree in education or early childhood education*' at an Australian university, and in addition, a one-year full-time postgraduate degree at an Australian university.
- 66 At the time he commenced employment with the College, Mr Gill did not qualify as a 'Four Years Trained Teacher' or a 'Five Years Trained Teacher'. Nor did he qualify as a Two' or 'Three-years Trained Teacher'.
- 67 Based upon the evidence presented at trial, at the time that he commenced with the College, Mr Gill's classification fell within the ambit of cl 6.3.2.1.4 of the Agreement: he was a '*Not otherwise classified*' teacher and therefore, read in conjunction with cl 6.2.4 of the Agreement, was to commence on Step 1, progressing to each further step upon completion of a year's full-time service.

Issue 2: Did the College accurately assess the claimant's qualifications and experience at the commencement of his employment?

- 68 Mr Gill asserts that at the time he commenced with the College in April 2017, he had performed the equivalent of 6.84 years prior service as a full-time teacher.¹²
- 69 Pursuant to cl 6.3.1.1 of the Agreement, Mr Gill was entitled to be granted credit for previous teaching service if the following criteria were met:
- (i) Upon engagement, Mr Gill was required to establish to the satisfaction of the College the length of his prior teaching service;
 - (ii) The teaching service must have occurred in recognised schools certified or registered under the appropriate legislation in other States or Territories.
- 70 The clause then sets out a calculation for calculating the service of particular classes of teachers: full-time teachers, part-time teachers and relief teachers.
- 71 Each of those classes is clearly defined in cl 4 of the Agreement: in order to satisfy the definition of a 'teacher', the teacher must be registered to teach within the State of Western Australia.¹³
- 72 To satisfy the criteria for credit for prior service pursuant to cl 6.3.1 of the Agreement, a teacher is required to provide evidence of prior teaching service amassed since being registered to teach in Western Australia¹⁴ or within 'schools certified or registered under the appropriate legislation in other States or Territories of the Commonwealth of Australia'.¹⁵
- 73 Clearly, when cl 6.3.1 of the Agreement is read in conjunction with the definitions in cl 4.1.13 to 4.1.13, the Agreement allows the College to give credit to teachers who have been registered to teach in another State or Territory of Australia and who can provide satisfactory evidence of teaching experience in a certified or registered school within that jurisdiction.
- 74 Mr Gill asserts that he should have been given credit for the following full-time teaching service amounting to a total of 6.21 years¹⁶:

School/Educational Facility	Time Period	Service
Lilydale Adventist Academy	15/01/2008 to 14/01/2010	2 years
Seventh-Day Adventist Schools Tasmania (Ltd)	15/01/2010 to 26/07/2012	2.53 years
Marist Regional College Tasmania	01/02/2015 to 31/07/2015	0.49 years
Tasmanian Department of Education (Devonport High School)	03/02/2014 to 17/04/2014	0.2 years
Tasmanian Department of Education (Yolla District High School)	10/08/2015 to 23/09/2015	0.12 years
Karalindi Aboriginal Education Community	01/02/2016 to 23/09/2016	0.64 years
Hedland Senior High School	30/01/2017 to 23/04/2017	0.23 years

- 75 Mr Gill asserts that he should have been given credit for the following part-time teaching service¹⁷:

School/Educational Facility	Time Period	Service
Marist Regional College Tasmania	20/10/2014 to 14/11/2014	0.04 years
Marist Regional College Tasmania	15/09/2014 to 26/09/2014	0.03 years
Marist Regional College Tasmania	21/07/2014 to 18/08/2014	0.07 years

- 76 Mr Gill asserts that he should have been given credit for the following relief teaching service¹⁸:

School/Educational Facility	Time Period	Service
Marist Regional College Tasmania	13 days	0.065 years ¹⁹
Tasmanian Department of Education	85 days	0.425 years ²⁰

77 Mr Gill was granted provisional registration as a teacher in Tasmania in January 2012²¹ and was granted provisional registration as a teacher in Western Australia from 12 February 2016.²²

78 He was not registered as a teacher in any State or Territory at the time that he was working at the Lilydale Adventist Academy: he had been granted 'Board Authority' to teach two subjects, which was a limited authority to teach. This did not amount to registration as a teacher, as is made clear in the letter from the Teachers Registration Board of Tasmania:

*Limited Authorities to Teach (LATs) are a special authority granted by the Board to school, when certain conditions are met, to enable the school to employ a person does not qualify for registration, for a specific and short timeframe and for a particular purpose. LATs are only used when a school cannot find a suitably registered teacher for a role and the school provides evidence of this to the Board.*²³

79 Given that Mr Gill was not granted provisional registration to teach in any State or Territory of Australia until January 2012, the College was not required to consider any period of service prior to that date.

80 At the time that Mr Gill commenced with the College, he was requested to provide evidence of years of his full-time equivalent teaching experience as a fully qualified teacher.²⁴

81 On 15 April 2017, at the time that he expressed interest in the teaching position, Mr Gill provided to the College a copy of his curriculum vitae (CV).²⁵

82 The information within the CV outlined in very general terms the following teaching experience from January 2012 onwards²⁶:

School/Educational Facility	Position	Time Period
Hedland Senior High School	Secondary Teacher	January 2017 – April 2017
Karalundi Aboriginal Community Inc (WA)	Secondary Teacher	January 2016 – September 2016
Yolla District High School (TAS)	Secondary Teacher	August - September 2016
Marist Regional College (TAS)	Secondary Teacher	July 2014 – July 2015
Various Schools (TAS)	Relief Teacher	January 2012 – July 2014

83 Along with the CV, Mr Gill provided a reference from Karalundi Aboriginal Education Community Inc, confirming that he had been employed with their organisation as a full-time teacher from February 2016 until 23 September 2016.

84 The information contained within the letter was inconsistent with Mr Gill's CV, since Mr Gill had asserted in his CV that he had commenced with Karalundi in January 2016, though this was only a difference of one month and may have been a typographical error.

85 Comparing the information contained within the CV and Karalundi letter to the information supplied by Mr Gill in his evidence about his prior teaching experience, it is clear that Mr Gill did not provide the College with any detailed information about his prior teaching experience at the time that it was requested. No distinction was made between full-time and part-time teaching within the body of the CV, no reference was made to 'FTE ratios' in order to correctly calculate any amount of part-time service,²⁷ and no information was provided about the total days of work as a casual or relief teacher.

86 Subsequently, on 8 April 2017, Mr Gill submitted a formal application for the role to Mr Dredge by email.²⁸ Within the application form, Mr Gill asserted that he had 'over 15' years of full-time teaching experience.²⁹ Within the section of the Application titled "Experience in the last five years", Mr Gill had written the words 'Please refer [sic] to resume'.

87 None of the attachments sent with the email provided any further information that would assist Mr Dredge to accurately calculate Mr Gill's previous teaching experience. Nor was any further information about teaching experience provided in the two emails sent to Mr Dredge on 10 April 2017.³⁰

88 After his interview for the position, Mr Gill was requested to provide further information. On 11 April 2017 he supplied via email to Mr Dredge a course outline, a PowerPoint presentation and copy of a payslip from the Department of Education relating to his position at Hedland Senior High School.³¹ The payslip indicated that Mr Gill was being paid at 'Band 2' for the 'Country Teaching Program'. His fortnightly pay rate at Hedland was \$2,612.28.

89 Prior to offering Mr Gill the teaching role at the College, Mr Dredge undertook an assessment of Mr Gill's previous teaching experience, based upon the information that had been provided to him.³² Given the vague assertions made by Mr Gill in his CV and his application, it was impossible for Mr Dredge to accurately calculate how much prior teaching Mr Gill had amassed, save and except for reviewing the information provided in the Karalundi letter and the Hedland Senior High School payslip.

90 Mr Dredge ultimately granted Mr Gill credit for a period equivalent to 2 years of full-time teaching service and ascertained that he was entitled to commence on salary Step 3.³³

91 Having reviewed the materials provided to Mr Dredge in early April 2017, I am satisfied that at the time that he undertook the assessment, Mr Dredge calculated the prior teaching experience as accurately as he could in the circumstances.

92 Based upon the information provided in evidence at trial, (bearing in mind that any service prior to January 2012 was ineligible because Mr Gill had not yet attained provisional accreditation), the actual prior teaching experience of Mr Gill at the time that he was offered the position at the College was 2.81 years, calculated as follows:

School/Educational Facility	Time Period	Service
Seventh-Day Adventist Schools Tasmania (Ltd)	1/02/2012 to 26/07/2012	0.50 years
Marist Regional College Tasmania	01/02/2015 to 31/07/2015	0.49 years
Tasmanian Department of Education (Devonport High School)	03/02/2014 to 17/04/2014	0.2 years

Tasmanian Department of Education (Yolla District High School)	10/08/2015 to 23/09/2015	0.12 years
Karalindi Aboriginal Education Community	01/02/2016 to 23/09/2016	0.64 years
Hedland Senior High School	30/01/2017 to 23/04/2017	0.23 years
Marist Regional College Tasmania	20/10/2014 to 14/11/2014	0.04 years
Marist Regional College Tasmania	15/09/2014 to 26/09/2014	0.03 years
Marist Regional College Tasmania	21/07/2014 to 18/08/2014	0.07 years
Marist Regional College Tasmania	13 days relief teaching	0.065 years
Tasmanian Department of Education	85 days relief teaching	0.425 years

- 93 Therefore, Mr Dredge was incorrect in his calculation by an amount of 0.81 years. However, such an error makes no meaningful difference, since Mr Gill had not yet amassed enough teaching experience to attain the next step, being Step 4.
- 94 Mr Gill asserts that he provided Statements of Service from the Tasmanian Department of Education, Marist Regional College and Karalundi to the College upon his commencement, to allow Mr Dredge to correctly calculate Mr Gill's prior teaching experience:³⁴ I do not accept this.
- 95 Had the Statements of Service been provided at the commencement of Mr Gill's employment, Mr Dredge would have been able to correctly ascertain the actual prior teaching experience of 2.81 years.
- 96 Further, in the response letter to the Independent Education Union (the Union) dated 31 July 2018, Mr Dredge made specific reference to the fact that Mr Gill had not provided sufficient details to the College: he then specifically listed the two schools that he was able to calculate (being Hedland and Karalundi) and gave an explanation regarding how he came to calculate the balance of the relief and short-term employment work.³⁵ Mr Dredge then invited the Union to provide further evidence in support of the prior teaching service.
- 97 Mr Gill's Statements of Service were attached to the subsequent letters from the Union dated 3 September 2018³⁶ and 22 March 2019.³⁷ That is the first time that the College received official Statements of Service from Mr Gill.
- 98 Even if there had been cogent evidence presented at trial that demonstrated Mr Gill had provided evidence of his prior teaching experience to the College in April 2017, there would only have been a marginal adjustment of 0.81 to Mr Dredge's assessment. It would not have qualified Mr Gill to receive any more than a 'Step 3' salary under cl 15.4 of the Agreement.
- 99 At no time throughout the duration of his employment until September 2018 did Mr Gill provide any further evidence of prior teaching experience as required by cl 6.3.1.1 of the Agreement, although had he done so, his salary would not have been adjusted.

Issue 3: Did the College correctly transition between levels of salary throughout the claimant's employment?

- 100 Mr Gill argues that by reason of him being employed on a full-time basis from 24 April 2017, that he was eligible to progress to the next salary level from 21 June 2017, since he had amassed 306 days by the time that he commenced and was only required to work a further 58 days in full-time employment to progress to the next salary level.³⁸
- 101 However, such an argument fails to properly examine the Letter of Offer or Employment to Mr Gill dated 12 April 2017 and also the relevant clauses of the Agreement.
- 102 The Letter of Offer of Employment specified that the salary is set '*according to the Staff Agreement 2016 to 2018, depending upon qualifications and years of experience*' as per 15.4 Table 1D Teacher Salaries and clause 6.3.2.³⁹
- 103 The letter confirmed that Mr Gill's salary for 2017 would be \$68,995 or Step 7 at a rate of (1.0) FTE pro rata.⁴⁰
- 104 The letter attached a copy of the Agreement.
- 105 Mr Gill signed the letter on 12 April 2017. At the time of signing the Letter of Offer of Employment, he was accepting the offer of employment on the terms and conditions set out in the letter and in the Agreement.
- 106 Pursuant to clause 6.2.4.1 of the Agreement:
... where the classification structure for an Employee contains steps within levels an Employee shall be appointed to step one of the appropriate level and shall progress to each further step in the level on completion of a year's full-time service or equivalent. The number of steps within each level shall be as set out in section 15 – Monetary Rates.
- 107 Pursuant to cl 6.3.6.6.1 of the Agreement:
A teacher who commences employment after the usual date of commencement at a school in any school year, shall be paid from the date the teacher commences provided that at the end of Term Four or final semester in that year, the teacher shall be paid an amount calculated pursuant to clause 6.3.6.3 or 6.3.6.4 as appropriate and shall receive no salary or other payment other than payment under this clause until the School Service Date or the resumption of term one for first semester in the following school year.
- 108 Pursuant to cl 6.3.6.6.2 of the Agreement:
In each succeeding year of employment, the anniversary of appointment of the teacher for the purpose of this clause shall be deemed to be School Service Date.
- 109 Pursuant to cl 4.1.32 of the Agreement:

“School Service Date” means the usual commencement date of employment at a school for teachers who are to commence teaching on the first day of the first term.

110 It is clear from the terms of the Agreement that Mr Gill was not entitled to progress to the next salary level from 21 June 2017. He was only entitled to commence to the next salary step upon his 12-month anniversary of appointment.

111 Mr Gill entered into a new contract with the College in December 2017 and remained at Step 7 but his salary increased incrementally to \$71,410 per annum.⁴¹

112 The College correctly transitioned Mr Gill to Step 9 in May 2018 when he had reached his anniversary of appointment.

113 At no time during Mr Gill’s employment did the College fail in its obligations to Mr Gill in respect of transitioning between salary levels.

Issue 4: Does any liability arise with respect to underpayment?

114 No liability arises with respect to underpayment. Having attained 2.81 years of prior teaching service and being a ‘*Not otherwise classified teacher*’ pursuant to cl 6.3.2.1.4 of the Agreement, Mr Gill was only entitled to commence on Step 3, being the annual salary of \$51,404.

115 At the time that Mr Gill commenced employment with the College, Mr Dredge reviewed Mr Gill’s previous salary at Hedland Senior High School and began Mr Gill at Step 7 (being the annual salary of \$68,995), because he did not want to pay Mr Gill a salary lower than he was paid in his previous role.

116 At the commencement of his employment, the College paid Mr Gill \$17,591 per annum more than they were required pay to under the Agreement.

117 Thereafter, Mr Gill correctly transitioned between the levels of salary until ceasing employment in December 2019.

118 Having concluded so, it is therefore not necessary for any assessment to be made regarding the second respondent’s liability.

Result

119 The claim is dismissed.

B. COLEMAN

INDUSTRIAL MAGISTRATE

¹ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638 at 53.

² Transcript of Proceedings pages 11 to 13.

³ *Ibid.*

⁴ *Ibid.*

⁵ Exhibit 1, attachment RG 9.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ See exhibit 1 attachment RG9.

⁹ Amended Statement of Claim para 12.

¹⁰ *Ibid.*

¹¹ Exhibit 1, attachment RG1.

¹² Amended Statement of Claim para 9, Exhibit 1, paras 13 to 27.

¹³ Agreement clauses 4.1.12, 4.1.13, 4.1.14

¹⁴ Agreement clause 4.1.12, 4.1.13, 4.1.14

¹⁵ Agreement clause 6.3.1.1.

¹⁶ Amended Statement of Claim para 9; Exhibit 1, paras 13 to 20; Exhibit 2, Annexures N and P: Statements of Service.

¹⁷ Amended Statement of Claim para 9ii; Exhibit 1, paras 21 to 24; Exhibit 2, Annexures N and P: Statements of Service.

¹⁸ C Amended Statement of Claim para 9iii; Exhibit 1, paras 25 to 27; Exhibit 2, Annexures N and P: Statements of Service.

¹⁹ Note that this calculation of service was incorrectly stated in the Amended Statement of Claim as ‘0.49’.

²⁰ Note that this calculation of service was incorrectly stated in the Amended Statement of Claim as ‘0.32’.

²¹ Exhibit 1, attachment RG2.

²² Exhibit 1, attachment RG1.

²³ *Ibid* at paragraph 2.

²⁴ Exhibit 2, paragraph 30 and annexure B Employment Application Form.

²⁵ Exhibit 2 para 10, annexure A.

²⁶ *Ibid.* Note that the claimant’s curriculum vitae informed the reader that his service period for relief teaching was from January 2010, however, since the claimant was not a registered teacher in Tasmania until January 2012, two years of this teaching service could not be taken into account.

²⁷ See clause 6.3.1.1.2 of the Agreement.

²⁸ Exhibit 2 para 10, Annexure B.

²⁹ Ibid.

³⁰ Exhibit 2 paras 11 and 12, Annexures C and D.

³¹ Exhibit 2 paras 14 and 15, Annexure E.

³² Exhibit 2 paras 27-37.

³³ Exhibit 2, para 35.

³⁴ Exhibit 1, paragraph 38.

³⁵ Exhibit 2, Annexure M, Letter to the Independent Education Union dated 31 July 2018.

³⁶ Exhibit 2, Annexure N, letter to Mr Craig Dredge dated 3 September 2018.

³⁷ Exhibit 2, Annexure P, Letter to Mr Craig Dredge dated 22 March 2019.

³⁸ Amended Statement of Claim paragraphs 16 to 18.

³⁹ Exhibit 2, Annexure F, Letter of Appointment.

⁴⁰ Ibid.

⁴¹ Exhibit 2, paras 21-22; Annexure H.

Schedule I: Jurisdiction, Practice And Procedure Of The Western Australian Industrial Magistrates Court Under The Fair Work Act 2009 (Cth)

Jurisdiction

- [1] An employee, an employee organization or an inspector may apply to ‘*an eligible State or Territory court*’ for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.
- [2] The IMC, being a court constituted by an industrial magistrate, is an ‘*eligible State or Territory court*’: FWA s 12 (see definitions of ‘*eligible State or Territory court*’ and ‘*magistrates court*’); *Industrial Relations Act 1979* (WA) s 81 and s 81B.
- [3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA s 544.
- [4] The civil penalty provisions identified in s 539 of the FWA include contravening a term of the NES: FWA s 44(1).
- [5] An obligation upon an ‘*employer*’ is an obligation upon a ‘*national system employer*’ and that term, relevantly, is defined to include ‘*a corporation to which paragraph 51(xx) of the Constitution applies*’: FWA s 12, s 14, s 42 and s 47. A NES entitlement of an employee is an entitlement of an ‘*employee*’ who is a ‘*national system employee*’ and that term, relevantly, is defined to include ‘*an individual so far as he or she is employed ... by a national system employer*’: FWA s 13, s 42 and s 47.

Contravention

- [6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for ‘*an employer to pay [to an employee] an amount ... that the employer was required to pay*’ under the modern award: FWA s 545(3)(a).
- [7] The civil penalty provisions identified in s 539 of the FWA includes:
- The Core provisions (including s 44(1) and s 45) set out in pt 2 - 1 of the FWA: FWA s 61(2) and s 539.
- [8] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for:
- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA s 545(3).
- [9] Any person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision: FWA s550(1).
- [10] Where a person is involved in a contravention, the person will have contravened the provision if they have:
- aided, abetted, counselled or procured the contravention; or
 - induced the contravention, whether by threats, promises or otherwise; or
 - in any way, by act or omission, directly or indirectly, been knowingly concerned in the contravention or have been a party to the contravention; or
 - conspired with others to effect the contravention: FWA s550(2).
- [11] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: *Mildren v Gabbusch* [2014] SAIRC 15.

Burden and standard of proof

- [12] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof ‘on the balance of probabilities’. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.

[13] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences [362].

PRISONS ACT 1981—APPEAL—Matters pertaining to—

2022 WAIRC 00746

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 24 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2022 WAIRC 00746
CORAM : CHIEF COMMISSIONER S J KENNER
 SENIOR COMMISSIONER R COSENTINO
 COMMISSIONER T EMMANUEL
HEARD : WEDNESDAY, 31 AUGUST 2022
DELIVERED : TUESDAY, 25 OCTOBER 2022
FILE NO. : APPL 11 OF 2022
BETWEEN : KEVIN SAID
 Appellant
 AND
 DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
 Respondent

Catchwords : Industrial Law (WA) – Appeal against the removal under s 106(2) of the *Prisons Act 1981* (WA) – Section 99 definition of ‘new evidence’ – Application to rely on documents not contained in the bundles of documents filed under reg 89E – Consideration of ‘new evidence’ – What does ‘taken into account...in making the removal decision’ mean? – Whether a document was ‘new evidence’ – Document’s relevance to appeal – Whether interests of justice require leave to tender new evidence – Whether to extend time to file documents under reg 89E

Legislation : *Corruption, Crime and Misconduct Act 2003* (WA)
Industrial Relations Act 1979 (WA) s 26(1)(a), s 26(1)(b)
Industrial Relations Commission Regulations 2005 (WA) reg 89D, reg 89E, reg 89E(2)
Police Act 1892 (WA)
Prisons Act 1981 (WA) s 13(3), s 10B, Part X, s 99, s 101, s 101(4), s 102, s 102(3), s 102(4), s 102(6), s 103(4), s 106, s 106(2), s 107, s 108, s 108(2), s 108(3), s 108(3)(b)(i), s 108(3)(b)(ii), s 108(4), s 109, s 110A

Result : Application dismissed

Representation:

Counsel:

Appellant : Mr C Fordham of counsel

Respondent : Ms E Negus of counsel

Solicitors:

Appellant : Slater & Gordon Lawyers

Respondent : State Solicitor’s Office

Case(s) referred to in reasons:

ACF v Forestry Commission (1988) 19 FCR 127; 79 ALR 685

Australian Unity Property Ltd v City of Busselton [2018] WASCA 38; (2018) 237 LGERA 333

Beverley v The Commissioner of Police [2017] WAIRC 00270; (2017) 97 WAIG 627

Byers v Minister for Corrective Services [2022] WAIRC 00186; (2022) 102 WAIG 252

Frantzen v Director-General Department of Justice [2022] WAIRC 00050; (2020) 102 WAIG 139

General Nominees Pty Ltd (Atf Family Trust Four) v the Metro Inner-North Joint Development Assessment Panel [2022] WASC 114

Lee v West Australian Police Force [2021] WAIRC 00481; (2021) 101 WAIG 1294

Marshall v Metropolitan Redevelopment Authority [2015] WASC 226

Metropolitan Water Board v St Marylebone Assessment Committee [1923] 1 KB 86

Parramatta City Council v Hale (1982) 47 LGRA 319

Polizzi v Commissioner of Police [2014] WAIRC 00302; (2014) 94 WAIG 477

Tobacco Institute of Australia v National Health and Medical Research Council [1996] FCA 1150

Reasons for Decision

THE COMMISSION:

- 1 The appellant, Mr Kevin Said, was formerly a Senior Prison Officer. He was removed from that position following removal action under the loss of confidence provisions contained in Part X of the *Prisons Act 1981* (WA). He has appealed the removal decision under that part.
- 2 By an interlocutory application, Mr Said seeks to rely at the hearing of his appeal on two documents that are not contained in the bundles of documents filed under reg 89E of the *Industrial Relations Commission Regulations 2005* (WA).
- 3 The first document is a transcript of a private examination of another prison officer to Corruption and Crime Commission proceedings. Mr Said submits that this is a document which the decision maker examined and took into account in making the removal decision. The fact that it was not included in the documents filed under reg 89E was a consequence of it not being available to him at the time of filing, being ‘restricted information’ under the *Corruption, Crime and Misconduct Act 2003* (WA). In effect, except for the delay in the document becoming available to him, it ought to have been contained in the documents filed under reg 89E of the *IRC Regulations*, being a document that was contained in the list of documents filed under reg 89D.
- 4 In the alternative, if the transcript is properly characterised as ‘new evidence’ as that term is used in the *Prisons Act*, then Mr Said seeks leave to tender it under s 108 of the *Prisons Act*.
- 5 The second document is an Incident Report logged by Mr Said in 2016. Mr Said agrees that this document is ‘new evidence’ for the purpose of Part X of the *Prisons Act*. He seeks leave to tender it on the basis that it is in the interests of justice to grant leave.
- 6 The respondent, the Director-General, Department of Justice, opposes orders enabling these two documents to be before the Commission at the hearing of the appeal. He maintains that the transcript is ‘new evidence’, and that neither document meets the test in s 108 for the tender of ‘new evidence’, because neither document is relevant to any issue in the appeal.
- 7 The determination of the interlocutory application concerning the transcript therefore involves:
 - (a) The construction of the *Prisons Act*, in particular, the meaning of ‘examined and taken into account’ in part (a) of the definition of ‘new evidence’;
 - (b) A factual finding as to what if any use the decision maker made of the transcript in making the removal decision, to determine whether the transcript is or is not ‘new evidence’ as correctly understood;
 - (c) If the transcript is not ‘new evidence’, whether the Commission should exercise its discretion to extend the time for filing it as a document relied upon under reg 89E; and
 - (d) If the transcript is ‘new evidence’, whether it is in the interests of justice to grant leave to tender it.
- 8 Points (c) and (d) above essentially turn on the transcript’s relevance to the issues in the appeal.
- 9 The determination of the application concerning the Incident Report involves an assessment of whether it is in the interests of justice to grant leave to tender it. Regard must be had to the factors in s 108(4) of the *Prisons Act*, namely whether Mr Said was aware of the substance of the new evidence before his removal, and whether its substance was contained in a document to which he had reasonable access before the removal. It also involves an assessment of the relevance of the Incident Report to the issues in the appeal.

The construction issue: General principles

- 10 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The applicable principles are well-known, and were summarised in *Australian Unity Property Ltd v City of Busselton* [2018] WASCA 38; (2018) 237 LGERA 333 as follows (citations omitted):

The first aspect is the imperative to give primacy to the language which the legislating body has chosen to use. As the plurality observed in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

This focus on the statutory text may be seen as an aspect of the rule of law. It recognises and preserves the role of the legislature, acting within constitutional constraints, in identifying the policy which legislation is to pursue by requiring that effect be given to the chosen text. This point was noted by Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*:

The danger that lies in departing from the ordinary meaning of unambiguous provisions is that “it may degrade into mere judicial criticism of the propriety of the acts of the Legislature”... it may lead judges to put their own ideas of justice or social policy in place of the words of the statute.

Additionally, focus on the statutory text facilitates the comprehension of the meaning of legislation by persons whose conduct it regulates. As French CJ observed in *Alcan*:

The starting point in consideration of the first question is the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose. That proposition accords with the approach to construction characterised by Gaudron J in *Corporate Affairs Commission (NSW) v Yuill* (1991) [1991] HCA 28; 172 CLR 319 at [340] as: ‘dictated by elementary considerations of fairness, for, after all, those who are subject to the law’s commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.’ In so saying, it must be accepted that context and legislative purpose will cast light upon the sense in which the words of the statute are to be read. Context is here used in a wide sense referable, inter alia, to the existing state of the law and the mischief which the statute was intended to remedy.

Prison officer appeals under Part X of the *Prisons Act*

- 11 In light of these principles, it is useful to commence the analysis with some observations about the statutory scheme for appeals against removal decisions.
- 12 Part X, Division 3 of the *Prisons Act* provides for the removal of prison officers due to loss of confidence in a prison officer’s suitability to continue as a prison officer. In this regard, suitability to continue as a prison officer means suitability having regard to the officer’s integrity, honesty, competence, performance or conduct: s 99 and s 101.
- 13 Division 3 sets out the processes involved in removal of prison officers. The Chief Executive Officer/Director-General may provide a notice setting out the grounds for the Notice of Loss of Confidence with an opportunity for the prison officer to make written submissions in relation to that notice under s 102 of the *Prisons Act*. Following the submission period, the Director-General must:
 - (a) decide whether or not to take removal action against the prison officer; and
 - (b) give the prison officer written notice of the decision (the decision notice): s 102(3) of the *Prisons Act*.
- 14 The decision notice must contain the reasons for the decision: s 102(5).
- 15 ‘Removal action’ is the action of recommending to the Minister that the prison officer be removed under s 13(3) of the of the *Prisons Act*: s 101.
- 16 Section 102(4) of the *Prisons Act* provides:
 - (4) The chief executive officer must not decide to take removal action against the prison officer unless the chief executive officer —
 - (a) has taken into account any written submissions received from the prison officer during the submission period; and
 - (b) still does not have confidence in a prison officer’s suitability to continue as a prison officer.
- 17 Section 102(6) of the *Prisons Act* provides:
 - (6) Except as provided in the regulations, the chief executive officer must, within 7 days after giving the decision notice —
 - (a) give to the prison officer a copy of any documents that were considered by the chief executive officer in making the decision; and
 - (b) make available to the prison officer for inspection any other materials that were considered by the chief executive officer in making the decision.
- 18 A prison officer who is removed as a result of removal action has a right of appeal to the Commission on the ground that it was harsh, oppressive or unfair under s 106.
- 19 Section 107 of the *Prisons Act* provides:

107. Proceedings on appeal

- (1) On the hearing of an appeal, the WAIRC must proceed in the following manner —
 - (a) first, it must consider the chief executive officer’s reasons for the removal decision;
 - (b) second, it must consider the case presented by the appellant as to why the removal decision was harsh, oppressive or unfair;
 - (c) third, it must consider the case presented by the chief executive officer in answer to the appellant’s case.
- (2) The appellant has at all times the burden of establishing that the removal decision was harsh, oppressive or unfair.

- (3) Subsection (2) has effect despite any law or practice to the contrary.
- (4) Without limiting the matters to which the WAIRC is otherwise required or permitted to have regard in determining the appeal, it must have regard to —
 - (a) the interests of the appellant; and
 - (b) the public interest, which is to be taken to include —
 - (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of prison officers; and
 - (ii) the special nature of the relationship between the chief executive officer and prison officers.

20 Sections 108 and 109 of the *Prisons Act* are also relevant context. They provide:

108. Leave to tender new evidence on appeal

- (1) New evidence cannot be tendered to the WAIRC during a hearing of an appeal unless the WAIRC grants leave under subsection (2) or (3).
- (2) The WAIRC may grant the chief executive officer leave to tender new evidence if —
 - (a) the appellant consents; or
 - (b) it is satisfied that it is in the interests of justice to do so.
- (3) The WAIRC may grant the appellant leave to tender new evidence if —
 - (a) the chief executive officer consents; or
 - (b) the WAIRC is satisfied that —
 - (i) the appellant is likely to be able to use the new evidence to show that the chief executive officer has acted upon wrong or mistaken information; or
 - (ii) the new evidence might materially have affected the chief executive officer's removal decision; or
 - (iii) it is in the interests of justice to do so.
- (4) In the exercise of its discretion under subsection (3), the WAIRC must have regard to —
 - (a) whether or not the appellant was aware of the substance of the new evidence before the appellant's removal; and
 - (b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access before the appellant's removal.

109. Opportunity to consider new evidence

- (1) If the chief executive officer is given leave to tender new evidence under section 108(2) —
 - (a) the WAIRC must give the appellant a reasonable opportunity to consider the new evidence; and
 - (b) the appellant may, without the leave of the WAIRC, tender new evidence under this section in response to the new evidence tendered by the chief executive officer.
- (2) If the appellant is given leave to tender new evidence under section 108(3), the WAIRC must give the chief executive officer a reasonable opportunity to consider the new evidence.

21 'New evidence' is defined in s 99:

new evidence, on an appeal against the removal of a prison officer, means evidence other than evidence of any of the following —

- (a) a document or other material that was examined and taken into account by the chief executive officer in making the removal decision;
- (b) the notice given under section 102(1);
- (c) a written submission made to the chief executive officer by the prison officer under section 102(2);
- (d) a decision notice;
- (e) a notification of the removal;

22 The approach the Commission is to take in determining appeals from loss of confidence removals was recently set out in *Frantzen v Director-General Department of Justice* [2022] WAIRC 00050; (2020) 102 WAIG 139 at [20]-[23] and restated in *Byers v Minister for Corrective Services* [2022] WAIRC 00186; (2022) 102 WAIG 252. Relevantly:

- (a) the approach under Part X is the same as the approach that is adopted by the Commission to appeals against removals of police officers under the *Police Act 1892* (WA).
- (b) Ultimately, the test is whether, having regard to the circumstances of a particular case, it was open to the Chief Executive Officer to lose confidence in a prison officer by reason of their integrity, honesty, competence, performance, or conduct.

(c) In determining whether the removal decision was harsh, oppressive or unfair, the Commission is to first determine whether there is a logical and sound basis for the Director-General to find as he did. The Commission should be attentive to the Director-General's reasons, examining them closely in terms of substance and the process by which they were formulated.

(d) The grounds of appeal mark out the scope of the issues to be determined.

23 An appeal under Part X is limited in scope and it is not a de novo proceeding. The parties are to consider the respondent's reasons for removal and the materials relied upon for the removal and advance their respective cases based upon it: *Lee* at [11].

24 Consistent with this general scheme, Part X regulates the use of 'new evidence' in appeals: *Lee* at [14].

What does 'taken into account...in making the removal decision' mean?

25 The constructional choice presented by the parties in this application is essentially whether 'taken into account...in making the removal decision' in the definition of 'new evidence' means:

(a) considered as part of the process that led to the removal decision, including intermediate findings, acts and procedural determinations (the broad approach); or

(b) considered as an operative factor in the removal decision, that is, a basis for the decision (the narrow approach).

26 Mr Said's counsel submitted that matters considered in the Notice of Loss of Confidence, as a step in the process of taking removal action, are matters that are taken into account in making the removal decision. Documents which are before the decision-maker and weighed in the process are therefore documents that are taken into account, even if they are not fundamental to the ultimate decision.

27 On the other hand, the Director-General submits that only those documents which are fundamental elements in the decision are 'taken into account', as correctly construed.

28 In support of a broad construction, counsel for Mr Said points to the interaction between the definition of 'new evidence' and the process which follows leave being granted to tender it, under s 109 of the *Prisons Act*.

29 Counsel for the Director-General relied upon notions of what it is to 'take into account' a relevant (or irrelevant) matter, derived from decisions concerning judicial review of administrative actions. Counsel directed the Commission's attention to Burchett J's comments in *ACF v Forestry Commission* (1988) 19 FCR 127; 79 ALR 685, an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), to the effect that a decision maker commits no error by considering a factor, and rejecting it, so that it played no part in the decision and did not affect the decision: a decision maker 'may pick up a red herring, turn it over to examine it, and then put it down, so long as [s]he does not allow it to affect [her] his decision'.

30 The Director-General posits that the logical extension is that considering a matter, but then rejecting it, means it has not been taken into account. It should be noted that Burchett J does not expressly consider or state whether such process means the matter has not been taken into account. His Honour's point is simply that administrative error by taking into account an irrelevant matter has not occurred.

31 The Director-General also relies on *Parramatta City Council v Hale* (1982) 47 LGRA 319 where Moffitt P stated at 339:

The obligation imposed by s. 90(1) is direct and specific. First it should be observed that s. 90(1) provides that the consent authority "shall take into consideration" such of the matters in (a) to (s) as are relevant. It was put to us that the authority could consider relevant matters and reject them. An assertion in these terms has an ambiguity likely to produce error. If the submission means that it is sufficient that the authority advert to a relevant matter and that it can then discard it, the submission must be rejected, because the requirement is that the matter shall be taken into consideration. It may well be that the council fell into this very error, which the submission made on its behalf seems to suggest, namely that having adverted to what was said concerning the environmental matters in the report, it discarded some matters without taking them into consideration. The obligation imposed by s. 90(1) is defined by the positive terms of the subsection, so that a gloss upon them is neither necessary nor desirable.

32 Again, the Director-General says that the reasoning applied is that averting to a matter, and then discarding it for the purpose of making the decision, means that the matter is not 'take[n] into consideration'.

33 In *Parramatta City Council*, the learned President was considering the requirements of s 90 of the *Environmental Planning and Assessment Act 1979* (NSW). The section provided that when determining a development application, the council 'shall take into consideration such of the following matters as are of relevance to the development the subject of the development application:' A list of potentially relevant matters followed.

34 The statutory formula considered in *Parramatta City Council* is starkly different to that which empowers the Director-General to take removal action. It is difficult to derive any assistance from it, in resolving the question of what 'taken into account' means when used in Part X of the *Prisons Act*.

35 The phrase 'take into account' is synonymous with 'have regard to'. The *Macquarie Dictionary* contains a definition of 'regard' as meaning 'to take into account; consider'.

36 The seminal statement on the words 'take into account' is that of Lord Hewart CJ in *Metropolitan Water Board v St Marylebone Assessment Committee* [1923] 1 KB 86 at 99:

...It is quite evident that confusion has arisen in the past between the ambiguous meanings of the word "account." "To take into account" in the sense of including figures in a mathematical calculation, is one thing; "to take into account" in the sense of paying attention to a matter in the course of an intellectual process is quite another thing...

37 Within these observations about the meaning of 'take into account' there remains scope for different formula. The choice between those different formula remains a matter of statutory construction. In some statutory contexts, taking a matter into

account will mean giving some consideration to it. In other contexts, it will mean giving the matter weight as a fundamental element in the ultimate decision. As Pritchard J stated in *Marshall v Metropolitan Redevelopment Authority* [2015] WASC 226 at [107]-[109]:

The word ‘regard’, when used as a verb, is synonymous with ‘consider’ and ‘take into account’. In other words, the phrase ‘have regard to’ (or ‘have due regard for’) requires the MRA to take into account, or give consideration to, the matters listed. In my view, s 66(1) of the MRA Act and cl 5.22 of the CPR Scheme together identify the relevant considerations which the MRA is required to take into account in considering a development application.

The question which then arises is the extent to which the MRA is required to give consideration to those matters. There are divergent authorities about the content of a requirement for a decisionmaker to take into account relevant considerations when exercising a statutory power. One line of authority is to the effect that provided the relevant matter is given some consideration, the duty is discharged. The alternative line of authority, which has received support in this State, is to the effect that the requirement to take into account a relevant consideration is a requirement to give proper, genuine and realistic consideration to the relevant matter.

However, in every case, the content of an obligation on a decisionmaker to take into account relevant considerations - or, as in this case, to ‘have regard to’ or to ‘have due regard for’ particular matters - must be determined by a process of statutory interpretation. That process requires that the words used in the statute be construed within their statutory context.

- 38 In *Tobacco Institute of Australia v National Health and Medical Research Council* [1996] FCA 1150, Finn J observed (emphasis added):

...It is the case that the usual context in which courts in this country have construed the formula ‘have regard to’ is one where, as part of a decision making process, regard is to be had to particular considerations or matters that are themselves of a substantive kind, eg particular criteria, effects, etc: see eg *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119.

In cases of that variety, the ‘have regard to’ formula has been interpreted consistently as requiring that the decision maker subject to the formula must ‘take into account’ the matter or consideration to which regard is to be had, and must ‘give weight to’ that matter or consideration ‘as a fundamental element in making his determination’: *Re R J D Hunt; Ex parte Sean Investments Pty Ltd* [1979] HCA 32; (1979) 53 ALJR 552 at 554 per Mason J; see also *R v Toohey; Ex parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327 at 333, 338; *Queensland Medical Laboratory v Blewett* [1988] FCA 423; (1988) 84 ALR 615 at 623.

Distinctively, in the present case, s12(3) of the [*National Health and Medical Research Council Act 1992* (Cth)] does not oblige the NH&MRC to have regard to a particular matter as a consideration relevant to the substance of its decision and of which account must be taken for that reason. Rather, it must have regard to the submissions received irrespective of whether, in the end, they are found to contain matter relevant at all to the decision to be taken. This obligation is a central element in facilitating the community’s participation in the NH&MRC’s policy development process.

Viewed in this light the import of the formula must be somewhat different from that indicated by Mason J in *Sean Investments*, above. Given the purpose to be served by the consultation process, **I would adapt** what Mason J said in *Sean Investments* so that the obligation to have regard to submissions received required the NH&MRC, in preparing the draft recommendation, to take them into account and to give positive consideration to their contents as a fundamental element in its decision making.

By way of elaboration, ‘positive consideration’ of a submission (i) would preclude the adoption of an a priori criterion which itself excluded a part or parts of that submission from actual consideration; and (ii) would involve ‘an active intellectual process directed at that ... submission’: *Tickner v Chapman* [1995] FCA 1726; (1995) 57 FCR 451 at 462 per Black CJ.

- 39 Justice Finn’s observations are pertinent because the administrative decision-making scheme his Honour was considering was, like the Director-General’s power in this case, one where there was no obligation to have regard to particular factors other than the affected parties’ submissions.
- 40 More recently, in *General Nominees Pty Ltd (Atf Family Trust Four) v the Metro Inner-North Joint Development Assessment Panel* [2022] WASC 114, Tottle J observed at [85] that a statutory requirement to give ‘due regard to’ to listed matters requires that a decision-maker must give ‘active or positive consideration to the matters listed, to the extent that they apply in any particular case’, but may be something less than a requirement that a decision-maker must apply or act in compliance with the matters listed.
- 41 Returning to the text and context of the *Prisons Act*, then, we acknowledge that there are competing indications of the legislature’s intent.
- 42 Favours a narrow construction of the phrase ‘taken into account’, the definition requires the document or material to be both examined and taken into account. Taking into account a document or material must therefore be something additional to merely examining it.
- 43 The limited nature of Part X appeals, and the requirement of s 102(5) to give reasons for a removal decision, also provide support for the narrow approach.
- 44 We note to the use of the word ‘considered’ in s 102(6), rather than ‘taken into account’, could indicate a deliberate distinction is intended between the two phrases.
- 45 However, the more compelling textual considerations are those which favour a broad construction of ‘taken into account’.

- 46 Aside from the definition itself, the term ‘new evidence’ is only used in Division 3, Subdivision 3 concerning appeals against removal decisions. This indicates that ‘new evidence’ is evidence which comes into play at the appeal stage of the Part X process, rather than in the investigation and loss of confidence stages of the process. In this structure, there is a chronological ‘line in the sand’. This reveals an intention to distinguish between documents and information in play before the decision was made and documents or matters coming into play after the decision is made. This distinction was alluded to in *Polizzi* at [10].
- 47 Second, as signified earlier, the ambit of the decision maker’s discretion is wide. There is no prescription as to what criteria the decision maker is to apply in forming the removal decision: no list of factors which might justify or mitigate a loss of confidence. The only matter which the decision maker is bound to have regard to, or take into account, in making the decision, is the written submissions received from the prison officer during the submission period: s 103(4). The decision maker is not compelled to give any particular weight to the submissions made by the prison officer.
- 48 The Director-General is not required to reach his or her decision after considering far reaching or comprehensive information that might possibly be or become available. The Director-General may conduct an investigation to determine a prison officer’s suitability to continue as a prison officer: s 101(4). Arriving at a conclusion as to loss of confidence necessarily permits the Director-General to make value judgments around concepts of integrity, honesty, competence, performance, conduct and the public interest.
- 49 The very process of making a removal decision, by its nature, involves weighing and arriving at a decision by a process of synthesis. For instance, a mitigating factor might be genuinely and carefully weighed in favour of a prison officer, but ultimately not sway the Director-General against taking removal action. The mitigating factor’s ultimate rejection does not diminish its involvement in the decision-making process, so that it shouldn’t be before the Commission on appeal.
- 50 The nature of the decision-making power is such that, by taking something into account, the decision maker need not rely upon it positively, or act in compliance with it. The judgement and estimation involved in a removal decision does not involve a tallying or tick box exercise, where all potentially relevant factors fall for or against the removal decision.
- 51 In other words, the nature of the decision-making process is such that many relevant factors may be part of the decision-making process yet not determinative of the ultimate decision, being the exercise of a wide discretion. It follows that the intended scope of what are matters ‘examined and taken into account’ is wide. The Director-General can consider something, but ultimately reject it, as part of the process of ‘making the removal decision’.
- 52 Third, the fact that the other exclusions contained in subpars (b), (c), (d) and (e) of the definition are documents that evidence steps in the process of removal, rather than evidence which might operate to positively inform the ultimate removal decision, also supports a view that what is intended to be captured by the exclusions are documents that were part of the process leading to the removal action, rather than documents that were relied upon as operative to the decision. For example, subpar (b) refers to the notice of loss of confidence. This is a document that evidences the process leading to the removal decision, not a document which could form part of the operative reasons for the removal decision.
- 53 Fourth, the phrase ‘take into account’ is also used in reference to the obligation on the Director-General in relation to the written submissions made by the prison officer under s 102(4). It is self-evident that in this context, ‘take into account’ does not mean to use those submissions as positively or operatively determinative. The Director-General is able to reject a prison officer’s submissions after considering them, so that the submissions do not form part of the reasons for a removal decision. The words ‘taken into account’ in s 102(4) must mean to consider and give any weight or no weight to the submissions as the Director-General thinks fit.
- 54 Most compellingly, when one puts ‘new evidence’ in its operative context, that is, in ss 108, 109 and 110A, it becomes apparent documents or materials which the Director-General considered in the course of the loss of confidence process cannot be intended to be ‘new evidence’.
- 55 An application to tender new evidence can be made by either the Director-General or the prison officer. The criteria for granting leave in each case is different. If the Director-General is applying, there are only two criteria under s 108(2):
- (2) The WAIRC may grant the chief executive officer leave to tender new evidence if —
 - (a) the appellant consents; or
 - (b) it is satisfied that it is in the interests of justice to do so.
- 56 If the prison officer is applying, the criteria under s 108(3) are:
- (3) The WAIRC may grant the appellant leave to tender new evidence if —
 - (a) the chief executive officer consents; or
 - (b) the WAIRC is satisfied that:
 - (i) the appellant is likely to be able to use the new evidence to show that the chief executive officer has acted upon wrong or mistaken information;
 - (ii) the new evidence might materially have affected the chief executive officer’s removal decision; or
 - (iii) it is in the interests of justice to do so.
- 57 If ‘new evidence’ is construed to include documents that were before the Director-General, and considered but not relied upon, then the criteria in s 108(3)(b)(i) and (ii) are redundant and have no scope to operate. If the Director-General had considered particular evidence, but the removal decision was made, it will be practically impossible to show that the evidence might materially have affected the Director-General’s decision. Similarly, such evidence, assuming it is relied upon as correct information, will never qualify as showing the Director-General acted upon wrong or mistaken information.

- 58 Further, s 108(4), which applies only to a prison officer's application for leave to tender new evidence, requires the Commission to have regard to whether or not the prison officer was aware of the substance of the new evidence before their removal, and whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access before the appellant's removal.
- 59 These matters are specified as relevant factors consistent with the purpose of the scheme which is to vest the Director-General with authority to make a removal decision and limit the role of the Commission on appeal. In other words, to ensure that prison officers make the most of their opportunity to make submissions to the Director-General, rather than leave the substance of their response for their appeal.
- 60 Documents which formed part of an investigation, and which were considered by the Director-General, even if ultimately given no weight, should ordinarily be documents which the prison officer was aware of before their removal. If such documents are 'new evidence', prison officers will bear a higher burden in any application for leave to tender them on appeal, for no apparent reason related to the purpose of Part X.
- 61 Section 109 provides that if leave is granted to a party to tender new evidence, then the other party must be given a reasonable opportunity to consider the new evidence, and tender new evidence in response. If this applied to documents and material that was before the Director-General in the process of making a removal decision, the purpose of ensuring the removal process itself is the primary venue for determining the merits of a loss of confidence process, is undermined. It is not clear how the overall purposes of Part X are achieved by giving the parties' what would in effect be a second bite at the cherry, on the same information that was previously available to them. Indeed, this would operate perversely, particularly if the Director-General is required to be given an opportunity to consider evidence that was already before them.
- 62 Even greater absurdity would be created in the application of s 110A. It contemplates that the Director-General might revoke a removal decision or reformulate their reasons upon leave being granted to a prison officer to tender new evidence. Obviously, such provisions would be unnecessary if 'new evidence' encompasses evidence which was before the Director-General before they made a removal decision.
- 63 Although there are clearly competing textual and contextual considerations, the most compelling considerations are these latter ones, being found in the core of how the definition of 'new evidence' operates in the scheme of an appeal. This ultimately leads me to the conclusion that the meaning of 'taken into account...in making the removal decision' means considered as a step in the process that led to the removal action. The phrase does not involve the narrower requirement that the evidence be an operative factor or basis in the ultimate decision.
- 64 The result is that documents and materials that are both examined by the Director-General, and considered by them as a step in the process leading to the removal action, will be within the exclusion in subpar (a) of the definition of 'new evidence' and therefore outside the scope of what is 'new evidence'.

Is the transcript 'new evidence'?

- 65 Some background details are necessary.
- 66 The relevant allegations that formed the basis of the Notice of Loss of Confidence can be summarised as:
- (a) That Mr Said misled the Corruption and Crime Commission about when he first became aware of an incident that occurred on 12 November 2018 involving the assault of a prisoner and cover-up of the assault by prison-officers involved in it. Mr Said maintained in his evidence to the CCC that he did not know about the incident until after prison officers were suspended in 2020 (Ground 5).
 - (b) That Mr Said failed to report misconduct which he knew about (in other words, aided in the cover-up of misconduct) (Ground 6).
 - (c) That Mr Said counselled other prison officers who had been stood down over the November 2018 incident in a manner which undermined the integrity of the investigation and perpetuated a toxic culture and corruption within prisons (Grounds 1, 2, 3, 4).
- 67 The allegations were contained in a Notice of Loss of Confidence dated 5 May 2021, which was served on Mr Said on 12 May 2021 together with a summary of investigation, an inspection list which listed the transcript, and copies of all documents in the inspection list, other than the transcript. The inspection list claimed privilege against the transcript's production. Mr Said was provided with information to enable him to inspect the transcript and take notes.
- 68 The witness whose evidence is recorded in the transcript said, in their evidence to the CCC, that they told Mr Said about the November 2018 incident in the days following its occurrence. The Notice of Loss of Confidence and summary of investigation considered the transcript to be relevant to loss of confidence in two ways. First, as evidence of the date that Mr Said first became aware of the incident, being a date that was earlier than he stated in his evidence to the CCC. On this point, the investigation also referred to evidence that Mr Said accessed the Total Offender Management Solution (TOMS) database records for the incident four times in the eight days following the incident.
- 69 Second, the evidence was relevant to the allegation that the appellant failed to comply with his obligation to report misconduct. This allegation stands on a finding that Mr Said knew of the misconduct. The summary of investigation and the Notice of Loss of Confidence concluded that Mr Said was obliged to, and did not, report suspected misconduct at two points in time, being:
- (a) in the days shortly after 12 November 2018, when he is alleged to have become aware of the Incident and cover up; and
 - (b) in August 2020, after the five officers involved in the incident and cover up were stood down and he spoke to some of them directly.

70 In his submissions in response to the allegations, Mr Said generally denied the truth of the witness's evidence about the witness's discussions with him. He made submissions as to why the witness's evidence should be treated as not credible in relation to those matters. He also pointed out that the witness's evidence was not put to him when he gave evidence to the CCC, depriving him of a fair opportunity to fully explain his version of events.

71 The decision notice recording the reasons for Director-General's removal decision stated, relevantly (emphasis added):

...

5. While I have carefully considered your Written Submission, I have decided to take removal action against you on the grounds set out in the NLOC.

6. This correspondence constitutes the Decision Notice for the purposes of section 102(3) of the Act and explains the reasons for my decision.

7. **You have already been provided with all documents I have taken into account in making this decision (namely, the Summary of Investigation and all documents in the List of Documents).**

...

Ground 5

...

30. The second ground you raise in your response is that it was not put to you in your examination before the Commission that you had a discussion about the events of 12 November 2018 and you therefore did not have the opportunity to respond to this in full. **While I consider [the witness's] testimony on this issue to be credible**, I also accept that the issue could have been more fully explored with you in context during your examination.

31. Therefore, while Ground 4 stands, **I am relying only on the evidence relating to your TOMS access and have not taken into account nor relied on in my final decision the original assertion that you acquired the relevant knowledge from a conversation with [the witness].**

Ground 6

...

34. I note that within your Written Submission you strongly deny having any conversation with [the witness] following the events of 12 November 2018. For the reasons set out in paragraph 30 of this Decision Notice, in relation to Ground 6 **I have not taken into account nor relied on in my final decision the original assertion that you acquired the relevant knowledge from a conversation with [the witness].**

35. Instead, my loss of confidence on this ground is based only on one point in time: that, following the officers' receipt of the correspondence suspending them on 14 August 2020, you had sufficient grounds to reasonably suspect that misconduct and potentially criminal conduct had taken place and you then had an obligation to report it.

...

72 The Director-General's reasons for the removal decision are set out comprehensively and transparently in the decision notice. There is no reason for the Commission to look beyond the decision notice, or to draw any inferences that particular information was or was not considered or taken into account in making the decision. The Commission was not invited to do so.

73 It is clear from the decision notice that the Director-General was aware of the existence of the transcript, had been provided with the transcript and had considered the transcript. Indeed, the Director-General formed the view that the witness's evidence as contained in the transcript was 'credible'.

74 It is also clear that the transcript was not relied upon by the Director-General as justification for the decision to take removal action. Indeed, as to Ground 6, the decision to confine the allegation to the later point in time meant that the transcript became irrelevant to the allegation. In other words, while the Director-General had regard to the transcript, he gave it no weight and it formed no part of the reasons for making the removal decision.

75 Nevertheless, because the transcript was examined by the Director-General, and was considered by him in the process leading to the removal action, including in his assessment of the grounds for the Notice of Loss of Confidence and the Investigation Report and Mr Said's submissions, it qualifies as a document which falls within the exclusion in subpar (a) of the definition of 'new evidence' set out at s 99. It is therefore not 'new evidence'.

Determining the application in relation to the transcript

76 As a consequence, Mr Said is not required to seek leave under s 108 to tender the transcript, nor will the processes set out in ss 109 and 110A be triggered if Mr Said was to rely upon it in the hearing of the appeal.

77 However, in order for Mr Said to rely upon the document he requires a direction allowing him to file the transcript as a document which he relies upon in his case, outside the time specified in reg 89E(2) of the *IRC Regulations*.

78 Reg 89E of the *IRC Regulations* is in the following terms:

89E. Documents relied on to be filed and served

(1) Except as otherwise directed by the Commission, within 14 days of the service on the appellant of the documents referred to in regulation 89D —

- (a) the chief executive officer must file in the office of the Registrar 3 copies of every document relied upon by the chief executive officer in the appellant's case; and
- (b) the Registrar must serve a copy of those documents on the appellant.
- (2) Except as otherwise directed by the Commission, within 14 days of the service on the appellant of all of the documents referred to in subregulation (1) —
- (a) the appellant must file in the office of the Registrar 3 copies of every document relied upon by the appellant in the appellant's case; and
- (b) the Registrar must serve a copy of those documents on the chief executive officer.
- (3) If, under an agreement between the chief executive officer and the appellant, one party files a document on behalf of both parties, the requirements under this regulation in relation to that document are taken to have been satisfied.
- 79 The regulation confers a discretion on the Commission. There is nothing in the regulation itself which specifies how the discretion should be exercised, so the Commission must be guided by the factors set out in s 26(1)(a) and (b) of the *Industrial Relations Act 1979* (WA): see s 10B of the *Prisons Act*.
- 80 Acting according to the substantial merits of the case requires consideration of whether the transcript is relevant to the appeal. It would not be acting in accordance with the substantial merits of the case to extend the prescribed time for filing a document, if that document will play no part in assisting the Commission to determine any issue in the appeal.
- 81 Mr Said's counsel submits that the transcript is relevant because it provides context to excerpts from the evidence Mr Said gave to the CCC in public hearings, reproduced in the Notice of Loss of Confidence and summary of investigation. Counsel did not suggest that Mr Said would inevitably or certainly tender the transcript, but seeks its inclusion for the purpose of reg 89E of the *IRC Regulations* in case it is necessary to refer to it because the excerpts from Mr Said's evidence to the CCC is before the Commission. Counsel submitted that the test for relevance was 'lower' for the purpose of reg 89E documents, or at the preliminary stage, but did not otherwise articulate how the document was relevant to the issues in the appeal.
- 82 The grounds of appeal as specified in the notice of appeal filed under s 106(2) mark out the scope of the issues to be determined: *Beverley* at [43]-[44]. As s 106(2) refers to the removal decision, the removal decision also plays a part in setting out the scope of the issues in the appeal.
- 83 Paragraphs 17 to 26 of the appellant's grounds attached to the Notice of Appeal set out the substance of Mr Said's grounds of appeal. Relevant to the Grounds 5 and 6 in the decision notice they are:
- ...
- Unjust*
18. Mr Said denies that he engaged in misconduct of the type alleged by any of the allegations.
- ...
- 2) In relation to ground 5, Mr Said could not, as at November 2020, recall the details of events occurring at Hakea Prison on 12 November 2018. It would have been disingenuous for Mr Said to have given evidence to the contrary.
- Computer records taken from 2 years' prior provide no proof of Mr Said's current state of knowledge.
- 3) In relation to ground 6, the Director General has inferred that Mr Said had specific knowledge of misconduct, and that he then knowingly failed to make a report about what he knew. The inferences drawn in relation to Mr Said's knowledge were not supported by reasonable evidence and are denied.
- ...
- Disciplinary action was disproportionate*
25. The assessment as to the seriousness of the conduct alleged against Mr Said was improperly infected by particular assertions made during CCC examinations.
26. The Appellant further contends that significant mitigating issues were not given proper consideration.
- ...
- 84 The issues raised by these grounds, read with the decision notice, are:
- (a) Whether it was reasonably open to the Director-General to find that Mr Said first knew about the November 2018 incident, based on Mr Said's TOMS accesses.
- (b) If Mr Said first knew about the November 2018 incident, whether it was open to the Director-General, based on Mr Said's TOMS accesses, to find that he knowingly gave false evidence to the CCC that he did not know about the November 2018 incident.
- (c) Whether it was reasonably open to the Director-General to find that from 14 August 2020, Mr Said had sufficient grounds to reasonably suspect other prison officers had engaged in misconduct in relation to the November 2018 incident.
- 85 The transcript records the witness as giving evidence of a discussion he had with Mr Said about the November 2018 incident in the days following it. There are no other parts of the transcript which have been referred to in any of:

- (a) the decision notice;
- (b) the Investigation Report;
- (c) Mr Said's submissions to the Director-General;
- (d) Mr Said's Notice of Appeal or grounds of appeal; or
- (e) Mr Said's submission in this application.

- 86 The relevant factual findings on which the removal decision was based were not made on the basis of evidence contained in the transcript. Indeed, Ground 6 concerns a later point in time than the evidence in the transcript relates to.
- 87 The transcript is not relevant to the issues in the appeal. Accordingly, there is no justification for the Commission to exercise its discretion to allow its late filing.

Application for leave to tender new evidence - The Incident Report

Was Mr Said aware of the substance of the Incident Report before his removal?

- 88 The Incident Report is a Department of Corrections Incident Description Report recorded on Hakea Prisons' TOMS database. It is for an incident occurring on 12 January 2016 and was completed by Mr Said. It describes a Code Red in Unit 7 involving a prisoner who barricaded himself in a dayroom. Mr Said talked with the prisoner, to diffuse a crisis involving the potential for self-harm or suicide. The incident culminated in Mr Said having to call for assistance because the prisoner proceeded to hang himself.
- 89 Mr Said did not refer to this event, nor to the Incident Report, in his submissions to the Director-General. However, there is no suggestion that he was not aware of the substance of the Incident Report. The inference can reasonably be drawn that he was aware of its substance. That inference is compelled by the fact that he completed the Incident Report, the incident itself was of such seriousness and consequence that it must have remained starkly in Mr Said's mind. Mr Said seeks to rely on it precisely to make the point that his involvement in the incident had heightened his inclination to take the risk of self-harm and suicide seriously.
- 90 Mr Said concedes that the Incident Report was 'able to be accessed and considered' by the Director-General at all material times. However, neither Mr Said nor the Director-General addressed the Commission, or advanced evidence of, whether Mr Said had reasonable access to the Incident Report (via TOMS) before his removal. In the absence of any evidence or suggestion to the contrary, it is safe to infer that Mr Said did not request access to TOMS for the purpose of obtaining a copy of the Incident Report. In light of Mr Said's concession that the report was available to the Director-General, we also infer that the Director-General would have made the Incident Report available to Mr Said for the purpose of responding to the Notice of Loss of Confidence had it been sought.
- 91 These matters weigh against the grant of leave.

Is it in the interests of justice to grant leave to tender the Incident Report?

- 92 Mr Said's counsel submits that in making the removal decision, the Director-General was 'unreasonably dismissive' of Mr Said's explanations of his genuine welfare concerns for the prison officers to whom his comments the subject of the allegations were addressed. He says the Incident Report provides important and relevant contextual evidence as to Mr Said's state of mind when he made the statements which are the subject of the allegations against him.
- 93 It is said that the Incident Report might materially have affected the way that the Director-General assessed Mr Said's words and actions.
- 94 Mr Said's counsel did not seek to rely on the Incident Report to show that Mr Said had some greater sensitivity to the risks of self-harm and suicide in prisons. Rather, it goes to the veracity of Mr Said's explanation that the statements he made were for the purpose of lifting the spirits of his co-workers:

FORDHAM, MR:

Well, it relates to the gravity that - or the weight that should be given to Mr Said's explanation, because the Director General has not placed much weight on it. And we say it's a very serious matter, and we say that report highlights why it's serious, and why it's serious, in particular, to Mr Said - not that he has a particular sensitivity to it, but he doesn't - his experience with it means that it's not going to be simply something or it's less likely to be something that's going to be said as a glib excuse.

Because it's - the way that it's been taken by the Director-General seems to be that it's been disregarded as an excuse, so simply a glib explanation to say, 'Well, I was worried about him - I was worried about his welfare'. And the response in the decision notice seems to say, 'Well, I'm not satisfied that that's the case, I'm not really satisfied that you had concerns or that those concerns would have warranted you making the type of statement that you did'. He accepted that managing such risks was a core part of working in the prisons environment. However, he said that the Decision Notice demonstrated that the Director-General treated Mr Said's concerns as 'glib explanations.'

- 95 When asked to identify which parts of the decision notice indicated the Director-General was dismissive of Mr Said's explanations, counsel pointed to the following statements in the decision notice:

...

12. ...The statements were characterized in the NLOC as demonstrating that you were intentionally providing the advice to undermine the investigation...

- ...
18. I do note your explanation that you made these statements to this particular person as a form of support to him.
19. I am unpersuaded that your reference to ‘providing support lessens [the] significance of your comments and I continue to have lost confidence in you on this ground.
20. Your response to this Ground does not add anything to the information that is already before me based on your evidence before the Commission. The NLOC already sets out why my concerns are not lessened by your attempt to explain your conduct as using humour or offering ‘welfare support’ to the officers.
- ...
22. Your response to this ground is that by remaining ‘staunch’, you meant continuing to support an officer “*unless that person has been found guilty*”. You further add that you would report and disown an officer immediately if you found out that they had mistreated other staff or prisoners.
- ...
24. However, the full context in which you made these statements is set out in the NLOC. I remain persuaded that you were discussing the scrutiny of past instances of the use of force against prisoners and your comments reflect an intention to undermine the integrity and accountability systems that are put in place by the Department to monitor use of force incidents and potential misconduct.
- ...
- 96 As reference is made in the decision notice to the Notice of Loss of Confidence, we have also paid close attention to the Notice of Loss of Confidence, in particular pars 38, 47-51 and 60.
- 97 The Director-General’s reasons read with the Notice of Loss of Confidence do not reveal that he was dismissive of Mr Said’s welfare concerns. Nowhere is there any indication that the Director-General formed a view as to Mr Said’s state of mind concerning a desire to manage welfare risks. Rather, the Director-General did not accept that there is a rational or reasonable link between having a genuine and reasonable concern about a prison officer’s welfare and such concern justifying the statements that Mr Said made to those prison officers. That is, there is no finding that Mr Said did not reasonably have welfare concerns. The Director-General simply reasoned that holding such welfare concerns provided no excuse for making the statements.
- 98 Accordingly, Mr Said’s grounds of appeal are not advanced by the Incident Report and the interests of justice do not require that Mr Said be given leave to tender it.
- 99 The application should be dismissed.

NOTE: [41], [44] and [90] amended by Corrigendum issued 26 October 2022 ([2022] WAIRC 00748).

2022 WAIRC 00747

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 24 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KEVIN SAID

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT

CORAM

CHIEF COMMISSIONER S J KENNER
SENIOR COMMISSIONER R COSENTINO
COMMISSIONER T EMMANUEL

DATE

TUESDAY, 25 OCTOBER 2022

FILE NO/S

APPL 11 OF 2022

CITATION NO.

2022 WAIRC 00747

Result Application dismissed

Representation

Appellant Mr C Fordham of counsel

Respondent Ms E Negus of counsel

Order

HAVING heard Mr C Fordham of counsel on behalf of the appellant and Ms E Negus of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Prisons Act 1981* (WA), hereby orders –

THAT the appellant's application dated 29 July 2022 be and is hereby dismissed.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

2022 WAIRC 00748

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 24 FEBRUARY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KEVIN SAID

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT

CORAM

CHIEF COMMISSIONER S J KENNER
SENIOR COMMISSIONER R COSENTINO
COMMISSIONER T EMMANUEL

DATE

(CORRIGENDUM WEDNESDAY, 26 OCTOBER 2022)

FILE NO/S

APPL 11 OF 2022

CITATION NO.

2022 WAIRC 00748

CORRIGENDUM

1. In paragraph [41] of the Reasons for Decision dated 25 October 2022 ([2022] WAIRC 00746), delete 'I' and insert 'we' in lieu thereof.
2. In paragraph [44] of the Reasons for Decision dated 25 October 2022 ([2022] WAIRC 00746), delete 'I' and insert 'we' in lieu thereof.
3. In paragraph [90] of the Reasons for Decision dated 25 October 2022 ([2022] WAIRC 00746), delete 'I' and insert 'we' in lieu thereof.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

Dated: 26 October 2022

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2022 WAIRC 00721

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DIANNA MICHELLE FRANTOM

APPLICANT

-v-

OCEAN ALLEY LIFESTYLE

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

FRIDAY, 14 OCTOBER 2022

FILE NO/S

U 66 OF 2022

CITATION NO.

2022 WAIRC 00721

Result

Application dismissed

Representation

(on the papers)

Order

WHEREAS this is an application made pursuant to s 29(1)(c) of the *Industrial Relations Act 1979* (WA) (IR Act);
 AND WHEREAS two conciliation conferences took place pursuant to s 32 of the IR Act;
 AND WHEREAS at the conclusion of the second conciliation conference, the parties reached an agreement to settle the matter;
 AND WHEREAS the parties signed a Deed of Settlement and Release;
 AND WHEREAS on 20 September 2022, a directions hearing took place as the applicant had not discontinued the matter in light of an agreement being reached;
 AND WHEREAS on 20 September 2022, a springing order was issued ([2022] WAIRC 00679);
 AND WHEREAS on 12 October 2022, the applicant filed a Form 1A application requesting that a hearing be listed in accordance with the order that issued ([2022] WAIRC 00679);
 AND WHEREAS, I, the undersigned have considered the applicant's Form 1A application requesting that a hearing be listed;
 NOW THEREFORE, I the undersigned pursuant to the powers conferred on me under the *Industrial Relations Act 1979* (WA), hereby order –

1. THAT the applicant's Form 1A application requesting that a hearing be listed dated 12 October 2022 be and is hereby dismissed.
2. THAT the applicant's unfair dismissal claim be and is hereby dismissed under s 27(1)(a) of the IR Act.

(Sgd.) R COSENTINO,
 Senior Commissioner.

[L.S.]

2022 WAIRC 00717

UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2022 WAIRC 00717
CORAM : COMMISSIONER T B WALKINGTON
HEARD : FRIDAY, 19 AUGUST 2022
DELIVERED : FRIDAY, 14 OCTOBER 2022
FILE NO. : U 63 OF 2021
BETWEEN : EMILY ELIZABETH MAE GIBSON
 Applicant
 AND
 SHIRE OF HALLS CREEK
 Respondent

CatchWords : Termination of employment; unfair dismissal; failure to prosecute claim; no appearance by applicant
Legislation : *Industrial Relations Act 1979* (WA)
Industrial Relations Commission Regulations 2005 (WA)
Result : Application dismissed for want of prosecution
Representation:
Applicant : No appearance
Respondent : Mr A Sinanovic (of counsel)

Case(s) referred to in reasons:

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

Reasons for Decision

- 1 Ms Emily Elizabeth Mae Gibson had been employed by the Shire of Halls Creek (the Shire) from 7 December 2020 to 26 July 2021 as a Ranger.
- 2 Ms Gibson made an application on 10 August 2021 claiming she had been unfairly dismissed by the Shire because she had not been afforded due process. Ms Gibson seeks compensation.

- 3 The Shire opposes the application and contends that Ms Gibson's employment was terminated because Ms Gibson had failed to appropriately advise her employer of her non-attendance, concerns for her conduct and performance. The Shire contended that it had conducted its deliberations and engagement with Ms Gibson in a fair manner.
 - 4 The case management of this application has some history.
 - 5 On 26 August 2021 the parties' availability to attend a conciliation conference was sought. A second request to the applicant was required before a response was provided.
 - 6 On 7 September 2021 the Commission notified the parties of a conciliation conference scheduled for 21 September 2021 in accordance with their availability.
 - 7 Ms Gibson failed to attend the conciliation conference. On the evening of 23 September 2021 Ms Gibson advised the Commission that she had understood the conciliation conference was scheduled on 23 September 2021 and not 21 September 2021. Ms Gibson advised she had not been able to attend the conciliation conference because she had been required to attend to an urgent and unforeseen task at work. Ms Gibson requested a second conciliation conference be scheduled.
 - 8 Ms Gibson again failed to respond to the first request for her available dates for the rescheduled conciliation conference and a second request was required to elicit this information.
 - 9 On 7 October 2021 the parties were notified of a second conciliation conference on 27 October 2021 in accordance with their availabilities. The parties did not reach a settlement at the conciliation conference and Ms Gibson requested the matter be heard and determined by the Commission.
 - 10 On 18 November 2021 the parties were notified of a directions hearing on 8 December 2021. On the morning of the scheduled directions hearing, Ms Gibson notified the Commission by email that she was unable to attend the directions hearing and enquired if the date could be changed.
 - 11 The Shire opposed the adjournment of the directions hearing on the basis that the onus is on Ms Gibson to prosecute her claim with due expedition, and not to hinder the Commission's statutory objectives of acting with due speed (s 22B of the *Industrial Relations Act 1979* (IR Act) and resolving disputes 'with the maximum of expedition' (s 6(c) of the IR Act)); the applicant previously failed to attend a conciliation conference scheduled for 21 September 2021 and the conciliation conference was subsequently re-listed for 27 October 2021. The applicant had been given almost four weeks' notice of the directions hearing. The applicant's request comes hours before the directions hearing and without any evidence or explanation. In the context of the history of this matter including the applicant's failure to attend a previous listing, the respondent opposed any adjournment of the directions hearing.
 - 12 The parties were notified that the Commission directed that the directions hearing would proceed as listed for later that day.
 - 13 Ms Gibson did not attend the directions hearing. The respondent attended.
 - 14 On 8 December 2021, the Commission emailed the parties confirming the directions hearing proceeded and outlined the purpose of the directions hearing and requested Ms Gibson inform the Commission on how she wished to progress her application.
 - 15 On 22 December 2021, the Commission emailed Ms Gibson noting that a response to the request made on 8 December 2021 had not been received and sought a response. Ms Gibson was advised that in the event she did not reply, the Commission may list this matter for a show cause hearing and that she would need to show cause as to why her application ought not be dismissed pursuant to s 27(1) of the IR Act.
 - 16 On 24 December 2021 Ms Gibson responded with 'I wish to continue the matter to a hearing'.
 - 17 On 5 January 2022 the parties were directed to confer on programming of the matter to hearing on the following matters:
 - (a) The need for discovery and the manner of such (informal/formal);
 - (b) The number of witnesses the parties intend will give evidence;
 - (c) Preferences for either outlines of witness evidence or signed witness statements;
 - (d) Whether the parties shall file outlines of submissions prior to the hearing.
- The parties were advised that if they reached an agreement on the matters a Minute of Proposed Direction would be prepared. The parties were further advised that if they had not reached agreement by 26 January 2022, a further directions hearing would be set down.
- 18 On 20 January 2022 the Shire emailed Ms Gibson and advised that she had not responded to their attempts made on 10 and 14 January 2022 to arrange a suitable time to confer. The Shire set out its position on the matters raised by the Commission and sought Ms Gibson's position. The Shire notified Ms Gibson that if she did not respond, a request would be made for the Commission to list this matter for a show cause hearing.
 - 19 On 27 January 2022 the Shire requested that the Commission convene a hearing for the applicant to explain why her application should not be dismissed. The Shire contended that the applicant has not taken any steps to progress her claim since 27 October 2021 and that Ms Gibson had failed to prosecute her claim with due diligence.
 - 20 On 28 January 2022 the parties were notified that a show cause hearing was listed for 18 March 2022.
 - 21 At the show cause hearing, Ms Gibson submitted that she had consulted with a lawyer about the communications she had received from the Shire and had been advised not to respond to their communications. Ms Gibson advised that she had been confused by recent communications and was unsure about what to do. Ms Gibson advised that she intended to obtain legal advice to assist her to navigate the process.

- 22 The Commission declined to dismiss the application and directions to progress the matter to hearing were issued on 18 March 2022.
- 23 On 12 April 2022 the respondent requested the Commission list the matter for a hearing for Ms Gibson to show cause as to why her application ought not be dismissed because the applicant had failed to comply with the Commissioner's direction to file and serve any outlines of witness evidence and any documents upon which she intended to rely by the due date. The Shire submitted that the applicant's non-compliance was aggravated in circumstances where the Commissioner indicated during the show cause hearing that the applicant is being allowed to pursue her claim by the slimmest of margins following repeated failures to prosecute her claim over an extended period. Further, the Commissioner indicated to the parties that, to the extent any extensions to any of the deadlines are needed, the party seeking the extension would need to seek the extension in advance of the deadline expiring. The applicant had not yet responded to the Commission's email concerning dates for a final hearing. The failure to respond is consistent with the applicant's previous failures to respond to the Commission's emails.
- 24 On 13 April 2022 the parties were notified by email that the matter was listed for a show cause hearing for Friday, 12 August 2022 at 10:30am. The parties were advised that the show cause hearing was listed for the applicant to show cause why this matter ought not be dismissed pursuant to s 27(1) of the IR Act. On 19 April 2022 the notice of hearing was also posted to Ms Gibson.
- 25 On 17 May 2022 the parties were notified by email that the show cause hearing had been rescheduled and the matter was now listed for a show cause hearing for one week later on Friday, 19 August 2022 at 10:30am. On 17 May 2022 the notice of hearing was also posted to Ms Gibson.
- 26 On 19 August 2022 Ms Gibson did not attend the hearing. The respondent attended the hearing.

The Law

- 27 The Commission can dismiss a matter under s 27(1)(a) of the IR Act:

27. Powers of Commission

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

Should This Application Be Dismissed?

- 29 The Commission has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings: s 27(1)(d) of the IR Act. Service on Ms Gibson in this matter was effected by leaving the notice at, or sending it by pre-paid post to, Ms Gibson's usual or last known place of abode: r 24(2)(d) of the *Industrial Relations Commission Regulations 2005* (WA) (IR Regulations).
- 30 Alternatively, service was effected on Ms Gibson by sending the notice of hearing as an attachment to an email sent to the email address that Ms Gibson had provided to the Commission, in accordance with r 25(3) of the IR Regulations.
- 31 I am satisfied that Ms Gibson has been duly served with notice of these proceedings and the Commission may proceed with the hearing in her absence.
- 32 Ms Gibson has not contacted the Commission since her email advising that she wished to progress her matter. Ms Gibson has not responded to the emails sent to her by my Associate or attended the show cause hearing on 19 August 2022.
- 33 There has been a relatively long delay in the context of this application and there has been no explanation for that delay. There is no evidence of hardship to Ms Gibson if her application is dismissed; and there is nothing before the Commission to suggest the respondent's conduct in the matter has in any way contributed to Ms Gibson's failure to prosecute this application.
- 34 The onus rests with a party initiating proceedings to prosecute those proceedings diligently. Where the Commission requires advice to be provided within given time frames for the purpose of the matter being dealt with expeditiously, it is not the role of the Commission to continue to pursue parties to ascertain the status of matters. It is the responsibility of the applicant to progress the application. The applicant has not met the onus which falls to her and has not pursued this matter appropriately.
- 35 In the circumstances, I find that Ms Gibson has not prosecuted her application at the Commission. I will order that this application be dismissed under s 27(1)(a) of the IR Act.
-

2022 WAIRC 00718

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

EMILY ELIZABETH MAE GIBSON

APPLICANT

-v-

SHIRE OF HALLS CREEK

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 14 OCTOBER 2022

FILE NO/S

U 63 OF 2021

CITATION NO.

2022 WAIRC 00718

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	Mr A Sinanovic (of counsel)

Order

HAVING heard from Mr A Sinanovic (of counsel) on behalf of the respondent and there being no appearance by the applicant, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT this application be, and by this order is dismissed for want of prosecution.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2022 WAIRC 00749

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GEORGE STEPHEN

APPLICANT

-v-

KAEFER INTERGRATED SERVICES

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 26 OCTOBER 2022

FILE NO/S

U 94 OF 2022

CITATION NO.

2022 WAIRC 00749

Result	Discontinued by leave
Representation	
Applicant	Mr G Stephen
Respondent	Mr A Kadir

Order

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

AND WHEREAS on 17 October 2022 the applicant filed a *Form 1A – Multipurpose Form* to discontinue this application;

AND WHEREAS on 24 October 2022 the Commission asked the respondent whether there was any objection to the applicant discontinuing this matter;

AND WHEREAS on 24 October 2022 the respondent confirmed it does not object to the matter being discontinued;

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

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

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2022 WAIRC 00741

UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2022 WAIRC 00741
CORAM : COMMISSIONER C TSANG
HEARD : ON THE PAPERS
DELIVERED : THURSDAY, 20 OCTOBER 2022
FILE NO. : U 65 OF 2022
BETWEEN : LOANNE CARTER
 Applicant
 AND
 DEPARTMENT OF EDUCATION WA
 Respondent

CatchWords : Industrial Law (WA) - Application for unfair dismissal to be dismissed - Want of jurisdiction - Jurisdiction of commission - Public Service Appeal Board - Government officer - Laboratory Technician - Administrative or clerical duties - On the salaried staff - Respondent's interlocutory application upheld - Unfair dismissal application dismissed for want of jurisdiction

Legislation : *Australian Constitution* s 109
Fair Work Act 2009 (Cth) s 12, s 13, s 14, s 26(1) s 29(1), s 133, s 170, s 172(2), s 172(3)
Industrial Relations Act 1979 (WA) s 7, s 23(1), s 27(1)(a), s 29, s 29(1)(c), s 80C(1), s 80E(1), s 80I
Public Service Management Act 1994 (WA) s 5(1)(c)(i)
School Education Act 1999 (WA) s 235(1)(c)

Result : *Order Issued*

Representation:
Applicant : In person
Respondent : Ms E Negus (of counsel)

Case(s) referred to in reasons:

Alexander Byers v Minister for Corrective Services [2022] WAIRC 00186; 102 WAIG 252
Bellamy v Chairman, Public Service Board [1986] WAIRC 11579; (1986) 66 WAIG 1579
Federated Clerks Union v Cary (1977) 57 WAIG 585
Fenton v WA Country Health Service – SW [2021] WAIRC 00214; (2021) 101 WAIG 585
Rutherford v Hausner [2011] FMCA 1033
United Voice v J Markoff Family Trust T/A Belrose Care [2012] FMCA 406

*Reasons for Decision***The respondent's interlocutory application**

- 1 On 6 July 2022, the respondent filed an application for an order that the applicant's unfair dismissal application be dismissed for want of jurisdiction on the basis that the applicant was a government officer and therefore there is no jurisdiction for the applicant's appeal in the general jurisdiction of the Commission, with any appeal against dismissal required to be made to the Public Service Appeal Board (**respondent's interlocutory application**).
- 2 Section 27(1)(a) of the *Industrial Relations Act 1979* (WA) (**Act**) relevantly states:

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
 - (a) at any stage of the proceedings dismiss the matter or any part of it or refrain from further hearing or determining the matter or part if it is satisfied —
 - (i) that the matter or part is trivial; or
 - (ii) the further proceedings are not necessary or desirable in the public interest; or
 - (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or

- (iv) that for any other reason the matter or part should be dismissed or the hearing of it discontinued, as the case may be;

Background

- 3 On 29 April 2022, the applicant filed a Form 2 – Notice of claim of harsh, oppressive or unfair dismissal (**unfair dismissal application**) claiming that she was unfairly dismissed on or around 24 April 2022 from her position as a Laboratory Technician, which had commenced on 15 October 2015.
- 4 On 6 July 2022, the respondent filed a Form 2A – Employer Response to Unfair Dismissal Application (**Employer Response**). In the Employer Response, the respondent agrees that the applicant commenced employment on 15 October 2015 but states that this was on a casual basis, with the applicant subsequently being employed on fixed term contracts and commencing employment as a permanent employee on 24 April 2017. In the Employer Response, the respondent raises the jurisdictional objection that the applicant was a government officer, and therefore any appeal against the applicant’s dismissal is required to be made to the Public Service Appeal Board (**Board**).
- 5 At the same time as filing the Employer Response, the respondent filed the respondent’s interlocutory application.
- 6 On 11 August 2022, Directions (2022 WAIRC 00611) were issued by consent on the following terms:
- (a) THAT the question of whether the applicant is a government officer for the purposes of section 80E(1) of the *Industrial Relations Act 1979* (WA) be determined as a preliminary issue (jurisdictional issue).
 - (b) THAT the respondent file any documentary evidence and written submissions relevant to the jurisdictional issue by no later than 16 August 2022.
 - (c) THAT the applicant file any responsive documentary evidence and written submissions relevant to the jurisdictional issue by no later than 30 August 2022.
 - (d) THAT subject to further order, the jurisdictional issue be determined on the papers.
 - (e) THAT there be liberty to apply.

Respondent’s contentions

- 7 On 16 August 2022, the respondent filed its written submissions contending that s 80E(1) of the Act provides the Board with the jurisdiction to hear an appeal by a government officer.
- 8 The respondent submits that the Board’s jurisdiction ousts the general jurisdiction of the Commission to hear applications claiming unfair dismissal by government officers: *Bellamy v Chairman, Public Service Board* [1986] WAIRC 11579; (1986) 66 WAIG 1579, 1581.
- 9 The respondent submits that if the applicant was a government officer, any appeal against a decision that she be dismissed must be made to the Board.
- 10 The respondent submits that s 80C(1) of the Act defines the term ‘government officer’ and the applicant falls within paragraph (b), namely, ‘every other person employed on the salaried staff of a public authority’.
- 11 The respondent submits that the applicant was employed in the Department of Education (**Department**) and the Director General of the Department was the applicant’s ‘employing authority’: s 5(1)(c)(i) of the *Public Service Management Act 1994* (WA). The respondent submits that it is ‘uncontroversial’ that the Department is a ‘State Government department’ and therefore a ‘public authority’: s 7 of the Act.
- 12 The respondent submits that the remaining question is whether the applicant was ‘on the salaried staff of’ the Department.
- 13 The respondent relies on *Kathleen Margaret Fenton v WA Country Health Service - SW* [2021] WAIRC 00214; (2021) 101 WAIG 585 (*Fenton*), in which the Board chaired by Cosentino SC examined the case law regarding what it means to be ‘on the salaried staff’ of a public authority for the purposes of the definition of ‘government officer’ at [46]-[50] (emphasis added):

...As Kenner C identified in *McGinty*, the concept of a fixed payment is central.

We therefore return to what is the ordinary and natural meaning of the phrase “salaried staff”. The earlier decisions we have referred to above refer to various dictionary definitions, and it is helpful to briefly revisit those. The Macquarie Dictionary meaning of “salary” is:

...a fixed periodical payment paid to a person for regular work or services, especially work other than that of a manual, mechanical, or menial kind.

The Oxford English Reference Dictionary definition of “salary” is:

A fixed regular payment, usually monthly or quarterly, made by an employer to an employee, esp. a professional or white-collar worker (cf wage).

The Oxford definition references the definition of wage for clarification of meaning. “Wage”, then, is defined:

...a fixed regular payment, usually daily or weekly, made by an employer to an employee, especially to a manual or unskilled worker (cf salary).

We consider these definitions are most helpful in understanding the phrase “salaried staff” in s 80C. From these definitions one can appreciate the subtlety of difference between “salary” and “wages”. Once it is accepted that the words are intended to limit the class of employees to whom it applies, it follows that the dichotomy between salary and wages is important. Contrasting these two concepts, wages and salary, assists to clarify where the focus of the difference between wages employees and salaried staff lies. *Both are paid a fixed, regular/periodical payment. Accordingly, a focus on computation of earnings by time is of little utility. Rather, the key differences are in the*

frequency of payments and the services for which the payment is made. Commissioner Kenner arrived at this point in McGinty when he succinctly described salaried staff as “generally those in the administrative, technical and professional ranks of the public sector”.

- 14 The respondent submits three reasons as to why the applicant, a Laboratory Technician, was ‘on the salaried staff of’ the Department:
- (a) Laboratory Technicians are treated as government officers;
 - (b) The applicant performed clerical and administrative or technical duties; and
 - (c) The applicant was paid a fixed fortnightly amount.
- 15 In relation to the first reason, that Laboratory Technicians are treated as government officers, the respondent submits that the union representing Laboratory Technicians (being the Civil Service Association of Western Australia) and the Public Service Arbitrator treat Laboratory Technicians as government officers under the Act: cl 3 of the *Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No. 5 of 1983 (Award)* and cl 5.2 of the *Department of Education (School Support Officers) CSA Agreement 2021 (Agreement)*.
- 16 Clause 3 of the Award states:
- This Award shall apply to all Government [sic] Officers employed by the Minister for Education (hereinafter referred to as the Minister) in an administrative, clerical or general capacity who are not employed under the *Government Officers Salaries, Allowances and Conditions Award 1989...*
- 17 Clause 5.2 of the Agreement states:
- This Agreement shall apply to all Employees who are members or eligible to be members of the Union and covered by the Award...
- 18 The respondent submits that the term ‘Government Officers’ is not explicitly defined by the Award, but the Award should be interpreted as adopting the definition in the Act for two reasons.
- 19 First, the words at cl 3 of the Award that ‘all Government Officers ... not employed under the *Government Officers Salaries, Allowances and Conditions Award 1980* [sic]’ indicates that the meaning of ‘Government Officer’ under both Awards is the same. The respondent submits that the *Government Officers Salaries, Allowances and Conditions Award 1989* applies to ‘Government officers’ (cl 4) and defines ‘Officer’ as ‘a Government officer within the meaning of the *Industrial Relations Act 1979*’ (cl 6).
- 20 Second, the term ‘Officer’ which is used throughout the Award to refer to covered employees is defined in the Award to mean ‘an employee pursuant to section 235(1)(c) of the *School Education Act 1999*’ (**School Education Act**). The respondent submits that employees engaged pursuant to s 235(1)(c) of the School Education Act are government officers under the Act. Section 235(1) of the School Education Act provides:
- 235. Categories of staff to be employed**
- (1) To enable the functions of the department to be performed persons are to be employed in the department —
 - (a) as public service officers appointed or made available under Part 3 of the PSMA; or
 - (b) as members of the teaching staff; or
 - (c) as other officers; or
 - (d) as wages staff.
- 21 The respondent submits that officers employed under s 235(1)(c) of the School Education Act are not ‘wages staff’ and therefore they are ‘on the salaried staff’ of the Department.
- 22 The respondent submits that whilst the Award and Agreement refer to classifications by level rather than job description, it is clear that the Award and Agreement apply to Laboratory Technicians because the position is referred to in cl 7B of the Award.
- 23 The respondent submits that the Award (and its predecessors) have been registered by the Public Service Arbitrator from 1978 and the Agreement (and its predecessors) have also been registered by the Public Service Arbitrator.
- 24 The respondent submits that the Public Service Arbitrator has jurisdiction in relation to government officers. The respondent submits that the registration of the Award and Agreement by the Public Service Arbitrator means the Civil Service Association and the Public Service Arbitrator have treated employees covered by the Award and the Agreement as government officers under the Act from 1984, when the current definition of government officer was included in the Act.
- 25 In relation to the second reason, that the applicant performed clerical and administrative or technical duties, the respondent submits that the services for which the applicant was paid were clerical and administrative and/or technical duties.
- 26 The respondent submits that clerical duties primarily relate to the recording of information: *Federated Clerks Union v Cary* (1977) 57 WAIG 585, 587 (Brinsden J, Wickham J agreeing).
- 27 The respondent relies on the definition of ‘administrative’ in the Oxford Dictionary and submits that administrative duties are broader and relate to the running of a business or organisation:
- of, relating to, or concerned with administration (in various senses); (in later use *esp.*) relating to or required for the running of a business, organization, etc.

- 28 The respondent submits that a number of the applicant's duties were clerical because they required the recording of information, and/or administrative because they related to the running of the science laboratory. The respondent submits that such duties included:
- (a) providing advice to other employees on various matters (including curriculum requirements, suitable science experiments and matters such as safe use and documentation of science equipment, chemicals and biological materials);
 - (b) managing laboratory stocks, including ordering of supplies and equipment, liaison with suppliers, and completion of annual stock-takes;
 - (c) assisting with coordinating the science budget, including monitoring expenditure, providing advice as required, and managing petty cash and business card accounts; and
 - (d) inducting and training Level 1 Technicians (if present) and inducting new science teachers in the safe use of chemicals and equipment.
- 29 The respondent submits that a number of the applicant's duties were technical because they required particular scientific knowledge and/or expertise. Such duties included preparing chemicals, equipment and materials, designing and constructing teaching aids and collecting and caring for living organisms.
- 30 In relation to the third reason, that the applicant was paid a fixed fortnightly amount, the respondent submits that the applicant was paid a fixed fortnightly amount under cl 10.6 of the Agreement and cl 10(7) of the Award such that payments to the applicant therefore possess the key features of a salary identified in *Fenton* at [46]-[50] as being fixed and less frequent than the payment of wages.

Applicant's contentions

- 31 The applicant contends that her unfair dismissal application should be heard by the Commission pursuant to the industrial award that she was contracted under.
- 32 The applicant relies upon s 29(1) of the *Fair Work Act 2009* (Cth) (**Fair Work Act**), which states that:
- A modern award or enterprise agreement prevails over a law of a State or Territory, to the extent of any inconsistency.
- 33 The applicant also relies upon s 109 of the *Australian Constitution* (**Constitution**), which states that:
- When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.
- 34 The applicant submits that the Fair Work Act and the Constitution require the Award and the Agreement to be used to determine that the Commission has jurisdiction to hear and determine her unfair dismissal application as they are the agreements under which she was employed.
- 35 The applicant relies on cl 56(5) of the Award, which states:
- Where the dispute cannot be resolved within five (5) working days of the Association representatives' referral of the dispute to the employer or his/her nominee, either party may refer the matter to the Western Australian Industrial Relation Commission.
- 36 The applicant also relies on cl 61.6 of the Agreement, which states:
- Where the dispute cannot be resolved within five working days of the Union representative's referral of the dispute to the Employer or his/her nominee, either party may refer the matter to the WAIRC.

Consideration

- 37 Section 29 of the Act outlines who may refer an industrial matter to the Commission. The applicant has brought an unfair dismissal application pursuant to s 29(1)(c) of the Act.
- 38 The Commission's jurisdiction to 'enquire into and deal with any industrial matter', which necessarily includes the applicant's unfair dismissal application, is expressly stated as being 'subject to this Act': s 23(1) of the Act.
- 39 Section 80E(1) of the Act provides the Public Service Arbitrator with exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer.
- 40 Section 80C(1) of the Act defines a 'government officer' as including 'every other person employed on the salaried staff of a public authority': paragraph (b) of the definition.
- 41 A 'public authority' is defined in s 7 of the Act to include a 'State Government department'.
- 42 There is no dispute that the applicant is employed in the Department. There is also no dispute that the Department is a 'State Government department' and therefore a 'public authority' under the Act.
- 43 I agree with the respondent's submissions that in light of s 80E(1), s 80C(1) and s 7 of the Act what remains to be determined is whether the applicant was employed 'on the salaried staff' of the Department.
- 44 If the applicant was employed 'on the salaried staff' of the Department, she will be considered a 'government officer' and therefore the Board has exclusive jurisdiction to hear any appeal regarding the applicant's dismissal.
- 45 If the applicant was not employed 'on the salaried staff' of the Department, she will not be considered a 'government officer' and therefore the Commission does have jurisdiction to hear and determine the applicant's unfair dismissal application, such that the respondent's interlocutory application must be dismissed.

- 46 The applicant submits that the Commission has jurisdiction to hear the applicant's unfair dismissal application because:
- (a) The Fair Work Act provides that a modern award or enterprise agreement prevails over a law of the State, presumably the Act, to the extent of any inconsistency; and
 - (b) The Constitution provides that when a State law, presumably the Act, is inconsistent with a law of the Commonwealth, presumably the Fair Work Act, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.
- 47 The references to a 'modern award' and an 'enterprise agreement' in the Fair Work Act are references to a modern award 'made under Part 2-3' of the Fair Work Act and an enterprise agreement 'made as referred to in' s 172(2) and s 172(3) of the Fair Work Act: s 12 of the Fair Work Act.
- 48 Modern awards and enterprise agreements under the Fair Work Act involve national system employees and national system employers: s 133 and s 170 of the Fair Work Act. National system employers include employers that are constitutional corporations, the Commonwealth, and Commonwealth authorities: s 14 of the Fair Work Act.
- 49 At all times, the applicant was employed in the Department. There is no dispute that the Department is a 'State Government department'. As a 'State Government department' the Department is not a constitutional corporation, the Commonwealth, or a Commonwealth authority. In short, the Department is not a national system employer under the Fair Work Act, and by extension, the applicant was not a national system employee under the Fair Work Act: s 13 of the Fair Work Act.
- 50 As the applicant was not a national system employee, the Fair Work Act does not apply to the applicant's employment: s 26(1) of the Fair Work Act. As the Fair Work Act does not apply to the applicant's employment, there is no inconsistency between a law of the State and a law of the Commonwealth that needs to be considered.
- 51 The applicant submits that cl 56(5) of the Award and cl 61.6 of the Agreement provides the Commission with jurisdiction to resolve the applicant's dispute with the Department. Clause 56 of the Award and cl 61 of the Agreement are the Dispute Settlement Procedure clauses that apply if an employee covered by the Award or Agreement seeks to resolve a question, difficulty or dispute arising under the Award, or to resolve a question, difficulty or dispute arising in the course of employment under the Agreement. The applicant has brought an unfair dismissal application pursuant to s 29(1)(c) of the Act. The applicant has not sought to invoke the dispute settlement procedure in the Award or the Agreement. The dispute settlement procedure provisions of the Award and Agreement do not provide any assistance in determining the Commission's jurisdiction in relation to the applicant's unfair dismissal application and the respondent's interlocutory application.
- 52 The employment contract issued to the applicant relevantly provides as follows:
- | | |
|--------------------------------------|--|
| Employer | The Director General of the Department of Education |
| ... | |
| Classification Level/Salary | Level 2, \$55,189-\$59,931 per annum (SSO GA 2014) |
| Employment Basis | Permanent |
| Work Fraction (e.g. 1.0, 0.8) | Part Time (0.8) |
| ... | |
| Industrial Award | Education Department Ministerial Officers Salaries, Allowances & Conditions Award 1983 |
| Industrial Agreement | School Support Officers (Government) General Agreement 2014 |
| Legislation | <i>School Education Act 1999 and School Education Regulations 2000</i> |
- 53 The *School Support Officers (Government) General Agreement 2014* referred to in the applicant's employment contract was replaced by the *Department of Education (School Support Officers) CSA Agreement 2019 (2019 Agreement)* (2020 WAIRC 00108). In turn, the 2019 Agreement was replaced by the Agreement (2022 WAIRC 00223).
- 54 Clause 5.2 of the Agreement states that the Agreement applies 'to all Employees who are members or eligible to be members of the Union and covered by the Award.'
- 55 The Agreement defines an 'Employee' as meaning 'an officer employed under the provisions of the Award.'
- 56 The Agreement defines the 'Award' as meaning 'the *Education Department Ministerial Officers Salaries, Allowances and Conditions Award 1983 No. 5 of 1983*'. This is the same 'Industrial Award' referred to in the applicant's employment contract.
- 57 The parties agree that the applicant was an employee to whom the Agreement applied: the respondent's submissions at [16] and the applicant's submissions at [4] and [6].
- 58 As the applicant was an 'Employee' under the Agreement she was also 'an officer employed under the provisions of the Award.'
- 59 Clause 3 of the Award is the scope clause and states that the Award applies to all:
- Government Officers employed by the Minister for Education (hereinafter referred to as the Minister) in an administrative, clerical or general capacity who are not employed under the *Government Officers Salaries, Allowances and Conditions Award 1989*. It does not apply to any officer employed on the teaching staff under provisions of the *Education Act 1928*, or the regulations made under the Act, or to any child care worker.
- 60 The parties agree that the applicant was an employee to whom the Award applied: the respondent's submissions at [16] and the applicant's submissions at [4] and [5].

- 61 The respondent submits that whilst the scope clause of the Award refers to ‘Government Officers’, the Award does not explicitly define the term, and the term should have the same definition as in the Act.
- 62 In circumstances where the parties agree that the Award applied to the applicant it follows that the scope clause wholly applied to the applicant, such that the applicant was a ‘Government Officer’ under the Award and was also ‘employed ... in an administrative, clerical or general capacity’.
- 63 The respondent also submits that the definition of ‘Officer’ in the Award provides support for the contention that the applicant was ‘on the salaried staff of the Department’.
- 64 The Award defines both an ‘Employee’ and an ‘Officer’ as meaning an ‘employee pursuant to section 235(1)(c) of the *School Education Act 1999*’. Section 235(1)(c) of the School Education Act states (emphasis added):

235. Categories of staff to be employed

- (1) To enable the functions of the department to be performed persons are to be employed in the department —
- (a) as public service officers appointed or made available under Part 3 of the PSMA; or
 - (b) as members of the teaching staff; or
 - (c) *as other officers; or*
 - (d) as wages staff.

- 65 Section 235(1) of the School Education Act concerns the categories of staff to be employed in the Department. The provision provides for four separate categories of staff that are employed, namely, public service officers, teachers, other officers, and wages staff. The provision also provides that ‘other officers’ are in a separate category to ‘wages staff’.
- 66 As previously stated, what needs to be determined is whether or not the applicant was employed ‘on the salaried staff’ of the Department such that she falls within the definition of a ‘government officer’ under s 80C(1) of the Act, such that her unfair dismissal application should be dismissed for want of jurisdiction.
- 67 The respondent relies on the analysis in *Fenton* in support for the proposition that the applicant was ‘on the salaried staff of the Department’.
- 68 The Board in *Fenton* at [35] cites *The Totaliser Agency Board v Edith Fisher* (1997) 77 WAIG 1889 as the leading authority on the meaning of ‘salary’ in *McGinty v Department of Corrective Services ABN 25103389163* [2012] WAIRComm 54; (2012) 92 WAIG 190 (*McGinty*) at [10]-[11]:

As noted above, the industrial instruments in part, still refer to the payment of “wages”. Further, s 80C of the Act does not just refer to the payment of a “salary” to a person. The statute refers to a person employed on the “salaried staff” of a public authority. Whilst the distinction between “wages employees” and “salaried staff” in terms of somewhat anachronistic “blue collar” and “white collar” employment may no longer have the connotations it once may have had, nonetheless, the legislature has sought to confine the jurisdiction of the Arbitrator to those specific employees in s 80C of the Act. They are generally those in the administrative, technical and professional ranks of the public sector.

- 69 Applying *Fenton* requires a two-step assessment process in determining whether the applicant was a government officer pursuant to s 80C(1) of the Act. Firstly, to determine if the applicant was paid a salary. Secondly, to determine if the applicant was generally working in the ‘administrative, technical and professional ranks’ of the public sector.
- 70 In relation to the first test, the respondent submits that the applicant was paid a fixed fortnightly amount under cl 10.6 of the Agreement and cl 10(7) of the Award.
- 71 This is consistent with the employment contract which refers to the applicant receiving an annual salary, as a permanent employee, employed on a part time basis of a 0.8 work fraction. There is no reference in the employment contract to the applicant being paid on an hourly basis, or on a basis that was not ‘a definite payment for personal services arising under some contract, and ... computed by time’: *In Re Shine; Ex parte Shine* [1892] 1 QB 522 as cited in *Fenton* at [26]. Nor is there any reference in the employment contract to the applicant not being paid a fixed payment for the work performed: *McGinty* as cited in *Fenton* at [46].
- 72 The applicant does not refute that she was paid a salary, nor does she claim that she was a ‘wages’ employee.
- 73 For the reasons identified, I find that the applicant was paid a salary.
- 74 In relation to the second test, the respondent specifies the duties in the applicant’s job description that were clerical and/or administrative in nature and those that were technical.
- 75 I do not consider that I need to make findings about the specific duties performed by the applicant as a Laboratory Technician which were of an administrative nature and which were of a technical nature, in circumstances where:
- (a) The applicant does not refute that she performed clerical and administrative or technical duties as a Laboratory Technician; and
 - (b) The parties agree that the Award applied to the applicant, it follows that in accordance with the scope clause of the Award that the applicant was ‘employed ... in an administrative, clerical or general capacity’.
- 76 For the reasons identified, I find that the applicant was an employee generally employed in the ‘administrative, technical and professional ranks’ of the public sector.
- 77 As I have found that the applicant was paid a salary and was employed in the category of an employee generally ‘in the administrative, technical and professional ranks of the public sector’, I find that the applicant was employed ‘on the salaried staff’ of the Department.

- 78 Therefore, I find that the applicant was a ‘government officer’ under s 80C(1) of the Act.
- 79 As the applicant was a government officer, the Commission does not have jurisdiction to enquire into and deal with the applicant’s unfair dismissal application. As a government officer, the Board chaired by a Public Service Arbitrator has exclusive jurisdiction to enquire into and deal with the applicant’s industrial matter.
- 80 In any event, the applicant had named the ‘Department of Education WA’ as the respondent in the applicant’s unfair dismissal application. The Employer Response states that the respondent should have been identified as the ‘Director General, Department of Education’.
- 81 As noted above, the applicant’s employment contract names ‘The Director General of the Department of Education’ as the applicant’s employer.
- 82 The applicant objected to the Commission issuing an order to correct the respondent’s name to ‘Director General, Department of Education’.
- 83 It is the applicant’s responsibility to identify her employer in any application brought in the Commission. Failing to do so enlivens the possibility of the respondent raising another ground on which the unfair dismissal application should be dismissed, namely, that a party who is not the applicant’s employer has no case to answer in relation to the applicant’s employment: *Alexander Byers v Minister for Corrective Services* [2022] WAIRC 00186; 102 WAIG 252 at [4].
- 84 However, as I have found the applicant was a government officer it follows that the applicant’s unfair dismissal application will be dismissed for want of jurisdiction and there is no need for me to make any findings as to whether the unfair dismissal application should be dismissed on the basis that the respondent named in the unfair dismissal application has no case to answer.

Conclusion

- 85 The Commission’s jurisdiction to ‘enquire into and deal with any industrial matter’ is expressly stated as being ‘subject to this Act’: s 23(1) of the Act.
- 86 Section 80E(1) of the Act provides the Public Service Arbitrator with exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer.
- 87 For all the reasons outlined above, I find the applicant to be a government officer.
- 88 Therefore, the Commission does not have jurisdiction to hear and determine the applicant’s unfair dismissal application, and the applicant’s unfair dismissal application will be dismissed for want of jurisdiction pursuant to s 27(1)(a) of the Act.
- 89 If the applicant seeks to appeal her dismissal, she should bring an appeal to the Board in accordance with s 80I of the Act.

2022 WAIRC 00742

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LOANNE CARTER

APPLICANT

-v-

DEPARTMENT OF EDUCATION WA

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

THURSDAY, 20 OCTOBER 2022

FILE NO/S

U 65 OF 2022

CITATION NO.

2022 WAIRC 00742

Result	Order Issued
Representation	
Applicant	In person
Respondent	Ms E Negus (of counsel)

Reasons for Decision

HAVING heard from the applicant and Ms E Negus of counsel for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

- (1) THAT the respondent’s application under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) to dismiss application U 65 of 2022 be upheld; and
- (2) THAT application U 65 of 2022 be, and by this order, is dismissed.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2022 WAIRC 00761

UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2022 WAIRC 00761
CORAM : SENIOR COMMISSIONER R COSENTINO
HEARD : MONDAY, 17 OCTOBER 2022
DELIVERED : MONDAY, 17 OCTOBER 2022
FILE NO. : U 85 OF 2022
BETWEEN : MA SHANLEY ZOE FERMO
 Applicant
 AND
 TAMANA SHARIF AS TRUSTEE FOR KHEIRKHAH FAMILY TRUST
 Respondent

CatchWords : Industrial Law (WA) – Unfair dismissal – Termination of employment – Apprentice – Was there a dismissal? – Did the applicant’s conduct justify dismissal? – Dismissal found to be harsh, oppressive and unfair – Compensation for loss of wages
Legislation : *Industrial Relations Act 1979* (WA)
Result : Application upheld
Representation:
Applicant : Ms S Fermo on her own behalf
Respondent : No appearance

Case(s) referred to in reasons:*Blyth Chemicals Ltd v Bushnell* [1933] HCA 8; (1933) 49 CLR 66*Bogunovich v Bayside Western Australia Pty Ltd [No 2]* (1998) 79 WAIG 8*Li v Haydar Family Restaurants T/A McDonalds* [2003] WAIRC 09489; (2003) 83 WAIG 3303*Manning v Huntingdale Veterinary Clinic* (1998) 78 WAIG 1107*The Undercliffe Nursing Home v The Federated Miscellaneous Workers’ Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385*Reasons for Decision**Ex Tempore*

- 1 The applicant, Ms Shanley Fermo started her hairdressing apprenticeship at Natural Elements for Hair, a salon owned by the respondent, Ms Tamana Sharif as trustee for Kheirkhah Family Trust. Natural Elements for Hair is a small business, with only two or three employees working in addition to Ms Sharif at any one time. Ms Fermo’s and Ms Sharif’s working relationship lasted only 18 months. Ms Fermo worked her last shift on 28 June 2022. On that day, she and Ms Sharif said things to each other that neither liked hearing. A text message exchange following that discussion documented the end of the working relationship.
- 2 Ms Fermo is seeking compensation for what she says was an unfair dismissal. She is an ‘employee’ as defined who has standing to bring this claim: *Industrial Relations Act 1979* (WA) (IR Act), s 7 and s 29(1)(c). Her claim was filed in time.
- 3 I must decide:
 - (a) whether there was a dismissal, that is, termination of Ms Fermo’s employment at Ms Sharif’s initiative;
 - (b) if there was a dismissal, was it harsh, oppressive or unfair. This depends on whether Ms Sharif had a valid reason for the dismissal related to Ms Fermo’s conduct; and,
 - (c) if the dismissal was harsh, oppressive or unfair, should compensation be awarded. If so, how much?

Was Ms Fermo dismissed?

- 4 The first issue is whether there has been a dismissal for the purpose of s 29(1)(c) of the IR Act, that is, was there some action on the part of Ms Sharif which led to or effected the termination of Ms Fermo’s employment: *Li v Haydar Family Restaurants T/A McDonalds* [2003] WAIRC 09489; (2003) 83 WAIG 3303 at [60].
- 5 There will not be a dismissal if Ms Fermo resigned or ended the employment by her own will.
- 6 Ms Sharif did not attend the hearing of this matter, so Ms Fermo’s evidence was the only evidence before the Commission, and it was uncontested.

- 7 Ms Fermo started working for Ms Sharif in early 2021.
- 8 On 28 June 2022, Ms Fermo was at the front of the salon when she asked Ms Sharif for a pay rise. She said that Ms Sharif walked off, but later pulled her into the back of the shop to talk to her. Ms Sharif told her ‘If I’m not doing enough for you, you should leave’ or something to that effect. Ms Fermo responded that her concern was not about whether Ms Sharif was doing enough, but rather was about her own work being valued.
- 9 This conversation happened at around 2.00 pm. Ms Sharif did not speak to Ms Fermo for the rest of the day. Ms Fermo finished work at her usual time of 5.00 pm.
- 10 That evening, Ms Fermo received a text message from Ms Sharif. It said (in part):
- I really enjoyed working with you, but it’s okay things happens in the salon and we both been part of it...
- ...
- The conversation we went through today it’s gone too far at this point it’s not only about the money the things you said to me I found it very disrespectful...
- ...
- ...[I]f someone comes and tells me things like that being the owner of the salon it’s very difficult for me to take it. I don’t want to waste your time and my time at this point.
- ...
- I’m not sure if my decision is correct or not, but at this point I want you to spend more time looking for a job for you and best of luck with everything. I don’t want to be an option[.] [I]f you can’t find a pay rise somewhere then I’m still there for you.
- Even if you find a job and give me a notice I don’t need any notice from you.
- I did my best for you, if it’s not enough its totally ok my love.
- ...
- I will calculate all your money deposited to your account.
- Please accept my apology 😊

- 11 Ms Fermo responded to this text message requesting payment of two weeks’ notice, confirming that she would ‘from now 28th of June to the 12th of July...be leaving the salon with or without a new job’.
- 12 Ms Sharif refused to pay or give notice, but said ‘the best [she] could do’ was transfer Ms Fermo’s apprenticeship.
- 13 Ms Sharif did not use words, either in person, or in any writing, expressly saying that she was terminating the employment or dismissing Ms Fermo. But it is clear from her text message of 28 June 2022 that she intended that be the outcome. She wanted the employment to end and she decided to end it. This is apparent from:
- (a) her reference to the working relationship in the past tense (‘I really enjoyed working with you’);
 - (b) her statement that the events of the day meant ‘it’s gone too far’;
 - (c) her reference to her ‘decision’; and,
 - (d) her reference to calculating and depositing money due to Ms Fermo.
- 14 Further, when Ms Fermo asked for notice or pay in lieu of notice, Ms Sharif said nothing to suggest that the employment was still on foot, such that payment was not necessary. Rather, she simply sought to justify non-payment of notice on the basis that she was the business owner, and did not want to pay notice in circumstances where Ms Fermo had acted in a disrespectful way towards her.
- 15 A reader of the text message exchange would reasonably conclude that it was bringing the employment relationship to an end.
- 16 Accordingly, I find that the text message exchange of 28 June 2022 effected the termination of the employment, and that the termination was at Ms Sharif’s initiative. There was a dismissal.

Did Ms Fermo’s conduct justify dismissal?

- 17 There is a clue in Ms Sharif’s text messages that the reason she had decided to end the employment was because Ms Fermo had challenged her, either on money, or on her management of the business, or both. She found those challenges disrespectful.
- 18 Ms Fermo’s evidence about the relevant conversation was that it concerned only her request for a pay increase.
- 19 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the employee: *The Undercliffe Nursing Home v The Federated Miscellaneous Workers’ Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385.
- 20 Because the dismissal was done without giving any notice, or payment in lieu of notice, it was a summary dismissal. Summary dismissal will be justified only where an employee has committed an act of serious misconduct. Serious misconduct means wilful or deliberate behaviour by an employee which is inconsistent with the employment continuing. It includes things like theft, fraud, assault, and disobeying lawful and reasonable orders.
- 21 The employer has the onus of showing that there was serious misconduct justifying dismissal. 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.

- 22 There is no suggestion that when she raised the matters she was complaining about, Ms Fermo used offensive or abusive language. It seems that Ms Sharif's perception that the communications were disrespectful arose merely because Ms Fermo raised her issues, concerns or request, not because of the way she communicated or the language of the communication.
- 23 It is legitimate and reasonable for Ms Fermo to have raised the topic of her rate of pay with Ms Sharif. Even if she had also raised or commented on Ms Sharif's demeanour, that too is a matter which it was legitimate for her to raise, being a matter which impacted on her work and employment.
- 24 I am not making any comment or finding about whether Ms Fermo's concerns were reasonably held or not, or whether Ms Sharif ought to have made any concessions in relation to them. I only mean that if they were matters that were on Ms Fermo's mind and affecting her enjoyment of her work, it was okay for her to talk to Ms Sharif about them. It was not misconduct for her to tell Ms Sharif these things, or even to argue about these things.
- 25 Ms Fermo's conduct was not misconduct, and it did not justify dismissal from her employment. Accordingly, the dismissal was unfair.

Should Ms Sharif compensate Ms Fermo, and if so, by how much?

- 26 Ms Fermo seeks two weeks' wages as compensation for unfair dismissal. She also seeks three days' pay for her lost wages when attending at the Commission. She does not seek reinstatement. That is, in part, because since the dismissal, she has secured alternative employment. This fact means that reinstatement would be inappropriate.
- 27 The principles in relation to the assessment of compensation for unfair dismissal claims are well settled: *Bogunovich v Bayside Western Australia Pty Ltd [No 2]* (1998) 79 WAIG 8.
- 28 The award should compensate the unfairly dismissed employee, as far as possible, for the '...loss or injury caused by the dismissal': IR Act, s 23A(6). An employee should be awarded a sum that they would have earned had the employment continued. An unfairly dismissed employee is to be compensated to the fullest extent of their loss but the calculation of loss must not be arbitrary: *Manning v Huntingdale Veterinary Clinic* (1998) 78 WAIG 1107.
- 29 Ms Fermo was earning \$17.98 per hour in her employment with Ms Sharif. She found a new full-time job paying at a higher hourly rate within a week of finishing with Ms Sharif. She was unclear about when she actually commenced the new job.
- 30 I am unable on the evidence to calculate Ms Fermo's loss precisely, but two weeks' pay is likely sufficient to compensate her to the full extent of her actual loss. The award will be \$1366.48 gross being 76 hours at the rate of \$17.98 per hour.
- 31 The orders will be:
- (a) the name of the respondent will be amended to Tamana Sharif as trustee for the Kheirkhah Family Trust;
 - (b) declaring the respondent's dismissal of the applicant to be harsh, oppressive and unfair; and,
 - (c) for the respondent to pay the applicant compensation in the sum of \$1,366.48 within 21 days of the date of the orders issuing.

2022 WAIRC 00723

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MA SHANLEY ZOE FERMO

APPLICANT

-v-

THE TRUSTEE FOR KHEIRKHAH FAMILY TRUST

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

MONDAY, 17 OCTOBER 2022

FILE NO/S

U 85 OF 2022

CITATION NO.

2022 WAIRC 00723

Result

Order issued

Representation

Applicant

Ms S Fermo on her own behalf

Respondent

No appearance

Order

HAVING heard from Ms S Fermo on her own behalf and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA):

1. ORDERS that the respondent's name be amended to substitute 'The Trustee for KHEIRKHAH FAMILY TRUST' with 'Tamana Sharif as Trustee for KHEIRKHAH FAMILY TRUST'.

2. DECLARES that respondent's dismissal of the applicant was harsh, oppressive and unfair.
3. ORDERS that the respondent pay to the applicant compensation in the sum of \$1366.48 (gross) within 28 days of date of these orders.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2022 WAIRC 00739

UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2022 WAIRC 00739
CORAM : COMMISSIONER C TSANG
HEARD : FRIDAY, 22 JULY 2022
DELIVERED : THURSDAY, 20 OCTOBER 2022
FILE NO. : U 53 OF 2021
BETWEEN : VERONA MARIE WAUCHOPE
 Applicant
 AND
 DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Industrial Law (WA) - Application to strike out unfair dismissal claim - improper conduct - personal insults and threats of legal proceedings - capacity or tendency to interfere with the administration of justice - he or she who seeks equity must do equity, and he or she must also come with clean hands - Respondent's interlocutory application upheld - Unfair dismissal application dismissed

Legislation : *Industrial Relations Act 1979* (WA) s 26(1), s 26(1)(a), s 26(1)(c), s 27(1)(a)(iv)

Result : *Order Issued*

Representation:

Applicant : Mr A Gill (of counsel)

Respondent : Mr D Anderson (of counsel)

Case(s) referred to in reasons:

Australian Competition and Consumer Commission (ACCC) v Maritime Union of Australia (2001) 114 FCR 472
Brown v Commissioner, Department of Corrective Services [2017] WAIRC 00714; (2017) 97 WAIG 1393
Civil Service Association of Western Australia Incorporated v Director General, Ministry of Justice [2003] WAIRC 08587; (2014) 94 WAIG 215
De Vos v Minit Australia Pty Ltd [2002] WAIRC 06108; (2002) 82 WAIG 2195
De Vos v Minit Australia Pty Ltd [2003] WAIRC 07735
Librizzi v The State of Western Australia [2006] WASCA 237
R v Kellest [1976] QB 372
R v McLachlan [1998] 2 VR 55
The Queen v Russell Gordon Haig Mathews [1992] QCA 462
Tye v Care Services Administration Pty Ltd [2017] WAIRC 00689; (2017) 97 WAIG 1319

*Reasons for Decision***The respondent's interlocutory application**

- 1 On 25 February 2022, the respondent filed an interlocutory application (**strike out application**) for an order that the applicant's unfair dismissal claim be dismissed under s 27(1)(a)(iv) of the *Industrial Relations Act 1979* (WA) (**Act**) on the grounds that:
 - (a) the applicant has, since her dismissal, acted improperly towards several potential witnesses including by seeking to intimidate them (**ground 1**);

- (b) the applicant has provided false or misleading information to the respondent with respect to the progress of the criminal charges against her (**ground 2**); and/or
- (c) there has been a complete and irretrievable breakdown of trust and confidence between the applicant and the respondent, such that reinstatement is impracticable and has been at least since the time of her dismissal (**ground 3**).

2 Section 27(1)(a)(iv) of the Act states (emphasis added):

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
 - (a) at any stage of the proceedings dismiss the matter or any part of it or refrain from further hearing or determining the matter or part if it is satisfied —
 - (i) that the matter or part is trivial; or
 - (ii) that further proceedings are not necessary or desirable in the public interest; or
 - (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
 - (iv) *that for any other reason the matter or part should be dismissed or the hearing of it discontinued, as the case may be;*

Background to the respondent's interlocutory application

- 3 On 23 June 2021, the applicant filed a Form 2 – Notice of claim of harsh, oppressive or unfair dismissal (**unfair dismissal application**) claiming that she was unfairly dismissed by the respondent on 10 June 2021, from her position as Senior Teacher and Data Analyst (Presenter) at Waroona District High School, which had commenced on 30 January 2020.
- 4 On 15 July 2021, the respondent filed a Form 2A – Employer Response to Unfair Dismissal Application (**Employer Response**) contending that the respondent had concluded, to the required standard, that the applicant had committed 10 of the 13 allegations of misconduct, which broadly related to:
 - (a) inappropriate conduct with students including unprofessional Facebook messages to students for non-professional purposes;
 - (b) failing to inform her line manager that she had been charged with three counts of breaching a family violence restraining order;
 - (c) inappropriate assistance to students sitting the writing component of the Online Literacy and Numeracy Assessment (OLNA); and
 - (d) allowing a Year 10 student to stay at her home, consume alcohol and smoke cannabis, and smoking cannabis with the student.
- 5 On 2 December 2021, the Commission issued the following Directions (2021 WAIRC 00609):
 - (a) THAT the respondent file and serve upon the applicant a bundle of documents on which it may seek to rely in the hearing of this matter by 13 January 2022;
 - (b) THAT the respondent provide the applicant with a proposed statement of agreed facts for the hearing of this matter by 20 January 2022;
 - (c) THAT a Scheduling Conference be listed on 11 February 2022; and
 - (d) THAT the parties have liberty to apply on short notice.
- 6 At the Scheduling Conference on 11 February 2022, the Commission issued the following Directions (2022 WAIRC 00062):
 - (a) THAT the parties file a statement of agreed facts by no later than 25 February 2022;
 - (b) THAT the parties file a bundle of agreed documents by no later than 18 March 2022;
 - (c) THAT the applicant 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 April 2022;
 - (d) THAT the respondent file and serve upon the applicant any outlines of witness evidence and any documents in reply by no later than 29 April 2022;
 - (e) THAT the applicant may file and serve upon the respondent any further outlines of witness evidence and any documents in reply by no later than 13 May 2022;
 - (f) THAT the applicant file and serve an outline of submissions upon which they intend to rely by no later than 27 May 2022;
 - (g) THAT the respondent file and serve an outline of submissions upon which it intends to rely by no later than 10 June 2022;
 - (h) THAT the matter be listed for hearing for 3 days on a date to be fixed; and
 - (i) THAT the parties have liberty to apply at short notice.
- 7 On 25 February 2022, the respondent filed the strike out application. In the application, the respondent requested a stay of the Directions of 11 February 2022 pending the hearing of the strike out application.
- 8 On 2 March 2022, the Commission listed the strike out application for hearing and issued a Direction (2022 WAIRC 00089) staying the Directions of 11 February 2022 pending the determination of the strike out application.
- 9 The Directions made in this matter are replicated in full in these reasons for decision as it is relevant to note that aside from the bundle of documents the respondent seeks to rely upon, the parties have not had the opportunity to file any other documents or evidence in support of their contentions in the applicant's unfair dismissal application. This is because the respondent's strike

- out application interposed the requirement for compliance with the Directions of 11 February 2022, with any requirement to file material in relation to the applicant's unfair dismissal application stayed pending the outcome of the strike out application.
- 10 Counsel for the applicant submits that dismissing the applicant's unfair dismissal application at this stage, without the applicant's unfair dismissal application having fully been heard and all evidence led, would be harsh and extreme.
 - 11 The respondent submits that ground 3 of the strike out application proceeded on the basis that the applicant stated in her unfair dismissal application that she was seeking reinstatement.
 - 12 By interlocutory applications dated 4 and 22 March 2022, the applicant amended her unfair dismissal application to remove reinstatement as the remedy she was seeking. In her interlocutory application of 22 March 2022, the applicant states that she is now only seeking compensation as a remedy in her unfair dismissal application.
 - 13 At the hearing of the respondent's strike out application, counsel for the respondent advised that the respondent was no longer pressing grounds 2 and 3.
 - 14 In the circumstances, the respondent did not call any witnesses to give evidence and relied on the emails sent by the applicant and a series of text messages sent by the applicant's partner in support of ground 1 of the strike out application; namely that the applicant has, since her dismissal, acted improperly towards several potential witnesses including by seeking to intimidate them.
 - 15 The emails and text messages were admitted into evidence, with two emails filed with the Registry by consent after the hearing, on the basis that the applicant agreed in evidence in chief or under cross-examination that she had sent each of the emails and there was no objection to the text messages sent by the applicant's partner being admitted into evidence.
 - 16 The only witness called to give evidence at the hearing was the applicant.
 - 17 At the hearing, the applicant agreed that she had sent each of the emails and gave evidence about the context to the sending of the emails. In addition to the other submissions made by the applicant's counsel (addressed later in these reasons for decision), counsel for the applicant submits that the context behind the applicant sending the emails supports the strike out application being dismissed.

The respondent's contentions

- 18 The respondent submits that improper conduct of an applicant towards witnesses, including attempts to intimidate them, is a basis on which the Commission may dismiss an application: *Brown v Commissioner, Department of Corrective Services* [2017] WAIRC 00714; (2017) 97 WAIG 1393 (*Brown*).
- 19 The respondent attaches more than two dozen emails to the strike out application in support of the submission that the applicant has, since she was dismissed on 10 June 2021 and therefore at a time when her unfair dismissal application was imminent or on foot, repeatedly directed intimidating and insulting communications towards potential witnesses.
- 20 Some of the emails are lengthy and therefore not all of the content of these emails have been replicated in these reasons for decision. The content of the emails and the applicant's partner's text messages have been included subject to omissions of any content which may have the potential to reveal the identity of minors.
- 21 All emails were tendered on the basis that the applicant agreed that she had sent them. Neither counsel questioned the applicant on the truth or otherwise of the content of the emails such that the content of the emails as they appear in these reasons for decision need to be considered in that context, that is, that they are the applicant's unchallenged assertions.
- 22 The emails attached to the respondent's strike out application that were sent by the applicant include the following emails, sent on the following dates to the following persons, prior to the applicant's dismissal on 10 June 2021:
 - (a) 19 February 2021 at 12.24 am to Lisa Rodgers, the respondent, with content including:

The investigation has gone on for many months. The interpretation of statutory law, by SID has been inconsistent and inept. It is laughable, Ms Rodgers!

...

The actions of the DoE is fraught with misconduct!

I am NOT saying this because I do not agree with decisions about my conduct. I AM SAYING THIS BECAUSE IT IS A FACT OF LAW!

...

What is going on in SID? It takes an outside executive branch to do what an entire Department is paid to do within DoE. What use are they? What a waste of funds!

This needs to be disclosed Ms Rodgers and if you fail to act appropriately, I will disclose the misuse of public resources AND misconduct to the Public Sector Commission. I will also go public and to the media who already have been following my story.

This entire saga has been a Masterclass in patience. I make no apology for my frustration at this point! Enough is enough!

(Exhibit 10, pages 1-2)
 - (b) 3 March 2021 at 12.38 pm to the respondent, with content including:

This is INHUMAN! I am being DEHUMANISED by your employees who are playing some sick game that is unlawful and destroying my career.

COULD YOU PLEASE MEET WITH ME TO DISCUSS? I AM A HUMAN BEING NOT A WAR CRIMINAL OR A NUMBER ON PAPER.

(Exhibit 10, page 3)

- (c) 10 May 2021 at 4.15 pm to Chris Hodges, Principal Investigator, Investigations and Compliance, Teacher Registration Board of Western Australia, with content including:

I am more than repulsed by this serious abuse of an employee who has no reason to climb a slippery pole, who is in her penultimate year of law and my expertise is in policy development (Curtin University). Why would I suddenly start behaving like a Waroona troglodyte? Smokingbongs????

Where is the common sense? Or is there some political motivation?

As I have said, the DoE are losing credibility. Not one Perth School I have worked in, not one International School, not one university academic with whom I have worked, not one principal, colleague or employee would believe the ridiculous allegations from a school with an ICSEA in the 700's.

I am published internationally in academic subscriptions and proceedings. My book is sold in 17 languages and I'm interviewing on American News next month regarding its popularity in the States.

I belong to international conference committees, we meet annually in Greece with academics from NASA and Harvard. I attend Fullbright Awards and make speeches- what will these award winning researchers think of my plight if I am treated so unfairly?

I know my good friend Dr Anderson the Canadian President of the ICICTE, will tell me this would not, COULD NOT ever happen in Canada. Already he has told me our Justice system is prehistoric.

This abhorrent process, if not stopped will place the DoE in disrepute not just locally but in many countries. Regardless of the outcome, I will still be invited to present at these conferences.

My life is education- I'm an author and researcher. Falcon Primary School hosted my book launch! There is a chapter in my book on 'not fraternising with students'. I teach this very thing in P.D.

This is an unnecessary [sic] 'restraint of trade' and I am denied my basic human rights to work, due to malfeasance.

The longer this goes on the worse the detriment. I did drug testing to prove my innocence-where is the evidence? It is small town exclusivity and intimidation.

I hope you do the right thing and avoid this mobbing mentality gaining any more traction.

regards

Verona

(Exhibit 10, pages 4-6)

- (d) 22 May 2021 at 4.40 pm to the respondent, with content including (original emphasis):

Is this some sort of 'misogynist club'?

I reported this all along the way. It fell on deaf ears.

Somebody needs to be accountable for this defamation. Placing me on '*sick leave*' **caused** the escalation of the lynching at Waroona DHS -there was NO ALLEGED MISCONDUCT IN THE 8 WEEKS I WAS PHYSICALLY PRESENT AND WORKING AT THE SCHOOL! ONLY AFTER I LEFT DID THE GOSSIP START.

CHECK THE COMPLAINTS! I ONLY HAD PRAISE FOR THE WORK I DID UNTIL JOHN O'BRIEN INSTRUCTED ABBISS TO PLACE ME ON LEAVE. HE INCITED THE MOBBING!

THIS IS CRIMINAL! IT IS A SIGN THE DEPARTMENT OF EDUCATION NEEDS TO TRAIN AND UPSKILL MANAGER'S LIKE O'BRIEN IN LABOUR RELATIONS (particularly in regards to ethical conduct AND SEXISM!)

THIS IS THE WAY YOUR DEPARTMENT TREATS VICTIMS OF DV [...]

LISA, PUNISHING A SINGLE MOTHER, WHO IS THE VICTIM OF DV IS UNETHICAL! LOOK WHAT HAS HAPPENED TO MY CAREER?

JUST BECAUSE I AM EDUCATED AND ARTICULATE, DOES NOT PRECLUDE ME FROM BEING THE VICTIM OF ABUSE.

THIS IS JUST BARBARIC, LISA! LIKE THE WITCHES BURNED AT THE STAKE IN MEDIEVAL TIMES, THIS INVESTIGATION COMPARES TO THROWING THE 'WITCH' IN THE WATER TO SEE IF SHE FLOATS-THERE IS NO POSSIBLE WAY FOR THE ACCUSED TO SURVIVE!

PLEASE, MS RODGERS, DO NOT TELL ME THAT WHAT JOHN O'BRIEN PUT IN THE LETTER ATTACHED (WITHOUT MY KNOWLEDGE) IS ACCEPTABLE, PROFESSIONAL OR ETHICAL.

VERONA

(Exhibit 10, pages 7-8)

- (e) 24 May 2021 at 10.30 am to the respondent, with content including (original emphasis):

WHY DO YOU DO THIS TO PEOPLE? **I DID NOTHING WRONG AND I WILL PROVE MY INNOCENCE REGARDLESS OF WHAT YOU DECIDE.**

WHY ARE YOU SO COLD AND CRUEL TO A WOMAN [...] WHO HAS BEEN THROUGH SUCH AN ORDEAL? WHERE IS THE HUMAN ELEMENT OF YOUR DEPARTMENT?

...

YOU DESTROY LIVES OF PEOPLE WHO HAD NO CHANCE TO ESCAPE THIS MYSOGYNISTIC [sic] BULLYING!

WE DID NOT DESERVE THIS...NOBODY DOES!

(Exhibit 10, pages 9-10)

- (f) 1 June 2021 at 2.16 pm to the respondent, with content including:

I'VE BEEN VICTIM BLAMED, CALLED 'DELUSIONAL' BECAUSE I NOTIFIED MY EMPLOYER THAT MY EMAIL WAS HACKED BY MY VIOLENT EX-HUSBAND, ACCUSED OF BEING MENTALLY UNFIT-WHICH I CLEARLY WAS NOT AND BULLIED, DUE TO A NEGLIGENT PRINCIPAL AT OCEAN ROAD PRIMARY SCHOOL.

SOMETHING NEEDS TO BE DONE. I WOULD NOT WISH WHAT I HAVE BEEN THROUGH-THIS HORRIFIC INJUSTICE AND MEDIEVAL WITCH HUNT BECAUSE I ASKED FOR HELP [...] ON ANYONE.

ONE WOULD THINK WITH A WOMAN AT THE HELM, STEERING THIS DEPARTMENT, THAT THIS FORM OF ABUSE WOULD NOT BE TOLERATED.

I HAVE NO WORDS!

(Exhibit 10, pages 10-11)

- 23 The emails attached to the respondent's strike out application that were sent by the applicant include the following emails, sent on the following dates to the following persons, on or after the applicant's dismissal on 10 June 2021:

- (a) 10 June 2021 at 10.34 am to David Mattin, Deputy Principal of Waroona District High School. The respondent submits, unchallenged, that the applicant alleges she was subject to 'accusations, sabotage and complaints/harassment' by him in her unfair dismissal application, and appears to allege that many of the allegations against her can be traced back to him. The email contains the subject line 'Notice of personal action against you', and is replicated in full below.

If you had have spent half the time doing your job, as you did trying to discredit me for being a professional and bring me down to your level, trumping up and inciting accusations about an expert educator who has forgotten more about education than you will ever know, a hard- working and respected professional woman, who threatened your ineptitude, and exposed you for the dim-witted troglodyte you are, then I would never have met your ugliness and the ugliness of a couple of jealous pathologically envious underachievers. What a coward!

You are without a moral compass, your lazy tardy approach to work, I would never have been called by Jacquie Abbiss to fix the deplorable situation with your data at your poor performing school.

You are despised by the students and staff, you have no moral obliquity and you could not have achieved the outstanding career I have in life. I watched you degrade and subjugate Emma!

I will see you in Court and I will be taking a personal action against you for the defamation and unlawful manner in which you worked tirelessly to defame me.

You are a contemptible low-life who hides out in low ICSEA schools like Waroona, to fly under the radar. You have no respect from the community, nor the teachers. Even Jacquie complained to me about your apathy upon arrival and said she hopes I can 'get you to come around' as you do NOTHING!

Jim Bell warned me not to go to Waroona over the Christmas break. He told me it was known for being a toxic place nobody gets out of. Where the unemployable hide-like you! You couldn't handle that I made a difference, that a woman was smarter, more capable and brought in to fix the mess you allowed to fester.

YOU ARE A KNOWN BULLY! MY FAMILY AND MY COLLEAGUES WILL NOW NOT GIVE UP UNTIL YOU ARE FULLY ACCOUNTABLE FOR YOUR CRIMINAL ACTIONS.

Do NOT think your wilful attempt to discredit me is not obvious to all who know me outside that toxic cesspool you inhabit. You are NOTHING in EDUCATION.

I WILL SEE YOU IN COURT! AND EXPOSE YOU, you despicable coward!

(Exhibit 10, page 12)

- (b) 10 June 2021 at 11.30 am to Jacquie Abbiss, Principal of Waroona District High School, copied to the 'All Staff' at Waroona District High School email address. This email contains the subject line 'Fw: Notice of personal action against you', with content including (original emphasis):

You are without doubt the nastiest, most immoral sycophant I have come across in 29 years in education. You begged me to come and help you fix the 'shocking situation' at Waroona DHS.

...

Dr Bassett told me I had been bullied by you as you felt intimidated by my Mensa IQ. He said low performing teachers will find me a threat in so many ways. He was disgusted at the things you made so personal and told me you were obviously unable to manage the situation you created so you just went with the 'mob' to save your

own reputation. YOU ONLY WANTED ME THERE TO FEATHER YOUR NEST, USE ME AND TAKE ALL THE CREDIT. THAT IS A BULLY!

Had I known you **were** the things I had heard about you, from your former colleagues, (hence why they called you 'Ms Abysmal'), I would NEVER have agreed to assisting you.

You couldn't even control a year 8 class. I watched you struggle to implement the most basic lesson.

...

You are a nasty, unethical, jealous pathologically envious useless teacher and [sic] the unemployable TA's, with a conflict of interest and motive at your school who complained I assisted students to cheat had **NOT** read p 52 of the OLN Handbook. THEYRE [sic] NOT EVEN TEACHERS WHO HAVE EVER BEEN OLN SUPERVISORS! TO BE CLEAR-their accusations do NOT imply cheating.

...

I CAN ONLY PITY YOU. I AM CONVINCED THIS HAPPENED FOR A REASON. THERE IS ENOUGH ILLEGALITY IN YOUR ACTIONS FOR SEVERAL WRITS TO BE PLACED IN THE SUPREME COURT. SOMEBODY NEEDS TO EXPOSE PUBLIC OFFICE CORRUPTION, AND I WILL NOT LET YOU GET AWAY WITH THIS.

CRIMINAL DEFAMATION IS A SUMMARY OFFENCE WITH 2 YEARS JAIL TIME.

THIS WITCH HUNT WILL BE EXPOSED. THE MEDIA HAVE NOW BECOME INVOLVED.

Your EX-colleagues are repulsed by your behaviour! You don't care about your staff, or the students. It is only about your CV AND YOU GETTING OUT OF THERE LIKE YOU TOLD ME.

Never in 29 years of an outstanding career, has anyone adduced such vile and disgusting accusations about me. *Briginshaw* is the test! Seriously 8 weeks and 1 day, AT WAROONA? Compared to 29 years in the best schools in the world? Executive manager at Curtin-teaching awards! You must be kidding yourself if you think you will get away with what you have done to my family.

SHAME ON YOU JACQUIE ABBISS, YOU SELFISH, UNETHICAL SELF-PROMOTER with terrible people skills. I was WARNED about this earlier, how your interpersonal skills were consistent with an introverted slug.

(Exhibit 10, pages 13-14)

- (c) 10 June 2021 at 4.06 pm to Ken Perris, Regional Executive Director for the Goldfields Region in the Department of Education. The respondent submits, unchallenged, that Mr Perris had some involvement in the management of the applicant during her employment, and is referred to in the applicant's unfair dismissal application. This email contains content including:

You, Mr Perris, are a weak man! You tremble like a mouse when faced with the truth. I saw this at Lakelands.

(Exhibit 10, page 15)

- (d) 25 June 2021 at 2.17 pm to Ken Perris, with content including (original emphasis):

These personal items were packed away on the first day of my absence from Waroona in full knowledge that I was not coming back to the school. Because you were disingenuous, every single step of the way in bullying me out of that toxic school.

I am positive you understand that I cannot and will not arrange for the collection of these items after the way I have been treated by YOU!

Your part in this Ken, is unforgivable. I do NOT know how you sleep at night, bullying a single mother [...] and defaming me as you have.

No wonder the DoE has a reputation of incompetence and inhumane conduct from 151 Royal Street. My colleagues are sickened to the core by what YOU have done to me.

Verona

(Exhibit 10, pages 16-17)

- (e) 25 June 2021 at 2.32 pm to Jacqui Abbiss, copied to Ken Perris, with content including:

Jacqui, YOU would sell your own Grandmother for a promotion. I came to you in good faith to assist with your lack of knowledge in data management and coaching.

You have NO integrity! I was told you have a low IQ. That I can accept, but to pretend to care about me to get me to work at your school then throw me under the bus....NO WORDS!

Phil Judge and Christine Edgar as well as many other colleagues who know what you have done to me, are disgusted in the extreme.

You have no substance!

...

YOU ARE CONTEMPTIBLE IN EVERY WAY!

(Exhibit 10, page 18)

- (f) 25 June 2021 at 2.46 pm to the respondent, with subject line 'CORRUPTION'. This email is replicated in full below.
- Lisa,
I am about to raise merry hell to make sure this sick bullying of teachers at the coal-face, in the DoE, is reviewed in the Courts.
WHAT YOU HAVE PUT ME AND MY FAMILY THROUGH IS CRIMINAL.
No wonder parents are losing faith in you and kids are dying...look at the culture you encourage in the Department.
LOOK AT THE WOMAN WHO HAS RUINED MY CAREER COMMITTING A CRIME SHE HAS NOW BEEN CHARGED FOR ON THIS VIDEO!
How do you not expect me to be furious after this corrupt and unethical process has caused the pain and suffering I have endured. Of course I am defensive-YOU WOULD FEEL THE SAME!
Verona
- (Exhibit 10, page 19)
- (g) 5 July 2021 at 10.53 am to Sam Pack, the respondent's solicitor at the time, with content including:
- I am currently in hospital and will not be attending to anymore emails from you on direction from my doctor.
My emails were deliberately ignored when I asked about my belongings, adding to my stress.
When I received an email from 'karen' from regional office, she said I needed to hand back my keys- not get my things. I asked her if she knew something I didn't. I had NOT been dismissed when she asked for these in 2020.
My emails and pleas for help were ignored when I was horrendously bullied in the first days of my attendance to work at Waroona DHS.
This entire defamation was a set up. And is the reason I have had breakdown and am now in hospital.
You work for a Department well rehearsed in such bullying, without conscience.
You are the reason people take their life.
- (Exhibit 10, page 20)
- (h) 28 July 2021 at 9.06 am to Amanda Cann, who was primarily responsible for the investigation into the disciplinary allegations against the applicant, and Marc Sorrell, the principal investigator at the Department of Education who was involved in the disciplinary investigation. This email is replicated in full below.
- I will NOT rest until I see justice and clear my name. You are merely covering up a fake-investigation (witch-hunt).
Your conduct, Amanda is unethical. Marc Sorrel, you are contemptible! Both of you are luddites!
- (Exhibit 10, page 22)
- (i) 10 August 2021 at 8.27 am to the respondent. This email is replicated below.
- I begged you for help and you ignored me.
As I said, the truth will come out and I will clear my name.
All I want is the truth.
I will NOT stop until I get justice [...]
This practice of department bullying must stop.
Why do people like you simply not care, Lisa?
- (Exhibit 10, page 23)
- (j) 10 August 2021 at 8.52 am to Amanda Cann, copied to Marc Sorrell. The content of this email is replicated below. Counsel for the respondent submits that this email is one that contains 'deeply personal' comments, where the applicant refers to the email recipient's family members, which strikes 'most deeply' and is 'very, very personal'.
- You are both contemptible! I will not rest until I know that you personally Amanda, are restrained from ever doing what you have done to teachers like me.
Shawn and I both are working tirelessly with our lawyers to ensure no stone is unturned and the truth will come out.
Marc, your attitude is one nobody needs in our education system. [...] the sick misogynistic and unethical person you are.
Your attitude in the conciliation was vile. Shawn had to restrain himself. He said in his workplace people so primitive with such an ego do not exist.
God help our women teachers. What sort of man bullies a woman [...]? No man does.
I have faith in the law. You obviously need retraining. In your role you should have some basic understanding of the rule of law.
You are both seriously inept. Time will show this.
Amanda I hope your daughter never goes through anything like this. I also hope she does not learn her morals from you!
- (Exhibit 10, page 24)

- (k) 29 October 2021 at 4.43 pm to Jacquie Abbiss. This email is replicated in full below.
- FYI
- This has gone very public! You should be ashamed of yourself, Jacquie. I came to Waroona to help you! I couldve [sic] gone anywhere-Jacquie B begged me to go to her school. She would never have allowed this to happen to me.
- You obviously have no conscience! I am seeking damages from you personally.
- (Exhibit 10, page 27)
- (l) 30 October 2021 at 9.33 pm to Ken Perris. This email is replicated in full below.
- You will hear from my lawyer regarding criminal charges I am taking against you personally.
- Verona
- (Exhibit 10, page 28)
- (m) 5 November 2021 at 7.49 am to the respondent. This email is replicated in full below.
- FYI
- Lisa,
- Police defamed me to the Department and this is why your officers acted so brazenly and unlawfully in having me set -up whilst I was on sick leave.
- This is going viral in the news. I would hope you have the decency to look at the facts and review what the SID have done.
- I've already been cleared by the WWCSU. I DID NOTHING WRONG!
- DO YOU WANT TO DO THE RIGHT THING BECAUSE YOU ARE IN THE WRONG AND IT WILL BE EXPOSED, JUST AS THE MANDURAH POLICE HAVE BEEN EXPOSED.
- Verona
- (Exhibit 10, page 29)
- (n) 6 November 2021 at 8.37 am to the respondent. This email is replicated in full below.
- LISA,
- YOUR DOMESTIC VIOLENCE POLICY FOR WOMEN LIKE ME IS UNKNOWN TO OFFICERS OF THE DOE.
- IT TOOK MEDIA ATTENTION FOR THE POLICE TO LISTEN TO ME. WHY DOES IT TAKE A DEFAMATION [sic] TRIAL TO GET YOU TO LISTEN?
- THIS IS ONLY GOING TO RESULT IN BAD PUBLICITY FOR YOU.
- SHAME ON YOU LISA!
- (Exhibit 10, page 30)
- (o) 8 November 2021 at 9.29 pm to the respondent, with content including:
- As you know, this case has been the topic of the newspapers twice already, with the DOE included as having persecuted an innocent mother. The response from ALL over the nation, has been heartfelt. The media are releasing several more stories on my case.
- YOU never even looked into my matter. Despite the evidence I showed you, proving my innocence.
- My defamation lawyer has said that for every single person who has defamed me, there is a separate instance of defamation, and for each time it has been republished, or spoken. This will be a record defamation case in WA.
- (Exhibit 10, pages 32-33)
- (p) 10 February 2022 at 11.52 pm to Martyn Griffiths, Tim Yorke, Director, ICT Operations and Customer Service within the Department of Education and Amanda Cann. The respondent submits, unchallenged, that Mr Yorke provided some technical information to investigators in the course of the investigation into the applicant's misconduct and is also a material witness with respect to one allegation. This email is replicated below (original emphasis).
- Good day Martyn,
- I refer to my previous 2 responses to your requests about my laptop.
- As previously advised, Tim Yorke failed to provide a response to my request in April 2020, for assistance in a security and safety matter, in regards to my accounts being accessed and compromised. Yorke ignored my requests for help when I made a genuine request for him to check the security of my accounts on the laptop in question.
- To make matters even more insidious, some delusional and incompetent manager in Employment Relations, called John O'Brien, in his infinite wisdom, decided that this request for assistance was a sign that I suffered a mental illness and should be placed on sick leave. Unbelievable as it sounds, this actually happened.
- Naturally, this incompetent egomaniac, who thought he would play psychiatrist for a day, was mistaken, and I was not mentally ill, AND my computer was being accessed by a third party AND my accounts were compromised.

This idiotic behaviour on the part of the HR Manager, as well as the lack of duty of care of Tim Yorke, has resulted in a serious detriment to the safety of [...]. There is a police investigation underway and my stalker has been charged **with multiple indictable offences , who is now behind bars awaiting trial.**

The Department of Education have been the root cause of much of the harm suffered [...]. Tim Yorke being the main instigator of providing false information to noth [sic] SID and the police.

The Department's negligence caused me [...] irreparable harm. Worse still they have now tried to cover up this ineptitude by fabricating accusations and inciting complaints about me, in order to cover their own wrongdoings (in typical government department style).

Tomorrow I am in the WAIRC fighting this crass, unconscionable bullying and malfeasance.

If you think I am going to pay for this computer, that is now the subject of a police investigation, you are possibly as delusional as John O'Brien.

This wanton baboon fudge-wittery and idiocracy has cost me hundreds of thousands of dollars in legal fees and my senior teacher salary.

I implore you to refer this to the SID. In fact, I have saved you the task and included another inept and simpleton luddite from SID (Amanda Cann) in this email.

She is fully aware of the cover-up and sham investigation she orchestrated with malicious and sinister intentions to sack me and deny me procedural fairness.

Let her deal with this complaint. She really cannot do anything worse than she has at this point.

You deal with it, because if you had have checked my computer back in April 2020, we would not be having this conversation now.

Good luck!

(Exhibit 10, pages 39-40)

- (q) 11 February 2022 at 12.04 am to Amanda Cann. This email is replicated below.

Seriously Amanda Cann-could you really be so technology illiterate? Where have you lived? Under a rock?

Tim Yorke will be subpoenaed regarding his falsifying information for an investigation. He knows full well this is NOT the truth what he has adduced in this document-unless he has got dementia and forgotten what he told Shawn and I only 3 months earlier-CHECK YOUR FACTS YOU LUDDITE!

How have you even got a job? Is incompetence a requirement to work for SID? How can you conduct an investigation when you do not understand basic technology [...].

Amanda-go back to school!

(Exhibit 10, page 39)

- (r) 23 February 2022 at 7.34 pm to Bronwyn White, Principal of Halls Head College and Dean Finlay, Principal of Ocean Road Primary School. The respondent submits, unchallenged, that the applicant's case appears to be that Mr Finlay is in some way responsible for or contributed towards some or all of the allegations against her. The respondent submits that this email is particularly notable because it was sent after the issue of the applicant's improper communications to potential witnesses was raised at the Scheduling Conference in the Commission on 11 February 2022. The email contains content which includes:

Dear Bronwyn,

...

The vexatious gossip spread by Dean Finlay is now the subject of a very much larger defamation claim and 3 national news stories.

I have a huge defamation claim with Barristers currently for the horrific untruths spread around without my knowledge.

...

We will never recover from this, but I will ensure restitution from the perpetrators of the crimes that have cost [...] so much.

God help Dean Finlay!

regards

Verona Wauchope

(Exhibit 10, page 42)

- 24 In addition to the emails from the applicant, the respondent relies on a series of text messages sent by the applicant's partner, Shawn Wenn to Amanda Cann, on 3 July 2021 between 8.27 pm and 8.35 pm, with the following content:

You are a piece of shit

You fucking gutless waste of a person

Hope you can sleep at night knowing [...] doesn't have his mother

(You missed a call, but the caller didn't leave a message)

Fucking gutless

I hope you are ready for your name to go over the media for causing someone to kill themselves

Piece of shit

(Exhibit 10, page 21)

- 25 The respondent submits, unchallenged, that whilst the text messages were not sent by the applicant, they are nonetheless relevant because the applicant has made it clear that Mr Wenn is in her camp and is supporting her, and it is to be expected that a witness receiving improper communications from him will perceive those as adding to the pressure coming from the applicant. The respondent further submits that the applicant has never sought to distance herself from or apologise for those messages and has instead only offered excuses for them in the same way she has offered excuses for her conduct.
- 26 The record of the text messages (Exhibit 10, page 21) notes that Mr Wenn's text messages followed a voicemail that Mr Wenn left for Ms Cann. The respondent did not press for the voicemail to be played at the hearing and did not seek to tender it into evidence. As such, I have not considered its contents.
- 27 The respondent further relies on the following emails sent after the strike out application was filed. The respondent submits that these were sent after the applicant was put on notice that the content of her emails were inappropriate:

- (a) 25 February 2022 at 9.45 pm to Sam Pack, copied to the chambers of the Commissioner that had the allocation of the matter at the time (**Chambers**), replying to Mr Pack's email sent earlier that day at 2.41 pm to the Registry, copying in the applicant, filing the respondent's strike out application, with content including (original emphasis):

The vicious and sick lies Amanda Cann made up to incite children to lie about me and the evidence that certain students were bribed with money to lie about me, is evident that I have been set up, to cover misconduct by your clients.

My partner Shawn Wenn received a phone call from [...] when he discovered me not breathing and unresponsive one night. Shawn was in Newman working. Once the ambulance had delivered [sic] me to the hospital after I was resuscitated, he lost his cool and left a phone message on Amanda's phone.

Given the sick and twisted lies she told students and the way she adduced false information in writing in the file of defamation she put to me to justify my dismissal, it is entirely reasonable my partner would have a break down like this. He thought I had died as a result of the injustice I was dealt and left to fight this injustice alone, denied union support by the DoE and criminally set up with fabricated evidence and horrific stories of me being a 'transvestite with a penis who wants to rape girls'. Students were told I had kidnapped a student at Waroona and had done this before! It is sick!

...

I have suffered a terrible breakdown and was admitted to hospital and am having ongoing treatment for the trauma and severe and disabling anxiety and depression, I suffer now as a result of this bullying.

For these reasons, I contest this application to have an interlocutory hearing on the grounds that this is a further unethical and malicious [sic] attempt to deny an innocent person justice. Another attempt in malafides to defame me and throw as much mud as you can in the hope that some will stick. You are trying to further bully me with your tactics to deny me a hearing.

It is unconscionable what you have done to my family. It is unconscionable to deny me a hearing at this point. It is unconscionable and unethical to lie on your application to the Commission.

I know you are impervious to the injustice your client inflicts, but seriously Mr Pack, I have way too much evidence to prove that this was a sham investigation and an unethical attempt to cover up an abuse of power.

Amanda Cann has acted unconscionably and criminally in her conduct throughout this process. She criminally defamed me and abused her power to deny me procedural fairness. She has deliberately put false information in the report despite knowing full-well the information is wrong AND she refused to change incorrect dates, **knowing** I had provided her evidence of the correct dates. This had an enormous impact on my case. She told me she would not take out the false reports she had made as the report was not "*a live document*".

(Exhibit 1)

- (b) 25 February 2022 at 10.01 pm to Sam Pack, copied to Chambers, replying to Mr Pack's email sent earlier that day at 2.17 pm which amongst other things advised the applicant that the respondent's strike out application was due to be filed with the Registry that afternoon. This email is replicated in full below.

Why does this not surprise me at all?

It would not matter, Mr Pack, if I asked for 10 cents from your client to settle this matter, they are so arrogantly pretentiously ignorant of the law and ethical conduct, that they would pursue this matter to the High Court using Tax-payers money without conscience, just to prove a point-how BIG they are!

I know your mentor Julia has a conscience, I can see by your constant smirking, mocking me and gloating that you appear to enjoy hurting people in pain.

To be clear-I refer to a retraction of the defamation and filthy slandering of my good reputation. I refer to your client's sham investigation and dirty tactics to harm a reputable and hard- working teacher who through no fault of her own found herself a target and a desirable person to sack-because I see through stupid cover-ups and fake-school reviews that really never happen at all, because afterall...who'd know? Well I knew!

You had no intention was never to allow me to get to a hearing and have your accusations tested. It doesn't take Sherlock to work that out.

kind regards

Verona

(Exhibit 2)

- (c) 26 February 2022 at 10.52 am addressed to Commissioner Walkington, copied to Sam Pack, with content including the following (original emphasis). Counsel for the respondent submits that this is an email that, no matter how cathartic it might have been in the moment for the applicant to send, was intended to unnerve.

I have never induced a witness, nor did my partner Shawn have any intention to intimidate a witness. He called Amanda Cann from Newman, when [...] had to get off the phone so the ambulance could instruct him on first aid on 3rd July 2021, because I had stopped breathing and had no pulse. I was resuscitated by paramedics. Shawn thought I had died! This is evident in his texts and voice messages when Amanda Cann did not answer his calls. And yet she gave Shawn her phone number to call him at any time.

The department of education is not in a position of vulnerability. They have blocked me from my emails and cherry-picked certain emails and evidence to paint a terrible image of me, as they did to students and staff, spreading the most sick and malicious lies in bad faith. I had no chance to defend myself, nor prove my innocence to police when my violent ex-husband made false reports to police.

The department of education is inciting now, evidence from workers such as Bronwyn White, who was my client when I was an independent consultant. She has heard terrible untruths about me, and I was merely trying to mitigate the damage to my reputation. This is a normal reaction.

The Department could easily have my email blocked, if they were seeking to avoid intimidation of witnesses, given the trauma I have faced and the fact I am unrepresented. But they instead have chosen to incite ANY member of the DoE, including my colleagues and friends, to report anything they receive from me via email as evidence of *malafides*.

I assert that this is in itself *malafides*. If I am allegedly intimidating a witness, then it is very easy to block an email AND/OR instruct employees to delete.

I have not telephoned anyone! Everything I do is done in writing, which proves I am not seeking to do anything covertly or dishonestly. I am merely seeking to stop the terrible gossip going around about me that is destroying my life and caused me to attempt suicide.

I will never be the same and this injustice causes me such pain and anguish, that many days I have to seek help, because I fear for life.

This has never happened before in my life. Even my therapist said she is in awe how I am functioning every day with this nightmare I have suffered.

I assert the DoE is trying to deny me my day in Court. If they have nothing to hide, they would not fear a single mother on unemployment benefits, with a TPD seeking justice in the WAIRC.

kind regards

Verona Wauchope

(Exhibit 11)

- (d) 1 March 2022 at 2.15 pm to Sam Pack, copied to Chambers, with content including:

This attempt to deny me my day in Court is in bad faith, Mr Pack.

(Exhibit 3)

- (e) 2 March 2022 at 9.01 am to Sam Pack, copied to Chambers, with content including (original emphasis):

And you are still bullying me, trying to deny me a hearing.

I have no words to describe your underhanded attempt to cover-up this abuse.

(Exhibit 4)

- (f) 5 March 2022 at 5.14 pm to Sam Pack, copied to Chambers, with content including:

There has been a report to muddy my name and fabricate heinous breaches against me and I assert that the deputy has played a major role in this for reasons that are more than my complaints about him being a bully in the school.

I have been wronged and I know the DoE know this. I just do not understand how people are getting away with this unethical behaviour?

Verona

(Exhibit 5)

- (g) 9 March 2022 at 9.51 pm to Sam Pack, copied to Chambers, with content including:

Dear Mr Pack,

I refer to your email below and your consideration of calling witnesses.

...

I am genuinely concerned for your witnesses. Just how far will they go to save their jobs and join the 'Blue Shield'? Commit a crime? Absolutely they will!

Whistleblowers end up like Frank Scott and Verona Wauchope.

(Exhibit 6)

- (h) 16 March 2022 at 9.40 pm to Sam Pack, copied to Chambers, with content including (original emphasis):

There is no end to your client's unethical, unconscionable and highly embarrassing behaviour.

I assert that your application to have my matter dismissed is a desperate attempt to cover the extreme bullying, unlawful and embarrassingly ignorant behaviour of certain Education Department senior management, which will be revealed in a hearing.

I have nothing to hide, Mr Pack. Your client's conduct shows 'extreme bullying' and unlawfulness. This is irrefutable! You cannot deny this as an '*agreed fact*' you or you would simply be lying.

(Exhibit 7)

- (i) 3 April 2022 at 9.14 pm to Sam Pack, copied to Chambers, with content including:

Mr Pack,

I am concerned that in your desperate attempts to discredit my integrity, you will be forcing an officer to sign a sworn statement which is clearly untrue...

...

The DoE then told me they would find a way to sack me. Months later, they fabricated accusations to justify sacking me.

This is the truth! Nobody wants to admit this as they are scared they will lose their high-paying jobs. John O'Brien, Ken Perris, Damien Stewart, Jacque Abbiss, Dean Finlay, and Mattin have either; abused power, been bullied or in bad faith said heinous untruths about me because I made a complaint of serious and unacceptable misconduct.

When will government departments stop bullying women? When will they act protectively towards DV victims in their employment? When will they show integrity?

It is not in the best interests of the DoE to admit they made mistakes that snowballed. It's easier to send you to get rid of this mud I have on them.

Somebody has to stand up to bullies. This duress I have suffered, my family has suffered, cannot be in vain.

You simply cannot substantiate what you have put in writing-nor can Inspector Snashell. He simply was not around when this happened and he is also aware of the discreetness exercised in the force.

I look forward to the Interlocutory Hearing, where I can prove, everything I have said is truthful. Only a fool would lie in Court!

Verona

(Exhibit 8)

- (j) 5 April 2022 at 4.00 pm to Sam Pack, copied to Chambers, with content including:

Dear Mr Pack,

I refer to the below, and the attached in relation to your false allegations in your application to have my matter dismissed.

I also refer to the significant difference between the circumstances in my matter and those of the cases you cited.

The reaction whereby I was inconsolable, traumatised and outraged at the injustice and lack of procedural fairness, the chronic bullying AND the attempts to discredit me as a professional, AFTER my dismissal was one that any reasonable person would have, when treated so abhorrently by your client.

...

Additionally, unlike in Brown, I knew that the persons receiving my emails, which were grief stricken-rage at the sickening injustice of what the DoE had done to me and my career, would not hinder or threaten any person or trial as these employees had the full support of Manager John O'Brien who had orchestrated the entire dismissal-starting in March 2020.

I am being open and honest in my disclosure of documents and facts. I do not wish to waste your time or the Commissioner's.

Please look at a better case precedent, if you wish to be persuasive. I had no intent to save my career with the DoE, nor intent to change the way a witness responds in any jurisdiction. I held no misgivings that any single one of these people who received my email or Shawn's, would feel anything other than glee and joy at being able to use the email against me, rather than it being helpful to me. I knew it was never going to assist me. I knew the DoE would take this grief-fuelled response and without a single thought of human suffering, would use this as a means to further disable the victim.

I was beyond outraged at the sheer injustice of this entire sinister debacle. Any reasonable person would be, in my shoes. There was no logic and no common sense to any of the accusations or investigation. This is why I was so shocked and distraught at the malice towards me, when I had been such a sought after professional with a unique skill-set in data analytics and pedagogy, only weeks prior to this defamation by your client. Unfortunately, the DoE are renowned for, NEVER backing down and protecting the manager or principal who makes such egregious decisions about an employee.

I was far too emotional to have intentions of corrupting witnesses for any such appeal or litigation. As was Shawn Wenn. It is outrageous to assert such allegations and shows a complete lack of moral obliquity and conscience. Trying to have my matter dismissed because YOUR client bullied a woman to the extreme that she tried to take her life, is unconscionable and a desperate attempt to avoid the perpetrators being exposed.

I am not guilty-your client is guilty of gross misconduct and negligence. Any lay person can see this. I am not persisting in this jurisdiction for financial gain.

I just want the truth! I want the unconscionable conduct of O'Brien and Mattin to be exposed and that no mother/ employee should ever go through such extreme trauma again. This extreme bullying and misconduct is occurring at an alarming rate in the DoE and teachers just walk away.

There needs to be an end to such malicious behaviour and a realisation that the administrators of teachers are there to support our profession, not persecute us. Teachers are leaving at an alarming rate-especially the smart ones who know they can do better elsewhere.

What sort of State government allows schools to regress so badly and shoots the few skilled teachers who can identify performance issues and rectify them?

regards

Verona

(Exhibit 9)

- 28 The respondent submits that whatever the applicant's motives and whatever allowance may be made for her being under a great deal of pressure as a result of her dismissal, her conduct in the correspondence that she has sent (and presumably by extension her condonation of the text messages sent by Mr Wenn), is entirely improper. The respondent submits that this behaviour should not be condoned by the Commission and is conduct that provides the necessary basis for the Commission to strike out the applicant's unfair dismissal application.
- 29 The respondent submits that the emails which post-date the strike out application are as serious, if not more serious than the emails which the strike out application is based upon because the emails come after the strike out application was filed. The respondent submits that the applicant was on notice that the correspondence she had been sending was recognised or considered by the respondent to be intimidating and harassing and therefore inappropriate, yet the applicant persisted in sending such emails.
- 30 The respondent relies on *Brown*, wherein the Public Service Appeal Board chaired by Commissioner Matthews (**Board**) dismissed an appeal after it emerged midway through a hearing that the appellant, Mr Brown, had acted improperly towards a witness, Ms McCloy, in a phone call before the hearing. The respondent submits that the Board found Mr Brown's conduct occurred either at a time Mr Brown's appeal to the Board had been commenced or would imminently commence, and when Mr Brown knew or acted on the belief that Ms McCloy would be a witness in the appeal.
- 31 The respondent submits that the Board in *Brown* proceeded on the assumption or made findings in favour of Mr Brown that:
- (a) Mr Brown believed he was telling the truth, and all Mr Brown was seeking to do was to have Ms McCloy also tell the truth: at [30], [34], [52], [55].
 - (b) Mr Brown's conduct was not premeditated or intentional, but rather occurred in an opportunistic way in the course of a conversation: at [62]-[65], [100].
 - (c) Mr Brown did not know at any time that he was potentially interfering with the administration of justice: at [66], [83].
 - (d) Mr Brown's conduct did not actually affect Ms McCloy in any way that might undermine the Board's ability to do proper justice: at [68].
 - (e) Mr Brown's conversation with Ms McCloy was a one off and occurred in the context of Mr Brown otherwise having given 10 years of good service without any previous misconduct: at [100].
- 32 The respondent submits that the Board in *Brown* considered as matters of principle that:
- (a) While it is legitimate to seek to persuade a witness to tell the truth by reasoned argument it is not legitimate to do so by intimidation or inducement. Other than reasoned argument, a party's only option is to leave the matter to the Board or Commission to determine where the truth lies: at [55], [58].
 - (b) For the Board to take action in respect of improper conduct, it is not necessary that the conduct actually frustrates the Commission's processes. It is enough that it has the capacity or tendency to do so, or that there is a real risk to interfere with justice or a real and definite tendency to prejudice or embarrass proceedings or a clear tendency to prejudice the administration of justice: at [69].
- 33 The respondent submits that the Board in *Brown* at [61] found that Mr Brown used fear and intimidatory tactics and the promise of benefits and inducements to attempt to persuade Ms McCloy, for example by:
- (a) suggesting that if she took a particular course the proceedings would end;
 - (b) suggesting that there would be no negative consequences to taking that course;
 - (c) suggesting that she needed to change her evidence to avoid people thinking ill of her and acting poorly towards her;
 - (d) suggesting that the proceeding would be 'a real ugly thing' if it continued to court; and

- (e) suggesting that she would be isolated and alone, and the proceedings would be a lonely and stressful experience for her.
- 34 The respondent submits that the Board described Mr Brown's actions towards Ms McCloy as 'outrageous', 'completely outrageous' and 'reprehensible': **Brown** at [61]. The respondent submits that despite the assumptions the Board made about Mr Brown's honesty, lack of sinister intention, and the lack of any actual effect on Ms McCloy, the Board concluded that Mr Brown's conduct was improper (**Brown** at [72]) and determined it was appropriate to dismiss Mr Brown's appeal at a preliminary stage: **Brown** at [106].
- 35 The respondent submits that the Board in **Brown** noted that having full regard to s 26(1) of the Act, found that although the substantial merits of the case might be said to be, at that stage, not fully exposed, that equity and good conscience and regard for the interests of all persons, including the appellant, respondent, Ms McCloy, and the interests of the community in protecting the Public Service Appeal Board's processes from interference by way of improper conduct by an appellant, demanded the result that the appeal be dismissed.
- 36 The respondent submits that she is content for the Commission, like the Board did in **Brown**, to determine the strike out application on the assumptions favourable to the applicant, namely that the applicant believes her version of events to be the truth and she was not seeking to have witnesses tell untruths.
- 37 The respondent also submits that she does not seek to prove that the applicant's conduct actually affected a witness, with the strike out application focussing solely on the fact of the applicant's conduct in directing various emails and messages towards witnesses, and the potential for that conduct to affect a witness.
- 38 The respondent submits that the applicant's improper conduct amounts to a campaign of intimidation and vilification, justifying the dismissal of her unfair dismissal application.
- 39 The respondent submits that in **Brown**, the Board placed particular emphasis on statements made by Mr Brown to Ms McCloy which sought to isolate Ms McCloy and paint a picture of her being on a side lacking both quantity and quality. The respondent submits that the applicant has taken the same approach and often seeks to paint a picture of the witnesses being despised and ridiculed by others, as referred to in the emails at:
- (a) Exhibit 10, page 24;
 - (b) Exhibit 1;
 - (c) Exhibit 2;
 - (d) Exhibit 4; and
 - (e) Exhibit 6.
- 40 The respondent submits that the conduct of Mr Brown in **Brown** pales in comparison to the conduct of the applicant, as the language used by the applicant and the pressure sought to be applied to witnesses is orders of magnitude stronger, including not only personal insults and vitriol, but threats of various legal proceedings and prosecutions against witnesses personally.
- 41 Unlike in **Brown**, the respondent submits that the applicant's correspondence cannot be dismissed as a one off, but rather has been consistent and continued even after her improper communications were expressly raised at the Scheduling Conference before the Commission on 11 February 2022.
- 42 The respondent submits that it cannot be said that the applicant has demonstrated any insight into or remorse for her actions. The respondent submits that nowhere in the applicant's multitude of emails to the respondent and the Commission in response to the strike out application has there been any expression of remorse or a demonstration of insight. The respondent submits that the applicant has instead asserted that it is the respondent's fault that she has continued to direct improper correspondence towards witnesses.
- 43 The respondent submits that through the cases referred to by the respondent, the Commission has set a bar indicating what the Commission will and will not tolerate when it comes to harassment and intimidation of witnesses. The respondent submits that the applicant has not conducted herself in a way that accords with two important maxims of equity which apply in this jurisdiction, namely that he who seeks equity must do equity, and he must also come with clean hands.
- 44 The respondent relies on the following passage in *Civil Service Association of Western Australia Incorporated v Director General, Ministry of Justice* [2003] WAIRC 08587; (2014) 94 WAIG 215 (**Civil Service Association**) at [56]:
- The injunction in s 26(1)(a), governs the manner of the exercise of the Commission's jurisdiction, and somewhat tritely, is not a source of power in itself. However, what it does permit is the departure from strict legal entitlement, in circumstances where the equity and good conscience compels such a conclusion. For example, in a contractual benefits claim, in circumstances where the applicant may be strictly entitled to a benefit under his or her contract of employment, but the circumstances of the case reveal that the applicant engaged in some form of misconduct or deceit in relation to the matter the subject of the claim, the Commission is empowered in my opinion, pursuant to s 26(1)(a), to deny an applicant relief. This approach would appear to accord with the two important maxims of equity, they being that "he who seeks equity must do equity" and that "he must also come with clean hands". In my opinion, there is nothing inconsistent with the Commission's jurisdiction, for the application of these broad principles, having regard to s 26(1)(a) of the Act.
- 45 The respondent submits, in reliance on **Brown**, that **Brown** is not limited to the availability of a remedy but speaks to the required standards of conduct of those who seek equity and fairness from the Commission.
- 46 The respondent relies on the following paragraph in **Brown** at [106]:
- We have full regard to section 26(1) *Industrial Relations Act 1979* and find that although the substantial merits of the case might be said to be, at this stage, not fully exposed, that equity and good conscience and regard for the interests of all

persons, including not only the appellant but also the respondent and Ms McCloy, and the interests of the community in protecting the Public Service Appeal Board's processes from interference by way of improper conduct by an appellant, demands the result that the appeal be dismissed at this time.

- 47 The respondent submits that whilst *Brown* focuses on witness intimidation and harassment, this was because the recipient of the conduct in *Brown* was a witness. The respondent submits that the concern in *Brown* was the conduct of Mr Brown, which had the capacity to interfere with the administration of justice. Therefore, the respondent submits, whether it is a potential witness, an actual witness, or a person otherwise connected to the proceedings, the same principle applies.
- 48 The respondent submits that by analogy, whether it be a witness, an Associate to the Commission, or counsel in the proceedings, there is the capacity for correspondence of the kind sent by the applicant to interfere with the administration of justice, and the capacity for interference exists whether or not the applicant had the intention to engage in any interference with the administration of justice.
- 49 The respondent also submits that the applicant has also demonstrated a willingness to direct insult and illegitimate pressure towards the lawyer acting for the respondent, which is in some respects analogous to that in *De Vos v Minit Australia Pty Ltd* [2002] WAIRC 06108; (2002) 82 WAIG 2195 (*De Vos*), where a rude gesture by an applicant to the respondent's counsel during cross-examination ultimately prompted the dismissal of the applicant's claim.

The applicant's contentions

- 50 Counsel for the applicant submits that the power to dismiss an unfair dismissal application before the Commission under s 27(1)(a)(iv) of the Act is an exceptional one and should be exercised sparingly and with extreme caution: *Brown* at [81], [82].
- 51 Counsel for the applicant submits that the applicant is entitled to invoke the jurisdiction of the Commission and should not lightly be deprived of its exercise: *Brown* at [81]. Counsel for the applicant submits that a dismissal of the applicant's unfair dismissal application, without the matter having been fully heard and all evidence having been led, would be harsh and extreme, and it would be an exceptional result for improper conduct to deny a person their 'day in court': *Brown* at [83].
- 52 Counsel for the applicant submits that the Commission's power to dismiss an unfair dismissal application should not be used to 'punish' the applicant and it is relevant to consider the applicant's intentions and the effect of her conduct: *Brown* at [83].
- 53 Counsel for the applicant submits that, at all times, the applicant believed that what was contained in the emails and messages was true and that she never sought to coerce or influence a witness to these proceedings to tell anything but the truth.
- 54 Counsel for the applicant denies that the applicant's conduct was a 'campaign of intimidation and vilification' such as to amount to a reason to dismiss the applicant's unfair dismissal application.
- 55 Counsel for the applicant submits that the emails sent by the applicant demonstrate the applicant's frustration and grievances since her commencement as a teacher at Waroona Senior High School on 29 January 2020.
- 56 Counsel for the applicant submits that the applicant's emails contain an amount of vitriol.
- 57 Counsel for the applicant further submits that the amount of vitriol contained in the emails is completely and utterly out of character with the applicant.
- 58 Counsel for the applicant submits that the vitriol is completely at odds with the applicant's history as a teacher in Western Australia and abroad and in other States of Australia, and her record as a recognised leader in certain fields of teaching regarding the National Assessment Program – Literacy and Numeracy (NAPLAN) especially.
- 59 The applicant gave evidence at the hearing of the context in which she sent the emails.
- 60 In relation to the email (Exhibit 10, page 12) to David Mattin, the Deputy Principal on 10 June 2021 at 10.34 am, the applicant says that she sent this email because she had just been dismissed the previous afternoon.
- 61 In relation to the email (Exhibit 10, pages 13-14) to Jacque Abbiss and copied to the 'All Staff' email address on 10 June 2011 at 11.30 am, the applicant says this email was sent to the Principal who she believed was her friend, on the day of her dismissal. She says that she sent the email because she felt a kind of release of pressure and distress. She says she was upset at the Principal as she felt that she had been really wronged, and she believed that the Principal knew that she had not engaged in the misconduct that led to her dismissal. In short, the applicant says the email was sent because she felt her dismissal was unjust and the Principal had betrayed her, in circumstances where she had accepted employment at the school at the request of the Principal.
- 62 In relation to the email (Exhibit 10, page 24) to Amanda Cann, copied to Marc Sorrell, both from the Department's Standards and Integrity unit that undertook the workplace investigation into the allegations of misconduct against the applicant, sent on 10 August 2021 at 8.52 am, the applicant says this email was sent because she was enraged at Ms Cann in excluding exculpatory evidence in response to the allegations of misconduct from the file, which the applicant says contains the investigation. The applicant says she sent the sections of the email directed to Mr Sorrell because he 'had actually been really, really cruel in his verbal interactions with me, mocking me' and 'insinuating horrible, horrible things about my personal life'. The applicant gave evidence that whilst the email was sent a month after her dismissal, it was sent at a time when she had just come out of the Rockingham Mental Hospital after having taken an overdose. The applicant states in her unfair dismissal application that she was dismissed on 10 June 2021, so the email to Ms Cann, copied to Mr Sorrell was actually sent two months after the applicant's dismissal. I make no adverse findings in relation to this discrepancy.
- 63 The applicant gave evidence that in relation to all of the emails in the respondent's strike out application, that on review of them, she feels sick that she had felt so angered, outraged and distressed at the time she sent the emails. She says she does not have much of a recollection of the emails as they were sent close to the time she was in hospital, with at least one email sent when she was in hospital.

- 64 When asked to clarify, the applicant states that she had sent Mr Sorrell an email whilst she was in hospital.
- 65 The applicant does not accept that the content of her emails may have hurt the recipients. The applicant accepts that a reasonable person would be hurt by their content but does not think that Ms Cann and Mr Sorrell would be. This is because she believes that they think she is a joke to them, and therefore thinks the emails she sent would have been innocuous for them.
- 66 Under cross-examination, it was put to the applicant that she had sent a number of emails (specifically Exhibits 3, 4 and 7) to the respondent's solicitor, Mr Pack, after the respondent had filed the strike out application. Namely, at a time after the respondent had placed the applicant on notice that the respondent considered the emails the applicant had sent up until that time to be inappropriate.
- 67 Despite counsel for the respondent specifically asking the applicant if she accepts that the three emails (Exhibits 3, 4 and 7) were inappropriate, the applicant did not indicate any such acceptance.
- 68 Counsel for the applicant does not deny that the emails sent by the applicant were vindictive or vicious on the face of them, but submits that the emails have to be taken in the context of what was occurring at the time with Waroona District High School, and the impact this had on the applicant psychologically, and therefore what the applicant's state of mind was at the time.
- 69 Counsel for the applicant submits that the applicant's communications are to be distinguished from Mr Brown's communication in *Brown*, as at the time the applicant sent the emails the applicant was not aware whether certain people would be witnesses or not, and that despite what is contained in the applicant's emails that the applicant had no intention to influence witnesses. Counsel for the applicant submits that the applicant had no intention to try and stop the recipients of the emails from giving evidence, rather, the tone of the emails reflects the applicant's frustration about what the applicant understood was happening.
- 70 In relation to the emails that the applicant sent to counsel for the respondent, the applicant's counsel submits that those emails were sent by the applicant at a time when she was self-represented. Further, counsel for the applicant submits that the emails need to be taken in the context of what had happened to the applicant when she was dismissed, and prior to that, which, counsel for the applicant submits goes to the state of mind of the applicant.
- 71 Counsel for the applicant submits that it wasn't just an instance of the applicant being psychologically afflicted by what had occurred to her and that just being resolved, because it hasn't. Counsel for the applicant submits that the applicant's state of mind permeated the applicant's communications, not only at the time of the dismissal and following the dismissal, but when the application was made to the Commission and when the applicant was communicating with counsel for the respondent.
- 72 Counsel for the applicant does not deny that the content of the applicant's emails, in some instances, is vile. In this respect, counsel for the applicant does not disagree with the respondent's submission that Mr Brown's conduct in *Brown* pales in comparison with the applicant's conduct. Counsel for the applicant submits, that whilst the communication from the applicant is vile, there is a reason for that, and that reason is the effect that the dismissal had on the applicant, and the effect of what happened to the applicant prior to the dismissal, which I understand to be the investigation into allegations of misconduct.
- 73 Counsel for the applicant does not disagree with the respondent's submission that Mr Brown's conduct in *Brown* was a one off, which is not the situation with the applicant's communications. Counsel for the applicant submits that there was a long period of time where the applicant was under extreme pressure from the allegations that had been made against her, which included 13 allegations of misconduct that the applicant had to answer, which resulted in the applicant's dismissal.
- 74 Counsel for the applicant submits that the power of the Commission to dismiss the applicant's unfair dismissal application under s 27(1)(a)(iv) of the Act is an exceptional one and is a power that should not be used to punish the applicant. Counsel for the applicant submits that the applicant is entitled to invoke the jurisdiction of the Commission and should not be deprived of that lightly.
- 75 Counsel for the applicant submits that the evidence from the applicant is that the applicant was psychologically traumatised by what had occurred to her from the time she was employed at Waroona District High School including the investigation into the applicant's misconduct, the allegations of which are denied by the applicant, through to the time when the applicant was dismissed.
- 76 Counsel for the applicant submits that it would be premature to dismiss the applicant's unfair dismissal application without hearing from the applicant about the gravity of what the applicant says occurred in terms of the dismissal and how it was carried out.

Consideration

- 77 Section 27(1)(a) of the Act expressly empowers the Commission to dismiss an unfair dismissal application at any stage: *Tye v Care Services Administration Pty Ltd* [2017] WAIRC 00689; (2017) 97 WAIG 1319 (*Tye*) at [38]:
- Section 27(1)(a) of the Act expressly empowers the Commission to dismiss any matter before it at any stage of the proceedings (which includes hearing an application to dismiss at a preliminary or interlocutory stage) without a full hearing of evidence and submissions going to the merits of a claim, providing the preconditions for the exercise of the power are made out.
- 78 In this matter, I would be empowered to dismiss the applicant's unfair dismissal application pursuant to s 27(1)(a)(iv) of the Act if I was satisfied that 'for any other reason' not otherwise stated in s 27(1)(a)(i)-(iii) the applicant's unfair dismissal application should be dismissed.
- 79 The Commission has accepted that it is entitled to apply the maxims of equity that 'he who seeks equity must do equity' and 'he who seeks equity must come with clean hands.': *Brown* at [44] citing *Civil Service Association*.
- 80 It is appropriate for the Commission to have regard to relevant equitable principles in matters before it: *Civil Service Association* at [55] per Commissioner S J Kenner (as he then was):

Whilst it is trite to observe that the Commission is not a court of equitable jurisdiction, in my view, given that the touchstone of the Commission's jurisdiction is to enquire into and deal with industrial matters "in accordance with equity, good conscience and the substantial merits of the case" under s 26(1)(a) of the Act, it is appropriate for the Commission to have regard to relevant equitable principles, as part of "inquiring into and dealing with" an industrial matter.

- 81 In applying the equitable principles, Commissioner Kenner (as he then was) stated that in a contractual benefits claim, the Commission is empowered pursuant to s 26(1)(a) of the Act to deny an applicant relief if the applicant has engaged in some form of misconduct or deceit in relation to the matter the subject of the claim: *Civil Service Association* at [56]:

For example, in a contractual benefits claim, in circumstances where the applicant may be strictly entitled to a benefit under his or her contract of employment, but the circumstances of the case reveal that the applicant engaged in some form of misconduct or deceit in relation to the matter the subject of the claim, the Commission is empowered in my opinion, pursuant to s 26(1)(a), to deny an applicant relief.

- 82 Section 26(1) of the Act states that:

26. Commission to act according to equity and good conscience

(1) In the exercise of its jurisdiction under this Act the Commission —

- (a) must act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and
- (b) must not be bound by any rules of evidence, but may inform itself of any matter in such a way as it thinks just; and
- (c) must have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and

- 83 Whilst *Civil Service Association* provides that s 26(1)(a) empowers the Commission to deny relief to an applicant if they engage in some form of misconduct or deceit in relation to a contractual benefits claim, in my view, this is apropos to the Commission being empowered to deny an employee relief at an early stage of an unfair dismissal application if the employee engages in some form of misconduct or deceit in relation to their unfair dismissal application.

- 84 Section 27(1)(a)(iv) of the Act empowers me to dismiss the applicant's unfair dismissal application if I am satisfied that 'for any other reason' the applicant's unfair dismissal application should be dismissed.

- 85 I would be satisfied that the applicant's application should be dismissed, if I was satisfied that the applicant had engaged in some form of misconduct in relation to her unfair dismissal application.

- 86 The term 'misconduct' is defined in the *Butterworths Employment and Law Dictionary* (1997) as:

Wrongful, improper, or unlawful conduct, motivated by premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts. Misconduct may involve either gross negligence or a deliberate departure from accepted standards so as to portray indifference and an abuse of privileges: *Pillai v Messiter* (No 2) (1989) 16 NSWLR 197.

- 87 The respondent has characterised the applicant's conduct as improper and intimidating and harassing and therefore inappropriate.

- 88 The term 'improper conduct' is defined in the *Butterworths Employment and Law Dictionary* (1997) as:

Behaviour which in all the circumstances of a case is an inappropriate or incorrect way of discharging duties, obligations, and responsibilities. Conduct may be improper regardless of whether it is conscious or unconscious. Improper conduct is a breach of the standards of behaviour which would be expected of a person by reasonable people with knowledge of that person's duties, powers and authority and the circumstances of the case: *R v Byrnes and Hopwood* (1995) 183 CLR 501; 130 ALR 529.

- 89 The term 'intimidate' in the context of intimidation of a witness under s 36A of the *Crimes Act* 1914 (Cth) was considered in *The Queen v Russell Gordon Haig Mathews* [1992] QCA 462 at [7]:

In a context like s.36A the word "intimidate" and its derivatives is not a technical term, or term of art, but a word in common use employed in its popular sense: "O'Connell v. the Queen (1844) 11 Cl. & Fin. 155, 235; 8 E.R. 1061, 1092. Ordinarily intimidation would involve some threatening words or conduct tending to coerce the other person: cf. *Bilby v. Hartley* (1892) 4 Q.L.J. 137, 143, col.2.

- 90 The term 'harassment' was considered in *Australian Competition and Consumer Commission (ACCC) v Maritime Union of Australia* (2001) 114 FCR 472 at [60]:

The word "harassment" in my view connotes conduct which can be less serious than conduct which amounts to coercion. The word "harassment" means in the present context persistent disturbance or torment...On the other hand where the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely to convey the demand for recovery, the conduct will constitute undue harassment (see per French J in *McCaskey* at 27 [48]). Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter.

- 91 The respondent submits that the applicant's improper conduct amounts to a campaign of intimidation and vilification. Counsel for the applicant denies that the applicant's conduct was a campaign of intimidation and vilification such as to amount to a reason to dismiss the applicant's unfair dismissal application. The respondent's characterisation of the applicant's conduct as a 'campaign' suggests an element of pre-meditation or intention on the part of the applicant to intimidate and vilify. Given the

definition of 'improper conduct' provides that conduct 'may be improper regardless of whether it is conscious or unconscious', I do not consider that I need to find that the applicant's conduct amounts to a 'campaign' of intimidation and vilification.

- 92 If the evidence supports a conclusion that the applicant has engaged in some form of improper conduct (whether conscious or unconscious) in relation to her unfair dismissal application, then it follows that the applicant has engaged in misconduct in relation to her unfair dismissal application, and therefore has failed to observe one or both of the two important maxims of equity cited in *Brown* and *Civil Service Association*.
- 93 Counsel for the applicant concedes that the applicant's emails were vindictive or vicious, and vile. In my view, the emails were all of those things.
- 94 The respondent submits, and the applicant's counsel does not dispute, that the applicant's emails contained personal insults and threats of various legal proceedings and prosecutions against the recipients personally.
- 95 I find the following emails (**Exhibit 10 Emails**) contained personal insults and/or threats of various legal proceedings against the recipients personally:
- (a) Exhibit 10, page 12: 'dim-witted troglodyte', 'jealous pathologically envious underachievers', 'coward', 'without moral compass', 'your lazy tardy approach to work', 'you have no moral obliquity', 'I will see you in Court and I will take a personal action against you for the defamation and unlawful manner in which you worked tirelessly to defame me', 'contemptible low-life', 'where the unemployable hide-like you!', 'MY FAMILY AND MY COLLEAGUES WILL NOW NOT GIVE UP UNTIL YOU ARE FULLY ACCOUNTABLE FOR YOUR CRIMINAL ACTIONS'.
 - (b) Exhibit 10, page 13-14: 'nastiest, most immoral sycophant', 'you felt intimidated by my Mensa IQ', 'Ms Abysmal', 'nasty, unethical, jealous pathologically envious teacher', 'THERE IS ENOUGH ILLEGALITY IN YOUR ACTIONS FOR SEVERAL WRITS TO BE PLACED IN THE SUPREME COURT', 'I WILL NOT LET YOU GET AWAY WITH THIS', 'SELFISH, UNETHICAL SELF-PROMOTER with terrible people skills', 'introverted slug'.
 - (c) Exhibit 10, page 15: 'weak man!', 'tremble like a mouse'.
 - (d) Exhibit 10, page 16-17: 'disingenuous', 'incompetence and inhumane conduct'.
 - (e) Exhibit 10, page 18: 'YOU would sell your own Grandmother for a promotion', 'NO integrity', 'low IQ', 'no substance', 'CONTEMPTIBLE IN EVERY WAY!'.
 - (f) Exhibit 10, page 19: 'I am about to raise merry hell'.
 - (g) Exhibit 10, page 20: 'You are the reason people take their life'.
 - (h) Exhibit 10, page 22: 'I will NOT rest until I see justice and clear my name', 'unethical', 'contemptible!', 'luddites!'.
 - (i) Exhibit 10, page 23: 'I will NOT stop until I get justice'.
 - (j) Exhibit 10, page 24: 'contemptible!', 'I will not rest until I know that you personally Amanda, are restrained from ever doing what you have done to teachers like me', 'You obviously need retraining', 'seriously inept'.
 - (k) Exhibit 10, page 27: 'This has gone very public!', 'no conscience!', 'I am seeking damages from your personally'.
 - (l) Exhibit 10, page 28: 'You will hear from my lawyer regarding criminal charges I am taking against you personally'.
 - (m) Exhibit 10, page 29: 'This is going viral in the news', 'YOU ARE IN THE WRONG AND IT WILL BE EXPOSED'.
 - (n) Exhibit 10, page 30: 'WHY DOES IT TAKE A DEFAMATION [sic] TRIAL TO GET YOU TO LISTEN?', 'SHAME ON YOU'.
 - (o) Exhibit 10, page 32-33: 'My defamation lawyer has said that for every single person who has defamed me, there is a separate instance of defamation', 'This will be a record defamation case in WA'.
- 96 In *R v Kellett* [1976] QB 372 (*Kellett*) (cited in *Librizzi v The State of Western Australia* [2006] WASCA 237 (*Librizzi*) at [144]), the English Court of Appeal held that Mr Kellett was properly convicted of attempting to pervert the course of justice in circumstances where he threatened to sue for slander if potential witnesses in divorce proceedings gave evidence which he may have believed false.
- 97 I find that the Exhibit 10 Emails contain threats of various legal proceedings and prosecutions against the recipients personally, and therefore have the character of the threat to sue for slander that was the subject of the conviction in *Kellett* as cited in *Librizzi*.
- 98 I find the tone of many of the Exhibit 10 Emails to be intimidatory and harassing, with references to not giving up, not resting, not stopping, raising 'merry hell', going public, going viral, and the threatening of Supreme Court action, defamation proceedings, the seeking of damages, and criminal charges. All of these references can well be understood as threats.
- 99 For all of the reasons identified, namely that the emails were vindictive or vicious, and vile, contain personal insults and threats of various legal proceedings and prosecutions against the recipients personally, and were also persistent or repeated, I consider the applicant's emails to fall within the definitions of intimidatory and harassing conduct and therefore I find the conduct of the applicant in sending the Exhibit 10 Emails to be improper conduct.
- 100 I agree with the respondent's submission that the emails that post-date the respondent's strike out application are particularly objectionable as they have been sent at a time after the applicant was clearly put on notice that the content of her emails were considered by the respondent as being inappropriate.

- 101 The respondent submits that the applicant was first put on notice that the respondent considered the applicant's emails to be inappropriate at the Scheduling Conference before the Commission on 11 February 2022. On 25 February 2022, two weeks after the Scheduling Conference, the respondent filed the strike out application.
- 102 If the applicant did not know the respondent considered the emails sent by her to be inappropriate in the period up to and after the Scheduling Conference on 11 February 2022, then this was made patently clear to the applicant on the respondent filing the strike out application on 25 February 2022.
- 103 The respondent's strike out application is in simple terms.
- 104 At paragraph [3] of the schedule to the respondent's strike out application, the respondent states:
- The improper conduct of an applicant towards witnesses, including attempts to intimidate them, is a basis on which the Commission may dismiss an application: see *Brown v Commissioner, Department of Corrective Services* [2017] WAIRC 00714.
- 105 At paragraph [4] of the schedule to the respondent's strike out application, the respondent states:
- In this case, the Applicant has repeatedly directed intimidating and/or insulting communications towards potential witnesses. Only those communications which occurred after the Applicant was dismissed on 10 June 2021, and therefore at a time when her unfair dismissal application was imminent or on foot, have been included in the list below.
- 106 At paragraph [15] of the schedule to the respondent's strike out application, the respondent states:
- Whatever the Applicant's motives, and whatever allowance can be made for her being under a great deal of pressure as a result of her dismissal, such conduct is entirely improper and should not be condoned by the Commission.
- 107 On and after 25 February 2022, the applicant directs her email correspondence to the respondent's solicitor. Ten emails were tendered. The emails contain the following content:
- (a) Exhibit 1: accusing the respondent's solicitor of unconscionable, unethical, and dishonest conduct, and being impervious to her child's injuries; and accusing Amanda Cann (investigator engaged by the respondent to investigate the allegations of misconduct) of acting unconscionably and criminally.
 - (b) Exhibit 2: accusing the respondent's solicitor of smirking, mocking, gloating and seemingly enjoying hurting people in pain; and accusing the respondent of 'so arrogantly pretentiously ignorant of the law and ethical conduct, that they would pursue this matter to the Hight Court using Tax-payers money without conscience, just to prove a point – how BIG they are!'
 - (c) Exhibit 3: accusing the respondent's solicitor of attempting to deny the applicant her day in court in bad faith; and accusing the Police of 'severe defamation and bias' against her, accusing the Police and the Department of Education of protecting themselves 'when a wrong is committed'. There is also reference to 'wrongful and unethical actions of government officers.'
 - (d) Exhibit 4: accusing the respondent's solicitor of bullying, denying her a hearing and being underhanded in an attempt to 'cover-up this abuse'; and accusing the Department of Education of forcing her into poverty and bullying its employees.
 - (e) Exhibit 5: accusing the Department of Education of attempting to muddy her name, fabricating heinous breaches against her and of unethical behaviour.
 - (f) Exhibit 6: accusing the respondent's solicitor of being impervious to her and her child's concerns for their safety and suicide attempts; and accusing the respondent of deceiving or bullying employees into perjuring themselves or lying.
 - (g) Exhibit 7: accusing the respondent's solicitor of bad faith and unconscionability, and of attempting to cover up the extreme bullying, unlawful and embarrassingly ignorant behaviour of senior management of the Education Department; and accusing the respondent of unethical, unconscionable and highly embarrassing behaviour.
 - (h) Exhibit 8: accusing the respondent's solicitor of forcing an officer to sign an untrue statement in a desperate attempt to discredit her, and of being sent by the Department of Education to 'get rid of this mud I have on them'; and accusing John O'Brien, Ken Perris, Damien Stewart, Jacquie Abbiss, Dean Finlay and David Mattin of abusing power, or being bullied or in bad faith saying heinous untruths about her.
 - (i) Exhibit 9: accusing the respondent's solicitor of a complete lack of moral obliquity and conscience and of acting unconscionably; and accusing the respondent of being guilty of gross misconduct and negligence, and malicious behaviour.
- 108 Although the applicant does not indicate any acceptance that the emails she sent to the respondent's solicitor were inappropriate; I find that they clearly were.
- 109 The respondent submits that Exhibit 6 was objectionable because the applicant was suggesting that the respondent's solicitor might endanger himself to a charge of perjury if he persisted with the strike out application, and therefore, was overtly an attempt to influence the administration of justice in the circumstances. Whilst in *Brown*, the Board gave Mr Brown the benefit of the doubt that he did not intend to influence the administration of justice, the respondent submits that I should draw the inference that the applicant did intend to influence the administration of justice, even though that inference according to *Brown* was strictly not necessary.
- 110 Counsel for the applicant submits that the conduct of the applicant differed from the conduct of Mr Brown in *Brown*, in that the words that were used by Mr Brown 'clearly were words that would discourage a potential witness'. However, the applicant had no intention to discourage a witness. Counsel for the applicant submits that there was no evidence that the applicant had an intention to try and stop the recipients of her emails from giving evidence.

- 111 Counsel for the applicant urges me to focus on the applicant's lack of intention to influence a witness, the lack of any evidence of an adverse effect on any witness, and that the applicant believed in the truth of what is contained in the emails that she sent.
- 112 In *Brown*, the Board did not hear from Mr Brown, but was prepared to proceed on the basis most favourable to him, that Mr Brown believed he was telling the truth and he was just seeking for Ms McCloy to tell the truth, that he had no intention to interfere with the administration of justice, that he did not know that he was potentially interfering with the administration of justice, and Mr Brown did not actually interfere with the administration of justice, in that, Ms McCloy did in fact attend to give evidence. The Board found that for the Board to take action it was unnecessary for Mr Brown's conduct to actually interfere with the administration of justice – it was sufficient that Mr Brown's conduct had the capacity or tendency to interfere with the administration of justice.
- 113 In this matter, there is no evidence that the applicant sent the emails with a premeditated and clear intent to interfere with the administration of justice. There is also no evidence that the applicant sent the emails in circumstances where she clearly knew that in doing so, she was potentially interfering with the administration of justice. Although, it is arguable that the respondent placed her on notice of that potential on the filing of the strike out application, and from that time it is arguable that the applicant should have known. There is also no evidence that the applicant actually did interfere with the administration of justice.
- 114 Like *Brown*, a lack of a premeditated intention is irrelevant. The assessment is whether the communication has the 'capacity or tendency' to interfere with the administration of justice: *Brown* at [67].
- 115 If conduct has the 'potential or tendency' to interfere with the administration of justice, then it is enough for it to be improper: *Librizzi and R v McLachlan* [1998] 2 VR 55, as cited in *Brown* at [69].
- 116 I make no findings that the applicant had the intention to, or that the applicant did, interfere with the administration of justice. However, I find that the applicant's emails contained threats of various legal proceedings and prosecutions against the recipients, were persistent or repeated, and were written in a tone that I consider to be intimidatory and harassing, and on that basis, I find that the applicant's emails had the capacity, tendency or potential to interfere with the administration of justice.
- 117 The respondent submits that it is open to me to infer, particularly given the emails the applicant sent to the respondent's solicitor after the filing of the strike out application, which the respondent submits demonstrates a willingness on the part of the applicant to insult and apply illegitimate pressure, that the applicant sent the emails with the intention to influence the administration of justice.
- 118 There is no evidence that the respondent's solicitor was insulted or experienced illegitimate pressure. In any event, for the reasons in *Brown*, I do not consider it necessary for me to find the applicant had the intention to influence the administration of justice in the emails that she sent to the respondent's solicitor. As was the case in *Brown*, it is sufficient if I find that the emails sent to the respondent's solicitor had the capacity, tendency or potential to interfere with the administration of justice. I find the emails to the respondent's solicitor had the capacity, tendency or potential to interfere with the administration of justice.
- 119 I find the emails the applicant sent to the respondent, to other employees of the respondent, and to the respondent's solicitor, had the capacity, tendency or potential to interfere with the administration of justice. Unlike in *Brown*, the applicant did not just have one communication with one potential witness in the proceedings that arose in 'an opportunistic way'. Rather, the applicant sent multiple emails over an extended period. The applicant continued to send these emails even after she was put on notice by the respondent through the filing of the strike out application that the respondent considered the emails she was sending to be improper. Also, unlike in *Brown*, the vindictive, vicious, and vile tone of the applicant's emails 'pales in comparison' with the communication that Mr Brown had with the witness in *Brown*.
- 120 Counsel for the applicant submits that Mr Brown in *Brown*, sought to influence an actual, or a potential, witness in his proceedings before the Board. Counsel for the applicant submits that in contrast, at the time the applicant sent her emails, she was unaware whether certain people would be witnesses or not in her unfair dismissal application.
- 121 In *Brown* at [53], the Board found that at the time Mr Brown had the conversation with Ms McCloy, Mr Brown knew, or acted on the belief that, Ms McCloy would be a witness in the proceedings before the Board.
- 122 The applicant filed her unfair dismissal application on 23 June 2021, and in the unfair dismissal application she specifically names the following positions:
- (a) 'Principal (JA)', which is a reference to Jacque Abbiss.
 - (b) 'The older male deputy', which is a reference to David Mattin.
 - (c) 'Acting RED (regional director)', which is a reference to Ken Perris.
 - (d) 'The Labour Relations Manager', which is a reference to John O'Brien.
 - (e) 'A long-term teacher assistant', which is a reference to Tamara Smith.
- 123 The respondent filed the Employer Response on 15 July 2021. In the Employer Response, the respondent contends that the applicant was dismissed following a disciplinary process. The respondent attaches an allegation letter sent on or about 2 October 2020, a further allegation letter dated 2 November 2020, a letter dated 19 February 2021 with the respondent's proposed findings and actions which refers to the applicant being provided with a copy of the investigation report at the time the letter was sent to her, and the letter of termination dated 9 June 2021.
- 124 Whilst the applicant may not have known for certain who would be called to give evidence at the hearing, it should have been readily apparent to the applicant that the parties she named in her unfair dismissal application would potentially be witnesses in the matter, as would the investigators into the allegations of misconduct, namely Ms Amanda Cann and Mr Marc Sorrell, as the evidence of these persons are matters that the applicant has directly placed in contention in her unfair dismissal application.

- 125 I do not accept that the applicant would not perceive that the persons named in her unfair dismissal application and as the authors of the investigation report, could potentially be called as witnesses in the hearing of her unfair dismissal application.
- 126 The respondent submits that **Brown** focussed on witness intimidation and harassment because in **Brown** the recipient of Mr Brown's conduct was in fact a witness. The respondent submits that the concern in **Brown** was the effect of Mr Brown's conduct and the capacity of that conduct to interfere with the administration of justice. The respondent submits that whether a person is a would be witness, an actual witness, or a person otherwise connected to the proceedings, then the same principles apply. The respondent submits that by analogy, all persons connected to the proceedings, whether a witness, an Associate of the Commission, or counsel in the proceedings, in each and every case, there is the capacity for correspondence of the kind sent by the applicant to interfere with the administration of justice, whether or not the applicant had such intent in sending the correspondence.
- 127 I agree with the respondent's submission that a person 'connected to the proceedings' such as the respondent's solicitor in this case, is involved in the administration of justice, such that where, as occurred in this case, the applicant sent the respondent's solicitor the email correspondence on the terms of the emails sent, that such correspondence has the capacity, tendency or potential to interfere with the administration of justice.
- 128 Counsel for the applicant submits that the emails that the applicant sent were 'completely and utterly out of character with the applicant.' I make no findings in this regard. For the reasons identified, where I find in line with **Brown** that the emails sent by the applicant had the capacity, tendency or potential to interfere with the administration of justice, I do not consider that I need to make any findings as to whether the emails sent were 'out of character with the applicant'.
- 129 Counsel for the applicant submits that the applicant was for a long period, from the time of the investigation into the allegations of misconduct and until the applicant's dismissal, under 'extreme pressure'. The applicant also gave evidence that approximately one month after her dismissal, she had a breakdown and was admitted to the Rockingham Mental Hospital. The applicant gave evidence of sending one email to Mr Marc Sorrell whilst in hospital.
- 130 Counsel for the applicant submits that the emails that the applicant sent need to be considered in the context of her state of mind at the time she sent the emails. Counsel for the applicant submits that the applicant's emails were sent because the applicant was experiencing 'frustration'. They were not sent because the applicant was intending to influence a witness.
- 131 I accept that the applicant may have experienced stressful and difficult times in the period that she was subject to the workplace investigation, was dismissed from her employment, and in the month after her dismissal when she was admitted to a mental health hospital. I accept that some of the emails that the applicant sent were sent within this context. However, I do not accept that all of the emails the applicant sent were sent during a period the applicant was experiencing what counsel for the applicant described as 'extreme pressure'. In particular, I do not accept the emails the applicant sent to the respondent's solicitor following the respondent's filing of the strike out application fall into this category for the reasons that follow.
- 132 Firstly, in **Brown** at [100], the Board accepted that Mr Brown's conduct was to be viewed 'as opportunistic and unthinking and occurring in circumstances where the appellant was himself under a great deal of pressure having lost his job when, so far as he was concerned (and we accept for present purposes), he had done nothing wrong.' However, despite the Board's acceptance of Mr Brown's 'state of mind', this did not absolve Mr Brown from his conduct and did not prevent the Board from finding that his conduct was improper, and therefore his appeal should be dismissed. Likewise, even if the applicant was under extreme pressure over the entire period when she sent the emails the subject to the strike out application, I do not consider that this absolves the applicant from a finding that the emails were improper.
- 133 Secondly, no medical evidence was submitted by the applicant about her state of mind.
- 134 In any event, I make no findings that the applicant intended to influence a witness. Rather, I find that the emails the applicant sent, regardless of the applicant's intentions, had the capacity, tendency or potential to interfere with the administration of justice.
- 135 It is not an uncommon experience for employees undergoing an investigation into misconduct, especially where they deny the allegations of misconduct as the applicant has stated in her unfair dismissal application and as counsel for the applicant submitted at the hearing, to be feeling uncertain and apprehensive. It is not uncommon for an employee who has been dismissed to be feeling distressed and as counsel for the applicant submits, feeling frustrated by the turn of events. However, I do not accept that the applicant's state of mind, or frustration, excuses the applicant's conduct.
- 136 I find the conduct of the applicant in sending the emails constitutes improper conduct. In particular, the emails the applicant sent to the respondent's solicitor after she was squarely placed on notice by the respondent filing the strike out application that the respondent considered the emails she had been sending to be inappropriate.
- 137 Whilst counsel for the applicant submits that the emails that the applicant sent need to be considered in the context of her state of mind at the time they were sent, what is before the Commission are the emails that the respondent has attached to the strike out application. These were sent by the applicant in the period from 19 February 2021 to 23 February 2022. At the hearing, nine emails which the applicant sent to the respondent's solicitor were tendered. These were sent by the applicant in the period from 25 February to 5 April 2022. After the hearing, and by consent, two further emails were tendered. These were sent by the applicant to the respondent's solicitor and/or to the Commission on 25 and 26 February 2022.
- 138 Of the emails tendered, the last email was sent by the applicant on 5 April 2022. It appears from the correspondence from the applicant's counsel on the file that the applicant obtained legal representation on or around 22 April 2022.
- 139 The respondent submits that the applicant has demonstrated a willingness to direct insult and illegitimate pressure towards the lawyer acting for the respondent, which is analogous to **De Vos**. In **De Vos**, Mr De Vos made an obscene and offensive gesture towards counsel for the respondent during the hearing of Mr De Vos' unfair dismissal application. The gesture was made after approximately 20 minutes of cross-examination. Mr De Vos apologised and explained that it was his way of dealing with stress to do something in a non-verbal way. The Commission found that Mr De Vos' conduct was not only personally offensive to

the respondent's counsel, but it was also a contempt of the Commission process, the same process that Mr DeVos was seeking to utilise.

- 140 In *De Vos v Minit Australia Pty Ltd* [2003] WAIRC 07735, the Full Bench of the Commission described the cross-examination of Mr De Vos at first instance, on a fair reading of the transcript, as polite, correct and not at all oppressive or belittling; it was not at all exceptionable.
- 141 In this regard, the applicant's conduct towards the respondent's solicitor is analogous to *De Vos*.
- 142 The respondent's solicitor sent an email to the applicant on 25 February 2022 at 2.17 pm, in response to an email from the applicant enclosing an 'offer to make amends', which relays the respondent's instructions to decline the applicant's offer and noted that the parties were due to file a statement of agreed facts, however, the respondent intended to make an interlocutory application which will overtake those programming orders. The respondent's solicitor advised that he intends to file the application later that day and will copy in the applicant when he does so. Like the cross-examination in *De Vos*, this email is polite, correct, and not at all exceptionable. In response to this email, the applicant sent the respondent's solicitor an email (Exhibit 2) on 25 February 2022 at 10.01 pm, which accuses the respondent's solicitor of constant smirking, mocking the applicant and gloating, and of appearing to enjoy hurting people in pain.
- 143 The respondent's solicitor sent an email to the Commission, copied to the applicant, on 25 February 2022 at 2.41 pm, in effect to file and serve the respondent's strike out application. Like the cross-examination in *De Vos*, this email is polite, correct, and not at all exceptionable. In response to this email, the applicant sent the respondent's solicitor a lengthy email (Exhibit 1) on 25 February 2022 at 9.45 pm, which accuses the respondent's solicitor of personally behaving in an unconscionable manner, accuses the respondent's solicitor of unconscionable and unethical behaviour and of lying to the Commission, and asserts that the respondent's solicitor is impervious to the injustice inflicted by the respondent.
- 144 On 1 March 2022 at 2.15 pm, the applicant sent an email (Exhibit 3) to the respondent's solicitor '[i]n relation to your application for 1A for an Interlocutory hearing', which accuses the respondent's solicitor of 'bad faith' in attempting to deny the applicant her day in court.
- 145 However, unlike in *De Vos*, the applicant has not apologised nor expressed contrition for her conduct.
- 146 The applicant appears to justify her emails to the respondent's solicitor on the basis that there was a divergence of views regarding the facts of the matter, and that she did not have the assistance of legal representation at the time and therefore was unsure of how to communicate with the respondent's solicitor.
- 147 It is not an uncommon occurrence for parties in matters before the Commission to be self-represented. The lack of representation does not and cannot provide a self-represented party with full immunity for their conduct in the proceedings before the Commission. All parties, whether represented by lawyers, industrial agents, agents or self-represented are expected to comply with the Commission's orders and processes. For example, a self-represented applicant or appellant would not be exempted from actively prosecuting their matter, and a failure of a self-represented applicant or appellant to do so would not prevent an application for their matter to be dismissed for want of prosecution.
- 148 Likewise, a self-represented party would not be excused from conducting themselves in an inappropriate manner in the proceedings.
- 149 It is inappropriate for a party to proceedings in this Commission to direct repeated and as conceded by the applicant's counsel, vindictive or vicious, and vile communications to the other party, including to the other party's legal representative. It should also be noted that the applicant copied in the Commission to some of these emails. That too was inappropriate.
- 150 The inappropriateness is in no way lessened by the applicant being self-represented at the time she sent the emails.
- 151 The applicant is seeking relief in the Commission. The Commission is bound by s 26(1) of the Act to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities and legal forms and having regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole.
- 152 I find the applicant's conduct to be improper and therefore to constitute misconduct in relation to her unfair dismissal application. Therefore, I find that the applicant has not conducted herself in a way that accords with two of the important maxims of equity which apply in this jurisdiction, namely that he or she who seeks equity must do equity, and he or she must also come with clean hands: *Civil Service Association*.
- 153 In circumstances where I have found the applicant's conduct to constitute misconduct in relation to her unfair dismissal application, I do not consider that I need to make any findings regarding the text messages that were sent by the applicant's partner.
- 154 I agree with counsel for the applicant that the power to dismiss an unfair dismissal application before the Commission under s 27(1)(a)(iv) of the Act is an exceptional one, and should be exercised sparingly and with extreme caution, given the applicant is entitled to invoke the jurisdiction of the Commission and should not lightly be deprived of its exercise.
- 155 Counsel for the applicant also submits that the power of the Commission to dismiss the applicant's unfair dismissal claim under s 27(1)(a)(iv) of the Act should not be used to punish the applicant. Counsel for the applicant submits that dismissing the applicant's unfair dismissal application now, would be punishing the applicant for something that was completely out of her control, because of her psychological state at the time.
- 156 The applicant may view a dismissal of her unfair dismissal application at this point as 'punishment'. However, s 26(1)(a) and (c) of the Act provides that in acting in accordance with equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms, I must also have regard to the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole.

157 In this regard, I have had regard to the applicant's entitlement to invoke the jurisdiction of the Commission. I have also had regard to the fact that a dismissal of the applicant's unfair dismissal application, without the matter having been fully heard and all evidence having been led, would deny the applicant her 'day in court'.

158 I have also had regard to the interests of the other parties, namely the recipients of the applicant's emails, and also the interests of the community in protecting the Commission's processes from interference by way of improper conduct by an applicant: *Brown* at [106].

159 In all the circumstances, I consider it appropriate to dismiss the applicant's unfair dismissal application in accordance with s 27(1)(a)(iv) of the Act.

Conclusion

160 Section 27(1)(a) of the Act expressly empowers the Commission to dismiss an unfair dismissal application at any stage: *Tye* at [38].

161 The power to dismiss the applicant's unfair dismissal application under s 27(1)(a)(iv) of the Act is an exceptional one, should be exercised sparingly and with extreme caution, and that prima facie, the applicant is entitled to invoke completely the Commission's jurisdiction: *Brown* at [81] and [83].

162 In this matter, I would be empowered to dismiss the applicant's unfair dismissal application pursuant to s 27(1)(a)(iv) of the Act, if I was satisfied that 'for any other reason' the applicant's unfair dismissal application should be dismissed.

163 The Commission has accepted that it is entitled to apply the maxims of equity that 'he who seeks equity must do equity' and 'he who seeks equity must come with clean hands.': *Brown* at [44] citing *Civil Service Association* at [56].

164 I am satisfied that the correspondence the applicant sent had the capacity, tendency or potential to interfere with the administration of justice and that the applicant therefore engaged in improper conduct. As such, I am satisfied the applicant engaged in misconduct in relation to her unfair dismissal application. In engaging in misconduct, I am satisfied that the applicant did not comply with the equitable maxims in *Civil Service Association*. Therefore, having regard to the matters at s 26(1)(a) and (c) of the Act, I am satisfied that the applicant's unfair dismissal application should be dismissed pursuant to s 27(1)(a)(iv) of the Act.

2022 WAIRC 00740

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

VERONA MARIE WAUCHOPE

APPLICANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

THURSDAY, 20 OCTOBER 2022

FILE NO/S

U 53 OF 2021

CITATION NO.

2022 WAIRC 00740

Result

Order Issued

Representation

Applicant

Mr A Gill (of counsel)

Respondent

Mr D Anderson (of counsel)

Order

HAVING heard from Mr A Gill of counsel on behalf of the applicant and Mr D Anderson 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 application under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) to dismiss application U 53 of 2021 be upheld; and
- (2) THAT application U 53 of 2021 be, and by this order, is dismissed.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

CONFERENCES—Matters arising out of—

2022 WAIRC 00763

DISPUTE RE PAYMENT OF PRIVATE PRACTICE COST ALLOWANCE AS PER CLAUSE 23(7) OF WA HEALTH SYSTEM MEDICAL PRACTITIONERS AMA INDUSTRIAL AGREEMENT 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2022 WAIRC 00763
CORAM : PUBLIC SERVICE ARBITRATOR
 SENIOR COMMISSIONER R COSENTINO
HEARD : TUESDAY, 18 OCTOBER 2022
DELIVERED : TUESDAY, 18 OCTOBER 2022
FILE NO. : PSAC 9 OF 2022
BETWEEN : AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
 Applicant
 AND
 CHILD AND ADOLESCENT HEALTH SERVICE (CAHS)
 Respondent

CatchWords : Industrial Law (WA) – Public Service Arbitrator – Section 44 application – Dispute regarding Private Practice Cost Allowance – Application for dismissal – Jurisdiction of the Arbitrator – Enforcement of an industrial instrument – Interpretation of an industrial instrument – Contravention of ‘no further claims’ clause of the relevant industrial instrument – Judicial or arbitral powers – Section 44 does not give the Arbitrator judicial power or jurisdiction to enforce industrial instruments nor to merely construe them – Application dismissed for want of jurisdiction

Legislation : *Industrial Relations Act 1979* (WA)

Result : Application dismissed for want of jurisdiction

Representation:

Applicant : Ms K Taylor

Respondent : Mr J Carroll of counsel

Case(s) referred to in reasons:

Civil Service Association of Western Australia Incorporated v Mr Neil Fernandes Managing Director Central Institute of Technology [2016] WAIRC 00250; (2016) 96 WAIG 527

Crew and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 2623

United Voice WA v The Director General, Department of Education [2014] WAIRC 01361; (2015) 95 WAIG 13

Reasons for Decision

Ex Tempore

- 1 This matter was commenced by the Australian Medical Association (WA) Incorporated (AMA) as an application for a compulsory conference under s 44 of the *Industrial Relations Act 1979* (WA) (IR Act). The respondent, Child and Adolescent Health Service (Health Service) seeks the dismissal of the claim on the basis the Public Service Arbitrator (Arbitrator) is without jurisdiction to deal with the matter under s 44, because it is, in substance, either:
 - (a) a claim for enforcement of an industrial instrument, which is a claim within the exclusive jurisdiction of the Industrial Magistrates Court under s 83 of the IR Act; or,
 - (b) a claim for interpretation of an industrial instrument which needs to be made under s 46 of the IR Act and which would require the joinder of all named parties to the industrial instrument; or
 - (c) if neither of the above, a claim that contravenes the ‘no further claims’ clause of the relevant industrial instrument.
- 2 In order to determine the dismissal application, I need to characterise the essential nature of the proceedings: *Crew and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 2623 at 2628.
- 3 The Arbitrator’s powers under s 44 are arbitral, not judicial powers. The exercise of judicial power involves the ascertainment, declaration and enforcement of rights and liabilities of parties as they exist or are deemed to exist when proceedings are instituted. Arbitral powers are directed at whether rights and obligations should be created, consistent with the objects of the IR Act.
- 4 The Health Service’s counsel rightly acknowledged that an industrial dispute might be within the arbitral jurisdiction and invoke only arbitral powers, even if it involves interpreting an industrial instrument along the way. This was recognised by

- Smith AP in *United Voice WA v The Director General, Department of Education* [2014] WAIRC 01361; (2015) 95 WAIG 13 at [100] and [107].
- 5 The relief the AMA seeks is the starting point for determining whether the essential nature of the present application is such as to invoke judicial or arbitral powers. The relief must be connected to the industrial dispute, so the industrial dispute itself also needs to be analysed.
 - 6 The AMA argued that the application essentially only seeks the involvement of the Arbitrator to assist in resolving an industrial dispute by conciliation and in accordance with the dispute settlement procedure set out cl 54 of the *WA Health System - Medical Practitioners - AMA Industrial Agreement 2016* (Industrial Agreement), which was the industrial instrument that was in operation when the application was filed.
 - 7 This does not answer the problem of the Arbitrator's jurisdiction. First, even if the AMA is only seeking conciliation, it has done so by invoking s 44 of the IR Act. *Crewe and Sons Pty Ltd* and *United Voice WA* establish that s 44 does not give the Arbitrator judicial power or jurisdiction to enforce industrial instruments nor to merely construe them.
 - 8 Second, a dispute resolution clause in an industrial agreement cannot confer jurisdiction which the Arbitrator does not otherwise have: *Civil Service Association of Western Australia Incorporated v Mr Neil Fernandes Managing Director Central Institute of Technology* [2016] WAIRC 00250; (2016) 96 WAIG 527.
 - 9 The remedies sought in the application are:
 - (a) a conference to assist resolve the '...longstanding ... backpay dispute, as per clause 59 of the [Industrial] Agreement'; and
 - (b) 'Any other recommendations or orders the Commission sees fit in the interests of supporting ongoing compliance with the Agreement and expeditious resolution of any disputes between the parties in future'.
 - 10 The application did not merely seek conciliation. The relief extended to seeking orders in the nature of enforcement. In particular, reference to compliance suggests the invocation and determination of vested rights and obligations.
 - 11 To understand this relief, further context is required about the nature of the dispute. The application was made '...on behalf of a number of Senior Doctors who continue to be denied back-pay for accepted claims ... [for the Private Practice Cost allowance under] clause 23(7)...'. The factual background in the application refers to a particular doctor whose claims for the cl 23(7) allowance this year were accepted, but had claims for previous years denied. It also sets out a history of correspondence disputing the Health Service's decision and seeking to resolve the dispute. The correspondence dates from November 2021 to July 2022, that is, about eight months of to-ing and fro-ing.
 - 12 The last substantive word or words on the matter were in a letter from the AMA President of 28 June 2022 and an email in response from the Health Services' Manager, Workplace Relations, dated 4 July 2022. What emerged from that exchange is that there was a dispute between the parties involving issues of enforcement of the Industrial Agreement, and issues of construction of the industrial agreement. But the dispute also involved disparity in the application of the industrial agreement across health service providers, issues of timing and delays, and grievances about the lack of or quality of communications to resolve these issues.
 - 13 So, from the correspondence attached to the application, it is apparent that the parties were in dispute about the construction of cl 23(7) of the Industrial Agreement and other industrial issues not strictly to do with rights and entitlements.
 - 14 Of these issues, which does the present application relate to? I pressed Ms Taylor for the AMA about this. She confirmed that the AMA is not seeking any relief which would go beyond the rights, entitlements and obligations of the relevant clause in the industrial agreement. She said that the relief the AMA would seek if the dispute was not resolved by conciliation, would be the consistent application of the clause across health service providers and back paid to the doctors on whose behalf the claim is brought.
 - 15 Ms Taylor also said that in order to be satisfied that such relief could be granted, the Arbitrator would need to determine the meaning of the relevant terms of the Industrial Agreement, and whether the respondent had an obligation to pay. This means that the essential nature of the application is for enforcement of the industrial agreement. Ms Taylor, to her credit, did not try to squeeze a round peg into a square hole. She frankly stated that the dispute is essentially about the round peg - that is, the rights and obligations under the agreement.
 - 16 In *Crewe and Sons Pty Ltd*, the Full Bench repeatedly emphasised that s 44 should not be read down. It also said, at 2628, that the powers in s 44 are available unless it is unequivocally apparent that the matter is one that should be dealt with under s 46, s 83 or another special power conferring section of the IR Act.
 - 17 There may be occasions when the powers in s 44 are available, particularly prior to referral for arbitration, when industrial disputes involve issues about the construction and enforcement of industrial instruments as part of an industrial dispute. However, given the AMA's frank characterisation of the dispute and what is ultimately sought by the application, it is unequivocally apparent that the matter should be dealt under s 46 or s 83 of the IR Act. Its essential character is not within the arbitral jurisdiction, and, therefore, not capable of being referred for arbitration under s 44.
 - 18 I will accordingly grant the Health Service's application and dismiss the proceedings for want of jurisdiction.
-

2022 WAIRC 00725

DISPUTE RE PAYMENT OF PRIVATE PRACTICE COST ALLOWANCE AS PER CLAUSE 23(7) OF WA HEALTH SYSTEM MEDICAL PRACTITIONERS AMA INDUSTRIAL AGREEMENT 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED

APPLICANT

-v-

CHILD AND ADOLESCENT HEALTH SERVICE (CAHS)

RESPONDENT**CORAM**PUBLIC SERVICE ARBITRATOR
SENIOR COMMISSIONER R COSENTINO**DATE**

TUESDAY, 18 OCTOBER 2022

FILE NO

PSAC 9 OF 2022

CITATION NO.

2022 WAIRC 00725

Result Application dismissed for want of jurisdiction**Representation****Applicant** Ms K Taylor**Respondent** Mr J Carroll of counsel and Ms E Barrington*Order*

HAVING heard from Ms K Taylor on behalf of the applicant and Mr J Carroll of counsel and Ms E Barrington on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

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

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

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2022 WAIRC 00730

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 12 JULY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KENNETH BROWN

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT**CORAM**CHIEF COMMISSIONER S J KENNER
COMMISSIONER T EMMANUEL
COMMISSIONER C TSANG**DATE**

WEDNESDAY, 19 OCTOBER 2022

FILE NO.

APPL 34 OF 2022

CITATION NO.

2022 WAIRC 00730

Result Directions issued
Representation
Appellant Mr D Stojanoski of counsel
Respondent Mr J Carroll of counsel

Direction

HAVING heard Mr D Stojanoski of counsel on behalf of the appellant and Mr J Carroll of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs—

- (1) THAT the appellant file an outline of submissions and any list of authorities upon which he intends to rely in support of the s108(3)(b) application by 28 October 2022.
- (2) THAT the respondent file an outline of submissions and any list of authorities upon which he intends to rely in opposition to the s108(3)(b) application by 4 November 2022.
- (3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.]

For and On behalf of the Western Australian Industrial Relations Commission.

2022 WAIRC 00735

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JACQUELINE STARK

APPLICANT

-v-

ROSANNE DOWLAND DESIGN- THE TRUSTEE FOR THE DOWLAND FAMILY TRUST

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE WEDNESDAY, 19 OCTOBER 2022
FILE NO. B 23 OF 2022
CITATION NO. 2022 WAIRC 00735

Result Direction issued
Representation
Applicant Ms S Haynes (as agent)
Respondent Ms R Dowland

Direction

HAVING heard from Ms S Haynes on behalf of the applicant and Ms R Dowland 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 direction 2022 WAIRC 00680 is vacated;
2. THAT the applicant file and serve any outlines of witness evidence and documents upon which she intends to rely by no later than 4 November 2022;
3. THAT the respondent file and serve any outlines of witness evidence and documents upon which they intend to rely by no later than 18 November 2022;
4. THAT the matter be listed for hearing for one day, on 7 December 2022; and
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2022 WAIRC 00722

CONTRACTUAL BENEFIT CLAIMWESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
NEIL MORTIMORE**PARTIES****APPLICANT**

-v-

ALOSCA TECHNOLOGIES PTY LTD

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON
DATE MONDAY, 17 OCTOBER 2022
FILE NO. B 68 OF 2022
CITATION NO. 2022 WAIRC 00722**Result** Direction issued
Representation
Applicant Mr N Mortimore
Respondent Mr S Crockett*Direction*

WHEREAS On 6 October 2022 the applicant applied for the Commission to accept an outline of evidence submitted ten days after the due date of 27 September 2022. On 5 October 2022 the applicant had become aware that Directions setting out dates for the parties to file and serve outlines of witness evidence and submissions had issued on 13 September 2022;

AND WHEREAS The Commission sought the respondent's views on providing the applicant with an extension and whether the respondent would require an extension to file and serve any outlines of the evidence their witness/es will be giving at the hearing. On 7 October 2022 the respondent informed the Commission that it opposed the granting of an extension to the applicant on the basis that the applicant had stated prior to the directions being issued that he would be able to file and serve his outlines of witness evidence on or before the proposed date of 27 September 2022. Subsequently the respondent submitted documents by email on 9 October 2022;

The Commission has considered the parties submissions and noted that the delay resulting from the oversight is nine days and that once the applicant became aware of the Direction issued the applicant quickly addressed the oversight. The respondent has not pointed to any prejudice to it that would arise from granting the extension;

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

1. THAT the applicant's outlines of witness evidence filed on 6 October 2022 be accepted.
2. THAT the respondent file and serve any outlines of witness evidence and any further documents upon which they intend to rely by no later than 20 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 3 November 2022;
4. THAT the matter be listed for hearing for 1 day on a date to be fixed; and
5. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2022 WAIRC 00775

CONTRACTUAL BENEFIT CLAIMWESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PETER WATKINS;
INGER ISAKSEN**PARTIES****APPLICANTS**

-v-

AUSTRALIAN TRANSIT GROUP, GOVERNMENT OF WESTERN AUSTRALIA PUBLIC
TRANSPORT AUTHORITY - SCHOOL BUS SERVICES;**RESPONDENTS****CORAM** COMMISSIONER T KUCERA
DATE MONDAY, 7 NOVEMBER 2022
FILE NO/S B 105 OF 2022, B 106 OF 2022
CITATION NO. 2022 WAIRC 00775

Result	Directions issued
Representation	
Applicants	Mr G Ferguson
First Respondent	Mr I MacDonald Mr M Goosen
Second Respondent	Ms E Negus

Order

HAVING HEARD from Mr G Ferguson on behalf of the applicants, Mr I MacDonald and Mr M Goosen on behalf of the First Respondent, and Ms E Negus (of counsel) on behalf of the Second Respondent; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

1. THAT applications B 105 of 2022 and B 106 of 2022 be joined and dealt with together;
2. THAT the matter be adjourned to allow the parties to seek further legal advice; and
3. THAT a further conciliation conference be held at 10.15 am on 12 December 2022.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2022 WAIRC 00738

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 1 OF 2022

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	B. K ELSEGOOD & D.S ELSEGOOD & D.K ELSEGOOD & ELSEGOOD HOLDINGS PTY LTD & S.M ELSEGOOD & FALCONCREST HOLDINGS PTY LTD	APPELLANT
	-v-	
	ALAN MAHON	RESPONDENT
CORAM	BUSS J	
DATE	THURSDAY, 20 OCTOBER 2022	
FILE NO/S	IAC 4 OF 2022	
CITATION NO.	2022 WAIRC 00738	

Result	Orders Issued
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Order

1. The time for the appellant to file submissions and a list of legal authorities and serve a copy on the respondent be extended to Monday, 17 October 2022.
2. The time for the respondent to file submissions and a list of legal authorities and serve a copy on the appellant be extended to Monday, 14 November 2022.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

2022 WAIRC 00756

REVIEW OF NOTICE - S.51A - OSH ACT
THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES	CONSOLIDATED PASTORAL COMPANY PTY LTD	APPLICANT
	-v-	
	WORKSAFE COMMISSIONER	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 28 OCTOBER 2022	
FILE NO/S	OSHT 4 OF 2021	
CITATION NO.	2022 WAIRC 00756	

Result	Programming orders issued
Representation	
Applicant	Mr T Russell (of counsel)
Respondent	Mr T Pontre (of counsel)

Order

HAVING heard from Mr T Russell (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 all documents filed in relation to this matter be served by email.
2. THAT evidence in chief be adduced by signed witness statements which will stand as evidence in chief.
3. THAT by 22 December 2022, the parties file:
 - a. a list of agreed questions for the Tribunal to answer (and any other questions that are not agreed);
 - b. a statement of agreed facts and bundle of agreed documents;
 - c. a list of agreed questions to be answered by the expert witnesses (and any other questions that are not agreed); and
 - d. a list of agreed facts and assumptions to be put to the expert witnesses.
4. THAT the respondent file witness statements, documents and expert reports on which he intends to rely by 27 March 2023.
5. THAT the applicant file witness statements, documents and expert reports on which it intends to rely by 28 April 2023.
6. THAT by 29 May 2023:
 - a. in accordance with the *Commission's Practice Note 8 of 2021 – Concurrent Expert Evidence*, the experts meet, confer and file a written statement containing the matters in their respective reports about which they agree, disagree and the reasons for any disagreement; and
 - b. parties give notice to each other and the Commission of any witness required to attend for cross-examination and of any documents objected to (including the nature of the objection).
7. THAT the respondent file written submissions by 27 June 2023.
8. THAT the applicant file written submissions by 25 July 2023.
9. THAT the application be listed for a 4-day hearing in August 2023.

(Sgd.) T EMMANUEL,
 Commissioner.

[L.S.]

2022 WAIRC 00757

REVIEW OF NOTICE - S.51A - OSH ACT

THE WORK HEALTH AND SAFETY TRIBUNAL

PARTIES

HANCOCK PROSPECTING PTY LTD

APPLICANT

-v-

WORKSAFE COMMISSIONER

RESPONDENT**CORAM**

COMMISSIONER T EMMANUEL

DATE

FRIDAY, 28 OCTOBER 2022

FILE NO/S

OSHT 5 OF 2021

CITATION NO.

2022 WAIRC 00757

Result

Programming orders issued

Representation**Applicant**

Mr T Russell (of counsel)

Respondent

Mr T Pontre (of counsel)

Order

HAVING heard from Mr T Russell (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 all documents filed in relation to this matter be served by email.
2. THAT evidence in chief be adduced by signed witness statements which will stand as evidence in chief.
3. THAT by 22 December 2022, the parties file:
 - a. a list of agreed questions for the Tribunal to answer (and any other questions that are not agreed);
 - b. a statement of agreed facts and bundle of agreed documents;
 - c. a list of agreed questions to be answered by the expert witnesses (and any other questions that are not agreed); and
 - d. a list of agreed facts and assumptions to be put to the expert witnesses.
4. THAT the respondent file witness statements, documents and expert reports on which he intends to rely by 27 March 2023.
5. THAT the applicant file witness statements, documents and expert reports on which it intends to rely by 28 April 2023.
6. THAT by 29 May 2023:
 - a. in accordance with the *Commission's Practice Note 8 of 2021 – Concurrent Expert Evidence*, the experts meet, confer and file a written statement containing the matters in their respective reports about which they agree, disagree and the reasons for any disagreement; and
 - b. parties give notice to each other and the Commission of any witness required to attend for cross-examination and of any documents objected to (including the nature of the objection).
7. THAT the respondent file written submissions by 27 June 2023.
8. THAT the applicant file written submissions by 25 July 2023.
9. THAT the application be listed for a 4-day hearing in August 2023.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2022 WAIRC 00731

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WENDYL KEVIN TENNENT

APPLICANT

-v-

WA PRISON OFFICERS UNION OF WORKERS

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE WEDNESDAY, 19 OCTOBER 2022
FILE NO. PRES 8 OF 2022
CITATION NO. 2022 WAIRC 00731

Result Directions issued
Representation
Applicant Mr W Tennent
Respondent Mr C Fordham of counsel

Direction

HAVING heard Mr W Tennant on his own behalf and Mr C Fordham of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs—

- (1) THAT the directions dated 11 August, and 7 October 2022 be and are hereby suspended.
- (2) THAT the respondent file an outline of submissions and any list of authorities upon which it intends to rely in support of the s 27(1)(a) application by 28 October 2022.
- (2) THAT the applicant file an outline of submissions and any list of authorities upon which he intends to rely in opposition to the s 27(1)(a) application by 4 November 2022.
- (3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
 Chief Commissioner.

[L.S.]

2022 WAIRC 00732

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 WEDNESDAY, 19 OCTOBER 2022
FILE NO. PSAB 10 OF 2022
CITATION NO. 2022 WAIRC 00732

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 directions 2 to 7 of 2022 WAIRC 00635 are vacated;
2. THAT the appellant file and serve upon the respondent an outline of witness evidence and any documents, upon which they intend to rely by no later than 20 October 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 31 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 14 November 2022;
5. THAT the respondent file and serve upon the appellant an outline of submissions and any list of authorities, by no later than 28 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 00755

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

THURSDAY, 27 OCTOBER 2022

FILE NO

PSAB 21 OF 2022

CITATION NO.

2022 WAIRC 00755

Result

Direction Issued

Representation

Appellant

On her own behalf

Respondent

Mr R Andretich (of counsel)

Direction

HAVING heard from the appellant 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 filing date in direction 2 of the Directions dated 3 October 2022 (**[2022 WAIRC 00696]**) be extended to 27 October 2022.
2. THAT the filing date in direction 3 of **[2022 WAIRC 00696]** be extended to 10 November 2022.
3. THAT the filing date in direction 4 of **[2022 WAIRC 00696]** be extended to 24 November 2022.

(Sgd.) C TSANG,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2022 WAIRC 00695

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**

FRIDAY, 30 SEPTEMBER 2022

FILE NO

PSAB 21 OF 2022

CITATION NO.

2022 WAIRC 00695

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 00666] issued on 13 September 2022 be vacated;
2. THAT the parties file a bundle of agreed documents by no later than 29 September 2022;
3. THAT the parties file a joint statement of agreed facts by no later than 6 October;
4. 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 20 October 2022;
5. 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 3 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.) C TSANG,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2022 WAIRC 00671

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 22 MARCH 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ANDREW JAMES NORRIS

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL
DEVELOPMENT**RESPONDENT****CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL – CHAIRPERSON
MS K CARTER – BOARD MEMBER
MR B HAWKINS – BOARD MEMBER**DATE**

WEDNESDAY, 14 SEPTEMBER 2022

FILE NO.

PSAB 29 OF 2022

CITATION NO.

2022 WAIRC 00671

Result Directions issued
Representation
Appellant On his own behalf
Respondent Mr M McIlwaine (of counsel)

Direction

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

1. THAT the appellant file outlines of evidence and documents on which he intends to rely by 30 September 2022;
2. THAT the respondent file outlines of evidence and documents on which he intends to rely by 14 October 2022;
3. THAT the appellant file written submissions by 28 October 2022;
4. THAT the respondent file written submissions by 11 November 2022;
5. THAT discovery be informal; and
6. THAT this matter be listed for a one-day hearing.

(Sgd.) T EMMANUEL,
 Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2022 WAIRC 00724

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 APRIL 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SHARON PETERSON

APPELLANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON – CHAIR

MS B CONWAY – BOARD MEMBER

MS J FUREY – BOARD MEMBER

DATE

TUESDAY, 18 OCTOBER 2022

FILE NO.

PSAB 36 OF 2022

CITATION NO.

2022 WAIRC 00724

Result Direction issued
Representation
Appellant Dr S Peterson
Respondent Mr D Anderson (of counsel)

Direction

HAVING heard from the appellant on her own behalf and Mr Anderson on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the appellant file and serve upon the respondent further and better particulars in support of her application by no later than 1 November 2022;
2. THAT the respondent may file and serve upon the appellant a response to the appellant's further and better particulars by no later than 15 November 2022; and
3. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
 Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2022 WAIRC 00782

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 26 APRIL 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STAN MATVEEV

APPELLANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON - CHAIR

MR G LEE - BOARD MEMBER

MS N PYNE - BOARD MEMBER

DATE

WEDNESDAY, 9 NOVEMBER 2022

FILE NO.

PSAB 37 OF 2022

CITATION NO.

2022 WAIRC 00782

Result	Direction issued
Representation	
Appellant	Mr S Matveev
Respondent	Mr D Anderson (of counsel)

Direction

HAVING heard from the appellant on his own behalf and Mr Anderson on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the parties file a joint statement of agreed facts and bundle of agreed documents by no later than 23 November 2022;
2. THAT the appellant file and serve upon the respondent any outlines of evidence and documents upon which they intend to rely on at the hearing by no later than 30 November 2022;
3. THAT the respondent file and serve upon the appellant any outlines of evidence and documents upon which they intend to rely on at the hearing by no later than 14 December 2023;
4. THAT the appellant file and serve upon the respondent an outline of submissions and any list of authorities by no later than 21 December 2023;
5. THAT the respondent file and serve upon the appellant an outline of submissions and any list of authorities by no later than 11 January 2023;
6. THAT the matter be listed for hearing for 2 days on a date to be fixed;
7. THAT discovery be informal; and
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T B WALKINGTON,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2022 WAIRC 00733

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY AND IMPROVEMENT ACTION ON 9 MAY 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CANDIDO SALGADO

APPELLANT

-v-

DIRECTOR GENERAL OF HEALTH

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD

SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON

MR M ABRAHAMSON - BOARD MEMBER

MR R PARKES - BOARD MEMBER

DATE

WEDNESDAY, 19 OCTOBER 2022

FILE NO.

PSAB 39 OF 2022

CITATION NO.

2022 WAIRC 00733

Result Order issued
Representation
Appellant Mr M Gwizo as agent
Respondent Ms E Negus of counsel

Order

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

1. THAT the that the respondent's name be amended to substitute 'Director General of Health' with 'Director General, Department of Health'.
2. THAT the parties file a statement of agreed issues for determination, agreed facts and bundle of agreed documents by no later than 9 November 2022.
3. THAT the respondent file a written outline of the evidence in chief of any witness the respondent proposes to call by no later than 23 November 2022. Each witness outline must comply with Practice Note 9 of 2021.
4. THAT the appellant file a written outline of the evidence in chief of any witness the appellant proposes to call by no later than 7 December 2022. Each witness outline must comply with Practice Note 9 of 2021.
5. THAT the matter be listed for a 1-day hearing on a date after 7 December 2022, to be fixed.

(Sgd.) R COSENTINO,
Senior Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2022 WAIRC 00768

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 3 JUNE 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ZACHARY JAMES ALACH

APPELLANT

-v-

DEPARTMENT OF HEALTH

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD

SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON

MR G BROWN - BOARD MEMBER

MR M GOLESWORTHY - BOARD MEMBER

DATE

WEDNESDAY, 2 NOVEMBER 2022

FILE NO

PSAB 48 OF 2022

CITATION NO.

2022 WAIRC 00768

Result Order issued
Representation
Appellant Mr Z Alach on his own behalf
Respondent Mr M McIlwaine of counsel

Order

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

1. THAT the appellant is to file a notice with details of the decision or finding he is appealing against by no later than 7 November 2022. The notice must state:
 - a. The subparagraph of s 78(1)(b) of the *Public Sector Management Act 1994* (WA) (PSMA) that describes the decision or finding;
 - b. The section of the PSMA that the decision or finding was made under;
 - c. The date of the decision;
 - d. If the decision is in writing, the document that contains the decision; and

- e. If the decision is not in writing, what conversation or conduct is the decision.
2. THAT the respondent is to file by no later than 21 November 2022:
- a. Any documents the respondent relies upon in support of its application for the dismissal of the appeal for want of jurisdiction; and
- b. Written submissions in support of its application for the dismissal of the appeal for want of jurisdiction.
3. THAT the appellant is to file by no later than 5 December 2022:
- a. Any documents the appellant relies upon in opposing the application for the dismissal of the appeal for want of jurisdiction; and
- b. Written submissions opposing the application for the dismissal of the appeal for want of jurisdiction.
4. THAT unless otherwise ordered, the respondent's application for dismissal of the appeal for want of jurisdiction be determined on the papers.
5. THAT there be liberty to apply.

(Sgd.) R COSENTINO,
Senior Commissioner,
On behalf of the Public Service Appeal Board.

[L.S.]

2022 WAIRC 00767

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
NICHOLAS MAHER

PARTIES

APPLICANT

-v-

ROMAN CATHOLIC BISHOP OF BUNBURY

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE WEDNESDAY, 2 NOVEMBER 2022
FILE NO. U 61 OF 2022
CITATION NO. 2022 WAIRC 00767

Result Direction issued
Representation
Applicant Mr N Maher
Respondent Mr I Curlewis (of counsel)

Direction

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

1. THAT the applicant file and serve any outlines of witness evidence and relevant documents upon which he intends to rely by no later than 16 November 2022;
2. THAT the respondent file and serve any outlines of witness evidence and relevant documents upon which they intend to rely by no later than 14 December 2022;
3. THAT the applicant file and serve an outline of submissions and any list of authorities upon which he intends to rely by no later than 11 January 2023;
4. THAT the respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 1 February 2023;
5. THAT the matter be listed for hearing for 2 days on a date to be determined; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2022 WAIRC 00714

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KATHLYN LEAHY

APPLICANT

-v-

THE TRUSTEE FOR STAR HEALTHCARE INVESTMENTS FAMILY TRUST

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE THURSDAY, 13 OCTOBER 2022
FILE NO. U 91 OF 2022
CITATION NO. 2022 WAIRC 00714

Result Direction issued
Representation
Applicant Ms K Leahy
Respondent Dr A Ponnusamy

Direction

HAVING heard from Ms Leahy on her own behalf and Dr Ponnusamy 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 respondent provide to the applicant a copy of the document titled 'standard contract' as referred to in the letter to the applicant from Dr Anand Ponnusamy dated 17 April 2022, by no later than 26 October 2022;
2. THAT the applicant file and serve any outlines of witness evidence and documents upon which she intends to rely by no later than 9 November 2022;
3. THAT the respondent file and serve any outlines of witness evidence and documents upon which they intend to rely by no later than 23 November 2022;
4. THAT the applicant file and serve an outline of submissions and any list of authorities upon which she intends to rely by no later than 7 December 2022;
5. THAT the respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 21 December 2022;
6. THAT the matter be listed for hearing for four days, on a date to be determined; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2022 WAIRC 00762

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ALEJANDRO NIETO ROMERO

APPLICANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE MONDAY, 31 OCTOBER 2022
FILE NO. U 101 OF 2021
CITATION NO. 2022 WAIRC 00762

Result	Direction issued
Representation	
Applicant	Mr M Gwizo (agent)
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from Mr M Gwizo on behalf of the applicant and Mr M McIlwaine of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT discovery be informal and to be concluded by 9 November 2022.
2. THAT the parties file a joint statement of agreed facts and bundle of agreed documents by 16 November 2022.
3. THAT the applicant file outlines of witness evidence and any documents (other than the agreed documents) on which they intend to rely by 28 November 2022.
4. THAT the respondent file outlines of witness evidence and any documents (other than the agreed documents) on which they intend to rely by 12 December 2022.
5. THAT the applicant file a written outline of submissions by 18 January 2023.
6. THAT the respondent file a written outline of submissions by 1 February 2023.
7. THAT the matter be listed for a one-day hearing on a date to be fixed.
8. THAT the parties have liberty to apply on short notice.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Aboriginal Legal Service of Western Australia Limited Agreement 2022 AG 18/2022	09/11/2022	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Aboriginal Legal Service of Western Australia Limited	Senior Commissioner R Cosentino	Agreement registered
Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2022 AG 14/2022	27/10/2022	Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner T Kucera	Agreement registered
VenuesWest General Agreement 2022 AG 12/2022	27/10/2022	WA Sports Centre Trust	Media, Entertainment and Arts Alliance of Western Australia (Union of Employees), United Workers Union	Commissioner T Kucera	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2022 WAIRC 00779

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 19 JANUARY 2022

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	CLINTON VICTOR JUDE DURHAM	APPELLANT
	-v-	
	DEPARTMENT OF COMMUNITIES, CHILD PROTECTION AND FAMILY SUPPORT	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIR MR G LEE - BOARD MEMBER MR R DAVENPORT - BOARD MEMBER	
DATE	TUESDAY, 8 NOVEMBER 2022	
FILE NO	PSAB 9 OF 2022	
CITATION NO.	2022 WAIRC 00779	

Result	Respondent's name amended
Representation	
Appellant	Mr C Durham
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from the appellant on his own behalf and Mr Carroll (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*, and by consent, hereby orders:

THAT the name of the respondent be amended to 'Director General, Department of Communities'.

(Sgd.) T B WALKINGTON,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2022 WAIRC 00736

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 16 MARCH 2022

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	DANIELLE NICOLE LYE	APPELLANT
	-v-	
	ART GALLERY OF WESTERN AUSTRALIA	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIR MR B HAWKINS - BOARD MEMBER MS J FUREY - BOARD MEMBER	
DATE	WEDNESDAY, 19 OCTOBER 2022	
FILE NO	PSAB 45 OF 2022	
CITATION NO.	2022 WAIRC 00736	

Result Respondent's name amended
Representation
Appellant Ms D Lye
Respondent Ms E Negus (of counsel)

Order

HAVING heard from the appellant on her own behalf and Ms Negus (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*, and by consent, hereby orders:

THAT the name of the respondent be amended to 'Director General, Department of Local Government, Sport and Cultural Industries'.

(Sgd.) T B WALKINGTON,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2022 WAIRC 00737

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 16 MARCH 2022

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DANIELLE NICOLE LYE

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF LOCAL GOVERNMENT, SPORT AND
CULTURAL INDUSTRIES

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON - CHAIR
MR B HAWKINS - BOARD MEMBER
MS J FUREY - BOARD MEMBER

DATE

WEDNESDAY, 19 OCTOBER 2022

FILE NO.

PSAB 45 OF 2022

CITATION NO.

2022 WAIRC 00737

Result Direction issued
Representation
Appellant Ms D Lye
Respondent Ms E Negus (of counsel)

Direction

HAVING heard from the appellant on her own behalf and Ms Negus (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 question of whether the Public Service Appeal Board ought to accept this appeal out of time be determined as a preliminary matter;
2. THAT the preliminary matter be heard and determined on the papers;
3. THAT the appellant file and serve upon the respondent written submissions and any documents upon which she intends to rely addressing the preliminary matter, by no later than 9 November 2022;
4. THAT the respondent file and serve upon the appellant its written submissions and any documents upon which it intends to rely addressing the preliminary matter, by no later than 23 November 2022;
5. THAT the appellant may file and serve upon the respondent any written submissions in reply and any further documents upon which she intends to rely addressing the preliminary matter, by no later than 7 December 2022; and
6. 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 00719

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 30 DECEMBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2022 WAIRC 00719
CORAM : PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T EMMANUEL - CHAIRPERSON
 MR M ABRAHAMSON - BOARD MEMBER
 MR S DANE - BOARD MEMBER
HEARD : WEDNESDAY, 24 AUGUST 2022, TUESDAY, 23 AUGUST 2022
DELIVERED : FRIDAY, 14 OCTOBER 2022
FILE NO. : PSAB 6 OF 2022
BETWEEN : JESSICA HELLER-BHATT
 Appellant
 AND
 DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES
 Respondent

CatchWords : Public Service Appeal Board – Dismissal – Mandatory vaccination – Appellant unable to enter workplace because of vaccination status – Duties cannot be done entirely remotely – Appellant disobeyed a reasonable lawful order – Dismissal not unfair
 Legislation : *Industrial Relations Act 1979* (WA): s 26(1)(a), s 801
Public Sector Management Act 1994 (WA): s 78, s 80A, s 80 & s 82A
 Result : Application dismissed
Representation:
 Appellant : On her own behalf
 Respondent : Mr R Andretich (of counsel)

Cases referred to in reasons:*Adami v Maison de Luxe Limited* (1924) 35 CLR 143*Director General, Department of Biodiversity, Conservation and Attractions v Cosentino* [2022] WASC 306*Finlay v Commissioner of Police as the Chief Executive Officer of the Department known as the Police Service (Department of Police)* [2022] WASC 272*Gee v WA Country Health Services* [2022] WAIRC 00224*Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728*Kassam and Others v Hazzard and Others* [2021] NSWSC 1320*Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCFB 6015*McManus v Scott-Charlton* (1996) 70 FCR 16*R v Darling Island Stevedoring and Ligherage Company Limited* (1938) 60 CLR 601*Ronald David Miles & Ors t/a Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385*Reasons for Decision*

- 1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).
- 2 Ms Heller-Bhatt was employed as a District Child Protection Psychologist by the Director General, Department of Communities (**Director General**) from November 2016 until 30 December 2021 when she was dismissed.
- 3 The Director General took disciplinary action against Ms Heller-Bhatt, dismissing her by letter because Ms Heller-Bhatt did not follow a lawful direction to be vaccinated and provide evidence of partial vaccination or a valid exemption by 1 December 2021 (**Employer Direction**).
- 4 Ms Heller-Bhatt appeals to the Board the Director General's decision to take disciplinary action by dismissing her.
- 5 Ms Heller-Bhatt says that she was unfairly dismissed because she conditionally accepted the COVID-19 vaccination and did not enter the workplace without being vaccinated. Ms Heller-Bhatt argues that she complied with the Chief Health Officer's mandatory vaccination directions and she could have performed her role entirely remotely. In effect, she agrees that the Chief Health Officer's mandatory vaccination directions were valid but says that the Employer Direction was not a lawful order because it was unreasonable. Ms Heller-Bhatt asks the Board to reinstate her to her position (with backpay for lost wages), to be paid damages for the distress caused during the ordeal and to receive an apology.
- 6 The Director General says that Ms Heller-Bhatt was not unfairly dismissed. The Employer Direction was a reasonable lawful order. Ms Heller-Bhatt was required to be vaccinated in order to lawfully enter or remain at her place of work and perform her

duties. The Director General says that any event, an order by the Board reinstating Ms Heller-Bhatt to work entirely remotely would be an order formulating new contractual terms and conditions. Such an order would fall outside of the scope of the Board's powers under s 80I of the *Industrial Relations Act 1979* (WA) (**IR Act**).

What the Board must decide

- 7 To determine this matter, the Board must decide whether:
- a. the Employer Direction was a reasonable lawful order;
 - b. Ms Heller-Bhatt committed a breach of discipline by disobeying or disregarding a lawful order; and
 - c. the Board should adjust the decision to dismiss.

Legislative framework

- 8 Part 5 of the *Public Sector Management Act 1994* (WA) (**PSM Act**) applies to public service officers and other prescribed employees in relation to any suspected breach of discipline for disobeying or disregarding a lawful order.
- 9 By s 80 of the PSM Act, an employee who disobeys or disregards a lawful order commits a breach of discipline and is liable to disciplinary action. Section 80A provides that 'disciplinary action' includes a reprimand, fine, transfer, reduction in remuneration or classification and dismissal. Section 82A sets out how an employing authority deals with a disciplinary matter.
- 10 Section 78 of the PSM Act enables an employee who is aggrieved by a decision to take disciplinary action to appeal against that decision to the Board. The Board is a constituent authority of the Commission and exercises jurisdiction under the IR Act in hearing and determining such appeals. Under s 80I of the IR Act, the Board may 'adjust' the matters referred to in s 80I(1).
- 11 Section 26(1)(a) of the IR Act applies to the Board's exercise of its jurisdiction. It requires the Board to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms.

Background

- 12 The following background is not in dispute.
- 13 Ms Heller-Bhatt's primary place of work was the Department of Communities' (**Department**) office at 25 Duke St in Albany (**Albany Office**).
- 14 Ms Heller-Bhatt's duties and responsibilities are described in her Job Description Form (**JDF**). Her duties included:
- a. providing culturally appropriate assessment, therapy and consultation to children and carers of children in the care of the Department;
 - b. providing training and consultation to the Department's staff; and
 - c. attending meetings with school staff and other stakeholders in relation to children in the Department's care.
- 15 Certain therapy sessions can be conducted remotely, including via online therapy, depending on factors including the age of the child and any existing level of rapport. The Albany Office has a dedicated therapy room used for assessment, therapy and consultation of children in care, carers and parents. Ms Heller-Bhatt's office was next door to the therapy room.
- 16 Face to face and in person therapy and assessment can take place in therapy rooms, at community care services accommodation and at schools and education facilities.
- 17 Between September 2021 and 9 June 2022, under powers granted to him by the *Public Health Act 2016* (WA), the Western Australian Chief Health Officer (**CHO**) issued various directions including (**CHO Directions**):
- a. *Health Worker (Restrictions on Access) Directions (No 3)*, given 22 September 2021;
 - b. *Primary Health Care Worker (Restrictions on Access) Directions*, given 22 October 2021;
 - c. *Community Care Services Worker (Restrictions on Access) Directions*, given 5 November 2021;
 - d. *Education Worker (Restrictions on Access) Directions (No 4)*, given 22 December 2021;
 - e. *Booster Vaccination (Restrictions on Access) Directions (No 2)*, given 24 December 2021;
 - f. *Restrictions on Access (Revocation) Directions*, given 7 June 2022;
 - g. *Disability Support Accommodation Worker (Restrictions on Access) Directions*, given 8 June 2022; and
 - h. *Primary Health Care Worker (Restrictions on Access) Directions (No 3)*, given 9 June 2022.
- 18 The parties agree that Ms Heller-Bhatt was covered by at least the *Community Care Services Worker (Restrictions on Access) Directions* and perhaps the *Primary Health Care Worker (Restrictions on Access) Directions* up until 10 June 2022. From that date, she was covered by the *Primary Health Care Worker (Restrictions on Access) Directions (No 3)* dated 9 June 2022.
- 19 The effect of those CHO Directions is that:
- a. after 1 December 2021, Ms Heller-Bhatt had to be partially vaccinated against COVID-19 to access the Albany Office, other offices of the Department and community care services accommodation within the meaning of the Direction at [17(c)] above;
 - b. after 1 January 2022, Ms Heller-Bhatt had to be fully vaccinated to access the Albany Office, other offices of the Department and community care services accommodation, and partially vaccinated to attend schools and education facilities more frequently than once a week;
 - c. after 31 January 2022, a person who participates in or facilitates activities at a school or education facility more than once a week had to be fully vaccinated; and

- d. after 5 February 2022, a person subject to any of the restrictions in a. – c. had to be booster vaccinated for the mentioned activities.
- 20 The Director General directed Ms Heller-Bhatt to be vaccinated and provide evidence of partial vaccination or a valid exemption by 1 December 2021. Ms Heller-Bhatt did not comply with the Employer Direction. She remains unvaccinated.

Ms Heller-Bhatt's case

- 21 Ms Heller-Bhatt gave evidence. She also called Ms Cresdee and Ms Fox to give evidence.

Ms Heller-Bhatt's evidence

- 22 Ms Heller-Bhatt gave evidence that she conditionally accepted the COVID-19 vaccine. She says she requested 'crucial information regarding the vaccine's safety and other pertinent aspects' related to it to be able to make an informed decision. She explained that bodily autonomy is a core value belief for her and the employment contract she originally signed did not require her to be vaccinated.

Ms Heller-Bhatt's role

- 23 Ms Heller-Bhatt says: 'My role as District Psychologist involved closely supporting case managers, team leaders, and other child protection workers in their work with some of the most vulnerable children and families in communities as well as foster carers and biological parents.' Ms Heller-Bhatt says she could perform her work duties remotely by MS Teams and phone, as she did 'throughout [her] employment', including doing assessments, therapeutic support, consultations to staff members, liaising with external stakeholders and delivering staff training.
- 24 Ms Heller-Bhatt's evidence is that if a child needs direct, face to face therapeutic support, that could be referred to her colleague or external services. The bulk of her work is consultations to team leaders and child protection workers. It is common practice to provide support to case managers, child protection workers, parents and foster carers by phone and MS Teams, even before the pandemic, because the Department has various district offices in the Great Southern area. Providing services remotely is convenient and efficient, enabling swift attendance to crises and last minute needs. Ms Heller-Bhatt's evidence is that she would rarely go to school meetings. Instead she would meet with principals and teachers, and train district staff and associated professional agencies, by phone, MS Teams or Zoom.
- 25 Ms Heller-Bhatt gave evidence about the positive feedback she has received from District Directors, Assistant District Directors, team leaders, case managers and other staff about her performance in her role. She says that she has an excellent reputation.

Employer Direction

- 26 In response to a question from the Board about what she understood her employer to be directing her to do, Ms Heller-Bhatt said: 'Yes, so my impression was, um, that the direction was that I had to upload my vaccination status and then also that I was directed by my employer to, um, to accept, yeah, the vaccine.' Further:

EMMANUEL C: And a moment ago you said you understood it was to both upload your status and that you were directed to accept the vaccination?---Yes. Yes, absolutely, yep. So are you saying that you do not have before you any evidence that my employer asked me to get vaccinated?

No, we're not saying that, we're trying to find out what you say you were directed to do and on what basis you understood the direction was given?---Yes.

And I understand you're referring to perhaps a document that just happens to not be one that's in front of us?---Right.

That's not necessarily problematic, if neither party - you know, not everything has to be reflected in documents but we're just trying to understand exactly what you understood the direction to be?---Yes.

But I'm hearing you say that you understood it to be you needed to be vaccinated, is that what you mean by accept the vaccination?---Correct, yes.

So to be vaccinated and upload evidence of your vaccination?---Correct, yeah.

Okay. And you're saying you think - and again, I don't want to put words in your mouth, I'm trying to paraphrase what I understand you've just said?---Yeah.

Are you saying that you thought you were told to do that in a written communication sometime in October?---Yes, and there were ongoing communications, yes - - -

All right?--- - - - to that effect, yeah.

All right, thank you.

- 27 In cross-examination Ms Heller-Bhatt said:

ANDRETICH, MR: Going back to what the Commissioner put to you, did you understand that document to require you to be vaccinated against COVID-19?---I understood the document or I - I understood the directions had asked me, um, to be vaccinated.

and:

ANDRETICH, MR: But can I put it to you in this way? The 19 November document that went to you of 2021 indicated to you that you were required to be vaccinated in order to continue at work, is that correct?---Can you please repeat the question?

The document 19 November 2021 from the Director General you understood required you to be vaccinated against COVID-19 in order to continue at work?---Yes.

Working from home

- 28 In effect, Ms Heller-Bhatt's evidence is that she could perform her role entirely from home and the Director General did not need to dismiss her to comply with the CHO Directions.
- 29 Ms Heller-Bhatt said she had been working from home 'for quite a while'. She worked from home throughout the 2020 lockdown period. The effect of Ms Heller-Bhatt's evidence was that she made two applications to work from home for six months which were approved by the Department. Her first application was approved by a former District Director and her second application was approved by Ms Collard. The first time Ms Heller-Bhatt was able to work from home one day per week. The second time Ms Heller-Bhatt was able to work from home two days per week. Ms Heller-Bhatt also worked from home on an ad hoc basis, which she would discuss with her District Director who would grant her requests to work from home. Ms Heller-Bhatt's evidence is that she successfully worked from home via MS Teams and phone.
- 30 Ms Heller-Bhatt also gave evidence about having a different approach to her colleagues. She said: 'As psychologists, we all work very differently, we all have very unique skill sets, we have different qualifications, we have different trainings. We have different area of expertise essentially.' Ms Heller-Bhatt says her area of expertise is in what is needed by the family system, which focusses on how biological parents or foster carers can be supported so that they can effectively support young children. She explained that this means she does not usually treat or see children under the age of 10 individually. Rather she works with the family system. As this area of expertise is unique within the Department to Ms Heller-Bhatt, she supports and trains others.
- 31 Ms Heller-Bhatt's evidence is that she conducts assessments with children, which does not involve looking at the child individually. Ms Heller-Bhatt organises for a case manager to make a video recording of young children with their biological parents or foster carers. Ms Heller-Bhatt then makes an evaluation based on the video recording. She says: 'so therefore, um, it doesn't really necessitate for me, um, to do face to face assessments with children at all, it works - I work quite differently.' Ms Heller-Bhatt says that it is best practice for psychologists to work within their field of expertise and the area in which they feel most confident and competent. Ms Heller-Bhatt's evidence is that the psychology team meetings involve a discussion about clients, the skill set within the team and who is most confident to take on a particular client. If no one has the confidence or competence to work with a particular client then that client is referred out to an external specialist.
- 32 Ms Heller-Bhatt confirmed in cross-examination that she had indicated that she had for some time been able to discharge all of her duties remotely. She agreed that she had not worked exclusively remotely during the whole of her employment and also that there are situations where remote assessment of in particular a child is not appropriate in her capacity as a psychologist.
- 33 Ms Heller-Bhatt agreed in cross-examination that her JDF did not indicate that her work was limited to the assessment of vulnerable people based on a video taken by someone else.
- 34 When it was put to Ms Heller-Bhatt in cross-examination that she did not have approval to work from home exclusively, Ms Heller-Bhatt said that she was unaware that was even a possibility. Ms Heller-Bhatt's evidence was that she understood there were policy constraints in relation to working exclusively from home but she did not understand that from a logical perspective, because her services can be delivered remotely.
- 35 In cross-examination Ms Heller-Bhatt agreed that her place of work was the Albany Office, that she had not applied for that to change and that Ms Hobbs (the other psychologist in the Albany Office) was not her subordinate.
- 36 Ms Heller-Bhatt gave evidence that she last had face to face contact at work with a child a long time ago. She agreed that seeing a person face to face is direct contact but it was clear from her evidence that Ms Heller-Bhatt did not consider that direct contact had to be face to face. Her evidence was that she has direct contact with clients by MS Teams or Zoom. Ms Heller-Bhatt said that direct client contact accounted for around 25 to 30% of her duties and face to face work with children regardless of COVID-19 'was always a very, very small proportion.'
- 37 Ms Heller-Bhatt was asked about assessing a child where the child may be at risk from a biological parent or carer. It was put to Ms Heller-Bhatt that in those circumstances it would not be appropriate for the assessment to take place in the family or care environment. Ms Heller-Bhatt said such an assessment would be a five-minute procedure that could take place anywhere, in the home, office or park, and is usually done by a case manager.
- 38 The Director General put to Ms Heller-Bhatt that she would need to establish rapport with a child:

ANDRETICH, MR: But surely where a child's involved or someone involved you need to establish a rapport with that child or that person in providing the type of service you do. Is that not important to you?---No, because the child doesn't even have to be aware that we're here. I even do these assessments on Zoom where the parents just place me into the room, the - the child doesn't even know I'm there. They, ah, do the five minute procedure and, ah, yeah, and it's filmed via Zoom.

- 39 Ms Heller-Bhatt would not agree in cross-examination that if the Senior Clinical Consultant said to her that she needs Ms Heller-Bhatt to do a 'face to face assessment on this person' that Ms Heller-Bhatt would do it:

---Not necessarily.

You'd refuse to?---Ah, as a psychologist first and foremost my duty is, um, ah, my duty is to abide by my ethical code of - of psychologists and we are supposed to be working within our field of expertise and competence. Um, and that is very clear, that's always been very clear between Julia White and us psychologists, that we, ah, discuss any referral, ah, that, um, has been made to us. Ah, anything where we don't feel confident, ah, or competent, um, will be referred to either a colleague within the department or, ah, to external psychologist services.

So you'd refuse if she said to you "I've assessed this case, I want you to go out and do it this way". You would say "I'm not prepared to do it"?---Ah, Julia would not even make such a, ah, request. Ah, she would - she would, um, ask me if I were, um, willing to take on a client but she wouldn't - ah, she wouldn't request it the way you just - - -

But you could be. You could be directed as part of your duties to do that?---I don't know if that is even the case, Mr Andretich, I've never had a situation like that.

EMMANUEL C: Well, I mean Mr Andretich is putting it to you that your employer could have directed you to provide services in accordance with your JDF face to face, that's the proposition he's putting to you. I know you're saying, well, it wouldn't have happened. He's saying, well, it could have happened, your employer is able to do that, isn't your employer?---It's tricky to give you a yes or no answer because a psychologist first and foremost we have to abide by our code of ethics. So I - I - according to my code of ethics I am only supposed to be engaging with clients within my field of expertise.

Just so that I understand are you saying that you're not competent and confident to interact with clients face to face?---I am absolutely depending on the client presentation. If they, for example, if - if it was a client presentation that I have no expertise around at all and it's really pertinent that (indistinct 12.29.58) this person (indistinct 12.30.01) psychologist, (indistinct 12.30.02), psychologist. Sorry, with a specialised psychologist is what I'm going to say it would be against, ah, the benefit of my client, the best interests of my client for me to engage with them with that.

- 40 While Ms Heller-Bhatt would not agree that where it is necessary to see someone face to face then she is obligated to do so, she agreed that she had the skills and qualifications to see clients face to face. Ms Heller-Bhatt agreed that it would be an offence for her to come on to the premises of her workplace if she was not vaccinated. Ms Heller-Bhatt would not agree that she generally disagrees with vaccinations.

Impact of dismissal

- 41 Ms Heller-Bhatt spoke about the psychological, emotional and financial distress she experienced. A single mother with two children, her family has been adversely impacted by her dismissal. Further, Ms Heller-Bhatt says that when she was stood down without pay during the disciplinary process and the Director General prevented her from having paid employment on days she did not work for the Department.

Ms Fox' evidence

- 42 Ms Fox gave evidence for Ms Heller-Bhatt. She is a clinical and counselling psychologist with many years of experience. She qualified and practised in South Africa until 2009. Ms Fox has a small private telehealth practice. She does not work in child protection, see young children and has not practised child psychology in Australia. Ms Fox gave evidence about the benefits of using telehealth to deliver assessments and therapeutic interventions. Ms Fox said that the federal government and AHPRA have endorsed the use of telehealth. In cross-examination Ms Fox agreed that some practitioners would prefer to work with clients face to face.

Ms Cresdee's evidence

- 43 Ms Cresdee gave evidence for Ms Heller-Bhatt. She started work for the Department as an Education Officer in the Great Southern District from April 2020. She used to consult with Ms Heller-Bhatt about educational issues for children in the Department's care. Ms Cresdee gave evidence that she attended a meeting with Ms Collard as Ms Heller-Bhatt's support person. She said Ms Heller-Bhatt was very respectful and professional in the meeting but did not get the answers she was seeking from Ms Collard, who ended the meeting after 15 minutes.
- 44 Ms Cresdee gave evidence that her dealings with Ms Heller-Bhatt at work were almost exclusively by MS Teams or phone. She said that liaising in that way did not impede their work. Ms Cresdee said she understood that Ms Heller-Bhatt worked remotely with the Katanning and Manjimup districts from April 2020.
- 45 In cross-examination Ms Cresdee confirmed that Ms Heller-Bhatt used the therapy room at the Albany Office but then said she was not in a position to observe what Ms Heller-Bhatt did. She agreed she was not in a position to say anything about what Ms Heller-Bhatt's work other than as it related to Ms Cresdee's role as education officer. Ms Cresdee agreed that the focus of her examination was about the convenience of communicating remotely with Ms Heller-Bhatt.
- 46 Ms Cresdee said she is quite new to the role at the Department. She said 'I always heard that, um, if there was going to be therapy that there just wasn't the capacity in the office for any of our psychologists to work - very rarely with children, that they - it was outsourced.' She then said that she did not know whether Ms Heller-Bhatt did any direct therapy at the Department premises. In re-examination Ms Cresdee said that Ms Heller-Bhatt had never told her that it is never appropriate to therapeutically engage directly with children.

Department's case

- 47 Ms Collard and Mr Cohen gave evidence for the Department.

Ms Collard's evidence

- 48 Ms Collard has worked for the Department for 20 years and been in an executive role for the past two years. When Ms Collard was District Director of the Great Southern District from July 2021 until January 2022, Ms Heller-Bhatt reported to her. Ms Collard had overarching responsibility for casework, operational components and responsibility for all decisions for the district. Ms Julia White was responsible for Ms Heller-Bhatt's clinical supervision and support. In the event of a difference of opinion between Ms White and Ms Collard, Ms Collard would prevail.
- 49 Ms Collard gave evidence that she had worked in child protection for 20 years and been involved in all the work psychologists would be involved in. She is aware of Ms Heller-Bhatt's JDF and what was required of her. Ms Collard said:

And what did you see her role to be?---Um, a psychologist in the district, um, as one, um, like Jessica, um, would be responsible for providing consultation to district staff. Um, to support all of the, um, cases that might be open, so whether that's a child in care or a new investigation that might be open, intensive family support services. Ah, so they could be consultation on a whole range of matters whether it was, um, trauma, um, that the child was exhibiting, care or support

that the carer was, um, maybe challenged with the child's behaviours. Um, consultation in relation to therapy, um, and/or additional support needs for the child, um, or family system. Um, there is an assessment component to the psych role, so, um, part of that could be, um, assessing the child's um - the child's needs to see whether or not any additional supports are required externally to the department and - any referrals that may need to be made. Um, doing some, um, attachment based type assessments. Um, it might be, um, observing the dynamics between a parent and a child, um, observing the dynamics between a carer and a child. Um, it could be providing, um, intervention to, um, children and families that, um, we have open in the department. So that could be providing one on one therapy for the child. Um, it could be providing one on one support to a carer. Um, it, ah, could be a parenting capacity assessment, for example, psychologists can undertake parenting capacity assessments.

So there's a broad range of psychological support - -?---Yeah.

- - for what the carers, parents and a child?---Yes, that's correct.

- 50 The effect of Ms Collard's evidence is that Ms Heller-Bhatt's role extended to providing direct face to face therapeutic intervention for children. Ms Collard's evidence was clear that the role of a psychologist is broader than just providing advice or consultation. If allocated, they are expected to provide therapy directly to children. In cross-examination Ms Collard said that the three main aspects to the psychologist role are consultation, assessment and intervention (including therapy). All three aspects are expected of any psychologist employed by the Department.
- 51 She confirmed that Ms Heller-Bhatt occasionally worked from home on an ad hoc basis. Ms Collard denied that Ms Heller-Bhatt had a formal work from home agreement. She said that if Ms Heller-Bhatt had made an application, she would have seen it, and she had not. Ms Collard would not agree in cross-examination that Ms Heller-Bhatt had made two successful applications to work from home on a regular basis. Ms Collard denied having approved Ms Heller-Bhatt's application by email to work from home two days per week for six months and said she did not recall any emails to that effect. Ms Collard denied that Ms Heller-Bhatt worked from home two days per week on a regular basis while Ms Collard was Acting District Director. Ms Collard insisted that she approved occasional ad hoc work from home arrangements for Ms Heller-Bhatt.
- 52 Ms Collard gave evidence about the Department's flexible work options policy and guidelines. Under the policy, an employee must be in the workplace more than 50% of the time. This is because of operational needs, connection and team work. No employee had an open-ended or permanent work from home arrangement. Further, employees in regional child protection offices are considered frontline service delivery workers, because they are responsible to the community. Anyone can come in to the district office and request services. As a frontline worker, Ms Heller-Bhatt's opportunity to work from home was limited.
- 53 Ms Collard gave evidence that an open-ended period to work from home, for example for as long as it might take for vaccination requirements to be relaxed, was not something that the Department could offer its employees. As frontline workers, psychologists need to be 'right there' to provide support to staff, children and clients. That cannot just be done on a 'virtual mechanism.' While Ms Collard agreed that some work is outsourced because of workload capacity, she said that it takes time to outsource and it may be necessary to provide face to face psychological services immediately. Outsourcing must be approved by the District Director and the Chief Psychologist. In cross-examination, Ms Collard would not agree that psychologists would determine whether matters were outsourced.
- 54 The effect of Ms Collard's evidence was that psychologists are employed to provide direct (in person) assessments and therapeutic intervention, including with children. Ms Collard disagreed that it was unnecessary for Ms Heller-Bhatt to work directly with children because that could be done by Ms Hobbs instead.
- 55 Ms Collard gave evidence that the therapy room at the Albany Office is used by the psychologists to do therapy and support children in a safe space.
- 56 Ms Collard gave evidence that she met with Ms Heller-Bhatt (with Ms Cresdee in support) around 8 November 2021. She sent an email to Ms Heller-Bhatt dated 5 November 2021 that summarised the interactions with Ms Heller-Bhatt in that relevant period. The effect of Ms Collard's evidence was that Ms Heller-Bhatt said her employer required her to be vaccinated, Ms Heller-Bhatt did not want to be vaccinated and she thought she could work entirely remotely.
- 57 In cross-examination Ms Collard agreed that she had not ever directed Ms Heller-Bhatt to engage therapeutically with a child but she said she had directed another psychologist to do so. Ms Collard denied in cross-examination that Ms Heller-Bhatt could perform all of her duties remotely by phone, Zoom or MS Teams. Her evidence was that there were many duties that Ms Heller-Bhatt could not perform remotely, including direct therapeutic interventions with children, in person parenting capacity assessments, face to face observations of parents or carers with children, attending the Albany Office, supporting carers one on one in their home or office and attending meetings outside the office at premises affected by mandates (for example schools and hospitals). The effect of Ms Collard's evidence was to the extent that those duties might be able to be done remotely, they are best done in person.
- 58 Ms Collard also said that clients in child protection are very vulnerable. Many do not have video or phone access to do virtual meetings. It may not be culturally appropriate to do a virtual video recording of an Aboriginal family, for example. Ms Collard agreed that the Department had bought phones for clients before but video communications with a client is not best practice. Ms Collard agreed that it would depend on the particular client.

Mr Cohen's evidence

- 59 Mr Cohen has been the Chief Psychologist at the Department of Communities for the past six years, working with at risk children and their family environments. Before that Mr Cohen worked for the Department for five years in residential and secure care, having worked for 27 years in private practice working with the Children's Court and Family Court.
- 60 As Chief Psychologist, Mr Cohen says that he is effectively the arbiter of clinical matters and practice for the Department. His evidence is that all psychologists working for the Department must do assessment, consultation and therapy. That is driven by

the requirement of a particular child. In the Great Southern District in particular, limited alternative practitioners mean that providing a child with a cognitive or neurological assessment is 'a fairly basic requirement for a psychologist to have in their kit', and requires a face to face assessment. Ms Heller-Bhatt put to Mr Cohen that she had not done a face to face assessment in five years. Mr Cohen said that the Department psychologists often have to do those assessments.

61 Mr Cohen gave evidence about the need for Department psychologists to have face to face contact with children:

ANDRETICH, MR: But are there some aspects of dealing with children in particular that direct face to face contact is the best and the only way to go?---Um, I - I think there are. Look, one of the difficulties is we need to realise that the child protection deals with a very difficult specific client group. The children are often highly traumatised, um, ah, parents are often under a great deal of strain and particularly for those who've suffered significant trauma and intergenerational trauma there is a large amount of distrust about the department. So to make any meaningful assessments or to achieve any level of therapeutic trust the biggest factor is - is often that initial meeting with the child. Um, for a lot of our children it's quite difficult even just to get them into a therapy room, so often the initial meeting may occur in the waiting room. Um, one of the difficulties that we've discovered, um, many years ago we had a group that was doing work for us in Kalgoorlie, ah, and a particular practitioner was extremely keen to do work, ah, just via iPads. Um, um, at that - this is now I'm talking about four or five years ago and which probably wasn't as prevalent and as accepted as it is now as in the post-COVID environment. Um, and what we discovered was we actually separated the groups into two as a bit of a inhouse experiment in which the first person in the first case one group the person went and saw the children three times and then shifted to screen therapy. And the other group he just went straight to screen therapy. The screen therapy group barely lasted more than a couple of sessions and the other group lasted significantly longer.

The other aspect to it is, and depending upon the situation of the children, is for a lot of the actual computer in and of itself can be quite a novelty and so that just completely distracts from there being any therapeutic development. So this is where the children are - we want them to actually actively participate with the psychologist obviously, yeah.

Are you saying that your preference is then face to face contact at least initially?---There needs to be often in many cases initial face to face contact with the children that we deal with because they have an inherent distrust of the department and - and often given their backgrounds an inherent distrust in adults per se.

62 Further:

ANDRETICH, MR: Look, I'll move on from that, Mr Cohen. The question really at the heart of all of this is - and asking your opinion is it possible or desirable that a person employed in a position such as Ms Heller-Bhatt has no contact other than remotely?---Well, the answer to both is no. And the answer - the reason for that is because a psychologist like any other tradesman has - has a bag full of tools. Um, just recording a child with a carer is one tool in the kit but given the difficulties and the challenges and the broad ranges of problems our children face we need a whole lot more than that and one of those is actually being in the room with the child. Because remember you're not only assessing the child, you're assessing the carer. Um, and so whilst the - I understand that the recording is very, very useful it is also very useful for the psychologist who's doing the assessing to be doing the recording because it's quite important that the person that's doing the recording minimises their effect on the situation in terms of the carer and the child because they're a 3rd party in the room that can make things even more complicated. So the answer is no. A psychologist who works at the Department of Communities needs to be able to spend time face to face with carers and to work actively with children as and when required in a room to, um, include - so to get them to participate in therapy.

Well, Ms Heller-Bhatt says, "Well, that's all that I do and that's all that I'm prepared to do because that's what I feel, you know, I'm best at"?---Mm.

As a Chief Psychologist so what's your view on that?---Um, my - my view is that psychologists are employed by the department under the three pillars, they are expected to undertake a broad range of, um, assessments, um, therapy and - and consultations. Um, I think one of the aspects of all three of those that we need to appreciate is that the role of the psychologist is not only doing those three things but at a broad extent is how they do those things. And a lot of the people that we see are highly anxious, have a great deal of distrust et cetera. Psychologists are very skilled at developing relationships and how you model, how you deal with people in these situations is important, not only for the client, not only for the child, but also for the broader Department of Communities staff. And when you have case managers and staff in with you and you are working with these people you're actually modelling to them how they interact with the children, how they interact with the carers, and this is just as important in terms of getting our job done as a - as a broader child protection agency.

EMMANUEL C: And is the implication of what you're saying that that couldn't be done simply by remote means?---I - it's much more difficult to do it remotely. You know, I think - I think, you know, I mean one of the - one of the things that we all understand by the use of remote is what's lost. What's lost is the gaining of, um, trust and introduction at the beginning of meeting. When people walk into a room, ah, and they make eye contact and they - um, and what discussion may happen at the end that - that encourages people to, ah, feel as though they've made a relationship with the psychologist or indeed with the case manager and are willing to come back and - and have a more open discussion at some time in the future. These things are lost when we have a 8.30 till 10.30 booking on Skype in which we all go down and everyone sits around the table, we rocket through what's occurred, and then everybody leaves and there's no, ah, opportunity for familiarity to be able to be, um, produced. And one of the things about psychologists is their capacity to not only do that but also to model that for the staff as well.

63 Mr Cohen gave evidence about the importance of using the therapy room at the Albany Office in the context of the challenges of working with traumatised children. The effect of his evidence was that interacting remotely with vulnerable clients, particularly children, is often unsuitable.

- 64 Mr Cohen's unequivocal evidence was that the role done by Ms Heller-Bhatt cannot be completely performed remotely. In cross-examination Mr Cohen said that the main part of a district psychologist's work is a combination of consultation and therapy. He said that therapeutic interventions could be with a carer, a child or children. Mr Cohen explained that for reasons related to matters that go to court and conflicts of interest, ideally the Department tries to have external psychologists do the assessment and internal psychologists do the therapy. Sometimes both the assessment and therapy are done by internal psychologists.
- 65 In cross-examination Mr Cohen said that research about the efficacy of the use of telehealth by psychologists does not take into account the challenges of working with children, carers and parents with highly traumatised backgrounds in child protection, which is a very special set of circumstances.
- 66 Mr Cohen agreed in cross-examination that a psychologist should only provide services within the boundaries of their professional competence. He gave evidence that if a psychologist was regularly asked to do things they had no training in, the client would likely be referred to an external assessor who specialised in the area until the psychologist had received the necessary training. Mr Cohen maintained that there are core competencies for psychologists who work in child protection, including cognitive behavioural therapy with children. Psychologists employed by the public service are expected to be able to perform a broad range of duties to meet the needs of clients. Even if Ms Heller-Bhatt's training and expertise in attachment-based framework would skew her approach toward those kinds of assessments, it would not mean that she can operate in that area all the time, or that those were the only clients she would ever see.
- 67 Mr Cohen gave evidence that a psychologist and registrar currently support the Great Southern district by working remotely until the end of the year.
- 68 In re-examination Mr Cohen said 'So that ability for psychologists to work face to face with traumatised is still a core requirement for them to work for the department.' He said that is an expectation he has of every psychologist who works within the Department. The effect of his evidence is that working face to face with clients is a requirement of Ms Heller-Bhatt's role.

Ms Heller-Bhatt's submissions

- 69 At the hearing Ms Heller-Bhatt confirmed that she does not challenge the validity of any of the CHO Directions. She argues that the Employer Direction was not a lawful order because it was unreasonable.
- 70 Ms Heller-Bhatt argues that she has conditionally accepted the COVID-19 vaccine. Her conditional acceptance is set out in three 'conditional acceptance notices' that she sent to the Director General, which set out 10 conditions including that she be given: proof that she is bound by law [to be vaccinated], proof the COVID-19 vaccine is '100% safe and effective', evidence of the risk assessment done by the Director General, an agreement that the Department be liable for up to \$100,000 for any adverse reactions she has to the vaccine and up to \$20,000,000 for death or total and permanent disability caused by the vaccine, information about the Department's right to 'force civil conscription' on her, written evidence that shows the Department 'is not violating the Nuremberg Code' and an affidavit from the Director General with evidence of each of these conditions.
- 71 Ms Heller-Bhatt says the Director General refused these conditions and her offer to do her job remotely by MS Teams and phone.
- 72 Ms Heller-Bhatt submits there was no requirement for any vaccinations in her employment contract. She says that for consent to be valid it must be given voluntarily in the absence of undue pressure, coercion or manipulation. She relies on Dean DP's reasoning in *Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCFB 6015 (*Kimber*) and says that she understands the vaccines are experimental and until she is 'provided with crucial information regarding the vaccines' safety and other pertinent aspects related to the drugs [she does] not consent to have them'.
- 73 Ms Heller-Bhatt argues that the Director General's decision to dismiss her was unfair. She says that she did not need to be vaccinated to perform her role, because she can perform most of her role remotely and has done at times throughout her employment with the Department. It is safe and productive for her to do so. While psychologists are generally expected to attend to all duties of their position, they do so within their scope of expertise. Where a District Psychologist lacks capacity or skills to attend to a request, Psychology Services in Perth are consulted and external referrals can be made. Ms Heller-Bhatt says 'there is no need or actual circumstance in which a psychologist always attends to all work duties' and if a child needs face-to-face contact with Psychology Services, this can be done by Ms Heller-Bhatt's colleague, Ms Hobbs.
- 74 Ms Heller-Bhatt says that she did not feel supported by the Department during the disciplinary process despite her unblemished record. She experienced psychological, emotional and financial distress throughout the process and since she was dismissed. The Department did not act according to its purported values of respect, empathy and accountability. She asks the Board to reinstate her to her position, and allow her to work entirely from home.

Director General's submissions

- 75 The Director General says that Ms Heller-Bhatt accepts that the CHO Directions meant that she needed to be vaccinated from 1 December 2021 to enter her place of work.
- 76 In its amended *Form 4 – Response (General)*, the Director General said it conceded that a plain reading of its email dated 19 November 2021 to Ms Heller-Bhatt reveals that Ms Heller-Bhatt was not actually directed by that email to become vaccinated. However, Ms Heller-Bhatt has confirmed that she understood that she was directed to be vaccinated and provide proof of vaccination or a valid exemption. Ms Heller-Bhatt did not comply with the Employer Direction.
- 77 While Ms Heller-Bhatt argues that she could have worked all her hours from home for an open-ended period, the Director General says that he was not required to allow her to do so. No one else was allowed to do that. Ms Collard's evidence, as Ms Heller-Bhatt's direct line manager, is that at most an employee can be permitted to work from home for two

days per week for six months. The Director General says that psychologists provide a full range of services and face to face meetings with vulnerable children are preferred. Ms Heller-Bhatt's duties were not limited to what she preferred to do. Her JDF does not limit Ms Heller-Bhatt to only working with parents or caregivers, or providing remote services. The Director General says that the evidence shows that Ms Heller-Bhatt's role requires her direct contact where necessary and her presence in the workplace which is a community care facility. It is up to her employer, not Ms Heller-Bhatt, whether or not particular contact should be done remotely or in person.

- 78 The Director General argues that across the public sector, where employees were covered by public health orders that required them to be vaccinated in order to attend work, they were subject to the same direction as Ms Heller-Bhatt, and the same penalty for failing to obey that direction.
- 79 While the letter dated 19 November 2021 could have been clearer, Ms Heller-Bhatt understood that her employer required her to be vaccinated if she wanted to work. The effect of the Employer Direction was not that an employee could be forcibly vaccinated, as suggested by Ms Heller-Bhatt. The legislation and the direction did not require Ms Heller-Bhatt to be vaccinated, but if she wanted to work as a psychologist in the Albany Office then she needed to be vaccinated or exempt. She was neither.
- 80 The Director General says that Australian Privacy Principle 3.3A permits collection of personal information with consent and there was no coercion to rob Ms Heller-Bhatt of the capacity to make a decision. When an employer insists on vaccination to comply with the law, it does not offend the notion of bodily integrity. An occupational safety and health risk assessment is not relevant in circumstances where the CHO has issued public health mandates of the type that apply in this matter.
- 81 The Director General says that the Employer Direction was reasonable and lawful because it reflected the law that applied to psychologists working for the Department: *Kimber*.
- 82 The Director General submits that the Board could not reinstate Ms Heller-Bhatt if it is satisfied that Ms Heller-Bhatt cannot work in a way required by the employer and within the confines of her JDF. To adjust the decision by ordering the Director General to employ Ms Heller-Bhatt and allow her to perform her duties remotely would be giving her a new contract: *Gee v WA Country Health Services* [2022] WAIRC 00224.

Consideration

- 83 An appeal of this type is heard de novo: *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728.
- 84 Given Ms Heller-Bhatt denies that she disobeyed or disregarded a lawful order, the Board must decide, based on the evidence and arguments before it, whether:
- a. the Employer Direction was a reasonable lawful order;
 - b. Ms Heller-Bhatt committed a breach of discipline by disobeying or disregarding a lawful order; and
 - c. the Board should adjust the decision to dismiss.

Was the Employer Direction a reasonable lawful order?

- 85 It is not in dispute that CHO directions that are in force stand as valid law. The Board cannot ignore or overturn the effect of CHO directions.
- 86 The parties agree that at the time of her dismissal, the CHO Directions prevented Ms Heller-Bhatt from attending her workplace. Further, at the time of the hearing, the *Primary Health Care Worker (Restrictions on Access) Directions (No 3)* prevented Ms Heller-Bhatt from attending her workplace. The *Primary Health Care Worker (Restrictions on Access) Directions (No 4)* replaced those directions and are currently in force. In the Board's view it is uncontroversial that they have the same effect.
- 87 The subject heading of the Department's email dated 19 November 2021 was 'Department of Communities: Direction to be vaccinated against COVID-19'.
- 88 Of particular relevance it said:

Dear Mrs Heller-Bhatt

Employer Direction: Requirement to be vaccinated against COVID-19 and provide evidence of vaccination

You are receiving this lawful direction because your position, Psychologist, has as being affected by the Community Care Services Worker (Restrictions on Access) Directions (CCS Worker Directions).

...

Direction to be vaccinated against COVID-19 and to provide vaccination status

You are directed:

- to declare whether you are unvaccinated, partially vaccinated, or fully vaccinated against COVID-19 in accordance with the Schedule to this direction on the COVID-19 Vaccination Status Portal before 1 December 2021
- if you are partially or fully vaccinated against COVID-19, to provide evidence of your vaccination status in accordance with the Schedule to this direction;
- if you are unvaccinated against COVID-19, to declare if you intend to be partially vaccinated against COVID-19 before 1 December 2021 and fully vaccinated against COVID-19 before 31 December 2021; and

- if you are exempt from a requirement to be vaccinated against COVID-19, to provide evidence of the exemption in accordance with the Schedule to this direction.

Failure to comply with this lawful direction is a breach of discipline which may result in disciplinary action. The outcomes of any disciplinary action can range from counselling to dismissal.

- 89 The Board notes the Director General's concession set out at [76]. In the Board's view, the Department's email dated 19 November 2021 was poorly worded. But the Board is satisfied in the context of the extensive correspondence between the parties in this matter that Ms Heller-Bhatt was given the Employer Direction.
- 90 It is apparent from the two headings within the Department's email dated 19 November 2021, earlier correspondence between the parties and Ms Heller-Bhatt's central complaint, which is that she was dismissed because she is not vaccinated, that Ms Heller-Bhatt understood that her employer required her to be vaccinated or exempt in order to remain employed.
- 91 To her credit, Ms Heller-Bhatt did not argue that the Employer Direction was limited to a direction to declare whether she was unvaccinated, partially vaccinated or fully vaccinated. Her evidence was that she understood that she was directed to be vaccinated and provide evidence of vaccination or a valid exemption. That evidence is supported by at least five of Ms Heller-Bhatt's letters and emails to the Director General dated 25 October 2021, 15 November 2021, 17 November 2021 and 22 November 2021 where she reiterates as much.
- 92 The Board finds that the Director General directed Ms Heller-Bhatt to be vaccinated and provide evidence of vaccination or an exemption by 1 December 2021. The Board is satisfied that Ms Heller-Bhatt understood that her employer required her to be vaccinated and provide evidence of vaccination or an exemption by 1 December 2021. Ms Heller-Bhatt's purported 'conditional acceptance' of the vaccination does not assist her. The Board considers that the conditions Ms Heller-Bhatt put on her acceptance of the vaccine were not conditions any employer was likely to have been able to fulfil. In any event, we consider that the conditions were wholly unreasonable in the circumstances.
- 93 It is trite that an employee has a duty to obey an employer's lawful and reasonable orders (see *R v Darling Island Stevedoring and Ligherage Company Limited* (1938) 60 CLR 601 at 621; *Adami v Maison de Luxe Limited* (1924) 35 CLR 143 at 151; *McManus v Scott-Charlton* (1996) 70 FCR 16 at 21AD (*McManus*)). Disobeying or disregarding a reasonable lawful order is a serious matter. Reasonableness is a question of fact and balance/degree: *McManus* at 30C.
- 94 In his recent decision of *Finlay v Commissioner of Police as the Chief Executive Officer of the Department known as the Police Service (Department of Police)* [2022] WASC 272 (*Finlay*), Justice Allanson set out the law in relation to lawful orders at [21]:

It is a fundamental term implied by law into all employment contracts that employees are contractually obliged to follow the lawful and reasonable directions of their employer. At common law, an employee's obligation of obedience is to lawful commands - commands which involve no illegality, which fall within the scope of the contract of service, and are reasonable: *R v Darling Island Stevedoring and Ligherage Co; Ex parte Halliday v Sullivan* (1938) 60 CLR 601, 621 - 622. Reasonableness is not a separate requirement, but is the standard or test by which the common law determines whether an order is lawful: *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2018] FCAFC 77; (2018) 262 FCR 527, 564; *McManus v Scott-Charlton* (1996) 70 FCR 16, 21. Reasonableness is not determined in a vacuum, but rather by reference to 'the nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship...': *R v Darling Island Stevedoring and Ligherage*, 622.

- 95 His Honour held at [23]:

The authority of the employing authority under the *Public Sector Management Act* to issue lawful orders should be understood as having the same content of the common law rule, and to authorise orders which involve no illegality, which fall within the scope of the contract of service, and are reasonable.

The Board respectfully adopts his Honour's reasoning and applies it in this matter.

- 96 The Board must view Ms Heller-Bhatt's conduct in the context of the employment relationship as a whole, considering matters including the employment contract, her JDF, the effect of the CHO Directions, the nature of the Department's 'business' and the position held by Ms Heller-Bhatt.
- 97 The Board accepts the evidence given by the witnesses in this matter. While there were some differences in relation to matters such as whether Ms Heller-Bhatt had formal approval to work from home on a regular basis, those differences did not go to matters that determine the outcome in this case. Issues of credibility do not arise. The Board accepts that the witnesses gave evidence truthfully and to the best of their recollection.
- 98 On the basis of the evidence before us, we find:
- the Department has a responsibility to provide psychological services and support to vulnerable children, family members and carers in the Great Southern District. In part the Department achieves this by engaging suitably qualified psychologists to provide the necessary services and support;
 - Ms Heller-Bhatt's principal place of work was the Albany Office;
 - Ms Heller-Bhatt was a frontline worker employed to provide services to clients, including direct, face to face therapeutic intervention and engagement; and
 - face to face therapeutic intervention was provided at the Albany Office.
- 99 The Albany Office was covered by the *Community Care Services Worker (Restrictions on Access) Directions*. The effect of that CHO direction was that a psychologist could only attend the Albany Office if they were vaccinated.

100 Given that CHO direction, an employer direction requiring employees to be vaccinated or provide evidence of exemption was reasonably required in order for the Director General to recruit and maintain a workforce that could lawfully carry out the Department's statutory obligations.

101 Taking into account Ms Heller-Bhatt's employment contract, position, JDF, the nature of the Department's 'business' and the effect of the CHO Directions, the Board finds that the Employer Direction involved no illegality, fell within the scope of the contract of service and was reasonable in the circumstances. The Employer Direction was a reasonable lawful order.

Did Ms Heller-Bhatt disobey or disregard a lawful order?

102 Ms Heller-Bhatt was aware that her employment was at risk if she did not comply with the Employer Direction.

103 Ms Heller-Bhatt did not comply with the Employer Direction because she was not vaccinated and did not provide evidence of vaccination or an exemption by 1 December 2021.

104 Accordingly, the Board finds that that Ms Heller-Bhatt disobeyed or disregarded a lawful order. She committed a breach of discipline.

Should the Board adjust the decision to dismiss?

105 Contrary to Ms Heller-Bhatt's submission, the Employer Direction did not infringe Ms Heller-Bhatt's right to bodily integrity. It did not authorise involuntary vaccination or any act that interfered with her body without consent. Ms Heller-Bhatt was not physically forced to receive the vaccination. She could choose not to receive it, which she did. That choice had consequences for her employment, but her bodily integrity was not violated. The Board agrees with the reasoning of Allanson J in *Finlay* at [36]:

An employer seeking to manage their statutory responsibilities for health and safety, and to implement a proper response to the risks of the pandemic for the workforce and others who may be affected, may reasonably issue an order requiring vaccination for employees. While that may result in dismissal for those who choose not to comply, that is not itself an abrogation of the right of bodily integrity and is not itself reason to hold the order unlawful.

106 The dissenting judgment of Dean DP in *Kimber* does not assist Ms Heller-Bhatt. The Supreme Court of New South Wales dealt with that dissenting judgment in *Kassam and Others v Hazzard and Others* [2021] NSWSC 1320 from [65] – [69]:

[65] Given the very different jurisdictions being exercised by the Fair Work Commission and this Court, I would not ordinarily address the reasoning in their decisions (and I doubt they would address the reasoning in mine). However, as the Henry plaintiffs sought to rely on the reasoning it is necessary to record why that judgment is of no assistance.

[66] First, the relevant parts of the decision relied on by the Henry plaintiffs do not address the case law concerning consent to a medical treatment.

[67] Second, the passages relied on and passages to similar effect throughout the judgment appear to contain assertions about the efficacy and safety of COVID-19 vaccines and other aspects of the public health response to COVID-19 that were not reflected in the evidence that I found persuasive in this case and as far as I can ascertain were not the subject of evidence in that case.

[68] Third, elsewhere in her reasons, the Deputy President considered it necessary to opine on matters affecting either the validity or the appropriateness of making the Aged Care Order under the PHA (at [147] to [173]). The function of determining its validity is for this Court to discharge and the function of determining whether it should have been made is for the political process. The Fair Work Commission has neither function.

[69] Fourth, the Deputy President's judgment concludes with a number of clarion calls imploring "all Australians" to do things such as "vigorously oppose the introduction of a system or (sic) medical apartheid and segregation" (at [182]) and "vigorously oppose the ongoing censorship of any views that question the current policies regarding COVID" (at [183]). Political pamphlets have their place but I doubt that the Fair Work Commission is one of them. They are not authorities for legal propositions.

107 Ms Heller-Bhatt argues that it was unfair for the Director General to dismiss her because she could have worked entirely from home. She was not able to produce any documentary evidence to support a finding that the Department had approved Ms Heller-Bhatt to work from home other than on an occasional ad hoc basis. But in any event, the Board does not accept Ms Heller-Bhatt's argument that it was unfair for the Director General to dismiss her because she could have worked entirely from home.

108 Based on the agreed facts, documentary evidence and witness evidence, the Board finds that Ms Heller-Bhatt's key duties involved consultation, assessment and intervention. We accept the evidence of Ms Collard and Mr Cohen, which was undisturbed, that Ms Heller-Bhatt's duties included direct therapeutic interventions with children, in person parenting capacity assessments, face to face observations of parents or carers with children, attending the Albany Office, supporting carers one on one in their home or office and attending meetings outside the office at premises affected by mandates (for example schools and hospitals). In this case, failing to comply with the requirement to be vaccinated or provide a valid exemption meant that Ms Heller-Bhatt was unable to perform some of those key duties that she was engaged to perform. We find that because Ms Heller-Bhatt was not vaccinated or exempt, Ms Heller-Bhatt could not perform all of the duties of her role in accordance with her engagement. We consider that Ms Heller-Bhatt's conduct in failing to comply with the Employer Direction was inconsistent with the continuation of her employment.

109 In the circumstances, the Board does not consider that the decision to dismiss Ms Heller-Bhatt on 30 December 2021 was harsh, oppressive or unjust. It was not an abuse of the employer's right to dismiss in the sense discussed in *Ronald David Miles & Ors t/a Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385.

- 110 Even if the Board came to a different view, and found that the dismissal was harsh, oppressive or unjust (for example, because Ms Heller-Bhatt did not disobey or disregard a lawful order), we do not consider that we should adjust the decision to dismiss because at the time of the dismissal:
- Ms Heller-Bhatt was unable to provide service to the Director General in accordance with her contract of employment, for the reasons set out at [108];
 - at least three CHO directions were in force and the Board considers that their effect meant that Ms Heller-Bhatt could not perform all of her duties; and
 - it was unknown when (or if) those CHO directions would be lifted.
- 111 In this case, failing to comply with the Employer Direction was incompatible with Ms Heller-Bhatt's obligation as an employee to provide service. It meant that she could not perform all of the duties she was engaged to perform.
- 112 While Ms Heller-Bhatt argues that she could have worked (and could still work) entirely from home, given Ms Heller-Bhatt cannot attend her workplace and cannot perform all of her duties, we are not persuaded that the Board could or should adjust an employer's decision by, in effect, formulating new contractual terms.
- 113 The Board considers that an order reinstating Ms Heller-Bhatt to work entirely remotely and perform no face to face client services is outside of the scope of the Board's power. As held in *Director General, Department of Biodiversity, Conservation and Attractions v Cosentino* [2022] WASC 306 by Allanson J at [37]:
- On an appeal before the Board, it has the power to hear and determine the appeal and adjust 'all such matters' referred to in s 80I(1)(b); that is, any decision of (sic) finding referred to in s 78(1)(b) of the *Public Sector Management Act*.
- Here the matters referred include the finding of a breach of discipline and the decision to take disciplinary action in the form of dismissal. Allowing Ms Heller-Bhatt to work entirely remotely and perform no face to face client services falls outside of those matters. It is not a matter referred to in s 80I(1)(b) of the IR Act. For the Board to make such an order would be beyond power and amount to jurisdictional error.
- 114 Further, the Board considers that even if an order reinstating Ms Heller-Bhatt to work entirely remotely and perform no face to face client services was within the Board's power, such an order would be inconsistent with the Board's obligations under s 26(1)(a) of the IR Act. Such an order would not be in accordance with equity, good conscience, and the substantial merits of the case in circumstances where Ms Heller-Bhatt cannot attend her workplace and cannot perform all of her duties.

Conclusion

- 115 This is not a case about substandard performance. Ms Heller-Bhatt presented as a passionate psychologist who is committed to performing the valuable work of assisting vulnerable families in need. However, for the above reasons, the Board must order that application PSAB 6 of 2022 be dismissed.

2022 WAIRC 00720

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 30 DECEMBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JESSICA HELLER-BHATT

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER T EMMANUEL - CHAIRPERSON
 MR M ABRAHAMSON - BOARD MEMBER
 MR S DANE - BOARD MEMBER

DATE

FRIDAY, 14 OCTOBER 2022

FILE NO

PSAB 6 OF 2022

CITATION NO.

2022 WAIRC 00720

Result	Application dismissed
Representation	
Appellant	On her own behalf
Respondent	Mr R Andretich (of counsel)

Order

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 by the *Industrial Relations Act 1979* (WA), orders –
 THAT application PSAB 6 of 2022 is dismissed.

(Sgd.) T EMMANUEL,
 Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2022 WAIRC 00764

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 29 MARCH 2022

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MARGARET MEO	APPELLANT
	-v-	
	DEPARTMENT OF COMMUNITIES	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIR MR G BROWN - BOARD MEMBER MR N CINQUINA - BOARD MEMBER	
DATE	TUESDAY, 1 NOVEMBER 2022	
FILE NO	PSAB 54 OF 2022	
CITATION NO.	2022 WAIRC 00764	

Result	Appeal accepted out of time
Representation	
Appellant	Ms M Meo
Respondent	Mr D Anderson (of counsel)

Order

HAVING heard from Ms Meo on her own behalf and Mr Anderson (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 orders:

THAT the referral of this herein appeal, be and is, hereby accepted out of time.

(Sgd.) T B WALKINGTON,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2022 WAIRC 00765

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 29 MARCH 2022

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MARGARET MEO	APPELLANT
	-v-	
	DEPARTMENT OF COMMUNITIES	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON - CHAIR MR G BROWN - BOARD MEMBER MR N CINQUINA - BOARD MEMBER	
DATE	TUESDAY, 1 NOVEMBER 2022	
FILE NO.	PSAB 54 OF 2022	
CITATION NO.	2022 WAIRC 00765	

Result	Direction issued
Representation	
Appellant	Ms M Meo
Respondent	Mr D Anderson (of counsel)

Direction

WHEREAS the Board convened a Directions Hearing on 28 October 2022 and heard from the appellant on her own behalf and Mr Anderson on behalf of the respondent;

AND WHEREAS at that Directions Hearing the respondent indicated it intends to file an application seeking that this herein appeal be dismissed pursuant to s 27(1) of the *Industrial Relations Act 1979* (WA);

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

1. THAT the respondent file and serve its foreshadowed application pursuant to 27(1) of the *Industrial Relations Act 1979* (WA) or confirm by email it does not intend to make such an application by no later than 11 November 2022; and
2. 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 00776

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 DECEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2022 WAIRC 00776
CORAM	:	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIRPERSON MS J COATES - BOARD MEMBER Ms J AUERBACH - BOARD MEMBER
HEARD	:	FRIDAY, 22 JULY 2022, WEDNESDAY, 25 MAY 2022, FRIDAY, 18 FEBRUARY 2022, THURSDAY, 17 FEBRUARY 2022
DELIVERED	:	TUESDAY, 8 NOVEMBER 2022
FILE NO.	:	PSAB 1 OF 2021
BETWEEN	:	MICHAEL JOHN MILLWARD Appellant AND NORTH METROPOLITAN HEALTH SERVICE Respondent

CatchWords	:	Public Service Appeal Board – Breaches of discipline – Negligence and carelessness in the performance of his functions – Misconduct – Dismissal – Meaning of ‘negligence’, ‘careless’ and ‘function’ – Dismissal a proportionate penalty – Appeal dismissed
Legislation	:	<i>Health Services Act 2016</i> (WA): s 161(c), s 161(d), s 163(3)(b)(i) & s 172(2) <i>Industrial Relations Act 1979</i> (WA): s 80I(1) <i>Public Sector Management Act 1994</i> (WA): s 80(d) <i>Interpretation Act 1984</i> (WA): s 5
Result	:	Appeal dismissed
Representation:		
Appellant	:	Ms F Stanton (of counsel)
Respondent	:	Mr J Carroll (of counsel)

Cases referred to in reasons:

Blyth v Birmingham Waterworks Co (1856) 11 Ex 784

Briginshaw v Briginshaw (1938) 60 CLR 336

Civil Service Association of Western Australia Inc v Director General of Department for Community Development [2002] WASCA 241

Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728

NU v NSW Secretary of Family and Community Services [2017] NSWCA 221; (2017) 95 NSWLR 577

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

Titelius v Director General of the Department of Justice [2019] WAIRC 00195

Titelius v Public Service Appeal Board [1999] WASCA 19; (1999) 21 WAR 201

Reasons for Decision

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

- 2 Professor Millward was employed by North Metropolitan Health Service (**Health Service**) as a Consultant Medical Oncologist at Sir Charles Gairdner Hospital (**SCGH**) from about August 2003.
- 3 The Health Service found that Professor Millward committed two breaches of discipline related to the overtime claimed by and engagement as a contractor of another Health Service employee. The Health Service dismissed Professor Millward for those breaches of discipline.
- 4 Professor Millward appeals against his dismissal.

What the Board must decide

- 5 The Board must decide whether to adjust the Health Service's decision to dismiss Professor Millward.
- 6 This involves deciding whether:
 - a. the allegations are substantiated; and if so,
 - b. dismissal is a proportionate penalty.

Legal framework and principles

- 7 This is an appeal under s 172(2) of the *Health Services Act 2016* (WA) (**HS Act**) against the Health Service's decision to dismiss Professor Millward under s 163(3)(b)(i) of the HS Act after the Health Service found that Professor Millward committed breaches of discipline under s 161(c) and s 161(d) of the HS Act. Specifically, the Health Service found that Professor Millward committed an act of misconduct and was negligent or careless in the performance of his functions.
- 8 Section 80(I)(1) of the *Industrial Relations Act 1979* (WA) provides that the Board may 'adjust' the decision appealed.
- 9 It is common ground that the hearing is de novo: *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728. The Board must consider the appeal based on the evidence before it and may substitute its view for that of the Health Service.
- 10 The nature of the allegations in this matter, in particular allegations about dishonesty, a lack of fidelity or corruption, mean that the Board must apply the *Briginshaw* standard set out by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (**Briginshaw**) at 361-362:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

- 11 More recently, in *NU v NSW Secretary of Family and Community Services* [2017] NSWCA 221; (2017) 95 NSWLR 577, the Court of Appeal in New South Wales (Beazley P, McColl JA and Schmidt J agreeing) held at [53]:

The *Briginshaw* standard, like the principle in *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8, is often misunderstood. Correctly applied, as the Court stated in *Re Sophie* at [50]:

The requirement stated in *Briginshaw v Briginshaw*, that there should be clear and cogent proof of serious allegations, does not change the standard of proof, but merely reflects the perception that members of the community do not ordinarily engage in serious misconduct: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, per Mason CJ, Brennan, Deane and Gaudron JJ; *Palmer v Dolman* [2005] NSWCA 361 at [41]-[47] per Ipp JA (with whom Tobias and Basten JJA agreed).

I accept that where there is an allegation such as of sexual abuse in circumstances such as arise in this case, it is appropriate and necessary to apply the *Briginshaw* standard, as properly understood. Indeed it is generally accepted that there is no underlying conceptual difference in the application of the *Briginshaw* standard and the *Evidence Act*, s 140.

- 12 The onus is on the Health Service to establish that the misconduct occurred: *Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266 at 2266 (**Raxworthy**).
- 13 The Board must decide whether Professor Millward engaged in the alleged conduct, and if so, whether in the circumstances dismissal was a proportionate penalty.

The allegations

- 14 There is some complexity and a long history to the disciplinary process in this matter.
- 15 The Health Service put a number of allegations to Professor Millward. Ultimately the Health Service dismissed Professor Millward because it found that two of those allegations, Allegation 1 and Allegation 3, were substantiated.

Allegation 1

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

Particulars

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

- b. Between 30 April 2011 and 18 December 2018, Ms Judith Innes-Rowe was employed as a Clinical Trials Manager at the Clinical Trials Area with the Oncology Department, SCGH.
- c. Ms Innes-Rowe reported to you while she was working at SCGH.
- d. Between 1 July 2011 and 18 December 2018, Ms Innes-Rowe claimed and was paid \$593,614.00 in overtime.
- e. Ms Innes-Rowe was not entitled to claim overtime.
- f. You received a copy of Ms Innes-Rowe's overtime claims which was inconsistent with the approval process.
- g. You failed to apply an appropriate level of oversight by not scrutinising the overtime forms submitted by Ms Innes-Rowe resulting in additional and unnecessary costs to the Clinical Trials Unit.
- h. You failed to apply an appropriate level of oversight by not scrutinising the Payroll Certification Statements in relation to the overtime claimed by Ms Innes-Rowe resulting in additional and unnecessary costs to the Clinical Trials Unit.

...

If proven, [this] may constitute [a breach] of discipline.

Allegation 3

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

Particulars

- a. You are employed as a Consultant Medical Oncologist at Sir Charles Gairdner Hospital (SCGH) in Nedlands.
- b. On 19 December 2018, you approved Ms Judith Innes-Rowe to be engaged on a contract for service through Hays Specialist Recruitment (Australia) Pty Ltd (Hays) to work at the Clinical Trials Area with the Oncology Department, SCGH.
- c. Between 19 December 2018 and 2 June 2019, Ms Judith Innes-Rowe continued to be engaged on a contract for service through Hays to work at the Clinical Trials Area with the Oncology Department, SCGH.
- d. Ms Innes-Rowe reported to you while she was working at SCGH.
- e. Prior to Ms Innes-Rowe commencing on the Hays contract, she had been employed to work at the Clinical Trials Area with the Oncology Department, SCGH, since 12 October 1995, and performing the duties of Clinical Trials Manager at Level G-9 since 30 April 2011 under various WA Health System – HSUWA – Pacts Industrial Agreements.
- f. You were aware that Ms Innes-Rowe was not entitled to claim overtime while employed at Level G-9 under the WA Health System – HSUWA – Pacts Industrial Agreements.
- g. You approved pay and conditions while Ms Innes-Rowe was employed on the Hays contract that were not in accordance with WA Health Industrial Agreement pay and conditions, which were more favourable than Ms Innes-Rowe could have achieved as an employee of North Metropolitan Health Service (NMHS), and were more detrimental to NMHS than if Ms Innes-Rowe (or any other person engaged in her role) was engaged as an employee of NMHS. By way of example, you approved Ms Innes-Rowe to work hours of her own choosing, and you agreed that hours worked after 5:00pm would be paid at overtime rates, irrespective of what time she commenced work on that day.
- h. In an email dated 28 November 2017 from Ms Rebecca Wilson, Senior Payroll Officer, Health Support Services, you were made aware that as of 20 November 2017 the NMHS Authorisation Schedule had changed. From that date overtime required approval by a Tier 3 Officer. You are not a Tier 3 Officer and, therefore, you were aware that you could not approve overtime.
- i. You approved payment by NMHS to Hays, including overtime, for the services provided by Ms Innes-Rowe, the last being on 3 June 2019 for the week ending 2 June 2019.
- j. By approving Ms Innes-Rowe's employment through a Hays contract, you facilitated Ms Innes-Rowe receiving overtime payments that you knew she was otherwise not entitled to claim or be paid if she continued to be employed through a WA Health System – HSUWA – Pacts Industrial Agreement.

If proven, this may constitute a breach of discipline on the following grounds:

1. Corruptly using your position to obtain a benefit for another person (being Ms Innes-Rowe), and to cause a detriment to NMHS.
2. Breaching your duty of fidelity and good faith, which you owe to your employer, by knowingly circumventing established employment processes, and approving of the engagement of Ms Innes-Rowe on terms and conditions which were detrimental to NMHS.

Factual background

16 The following facts are not in dispute.

17 Professor Millward is an eminent Consultant Medical Oncologist. He holds no qualification in business administration, industrial law or human resource management. He has been employed by the Health Service (and its predecessors) since around August 2003, working 0.4 full-time equivalent for the Health Service at SCGH. His employment was covered by the

WA Health System – Medical Practitioners (Clinical Academics) AMA Industrial Agreement 2016 or its predecessor industrial agreements.

- 18 Professor Millward was the Head of Department of Medical Oncology at SCGH from 2007 to 2013. As Head of Department he managed the staff in the Clinical Trials Unit (CTU).
- 19 Since 2013, Dr Joanna Dewar has been Head of Department of Medical Oncology.
- 20 From before 2003 until she resigned in December 2018, Ms Judith Innes-Rowe was employed by the Health Service or its predecessor. Her employment was covered by the WA Health System – HSUWA – PACTS Industrial Agreement 2018 or its predecessor industrial agreements (**HSU Agreement**). From 2011 to 2017, Ms Innes-Rowe was engaged under consecutive maximum term contracts of employment as a ‘Research Data Manager’. Those contracts of employment entitled Ms Innes-Rowe to a salary of between G-8.2 and G-9.2 salary levels under the relevant HSU Agreement, even though the Research Data Manager position was at all times classified as level G-5.
- 21 In late 2017 a Briefing Note was prepared at Professor Millward’s request. It sought approval for the creation of two temporary positions within the CTU. One of those temporary positions was the Clinical Trials Manager position at proposed level G-9. The request to pay a temporary special allowance at level G-9 was approved by the Chief Executive on 11 July 2017 while the temporary positions were being created.
- 22 In 2018 Professor Millward sought and obtained approval for Ms Innes-Rowe to continue to be paid a temporary special allowance that enabled her to remain paid at level G-9.2 while the position of Clinical Trials Manager could be formally created and classified. From 1 January 2018 to 30 June 2018, Ms Innes-Rowe’s contract of employment provided that she was employed at level G-5.4, although she was paid at level G-9.2 because of the temporary special allowance.
- 23 Ms Innes-Rowe’s last maximum term contract with the Health Service was for the period from 1 July 2018 until 29 December 2018, in the newly created position of Clinical Trials Manager at level G-8.2.
- 24 From 2011 until December 2017, Ms Innes-Rowe was paid at or above the G-8 salary level.
- 25 In around October 2018, Ms Innes-Rowe told Professor Millward that she intended to retire and on 14 November 2018 she gave notice of her resignation, with her last day of employment being on 14 December 2018.

Special Purpose Accounts

- 26 From around 2007 until he was dismissed, Professor Millward was one of two people able to authorise expenditure from each Special Purpose Account (SPA). The SPAs contained funds for use by the CTU to fund all the expenses of running the trials. Ms Innes-Rowe was the other person able to authorise expenditure from the SPA.
- 27 Wages and other amounts payable to CTU staff were funded by monies in the relevant SPAs. Each month, Professor Millward received fortnightly SPA statements showing income into each SPA, expenses paid out of each SPA and the balances of each SPA.

Overtime

- 28 During the relevant period, Ms Innes-Rowe was paid overtime of around:
 - \$70,999.00 in 2017;
 - \$89,989.00 in 2016;
 - \$70,392.00 in 2015; and
 - \$12,097.00 in December 2014.
- 29 Between 17 November 2014 and 27 November 2017, 66 of Ms Innes-Rowe’s fortnightly P6 overtime claim forms (**P6 Overtime Forms**) were emailed to ‘HCN Payroll General Queries’ or ‘HSS Payroll General Queries’. Professor Millward was named as her Manager in every one of those forms. Professor Millward was copied in to 62 of those 66 emails.
- 30 When opened in Excel, the P6 overtime claim form contains macros which provide instructions about how to complete the form and submit it to Health Corporate Network (HCN) or Health Support Services (HSS).
- 31 On 28 November 2017, a senior payroll officer from HSS emailed Ms Innes-Rowe, copying in Professor Millward, and told Ms Innes-Rowe that her overtime request could not be processed due to the change in the Health Service’s Delegations Schedule. The email identified relevant positions which could approve the overtime claim. Professor Millward’s position was not one of those positions. From then on, Ms Innes-Rowe did not claim any more overtime as an employee.
- 32 From at least March 2015 until November 2017, as authorising signatory to the SPA Professor Millward received pay certification statements relating to Ms Innes-Rowe’s pay, including overtime (**Pay Certification Statements**). Each fortnight Professor Millward would receive a covering email from HCN attaching the Pay Certification Statement (**Covering Email**). The Covering Email said:

Dear Certifying Officer

In accordance with the Health Accounting Manual you are required to certify the attached Payroll Certification Statement. Please ensure you familiarise yourself with your responsibilities in accordance with the procedures outlines in the manual.

1. Review the attached PDF document

2. Details on the content of the statement and the process are available in the PCS User Guide

3. If you are satisfied that all employees listed are entitled to receive payment for the pay period specified, select the Payroll Certification button at the bottom of the statement. You will receive an automated confirmation of your certification.

4. If you have an issue or query with the information on the statement select “click here” at the bottom of the statement and follow the instructions. You will receive an automated confirmation that you have conditionally certified the payroll statement and be directed to the HCN Intranet for further instructions.

5. Standard, Base, Personal and Leave Hours can be in hours or sessions depending on the employee type. Sessionals [sic] employees are not entitled to accumulate overtime hours (OT Hrs).

What should I check on my Payroll Certification Statement? For checking your statement [Click Here](#)

If you are no longer the appropriate receiving officer, it is vital that you notify HCN so that our Statement is referred to the correct officer. This includes temporary changes such as Leave, Higher Duties etc.

HCN Employee Benefits

Health Corporate Network

33 From 27 July 2016, the Covering Email was sent by HSS. The content of the email was very similar:

REPLIES TO THIS EMAIL WILL NOT BE MONITORED

Dear Certifying Officer

If you are no longer the appropriate receiving officer, it is vital that you notify [HSS – Payroll Services](#) through the links provided so that our Statement is referred to the correct officer. This includes temporary changes such as Leave, Higher Duties etc.

In accordance with the [Health Accounting Manual](#) you are required to certify the attached Payroll Certification Statement. Please ensure you familiarise yourself with your responsibilities in accordance with the procedures outlines in the manual.

1. Review the attached PDF document

2. Details on the content of the statement and the process are available in the [PCS User Guide](#)

3. If you are satisfied that all employees listed are entitled to receive payment for the pay period specified, select the Payroll Certification button at the bottom of the statement. You will receive an automated confirmation of your certification.

4. If you have an issue or query with the information on the statement select “click here” at the bottom of the statement and follow the instructions. You will receive an automated confirmation that you have conditionally certified the payroll statement and be directed to the HSS Intranet for further instructions.

5. Standard, Base, Personal and Leave Hours can be in hours or sessions depending on the employee type. Sessionals [sic] employees are not entitled to accumulate overtime hours (OT Hrs).

What should I check on my Payroll Certification Statement? For checking your statement [Click Here](#)

HSS Payroll Services

Health Support Services

34 Professor Millward certified the Pay Certification Statements that related to Ms Innes-Rowe’s pay, including overtime.

35 On 19 March 2018, Professor Millward met with Ms Sarah Whiteside (Human Resources Consultant) and Ms Viviane Jabr (HR Manager). By email after the meeting, Professor Millward was told that HSU staff paid at level G-8 and above are not entitled to be paid overtime except for in specific circumstances. Those special circumstances include where the employee is rostered to work regular overtime or instructed by the employer to hold themselves on call.

The Hays Contract

36 After Ms Innes-Rowe resigned from her employment with the Health Service, Professor Millward entered into a contract with Hays Specialist Recruitment (Australia) Pty Ltd (**Hays**) on behalf of the Health Service for Ms Innes-Rowe to provide services to the Health Service (**Hays Contract**).

37 The terms and conditions of the Hays Contract are set out in several emails. Relevantly:

- a. for work during ordinary business hours, the Health Service would pay Hays \$110.76 plus GST per hour of Ms Innes-Rowe’s work;
- b. that hourly rate comprised \$80 per hour for Ms Innes-Rowe plus Hays’ costs and charges;
- c. Ms Innes-Rowe was not required to work any specific hours and could choose the hours she would work;
- d. if Ms Innes-Rowe chose to work after 5pm on a business day, regardless of when she started work, she would be paid ‘standard overtime rates’ as well as overtime rates if she chose to work on a Saturday, Sunday or a public holiday. Those ‘standard overtime rates’ meant that Ms Innes-Rowe was paid ‘time and a half’ after 5pm on business days and Saturdays, and ‘double time’ on Sundays and public holidays; and
- e. the Hays invoices, which were approved by Professor Millward, show that Hays’ costs were also multiplied by one and a half or two, respectively, when Ms Innes-Rowe chose to work at times that attracted the ‘standard overtime rates’. For example, when Ms Innes-Rowe chose to work on a Sunday, the cost to the Health Service was \$221.52 plus GST per hour.

38 Professor Millward was emailed invoices for approval which showed Ms Innes-Rowe’s hours of work for the week identified in the invoice, including while Professor Millward was on long service leave from 7 January until April 2019.

39 Ms Innes-Rowe worked under the Hays Contract for about 23 weeks.

CCC proceedings

- 40 In June 2019 Professor Millward was summonsed to appear in July as a witness in Corruption and Crime Commission (CCC) proceedings in relation to possible misconduct by Ms Innes-Rowe.
- 41 In September 2019, the CCC released a report on misconduct risks in Health Support Services and the Health Service (**CCC Report**). The CCC Report concluded that Ms Innes-Rowe engaged in serious misconduct in relation to her unsubstantiated overtime claims between 2012 and 2017.
- 42 The day the CCC Report was released, Professor Millward sent an email to colleagues at the Health Service, saying ‘Although there has been no suggestion that I engaged in any misconduct, as Judith’s immediate manager, I will have to bear some responsibility for this.’

Disciplinary process

- 43 The Health Service sent Professor Millward a letter dated 15 November 2019 that set out two allegations of breach of discipline (**Allegations 1 and 2**). In January 2020 Professor Millward’s solicitor responded to those allegations.
- 44 The Health Service sent Professor Millward a letter dated 3 April 2020 that set out another allegation of breach of discipline (**Allegation 3**). The Health Service conducted an investigation into the allegations. On 6 November 2020 the Health Service gave Professor Millward a copy of the investigation report (including its attachments) and informed Professor Millward that:
- a. Allegation 2 was not substantiated;
 - b. it was open to find Allegations 1 and 3 were substantiated; and
 - c. if Allegations 1 and 3 were found to be substantiated, the Health Service proposed to dismiss Professor Millward.
- 45 Professor Millward’s solicitor responded to the proposed finding and action.
- 46 The Health Service found that Allegation 1 and Allegation 3 were substantiated, and dismissed Professor Millward from his employment on 21 December 2020. The Health Service paid Professor Millward five weeks in lieu of notice.

Allegation 1

- 47 Although Allegation 1 refers to the period from 30 April 2011 to 18 December 2018, the following two matters are not in dispute:
- a. no overtime was claimed by, or paid to, Ms Innes-Rowe after an email was sent to Ms Innes-Rowe (copying in Professor Millward) on 28 November 2017; and
 - b. Professor Millward was only copied in to Ms Innes-Rowe’s overtime claims from 16 November 2014.
- 48 Accordingly, the Board considers that the relevant period that relates to Allegation 1 is from 16 November 2014 to 28 November 2017.
- 49 To establish Allegation 1, the Health Service must prove:
- a. Professor Millward had oversight and/or management of Ms Innes-Rowe’s overtime claims during the relevant period;
 - b. in all the circumstances, Professor Millward’s oversight of Ms Innes-Rowe’s overtime claims was negligent or careless; and
 - c. Ms Innes-Rowe was paid overtime payments to which she was not entitled.

Did Professor Millward have oversight and/or management of Ms Innes-Rowe?

Professor Millward’s evidence

- 50 Professor Millward’s evidence was that he was only Ms Innes-Rowe’s manager when he was Head of Department. When Dr Dewar became Head of Department in 2013, Professor Millward reported to her. At that time, they had a conversation and Dr Dewar asked Professor Millward to ‘continue to have some role providing direction to the CTU, acting as a resource for them and to sort of make sure there was someone around who they could approach if they were having issues and provide, I guess, strategic direction to the CTU.’
- 51 Professor Millward said:
- She asked me to keep an eye on the trials unit, that’s the only phrase I could specifically remember. I would have agreed to do so because obviously I’d invested a lot of time and effort in - in creating it and bringing it to where it was. I was still active in doing my own trials through the unit so I wanted it to continue. And because of my academic position and Cancer Council funding, I considered it to be part of my, if you like, reason for existence to support clinical research. So it seemed to me to fit with the sort of overarching goals of my academic position and the funders of that position.
- 52 No formal role was created and Professor Millward agreed that he remained responsible for the CTU budget. Professor Millward would not agree in cross-examination that he remained managerially responsible for Ms Innes-Rowe.
- 53 Professor Millward gave evidence about three Briefing Notes dated 4 July 2017, 29 December 2017 and 11 January 2018 which relate to arranging higher pay for the Clinical Trials Manager and Staff Development Officer. Professor Millward would not agree in cross-examination that he was involved in the production of those Briefing Notes because he was Ms Innes-Rowe’s manager. Professor Millward said his involvement was a continuation of the work he had done when he was Head of Department in trying to arrange for those positions to be reclassified.

- 54 Professor Millward denied his involvement in requesting of senior executives that Ms Innes-Rowe's temporary special allowance be extended, and not copying in Dr Dewar, showed that he was managerially responsible for Ms Innes-Rowe:

CARROLL, MR: So in this email as you - your evidence yesterday, you're expressing some frustration but then also you're requesting those senior people above you that the temporary special allowance for Ms Innes-Rowe be extended, is that right?

MILLWARD, M: I'm requesting that the process be continued until such time as hopefully the positions are created.

CARROLL, MR: Created, yes?

MILLWARD, M: Yes.

CARROLL, MR: And you haven't copied Dr Dewar into this email, is that right?

MILLWARD, M: No, that's correct.

CARROLL, MR: And isn't it the case that the reason why it's you requesting the TSAs be extended is because you had managerial responsibility for Ms Innes-Rowe?

MILLWARD, M: No. I am sending this email because I've been involved in the process and I'm frustrated with the length of time and the difficulties that it's causing.

CARROLL, MR: But if you were not managerial - managerially responsible for Ms Innes-Rowe what - why does it matter to you what her pay level is?

MILLWARD, M: Because as I stated I was charged with providing advice and direction to the whole clinical trials unit and I was aware that there was an issue that was causing concern at the highest level of the North Metropolitan Health Service. So I considered that as someone involved in this process that I should continue to be involved in this process and should express you know on behalf of the trials unit the frustration of the difficulties that this was causing. This was of course not just related to Ms Innes-Rowe. It concerned another person as well.

CARROLL, MR: Ms Walker, is that correct?

MILLWARD, M: Correct.

CARROLL, MR: Yes. I suggest to you, Professor Millward, that your whole involvement in requesting the extension of these TSAs was because in your mind you understood that you had managerial responsibility for Ms Innes-Rowe, isn't that right?

MILLWARD, M: No, no. I did not do this because Ms Innes-Rowe reported to me. I did this because I was charged with looking after the clinical trials unit and I considered this to be an important issue. Further, it was one that I've been directly involved with while head of department and I had corporate knowledge about.

- 55 Professor Millward denied that the reason human resources staff met with him to discuss Ms Innes-Rowe's overtime was because he was Ms Innes-Rowe's manager.

- 56 Professor Millward gave evidence about Ms Innes-Rowe's P6 Overtime Forms. He conceded that he was aware that he was named 'Manager' on those forms. He agreed that he did not raise an issue about being named as Ms Innes-Rowe's manager. Professor Millward denied that this was because he considered himself to have managerial responsibility for Ms Innes-Rowe, saying it was because he 'was an appropriate person as costs centre manager' and that he 'didn't take that to mean [he] was her line manager.'

- 57 In cross-examination the Health Service put to Professor Millward that it was implausible that Professor Millward would receive emails attaching Ms Innes-Rowe's P6 Overtime Forms for three years and not raise with Payroll or Ms Innes-Rowe that he did not believe he was responsible for approving Ms Innes-Rowe's overtime, if he did not consider that he was responsible for approving her overtime. Professor Millward said:

So it was never put to me that there was any discrepancy in the process. Clearly from what we know now the correct process was not being undertaken by Ms Innes-Rowe. The correct process would have been for her to email this form to myself or whoever she considered her line manager to - for that person to submit it. It was not - it did not occur to me during these three years that this process was in any way inappropriate but clearly it was.

- 58 When the Board noted that Professor Millward's response did not answer the proposition put to him by the Health Service, Professor Millward said 'No, I did not raise with Ms Innes-Rowe or anyone else that I considered that this process was in any way improper' and 'I did not consider that I directly approved these forms'. Professor Millward said he did not think he had ever considered who was approving the overtime.

- 59 The Health Service put to Professor Millward that the reason he negotiated the Hays Contract was because Professor Millward was managerially responsible for the person in the Clinical Trials Manager role. Professor Millward replied:

No, I didn't consider that this had anything to do with the line management of the clinical trials manager. This was a person, you know, who we wanted to engage through Hays to perform duties as a clinical trials manager for a brief period of time. I didn't consider that I was assuming any line manager responsibilities for the clinical trials unit. Sorry - it's actually clinical trials manager. I didn't consider that this engagement, you know, meant anything with respect to the position that was vacant.

- 60 The Board clarified that the proposition the Health Service was putting to Professor Millward was that Professor Millward was negotiating the contract, as opposed to somebody else, because he was managerially responsible. Professor Millward said:

MILLWARD, M: Yes, but the question was does that mean I'm responsible for the clinical trial manager position. I'm stating that I considered myself responsible for this engagement and yes, I considered myself responsible for the person who was engaged under these circumstances.

CARROLL, MR: But you wouldn't have considered - well, you wouldn't be responsible for that unless you had managerial responsibilities for the clinical trials unit, isn't that right?

MILLWARD, M: As I stated before I considered my position to be one of providing leadership and advice for clinical trials unit. And I considered this to be consistent with those responsibilities.

CARROLL, MR: Yes. So you considered that consistent with the responsibilities that you were taking on with the clinical trials unit is that you had authority to engage persons to be employed in that unit, is that right?

MILLWARD, M: I considered that as I stated yesterday the clinical trials unit had engaged short-term contractors before. That was a well-known process. And that I had - that I could engage Ms Innes-Rowe on a short-term basis while the substantive position was being advertised.

CARROLL, MR: Did - - - ?

MILLWARD, M: I didn't seek as part of this to say, "Well, actually, I think I should be the line manager of that position" rather than the JDF that was proof.

CARROLL, MR: Did you get Dr Dewar's approval to engage Ms Innes-Rowe through the Hays contract?

MILLWARD, M: Not specifically, no.

CARROLL, MR: No. And your evidence is that Dr Dewar was formally the line manager of the person in the clinical trials manager position, isn't that right?

MILLWARD, M: She was the line manager for the clinical trials manager, yes.

CARROLL, MR: Formally on the JDF?

MILLWARD, M: On the JDF.

CARROLL, MR: Yes?

MILLWARD, M: Yes.

CARROLL, MR: But isn't it the case that if you did not see yourself as having managerial responsibilities for the whole clinical trials unit you would have sought Dr Dewar's approval to enter into this contract?

MILLWARD, M: Um, as I stated, it - my - my, ah, mind at the time was that it was appropriate that I do this. It did not occur to me that I should seek anyone's formal approval, ah, to do it.

CARROLL, MR: Okay, so - - -?

MILLWARD, M: Ah, I did not consider, if you like, that I was employing somebody as a clinical trials manager.

CARROLL, MR: You felt it was appropriate for you to do this because it fell within the responsibilities that you had understood Dr Dewar had given to you, is that right?

MILLWARD, M: Yes.

- 61 Later in cross-examination, Professor Millward agreed that he had remained the point of contact throughout the Hays engagement, but when asked if that was because he had 'managerial responsibility' for Ms Innes-Rowe, said:

MILLWARD, M: As I stated, ah, I considered it, ah, that I was an appropriate person to, ah, organise this engagement and obviously that requires someone, ah, to be an initial point of contact. Ah, this - this is obviously a - a fairly standard, ah, thing that Hays would put out, um, so it may be in other circumstances the - the person who is to be engaged is not known at all, so they would have to have a - what's termed a client supervisor or initial point of contact.

CARROLL, MR: But you didn't see anyone else within the hospital as having any direct oversight over Ms Innes-Rowe other than yourself, isn't that right?

MILLWARD, M: Ah, for this, ah, engagement through Hays I considered I was the appropriate person to be that initial point of contact or client supervisor as stated by Hays, yes.

CARROLL, MR: And not just as the initial point of contact but to be supervise - to supervise Ms Innes-Rowe for the period of her engagement?

MILLWARD, M: So the engagement, ah, did not require a supervisor as such. Ah, somebody who is engaged is not formally reporting to anybody in that organisation. What they are saying here is that I'm the person in the organisation, ah, who this person should contact when they initially start and this person will be supervising, ah, the engagement. It's not stating that I'm a line manager or that person is an employee, ah, reporting to me.

CARROLL, MR: But it's not correct to say that a contractor of this sort would have no one within in this case North Metropolitan Health Service who is supervising them doing their work, that's not correct, is it?

MILLWARD, M: Ah, my understanding was that she would work independently, ah, and not require day to day supervision and that I was not taking on a line managerial responsibility for her but I was the person approving and supervising the engagement.

CARROLL, MR: Yes, and I think you said that other contractor arrangements occurred in the clinical trials unit from time to time, is that right?

MILLWARD, M: That's correct, yes.

CARROLL, MR: And going back to when Ms Innes-Rowe was an employee as the clinical trials manager if a contractor was engaged you would consider that she was the person with supervisory responsibilities over that contractor, isn't that right?

MILLWARD, M: I would consider that if someone else was - when someone else was employed by Hays, ah, that that line would - stated was, ah, Ms Innes-Rowe.

- 62 Later in cross-examination, Professor Millward said that the reason that he sent an email to Dr Dewar and the other consultants in the Medical Oncology Department dated 27 December 2018 outlining changes to the CTU was not because he had 'managerial responsibility' for the CTU, but because Professor Millward 'considered the organisation required for this exchange, ah, of clinical trials managers fell within what ... it was considered that [he] would do for the clinical trials unit, ah, and that [he] was the person who could communicate best what was going on.'
- 63 Professor Millward gave evidence about his comments relating to the CCC investigation. On the day the CCC released its report finding that Ms Innes-Rowe had engaged in misconduct, Professor Millward sent an email to his colleagues:

Dear Colleagues,

As some of you will be aware, a report tabled in State Parliament today by the CCC has made major adverse findings against Judy Innes-Rowe. In essence, it found she had received benefits she was not entitled to through submission of overtime and taking time off work without submitting appropriate leave requests. There will be substantial media publicity about this, and reports have been posted by The West Australian, ABC, and Channel 7.

It is important to emphasize that no patient harm has resulted and no research misconduct has been alleged, but clearly there has been loss of funds that were part of our research income. Although there has been no suggestion that I engaged in any misconduct, **as Judith's immediate manager, I will have to bear some responsibility for this.**

Following a meeting with Janet Zigari and David Joske this afternoon, I have been informed that NMHS has directed that I take leave effective immediately from SCGH. I hope this will only be for a short time, but it will extend at least until mid-next week when I leave for ESMO and so I am not permitted to undertake any clinical work at SCGH until at least my return from ESMO on October 3.

Of course this will result in unexpected (and I am sure unwanted) additional clinical load being placed upon others. I understand David and Jo plan to meet to devise a plan. When that is done, I am happy to organize a handover of patients. I think it is very sad that patient care could be put at risk because of issues that are not related to patient care, but this is the decision NMHS has made.

I will continue to undertake UWA work, other research work, Linear work etc so you will still see me around!

With best wishes

Michael

(emphasis added)

- 64 In his examination, Professor Millward said that when he says he 'had to bear some responsibility for this', he was referring to how he 'had put trust in her' and that because of that, he 'felt [he] had been betrayed and this outcome had happened'.
- 65 In relation to the sentence that says 'as Judith's immediate manager', Professor Millward had the following exchange in cross-examination with the Health Service and the Board:

CARROLL, MR: Can I draw your attention to the top of page 117, which is within your email?

MILLWARD, M: Yes.

CARROLL, MR: And you have a sentence there:

"Although there has been no suggestion that I engaged in any misconduct as Judith's immediate manager I will have to bear some responsibility for this."

Now, you said that in your email because you understood yourself to be Judith's - Ms Innes-Rowe's immediate manager, isn't that right?

MILLWARD, M: As I stated yesterday, I - I sent this - - -

EMMANUEL C: Professor Millward, I think you do need to, where they're such closed questions, answer yes or no, but if the answer's no and you want to say more about it, you've got counsel that can re-examine on the matter?

MILLWARD, M: Okay.

EMMANUEL C: Obviously if you don't know the answer to a question, don't say yes or no, tell us you don't know?

MILLWARD, M: Okay. Thank you. Sorry, would you say the question again?

CARROLL, MR: You've stated in this email that you were Judith's immediate manager. Now, the reference to "Judith" is Ms Innes-Rowe, isn't that right?

MILLWARD, M: That's correct, yes.

CARROLL, MR: And you've stated in the email that you were her immediate manager because in your mind you were, in fact, her immediate manager, isn't that right?

MILLWARD, M: Ah, I don't know what was in my mind then. I was certainly not stating - ah, I was responsible for the misconduct. What I was stating was that I worked closely - - -

CARROLL, MR: I'll stop you there?

MILLWARD, M: - - -with her.

CARROLL, MR: I don't think I'm suggesting at all that you were accepting responsibility for her misconduct. What I'm putting to you is you have referred in your email to being her immediate manager and the reason you did that was because you understood in your mind that you were her immediate manager?

MILLWARD, M: Ah, my belief is I was using the term to reflect that I worked closely with her and I'd invested trust in her. I don't think I was using a term to mean in any sort of reporting or strict managerial sense. However, clearly I had worked closely with her, ah, and, um, I felt in terms, as I said yesterday, that because I had trusted her that that meant that in some way some responsibility would have to be borne by me.

CARROLL, MR: That's implausible, Professor Millward. You say in the email that you were her immediate manager. That comes nowhere near simply saying that you had worked closely with her and reposed trust in her. You're stating to your colleagues that you were her immediate manager, isn't that right?

MILLWARD, M: I'm explaining what I thought at the time. Ah, clearly I'm using the term immediate in terms of working closely with, not in terms of any line management responsibility.

66 Professor Millward sent a further email on Monday 23 September 2019:

Dear Colleagues,

I want to thank you for all the calls/messages/emails of support that I have received.

I understand my patients have been divided up into the main clinics and inpatients allocated, so thank you to all who may encounter one. I have been phoned by Jo and Kevin about individual patients and I want to emphasise what I told Jo – I am happy to provide any advice about my patients by phone/message/email especially over the next few days before I leave for ESMO but also thereafter. This includes advice to our trainees and fellows. I think it is imperative that disruption to patient care be minimized and risk of adverse outcomes for both patients and medical staff be as low as possible.

Given some of the media reports following the release of the CCC report, I think it is important to emphasize some points that we all need to be clear on.

Firstly, as I stated below, there has been no harm to any patients, there is no suggestion of any research misconduct or failure to perform clinical trials properly. Our standards of trial documentation, data entry, accrual and other metrics have been and remain very good. I am very happy with our new trials manager, Ed and the team in place now is functioning very well. There are a lot of trials in submission and close to activation. Please defend and support our existing clinical trials unit.

Secondly, the SPA that Judy was paid from receives income from clinical trials based on the CTRAs. It does not receive money from research grants from NHMRC/CCWA etc or from donations to SCGH. Any suggestion that research grants have been 'stolen' is incorrect. If you have the opportunity, please reassure granting bodies that SCGH is a safe place to award grants to.

Thirdly, there is no financial 'crisis' in the clinical trials unit. I have financial balances for our clinical trial SPAs going back to January 2014. At the time the surplus was \$1,507,351. In January 2018 (just after the period that was examined in the CCC report) it was \$1,439,109. On 30/6/19 it was \$1,979,332. We certainly do not require any financial bail-out as a result of Judy's conduct reported by the CCC report!

Fourthly, it was stated in the CCC report that there were "two internal reports" recommending disciplinary action against Judy. I was not aware of any such reports prior to the release of the CCC report, and have never been shown these reports. Prior to the CCC report, I was not aware of any internal inquiry into the matters in the CCC report taking place.

I am sure you were all very surprised that this CCC inquiry was going on. I was served a witness summons on May 28 as what is termed a 'red notice'. This means I was forbidden to tell anyone including colleagues, friends and family about it. Similarly, after giving my evidence on June 28, it was not allowed for me to say anything until the report was made public.

Best wishes

Michael

67 At the hearing, Professor Millward gave evidence:

And on the day of these first emails, Thursday, 19 September, the CCC released a report which stated that they found that Ms Innes-Rowe had engaged in misconduct, for two principal reasons, one of which related to, potentially, claiming overtime when she was not at work. This was, obviously, devastating to myself. I was then summoned to a meeting with the Chief Executive of Sir Charles Gairdner Hospital, it was Janet Zagari and David Joske, the Head of - the Medical Co-Director, and I was informed that, as a result of this, I was to be stood down. Again, this was, obviously, a completely unexpected, unforeseen, and devastating thing to hear. I was in a position where I was a clinician, I had patients in the hospital under my care, I had patients booked in at the clinics in the upcoming days, I had asked them what was to happen, and I hadn't received an answer other than, "Well, we'll take care of that", and so I felt that I should write to my colleagues, informing them of this, and telling them, in essence, what I outlined in that email on the Thursday afternoon. It was a very different time, I felt - I had, obviously, you know, put a lot of trust in Ms Innes-Rowe, we'd worked together a long time, we had - you know, I felt that I had made a - an assessment of her, that she was an honest person, and was, you know, putting the needs of patients in the trials unit forefront, and to see that that may not be the case was very

different. And obviously, you know, a big blow to my - well, a big blow to myself to think that I had invested trust in someone in that way.

68 The Health Service cross-examined Professor Millward about parts of the transcript from the CCC proceedings. Professor Millward was asked whether he had agreed before the CCC that Ms Innes-Rowe reported to him directly. Professor Millward initially said 'I don't recall that. Ah, if I said she directly reported to me, then that was mistaken', but after being taken to page 71 of the transcript, specifically lines 24 and 25, he agreed he had said that and added that 'in the context of the question I believed that to be the case'.

69 In cross-examination Professor Millward confirmed that he agreed before the CCC that:

- a. after he was Head of Department, he took on a supervisory role and would have been considered the person that Ms Innes-Rowe was primarily responsible to;
- b. he was ultimately responsible for all staff and approving salary expenditure in the CTU; and that
- c. this included approving the payment of Ms Innes-Rowe's overtime.

70 The Health Service put to Professor Millward that despite his evidence that he was aware Ms Innes-Rowe frequently worked a lot of overtime, at the CCC hearing he had given evidence that he 'couldn't give an accurate answer' but 'thought Ms Innes-Rowe worked late once, maybe twice a week' because it was the truth. Professor Millward said that was what he said at the time and that he was trying to give the CCC an 'estimate'. He gave an average of the overtime Ms Innes-Rowe worked.

71 Professor Millward was further cross-examined on the CCC transcript:

CARROLL, MR: And do you recall giving evidence to the effect that since 2013 you have acted as the de facto person responsible for managing the clinical trials unit?

MILLWARD, M: Ah, yes, I don't recall stating that but if I stated that I accept it.

CARROLL, MR: Can I take you to tab 39 of the respondent's bundle that is? And this is a copy of the transcript of your evidence before the Corruption and Crime Commission, is that right?

MILLWARD, M: I believe so, yes.

And if I can take you to page - sorry.

EMMANUEL C: Thank you, go on.

CARROLL, MR: Can I take you to page 70 of the transcript and draw your attention to lines 26 to 28?

MILLWARD, M: Yes, correct.

CARROLL, MR: So you agree that your evidence was that since you were head of department you acted as the de facto person responsible for managing the unit?

MILLWARD, M: Ah, that's what I stated, that's what I thought was consistent with the arrangement that we've discussed, that, ah, I'd undertaken to do at Dr Dewar's request.

CARROLL, MR: And you agree that your evidence there was true in your - to the best of your knowledge and ability?

MILLWARD, M: Yes, yes.

And later:

CARROLL, MR: And do you recall agreeing with a proposition put to you before the CCC that you would be ultimately responsible for all staff and approving salary expenditure?

MILLWARD, M: I don't recall that specific point but - - -

CARROLL, MR: Can I take you to page 72? And I want to draw your attention to lines 48 to 49?

MILLWARD, M: Yes.

CARROLL, MR: And you agreed with that proposition because it's truthful, is that right?

MILLWARD, M: Yes.

CARROLL, MR: You agreed it's truthful that you were responsible for staff within the clinical trials unit and approving salary expenditure for those staff?

MILLWARD, M: Yes.

CARROLL, MR: And that included Ms Innes-Rowe?

MILLWARD, M: Yes.

CARROLL, MR: And that included approving Ms Innes-Rowe's overtime? Sorry, I withdraw that. It included approving the payment of Ms Innes-Rowe's overtime?

MILLWARD, M: Yes. As I stated, this was in reference to the - ah, to the payroll certification statement - - -

EMMANUEL C: Well, Professor Millward, I have said this to you a few times, it's not really for you to qualify now unless Mr Carroll's happy for you to continue to answer but if he's putting something to you, you just need to say yes or no. And your counsel will be able to - - -?

MILLWARD, M: Okay.

EMMANUEL C: - - - re-examine you after this?

MILLWARD, M: All right, sorry.

EMMANUEL C: Did you want to put that last question again, Mr Carroll?

CARROLL, MR: You agreed or you do agree or you would agree, sorry, that you were responsible for approving the payments of Ms Innes-Rowe's overtime and this is in the period after you were head of department?

MILLWARD, M: Yes. As I stated, I was approving salary expenditure, that's what I'm saying in those lines, yes.

- 72 Professor Millward gave evidence that he was invited to and did attend a meeting with Ms Whiteside and Ms Jabr, who worked in human resources. Exhibit AD1 – document 9 is a chain that includes a summary of what was discussed at the meeting:

From: Michael Millward

Sent: Wednesday, 18 April 2018 6:15 PM

To: 'Whiteside, Sarah'

CC: Millward, Michael; Jabr, Viviane

Subject: RE: [Confidential] Follow-up from HR meeting on 19 March 2018 – Clinical Trials Unit

Dear Sarah,

Thanks for the update. Can we meet on Monday to discuss and progress further. ?2.00pm/2.30pm/3.00pm [sic].

Best wishes

Michael

[email signature omitted]

From: Whiteside, Sarah [mailto:Sarah.Whiteside@health.wa.gov.au]

Sent: Monday, 9 April 2018 3:50 PM

To: Michael Millward <michael.millward@uwa.edu.au>

CC: Millward, Michael <Michael.Millward@health.wa.gov.au>; Jabr, Viviane <Viviane.Jabr@health.wa.gov.au>

Subject: [Confidential] Follow-up from HR meeting on 19 March 2018 – Clinical Trials Unit

Dear Michael

I wanted to provide a summary of items discussed, following out meeting on 19 March 2018 with Viviane Jabr, SCGH HR Manager.

Temporary Special Allowances for Judy Innes-Rowe and Gemma Walker

I sent the completed documentation, including Briefing Note and Request to Fill Forms, to Meredith Walker and Joanne Newson in Medical Specialties Division on 19 March 2018. An update regarding the progress of these requests was provided by Joanne Newson on 4 April 2018, as attached below.

Superannuation on Temporary Special Allowances

As a related issue, I recently received advice from HS Payroll that superannuation is automatically paid on 'Temporary Special Allowances', when set-up as such in the payroll system. I know that this has been an issue of concern for Judy. I understand that Judy will be looking into this issue with her accountant at the end of financial year, in order to reconcile the payment amounts, and may submit a claim later in the year if there is a discrepancy.

Recruitment and Selection processes within the Clinical Trials Unit

Viviane Jabr and I will be meeting with Meredith Walker in the next couple of weeks to discuss recruitment and contract renewal processes within the Clinical Trials Unit. We would like to explore whether there are any changes to current practices that could be made to increase stability for your team members, such as longer-term contract periods. The purpose of this meeting would be to explore options for your consideration, and no changes would be made without first discussing them with you.

Overtime

It was recently identified that Judy has worked an excessive amount of overtime over (at least) the last 3 financial years, as shown in table-form below. As per the NMHS Fatigue Management Policy, we have an obligation to manage risks associated with fatigue, including extended or excessive hours of work.

Additionally, the HSU Agreement limits the payment of overtime to staff at HSU staff, particularly at levels G-8 at [sic] above. Staff can only be paid overtime if they are directed to work those additional hours – on each occasion - by their employer. Furthermore, staff at level G-8 and above can only receive paid overtime if (a) rostered to work regular overtime or (b) instructed by the employer to hold themselves on-call, neither of which are likely to apply to Judy's situation.

Within the HSU Agreement, there is a preference for staff to take "time off in lieu", rather than receiving paid overtime.

Summary of earnings – Judy Innes-Rowe

Summary of earnings

FY June 2016 – June 2017 [Pay periods 576-601]

Earning Name	Total	Hours
BACKPAY ADJUST WITH SUPER	631.60	
BASE HOURS	120,628.50	1,900
GESB WEST STATE SUPER 558	11,979.78	
OVERTIME @ 1.5	34,454.79	361
OVERTIME @ 2.5	7,518.36	47
OVERTIME AT DOUBLE TIME	47,050.00	370
PUBLIC HOLIDAY (OBSERVED)	4,842.30	
Grand Total	227,105.33	

Summary of earnings

FY June 2015 – June 2016 [Pay periods 549-575]

Earning Name	Total	Hours
ANNUAL LEAVE	9,541.52	
BACKPAY ADJUST WITH SUPER	111.17	
BASE ADJUST	(3,242.27)	
BASE HOURS	115,777.98	1,848
GESB WEST STATE SUPER 558	12,596.65	
LOADING 17.5% (76)	1,615.80	
OVERTIME @ 1.5	39,012.17	415
OVERTIME @ 2.5	4,347.03	27
OVERTIME AT DOUBLE TIME	57,169.81	456
PERSONAL LEAVE CUMULATIVE	3,242.27	
PUBLIC HOLIDAY (OBSERVED)	3,214.02	
PUBLIC HOLIDAY 1.5	2,335.15	24.8
Grand Total	245,721.30	

Summary of earnings

FY June 2014 – June 2015 [Pay periods 523-548]

Earning Name	Total	Hours
ANNUAL LEAVE	19,913.38	
BACKPAY ADJUST WITH SUPER	2,582.96	
BASE ADJUST	(241.43)	

[Remainder of email chain not tendered]

- 73 Professor Millward gave evidence that at the meeting with Ms Whiteside on 19 March 2018 'it was conveyed' to him that 'the concern was related to the hours of work and the impact of fatigue'. Professor Millward said that following the meeting he was also told that 'at a level of 9, [Ms Innes-Rowe] was not able to work overtime' Professor Millward confirmed in cross-

examination that following the meeting he was 'informed that in fact Ms Innes-Rowe under her classification was not entitled to receive overtime'.

- 74 Professor Millward's evidence about whether he was surprised that human resources met with him was unclear. He had the following exchange during cross-examination:

CARROLL, MR: Were you surprised when you were called to go to this meeting?

MILLWARD, M: No, because the majority of the meeting is discussing the things that we've already discussed - discussed. Things like the temporary special allowances and I - my understanding of the meeting was that it was primarily to continue the process that was already there. I didn't know until I got to the meeting or I received the invitation to the meeting that there was going to be any specific discussion about overtime.

CARROLL, MR: But when you did discuss overtime you weren't surprised that that discussion was being had with you and not with another person, isn't that right?

MILLWARD, M: It was put to me by Ms Whiteside at the meeting that Ms Innes-Rowe had been working a lot of overtime and there was something for the chief management. Now, why Ms Whiteside raised that issue with me particularly I don't know but she clearly felt that you know I was the person who should be informed about this.

EMMANUEL C: So Mr Carroll is putting to you that you weren't surprised that it was raised with you?

MILLWARD, M: No.

EMMANUEL C: So is that the case or were you surprised that the issue was raised with you?

MILLWARD, M: I was surprised the issue was raised with me because I had not had any information or any issue relating to overtime before. Is that - is that question - - -

EMMANUEL C: Is that about being surprised about the content or surprised that it was raised with you as opposed to somebody else?

MILLWARD, M: I was not surprised that it was raised with me.

CARROLL, MR: You were not surprised that it was raised with you?

MILLWARD, M: I was not surprised that if there was such an issue, you know, that it would be brought to my attention.

CARROLL, MR: Yes. And that's because in your mind you were managerially responsible for Ms Innes-Rowe, isn't that right?

MILLWARD, M: No, I - I worked closely with her. I was involved in the work at the clinical trials unit.

I would assume that if someone said, "Look, this person had been required you know to work very long hours" and since then it would be brought to my attention. So because you know I would be a person who could say, "Well, how else could we, you know, restructure the trials unit or - or what could be done about it?"

CARROLL, MR: But wouldn't it be brought to the attention of the line manager, the person said to be working long overtime?

MILLWARD, M: I don't know if that was - would be usually the case or not.

- 75 When asked whether he thought it was for him to ask Ms Innes-Rowe to reduce her overtime, Professor Millward said yes. He denied that he was her line manager but said he 'felt like it was a reasonable request for him to make of her'.

Professor Millward's submissions

- 76 Professor Millward submits that at the relevant time, he was not Ms Innes-Rowe's manager, he was not responsible for Ms Innes-Rowe and oversight/management was not within the 'performance of his functions'. Professor Millward submits that his 'functions' were those he was contracted to perform. That did not include oversight of CTU staff. He argues that there was no contractual variation to make the allegedly negligent conduct part of his functions. Further, Professor Millward submits that he told Dr Joske in March 2019 that he had no line managerial responsibility for Ms Innes-Rowe.
- 77 More generally, Professor Millward says that he had no handover of, nor induction to, the Head of Department role. He was never given a JDF and he never received any training, advice or instruction about the duties of a Head of Department that were additional to his clinical and teaching duties as a clinical academic. Professor Millward says he received no advice about the industrial agreements that applied to staff for whom he was responsible. He was never given copies of those agreements or advice about their terms.
- 78 Professor Millward says he was never given any advice about the application of entitlements to overtime payments for any of the employees for whom he was responsible as Head of Department. Professor Millward submits that there was no basis for him to think Ms Innes-Rowe was not entitled to overtime.
- 79 Professor Millward argues that when Dr Dewar was appointed Head of Department of Medical Oncology, she was formally responsible for the staff employed to work in that department, including Professor Millward and Ms Innes-Rowe. Professor Millward agreed to 'keep an eye on the CTU' in a conversation with Dr Dewar but 'the limits and parameters of Professor Millward's responsibilities, taken on by reason of this conversation, were never articulated. Professor Millward received no additional remuneration or recognition for any continued role in respect of the CTU.' Professor Millward argues that that informal arrangement did not alter the formal managerial structure of the Medical Oncology Department. Ultimate responsibility for the department, including the CTU, remained with Dr Dewar.
- 80 In effect, Professor Millward denies that it was his role or responsibility to approve Ms Innes-Rowe's overtime. He says when overtime was paid to her, the payments were made without any action being taken on his part.

81 Professor Millward says he monitored the overall wages paid from the SPAs and the magnitude of overtime claims, 'including as revealed by the Payroll Certification Statements' to ensure the SPAs remained in credit.

Health Service's submissions

82 The Health Service argues that the contemporaneous documents overwhelmingly support a finding that Professor Millward was managerially responsible for Ms Innes-Rowe at the relevant time, and responsible for approving her overtime. The Health Service submits that Professor Millward admitted as much under affirmation before the CCC.

83 The Health Service argues that the documents show Professor Millward:

- a. was identified in briefing notes as Ms Innes-Rowe's manager and as the person advocating for a special temporary allowance to be paid to her;
- b. was the person human resources met with to discuss Ms Innes-Rowe and recruitment at the CTU;
- c. received Ms Innes-Rowe's P6 Overtime Forms for three years without objecting or telling anyone he should not be receiving them;
- d. was the person to negotiate and arrange the Hays Contract relating to Ms Innes-Rowe;
- e. notified staff about happenings and changes at the CTU as one would expect a manager would;
- f. referred to himself as Ms Innes-Rowe's immediate manager in the aftermath of the CCC report;
- g. would be one of the signatories of new offers of employment to Ms Innes-Rowe; and
- h. met with Ms Basile before taking long service leave to discuss the management of the CTU during his absence.

84 The Health Service submits that the only evidence suggesting Professor Millward was not managerially responsible for Ms Innes-Rowe was his evidence in chief before the Board. That evidence was self-serving and undermined by overwhelming evidence to the contrary.

Was Professor Millward's oversight negligent or careless in all of the circumstances?

Professor Millward's evidence

85 Professor Millward gave evidence that he was not given any training when he was made Head of Department. He was not given any instructions about how to approve overtime claims by people reporting to him. In examination in chief, Professor Millward gave evidence about his understanding about his responsibility for approving overtime from someone reporting to him, saying 'I do not think I had a clear understanding. From a medical point of view... it's basically done on trust.' He said that when he was copied in to emails attaching Ms Innes-Rowe's P6 Overtime Forms he generally did not look at them, saying 'I can't tell you that I never did but I certainly would not have routinely done so.' Professor Millward said that he does not remember ever looking at a P6 overtime claim form and seeing a box popping up that required him to do anything.

86 Professor Millward gave evidence that he 'didn't directly approve the payments of overtime to Ms Innes-Rowe' but that, because he received the P6 Overtime Forms, he was 'aware that overtime was being worked by Ms Innes-Rowe and others. And in a sense that I was aware of it and was happy with it, yes, I was in approval of it.'

87 In cross-examination the Health Service put to Professor Millward that the following factors show it was careless of Professor Millward to not review the P6 Overtime Forms that were copied to him:

- a. Professor Millward was identified as the manager on the forms;
- b. Professor Millward never questioned why the forms were being sent to him over three years;
- c. Professor Millward had looked at some of the forms, so he knew what they were about; and
- d. Professor Millward was responsible for approving Ms Innes-Rowe's salary, including overtime salary.

Professor Millward did not directly answer that proposition, saying:

MILLWARD, M: Ah, I was aware of her overtime, ah - ah, salary and overtime from the payroll certification form, so I wasn't relying - expecting to rely on a P6 form to tell me that information, ah - - -

EMMANUEL C: Just as a starting point do you disagree with the proposition Mr Carroll has put to you?

MILLWARD, M: Ah, I disagree that what you have said means that it was careless although in retrospect given what we know I can see how that could be inferred.

CARROLL, MR: And when you say "Given what we know" are you merely referring to that we now know Ms Innes-Rowe may well have been fraudulent?

MILLWARD, M: Yes.

CARROLL, MR: And so it's not those other factors that I identified, which you - sorry, I withdraw that. It's not the other factors which I identified which cause you to say in retrospect it may have been careless not to review those forms?

MILLWARD, M: No, I considered I was getting information about her overtime from the payroll certification forms.

CARROLL, MR: But the payroll certification forms didn't provide information as to what days she worked or what days she claimed to work overtime, is that right?

MILLWARD, M: That is correct, yes.

88 In cross-examination, the Health Service took Professor Millward to several of Ms Innes-Rowe's overtime forms. The Health Service pointed to examples of where Ms Innes-Rowe claimed to have worked overtime including:

- a. until 11:50pm on four occasions;
- b. regularly more than 10 hours per day;
- c. 15 hours per day on two days;
- d. 14 hours per day another two days; and
- e. 55 hours' overtime across two weeks.
- 89 The Health Service put to Professor Millward that 55 hours' overtime is substantial across two weeks. Professor Millward replied: 'Um, so I guess if you look at the dates it goes from 15/2 to 3/3, which is roughly two and a half weeks but regardless, yes, I would agree that that's a substantial amount of time.' He said that Ms Innes-Rowe was 'regularly working long hours' and that the job required long hours. Professor Millward would not concede that he 'should have asked her what particular tasks she was working at that time'. Initially Professor Millward did not concede that a reasonable manager would have questioned why an employee needed to work such long hours, explaining that 'this is the health sector, people work very long hours it's certainly not unusual'.
- 90 Professor Millward said that he was aware Ms Innes-Rowe was working overtime frequently and irregularly. There were some periods of time where she would not work overtime at all and some periods where she would work a lot.
- 91 Later, the Health Service put different examples of Ms Innes-Rowe's overtime to Professor Millward and said:
- CARROLL, MR:** Would you agree that if you had reviewed this form properly at the time when you were copied in you should have questioned why Ms Innes-Rowe was working such long hours?
- MILLWARD, M:** Um, I think this is the same question you asked on the other form, so - - -
- CARROLL, MR:** It is?
- MILLWARD, M:** - - - I'd give the same response.
- CARROLL, MR:** Is the answer no?
- MILLWARD, M:** The answer is that, ah, I knew that she was working overtime on occasions and there were periods when she would do a lot of overtime.
- CARROLL, MR:** And that doesn't really answer the question. The question is would you agree, if you had reviewed this form properly at the time, that you should have questioned why Ms Innes-Rowe was working such long hours?
- MILLWARD, M:** Ah, if I had, ah, reviewed this form at that time, and I'm not saying I did or I didn't, you know, I would have, ah, been aware that she was working a lot of overtime, which I was aware that she did, ah, and I may have asked what particular issues were - were making her so busy at that particular time.
- EMMANUEL C:** I think Mr Carroll is putting something different to you and he's entitled to put whatever he likes as long as it's relevant. He is saying if you had reviewed it properly you should have done this thing. And I'm getting the impression you disagree with the proposition but you're not being clear about whether you do or don't. You're answering a slightly different proposition, so I'm going to ask you to answer what he's put. But your counsel will re-examine you on this?
- MILLWARD, M:** Sure. Sure, okay.
- EMMANUEL C:** I expect. I mean - - -?
- MILLWARD, M:** All right.
- EMMANUEL C:** - - - it's open to her to re-examine you on matters that arise in cross-examination?
- MILLWARD, M:** Okay, sure.
- EMMANUEL C:** So you're saying a proper - is the gist of your question, Mr Carroll, a proper review meant that you should - you would have or you should have questioned why Ms Innes-Rowe was working such long hours? A proper review of this form means you should have questioned the long hours.
- CARROLL, MR:** Yes.
- EMMANUEL C:** Do you agree with that or not?
- MILLWARD, M:** Ah, yes.
- EMMANUEL C:** Okay?
- MILLWARD, M:** Yes.
- CARROLL, MR:** And would you agree that a proper review of the form would cause you to - should cause you to question whether it was safe for Ms Innes-Rowe to be working such long hours?
- MILLWARD, M:** I'm not sure what you mean by the word "Safe". Um, clearly it was subsequently brought to my attention that there was a policy relating to fatigue, ah, so but whether this form in itself would have meant that it would triggered a concern I don't know. As I said, it would require a longer period of time to determine, you know, the frequency of these events.
- CARROLL, MR:** But without knowing about a policy for fatigue you would agree, wouldn't you, Professor Millward, as someone who was a line manager for people when you were head of department that there's a responsibility to ensure that staff are able to perform their duties without being seriously fatigued and causing a risk to themselves?
- CARROLL, MR:** Would you agree with that?

MILLWARD, M: Yes, of course. Of course.

CARROLL, MR: Because on this form Ms Innes-Rowe is claiming to work to 11 pm having started at 8.30 am on a number of occasions. Wouldn't you query whether it's safe for her to be working those hours and then driving home late at night?

MILLWARD, M: Um, as I stated before, um, this is a - this is a health sector, you know, there are a lot of people who work very long hours, you know, so I'm not sure that it would have specifically raised that level of concern. I'm - I'm aware that people work a lot of long hours in health, in you know. Would I have been concerned that she would have been at particular risk of fatigue, ah, in driving home I don't think that would have occurred to me.

CARROLL, MR: Because you were aware people work long hours in health. Do you consider that means managers have no responsibility in health to worry about the long hours being worked by their subordinates?

MILLWARD, M: No, I totally agree they should.

92 When asked by his counsel whether he was 'able to observe by any means the amount of work that [Ms Innes-Rowe] performed', Professor Millward said:

MILLWARD, M: I certainly couldn't physically observe her at work. She - as the manager she would not usually come to a clinic or a specific clinical trial patient. This would be, you know, the lower level staff. Her office in the Clinical Trials Unit was not visible from where I was doing my clinical work in the cancer centre and you know, I would - if - to see her in her office I would have had to go to her office door and knock on it and see if she was actually there which I would not do unless I particularly needed to see her at a time.

STANTON, MS: So by what means did you have any knowledge of the work that Judith Innes-Rowe did?

MILLWARD, M: So obviously, you know, I was aware of things like protocols were being submitted, trials were opening and closing, I was aware - I would meet her generally on a weekly basis, sometimes just her sometimes with the level 7 person and we would discuss, you know, any particular issues that they felt they needed my input or advice on. Obviously I would see her from time to time in the department and I would receive emails and communications from her frequently about various topics.

STANTON, MS: About how often did you meet with her?

MILLWARD, M: It would have - generally about once a week.

STANTON, MS: Did you ever speak to her on the phone?

MILLWARD, M: From time to time but normally we would communicate by email because, you know, obviously if I happen to be seeing patients it wouldn't have been convenient for me to stop that and have a phone conversation. So our usual communications were by email.

STANTON, MS: And did you notice that you were receiving emails only in business hours or outside as well?

MILLWARD, M: I was receiving emails both inside and outside of, if you like, normal business hours. In fact, it - it became clear to me, you know, even before I was Head of Department that she was working long hours and I would receive emails, you know, often quite late in the evening.

STANTON, MS: So given those observations did you form any impression as to the likely usual weekly hours of work of Judith Innes-Rowe?

MILLWARD, M: I don't know that I formed a - in my mind a numerical figure but I was aware that she frequently worked after hours and on weekends.

93 Professor Millward also gave evidence that no one had suggested to him Ms Innes-Rowe might be dishonest or making dishonest overtime claims or given him any information about the times she entered and exited the CTU.

94 Professor Millward was asked in cross-examination about whether he approved Ms Innes-Rowe's overtime:

CARROLL, MR: Yes. So you were approving the payment of salaries to staff in the clinical trials after you were head of department?

MILLWARD, M: I was completing the payroll certifications, yes.

CARROLL, MR: And you understood that that meant that you were approving the payment of salaries to those staff?

MILLWARD, M: Yes.

CARROLL, MR: And that included Ms Innes-Rowe?

MILLWARD, M: Yes.

CARROLL, MR: And you were also responsible for approving the payment of overtime to staff within the clinical trials unit?

MILLWARD, M: I didn't directly approve the payments of overtime to Ms Innes-Rowe. But as I discussed, because I received the P6, I was aware that overtime was being worked by Ms Innes-Rowe and others. And in a sense that I was aware of it and was happy with it, yes, I was in approval of it.

CARROLL, MR: But you were - not only were you in approval of it, you were the person responsible for approving the payment of overtime for Ms Innes-Rowe, isn't that right?

MILLWARD, M: From the P6 forms, yes. From the - sorry, the payroll certification forms, yes.

- 95 Later in cross-examination, Professor Millward confirmed that no other employees copied him into emails with P6 overtime claim forms between 2014 and 2017.
- 96 Professor Millward spoke about Exhibit AD1 – document 6, which was a reply from HCN (later renamed HSS) to an email sent by Ms Innes-Rowe that attached a P6 overtime claim form. The email is dated 28 November 2017 and copied in Professor Millward. It says:

Hi Judy,

We have received your request for overtime from the above employees. As of the 20/11/2017 the NMHS Authorisation Schedule has changed and consequently this form is unable to be processed at this time.

Please resubmit your request with updated authority.

Should you have any queries regarding this email, please contact NMHS HR Services.

Tier 3	Director Finance & Business
	Nse-Mid Co-Director
	Director Youth Mental Health
	Service Co-Director
	Nse Mid Co-Director
	Nse Mid Co-Director
	Nse Mid Co-Director
	Nse Mid Co-Director
	Director Allied Health Services
	Director Safety Quality and Performance
	Mid Director-Statewide Obstetrics
	Director Regional and Support Services
	Director Finance and Business
	Director Projects
	Director Projects
	General Manager Dental
	Director Clinical Services
	Director Clinical Services
	Director Genetic Services

Thank you

Rebecca Wilson | Senior Payroll Officer

- 97 Professor Millward explained that Health Corporate Network/Health Support Services was an entity created to undertake payroll and human resources tasks across the Health Service. He explained that this email was the first time anyone had brought to his attention that there had been an ‘authorisation change’.
- 98 The North Metropolitan Health Service Authorisations, Delegations and Decision Making Schedule is Exhibit RD1 – document 30. Professor Millward’s evidence was that the first time he saw this document was in preparation for these proceedings.
- 99 Professor Millward was cross-examined about the email at [96]:

CARROLL, MR: We’re at tab 6 of the appellant’s bundle. So this is an email from HSS to Ms Innes-Rowe, which you were copied into, is that right, Professor Millward?

MILLWARD, M: Ah, correct, yes.

CARROLL, MR: And in this email HSS or where a person from HSS is informing Ms Innes-Rowe that the North Metropolitan Health Service authorisation schedule had changed and the form was unable to be processed at this time?

MILLWARD, M: Ah, that’s what it says, yes.

CARROLL, MR: And did you understand from that email that you did not have the authority then to approve overtime?

MILLWARD, M: Ah, I don’t think I understood at the time exactly what it meant. I was copied into it, so I probably didn’t pay a great deal of attention to it, but, ah, it says what it says, yes.

CARROLL, MR: But you would have understood at least that in order to approve overtime you needed to be authorised to do so?

MILLWARD, M: Ah, I would - ah, I would have understood that, yes. And that what it is stating here that there is a - a list of people or list of positions, um, which are labelled tier 3.

CARROLL, MR: Yes. And none of them were your position, were they?

MILLWARD, M: Correct, yes.

CARROLL, MR: In fact, they're all people who would when you weren't head of department they would be essentially two layers above you, is that right? You would report to the head of department and then the head of department and then the head of department would report to someone within these roles that are in front of you?

MILLWARD, M: Ah, I'm not sure I was aware at the time exactly what tier but, ah - - -

CARROLL, MR: Don't worry about the word tier?

MILLWARD, M: Yes.

CARROLL, MR: I'm just talking about those particular positions. So I think your evidence was that the head of department reports to one of the co-directors, is that right?

MILLWARD, M: Ah, yes, that's - that's what - that was correct when I was head of department. I'm not aware if there was a thing called a tier 3 or a tier 4 at that time.

100 Professor Millward was asked: 'After that email was received, had you been copied into any overtime claim forms or had anything to do with any sort of approving of overtime?'. He replied: 'I don't recall being copied into any overtime claim forms, no.'

101 In relation to the Pay Certification Statements, Professor Millward gave evidence that he would usually click on the box that says 'payroll certification'. He said there were 'certainly some times when I didn't click on it.' No one would raise with him if he did not click it and he had never heard of people not being paid because he did not click the button.

102 The Health Service put to Professor Millward that in his Amended Notice of Appeal, Professor Millward denies that he approved Ms Innes-Rowe's overtime. Professor Millward explained that he draws the distinction between 'approval of the overtime P6 form and the authorisation of payment on the payroll certification form'. Professor Millward agreed that when he says he did not approve Ms Innes-Rowe's overtime, he accepts that he approved the payment of her overtime through the Pay Certification Statements.

103 When asked if he was not only 'in approval' of Ms Innes-Rowe's overtime, but whether he was 'the person responsible for approving the payment of overtime for Ms Innes-Rowe', Professor Millward said: 'From the P6 forms, yes. From the - sorry, the payroll certification forms, yes.'

104 Professor Millward gave evidence about Exhibit RD1 – document 48, which contained a bundle of emails addressed to him as the 'Certifying Officer' and attaching Pay Certification Statements. He said that he would usually (but not always) click on the grey box that says 'Payroll Certification' and that this is part of what he did while he was 'keeping an eye' on the CTU for Dr Dewar. If he did not click it, he said that nothing happened. Professor Millward explained that staff were paid from two different SPAs.

105 Professor Millward's counsel asked him whether he 'formed an impression of Ms Innes-Rowe's overtime claims as a result of looking at these documents'. Professor Millward said:

MILLWARD, M: Yes. I was aware that she was claiming overtime and was being paid overtime, yes, by looking at these documents.

STANTON, MS: Right. And did you form an impression about the magnitude of the claims?

MILLWARD, M: No, I didn't form a specific impression of the magnitude of the claims, I was aware that she was working quite a lot of overtime but I did not prior to 2018 consider that the magnitude in total and I hadn't, for example, sat down and totalled them up or anything like that.

STANTON, MS: Yes. So as - if you look at it in real time so putting yourself back into the - the point in time where you would be looking at these documents obviously fortnight by fortnight or period by period, as it went along did you form any impression or any assessment of the magnitude of the claims?

MILLWARD, M: No, not to the extent that I could have kept in my head a running total or anything like that. I was aware there were times when she claimed overtime. I was aware there were claim - times when she did not. I was aware that there were periods when she would work overtime more than other times but in terms of did I have an idea in my head of the exact number of hours or the number of - or the amount of overtime dollars, no.

STANTON, MS: Okay. And then what about on a - a fortnight by fortnight basis, so if you just focus on a - a - a moment in time when you're looking at payroll statements, did you form any view about the amounts that you would see on these payroll certification statements as you went through them in real time? Did you form any view about the amount claimed?

MILLWARD, M: Well, as I said, clearly at times there were fairly large amounts and sometimes there was none. But I didn't form an impression in the sense that there was any particular pattern to it or that there was any particular threshold that, you know, triggered in my mind that there was something potentially amiss, no.

STANTON, MS: Did - did the magnitude of the claims - and I'm talking on a fortnight basis, a payroll statement by payroll statement basis, did it ever surprise you?

MILLWARD, M: No, no, not surprise me, no.

STANTON, MS: And why is that?

MILLWARD, M: Because I knew that she was working quite a lot of overtime.

- 106 In cross-examination, Professor Millward agreed that he regularly received Pay Certification Statements to certify. He would receive them by email, and the email contained instructions about how to complete them. Examples of these are in Exhibit RD1 - document 48. Professor Millward agreed that he received statements like this about certifying Ms Innes-Rowe's pay between 2015 and 2017, and clarified that he 'probably received them after 2017 as well.'
- 107 Professor Millward denied that he 'only considered [his] role in approving these forms was to ensure that there was enough money in the special purpose account to pay the stated amounts'. However he agreed that in his Notice of Appeal and the letter from his solicitor to the respondent in response to the allegations that he said the 'primary' reason he considered he was reviewing the Pay Certification Statements was 'to gain understanding of the total amount of expenditure' because it was his responsibility to ensure the SPAs remained in credit.
- 108 The Health Service pointed out that in the letter from Professor Millward's solicitor to the Health Service putting Professor Millward's response to the allegations to the Health Service, it was said on Professor Millward's behalf that his 'only role in relation to the payroll certification statements was to ensure the special purpose account remained in credit.' Professor Millward agreed that is what the letter says and accepted that 'in reviewing and signing off on those pay certification statements that part of [his] role was in that [he] needed to determine if the employees were entitled to receive the payment for the period specified'.
- 109 Professor Millward said he did not remember the instructions contained in the covering email to the Pay Certification Statements. The Health Service took Professor Millward to an example of the Covering Email and asked if Professor Millward agreed that he was told his role 'was to ensure that the persons listed are entitled to the pay set out in the statement'. Professor Millward said:
- MILLWARD, M:** Ah, as I stated, I was - I - I understood, ah, that I was saying that this person is entitled to receive payment - - -
- CARROLL, MR:** Yes?
- MILLWARD, M:** - - - from this SPA.
- CARROLL, MR:** But also they were entitled to the quantum of payment, which was sought in the payroll certification statement?
- MILLWARD, M:** Ah, that I consider the quantum of payment reasonable, yes.
- CARROLL, MR:** Well, not reasonable, you needed to consider that they were entitled to the payment?
- MILLWARD, M:** That they were entitled to the payment, yes.
- CARROLL, MR:** Yes. And keeping on tab 1 on that email the emails that you received accompanying these statements provided links with further information about checking payroll certification statements, do you agree with that?
- MILLWARD, M:** Ah, yes.
- CARROLL, MR:** Did you ever click on these links?
- MILLWARD, M:** Not that I recall, no.
- ...
- CARROLL, MR:** But you still knew even if you didn't click on the link you knew that it was your responsibility for approving the payments in the pay certification forms, is that right?
- MILLWARD, M:** Correct, yes.
- 110 Professor Millward explained that each month, he received an account statement for both SPAs. He would look over them 'to get an idea of the overall cash balance and make sure we weren't, if you like, running down our surplus and that it was maintained at a reasonably static or slowly increasing level.'
- 111 Professor Millward agreed during cross-examination that after he stopped being Head of Department he 'remained responsible for the budget of the clinical trials unit'. When the Health Service put to Professor Millward that he 'remained responsible for approving the payment of salaries for people in the clinical trials unit', Professor Millward said: 'I continued to receive the P6 payroll certification forms that we just discussed, which were sent to me as the signatory to the special purpose accounts from which their salaries were paid, yes.' Later in his testimony Professor Millward agreed he approved the salary expenditure, which included the payment of Ms Innes-Rowe's overtime.
- 112 Professor Millward said that he 'had knowledge of the SPAs that [Ms Innes-Rowe's contract] was being paid from' and that he 'approved the appointment of somebody to a position which would be paid from one of those cost centres'.
- 113 Professor Millward said he was not aware that there was any level of review of the SPA spending other than the Pay Certification Statements he was sent.

Dr Chee's evidence

- 114 Dr Raphael Chee gave evidence for Professor Millward. He worked as a Radiation Oncologist Consultant at SCGH from 2009 to 2013. From 2011 to 2013, he was Head of Department of his unit. Dr Chee said that he expressed concerns to the Executive team that he did not feel well-equipped to take on the Head of Department role because he was very young and still learning the trade. Dr Chee received no formal induction or training about what was required of a Head of Department.
- 115 Dr Chee gave evidence that one of his Head of Department duties included approving overtime claims submitted by staff. Dr Chee said that he was not given direction, training or instruction about what to do with the forms, but was 'just told to sign the forms.' Dr Chee said that he had no way of knowing whether staff had worked the overtime they were claiming and he 'assumed they were telling the truth.'

- 116 In cross-examination, Dr Chee explained that as Head of Department he approved overtime for 200-250 staff, including nurses, therapists, reception staff and junior doctors. Dr Chee said that he relied on his personal assistant to collate the overtime forms and review them before he signed off on them, 'especially if there's a few of them.' Dr Chee's evidence was that he 'would have a quick glance over – over the – a quick glance over the page and see if anything stands out.'
- 117 Dr Chee agreed that junior doctors were only entitled to overtime if their overtime was authorised at the time they worked the overtime. Dr Chee agreed that if a significant amount of overtime was sought, he would question whether or not he should approve it, and he would be concerned about whether the junior doctor was working too many hours. Dr Chee agreed that if a person was regularly working until midnight, having started at 8.30am, he would question the claim for overtime 'if it's consistent.' Dr Chee agreed that he would be concerned about that person's welfare and whether strategies could be put into place so that they did not need to work such long hours.
- 118 Dr Chee gave evidence that he did not know what Pay Certification Statements are.

Dr Phillips' evidence

- 119 Dr Martin Phillips gave evidence for Professor Millward. He was a Respiratory Consultant at SCGH from 1983 to 2017. During this time, Dr Phillips worked in different roles within the hospital and Health Department and was Head of Department of Respiratory Medicine from 1993 until 2003.
- 120 Dr Phillips said that it was part of his role while he was at SCGH (including when he was not Head of Department) to approve overtime for staff. He approved overtime for junior medical staff. Consultants did not have overtime. Dr Phillips also ran a clinical trials unit that had three or four staff members, including a Clinical Trials Manager. From time to time, Dr Phillips would approve overtime for them too, 'but that was a separate system, ah, run on a special accounts – um, ah, a special purpose accounts, ah, fund.' The effect of Dr Phillips' evidence was that he approved overtime for the staff in the clinical trials unit from around 1984 until almost 2017 when he left.
- 121 Dr Phillips' evidence is that he was never given any instruction or training on how to approach approving overtime for the clinical trials staff. He said:

PHILLIPS, M: I mean basically the SPA accounts, the special purpose accounts, were set up, um, ah, to be - well, they were - obviously came under the aegis of the, um, Health Department because of - for, ah, tax purposes in - in a sense, um, because they became non-taxable. But, ah, they really were there to run, ah, the trials and the moneys which went into them came from, ah, pharmaceutical companies or other - or other sponsors, um, and it was, therefore, our responsibility to manage those accounts. But the only instruction, well, there were two instructions, one was what would you spend the money on, for example, wages, ah, or salaries rather, ah, overtime, expenses related to the research, um, et cetera. But you - the only real, um, provision was that you maintained a positive balance, you remained in credit, so you couldn't overspend on the, ah, account and it had to be used for the purposes that had been established, ah, the ones which I have just detailed.

STANTON, MS: All right. So to come down to specifics, if the Clinical Trials Manager sends you by email or gives you in any other way a document that amounts to a claim for overtime when you were in that role of having to approve or disapprove of that overtime, what did you do? How did you approach the task?

PHILLIPS, M: Well, ah, provided that it appeared reasonable that - I mean there certainly were occasions when overtime was - was needed. I mean the roles of the Clinical Trials Manager, ah, was not only in dealing with actually running of the trial but also (indistinct 9.59.30) submission, um, ah, liaison with the pharmaceutical companies et cetera, um, establishing rosters, ah, for work. And - and the trials didn't necessarily fall into the need - you know, ah, eight to five weekdays, ah, they would extend to other occasions. Um, so those would be situations that I would sort of sign off on the actual time involved in - in maintaining the trial. Now, um, the Clinical Trials Manager would have, ah, ah, okayed to me in a sense, um, that, ah, the people who are, ah, under her, ah, were the other research members of the - other members of the research team had, in fact, um, done those, ah, tasks and that extra time was required and, um, and similarly for herself. But in this situation there's no particular way that I could, ah, check on it, um, because there weren't a sort of - there wasn't a clock in clock out mechanism or anything like that. Ah, so a lot of it was on trust and trust is obviously important in - in teams, small teams, and on the likelihood of it being appropriate in terms of the requirements and the time.

- 122 Dr Phillips gave evidence about Professor Millward's workload and said that he thought the Medical Oncology CTU was 'much more intense' than the Respiratory clinical trials unit. He thought Professor Millward would have been involved in many more trials than Dr Phillips was and Medical Oncology was short-staffed.
- 123 In cross-examination, Dr Phillips agreed that:
- a. one of the rules of the SPAs was to be sure that money being spent was for a purpose allowed under the account;
 - b. the second rule was that the SPA must remain in the positive;
 - c. he must think about the quantum of the expense and whether or not the expense is properly incurred; and
 - d. when he was given an overtime form, he would check that it looked reasonable in light of the facts he knew.
- 124 Dr Phillips also agreed in cross-examination that he approved overtime for employees in the CTU for periods when he was not Head of Department.

Ms Stagg's evidence

- 125 Ms Melissa Stagg gave evidence for the Health Service. She is the Operations Manager for Payroll Services at HSS. HSS provides shared corporate services to the health service providers that make up WA Health. Previously, HSS was called HCN and was part of the Metropolitan Health Service.
- 126 Ms Stagg gave evidence that the Operations Manager is responsible for the daily payroll activities that occur for the whole of WA Health. Ms Stagg manages seven teams that do 'transactional payroll activities'. Ms Stagg has also worked as Manager, Payroll Strategy Assurance and Compliance. She could not recall which role she was doing in 2013.
- 127 The effect of Ms Stagg's evidence is that the Operations Manager oversees the fortnightly pays. She does this by meeting with a group of team leaders and receiving indirect reports from payroll consultants. Ms Stagg has regular daily meetings with those people. She said:
- STANTON, MS:** Right. And is part of the oversight to look for any irregularities in terms of HSS processes?
- STAGG, M:** Um, I - it's not - I don't proactively look for any irregularities in the, um - there is an assumption that there, um - a lot of our processes have been set up to, um, work as they should be in the line with, um, what's expected from our, you know, within proper authorised documents to come in in order to - to produce a payment.
- We need our rosters authorised et cetera. From time to time it's brought to our attention that we can improve what we're doing and - and do better and we - we make adjustments accordingly.
- STANTON, MS:** Okay, but the data that's coming to you from your customers, your health service, health services, health service providers is part of what HSS is set up to do to make sure that the data that comes in is compliant with HSS processes?
- STAGG, M:** Yes.
- 128 Ms Stagg gave evidence that payroll staff are not required to have a particular qualification. Payroll consultants are paid at level 4 under the HSU Agreement.
- 129 Ms Stagg gave evidence about the payroll system and Ms Innes-Rowe's salary rates. HSS deals with two payroll systems. About 75% of employees are paid using a very old system called Lattice that contains 'everything we need to do in order to pay someone', including a person's position information, bank details, tax details, attendance and 'information that goes into making up a fortnightly pay'. The system also contains a history of the payments that have been made. Ms Stagg said that the main way that data is entered into Lattice is manually, by payroll consultants who report to Ms Stagg. Ms Stagg said that she doesn't have access to Lattice herself, because she does not make the payments, but her Team Leaders do. From the information those Team Leaders gave Ms Stagg, she can determine the salary level that Ms Innes-Rowe was paid between 2011-2018.
- 130 Ms Stagg gave evidence about Exhibit RD2A, which was a screenshot from the Lattice payroll system and another set of data that she said was extracted from the data warehouse that 'just shows that there was, um, temporary special allowance'.
- 131 In relation to the Lattice screenshot, Ms Stagg explained that the column marked 'DTE EFF' means 'date effective'. Where there is a change in salary, a new line is added. Where it is marked 'AG4091', that represents a level 9.1. AG4092 represents level 9.2 and AG4082 represents level 8.2.
- 132 For the warehouse data, Ms Stagg gave evidence that the table shows there was temporary special allowance paid. A temporary special allowance will top up a person's base rate of pay, similar to a higher duties allowance. For example an employee could be on level 5.4 but be paid at level 9.1 by having a special allowance added to their base rate of pay. Ms Stagg confirmed that the warehouse data relates to Ms Innes-Rowe. The columns marked 'period start date' and 'period end date' represent the pay periods the allowance was paid for. The column labelled 'Rate ID' refers to the base salary rate that the person was on at the time. Earnings ID 'would be the temporary special allowance ID'. A final table included in Exhibit RD2A showed the salary rate for Ms Innes-Rowe.
- 133 Ms Stagg's evidence was that the person's pay rate (from the relevant industrial agreement) is put into the system, and that then once the person's hours are added, the system calculates the pay rate. Allowances are also entered into the system. The system does not highlight errors such as whether a person is entitled to overtime. The payroll officer has to notice that. HCN relies on the manager having made the approval for payment over and above what is in the industrial agreement. Sometimes payments are authorised above what is in an agreement. This authorisation is made on a form that has been approved by the appropriate delegated person.
- 134 Ms Stagg gave evidence about Exhibit RD2B. She said that document is also an extract from the data warehouse. It summarises what a person has been paid over a period of time without needing to go through screen by screen or pay by pay. Exhibit RD2B relates to Ms Innes-Rowe. It shows the pay period start date, end date and what was paid. In the code description section, one is coded 105 and the other 106. Ms Stagg explained that 105 means overtime at time and a half, and 106 means overtime at double time. The table shows which hours were at each different rate.
- 135 Ms Stagg gave evidence that where a person is being paid a higher temporary special allowance, if they are paid overtime then that overtime is paid at the higher temporary special allowance rate. The effect of Ms Stagg's evidence was that Ms Innes-Rowe was paid \$244,937.30 in overtime during the relevant period.
- 136 Ms Stagg gave evidence about approval of overtime. She agreed in cross-examination that in 2011, an employee could fill out a P6 overtime claim form, insert the name and HE number of the supervising person and send it in without any signature and without copying in the manager. At that time, it may not have been irregular but HCN subsequently 'put something in place to say that we needed - the email needed to match the person, um, who had filled out the - the manager details.' HCN processed

overtime using the P6 Overtime Forms and then caused Ms Innes-Rowe to be paid in relation to both her salary and her overtime.

137 Counsel for Professor Millward put multiple examples of P6 Overtime Forms to Ms Stagg, including examples of P6 Overtime Forms where the name 'Michael Millward' is inserted as the manager, that were sent to HCN and that did not copy in Professor Millward. Ms Stagg agreed that at that time, that could have happened without HCN seeing it as irregular. She said it would not have been unusual for an assistant to fill in or submit forms on behalf of the manager. Ms Stagg agreed that there is no way of knowing from HCN's point of view from looking at the overtime forms, where the form was sent to HCN by someone other than Michael Millward, that Michael Millward has approved the overtime.

138 Ms Stagg gave evidence about an email from Mr Siviour that says 'On behalf of Michael Millward please process the following form' and that attached a form with 'Michael Millward' named as manager:

STANTON, MS: A person has put it. So again, there's no indication using that example from Mr Siviour that Michael Millward has seen or approved the overtime, is there?

STAGG, M: Um, I - I don't know.

STANTON, MS: Really? Because all the other times I've asked you that question, Ms Stagg, you've been happy to agree with me that - - -?

STAGG, M: But this - - -

STANTON, MS: - - - from HCN's point of view if the email wasn't copied to Michael Millward on the face of these documents there's nothing to show that Michael Millward has actually seen or approved this form. Isn't that your evidence?

STAGG, M: Ah, yes, but I've got no reason to believe that Mr Siviour didn't submit this form on behalf of Mr Millward and that Mr Millward had - could have filled this form out and Mr Siviour then submitted it on his behalf.

STANTON, MS: So you - - -?

STAGG, M: As you said that in his email because the other emails didn't say that.

STANTON, MS: Okay. So you'd be trusting Mr Siviour by reason of him saying "On behalf of Michael Millward please process the following form", you'd be trusting Mr Siviour to have run it past Professor Millward?

STAGG, M: Yes.

139 Another example put to Ms Stagg related to a form attached to a covering email from Ms Granner, who said: 'As this is my first time completing the overtime section I would appreciate your correcting these columns if they are filled out incorrectly.' When asked what HCN payroll would do if they received a question or request like that, Ms Stagg said:

STAGG, M: Um, we would read the email. If there was anything that we felt was missing from the form we would go back and ask the person or let them know that there was something that was missing. So, for example, if the manager's approval at the bottom of the form was missing but if the - it would be reasonable to assume that the times that have been put into the form were correct and that we would process it on that basis.

STANTON, MS: And the fact that, if we look on page 420 to the accompanying P6, the fact that someone has written in Michael Millward and an HE number that wouldn't look irregular to the person even though they'd been asked to especially check this one?---Um, no, it wouldn't be.

140 After looking at a number of P6 Overtime Forms from across two years, Ms Stagg agreed that 'most of the time the person sending the email is not the person with their name at the bottom of the form as the manager of the claimant'.

141 Ms Stagg gave evidence about a P6 overtime claim form relating to the period 16 February 2014 – 26 February 2014. Ms Innes-Rowe had submitted her own form. Ms Stagg agreed that HCN should have been alert to that irregularity and should have sent the form back to Ms Innes-Rowe, asking for it to be resubmitted by the appropriate person. Ms Stagg said the appropriate person would have been the manager or somebody other than herself. Counsel for Professor Millward put a bundle of overtime forms to Ms Stagg, who accepted that 'this is the way these forms are submitted on a regular basis all the way through 2014'.

142 Ms Stagg's evidence was clear that although HCN payroll staff would read emails sent to them, their role is to process 'the information that's on the actual form itself that's been authorised'. If they came across a form with very long hours claimed to have been worked, HCN would not raise any issues about that. In circumstances where an email was sent by Ms Innes-Rowe, attaching a form about hours that she claimed to have worked, with Professor Millward's details on the bottom of the form, the payroll consultant would assume that Professor Millward is aware of the form and would not raise any issues.

143 Counsel for Professor Millward put a range of examples of emails and P6 Overtime Forms sent to HCN relating to Ms Innes-Rowe. Ms Stagg gave evidence that the payroll officer's role is to provide 'transaction services, so they would be actioning the form'. She disagreed that the payroll officer would take action in relation to whether an employee 'is okay' if they appear to be working long hours.

144 Ms Stagg gave evidence about the email sent by HCN to Ms Innes-Rowe on 26 November 2014, which says:

Good afternoon, Judy.

Please be advised that this form is invalid as it needs to be sent by the delegated authority who signed off on this. Please request that Michael Millward re-submits this form for processing.

Thankyou [sic]

- 145 Ms Stagg confirmed that despite this email, and the reply from Ms Innes-Rowe, it 'was not the process' to inform Professor Millward of the irregularity. At that time, was not uncommon for people to submit forms on behalf of senior people.
- 146 In re-examination Ms Stagg explained that a HE number is used as an identifier and an electronic signifier.
- 147 Ms Stagg's evidence was that although there is no way of knowing that the designated manager had seen the form, there was also no way of knowing if the manager had not seen the form. Of the overtime forms Ms Stagg reviewed, she agreed that generally, but not always, Professor Millward was entered as the manager.
- 148 Ms Stagg agreed in cross-examination that sometimes the Pay Certification Statements show overtime that accumulated across more than one fortnight. She said that sometimes, they do not receive all the forms in time for the pays so it is possible that a claim relating to several weeks ago could be made in the current pay period. The Pay Certification Statements show the overtime that was a paid in the fortnight.
- 149 It is not in dispute that the Pay Certification Statements do not necessarily reflect the amount of overtime worked in the fortnight leading up to it.
- 150 Ms Stagg agreed that if the person who is the manager is on leave, employees will still get paid even if the manager has not clicked the grey button that says 'payroll certification'. She also agreed that there is not always a perfect correlation between the P6 Overtime Forms and the Pay Certification Statements.

Mr Kerr's evidence

- 151 Mr Andrew Kerr gave evidence for the Health Service. He was employed by the Health Service from October 2017 until October 2021 as Manager of Investigations.
- 152 Mr Kerr gave evidence about Exhibit RD1 - document 30. He explained 'it's the document that the Chief Executive and the Board Chair co-sign, which delegates responsibility or decision-making that is ordinarily invested with them to other offices in the organisation.' The document is available on the policy section of the Health Service's intranet.
- 153 Mr Kerr also gave evidence about the Covering Email. Mr Kerr said that he has seen emails like this before because he was the Payroll Certifying Officer for his area when he was Manager of Integrity for the Health Service. As the Payroll Certifying Officer, he was responsible for certifying the pay of people that report to him. If the link in the email is clicked, then it goes to the financial management manual, which explains the Pay Certification Statements.

Professor Millward's submissions

- 154 As set out above, in effect Professor Millward denies that he had oversight of Ms Innes-Rowe and says if he did, his oversight was not careless or negligent in all of the circumstances.
- 155 Professor Millward says because the HS Act does not define 'negligent' and 'careless', those terms should be given their ordinary meaning. Relying on *Titelius v Director General of the Department of Justice* [2019] WAIRC 00195 (**Titelius v DG**) at [19], Professor Millward says 'negligence' involves being 'inattentive to what ought to be done' and 'careless' means 'failing to take due care, being negligent, thoughtless or inaccurate.' Professor Millward argues that if the functions allegedly negligently or carelessly performed fell outside of his remit, their exercise cannot have been negligent in the performance of his functions. As he was not Head of Department during the relevant period, his 'functions' were those he was contracted to perform. Professor Millward submits that those functions did not include oversight of the CTU staff. As Head of Department, Dr Dewar was responsible for managing the CTU and its staff. Professor Millward argues that it was Dr Dewar's responsibility to deal with claims for overtime of those staff. Dr Dewar was responsible for ensuring the proper performance of those tasks.
- 156 Professor Millward argues that during the period that overtime was paid to Ms Innes-Rowe, the payments were made without any action being taken on his part. In relation to being copied in to Ms Innes-Rowe's emails to HSS attaching the P6 Overtime Forms from 2014 to 2017, Professor Millward argues that he did not understand that it was necessary for him to do anything to approve the overtime claimed. He says that there was no basis for him to believe that the payment of the overtime depended on him doing anything to approve it.
- 157 Professor Millward argues that he did monitor the overall wages paid from the SPAs and the magnitude of overtime claims, including as revealed by the Pay Certification Statements. He reviewed the Pay Certification Statements and they revealed the overtime hours worked by Ms Innes-Rowe. Given the nature of Ms Innes-Rowe's role, and her output, and the fact that she had to work independently without direct supervision, it was understandable that he was not alerted to any fraud on her part. Professor Millward argues:
- Insofar as [the Pay Certification Statements] reveal Ms Innes-Rowe's claimed overtime, the hours that Ms Innes-Rowe worked were not such as to cause Professor Millward to have any suspicion that the claims were fraudulent. That is because Professor Millward was aware of Ms Innes-Rowe working in the evenings and on weekends and because (as is accepted by the [Health Service]) he would frequently receive emails relevant to her work which were sent by her at those times. And further, Ms Innes-Rowe's output was such that Professor Millward was not surprised by Ms Innes-Rowe working long hours. Indeed, he says that it would have been impossible for her to do her job without working hours in excess of a standard 38 hour working week.
- 158 Professor Millward says that in all of the circumstances, he honestly believed, on reasonable grounds, that Ms Innes-Rowe's overtime claims were accurate in that they were likely to be commensurate with the actual amount of work performed and the actual times of its performance. Professor Millward argues that if Ms Innes-Rowe's overtime claims are not fraudulent, then he cannot have done anything wrong.

Health Service's submissions

- 159 The Health Service argues that Professor Millward's own evidence was that he either did not, or would rarely, look at the P6 Overtime Forms in to which he was copied for the better part of three years. In circumstances where the Board can find that

Professor Millward was managerially responsible for Ms Innes-Rowe and responsible for approving her overtime, Professor Millward's failure to review the P6 Overtime Forms (or tell someone the forms should not be sent to him) is manifestly negligent and careless. By failing to review the forms or tell someone they should not be sent to him, Professor Millward deprived the Health Service of any oversight of the P6 Overtime Forms due to his serious negligence and carelessness.

- 160 The Health Service argues that any reasonable person in Professor Millward's position would have at least been put on inquiry and would call into question whether the overtime claimed to have been worked was necessary and worked at all. On any view, the amount of overtime paid was excessive.
- 161 The Health Service submits that the Board should reject any suggestion that Professor Millward had a reasonable basis to consider that Ms Innes-Rowe was working the hours she stated. Professor Millward maintained he was not responsible for reviewing and approving Ms Innes-Rowe's overtime and he did not review or approve it. He maintained that he did not review the P6 Overtime Forms that were emailed to him. In his Amended Notice of Appeal, Professor Millward maintains he only reviewed Pay Certification Statements to determine if there was enough money in the SPA to meet the payment, not to determine if the payment was reasonably and properly incurred. Accordingly, Professor Millward could not have formed any operative view about the reasonableness of Ms Innes-Rowe's overtime. He did not turn his mind to that question. Professor Millward's knowledge of her work patterns is not a relevant basis for undermining any allegation of negligence or carelessness. Further, the Health Service argues that even on Professor Millward's evidence under affirmation before the CCC, Professor Millward could not honestly have considered Ms Innes-Rowe to be working anywhere near as much as she was claiming.
- 162 The Health Service submits that the question of training, expertise or knowledge about entitlements to overtime and how to review overtime claim forms is irrelevant because:
- a. the Health Service relies on common sense and not on any special expertise or knowledge to establish negligent or careless conduct. Any reasonable person in Professor Millward's position would review the P6 Overtime Forms in a similar manner to Dr Chee and Dr Phillips. That is, to see if anything stood out as being unreasonable, concerning or out of the ordinary. No technical training or knowledge is needed; and
 - b. any reasonable, sensible, intelligent person reviewing the P6 Overtime Forms would have seen the hours worked were significant and potentially dangerous from an occupational safety perspective. That person would have been put on notice to at least raise the issue with Ms Innes-Rowe or his own superior. Dr Chee accepted he would have done as much. It is reasonable that the Health Service expected as much.

Was Ms Innes-Rowe paid overtime to which she was not entitled?

Professor Millward's submissions

- 163 Professor Millward submits that Dr Chee and Dr Phillips gave evidence that they were not trained in approving overtime. He believes that overtime was approved on trust. Professor Millward argues that the amount of Ms Innes-Rowe's alleged fraud has kept changing and it is plausible on the evidence before the Board that Ms Innes-Rowe did work the days and times she claimed.

Health Service's submissions

- 164 The Health Service says the effect of cl 16.5 of the HSU Agreement is that although Ms Innes-Rowe held a position classified at level G-5, she received salary at level G-9 and so was not entitled to overtime payments (unless she met one of the conditions in cl 16.5(a) of the HSU Agreement). The Board can find that neither of the cl 16.5(a) exceptions applied to Ms Innes-Rowe and so she was paid approximately \$244,000 in overtime payments during the relevant period to which she was not entitled.

Allegation 1 – consideration

- 165 For the reasons set out below, the Board considers that there is clear and cogent proof of this serious allegation. We are satisfied that Allegation 1 is substantiated.

Did Professor Millward have oversight and/or management of Ms Innes-Rowe?

- 166 It is not in dispute that Ms Innes-Rowe's JDF shows the Head of Department as her line manager. In his email to Dr Joske dated 10 March 2019, Professor Millward said he was not Ms Innes-Rowe's line manager. Professor Millward gave evidence that he was not managerially responsible for Ms Innes-Rowe. However, the Board considers that evidence was self-serving and undermined by Professor Millward's later evidence. The Board finds that the totality of the evidence indicates that Professor Millward had oversight and management of Ms Innes-Rowe at the relevant time.
- 167 In his email to Dr Joske dated 10 March 2019 in response to Dr Joske's direction that Professor Millward end Ms Innes-Rowe's contractor arrangement under the Hays Contract, although Professor Millward said he had no line managerial responsibility for the CTU, which he says is the reason he copied Dr Dewar in to the email, Professor Millward stated 'Since I ceased being [Head of Department] in 2013, I have at [Dr Dewar]'s request continued to supervise and provide direction to the Unit' (emphasis added). By continuing to supervise and provide direction to the CTU, Professor Millward had oversight and management of Ms Innes-Rowe.
- 168 In response to human resources' email to him on 9 April 2018 saying that human resources would like to 'explore whether there are any changes to current practices that could be made to increase stability for your team members, such as longer-term contract periods. The purpose of this meeting would be to explore options for your consideration, and no changes would be made without first discussing them with you', Professor Millward thanked human resources for the update and asked to meet to progress the matter further. In July 2017, when HSS asked Ms Meredith Walker (copying in Professor Millward) about which of three options would be taken to appoint Ms Innes-Rowe at that time, it was Professor Millward who replied to HSS.

- Professor Millward notified staff of the Health Service by email dated 27 December 2018 about staffing changes in the CTU. Professor Millward met with Ms Basile before taking long service leave to discuss the management of the CTU during his absence. These matters lead the Board to find that Professor Millward had managerial responsibility for staff at the CTU.
- 169 Professor Millward ran the CTU for many years. He managed the CTU budget and approved salary expenditure. Professor Millward conceded that Ms Innes-Rowe reported CTU issues to him and he was the CTU cost centre manager. Professor Millward dealt with human resources about the payment of temporary special allowances to CTU staff and did not copy in Dr Dewar to his emails about that matter. Professor Millward, not Dr Dewar, is identified as the person seeking for Ms Innes-Rowe and another CTU staff member to be paid temporary special allowances because the classification of their positions did not reflect the work value of their roles. Those matters are inconsistent with the idea that it was Dr Dewar, and not Professor Millward, who had managerial responsibility for CTU staff.
- 170 Professor Millward did not raise any concerns about why human resources met with him about Ms Innes-Rowe's overtime. Further, his evidence was that it was reasonable for him to ask Ms Innes-Rowe to reduce her overtime. In our view, those matters are inconsistent with Professor Millward considering that he was not Ms Innes-Rowe's manager.
- 171 Professor Millward knew that he was copied in to emails attaching Ms Innes-Rowe's P6 Overtime Forms for three years. Professor Millward knew that the P6 Overtime Forms he was copied in to were forms that contained a claim for overtime. It is not in dispute that on at least 66 forms Professor Millward was identified as Ms Innes-Rowe's manager. There is no evidence that Professor Millward ever raised any concerns with anyone about being identified as Ms Innes-Rowe's manager on those forms, or about the fact that the forms were copied to him. Indeed, when the first P6 Overtime Form was copied to him, Professor Millward replied 'Thanks Judy' to Ms Innes-Rowe.
- 172 Professor Millard entered into the Hays Contract for Hays to provide Ms Innes-Rowe to work for the Health Service. He approved payments made under the Hays Contract. Hays identified Professor Millward as the contact for Ms Innes-Rowe's engagement. This conduct by Professor Millward also supports a finding that Professor Millward had, and considered he had, oversight and management of Ms Innes-Rowe.
- 173 Further, at the time the CCC report came out and before allegations of breach of discipline were made, Professor Millward said in the email to his colleagues that he was Ms Innes-Rowe's 'immediate manager' and would have to 'bear some responsibility'. Professor Millward's evidence in cross-examination that by 'immediate manager', he meant that he worked closely with and trusted Ms Innes-Rowe, and not that he had any managerial responsibility for her, was implausible.
- 174 Professor Millward agreed in his affirmed evidence before the CCC that:
- a. he had a supervisory role at the CTU;
 - b. Ms Innes-Rowe reported directly to him while he was Head of Department and since that time he has been the person she is primarily responsible to;
 - c. he was responsible for authorising salary payments to CTU staff;
 - d. ultimately he was responsible for all CTU staff and approving salary expenditure, including overtime;
 - e. he would receive and review every pay period a statement about how much salary, overtime and holiday leave loading staff were being paid; and
 - f. he approved the payment of Ms Innes-Rowe's salary and overtime.
- 175 In our view, a fair reading of the CCC transcript shows that those answers relate to the period after Professor Millward was Head of Department.
- 176 Considering the evidence before us, and applying the *Briginshaw* standard, the Board is satisfied that Professor Millward had oversight and management of Ms Innes-Rowe at the relevant time.

Consideration about whether Professor Millward was negligent or careless in the performance of his functions

- 177 The HS Act does not define 'performance' or 'functions'. However, s 161(d) of the HS Act mirrors s 80(d) of the PSM Act, which provides:

80. Breaches of discipline, defined

An employee who —

- (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

- (c) commits an act of misconduct; or
- (d) is negligent or careless in the performance of his or her functions; or
- (e) commits an act of victimisation within the meaning of section 15 of the *Public Interest Disclosure Act 2003*, commits a breach of discipline.

[Section 80 amended: No. 29 of 2003]

- 178 The PSM Act defines 'function' in s 3:

function has the meaning given by section 5 of the *Interpretation Act 1984*;

179 Section 5 of the *Interpretation Act 1984* (WA) provides the following definitions:

function includes powers, duties, responsibilities, authorities, and jurisdictions;

...

perform, in relation to functions, includes the exercise of a power, responsibility, authority or jurisdiction;

180 Accordingly, the performance of a function includes the exercise of a power, responsibility, authority or jurisdiction.

181 The Board does not accept that a duty or responsibility must be expressly set out in a JDF or written contract of employment in order for it to be part of an employee's functions for the purpose of s 161(d) of the HS Act. We agree with the Health Service's submission that an employee can be held accountable for their performance of duties and responsibilities that they carry out in the course of providing service where it falls within the scope of their contract of service, regardless of whether those duties and responsibilities are expressly set out in a written contract of employment or a JDF.

182 Professor Millward accepted that 'in reviewing and signing off on those pay certification statements that part of [his] role was in that [he] needed to determine if the employees were entitled to receive the payment for the period specified.' It was Professor Millward's responsibility and duty to determine if employees paid out of the SPA were entitled to receive the payment (including any payment of overtime) for the period specified. We find that approving the payment of Ms Innes-Rowe's overtime was part of Professor Millward's powers, duties or responsibilities for years, including after he was Head of Department. In particular, approving the payment of Ms Innes-Rowe's overtime was part of Professor Millward's powers, duties and responsibilities as authorised signatory of the SPA. It was something he did in the performance of his functions during the relevant period.

183 Both parties referred to the Supreme Court of Western Australia decision of *Titelius v Public Service Appeal Board* [1999] WASCA 19; (1999) 21 WAR 201 (*Titelius v PSAB*). In that case, Malcolm CJ said (Ipp and Wallwork JJ agreeing):

70. It follows that the essence of the charge of negligent performance of "functions" was based upon a breach of duty or responsibility. Absent such a breach, the applicant would not be negligent: cf Macken, McCarry and Sappideen, *The Law of Employment* (2nd ed, 1984) at pp 120-121; *Stroud's Judicial Dictionary* (5th ed, 1986) Vol 3 at pp 1688, 1699. In *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 784, Alderson B said:

"Negligence is the omitting to do something that a reasonable man would do, or the doing something which a reasonable man would not do..."

71. Similarly, as to the word "neglect" in a comparable context, namely the *Appeal Costs Fund Act 1964* (Vic): s 18(1)(c), McDonald J said in *Grimwade v The Queen* (1990) 51 A Crim R 470 at 476 that:

"'Neglect', as with the word 'default' is passive in its quality. It is to be interpreted in the context of s 18 of the Act as something which results in a trial being discontinued and a new trial being reordered. I am of the view that within that context the appropriate and proper meaning to be given to the word 'neglect' is to fail to perform a duty or obligation or to omit or to fail, through carelessness or negligence, to do something."

184 We agree with the approach taken by the Public Service Appeal Board chaired by Senior Commissioner Kenner (as he then was) in *Titelius v DG*, that for the purposes of s 80(d) of the PSM Act, and relevantly here, s 161(d) of the HS Act, the words 'negligent' and 'careless' bear their ordinary and natural meaning. The Macquarie Dictionary defines 'negligent' as 'guilty of or characterised by neglect, as of duty' and 'careless' as 'not paying enough attention to what one does', 'not exact or thorough' and 'done or said heedlessly or negligently; unconsidered'.

185 'Negligent' and 'careless' comprehends an action or behaviour 'which a reasonable [person] would not do': *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 784 cited by Malcolm CJ in *Titelius v PSAB*.

186 We agree with the Health Service that 'negligence' ordinarily contemplates whether conduct falls below an objectively reasonable standard. In the context of s 161(d) of the HS Act, the objectively reasonable standard of conduct is judged against a reasonable person in the position of the relevant employee. In this case, Professor Millward was a very experienced clinical academic who had financial responsibility for the CTU and had been Head of Department.

187 Arguments about it not being 'surprising to any reasonable manager to find a person willing to work a significant amount of overtime' do not assist Professor Millward. Willingness to work overtime and being entitled to claim or be paid overtime are different matters. Professor Millward should have properly overseen Ms Innes-Rowe's working overtime and claiming overtime in circumstances where he agreed to keep an eye on the CTU, acted as Ms Innes-Rowe's manager, was consistently copied in to her P6 Overtime Forms, was listed as her manager in those overtime claim forms for three years and approved the payment of her overtime as authorised signatory of the SPAs.

188 Professor Millward was Ms Innes-Rowe's manager. Ms Innes-Rowe's P6 Overtime Forms were copied to him for three years and after he had finished being Head of Department. Professor Millward did not question why the P6 Overtime Forms were being sent to him over that period. The Board finds that Professor Millward knew what those forms were about, because he had looked at some of them, but generally he did not look at the forms. At the same time, Professor Millward never questioned or raised with anyone why the forms were being sent to him or whether the P6 Overtime Forms should be sent to someone else. Any reasonable person in those circumstances would have reviewed the overtime claims or informed Ms Innes-Rowe and HSS/HCN if there was a reason why he could not or should not review and approve her overtime. The Board considers that, at a minimum, a reasonable person reviewing the overtime forms would have asked questions about the significant number (and pattern) of hours claimed as overtime by Ms Innes-Rowe. On the undisputed evidence, in the relevant period Ms Innes-Rowe was paid overtime of:

- \$70,999.00 in 2017;
 - \$89,989.00 in 2016;
 - \$70,392.00 in 2015; and
 - \$12,097.00 in December 2014.
- 189 A review of the P6 Overtime Forms shows that Ms Innes-Rowe regularly claimed to work extraordinarily long hours. For example, in the relevant period Ms Innes-Rowe claimed a total of 2,149 hours of overtime (compared to 3,088 ordinary hours). Ms Innes-Rowe often, on more than 38 occasions, claimed to work to midnight. She regularly claimed to work to 10pm when starting at 8.30am each weekday. On approximately 12 occasions, Ms Innes-Rowe claimed more overtime hours in a single pay period than she had worked ordinary hours. The Board considers that, on any reasonable view, the amount of overtime claimed by Ms Innes-Rowe was excessive and any reasonable person would have been put on inquiry. As set out in [91], eventually Professor Millward conceded that a proper review of the P6 Overtime Forms would have meant that he questioned Ms Innes-Rowe's long hours of work. He did not question her and he did not properly review the P6 Overtime Forms or the Pay Certification Statements.
- 190 Professor Millward's evidence is that he knew Ms Innes-Rowe was 'working overtime on occasions and that there were periods when she would do a lot of overtime'. Professor Millward said he did not form a specific impression of the magnitude of her overtime claims, nor any particular pattern or threshold of overtime claimed. It is not in dispute that Professor Millward was responsible for approving the Pay Certification Statements. That included approving the payment of salaries, including overtime, for the CTU staff. The Board considers that Professor Millward had a cavalier approach to matters in question, also demonstrated in cross-examination when in response to a direct question about whether he reviewed the P6 Overtime Forms, Professor Millward said he 'was not saying [he] did or didn't'. That approach was wholly unsatisfactory. Either Professor Millward did review the P6 Overtime Forms or he did not. Professor Millward repeatedly obfuscated during cross-examination. At times his evidence seemed to be tailored to suit his case. Often Professor Millward did not answer questions put to him.
- 191 Some of Professor Millward's explanations for matters put to him in cross-examination were contrived or implausible. This was not to his credit. At times Professor Millward could not bring himself to make a concession when it clearly was called for. For example, when it was put to Professor Millward that after the email from HSS dated 28 November 2017, he knew that he did not have authority to approve overtime, his evidence was 'I don't think I understood at the time exactly what it meant. I was copied into it, so I probably didn't pay a great deal of attention to it, but, ah, it says what it says, yes.' Other examples of this are set out at [56], [57] and [65].
- 192 The Board does not accept that Professor Millward had a reasonable basis to consider that Ms Innes-Rowe was working the overtime hours she claimed. Throughout the disciplinary process and in his Notice of Appeal (including as amended), Professor Millward maintained that he was not responsible for reviewing and approving her overtime. His evidence was that generally he did not review the overtime claim forms. In his Amended Notice of Appeal, Professor Millward said that he only reviewed the Pay Certification Statements to work out if there was enough money in the account to meet the payment. He did not consider whether the payment was reasonably and properly incurred. The Board considers that Professor Millward could not have formed a belief about the reasonableness of Ms Innes-Rowe's overtime claims because he did not turn his mind to that question. Having a general awareness that Ms Innes-Rowe worked long hours and often claimed overtime does not undermine the allegation of negligence or carelessness. Further, Professor Millward's evidence before the CCC was that prior to 2018 Ms Innes-Rowe would work late on occasions, and in response to being asked how regularly, Professor Millward's evidence was 'I couldn't give an accurate answer to that; once a week, maybe twice a week.' In those circumstances, the Board is not persuaded that Professor Millward could have honestly considered Ms Innes-Rowe to be working anywhere near as much overtime as she claimed to be.
- 193 The Board accepts that Professor Millward lacked knowledge about the HSU Agreement or its application. We accept that Professor Millward was not given any training or assistance in relation to how to properly oversee overtime claims. This was consistent with the experience described by Dr Chee and Dr Phillips. In our view, at a minimum the Health Service lacked proper systemic controls. But even Dr Chee and Dr Phillips gave evidence about not simply signing off on overtime claims. Unlike Dr Chee, who received P6 overtime claim forms from 200 – 250 staff members, Professor Millward only received P6 overtime claim forms from one staff member, Ms Innes-Rowe. Even with his much larger case load of overtime approvals, Dr Chee said that he would not 'merely tick and flick'. He would do a general check and would question excessive overtime. Dr Chee agreed that if he saw that an employee was working significant overtime or continually working very long hours, then he would have a concern about that person and might question the claim for overtime. Dr Phillips said that he would not blindly accept claims and he would only approve claims if they were reasonable in light of the facts of which he was aware. Like Professor Millward, Dr Phillips was responsible for approving overtime for a clinical trials unit when he was no longer Head of Department.
- 194 At a minimum, we find that Professor Millward was approving the payment of Ms Innes-Rowe's overtime in circumstances where he had not reviewed, or at least had not properly reviewed, the amount of overtime claimed, the reasons for the overtime or whether the overtime had been worked at all. Arguments to the effect that Professor Millward's responsibility went no further than ensuring the SPAs remained in credit are unpersuasive. An authorised signatory for the SPAs is responsible for ensuring the payment of expenses that are properly incurred, due and owing.
- 195 Further, it is not accurate for Professor Millward to say that he never received any instruction about how to oversee or approve overtime. In the relevant period, he received at least 73 Pay Certification Statements. Every one of those included a covering email that referred him to further information, explained what needed to be done and provided contact details for further instruction if needed.
- 196 Professor Millward's counsel argued that:

At some point, overtime claimed has to be taken on trust, based on the manager's knowledge of the amount of work done. And in the absence of any guideline or protocol to follow, managers are then left to exercise their own judgment about the matter, and that's what Professor Millward did.

In our view, Professor Millward's 'own judgment about the matter' fell well short of a reasonable or acceptable standard. His carelessness was remarkable, particularly given his responsibilities as authorised signatory of the SPA.

197 Even without any training or induction about particular steps to be taken in overseeing overtime claims, it is obvious that a person receiving overtime claim forms on which they are listed as 'Manager' and receiving Pay Certification Statements that set out the overtime hours claimed by an employee, where the Pay Certification Statements state 'I certify that the employees listed **are entitled to receive payment for the pay period specified**' (original emphasis) should review the overtime claim form and Pay Certification Statement and make sure that they are satisfied that the overtime should be paid. That involves considering whether the employee worked the hours claimed and whether the employee is entitled to be paid overtime for the hours. If they lack the knowledge to be satisfied of that, then they need to notify the appropriate person. Here, Professor Millward did neither of those things.

198 That there were systemic failures in this matter does not excuse Professor Millward's conduct. We cannot accept Professor Millward's submission that if Ms Innes-Rowe's overtime claims were not fraudulent, then there is no negligence, or as it was put: 'If the claims aren't fraudulent, he can't have done anything wrong.' Regardless of any fraud, Professor Millward was negligent and careless in the circumstances.

199 The Board finds that Professor Millward was negligent and careless in the performance of his functions.

Was Ms Innes-Rowe paid overtime to which she was not entitled?

200 The Board does not consider that it is necessary to make a finding about whether Ms Innes-Rowe worked the overtime hours she claimed. In any event, it would not be possible to make a finding about that on the limited evidence led about that issue in this matter.

201 However, to the extent that it is necessary for the Board to decide whether Ms Innes-Rowe was paid overtime to which she was not entitled, the Board finds that she was. We make that finding based on the evidence before us.

202 It appears from Ms Stagg's evidence, supported by Ms Whiteside's email, that Ms Innes-Rowe was paid significant amounts of overtime, relative to her base rate of pay, for a number of years as set out at [188].

203 Based on Ms Stagg's evidence and extracts from the Lattice payroll system the Board finds that:

- a. between November 2014 and July 2017, Ms Innes-Rowe's base salary was level G-9.2 of the HSU Agreement;
- b. from 1 July 2017 to November 2017, Ms Innes-Rowe's base salary was level G-5.4 but she received a Temporary Special Allowance that meant her salary was at level G-9.2 of the HSU Agreement; and
- c. Ms Innes-Rowe was paid \$244,937.30 in overtime payments in the relevant period that relates to Allegation 1.

204 Under cl 16.5 of the HSU Agreement, as an employee paid above level G-8 of the HSU Agreement, Ms Innes-Rowe was not entitled to be paid overtime except in the limited circumstances set out at cl 16.5(a), being if she was rostered to work regular overtime or instructed to hold herself on-call. Ms Innes-Rowe was supervised by Professor Millward. From his evidence the Board finds Ms Innes-Rowe was not rostered to work regular overtime, or instructed to hold herself on-call. Ms Innes-Rowe was therefore not entitled to overtime payments, but she was paid \$244,937.30 in overtime.

205 The Board finds that Ms Innes-Rowe was paid overtime to which she was not entitled.

Allegation 3

Professor Millward's evidence

206 Professor Millward's evidence about reporting lines, managerial responsibility and Ms Innes-Rowe's entitlement to overtime is set out at [50]-[75].

207 Professor Millward gave evidence about the Hays Contract. He said that the CTU was a 'mobile workforce' that was 'predominantly younger women'. At times, it was 'difficult to match the demand to the actual staff'. He said that often this was managed by hiring people on short term contracts from an external provider, in particular Hays Specialist Recruitment (Australia) Pty Ltd (**Hays**). The Clinical Trials Manager would contact Hays and say 'we are short staffed' or 'we need someone to do this work'. Hays would send the Clinical Trials Manager a list of people's CVs and 'an arrangement would be made with Hays for that person to commence.' Professor Millward was 'not aware [the arrangement] was approved by anyone other than the department or the clinical trials unit'. He clarified that by 'clinical trials unit' he meant the Clinical Trials Manager, Ms Innes-Rowe.

208 The Board asked Professor Millward to clarify the process for engaging people through Hays. He said:

MILLWARD, M: Ah, so what - prior to the engagement of Ms Innes-Rowe, Ms Innes-Rowe had handled the engagement of other staff for the clinical trials unit. Ah, this would happen in a number of ways. Ah, firstly, ah, if we needed a - a junior person to work in the clinical trials unit, ah, we would ask Hays, ah, for a list of potential people. These would not be people necessarily who had worked in a clinical trials unit but people with an appropriate background, as I explained yesterday. Ah, there were occasions where we wanted to engage specific people and we would say, well, you know, we will engage you through Hays or through some other agency but you will have to go to them and - so we can engage you through them, which is closer to what was done for Ms Innes-Rowe. Ah, so there were a number of ways in which we would engage people through Hays. Ah, from time to time, ah, they would approach us and say, you know, we have a list of people who you might be interested in, ah, do you have vacancies or do you need additional staff. Ah, so there - there are a number of mechanisms that could lead to an engagement.

COATES, MS: Okay, and then the terms upon which they were engaged how did that - how was that evidenced? Was it a standard contract with Hays or how would anyone know on what terms they were engaged or was it different for everyone?

MILLWARD, M: Ah, it was different for everybody.

COATES, MS: Okay, and the approval process for the person to be engaged through Hays where would that - what lines would that go through?

MILLWARD, M: Ah, as I stated, ah, I was not aware it went through any lines. Ah, it was, ah, not something that I was aware required to be or was escalated to any level above the clinical trials unit.

COATES, MS: Did you deal with Hays directly on those occasions or was that done on your behalf?

MILLWARD, M: Ah, it was predominantly Ms Innes-Rowe, ah, who dealt with Hays, ah, for that. I would - I had met Ms Jennifer McGrath person on a couple of occasions because, ah, she was interested in seeing if she could supply staff to the clinical trials unit as it got busier and obviously we needed staff from time to time.

COATES, MS: And then you would sign it off?

MILLWARD, M: Pardon?

COATES, MS: And then you would sign off the arrangement?---Ah, so what would normally happen was that the, ah, person who is engaged through Hays, ah, we would ask them - there was certain things that we insisted that they did, like have a Working with Children check and - and those things that are required to work in a hospital. Ah, and we would give them a thing saying while you're engaged and onsite you have to obey the hospital rules et cetera et cetera. But there was no formal contract that was signed.

EMMANUEL C: And I suppose on that point, what's your understanding of who was approving those engagements?

MILLWARD, M: Ah, approving them that they would - yes, that was predominantly Ms Innes-Rowe.

EMMANUEL C: Okay?

MILLWARD, M: And for the engagement of Ms Innes-Rowe it was myself.

COATES, MS: Are you aware if she sought further approvals up the line as far as the paperwork would go?

MILLWARD, M: Ah, I'm not aware that she did that, no.

- 209 When asked about whether, when other employees were engaged on short term contracts for the CTU, he would have expected Ms Innes-Rowe to 'supervise' those employees, Professor Millward said he 'would have expected that Ms Innes-Rowe would oversee the work' and that she would where necessary instruct them about what needed to be done.
- 210 In late 2018, Ms Innes-Rowe told Professor Millward that she intended to retire when her contract expired at the end of that year. Professor Millward's evidence was that this was not a complete shock to him because he knew she was in her mid-70s, but it placed the CTU in a difficult position because Professor Millward was due to take his long service leave shortly after Ms Innes-Rowe's contract would expire. Because there were clinical trials that were part way through, he considered it very important to organise a replacement for Ms Innes-Rowe as quickly as possible.
- 211 Professor Millward gave evidence about what he did to organise a replacement:

MILLWARD, M: So what had happened we submitted a request to advertise. Dr Dewar would have done that because as the person to whom the clinical trials manager formally reports to, she has to submit a request to fill a position. I undertook even though I was going on leave, to communicate with the relevant HSS people to make sure the advertisement went out as quickly as possible and I agreed that even though I was on long service leave, I would be the person who could be contacted for details of the position when it was advertised should people want further information. Obviously in an advertisement there's always someone who can be contacted and I said I would do that.

STANTON, MS: Right. And was there anything else that you did to safeguard the operation of the CTU apart from taking those steps in relation to getting a replacement employee?

MILLWARD, M: So I discussed with Ms Innes-Rowe whether she would be willing to continue for a short period on an engagement through Hays to provide temporary cover and ensure that at least some of the work that needed to be done, and there were a number of major tasks that were falling in that first three-month period, would be done. I also arranged for another person to be engaged or requested that Ms Innes-Rowe organise another person to be engaged to assist with some of these tasks and it - we confirmed with the level 7 position who was then on maternity leave what she could do and unfortunately she was only able to return from her maternity leave for two mornings a week. One thought obviously that I had was if this person returns fulltime then that person could assume some of the duties but she was not able to do that.

STANTON, MS: Right. Now in giving that evidence you've obviously mentioned some discussions with Dr Dewar about seeking a replacement, do you remember any other discussions with your colleagues about this problem?

MILLWARD, M: So we had a weekly consultants' meeting and it would have been raised there that Judith Innes-Rowe was leaving and I would have discussed with them and they would have discussed with me, you know, what impact this would have. We would have discussed a number of issues relating to the immediate care of the patients on the trials. I asked one of my colleagues, Dr Lim if during the time I was on long service leave if she would agree to be a person contactable by the Clinical Trials Unit staff if there were specific issues that they wanted medical input in about patients on trials. Normally that would be me but obviously sometimes those decisions had to be made quite quickly so someone needed to be put into that position.

- 212 Professor Millward gave evidence that both he and Dr Dewar approved the advertisements for the Clinical Trials Manager position after Ms Innes-Rowe resigned. Professor Millward said he was aware that someone higher up needed to approve a request to appoint, and approve a request for a temporary special allowance to be paid.
- 213 In relation to the negotiation of the contract with Hays, Professor Millward gave evidence about Exhibit AD1 – document 12. He confirmed that this email chain accorded with his understanding of what had been agreed with Hays, which was based on the terms of employment that Ms Innes-Rowe had put to him. She had said ‘she would not be able to work office hours’ because she had ‘other commitments’ but she would work as best she could to complete the tasks that needed to be done. Professor Millward considered that it was better Ms Innes-Rowe be there at the times she proposed than to have no one at all. Professor Millward said he was happy with her hourly rate because it ‘was actually I figured a bit less than what she was, you know, getting’.
- 214 In cross-examination, Professor Millward explained that he understood he was ‘agreeing to these terms and agreeing to the contract’ on behalf of the CTU. At the time, it did not occur to him that he was representing the Health Service or SCGH. Professor Millward denied that he negotiated this contract because he was ‘managerially responsible’ for the CTU and said that he ‘didn’t consider that [he] was assuming any line manager responsibilities for the clinical trials unit’. He denied thinking that he had the authority to employ people for the unit but said ‘the clinical trials unit had engaged short-term contractors before. That was a well-known process.’
- 215 Professor Millward said that he did not ‘specifically’ get Dr Dewar’s approval to engage Ms Innes-Rowe through Hays. He did not think the engagement required ‘a supervisor as such’, just a contact person. He said that he understood that Ms Innes-Rowe would ‘work independently’ and ‘not require day to day supervision’. His evidence was that he was not taking on line managerial responsibility for her but he ‘was the person approving and supervising the engagement’.
- 216 Professor Millward gave the following evidence about Exhibit AD2 which was a handwritten note. He said that he made the notes at a meeting with Tania Basile on 4 December 2018. The reason he knows it was 4 December is because he had written that date on the top of the document. Professor Millward said that he knows the meeting was with Ms Basile because when he found the note it had a post-it on it that said ‘Tania’.
- 217 The Board asked Professor Millward what he remembered about this meeting. He said at the meeting they discussed several issues including cover for his long service leave and what was going to happen to the CTU while he was on long service leave. Professor Millward mentioned the plan to engage Ms Innes-Rowe as a contractor for approximately three months while he was on long service leave.
- 218 The Board asked Professor Millward to clarify what was his independent recollection of the meeting and what had been prompted by the note, in circumstances where the evidence he was giving had not been included in his outline of evidence. Professor Millward explained that his memory was prompted by a conversation that he had with his representative the day before the hearing, when she referred to the email Professor Millward had sent his colleagues explaining that Ms Innes-Rowe would be returning as a contractor. Professor Millward said that his representative suggested that it would be helpful if there was any documentation from these meetings. He remembered that there might be and that he might have filed it with documents relating to long service leave rather than clinical trials.
- 219 Professor Millward said he was sure he had met with Ms Basile ‘at some stage’ prior to the beginning of Ms Innes-Rowe’s Hays Contract where he mentioned ‘that this was what’s going to happen’. He said that ‘from his recollection’ he and Ms Basile ‘had a least some conversation about the proposal to engage Ms Innes-Rowe through Hays as a short-term engagement while the, ah, position was advertised and recruited.’
- 220 On 27 December 2018, Professor Millward sent an email to Dr Dewar and other senior doctors in the Medical Oncology Department. He also copied in Ms Basile and Dr Joske who were the medical co-directors. Professor Millward gave evidence that he ‘had met with Tania and, you know, I wanted to make sure that everybody was aware of what the situation was.’ That email said:

Dear All,

As many of you know from our Consultant’s [sic] meetings and private conversations, there will be changes in our clinical trials unit. I want to let you all know what the plans are.

Judy Innes-Rowe has completed her current contract. After December 31, she will return as a contractor for approximately 3 months. During this time she will maintain continuity and primarily work on new and ongoing submissions and RGU activity. A request-to-fill and advertise for a new clinical trials manager has been submitted, and I will update you on the progress of this in the next week.

Gemma Walker has returned from maternity leave and is working Wednesday and Thursday mornings until approx. 1.30pm. She will return full-time in April.

Following the departure of Samantha Blades, a request-to-fill and advertise for new clinical trial staff has been submitted and again I will update you on this in the next week.

An RGS experienced contractor who will assist with protocol submissions and migration of older studies to RGS will be considered as a contractor in February.

During my long-service leave, Annette has agreed to attend the weekly clinical trial staff meetings (1230 Thursday) and help troubleshoot clinical issues etc.

A belated Merry Christmas to all!

Best wishes

Michael

- 221 Professor Millward's evidence is that no one raised any concerns or made any suggestions about this approach to him.
- 222 While on long service leave, Professor Millward continued to respond to emails about advertising Ms Innes-Rowe's position.
- 223 The Board asked Professor Millward whether he received and approved the Hays invoices while he was on long service leave. Professor Millward agreed that he did. Professor Millward denied that this was because he did not want someone else scrutinising the terms of the Hays Contract.
- 224 In cross-examination, Professor Millward explained that he thought engaging someone through Hays was different to appointing someone to a position, saying 'One is referring to an employee and the other is referring to a short-term contractual arrangement'. Professor Millward's evidence was that he did not think that 'by engaging a contractor through Hays that we were entering into an employment relationship with Ms Innes-Rowe'.
- 225 In cross-examination, Professor Millward explained that he thought it was better to engage Ms Innes-Rowe on the terms she proposed than to not have her working at all. He was not aware that he lacked any authority to enter such an arrangement and, if he had been then, then he would not have done so. Professor Millward denied knowingly or willingly subverting or sidestepping any limits on his authority.
- 226 Professor Millward conceded that in this case, he did not follow the usual procedure for engaging someone through Hays (in which a list of possible candidates was given to the CTU). Instead he negotiated directly with Ms Innes-Rowe. Professor Millward gave evidence that 'there are very, very few people who could potentially do this job' and that he thought Ms Innes-Rowe was the only one who could do it at short notice. Professor Millward said that he understood Ms Innes-Rowe's rate through Hays to be somewhat less than what she would be paid if she worked for the Health Service as a casual employee. However, once Hays' fees and penalty rates were considered, Professor Millward conceded that Ms Innes-Rowe was paid substantially more than what she would have received had she been an employee of the Health Service.
- 227 Professor Millward maintained in cross-examination that he entered into the Hays Contract to minimise risk to the CTU because of Ms Innes-Rowe's departure and his long service leave. He agreed that under the Hays Contract, Ms Innes-Rowe did not have to come to work if she did not want to but said he 'obviously expected that she would do her absolute best to fulfil the terms of the engagement and [he] had no reason to suspect that there was any reason she wouldn't.'
- 228 Professor Millward conceded that he did not ask whether there were any staff with requisite experience already employed by the Health Service. He considered whether the person who was working in Level 7 position could return from maternity leave early but she could not. Professor Millward said he was aware of all the oncology clinical trials managers in Perth and he knew there was nobody available at short notice who could step in.
- 229 Professor Millward gave evidence that even though he knew that Ms Innes-Rowe only had a 6-month contract, she had always been on 6-month contracts that were 'renewed automatically' so he did not realise that this time would be different. He had hoped that by the time Ms Innes-Rowe retired, the Level 7 person would be back from leave.
- 230 Exhibit AD1 – document 18 is an email chain between Ms Innes-Rowe and two Hays employees about Ms Innes-Rowe's correct rate of pay. Professor Millward confirmed that he understood Ms Innes-Rowe would be paid on the basis that there would be differential rates, depending on when she did the work. Specifically, Ms Innes-Rowe's base rate was \$80.00 per hour, her double time rate was \$160.00 per hour, on Saturdays she was paid time and a half and on Sundays she was paid double time.
- 231 Professor Millward said he stayed in 'regular email communication' with Ms Innes-Rowe while he was on long service leave. About once a month he would go into the office and meet with her briefly.
- 232 Professor Millward gave evidence that he received copies of Hays invoices for Ms Innes-Rowe's work while he was on long service leave. There is what he described as a 'timesheet' embedded in the document. Professor Millward said that Hays would send these documents to Ms Innes-Rowe, then she would request payment from the SPA. A timesheet 'is what was approved' then 'a request to pay an invoice was done'.
- 233 At first it was unclear from Professor Millward's evidence to whom the Hays invoices were initially sent:

STANTON, MS: And is the reason that you say it would go to Judith Innes-Rowe and then to you, is that anything to do with you being on long service leave?

CARROLL, MR: Objection. Leading question.

EMMANUEL C: Yes. It is rather.

STANTON, MS: Why would you say that, initially, they would have been sent to Judith Innes-Rowe and then to you?

MILLWARD, M: I don't - - -

EMMANUEL C: Well, did you say they went to Ms Innes-Rowe and then to you?

MILLWARD, M: I believe I said they would go to either of us. I don't recall if they were directly sent to me, or to someone else, with "Attention" on there.

STANTON, MS: Now, if I could ask you to go to AD1?

EMMANUEL C: Just before you move away from these documents, it's not very clear to me whether you're saying you did see these or not? These invoices. Professor Millward?

MILLWARD, M: Sorry?

EMMANUEL C: It's not clear to me whether your evidence is that you did see these Hays' invoices?

MILLWARD, M: Yes, I would have seen the Hays' invoices. I'm sorry, I thought the question was more about what I was approving, or authorising, while I was on long-service leave, which was the bit on the left. So there were

two processes there. There's a, "Yes, this person, you know, has worked here", and there is, subsequently, a request by Hays to pay an invoice.

EMMANUEL C: And is that what we're looking at now, the invoice?

MILLWARD, M: Yes.

EMMANUEL C: Okay?

MILLWARD, M: Yes, that's it. So - - -

EMMANUEL C: And can you tell us about the invoice? What was your involvement in dealing with the invoice?

MILLWARD, M: So the invoice would require a request, from totality, and not immediately, you know, obviously, we could accumulate invoices over a period of time, and either myself or Ms Innes-Rowe would submit, to HCN, a request to pay, which would include a list of people, engaged through Hays, and these documents. And then HCN would pay Hays the sum of the invoices that were submitted.

EMMANUEL C: I see. All right?

MILLWARD, M: Okay.

234 The Health Service attempted to clarify this during cross-examination. Professor Millward explained that he would authorise the timesheet himself, then later Hays would generate an invoice seeking payment. Invoices relating to Ms Innes-Rowe were sent to Professor Millward. He would then send a request to pay the invoice with HSS with a brief description such as 'Hays engagement Ms Innes-Rowe'. Professor Millward was unclear about whether he approved the payment, saying:

CARROLL, MR: Yes. So you would agree then that you're the person approving the payment of these invoices?

MILLWARD, M: I'm requesting the payment of these invoices, yes. Ah, I - I accept, if you like, that I was approving payment to Ms Innes-Rowe, ah, as a - as an engagement through Hays.

CARROLL, MR: Approving payment to Hays that you understood that Hays would then pay Ms Innes-Rowe?

MILLWARD, M: I was requesting payment to Hays, ah, from, ah, the SPAs. Obviously I don't approve that payment, that's - that's actioned by HSS.

CARROLL, MR: They action it but what are you - what distinction are you drawing between approve and request?

MILLWARD, M: Ah, I'm not drawing a distinction.

CARROLL, MR: Well, I keep asking you if you're approving and you say you're requesting?

MILLWARD, M: Ah, you're asking if I'm approving payment to Hays. Ah, if you mean - - -

EMMANUEL C: Approving payment of the invoice I think is what's being asked?

MILLWARD, M: Yes. Ah, yes. If you - if you like, yes.

EMMANUEL C: You were approving the payments - - -?

MILLWARD, M: Yes.

EMMANUEL C: - - - to Hays?

MILLWARD, M: Yes, yes.

CARROLL, MR: And isn't it the case that you were approving the payment of those invoices because you were Ms Innes-Rowe's supervisor at that point in time?

MILLWARD, M: Ah, I was approving the payments of the invoices, if you like, because, ah, I was her supervisor and I was able to request payments be made from the SPAs that I was a signatory for.

CARROLL, MR: Yes. And you understood that doing those duties, approving payment under this contract arrangement, fell within the scope of the duties that Dr Dewar had - - -?

MILLWARD, M: Yes.

CARROLL, MR: - - - afforded to you? Yes?

MILLWARD, M: Sorry, I - I don't think she actually forwarded any statement of duties to me. Ah, and in terms of the discussion, as I understood what she requested me to do, yes.

235 Professor Millward conceded that he received invoices from Hays and that he was aware that Ms Innes-Rowe's base rate (including Hays' costs) was \$110.76 per hour, which was doubled for Sundays and public holidays to \$221.52 per hour. Professor Millward said he understood he was not authorised to approve overtime but 'didn't consider the two to be related'. He said 'it was certainly not, you know, I want the ability to claim overtime.' Professor Millward's evidence was that he thought that it was 'penalty rates' and not overtime:

CARROLL, MR: Even though Ms Innes-Rowe is saying that your agreement was that she would be paid standard overtime rates?

MILLWARD, M: That's what Ms Innes-Rowe says. My understanding was that this was a penalty rate related to doing work at a non-standard time.

CARROLL, MR: Well, why didn't you correct that in your email? You've said, yes, this is correct accepting that that was the terms of the engagement below?

MILLWARD, M: Ah, it didn't occur to me that the term standard overtime rates would be equated to overtime worked.

236 Professor Millward conceded that he received and approved most of the Hays invoices while he was on long service leave. Professor Millward denied that this was because he did not want another person to approve the invoices because he did not want scrutiny of the terms of the Hays Contract. Dr Joske, of the Medical Specialities Division Co-Directors informed Professor Millward while he was on long service leave that Ms Innes-Rowe's contract through Hays was 'contrary to HR principles' and that it would 'have to stop immediately'. Dr Joske ended the email by saying 'I realise this may inconvenience your research and trials department. My apologies.'

237 Professor Millward replied to Dr Joske:

Dear David,

Thank you for your email. I am on long service leave, but am accessing emails from time to time. I would appreciate it if you would not refer to the Medical Oncology Clinical Trials Unit as 'your'. It is an integral part of the Medical Oncology Department, and undertakes trials for all Medical Oncology Consultants. The trials for which I am the Principal Investigator is a minority of the total work. I have no line managerial responsibility for the Clinical Trials Unit, the reporting structure is to the HOD Medical Oncology (hence I am including Jo Dewar in this email) then to yourself. Since I ceased being HOD in 2013, I have at Jo's request continued to supervise and provide direction to the Unit, as I believed this helped fulfill the reason for the creation, contracting and continued funding of my academic position based at UWA/SCGH by Cancer Council WA.

The situation regarding Judy and the Unit is as outlined in my email (attached) from 27/12/18. Judy is not currently employed by the Health Department and has no contract with it. The Clinical Trial Manager position is currently advertised with a closing date of 25/3/19.

At this time of transition in the Clinical Trials Unit, my decisions were made to minimize the following risks:

The clinical risk to patient care and patient safety for clinical trial patients by not having a Clinical Trials Manager.

The legal risk to the DoH which has signed contracts with external sponsors and companies to undertake trials safely to ICH-GCP standards and with an appropriate team in place to do this.

The reputational risk to SCGH as a site for conducting clinical research.

The management risk to lower level clinical trials staff needing experienced support and advice.

Please let me know what system yourself and Jo Dewar now propose to put in place.

Best wishes

Michael

238 Professor Millward said he did not hear anything further from Dr Joske about Ms Innes-Rowe's engagement with Hays or ceasing the Hays Contract.

239 Professor Millward gave evidence that Ms Innes-Rowe 'left' in May 2019. A replacement had been appointed 'so she had ceased the Hays engagement'. In June 2019, Professor Millward received a summons from the CCC to appear as a witness in relation to Ms Innes-Rowe's 'possible misconduct'. Professor Millward appeared before the CCC in July 2019.

Professor Millward's submissions about Allegation 3

240 In essence, Professor Millward argues that it is unfair to blame him for entering into the Hays Contract. Professor Millward submits that he approved the Hays Contract in good faith, believing he had authority to do so and that the engagement was vital to the ongoing functioning of the CTU. He denies that approving the Hays Contract amounts to a breach of discipline.

241 Professor Millward argues that for Allegation 3 to be made out, the Board would need to find that at the relevant time Professor Millward knew that he lacked authority to engage Ms Innes-Rowe through Hays and that Professor Millward had a corrupt and dishonest motive. He says that there is no evidence that the Health Service told Professor Millward about the existence of the Delegations Schedule and its effect on his authority, or that Professor Millward knew about the Delegations Schedule at the relevant time. Further, Professor Millward submits that there is no evidence that he knew at the relevant time that the Delegations Schedule provided that he did not have authority to enter into the Hays Contract.

242 Professor Millward argues that the Board should not assume that he would have understood that if he lacked authority to enter into an employment contract, or approve a temporary special allowance (whether because of advice, experience or by reading the Delegations Schedule), that Professor Millward must have known he lacked authority to engage a contractor through Hays on a short-term basis.

243 Professor Millward submits that external contractors were 'not infrequently' used by the CTU and Professor Millward was never told that he had no authority for that.

244 Further, Professor Millward notes that when he emailed all of the Co-Directors, including Dr Joske and Dr Dewar as Head of Department, and told them about Ms Innes-Rowe's retirement from her employment and the plan to have her return as a contractor on a temporary, short-term basis, no one raised any concerns with him about a lack of authority or other impropriety. He also argues that because Dr Joske does not mention in his email to Professor Millward dated 8 March 2019 that Professor Millward did not have authority, the Board can infer that Dr Joske was also unaware that Professor Millward did not have authority.

245 Professor Millward says that even if it could be found that he knew he lacked authority, that would not establish corruption. The evidence does not show that he caused the Health Service to enter into the Hays Contract to profit Ms Innes-Rowe. Instead the evidence shows that his concern at the time was to ensure continued proper functioning of the CTU despite the resignation of its manager of many years. He submits:

...the purpose of the CTU was to help treat cancer patients on clinical trials, such that it was vital that the CTU continued to function for the protection of those patients. Prof Millward was also cognisant of the contractual obligations owed to the pharmaceutical companies and research organisations that were its trial sponsors. A breach of those contracts by a failure to meet all of the requirements of all trial protocols would have been a very serious matter putting the Department of Health at risk of claims for damages.

246 Professor Millward submits that his anxiety about the situation was heightened because of his upcoming long service leave and because the next most senior member of the CTU was taking parental leave, and he had discovered she would only be able to return to work two mornings per week. Professor Millward says that it is understandable in those circumstances that he wanted to maintain continuity at the CTU until they could appoint a replacement.

247 Professor Millward argues that his:

[U]nselfish and conscientious involvement in recruiting a replacement Clinical Trials Manager, even when he was on long service leave, demonstrates that he was motivated to do all that he could, in good faith, to ensure the continued, successful operation of the CTU and to have a replacement Clinical Trials Manager appointed as soon as possible. That evidence is inconsistent with Professor Millward seeking to prolong the arrangement with Hays in respect of Ms Innes-Rowe, and it is inconsistent with a corrupt motive to improperly benefit Ms Innes-Rowe by means of that arrangement.

248 Professor Millward says that at the relevant time, there was little else that he could have done, and it 'would have been foolish to have decided to quibble about the rate, the days and times when work would be done or the differential rates depending on the time when work was carried out.' Further, he argues:

The arrangement with Hays was not, as has been submitted by the respondent, "extraordinarily detrimental" to the respondent. To the contrary, it was an arrangement made in order to avoid extraordinary detriment to the respondent such as would have been occasioned if the CTU did not continue to function so as to meet contractual obligations to sponsors pursuant to contracts entered into between those sponsors and the Department of Health. The failure of a single trial would have been highly detrimental to the reputation of the respondent. The failure of any trial also gave rise to risk of harm to patients. It was entirely reasonable that these serious risks eclipsed a concern about the commerciality of the arrangement.

249 Professor Millward argues that he never hid the Hays Contract arrangement. He says that telling his superiors about it by email and during his meeting with Ms Basile is inconsistent with corruption or dishonesty.

250 Professor Millward argues that the evidence lacks any hint of a motive for him to have acted as he did for the benefit of Ms Innes-Rowe. Rather, Professor Millward says the evidence 'establishes that [his] motivations were honourable, and that his actions were undertaken in good faith for the benefit of the CTU, the Department of Health, the respondent and cancer patients on clinical trials.'

Professor Millward's submissions about the disposition of the appeal

251 Professor Millward says neither allegation has been made out and the Board should reinstate him to his former position with effect from the date of dismissal without loss of wages or entitlements from that date.

252 If the Board finds any of the alleged misconduct has been made out, Professor Millward argues that it would be appropriate for the Board to adjust the decision by quashing the decision to dismiss. No penalty beyond a reprimand would be necessary or appropriate in light of the following mitigating factors:

- a. lack of clarity about managerial responsibility – if Dr Dewar did delegate relevant managerial responsibility to Professor Millward, the parameters of that delegation were unclear. It would be unfair to punish Professor Millward, by way of dismissal, for failing to undertake a managerial exercise in a particular way when the relevant task had not been clearly or expressly delegated to him;
- b. a lack of communication from HSS – including that there is no evidence that Professor Millward was informed about the reason why Ms Innes-Rowe began copying the P6 Overtime Forms to Professor Millward;
- c. no knowledge of any potential fraud – suspicions about the accuracy of Ms Innes-Rowe's overtime claims were not shared with Professor Millward. That information could have been shared before the matter was referred to the CCC, and the Executive could have intervened in the contracting arrangement to safeguard the CTU;
- d. a lack of instruction about scrutiny of overtime claims – this is said to significantly mitigate any misconduct on the part of Professor Millward;
- e. a lack of instruction about authority – Professor Millward should not be subjected to a penalty in circumstances where his employer did not bring the Delegations Schedule or limits of his authority to his attention;
- f. Professor Millward's long hours of work and wide range of important responsibilities;
- g. age – Professor Millward is 64. Dismissal at this stage of his career is difficult to overcome. It would be hard for him to relocate in search of a comparable full-time position;
- h. length of service and record – Professor Millward had 17 years of continuous service with an otherwise unblemished record;
- i. Professor Millward has already suffered a very significant penalty – this disciplinary process has been very distressing for him. By the time the Health Service dismissed Professor Millward, he had been stood down and sporadically received advice of allegations being made against him for more than a year. Since his dismissal, the findings have hung over his head for a further year and a half. Professor Millward has not found any alternative comparable employment. He has lost income and reputation; and

- j. it is in the public interest to deploy Professor Millward's skills as a highly experienced and skilled medical oncologist for the benefit of the public.

Health Service's submissions about Allegation 3

253 The Health Service says that it is the nature and the terms of the Hays Contract that establishes misconduct. The Health Service does not rely on Ms Innes-Rowe's historical overtime claim forms lacking in veracity or validity as a basis for alleging that entering into the Hays Contract was misconduct.

254 The Health Service argues that Professor Millward used the Hays Contract to achieve what he knew he was unable to approve and achieve through usual employment arrangements, in circumstances that allowed Ms Innes-Rowe to achieve a benefit to which she was not otherwise entitled (extra pay than if she had been an employee), and where the Health Service suffered a detriment (a very detrimental contractor arrangement), and where Professor Millward obtained a benefit (being that he did not have to put in the effort to arrange for a person to be properly employed through the usual process).

255 The Health Service says that the evidence establishes that:

- a. in November 2017 Professor Millward was told he did not have authorisation or delegated authority to approve overtime payments for any employee;
- b. in March 2018 Professor Millward was told that the Clinical Trials Manager was not entitled to overtime except in very limited circumstances;
- c. before December 2018 Professor Millward must have been aware that he did not have authority to employ a person in the Clinical Trials Manager position, and that approval from his superiors was needed;
- d. before December 2018, Professor Millward had been told at least twice of limits to his or others' authority under the Delegations Schedule. He knew of the Delegations Schedule;
- e. despite the above knowledge, Professor Millward entered into the Hays Contract. Relevantly:
 - i. the terms allowed Ms Innes-Rowe to work the days and times of her choosing;
 - ii. the terms allowed Ms Innes-Rowe to be paid through Hays at overtime rates if she worked outside of business hours in circumstances where the Clinical Trials Manager was not entitled to overtime as an employee;
 - iii. Professor Millward approved payment of the Hays invoices, which had the effect of approving claims for overtime made by Ms Innes-Rowe, despite knowing that he did not have authority to approve overtime;
- f. Professor Millward was on long service leave for most of the period in which he was approving invoices under the Hays Contract, so he knew that he had no way to scrutinise the accuracy of Ms Innes-Rowe's claims about the hours she chose to work and said she worked.

256 The Health Service submits that the effect of the Hays Contract was that the Health Service had no contractual right to require certain work to be done. In effect the Health Service had to pay higher rates of pay based on when Ms Innes-Rowe chose to work, rather than whether and when work needed to be done. The rates to be paid to Hays exceeded, in some cases quite substantially, the rates of pay that the Health Service would have needed to pay an employee engaged in the same role. The Hays Contract was extraordinarily detrimental to the Health Service and very beneficial to Ms Innes-Rowe. The Health Service argues that Professor Millward used the Hays Contract as a vehicle to step around that which he knew he could not do. Further and in any event, the Health Service says that Professor Millward lacked delegation or authorisation to enter into such a contract on its behalf. In the circumstances Professor Millward should have known that the Delegation Schedule existed and that he did not have authority to enter into such an arrangement on the Health Service's behalf.

257 The Health Service argues that Professor Millward very seriously undermined his employer by entering into the Hays Contract, because:

- a. the conduct was corrupt (dishonest) given his knowledge about what he could not do. Professor Millward used his position to gain a benefit for Ms Innes-Rowe and cause a detriment to the Health Service;
- b. Professor Millward's conduct breached his duty of fidelity and good faith by knowingly circumventing established employment processes and approving Ms Innes-Rowe's engagement on terms and conditions that were substantially detrimental to the Health Service and on terms and conditions that Professor Millward had no authority to approve (and he knew or should have known that he had no such authority).

258 The Health Service addressed the matters raised by Professor Millward by way of explanation or exculpation as follows:

- a. Professor Millward did not seek advice from his superiors before entering into the contract, so there is no advice he can rely on to excuse that conduct;
- b. Professor Millward did not take steps to work out if there was someone available to perform the role of Clinical Trials Manager on a short-term basis until recruitment could be completed, so the Board cannot accept that his conduct was reasonably necessary to minimise the stated risks;
- c. even if Professor Millward was to enter into such a contract to minimise the stated risks (which he could not do without approval from the Chief Executive or the Health Service's Board), there is no evidence that Professor Millward tried to negotiate better terms with Hays;
- d. under the Hays Contract Ms Innes-Rowe was not required to work any hours. She could work any days or hours of her choosing and the Health Service had no contractual right to direct Ms Innes-Rowe or Hays to ensure

work that needed to be done was done. Accordingly the Hays Contract did not mitigate the risks Professor Millward refers to and is not a reasonable basis to enter into the arrangement; and

- e. Professor Millward knew from at least 1 July 2018, or should have known, that he needed to take steps to arrange for someone to be employed as Clinical Trials Manager from the first week of January 2019. Failing to take steps at an earlier time to ensure the role was filled in the first week of January 2019 suggests that Professor Millward did not consider the matters a risk.

Allegation 3 - consideration

- 259 Fundamental to Allegation 3 is that Professor Millward acted improperly in all the circumstances. Considering the evidence in total, the Board finds that he did.
- 260 Given the requirement to request the Executive Director or Chief Executive's approval to fill a vacancy, as shown by Professor Millward's evidence and the documentary evidence, the Board considers that before December 2018 Professor Millward must have been aware that he did not have the authority to employ a person in Ms Innes-Rowe's position. Approval was required from his superiors.
- 261 The Board finds that before December 2018, on at least two occasions Professor Millward was informed about limitations to his or others' authority under the Delegations Schedule. This is clear from Exhibit AD1 – document 6 and Exhibit RD1 – document 14. Professor Millward was aware of the Delegations Schedule and it is not in dispute that the Delegations Schedule could be accessed on the Health Service's intranet.
- 262 The Board finds that Professor Millward was told by email on 28 November 2017 that he did not have delegated authority (and was not otherwise authorised) to approve overtime payments for any employee. On 19 March 2018, Professor Millward was told by email that the position in which Ms Innes-Rowe was then employed was not entitled to overtime, other than in very limited circumstances which did not apply to Ms Innes-Rowe.
- 263 It is implausible that Professor Millward could be aware, as he was, of the layers of authority required for (and the bureaucratic complexity involved in) appointing an employee to a position, arranging for the payment of a temporary special allowance or reclassifying a position, but that at the same time Professor Millward would not appreciate that he lacked authority to enter into the Hays Contract. This is even more so given the extraordinary terms of the Hays Contract.
- 264 The Board is satisfied that at the time that Professor Millward engaged Ms Innes-Rowe on the Hays Contract, Professor Millward was aware that Ms Innes-Rowe was not entitled to overtime and that he did not have authority to approve overtime payments. Further, Professor Millward was aware that he did not have authority to appoint a person to the Clinical Trials Manager position. Yet it was in those circumstances that Professor Millward entered into the Hays Contract.
- 265 The Board finds that Professor Millward negotiated the terms of the Hays Contract despite knowing he lacked authority to approve overtime payments or appoint a person to the Clinical Trials Manager position. Professor Millward concedes as much. It is also clear, and the Board finds, that under the terms of Hays Contract negotiated by Professor Millward:
- a. Ms Innes-Rowe could work the days and times of her choosing;
 - b. Ms Innes-Rowe's base rate was \$110.76 per hour (including Hays' costs);
 - c. Ms Innes-Rowe's Sunday and public holiday rate was \$221.52 per hour (including Hays' costs); and
 - d. Ms Innes-Rowe could be paid through Hays at overtime rates if she worked outside of business hours in circumstances where the position in which she was working would not entitle an employee to overtime.
- 266 The Board considers that Professor Millward was deliberately vague when giving evidence about a number of material matters, including whether he approved the payments of the Hays invoices. Counsel for the Health Service and the Board had to repeatedly ask Professor Millward to answer the questions put to him. Eventually Professor Millward conceded that he approved payment of the Hays invoices. The Board finds Professor Millward approved payment of the Hays invoices, which had the effect of approving claims for overtime made by Ms Innes-Rowe, in circumstances where Professor Millward was aware that he did not have authority to approve overtime. Further, given Professor Millward was on long service leave for most of the period in which he approved the Hays invoices, he had no meaningful way to oversee or scrutinise the accuracy of Ms Innes-Rowe's claims about the hours she chose to work and said she worked.
- 267 The Board accepts that the effect of the Hays Contract was that the Health Service had no contractual right to require any work to be done. Further, the Health Service effectively had to pay significantly higher rates of pay based on when Ms Innes-Rowe chose to work, rather than based on whether and when work needed to be done.
- 268 The Board accepts that on the whole the rates to be paid to Hays were substantially more than the Health Service would have had to pay an employee doing the same role. Ms Innes-Rowe worked under the Hays Contract for about 23 weeks. During that time, Hays invoiced the Health Service approximately \$130,891 for approximately 805 hours worked by Ms Innes-Rowe. At the time, the full-time annual salary for a level G-8.2 position was \$118,402. It would have cost the Health Service around \$59,201 plus superannuation to employ a Clinical Trials Manager for 26 weeks, and that person would have provided 988 hours of work.
- 269 Professor Millward's evasive evidence was unimpressive. Further, his insistence, on one hand, that he had no training or expertise in industrial relations or human resources and, on the other hand, the distinctions he drew (for example, between being 'in approval' of overtime versus approving overtime, or between the payment of penalty rates under the Hays Contract and the payment of overtime) were simply implausible. Further, despite Professor Millward's attempt to argue that the Hays Contract did not involve the payment of overtime, Professor Millward confirmed in his email to Hays dated 18 April 2019 that he had approved the payment of 'standard overtime rates' to Ms Innes-Rowe. In any event, in the Board's view, whether the inflated rates of pay that Ms Innes-Rowe could command under the Hays Contract were penalty rates or overtime rates is not to

- the point. The terms of the Hays Contract allowed Ms Innes-Rowe to be paid at rates that far exceeded ordinary time rates when she chose to work on particular days or at particular times.
- 270 The Board accepts that Professor Millward did not have the delegation or authorisation to enter into the Hays Contract on behalf of the Health Service. Under the Delegations Schedule only Tier 1 or Tier 2 Officers had such delegated authority. Professor Millward was not a Tier 1 or Tier 2 Officer. In circumstances where Professor Millward had been made aware of the Delegations Schedule and was aware that his authority was limited, the Board considers that Professor Millward should have been on notice that he did not have authority to enter into the arrangement under the Hays Contract on behalf of the Health Service.
- 271 We cannot accept Professor Millward's submission that:
- a. his activity was 'generous and conscientious and going above his duty'; or
 - b. his reasoning in entering the Hays Contract was sound and appropriate.
- 272 In our view, Professor Millward had no reasonable basis to believe he had authority to enter into the Hays Contract. The Board accepts that Professor Millward knew he could not approve Ms Innes-Rowe's overtime or engage her on a contract of employment but, despite that knowledge, he still entered into the Hays Contract which had the effect of achieving that which he knew he could not. Namely, he could (and did) approve the engagement of Ms Innes-Rowe to perform the Clinical Trials Manager role, without the approval of his superiors, paid at a rate of pay that exceeded the ordinary rate of pay under the HSU Agreement. The Board considers it open to find, and we do, that Professor Millward's conduct in doing so was dishonest.
- 273 Further, we consider that Professor Millward's conduct breached the duty of fidelity that he owed to the Health Service, by knowingly circumventing employment processes and approving Ms Innes-Rowe's engagement on terms and conditions that:
- a. were substantially detrimental to the Health Service; and
 - b. he had, and he knew that he had, or should have known that he had, no authority to approve.
- 274 Professor Millward did not seek advice from his superiors before he entered into the Hays Contract, nor did he discuss the terms and conditions of the Hays Contract.
- 275 The Board does not consider that Professor Millward's conduct in entering into the Hays Contract can be excused or justified on the basis that it protected against risks, including risks to patient care and safety, legal risk to the Health Service because of executed contracts and reputational risk to the Health Service. Professor Millward did not take steps to find out if someone else (internal or external) could perform the Clinical Trials Manager role on a short-term basis until an employee could be engaged.
- 276 The Board is not persuaded that Professor Millward's actions were reasonable because he 'was aware that there was nobody who was available at short notice to, ah, step in like this'. Further, there is no evidence that Professor Millward tried to negotiate better terms with Hays, such as a term allowing the Health Service any control over the hours worked, or work done, by Ms Innes-Rowe. It was clear from Professor Millward's evidence and his response to the allegations dated 20 January 2020 that he wanted to retain Ms Innes-Rowe's services as Clinical Trials Manager at that time, regardless of the cost.
- 277 The Board is not persuaded that it was necessary or reasonable to enter into the Hays Contract to minimise the risks of not having a Clinical Trials Manager. The Hays Contract did not require Ms Innes-Rowe to work any hours. She could choose to work any days or hours. The Health Service had no contractual right to direct her or Hays to ensure work was done.
- 278 Professor Millward knew that Ms Innes-Rowe was employed on a 6-month maximum term contract that expired on 29 December 2018. He knew that she was in her mid-70s. By October 2018 Ms Innes-Rowe had told Professor Millward that she was going to resign and she gave notice of her resignation on 11 November 2018. We consider that Professor Millward ought to have known from at least July 2018 that it was necessary to take steps to arrange for a person to be employed as Clinical Trials Manager from January 2019. That undermines Professor Millward's argument that he had no choice but to enter into the Hays Contract because he had mere weeks to organise a replacement Clinical Trials Manager.
- 279 We infer from Professor Millward's diary entry that he met with Ms Basile on 4 December 2018. We accept that Professor Millward told his superiors by email and at that meeting that Ms Innes-Rowe would be engaged as a short-term contractor. But there is no evidence that Professor Millward told them about the terms of the Hays Contract, and it is the terms of that arrangement that are so objectionable and give rise to the misconduct.
- 280 The HS Act does not define 'act of misconduct' or 'misconduct' so those terms must be given their ordinary meaning, being conduct that is 'improper or immoral by the standards of ordinary people': *Civil Service Association of Western Australia Inc v Director General of Department for Community Development* [2002] WASCA 241 at [31] per Anderson J (Hasluck and Parker JJ agreeing).
- 281 The Board accepts that Professor Millward did not receive a financial benefit from the Hays Contract. However, the Board does not accept that Professor Millward acted in good faith on reasonable grounds in entering into the Hays Contract. In our view, Professor Millward was not motivated to benefit Ms Innes-Rowe, although his actions certainly had that effect. We find that Professor Millward wanted to ensure the smooth operation of the CTU, he trusted Ms Innes-Rowe and considered that her services had to be secured, regardless of the cost or proper process that should be followed. In doing so, Professor Millward acted improperly and dishonestly. In the circumstances, given its terms, simply entering into the Hays Contract amounted to misconduct.
- 282 Even if Professor Millward was honestly motivated, we consider that his actions were wholly inappropriate and amounted to misconduct.
- 283 Applying the *Briginshaw* standard, in the Board's view there is clear and cogent proof of this serious allegation. Professor Millward's conduct was improper by the standards of ordinary people. We find that Allegation 3 is substantiated.

284 Specifically, we find:

- a. Professor Millward approved Ms Innes-Rowe being engaged on the Hays Contract to work at the CTU;
- b. Ms Innes-Rowe was engaged on the Hays Contract from December 2018 until May 2019;
- c. Ms Innes-Rowe reported to Professor Millward while she worked at the CTU, even while Professor Millward was on long service leave;
- d. Ms Innes-Rowe had been employed to work in the CTU and performing the duties of the Clinical Trials Manager since 1995 and paid above level G-8 since 30 April 2011 under the HSU Agreements;
- e. from at least 9 April 2018, Professor Millward was aware that Ms Innes-Rowe was not entitled to claim overtime while being paid above level G-8 of the HSU Agreement;
- f. Professor Millward approved pay and conditions while Ms Innes-Rowe was engaged on the Hays Contract that were not in accordance with the HSU Agreement pay and conditions, which were:
 - i. more favourable than Ms Innes-Rowe could have achieved as an employee of the Health Service; and
 - ii. considerably more detrimental to the Health Service than if Ms Innes-Rowe (or someone else in her role) was engaged as an employee of the Health Service (for example, Ms Innes-Rowe could work hours of her choosing and hours Ms Innes-Rowe worked after 5pm would be paid at what amounted to overtime rates, regardless of what time she started work that day);
- g. On 28 November 2017, when Professor Millward received an email from a HSS Senior Payroll Officer telling him that the Health Service's Authorisation Schedule had changed and overtime required approval by a Tier 3 Officer, Professor Millward knew that he was not a Tier 3 Officer. He had no reason to think he could approve overtime;
- h. Professor Millward approved payment by the Health Service to Hays, including rates of pay that exceeded overtime rates under the HSU Agreement for services provided by Ms Innes-Rowe; and
- i. by approving Ms Innes-Rowe's engagement through the Hays Contract, Professor Millward facilitated Ms Innes-Rowe receiving the equivalent of overtime payments that Professor Millward knew she was not otherwise entitled to claim or be paid if she had continued to be employed by the Health Service under the HSU Agreement.

285 The Board finds that Professor Millward committed an act of misconduct that amounted to a breach of discipline contrary to s 161(c) of the HS Act. He dishonestly used his position to obtain a benefit for Ms Innes-Rowe and to cause a detriment to the Health Service. Professor Millward breached his duty of fidelity to the Health Service by using the Hays Contract to achieve what he knew he was unable to approve and achieve through usual employment arrangements. He did this in circumstances that allowed Ms Innes-Rowe to achieve a benefit to which she was not otherwise entitled (being more pay than if she had been an employee), where the Health Service suffered a detriment (being a very detrimental contractor arrangement), and where Professor Millward obtained a benefit (being that he secured the services of the person he wished to retain in the role at that time).

Is dismissal a proportionate penalty?

286 The Board is satisfied on the evidence that the Allegation 1 and Allegation 3 are made out. In our view, the conduct the subject of Allegations 1 and 3 clearly amounts to breaches of discipline.

287 Professor Millward accepted before the CCC that he was responsible for approving Ms Innes-Rowe's salary and overtime but he abandoned that position once Allegation 1 was made against him.

288 We agree with the Health Service that Professor Millward's lack of acceptance of responsibility by suggesting his role was simply to ensure the SPA remained in credit is an aggravating factor. Further, here the wrongdoing was sustained, serious and not the result of spontaneous, extreme circumstances.

289 Without the matters set out at [288], we may have been persuaded that a final warning would be a fair penalty for Allegation 1. Professor Millward says that his conduct was in good faith and he maintains that he has not done anything wrong. We have real concerns about Professor Millward's lack of insight and awareness about why his conduct in Allegation 1 is serious and problematic. In our view, Professor Millward's conduct fell far below the standard expected of a senior employee in the public sector. Professor Millward's approach in this regard raises concerns about his suitability for continued employment in his role with the Health Service.

290 The conduct in Allegation 3 is serious misconduct. It was dishonest and a significant breach of Professor Millward's duty of fidelity. We agree that it provided a significant benefit to Ms Innes-Rowe and significant detriment to the Health Service. Again, Professor Millward failed to acknowledge or have any insight into his wrongdoing. We consider that dismissal is a proportionate and reasonable response to the conduct in Allegation 3.

291 We are not persuaded that the mitigating factors set out at [252] above provide a basis for the Board to adjust the decision to dismiss.

292 We conclude that dismissal is a fair penalty in the circumstances. We are not persuaded that we should adjust the Health Service's decision to dismiss Professor Millward.

293 We will order that application PSAB 1 of 2021 is dismissed.

2022 WAIRC 00778

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 DECEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MICHAEL JOHN MILLWARD

APPELLANT

-v-

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIRPERSON
MS J COATES - BOARD MEMBER
MS J AUERBACH - BOARD MEMBER**DATE**

TUESDAY, 8 NOVEMBER 2022

FILE NO

PSAB 1 OF 2021

CITATION NO.

2022 WAIRC 00778

Result Appeal dismissed**Representation****Appellant** Ms F Stanton (of counsel)**Respondent** Mr J Carroll (of counsel)*Order*

HAVING heard from Ms F Stanton (of counsel) on behalf of the appellant and from Mr J Carroll (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), orders –
 THAT application PSAB 1 of 2021 is dismissed.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2022 WAIRC 00777

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 DECEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MICHAEL JOHN MILLWARD

APPELLANT

-v-

CHIEF EXECUTIVE, NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIRPERSON
MS J COATES - BOARD MEMBER
MS J AUERBACH - BOARD MEMBER**DATE**

TUESDAY, 8 NOVEMBER 2022

FILE NO

PSAB 1 OF 2021

CITATION NO.

2022 WAIRC 00777

Result Order issued**Representation****Appellant** Ms F Stanton (of counsel)**Respondent** Mr J Carroll (of counsel)*Order*

WHEREAS this is an appeal to the Public Service Appeal Board under the *Industrial Relations Act 1979* (WA);
 AND WHEREAS at a hearing on 22 July 2022 the parties asked the Public Service Appeal Board to amend the name of the respondent;
 AND HAVING heard from the parties, the Public Service Appeal Board considers the name of the respondent should be amended;

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

THAT the name of the respondent be amended to ‘North Metropolitan Health Service’.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2022 WAIRC 00773

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TERENCE REGINALD ROY

APPELLANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

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

DATE

FRIDAY, 4 NOVEMBER 2022

FILE NO

PSAB 14 OF 2021

CITATION NO.

2022 WAIRC 00773

Result	Appeal discontinued by consent
Representation	(on the papers)
Appellant	MDC Legal
Respondent	State Solicitor's Office

Order

WHEREAS this is an appeal made pursuant to s 80I(1)(a) of the *Industrial Relations Act 1979* (WA) (IR Act);
AND WHEREAS on 2 November 2022, the appellant’s representative wrote to the Public Service Appeal Board (Board) and attached a minute of proposed consent orders signed by both parties;

AND WHEREAS on 2 November 2022, the Board considered the correspondence;

NOW THEREFORE the Board, pursuant to the powers conferred under the IR Act, and by consent, hereby orders –

THAT the matter be and is hereby discontinued with no order as to costs.

(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 00759

REVIEW OF DECISION - S.61A - OSH ACT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	:	2022 WAIRC 00759
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	THURSDAY, 21 OCTOBER 2021, WEDNESDAY, 20 OCTOBER 2021, CLOSING SUBMISSIONS THURSDAY, 11 NOVEMBER 2021
DELIVERED	:	FRIDAY, 28 OCTOBER 2022
FILE NO.	:	OSHT 3 OF 2021
BETWEEN	:	SEAN PATRICK LAMPRECHT Applicant AND WORKSAFE WESTERN AUSTRALIA COMMISSIONER DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY Respondent

CatchWords	:	Class 2 Demolition Licence, lawfully obtained experience – safe and proper manner – demolition work – reviewable experience – proportionality – equity, good conscience, and the substantial merits of the case
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Occupational Safety and Health Act 1984</i> (WA) <i>Occupational Safety and Health Regulations 1996</i> (WA)
Result	:	Decision affirmed
Representation:		
Applicant	:	Mr T Retallack (of counsel)
Respondent	:	Mr A Hay (of counsel)

Cases referred to in reasons:

ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18; (2014) 254 CLR 1

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; (1996) 186 CLR 389

Eclipse Resources Pty Ltd v The State of Western Australia [No. 4] [2016] WASC 62; (2016) 307 FLR 221

Elvidge Pty Ltd v BGC Construction Pty Ltd [2006] WASCA 264

GHD Pty Limited v WorkSafe Western Australia Commissioner [2021] WAIRC 00655; (2021) 102 WAIG 89

Green v Mabey (Unreported, WASC, Library No 940711, 7 December 1994)

Jackson v Harrison [1978] HCA 17; (1978) 138 CLR 438

Minister For Aboriginal Affairs v Peko Wal/Send [1986] HCA 40; (1986) 66 ALR 299

Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; (2010) 240 CLR 611

Nakad v Commissioner of Police, New South Wales Police Force [2014] NSWCATAP 10

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

Sean Investments Pty Ltd v Mckellar [1981] FCA 191; (1981) 38 ALR 363

Shepherd v Murray [2000] WASCA 281

Shrimpton v The Commonwealth (1945) 69 CLR 613

Stamatelatos v Commissioner of Police, NSW Police Force [2018] NSWCATAD 156

Stratton Creek Pty Ltd v Morrison [2005] WASC 84

Sullivan v Civil Aviation Safety Authority [2013] FCA 1362; (2013) 138 ALD 600

Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93; (2014) 322 ALR 581

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

Waugh v Kippen [1986] HCA 12; (1986) 160 CLR 156

Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1994) 74 WAIG 2

Reasons for Decision

- 1 Mr Sean Lamprecht owns a business that undertakes demolition work. In October 2020, Mr Lamprecht applied to renew his class 2 demolition licence which was due to expire on 28 November 2020.
- 2 The WorkSafe Commissioner declined to reissue a licence because he considered Mr Lamprecht did not have sufficient experience in class 2 demolition work. Mr Lamprecht submitted a statement of his experience in class 2 demolition work to support this application. The WorkSafe Commissioner excluded from his consideration those class 2 jobs which had not been notified to WorkSafe. The failure to notify these jobs contravened the *Occupational Safety and Health Regulations 1996* (WA) (OSH Regulations). Mr Lamprecht also submitted several additional class 2 demolition jobs. The WorkSafe Commissioner excluded these jobs from his considerations because those class 2 jobs had been undertaken following the expiry of Mr Lamprecht's class 2 demolition licence. Mr Lamprecht did not provide any other evidence of class 2 demolition work to the WorkSafe Commissioner.
- 3 Mr Lamprecht has applied to the Tribunal to review the WorkSafe Commissioner's decision to refuse to grant him a class 2 demolition licence. Mr Lamprecht submits that the Tribunal ought to grant him a licence because he is able to undertake class 2 demolition work in a safe and proper manner. Mr Lamprecht contends the demolition work undertaken between March 2015 and November 2020 along with WorkSafe's audits of his work during that period provides the basis for the Tribunal finding that he can perform the class 2 demolition work in a safe and proper manner. Mr Lamprecht contends that the Tribunal ought not to exclude from its consideration the class 2 demolition jobs undertaken in contravention of the OSH Regulations because the adverse consequences of the denial of a licence is disproportionate to the breach of the OSH Regulations. Mr Lamprecht

submits that the Tribunal ought to consider his experience in demolition work other than class 2 demolitions. Mr Lamprecht seeks the Tribunal quash the decision of the WorkSafe Commissioner and order that he be granted a licence.

- 4 The WorkSafe Commissioner opposes Mr Lamprecht's application and contends that the requirement to be able to undertake demolition work in a 'safe and proper manner' should be understood to mean lawfully and in accordance with the OSH Regulations. The WorkSafe Commissioner asserts Mr Lamprecht carried out work unlawfully on a recurrent basis and the evidence of the breaches of the *Occupational Safety and Health Act 1984* (WA) (OSH Act) and the OSH Regulations is a relevant consideration for the Tribunal. The WorkSafe Commissioner submits that the Tribunal ought to affirm his decision to not issue a class 2 demolition licence.

Evidence of the Applicant's Ability to Perform Class 2 Demolition Work

- 5 Mr Lamprecht gave evidence that he has undertaken demolition work for many years and over that time has learnt how to do most tasks associated with demolishing houses and structures. Mr Lamprecht described the process he undertakes when demolishing a structure. This process involves Mr Lamprecht identifying the height of the structure and ascertaining whether it is two storeys. Mr Lamprecht then assesses how close it is to the boundary line and how close the structure is to any other structures. Prior to commencing any work temporary fencing is erected.
- 6 When undertaking demolition work Mr Lamprecht operates various machinery, including a truck for which he is licenced and a 12-tonne excavator which he has a ticket to operate. Mr Lamprecht is also licenced to operate a front-end loader and a bobcat.
- 7 Mr Lamprecht gave evidence that he checks for asbestos by walking around the structure from the outside to look at the roof profile and then going inside. If Mr Lamprecht is uncertain about the presence of asbestos, he takes a sample and obtains a laboratory test. If asbestos is present, he will use caution tape and warning signs. An asbestos register is completed prior to commencing the job.
- 8 When Mr Lamprecht has identified that asbestos is present, he usually engages others to assist. In five jobs submitted for consideration by the Tribunal he engaged others to assist him. Mr Lamprecht gave evidence that the people assisting him had completed demolition training.
- 9 On the first morning of a demolition job Mr Lamprecht reviews the asbestos removal work plan ensuring safe work method statements are used for asbestos removal and safe work method statements are used for the demolitions. Mr Lamprecht ensures daily attendance registers are completed for those who are working with him, and he creates the required documents prior to the job. At the review meeting he delegates specific tasks. For example, delegating the task of watching during asbestos work to ensure no one enters the exclusion zone. There is an opportunity for those working on the job to comment on the proposed safe work method systems and he requires persons working on the job to sign that they have agreed with the proposed system.
- 10 Mr Lamprecht then walks through the job with the other people and discusses with them how the job will proceed. In this process, they identify risks and talk about how they will address them. They look for slip and trip hazards. At this time, they get their tools and Personal Protective Equipment (PPE) ready and conduct a safety check. Mr Lamprecht says this whole process takes no more than 30 minutes.
- 11 Mr Lamprecht supervises his employees during the job, and he always remains on site with them.
- 12 If there is a need to use machinery on the site, Mr Lamprecht completes a pre-start inspection checklist on the machine.
- 13 Demolition always happens after the asbestos is removed, wrapped, and disposed of.
- 14 Mr Lamprecht gave evidence of 14 demolitions carried out between 2015 and 2020:
- (i) Demolition of a shed over 2 meters high on Cunliffe Street, Lancelin in March 2015.
 - (ii) Demolition of single storey dwelling with a patio over 2 metres in DeBurgh Street, Ledge Point in July 2015.
 - (iii) Full demolition of a dwelling and pergola over 2 metres in Dillworth Way, Ledge Point commencing in July 2015.
 - (iv) Full demolition of a derelict school house in Chitna Road, Neergabby in December 2015.
 - (v) Demolition of a two-storey house consisting of a single storey house on stilts greater than two metres and less than ten metres in height in Jones Street, Ledge Point in November 2017.
 - (vi) Demolition of an external ablution block greater than two metres and less than ten metres in height in Whitfield Street, Guilderton commencing in May 2020.
 - (vii) Demolition of four sheds and four concrete tanks that were two metres high or more in Reserve Road, Chittering commencing in October 2020.
 - (viii) Demolition of one shed and two partial structures which are not single storey houses and which are greater than two metres and less than ten metres in height in Midlands Road, Watheroo commencing in April 2019.
 - (ix) Partial demolition of a structure greater than two metres and less than ten metres in height in Merewana Road, Watheroo commencing in May 2019.
 - (x) The demolition of two sheds greater than two metres and less than ten metres in height at DeBurgh Street, Ledge Point commencing in February 2019.
 - (xi) Demolition of a structure greater than two metres and less than ten metres in height at Ammon Avenue, Ledge Point commencing in March 2016.
 - (xii) The demolition of three structures greater than two metres and less than ten metres in height at Beattie Road, Beermullah commencing in May 2016.

- (xiii) Demolition of a structure greater than two metres and less than ten metres in height in Walebing Way, Guilderton commencing in March 2016.
 - (xiv) The demolition of a structure greater than two metres and less than ten metres in height at Moore River Drive, Guilderton commencing in May 2016.
- 15 Mr Lamprecht concedes he did not notify these jobs to WorkSafe as required by regulation 3.119. Mr Lamprecht's evidence is that at that time he had misunderstood the requirements of the OSH Regulations and only notified commercial jobs and not demolition jobs associated with residential dwellings. Mr Lamprecht says that he now properly understands the requirements of the OSH Regulations and that once he had been made aware of his error, he subsequently notified the class 2 demolition jobs as required by the OSH Regulations.
- 16 Mr Lamprecht gave evidence of a further five class 2 demolitions carried out between 28 November 2020 and 21 April 2021:
- (i) The first class 2 job was located at Lot 232 Wedge Street, Guilderton. Mr Lamprecht worked on this job with David Moir and Franz Lamprecht. The applicant said it was a class 2 job as it was a shed higher than two metres and he estimates the structure was 6 metres by 6 metres and 3.5 metres tall. The shed was clad in asbestos which was removed in accordance with the method described by Mr Lamprecht in his oral evidence. The job required portable scaffolding. The documents relating to this job submitted to the Tribunal include a demolition permit, a notice of completion, a notification of demolition work to WorkSafe signed on 13/01/2021 (handwritten notation emailed on 13/1/2021), showing a proposed commencement date of 15/02/2021 and WAD licence 229 with an expiry date of 28/11/2022, an asbestos removal works plan dated 5/2/2021, a Safe Work Method Statement signed by the applicant, David Moir and Franz Lamprecht on 5 February 2021 and a demolition permit issued by the local government.
 - (ii) Jobs two and three were both at Lot 184 Nilgen Road, Nilgen. The applicant worked on this job with Franz Lamprecht. The site was owned by the Water Corp and involved the demolition of five concrete tanks. Mr Lamprecht explained that these were class 2 jobs because the tanks are greater than two metres high and had steel reinforcing and an inner liner to make the water safe for drinking. The tanks were 2.2 metres high and about 8.0 metres in diameter. This job was notified to WorkSafe on 13 January 2021 by email with a commencement date of 22 February 2021 and citing the expired class 2 demolition licence number with the expiry date section of the form left blank.
 - (iii) The fourth job submitted was located at 18 Kaiber Avenue, Yanchep. Mr Lamprecht worked on this job with David Moir and Franz Lamprecht. It was demolition of a dwelling with an attached carport about 8 metres long, 3.5 metres wide and 3.0 metres high. The applicant said this was a class 2 job because the single storey house had a carport higher than two metres. During this job a WorkSafe Inspector visited the site on 9 February 2021. The inspector checked permits, fencing, signage and commented that 'everything complies' and that he was 'well organised'. The documents submitted to the Tribunal include an email that the applicant's wife Amber Lamprecht sent to the Department on 13 January 2021 on the applicant's behalf which attaches a notification of the class 2 demolition work for this job citing the licence WAD 229 and omitting the expiry date. This notification was given eight days before demolition began. Amber Lamprecht prepared the notification of demolition work and it is her handwriting on this form and Mr Lamprecht signed it.
 - (iv) The fifth job was located at 5 Troy Street, Guilderton. Mr Lamprecht worked on this job with David Moir, Franz Lamprecht and Blake Anderson. The job was the demolition of a dwelling on stilts and a free standing shed 3.0 metres by 3.0 metres and about 3.0 metres high at its highest point. The applicant said this was a class 2 job because it includes a garden shed higher than two metres. Risks were associated with this job because the shed was on a boundary line and a fence was at risk of being damaged during the demolition. The documents submitted to the Tribunal include a notification of demolition work for this job that Amber Lamprecht sent as an attachment to the Department on 12 April 2021 on the applicant's behalf. This notification was sent seven days before the demolition began. The description indicates why the job is a class 2 demolition. Amber Lamprecht prepared the notification of demolition work and it's her handwriting on this form with Mr Lamprecht's signature.
- 17 Mr Lamprecht whilst conceding the work was carried out after his licence had expired contends that this experience should be considered by the Tribunal. Mr Lamprecht submits that he understands his application to renew or re-issue a licence is the subject of these proceedings and therefore his application was pending and has not been rejected by the WorkSafe Commissioner. Mr Lamprecht submits he notified the WorkSafe Commission of the proposal to undertake these class 2 demolitions in accordance with regulation 3.119. Mr Lamprecht asserts that the WorkSafe Commissioner was aware of the jobs because he had notified WorkSafe, and the WorkSafe Commissioner did not advise him that he was not permitted to perform demolition work whilst his application was pending. Mr Lamprecht says it was reasonable for him to believe that it was not unlawful to perform the demolitions which he notified to WorkSafe whilst his application was pending.
- 18 WorkSafe submit that the Tribunal ought not grant Mr Lamprecht a class 2 demolition licence because he is not able to satisfy the requirement that he can do class 2 demolition work in a safe and proper manner because:
- (1) Mr Lamprecht has not recently completed class 2 demolition works lawfully.
 - (2) Mr Lamprecht has breached the regulations and conditions of his previous licences on a recurrent basis by:
 - (a) Failing to submit notifications of demolition work required by the OSH Regulations.
 - (b) Engaging workers to undertake demolition works without ensuring they had the required training.
- 19 Mr Lamprecht submits that the Tribunal ought to grant him a licence because he is able to undertake class 2 demolition work in a safe and proper manner. Mr Lamprecht contends the demolition work undertaken between March 2015 and November 2020 along with WorkSafe's audits of his work during that period provides the basis for the Tribunal finding that he can

perform the class 2 demolition work in a safe and proper manner. Mr Lamprecht contends that the Tribunal ought not to exclude from its consideration the class 2 demolition jobs undertaken in contravention of the OSH Regulations because the adverse consequences of the denial of a licence is disproportionate to the breach of the OSH Regulations.

Question to be Decided

- 20 The issue for the Tribunal to decide in this matter is whether I am satisfied on the evidence before the Tribunal that Mr Lamprecht is able to undertake class 2 demolition work in a safe and proper manner.
- 21 Mr Lamprecht has submitted evidence of his experience which has been gained in contravention of the regulations and/or the conditions of a previously issued licence. To answer the question of whether I am satisfied by the evidence submitted I must consider the weight to be given to the experience obtained in contravention of the regulations.

Nature of the Review

- 22 The nature of the review under s 61A(3) of the OSH Act is by way of a rehearing and the powers of the Tribunal are exercisable without having to find error in a decision made by the WorkSafe Commissioner.
- 23 In accordance with s 61A(3) of the OSH Act, the Tribunal is required to 'inquire into the circumstances relevant to the decision' of WorkSafe. This involves the Tribunal assessing whether, in view of the material before it, WorkSafe was justified in making the decision it did. This requires the Tribunal to investigate for itself the circumstances giving rise to the decision and the validity of the conclusions reached: *Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* (1994) 74 WAIG 2; *The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd* [2007] WAIRC 01273; (2008) 88 WAIG 22.

Equity, Good Conscience, and the Substantial Merit

- 24 In exercising its jurisdiction, Mr Lamprecht submits that the Tribunal is required by s 51I of the OSH Act and s 26(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**) to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms.
- 25 The WorkSafe Commissioner submits that the Tribunal is not required to take account of matters listed in s 26(1) of the IR Act. Section 26(1) of the IR Act only applies where the Tribunal is exercising jurisdiction under the IR Act. In the present proceedings the Tribunal is exercising jurisdiction under s 61A of the OSH Act and not under the IR Act. The objectives of the OSH Act are different from those of the IR Act. The IR Act is concerned with bargaining for fair wages and working conditions. Whereas the objects of the OSH Act are to secure safety of people at the workplace.
- 26 The practice and procedure to be adopted by the Tribunal is set out in s 51I of the OSH Act:

51I. Practice, procedure and appeals

- (1) The provisions of sections 22B, 26(1), (2) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 33, 34(1), (3) and (4), 36 and 49 of the *Industrial Relations Act 1979* that apply to and in relation to the exercise of the jurisdiction of the Commission constituted by a commissioner apply to the exercise of the jurisdiction conferred by section 51G —
- (a) with such modifications as are prescribed under section 113 of that Act; and
- (b) with such other modifications as may be necessary or appropriate.
- (2) For the purposes of subsection (1), section 31(1) of the *Industrial Relations Act 1979* applies as if paragraph (c) were deleted and the following paragraph were inserted instead —
- “
- (c) by a legal practitioner.
- ”.

- 27 The relevant sub-clauses of s 26 of the IR Act are:

26 Commission to act according to equity and good conscience

- (1) In the exercise of its jurisdiction under this Act the Commission —
- (a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal form; and
- (b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; and
- (c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and
- (d) shall take into consideration to the extent that it is relevant —
- (i) the state of the national economy;
- (ii) the state of the economy of Western Australia;
- (iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;
- (iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;

- (v) any changes in productivity that have occurred or are likely to occur;
 - (vi) the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;
 - (vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.
- 28 It is clear from the text of the OSH Act that the Tribunal exercises its powers and discretion consistent with and applying the provisions of s 26(1) of the IR Act.
- 29 The Full Bench in *GHD Pty Limited v WorkSafe Western Australia Commissioner* [2021] WAIRC 00655; 102 WAIG 89 considered s 26 of the IR Act to be incorporated into the OSH Act [110] and observed that the Tribunal exercises quasi-judicial power and not executive power [111].
- 30 I find that the Tribunal is required to have regard to the provisions of s 26(1) of the IR Act and when reviewing a matter referred to it under the OSH Act must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal form. In addition, the Tribunal is not bound by the rules of evidence and may inform itself as it thinks just. The Tribunal must consider the interests of the persons immediately concerned whether directly affected or not and, where appropriate, the interests of the community as a whole.

Application of the Principles in *Briginshaw*

- 31 Mr Lamprecht asserts that the Tribunal ought to adopt the standards set in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.
- 32 The WorkSafe Commissioner asserts the Tribunal is not bound to apply the principle set out in *Briginshaw* and refers the Tribunal to *Sullivan v Civil Aviation Safety Authority* [2013] FCA 1362; (2013) 138 ALD 600 at [38] per Jagot J (as Her Honour then was). *Sullivan* concerned an appeal from a decision of the AAT to affirm the cancellation of the applicant's helicopter licence. This decision was then appealed to the Full Court of the Federal Court in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93; (2014) 322 ALR 581. In dismissing the appeal, Flick and Perry JJ found that the AAT is 'freed from the rules of evidence' and thus as a matter of law the *Briginshaw* principle does not directly apply. However, Flick and Perry JJ added that such freedom 'does not absolve it from the obligation to make findings of fact based upon material which is logically probative in which the rules of evidence provide a guide'.
- 33 Section 511 of the OSH Act and s 26(1)(b) of the IR Act provides that the Tribunal is not bound by the rules of evidence. *Briginshaw* is concerned with the application of rules of evidence by a court bound by them.
- 34 Where there is a requirement that a decision maker be satisfied of a matter before exercising a discretion, the decision maker's opinion must be supported by probative evidence and not be illogical or irrational. *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [130]-[131] per Crennan and Bell JJ.
- 35 Provided that the material findings of fact are reasonably open and based on some logically probative material, the process of reasoning cannot be impugned on the basis that the decision maker did not follow the test in *Briginshaw*. *Sullivan v Civil Aviation Safety Authority* [2013] FCA 1362; (2013) 138 ALD 600 at [38].
- 36 The standard of proof applying in these proceedings is the civil standard, that is, the balance of probabilities. These are not adversarial proceedings and there is no burden or onus of proof on either party (*Nakad v Commissioner of Police, New South Wales Police Force* [2014] NSWCATAP 10, [28] – [34]). The standards of proof in *Briginshaw* do, however, provide guidance for the Tribunal's exercise of jurisdiction.
- 37 I accept that applying the principles in *Briginshaw* may assist the Tribunal in ascertaining the facts of a matter.
- 38 It is for the Tribunal to assess the evidence and experience put before it and determine whether it is satisfied that this demonstrates a person can undertake work in a safe and proper manner. I consider that the application of s 26 in the context of the OSH Act does not result in an assessment of the experience without regard to the contraventions of the OSH regulations and the conditions of a licence. It is a question of the meaning of 'safe and proper' and whether that incorporates a consideration of an applicant's conduct in gaining the experience relied upon. The application of s 26 means the Tribunal must balance the weight given to the conduct of the applicant in gaining the experience and the interests of an applicant and the interests of the community as a whole.

Proportionality

- 39 I understand Mr Lamprecht submits that in applying its discretion afforded by s 26 of the IR Act, the Tribunal ought to have regard for the proportionality of its decision. The Tribunal is referred to the decision of the Western Australian Supreme Court of Appeal in *Elvidge Pty Ltd v BGC Construction Pty Ltd* [2006] WASCA 264. Mr Lamprecht contends the Tribunal ought to apply the reasoning of McClure J and consider the necessity of any further sanction. Mr Lamprecht submits that excluding this experience because he failed to notify the Commission, as required by the OSH Regulations and the conditions of his previously issued licence, would be disproportionate to the seriousness of the breach. Mr Lamprecht contends the refusal to grant a licence to him would be a further sanction against him that is disproportionate to the breaches of the OSH Regulations by his failures to notify class 2 demolition work and undertaking class 2 demolition work following the expiry of his licence. Mr Lamprecht submits that the WorkSafe Commissioner has alternative actions to use where he identifies a contravention of the OSH Regulations and the consequences of the imposition of the penalty of refusal to grant a licence is disproportionately harsh.
- 40 Mr Lamprecht contends that the Tribunal should adopt the approach set out in *BGC* and should only invoke a sanction of refusing to recognise rights because they arose out of or were associated with an unlawful act or purpose where:

- (i) The relevant statute itself discloses an intention that the relevant rights should be unenforceable in all circumstances, or
- (ii) Alternatively:
 - (1) the sanction of refusing to enforce the rights is not disproportionate to the seriousness of the unlawful conduct;
 - (2) the imposition of the sanction is necessary, having regard to the terms of the Statute to protect its objects or policies; and
 - (3) the Statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the Statute or the frustration of its policies.

41 Mr Lamprecht submits that excluding his experience because he failed to notify the Commission would be disproportionate to the seriousness of the breach. Mr Lamprecht refers the Tribunal to *Jackson v Harrison* [1978] HCA 17; (1978) 138 CLR 438 and submits that the Tribunal ought not apply a rule inflexibly or without regard to the surrounding circumstances. Mr Lamprecht asserts that his application for a licence ought to be considered pursuant to the provisions of regulation 3.116 and that an assessment conducted by the Tribunal ought to provide for distinctions between degrees of illegality and exclude cases of minor or lesser illegality.

42 Mr Lamprecht further submits that the Tribunal ought to consider the consequences for him and the detrimental impact of denying the community's access to the services he provides in making its decision.

43 The WorkSafe Commissioner contends that *BGC* does not guide the Tribunal in this matter because this matter does not concern a right or entitlement possessed by Mr Lamprecht. The *BGC* case is about the enforceability of a contract and considers the question of whether courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose. Mr Lamprecht has not pointed to the legal or equitable right he says has been refused and *BGC* does not apply.

44 The WorkSafe Commissioner submits that while a decision not to issue a licence may have an adverse effect on a person the power is not conferred for punitive purposes and the availability of alternative punishments or enforcement measures does not restrict the discretion conferred by the OSH Regulations. The WorkSafe Commissioner contends that a policy of excluding experience obtained unlawfully when considering a demolition licence is reasonable because reference to work being done in a 'proper' manner should be understood as meaning lawfully and in accordance with the OSH Regulations.

45 In *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, French CJ considered the term 'equity, good conscience and the substantial merits of the case' [14]:

The rolled-up direction to "act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms" was considered by the Court of Appeal of New South Wales in *Qantas Airways Ltd v Gubbins*. As pointed out by Gleeson CJ and Handley JA in that case, the collocation has no fixed legal meaning independent of the statutory context in which it is found.

46 French CJ observed at [23] of *Li*:

[e]very statutory discretion, however broad, is constrained by law. As Dixon J said in *Shrimpton v The Commonwealth*:

[C]omplete freedom from legal control, is a quality which cannot ... be given under our Constitution to a discretion, if, as would be the case, it is capable of being exercised for purposes, or given an operation, which would or might go outside the power from which the law or regulation conferring the discretion derives its force.

Every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred. Where the discretion is conferred on a judicial or administrative officer without definition of the grounds upon which it is to be exercised then

the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case.

That view, however, must be reached by a process of reasoning (footnotes omitted).

47 In this matter I find that the Tribunal is not considering the enforceability of a right arising from the terms of a contract as in the *BGC* case. The Tribunal's task is to apply the provisions of the law that set the conditions which a person must satisfy to be able to be licenced to undertake a task or activity that is regulated for reasons of safety.

48 Consistent with *Li*, the Tribunal in deciding whether to grant a licence to a person is to apply considerations of equity, good conscience and the merits of the case concerned for both the interests of persons immediately affected and the interests of the community as a whole.

49 Consistent with the observation of French CJ in *Li* citing *Shrimpton v The Commonwealth* (1945) 69 CLR 613 at 629-630 this discretion is to be exercised by the Tribunal in the context of the scope and purpose of the text of the OHS Act and Regulations.

Principles of Interpretation

50 The general approach to the construction of statutes, legislative instruments and other documents that may have legislative or regulatory effect, and contracts, is to construe the instrument as a whole. In *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ at [69], [70] and [78], it was said as follows:

[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute (45). The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"(46). In *Commissioner for Railways (NSW) v Agalinos* (47), Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed (48).

[70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals (49). Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions (50). Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other"(51). Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

[78] However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction (56) may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis Bennion points out (57):

"The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with." (footnotes omitted)

- 51 The principles of interpretation applicable to statutes apply to regulations and other subsidiary legislation: *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389 at 398 cited in *Eclipse Resources Pty Ltd v The State of Western Australia [No. 4]* [2016] WASC 62; (2016) 307 FLR 221; per Beech J at par 550. As to delegated legislation specifically, recently in *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; (2014) 254 CLR 1 the High Court said:

[28]...The appropriate enquiry in the construction of delegated legislation is directed to the text, context and purpose of the regulation, the discernment of relevant constructional choices, if they exist, and the determination of the construction that, according to established rules of interpretation, best serves the statutory purpose.

- 52 I find that the search for the scope and purpose of the legislation and regulations commences with the consideration of the objects of the OSH Act in s 5:

5. Objects

The objects of this Act are —

- (a) to promote and secure the safety and health of persons at work;
- (b) to protect persons at work against hazards;
- (c) to assist in securing safe and hygienic work environments;
- (d) to reduce, eliminate and control the hazards to which persons are exposed at work;
- (e) to foster cooperation and consultation between and to provide for the participation of employers and employees and associations representing employers and employees in the formulation and implementation of safety and health standards to current levels of technical knowledge and development;
- (f) to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health;
- (g) to promote education and community awareness on matters relating to occupational safety and health.

- 53 In *Shepherd v Murray* [2000] WASC 281; *Green v Mabey* (Unreported, WASC, Library No 940711, 7 December 1994) the Western Australian Supreme Court of Appeal held that the objects of the OSH Act are to secure the safety of persons at the workplace and create obligations on employers to protect against risk to health and safety.

54 The OSH Regulations, consistent with s 60(1) of the OSH Act, are to be regarded as giving effect to the objects of the OSH Act. Those objects include the promotion of health and safety of persons at work; to protect those persons and to reduce, eliminate and control hazards. The OSH Regulations give effect to the purpose of the OSH Act and provide detail on the duties, obligations, and requirements on a vast range of matters. Section 60(1) of the OSH Act provides the Governor with the power to make regulations necessary or convenient to giving effect to the purposes of the Act. Schedule 1 of the OSH Act lists the subject matters for which regulations can be made and includes:

Schedule 1 – Subject matter for regulations

...

4. The registration or licensing of —
- (a) any work, plant, process, substance or workplace;
 - (b) any person carrying out any kind of work,
- by the Commissioner or any other prescribed person or authority.

...

55 The Western Australian Supreme Court in *Stratton Creek Pty Ltd v Morrison* [2005] WASC 84 [48] stated that the dominant purpose of the OSH Regulations is protecting the safety of workers.

56 The Tribunal must interpret the OSH Regulations to determine whether a person is able to satisfy the criteria or requirements set out in the OSH Regulations. An interpretation which favours construction in accordance with the purpose or objects of an Act should be preferred in the case of occupational health and safety law. This principle of broad construction in safety matters was enunciated in *Waugh v Kippen* [1986] HCA 12; (1986) 160 CLR 156, 164 - 165.

Meaning of ‘safe and proper’

57 Regulation 3.116 authorises the WorkSafe Commissioner to issue class 2 demolition licences where he is satisfied that a person is able to perform class 2 demolition work in a safe and proper manner.

58 The WorkSafe Commissioner says that:

- (1) The OSH Act and Regulations do not expressly state the considerations that are to be taken into account in exercising a discretion to issue a demolition licence pursuant to r 3.116 of the OSH Regulations.
- (2) Where relevant considerations are not specified, it is largely for the decision maker to determine which matters are to be regarded as relevant and the comparative importance to be accorded to those matters. *Sean Investments Pty Ltd v McKellar* [1981] FCA 191; (1981) 38 ALR 363 at 375 per Deane J; *Minister for Aboriginal Affairs v Peko Wal/send* [1986] HCA 40; (1986) 66 ALR 299 at 309 per Mason J.
- (3) A decision maker may be bound to take into account a particular matter that is not expressly stated in the relevant legislation where a requirement to take account of the matter is implied from the subject matter, scope and purpose of the legislation. *Minister for Aboriginal Affairs v Peko Wal/send*.

59 Consistent with this, the WorkSafe Commissioner has defined the criteria that would satisfy him that an applicant is able to undertake class 2 demolition work in a safe and proper manner and advises applicants that they must satisfy and provide evidence of the following:

- (i) That they have demolition work experience relevant to the class of licence they are applying for.
- (ii) That they have a policy or operating procedures that ensure persons engaged to do licenced demolition work will be trained in safe demolition work before demolition occurs by a registered training organisation.
- (iii) That they have a policy in place that will ensure the demolition work will be directly supervised by a competent person.

60 The WorkSafe Commission publishes ‘*Guidelines for applicants for a Demolition Licence November 2019*’ (Guidelines) which contains information for applicants concerning the process of applying for a licence and sets out the criteria used in assessing an application. The Guidelines do not include demolition work procedures or work practices. Applicants are advised that details of recent experience, comprising of three jobs within the last five years, is required. The Guidelines state that experience obtained unlawfully will not be considered. Applicants must be trained in safe methods of demolition by a Registered Training Organisations registered by the Western Australian Training Accreditation Council.

61 Mr Lamprecht contends that the words ‘safe and proper’ should take their common or ordinary meaning and ‘proper’ manner should be understood to mean that the demolition work is done in a manner that is correct or appropriate to the circumstances in which class 2 demolition work is to be carried out. Mr Lamprecht submits that ‘proper’ in relation to the word ‘work’ does not include the requirement that the ‘work’ being done is also done lawfully. Mr Lamprecht asserts this construction is supported by the decision in *Stratton Creek* and is authority for construing Regulation 3.116 as ‘work in a safe and proper manner’ meant the work on site and that ‘proper’ referred to the manner and system of doing the work competently and not to any regulatory compliance.

62 The WorkSafe Commissioner submits that the task of the Tribunal is administrative and urges the Tribunal to reject Mr Lamprecht’s proposition that *Stratton Creek* is authority for the interpretation of ‘safe and proper manner’ to not include a requirement for lawful conduct by a person seeking a licence. The WorkSafe Commissioner submits that *Stratton Creek* concerned a question of the seriousness of offending and is not relevant to decisions in administrative proceedings. The

WorkSafe Commissioner contends that the relevant question for the Tribunal is whether an applicant for a licence is able to undertake work in accordance with the regulations relevant for that type and class of licence.

- 63 The meaning of 'in a safe and proper manner' I find by reference to the Macquarie Dictionary. The meaning of 'safely' is to secure from liability to harm, injury, danger, or risk, free from hurt injury danger or risk. The meaning of 'proper' is correctly and/or appropriately. The OSH Act and Regulations establishes a scheme for compliance including permits, licencing, suspension, cancellation, assessment, inspection, improvements and prohibition notices, fines and penalties and prosecutions.
- 64 The process for issuing and the requirement for the re-issuing of licences every two years is part of the scheme directed to the objects of the OSH Act, including to promote and secure the safety and health of persons at work and to protect persons at work against hazards. The OSH Regulations are directed toward the reduction and elimination of hazards. The existence of other means for the regulator to address conduct that contravenes the OSH Regulations does not reduce the need to ensure that the OSH Regulations are applied in a manner directed toward achieving their objectives. One of the objectives of issuing a licence under and with conditions is to reduce hazards and eliminate risks. In other words, prevent hazards as much as possible. The imposition of a penalty occurs after a hazard or risk has occurred or a hazard that fails to be adequately addressed in accordance with the legislation and regulations has been identified. In my view a measure directed at prevention cannot be in effect set off against a penalty or negated because a penalty may be imposed. I do not accept Mr Lamprecht's contention that the requirements established by the legislature aimed at prevention is in a continuum of penalties for breaches of the provisions of the legislation and therefore, where there are penalties of lesser impact on an applicant, they ought to be used in preference to the refusal to issue a licence.
- 65 Mr Lamprecht's explanation for failing to notify WorkSafe of class 2 demolition works was that he understood the obligation to notify of his intention to carry out a class 2 demolition only applied to two storey houses and commercial jobs. However, the evidence is that Mr Lamprecht failed to notify WorkSafe when demolishing commercial structures and a two-storey house.
- 66 Mr Lamprecht gave evidence that when he became aware of his error and that he was obliged to notify the WorkSafe Commission of class 2 demolition works he commenced doing so in accordance with the OSH Regulations for the demolition works.
- 67 The WorkSafe Commissioner gave evidence of the purpose of the notifications which are to provide the regulator with the information necessary to be able to inspect demolition works to ensure the works are carried out in compliance with the legislation and regulations. The class 2 demolition works undertaken by Mr Lamprecht between 2012 and expiry of the applicant's licence in November 2020 were not inspected because, in the absence of notification or a chance encounter of the site, it was not known to WorkSafe that these works were being undertaken. That is, the absence of any inspection of class 2 demolition work carried out by Mr Lamprecht can be attributed to Mr Lamprecht's failure to submit notifications.
- 68 Mr Lamprecht contends that the experience he obtained following the expiry of his licence ought to be considered by the Tribunal because the licence effectively remains operative because the WorkSafe Commissioner's decision to decline to reissue his licence is under review by this Tribunal. Mr Lamprecht submits he notified the WorkSafe Commission of the proposal to undertake these class 2 demolitions in accordance with regulation 3.119. Therefore, the WorkSafe Commissioner was aware of the jobs and did not advise him that he was not permitted to perform demolition work whilst his application was pending. Mr Lamprecht says it was reasonable for him to believe that it was not unlawful to perform the demolitions which he notified to WorkSafe whilst his application was pending.
- 69 The WorkSafe Commissioner contends that it was made clear to Mr Lamprecht that he did not have a current licence to undertake class 2 demolition work. In a letter from WorkSafe dated 25 September 2020 Mr Lamprecht was advised that it is an offence to carry out demolition work without a current licence. By letter dated 19 January 2021 to Mr Lamprecht, the WorkSafe Commissioner stated that he was not satisfied that he could continue to carry out demolition work in accordance with the regulations and had formed the preliminary view that his application should be refused.
- 70 Following the expiry of his licence in email communications to WorkSafe concerning several matters Mr Lamprecht included his intention to carry out class 2 demolition work. On 4 February 2021 Mr Lamprecht stated he intended to proceed to carry out demolition work the next day unless he was advised to not do so. At the hearing Mr Lamprecht accepted that this did not provide a reasonable time for a response from WorkSafe. On the second occasion, on 21 April 2021, Mr Lamprecht stated that he assumed his licence remained valid. In response WorkSafe emailed a response stating that class 1, 2 or demolition work cannot be done without a licence and that his licence has expired.
- 71 I find that Mr Lamprecht was notified, and ought to have taken note, that undertaking class 2 demolition work following the expiry of his licence would result in him being in breach of the OSH Regulations. I do not accept that Mr Lamprecht misunderstood the requirements for a current licence to undertake class 2 demolition work at any time. The requirement to be licenced had been clearly communicated to him.
- 72 Mr Lamprecht's class 2 demolition licence was issued with conditions including that class 2 demolition work is carried out in accordance with the OSH Act and OSH Regulations and that all persons carrying out demolition work have been trained in safe methods of demolition by a Registered Training Organisation (RTO) registered by the Western Australian Training Accreditation Council (TAC). A record of the training provided to each person who carries out demolition work, as required by condition 2 of a class 2 demolition licence, is to be kept for a minimum period of five years.
- 73 The WorkSafe Commissioner asserts that the evidence before the Tribunal is that Mr Lamprecht failed to ensure that people working on class 2 demolitions had been trained in safe methods of demolition by a registered training organisation. Mr Lamprecht's evidence is that he usually only engages others to assist him when asbestos needs to be removed prior to demolition. Mr Lamprecht submits the evidence before the Tribunal does not enable a conclusion that the workers whose names are on the asbestos register or Safe Work Methods Statements for a job subsequently carried out work on the same site.

- 74 I find that Mr Lamprecht agreed under cross examination that the removal of asbestos constituted demolition work or at least a part of demolition work. The evidence before the Tribunal is that not all persons engaged by Mr Lamprecht to carry out demolition work had been trained in safe methods of demolition by a RTO. I find that this contravened the conditions of the licence.
- 75 Mr Lamprecht submits that the Tribunal is not limited to assessing class 2 demolition work and may conclude that he is able to undertake class 2 demolition work in a safe and proper manner on the basis of an assessment of demolition work other than class 2 demolitions that he has conducted. Mr Lamprecht gave evidence of the practice and procedure he adopts when undertaking demolition work. However, this evidence is general in nature and is not supported by any evidence of specific jobs nor with references or evidence from any persons with expertise. Given this, I cannot make an assessment on this basis.
- 76 Mr Lamprecht contends that the Tribunal is able to conclude that he is able to undertake class 2 demolition work in a safe and proper manner because WorkSafe have conducted audits which have not identified any deficiencies in his records. Mr Lamprecht suggests that in the absence of an audit identifying that he had failed to comply with the OSH Regulations by not notifying of his intention to undertake a class 2 demolition his incorrect understanding of this requirement is understandable. The WorkSafe Commissioner submits that the audits review the paperwork of jobs selected at random and did not involve an inspection of the actual demolition works.
- 77 I find that the conduct of the audits was limited to a review of the records and the outcome of an audit is not sufficient to satisfy the Tribunal that Mr Lamprecht can undertake class 2 demolition work in a safe and proper manner. The assertion that an audit failed to identify and notify Mr Lamprecht of his failure to comply with the regulations moves the responsibility for compliance with the OSH Regulations from the individual performing the demolition to the regulator. I cannot find a sound basis for this, and I do not consider it relieves Mr Lamprecht of the responsibility to ensure he is complying with the law.
- 78 I find the meaning of the words 'safe and proper manner' incorporates the safe means by which a demolition is performed. This encompasses the performance of work in compliance with legislative requirements and conditions of licenses issued to perform a task in a safe manner. The objects of the OSH Act include 'to provide for formulation of policies and for the coordination of the administration of laws relating to occupational safety and health'. The meaning of the words in the context of the purpose of the statute encompass the manner of undertaking the activity and this includes compliance with the requirements of the legislation and the conditions of the license issued.
- 79 If I accept that requirements of the OSH Regulations referred only to a person's ability or competence to demolish class 2 structures, there is simply no work for the word 'safe' to do.
- 80 The Tribunal is required to look at the applicant's conduct, including potential future conduct. In that regard, past conduct of the applicant is a significant guide in assessing likely future conduct: See for example, *Stamatelatos v Commissioner of Police, NSW Police Force* [2018] NSWCATAD 156 at [141]. That is, 'safe and proper' includes considerations of the requirements of the law and a person's conduct.
- 81 All the evidence of his experience in class 2 demolitions submitted by Mr Lamprecht for the Tribunal's consideration have contravened the OSH Regulations in that the demolition was not notified to WorkSafe as required, persons engaged to work on the demolitions were not trained in accordance with the OSH Regulations and/or the class 2 demolition was carried out following the expiry of his licence.
- 82 In my view, a license should not be granted in circumstances where it is not possible to be satisfied that the applicant has a propensity to perform the tasks authorised by the license within the regulatory regime. There is sufficient evidence that Mr Lamprecht has had difficulty in comprehending the requirements of the OSH Act and the OSH Regulations. In these circumstances I am unable to be satisfied that Mr Lamprecht is able to undertake class 2 demolition work in a safe and proper manner.
- 83 A finding by the Tribunal that a person can or cannot undertake an activity safely and properly then requires the Tribunal to decide a course of action authorised by the OSH Act. In deciding this, the Tribunal ought to apply s 26 which provides that both the persons immediately affected, and the interests of the community be considered.
- 84 Mr Lamprecht contends that the loss of the class 2 demolition licence has had an adverse impact on his livelihood. Mr Lamprecht is seeking that the Tribunal's assessment of the manner in which a person conducts an activity and whether this is safe and proper include considerations of the consequences for a person denied a licence. That is, the extent of financial loss, the reduction of work and the loss of a supplier or provider of services for others.
- 85 However, s 26 does not limit the Tribunal's considerations to that of an applicant for a licence. The Tribunal must consider the issues in reference to the purpose of the legislation and regulations, and the interests of other people immediately affected, as well as the interests of the community. This includes any persons in the vicinity of a demolition and the interests of the community in ensuring a robust and rigorous scheme of safety.
- 86 The importance of safety considerations is evidenced by the adoption of a comprehensive regulation regime for demolition. The purpose of considering each person's application for a class 2 demolition licence is to ensure that demolition work is carried out safely and properly. Demolition work is hazardous and carries risk of injury to those undertaking the work and any persons in the vicinity of the work. It is important that the work is undertaken safely. The licencing scheme is an important element of safe systems of work. The consequences for an individual being denied a licence are outweighed by the overriding purpose of the legislation which are considerations for the safety of those undertaking demolition work and the community. The identification of work conducted in contravention of the OSH Regulations is an essential element and is not incidental to the licencing scheme. I find Mr Lamprecht's individual interest in maintaining a licence must be subordinate to the public interest in ensuring public safety.

Conclusion

- 87 For the reasons set out above I affirm the decision of the WorkSafe Commissioner.

2022 WAIRC 00760

REVIEW OF DECISION - S.61A - OSH ACT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES

SEAN PATRICK LAMPRECHT

APPLICANT

-v-

WORKSAFE WESTERN AUSTRALIA COMMISSIONER DEPARTMENT OF MINES,
INDUSTRY REGULATION AND SAFETY**RESPONDENT****CORAM** COMMISSIONER T B WALKINGTON
DATE FRIDAY, 28 OCTOBER 2022
FILE NO/S OSHT 3 OF 2021
CITATION NO. 2022 WAIRC 00760

Result Decision affirmed
Representation
Applicant Mr T Retallack (of counsel)
Respondent Mr A Hay (of counsel)

Order

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

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

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.
