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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

## INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2023 WAIRC 00024

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**

FRIDAY, 13 JANUARY 2023

**FILE NO/S**

IAC 4 OF 2022

**CITATION NO.**

2023 WAIRC 00024

**Result**

Order Issued

*Order*

BY CONSENT IT IS ORDERED THAT:

1. The appeal be dismissed.
2. There be no order as to costs.

[L.S.]

(Sgd.) S BASTIAN,  
Clerk of Court.

2023 WAIRC 00055

[2023] WASCA 12

**JURISDICTION** : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT  
**CITATION** : DOYLE -v- ROMAN CATHOLIC BISHOP OF BUNBURY [2023] WASCA 12  
**CORAM** : BUSS J  
MURPHY J  
SMITH J  
**HEARD** : 17 JANUARY 2023  
**DELIVERED** : 31 JANUARY 2023  
**FILE NO/S** : IAC 1 of 2022  
**BETWEEN** : ADRIAN DOYLE  
Appellant  
AND  
ROMAN CATHOLIC BISHOP OF BUNBURY  
Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
**Coram** : S J KENNER, CHIEF COMMISSIONER  
R COSENTINO, SENIOR COMMISSIONER  
T EMMANUEL, COMMISSIONER  
**Citation** : DOYLE V ROMAN CATHOLIC BISHOP OF BUNBURY [2022] WAIRC 00317 AND  
[2022] WAIRC 00318  
**File Number** : FBA 8 OF 2021

*Catchwords:*

Industrial Law - Appeal from the Full Bench of the Western Australian Industrial Relations Commission dismissing interlocutory applications in an appeal - *Industrial Relations Act 1979* (WA) s 90(1) - Appeal to Industrial Appeal Court moot

Industrial Law - Jurisdiction of Industrial Appeal Court to hear appeal not enlivened

*Legislation:*

*Industrial Relations Act 1979* (WA)

*Result:*

Appeal dismissed

*Category:* B

**Representation:***Counsel:*

Appellant : In person  
Respondent : Mr I Curlewis

*Solicitors:*

Appellant : In person  
Respondent : Lavan

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

Confederation of Western Australian Industry (Inc) v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1990) 70 WAIG 1281

Doyle v Roman Catholic Bishop of Bunbury [2021] WAIRC 00566

Doyle v Roman Catholic Bishops of Bunbury [2022] WAIRC 00317; [2022] WAIRC 00318; (2022) 102 WAIG 1125

Landsheer v Morris Corporation (WA) Pty Ltd [2014] WASCA 186

State Energy Commission of Western Australia v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1993) 73 WAIG 1453

Veloudos v Young (1981) 56 FLR 182

**JUDGMENT OF THE COURT:**

### Summary

1 The appellant has appealed to this court from a decision of the Full Bench of the Western Australian Industrial Relations Commission, unanimously dismissing four interlocutory applications in an appeal.

2 The appeal is moot. This is because the Full Bench delivered their decision dismissing the substantive appeal on 29 July 2022, and there has been no appeal to this court against that decision.<sup>1</sup> Consequently, in circumstances where there is no appeal against the decision finally determining the appeal before the Full Bench, whatever the outcome is of this appeal it can have no impact upon that decision.

3 It is well established that whilst courts and tribunals will not decide a question that is academic in the sense that it is useless, merely hypothetical, raised prematurely or a dead issue, they retain a discretion to determine a question where the determination is in the public interest.<sup>2</sup> There has been no suggestion in this appeal that the grounds of the appeal raise any matter of public interest.

4 In any event, the appellant has appealed to this court from the decision of the Full Bench dismissing the four interlocutory applications on three grounds, none of which enlivens the jurisdiction of the court in s 90(1) of the *Industrial Relations Act 1979* (WA) to hear an appeal.

5 For the reasons that follow, we are of the opinion that the appeal to the court must be dismissed.

### The interlocutory applications to the Full Bench

6 On 5 November 2021, Commissioner Walkington dismissed a claim by the appellant, which the appellant had referred to the Commission pursuant to s 29(1)(b) of the *Industrial Relations Act*, that the respondent as his employer had not allowed him a benefit (not being a benefit under an award or order) to which he was entitled under his contract of employment.<sup>3</sup> The appellant's claim was for an order that his employer pay him \$345,000, being the equivalent of three years' salary he claimed to have been owed under a fixed term contract.

7 The appellant filed an appeal in the Full Bench against the decision dismissing his application. The appeal was first listed for hearing before the Full Bench on 22 March 2022. Prior to the hearing of the appeal, the appellant filed four interlocutory applications in the appeal.

8 The interlocutory applications in the appeal were:

- (1) an application to amend his original claim, to add to the claim that had been dismissed which was the subject of the appeal claims for long service leave, sick leave and superannuation in the amounts of \$16,457, \$13,272 and \$103,500 respectively;<sup>4</sup>
- (2) an application for discovery, inspection and production of specified categories of documents;<sup>5</sup>
- (3) an application to invite the respondent to admit facts as to the identity of the employer;<sup>6</sup> and
- (4) an application for discovery of documents relating to perceived and actual conflicts of interest relating to the respondent and the respondent's solicitors, Lavan, and a request for the disclosure of costs and expenditure incurred by the respondent, and other employing entities, in relation to the appellant's litigation against them.<sup>7</sup>

### The decision of the Full Bench on the interlocutory applications in the appeal before the Full Bench

9 The Full Bench listed the interlocutory applications for hearing prior to the hearing of the substantive appeal.

10 After hearing submissions by the parties on 25 February 2022, on 4 March 2022, the Full Bench issued reasons for decision and made an order dismissing each of the applications.

11 The reasons why the Full Bench dismissed each of the applications were as follows.

12 The Full Bench found that s 49(4) of the *Industrial Relations Act* provides for a limited appeal to the Full Bench from a decision of a commissioner. In particular, the Full Bench found that s 49(4) makes clear that an appeal is to be heard and determined on the 'evidence and matters raised' in the first instance proceedings. It also found that an appeal is not an opportunity for a party to attempt to reargue their case at first instance, or seek interlocutory orders or directions to bolster their case on appeal, in relation to matters not dealt with at first instance.

13 In respect of the first interlocutory application, the Full Bench found it was not permissible for the appellant to amend his first instance claim on appeal, and that the time to seek leave to amend his claim was prior to or during the first instance proceedings.

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<sup>1</sup> *Doyle v Roman Catholic Bishops of Bunbury* [2022] WAIRC 00317; [2022] WAIRC 00318; (2022) 102 WAIG 1125.

<sup>2</sup> *Veloudos v Young* (1981) 56 FLR 182, 190 (Lockhart J); applied in *Confederation of Western Australian Industry (Inc) v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1990) 70 WAIG 1281, 1282 (Kennedy, Rowland & Nicholson JJ) and *State Energy Commission of Western Australia v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1993) 73 WAIG 1453, 1455 (Kennedy J) (Franklyn & Nicholson JJ agreed).

<sup>3</sup> *Doyle v Roman Catholic Bishop of Bunbury* [2021] WAIRC 00566.

<sup>4</sup> Appeal Book, 7.

<sup>5</sup> Appeal Book, 13 - 14.

<sup>6</sup> Appeal book, 22 - 24.

<sup>7</sup> Appeal book, 48 - 50.

14 The Full Bench found the second interlocutory application should be dismissed because it was also not permissible to seek interlocutory orders in an appeal for discovery and production of documents in order to support the appellant's grounds of appeal.

15 In respect of the third interlocutory application, the Full Bench noted that the name of the respondent had been changed by order of the Commission on the application of the appellant. It then went on to find that, if there had been subsequent changes to the legal entity employing staff of Catholic education institutions, the time for seeking admissions from the respondent in relation to this issue was prior to or at the first instance proceedings before the Commission, and it was not permissible, pursuant to s 49(4) for the Full Bench to now deal with such issues.

16 The Full Bench found the fourth interlocutory application should be dismissed on grounds that it was not an issue which was relevant to the proceedings before the Full Bench.

17 In their reasons, the Full Bench observed that in the event the appeal was upheld either in full or in part, and if the proceedings were remitted to the Commission at first instance, then it may be possible for the appellant to bring some of his interlocutory applications, in those further proceedings, should that transpire.

#### **The jurisdiction of the Industrial Appeal Court to hear an appeal from a decision of the Full Bench**

18 A right of appeal from a decision of the Full Bench to the Industrial Appeal Court is a remedy given by statute, and its jurisdiction is limited.<sup>8</sup>

19 There is no right of appeal to the court from any ground involving a question of fact, or on a question of law unless the ground is a ground which meets the criteria prescribed in s 90(1) of the *Industrial Relations Act*.

20 Section 90(1) provides an appeal lies to the court, in the prescribed manner, from any decision of the Full Bench:

- (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter; or
- (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
- (c) on the ground that the appellant has been denied the right to be heard, but upon no other ground.

#### **The appellant's grounds of appeal in the appeal to the Industrial Appeal Court**

21 The appellant's grounds of appeal against the decision to dismiss the interlocutory applications are not clearly articulated. However, from the appellant's written submissions filed on 20 April 2022, it appears that his grounds are as follows.

#### **Grounds 1 and 3 of the appeal**

22 In ground 1, the appellant claims the court's jurisdiction to hear the appeal arises pursuant to s 90(1)(a) and (b) on a ground that appears to allege the Full Bench erred in its decision [in failing] to address areas in online lodgement of interlocutory applications, by a change in the system for lodgement of interlocutory proceedings at sometime between 2021 and 2022. This ground appears to relate only to the applications for discovery and arises from a claim made by the appellant at the hearing before the Full Bench that he had been unable to successfully lodge an application for production of documents to be dealt with by Commissioner Walkington.<sup>9</sup>

23 Ground 1 is not a ground of appeal in respect of which it could be found that the decision of the Full Bench acted in excess of jurisdiction or that its decision is erroneous in law within the meaning of s 90(1)(a) and (b) of the *Industrial Relations Act*.

24 In ground 3, the appellant claims the court's jurisdiction to hear the appeal arises pursuant to s 90(1)(c) (being a denial of the right to be heard) on a ground that appears to allege that the Full Bench allowed transcripts to be edited to the benefit of one party. At the hearing of the appeal, the appellant put a submission that this ground was the most relevant ground of appeal. His complaint appeared to be that 'ums' and 'ahs' were removed from the transcript of the proceedings before Commissioner Walkington by the editors of the transcript. The appellant, however, informed the court that he does not claim that there were errors in the transcript of the hearing of the four applications before the Full Bench on 25 February 2022.

25 In the absence of any error in the transcript of the hearing of the four interlocutory applications by the Full Bench, in particular a transcription error that is relevant to the decision to dismiss the interlocutory applications, there is no scope for an argument to be put by the appellant that he had been denied the right to be heard by the Full Bench in respect of each of the interlocutory applications.

26 In addition, grounds 1 and 3 are not grounds of appeal that are capable of being found to arise from the decision of the Full Bench to dismiss the interlocutory applications. At their highest, they appear to raise complaints about administrative matters which are not the subject of or relevant to the Full Bench's decision.

27 For these reasons, an appeal to the Industrial Appeal Court on ground 1 or ground 3 could not be found to be within the jurisdiction of the court in s 90(1) of the *Industrial Relations Act*.

<sup>8</sup> See *Landsheer v Morris Corporation (WA) Pty Ltd* [2014] WASCA 186 [45] - [55] (Kenneth Martin J), [32] (Le Miere J agreed).

<sup>9</sup> Transcript of proceedings on 25 February 2022, 3.

**Ground 2 of the appeal**

- 28 In ground 2, the appellant claims the court's jurisdiction to hear the appeal arises pursuant to s 90(1)(b) and (c) on two grounds that appear to raise an argument that:
- (a) the Full Bench made an error in the construction or interpretation of s 49(4) of the *Industrial Relations Act* by using the term 'in the first instance' [when referring to the proceedings before the Commission the subject of the appeal]; and
- (b) the Full Bench denied the appellant a fair hearing on the right to be heard on the interlocutory applications.
- 29 The Full Bench's alleged error was not an error in the construction or interpretation of s 49(4) of the *Industrial Relations Act*.
- 30 The appellant's claim before Commissioner Walkington pursuant to s 29(1)(b)(ii) was properly referred to by the Full Bench as a first instance claim and as a claim that had been dismissed at first instance. In all appeals, it is common for an appellate body to refer to a person's claim which is the subject of the appeal as a first instance claim, the decision the subject of the appeal as the first instance decision, and to refer to the decision-maker of the decision that is the subject of the appeal as the decision-maker sitting at first instance.
- 31 It is also common to refer to the proceedings in which a decision was made that is the subject of an appeal as the proceedings at first instance. These terms are used for the purpose of simply identifying the proceedings and the relevant decision which are the subject of an appeal. Put another way, these terms identify the original proceedings and the original decision which are the subject of an appeal.
- 32 The appellant did not refer to any matter in his oral or written submissions that could properly found an argument that on the hearing of the interlocutory applications before the Full Bench on 22 February 2022, he was denied a fair hearing.
- 33 For these reasons, an appeal to the Industrial Appeal Court on ground 2 could not be found to be within the jurisdiction of the court in s 90(1) of the *Industrial Relations Act*.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Western Australian Industrial Appeal Court.

TS

Associate to the Honourable Justice Smith

31 JANUARY 2023

2023 WAIRC 00052

**APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 8 OF 2021 GIVEN ON 4 MARCH 2022**

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

**PARTIES**

ADRIAN DOYLE

**APPELLANT**

-v-

THE ROMAN CATHOLIC BISHOP OF BUNBURY ABN 28 169 397 119

**RESPONDENT**

**CORAM**

BUSS J  
MURPHY J  
SMITH J

**DATE**

TUESDAY, 31 JANUARY 2023

**FILE NO/S**

IAC 1 OF 2022

**CITATION NO.**

2023 WAIRC 00052

**Result**

Appeal dismissed

**Representation**

**Appellant**

In Person, via Audio-Link

**Respondent**

Mr I Curlewis (Of Counsel)

*Order*

1. The appeal be dismissed.

[L.S.]

(Sgd.) S KEMP,  
Clerk of Court.

## AWARDS/AGREEMENTS AND ORDERS—Variation of—

2023 WAIRC 00032

### ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD, 1980 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2023 WAIRC 00032
<b>CORAM</b>	:	SENIOR COMMISSIONER R COSENTINO
<b>HEARD</b>	:	ON THE PAPERS
<b>DELIVERED</b>	:	MONDAY, 16 JANUARY 2023
<b>FILE NO.</b>	:	APPL 55 OF 2022
<b>BETWEEN</b>	:	ELECTRICAL TRADES UNION WA Applicant AND WORMALD SECURITY CONTROLS AND OTHERS Respondents

CatchWords	:	Industrial Law (WA) – Application to vary award – Increasing allowances – Deletion of respondents no longer trading or no longer in existence – Updating respondent’s details
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Industrial Relations Commission Regulations 2005</i> (WA)
Result	:	<i>Award varied</i>
<b>Representation:</b>		
Applicant	:	Electrical Trades Union WA
Respondents	:	No appearance

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

*R.J. Donovan and Associates Pty. Ltd. v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch* (1977) 57 WAIG 1317

#### *Reasons for Decision*

- The Electrical Trades Union WA (ETU) applied to vary the *Electrical Trades (Security Alarms Industry) Award, 1980*. The variations are to:
  - increase a number of allowances in the Award; and
  - update Schedule One - **Schedule of Respondents** to remove a company which is deregistered and update the current names of the other respondents.
- Section 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**) empowers the Commission to vary an award.
- The ETU is a party bound by the Award and therefore has standing to bring the application: s 40(2) of the IR Act.
- As the application is made outside the term specified in the Award, s 40(3) of the IR Act is no barrier to the variations sought.
- The amendments proposed do not affect any substantive change to the scope of the Award or its area of operation. The application therefore does not attract the requirements of s 29A of the IR Act for publication of the proposed amendments or service on the s 29A parties.
- The application has otherwise been duly served as required by the IR Act and the *Industrial Relations Commission Regulations 2005* (WA).

#### Increasing allowances

- The ETU seeks to vary several allowances by 4.65% in line with the 2022 State Wage case [2022] WAIRC 00273; (2022) 102 WAIG 431. The allowances in this category are:
  - Clause 15 - Special Rates and Provisions; and
  - Clause 28(3) - Wages: Tool Allowance, Clause 28(4) - Wages: Construction Allowance and Clause 28(5) - Wages: Leading Hand Allowance.
- Principle 6.3 of the 2022 State Wage Case Statement of Principles states:
 

Allowances which relate to work or conditions which have not changed, and service increments may be adjusted as a result of the State Wage order, or, if an award contains another method for adjusting such allowances, in accordance with that other method.
- Principle 6.4 applies. It provides:

In the absence of any other prescribed method, where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed or service increments for a monetary safety net increase, the method of adjustment shall be as follows: divide the monetary safety net increase by the rate of pay for the key classification in the award which applied immediately prior to the safety net increase, and multiply the resulting figure by 100.

- 10 The ETU also seeks variation of allowances in line with CPI changes from June 2021 to June 2022. The allowances in this category are:
  - (a) Clause 11 - Overtime: Meal Allowance;
  - (b) Clause 16 - Car Allowance; and
  - (c) Clause 18 - Distant Work.
- 11 Principle 6.1 of the 2022 State Wage Case Statement of Principles states:

Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of those expenses.
- 12 The application to vary these allowances is unopposed.
- 13 These allowances were last varied on 1 January 2022: [2022] WAIRC 0044; (2022) 102 WAIG 110. Those variations updated the allowances to include increases based on the 2016 to 2021 State Wage Case decisions, and CPI increases to June 2021.
- 14 The ETU has provided the Commission with a schedule setting out the methodology and calculations supporting the variations now sought. The calculations show that the variations are consistent with the Statement of Principles as set out above. The Award does not itself specify a method for adjusting allowances which is at odds with the methods set out.
- 15 I am therefore satisfied that it is appropriate to make the variations to the allowances as sought.

#### **Replacement of Schedule of Respondents**

- 16 The application seeks to vary the Award by substitution of a new Schedule of Respondents. This part of the application is also unopposed, as no party has responded to the application.
- 17 The Area and Scope Clause of the Award is as follows:

This award relates to the Security Alarm Industry within the State of Western Australia and to all work done by employees in the classifications shown in Clause 28. - Wages and employed by Respondents in the industry in connection with the wiring, maintenance, installation and repair of all manner of electrical and electronic security surveillance detectors and equipment including, but without limiting the generality of the foregoing, the utilisation of electro-mechanical devices and signalling equipment.
- 18 The scope clause is of the same kind as was considered *R.J. Donovan and Associates Pty. Ltd. v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch* (1977) 57 WAIG 1317. The list of names in the Schedule of Respondents does no more than create a rebuttable presumption that those employers are engaged in the industry referred to in the scope clause.
- 19 Accordingly, the Schedule of Respondents does not have a direct bearing on the scope of the Award. It is not an operative provision. Its practical significance is that the persons and entities listed are parties to the Award pursuant to s 38 of the IR Act. They are therefore entitled to be served with applications made under Part II, Division 2A of the IR Act and to participate in proceedings initiated by such applications. Additionally, the named respondents are presumed to operate within the Security Alarm Industry.
- 20 The upshot is that there is no good reason for retaining the respondents listed in the Award who are deregistered corporations. Their inclusion is obsolete. Further, it is desirable to update the names of those corporations who remain registered, but have changed names. It is therefore appropriate to update the Schedule of Respondents.
- 21 Turning to the specific respondents listed in the current Schedule of Respondents:
  - (a) Wormald Security Controls: according to an ASIC Company Extract and ABN Lookup search, this business name is now cancelled. It was previously held by Wormald Security Australia Pty Ltd (A.C.N. 003 605 098), a company which was deregistered in 2020. It is appropriate that it be removed from the Schedule of Respondents.
  - (b) Chubb Alarms (A Division of Chubbs Australia Limited): according to an ASIC Company Extract and ABN Lookup search, this business name is now cancelled. It was previously held by Chubb Australia Ltd, a company which is now known as Chubb Australia Pty Ltd (A.C.N. 000 096 122). It is therefore appropriate that the name be updated in the Schedule of Respondents.
  - (c) Metropolitan Security Services (A Division of Mayne Nickless Limited): according to an ASIC Company Extract and ABN Lookup search, this business name is also now cancelled, but was held by Mayne Nickless Limited, which is now known as Idameneo (No. 789) Ltd (A.C.N. 004 073 410). It is therefore appropriate that the name be updated in the Schedule of Respondents.
- 22 An order will issue in the following terms:
  - (a) THAT the *Electrical Trades (Security Alarms Industry) Award, 1980* be varied in accordance with the following schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

2023 WAIRC 00048

**ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD 1980**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

-v-

WORMALD SECURITY CONTROLS AND OTHERS

**RESPONDENTS**

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** MONDAY, 23 JANUARY 2023  
**FILE NO/S** APPL 55 OF 2022  
**CITATION NO.** 2023 WAIRC 00048

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**Result** Award varied  
**Representation** (on the papers)  
**Applicant** Electrical Trades Union WA

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*Order*

WHEREAS the Electrical Trades Union WA applied on 5 December 2022 to vary the *Electrical Trades (Security Alarms Industry) Award 1980* pursuant to s 40 of the *Industrial Relations Act 1979 (WA) (IR Act)*;

AND WHEREAS for the reasons set out in [2023] WAIRC 00032, the Commission is satisfied that the requirements of the IR Act for varying the Award are met, and that it is appropriate that variations to the Award be made as set out in the reasons for decision;

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

THAT the *Electrical Trades (Security Alarms Industry) Award 1980* be varied in accordance with the following Schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

[L.S.]

(Sgd.) R COSENTINO,  
Senior Commissioner.

## SCHEDULE

**1. Clause 11. – Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof:**

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$15.20 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid \$10.45 for each meal so required.

**2. Clause 15. – Special Rates and Provisions:****A. Delete subclauses (1), (2), (3) and (4) of this Clause and insert in lieu thereof the following:**

- (1) Height Money: An employee shall be paid an allowance of \$3.50 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.
- (2) Dirt Money: An employee shall be paid an allowance of 71 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
- (3) Confined Space: An employee shall be paid an allowance of 90 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.
- (4) Hot Work: An employee shall be paid an allowance of 71 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

**B. Delete subclause (6) of this Clause and insert in lieu thereof the following:****(6) Percussion Tools:**

An employee shall be paid an allowance of 46 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

**C. Delete subclauses (13) and (14) of this Clause and insert in lieu thereof the following:**

- (13) An employee, holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid \$14.70 per week in addition to their ordinary rate.

- (14) A Serviceperson - Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of \$29.50 per week.

**3. Clause 16. – Car Allowance: Delete subclause (3) of this Clause and insert in lieu thereof the following:**

- (3) A year for the purpose of this Clause shall commence on the 1 July and end on the 30 June next following.

**RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE  
ON EMPLOYER'S BUSINESS  
MOTOR CAR**

Area And Details	Engine Displacement (In Cubic Centimetres)		
	Over 2600cc	1600cc - 2600cc	1600cc & Under
Metropolitan Area	100.0	89.3	77.7
South West Land Division	102.4	91.5	79.5
North of 23.5° South Latitude	113.0	100.9	87.8
Rest of the State	105.2	94.8	82.2
<b>MOTOR CYCLE</b> (In All Areas)	34.3 cents per Kilometre		

**4. Clause 18. – Distant Work: Delete subclauses (4) and (5) of this Clause and insert in lieu thereof the following:**

- (4) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of \$41.85 for any weekend that they return to their home from the job but only if -
- The employee advises the employer or the employer's agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;
  - The employee is not required for work during that weekend;
  - The employee returns to the job on the first working day following the weekend; and
  - The employer does not provide or offer to provide suitable transport.
- (5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$18.65 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**5. Clause 28. – Wages: Delete subclauses (3), (4) and (5) of this Clause and insert in lieu thereof the following:**

- (3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson in the performance of their work as a tradesperson the employer shall pay a tool allowance of \$20.40 per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.
- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.
- (c) An employer shall provide for the use of tradespersons all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A tradesperson shall replace or pay for any tools supplied by the employer if lost through their negligence.
- (4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid -
- \$65.80 per week if they are engaged on the construction of a large industrial undertaking or any large civil engineering project.
  - \$59.70 per week if they are engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.
  - \$34.50 per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.
- (b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.
- (c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. - Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.
- (5) Leading Hand: In addition to the appropriate total wage prescribed in subclause (1) of this clause, a leading hand shall be paid -
- If placed in charge of not less than three and not more than ten other employees \$37.50

- (b) If placed in charge of more than ten but not more than twenty other employees \$57.00
- (c) If placed in charge of more than twenty other employees \$73.60

6. **Schedule One – Schedule of Respondents: Delete this Schedule and insert in lieu thereof the following:**

SCHEDULE ONE – SCHEDULE OF RESPONDENTS

Chubb Australia Pty Ltd formerly known as Chubb Australia Ltd trading as Chubb Alarms

Idameneo (No. 789) Ltd formerly known as Mayne Nickless Limited trading as Metropolitan Security Services

2023 WAIRC 00030

**ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2023 WAIRC 00030  
**CORAM** : SENIOR COMMISSIONER R COSENTINO  
**HEARD** : ON THE PAPERS  
**DELIVERED** : MONDAY, 16 JANUARY 2023  
**FILE NO.** : APPL 52 OF 2022  
**BETWEEN** : ELECTRICAL TRADES UNION WA  
 Applicant  
 AND  
 HINCO ENGINEERING AND OTHERS  
 Respondents

CatchWords : Industrial Law (WA) – Application to vary award – Increasing allowances – Deletion of respondents no longer trading or no longer in existence – Updating respondent’s details

Legislation : *Industrial Relations Act 1979 (WA)*  
*Industrial Relations Commission Regulations 2005 (WA)*  
*Workplace Relations Act 1996*

Result : Award varied

**Representation:**  
 Applicant : Electrical Trades Union WA  
 Respondents : No appearance

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

*R.J. Donovan and Associates Pty. Ltd. v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch (1977) 57 WAIG 1317*

*Reasons for Decision*

- 1 The Electrical Trades Union WA (ETU) applied to vary the *Electronics Industry Award No A22 of 1985*. The variations are to:
  - (a) increase a number of allowances in the Award; and
  - (b) remove from the First Schedule - **Schedule of Respondents** persons and entities who are no longer trading or no longer in existence.
- 2 Section 40 of the *Industrial Relations Act 1979 (WA) (IR Act)* empowers the Commission to vary an award.
- 3 The ETU is a party bound by the Award and therefore has standing to bring the application: s 40(2) of the IR Act.
- 4 As the application is not made within the term specified in the Award, s 40(3) of the IR Act is no barrier to the variations sought.
- 5 The amendments proposed do not affect any substantive change to the scope of the Award or its area of operation. The application therefore does not attract the requirements of s 29A of the IR Act for publication of the proposed amendments or service on the s 29A parties.
- 6 The application has otherwise been duly served as required by the IR Act and the *Industrial Relations Commission Regulations 2005 (WA)*.

**Increasing allowances**

- 7 The ETU seeks to vary several allowances by 4.65% in line with the 2022 State Wage case [2022] WAIRC 00273; (2022) 102 WAIG 431. The allowances in this category are:

- (a) Part I Clause 20 - Special Provisions;
  - (b) Part I Clause 33(2) - Wages: Leading Hands and 33(5) Tool Allowance; and
  - (c) Part II Clause 10(5) - Wages: Construction Allowance, 10(6) Leading Hand and 10(7) Tool Allowance.
- 8 Principle 6.3 of the 2022 State Wage Case Statement of Principles states:
- Allowances which relate to work or conditions which have not changed, and service increments may be adjusted as a result of the State Wage order, or, if an award contains another method for adjusting such allowances, in accordance with that other method.
- 9 Principle 6.4 applies. It provides:
- In the absence of any other prescribed method, where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed or service increments for a monetary safety net increase, the method of adjustment shall be as follows: divide the monetary safety net increase by the rate of pay for the key classification in the award which applied immediately prior to the safety net increase, and multiply the resulting figure by 100.
- 10 The ETU also seeks variation of allowances in line with CPI changes from June 2021 to June 2022. The allowances in this category are:
- (a) Clause 9(3)(f) - Meal Allowance;
  - (b) Part I Clauses 13 and 15 – Travel Allowance;
  - (c) Part II Clauses 6 and 7 – Travel Allowance; and
  - (d) Part II Clause 5 – Loss of Clothing and Tool Allowance.
- 11 Principle 6.1 of the 2022 State Wage Case Statement of Principles states:
- Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of those expenses.
- 12 The application to vary these allowances is unopposed.
- 13 These allowances were last varied on 24 February 2022: [2022] WAIRC 0085; (2022) 102 WAIG 188. Those variations updated the allowances to include increases based on the 2020 and 2021 State Wage Case decisions, and CPI increases to June 2021.
- 14 The ETU has provided the Commission with a schedule setting out the methodology and calculations supporting the variations now sought. The calculations show that the variations are consistent with the Statement of Principles as set out above. The Award does not itself specify a method for adjusting allowances which is at odds with the methods set out.
- 15 I am therefore satisfied that it is appropriate to make the variations to the allowances as sought.

#### **Replacement of Schedule of Respondents**

- 16 The application seeks to vary the Award by substitution of a new Schedule of Respondents. This part of the application is also unopposed, as no party has responded to the application.
- 17 The Schedule of Respondents currently lists 26 companies and business names.
- 18 The Area and Scope Clause of the Award is as follows:
- This award relates to the Electronics Industry within the State of Western Australia and to all work done by employees (except those employees employed or engaged on research and development) employed in the classifications shown in Clause 33. - Wages of Part I - General or Clause 10. - Wages of Part II - Construction Work and employed by the respondents in connection with the making, installing, repairing and altering, assembling, testing, aligning, fault locating, of electronic componentry, instruments, equipment and/or systems provided that this award shall not replace or extend to cover the operations of any respondent to the Metal Trades (General) Award No. 13 of 1965 as amended, the Radio and Television Employees' Award No. 14 of 1974 as amended, the Draughtsmen, Tracers, Planners and Technical Officers' Award No. 11 of 1979 as amended or the Electrical Contracting Industry Award R22 of 1978 as amended.
- 19 The application to substitute the Schedule of Respondents is otherwise unopposed.
- 20 The scope clause is of the same kind as was considered *R.J. Donovan and Associates Pty. Ltd. v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch* (1977) 57 WAIG 1317. The naming of the respondents in the schedule does no more than create a rebuttable presumption that those employers are engaged in the industry referred to in the scope clause.
- 21 Accordingly, the Schedule of Respondents does not directly affect the scope of the Award. It is not an operative provision. Its practical significance is that the persons and entities listed are parties to the Award pursuant to s 38 of the IR Act. They are therefore entitled to be served with applications made under Part II, Division 2A of the IR Act and to participate in proceedings initiated by such applications. Additionally, the named respondents are presumed to operate within the electronics industry.
- 22 The 2005 amendments to the *Workplace Relations Act 1996* (Cth) had the effect that national system employers as defined by the *Workplace Relations Act 1996* (Cth) became covered by the Commonwealth industrial relations legislation to the exclusion of the IR Act. Subject to the transitional arrangements of the *Workplace Relations Act 1996* (Cth) preserving the Awards as Notional Agreements Preserving State Awards (NAPSA), the respondents to the Award who are or were national system employers ceased to be covered by the Award. The transitional provisions and the Award's status as a NAPSA ended on 31 December 2015.

- 23 As far as I have been able to ascertain, since that time, none of the national system employer respondents have participated in any proceedings concerning the Award. This is unsurprising given the lack of any practical interest in the Award.
- 24 The upshot is that there is no good reason for retaining the respondents listed in the Award who have ceased to exist, ceased to trade or ceased to be covered by the Award. Rather, their inclusion is obsolete. It is therefore appropriate to update the Schedule of Respondents.

25 Turning to the specific respondents listed in the current Schedule of Respondents:

- (a) Action Electronics Pty Ltd: despite this being the name contained in the Schedule of Respondents, according to ASIC's registers, no company with this exact name exists or has previously existed. A company with a similar name, Acton Electronics Pty Ltd was deregistered in 2016. The company with the similar name Action Electrical Pty Ltd was deregistered in 1992. In any event, as no company with this name is currently registered or in existence, it is appropriate that it be removed from the Schedule of Respondents.
- (b) Aldetec Pty Ltd: according to an ASIC Company Extract, this company was deregistered in 2013. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (c) Allcom Pty Ltd: according to an ASIC Company Extract, this company changed its name to LNC Pty Ltd and was then deregistered in 1994. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (d) Ampac Industries (WA) Pty Ltd: according to an ASIC Company Extract for the company with the similar name, Ampac Industries (W.A.) Pty Ltd (A.C.N. 008 876 935), the company changed its name several times and was deregistered in 2020. Another company with a similar name Ampac Industries (W.A.) Pty. Ltd. (A.C.N. 009 104 152), also changed its name and is now known as Ampac Developments Pty Ltd. It is still registered and has its registered office in Joondalup. It is most likely that this still registered company was the original respondent to the Award, as the deregistered company was registered in 1978 under the name Ampac Distributors Pty Ltd, and had that name when the Award was made in 1985.

It is therefore appropriate to amend the name of the respondent in the Schedule of Respondents.

- (e) Associated Electronic Services (1979) Pty Ltd: according to an ASIC Company Extract, this company has changed its name to Vix Technology (Aust) Pty Ltd and has a registered office in Perth. It is therefore appropriate to amend the name of the respondent in the Schedule of Respondents.
- (f) Automated Lab Equipment Pty Ltd: no company with this name appears to be recorded on ASIC's registers. Nor can any current business with this name be located on open source searches. I am satisfied no company of this name exists and therefore it is appropriate to remove the name from the Schedule of Respondents.
- (g) Computronics International Pty Ltd: according to an ASIC Company Extract, this company was deregistered in 2013. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (h) Digital Systems Pty Ltd: according to an ASIC Company Extract, this company was deregistered in 2019. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (i) Ejan Electronics Services: an ABN Lookup search shows that a partnership of E.S. Smirk & J.O Smirk were previously registered as the holders of the business name Ejan Electronic Services. That business name was cancelled in 2000. Ejan Communications is a current registered business name, held by the Trustee for the Smirk Communications Trust. Newhawk Corporation Pty Ltd is the trustee for the Smirk Communications Trust. The ETU has applied to substitute Ejan Communications for Ejan Electronics Services. This is, in effect, an application to add a new employer to the Schedule of Respondents.

I am not satisfied it is appropriate to do so. First, no evidence has been provided to the Commission to establish that Newhawk Corporation Pty Ltd employs employees in the electronics industry. Second, even if Newhawk Corporation Pty Ltd does operate in the electronics industry, it is most likely a National System Employer and not covered by the Award.

I am satisfied that it is appropriate to remove Ejan Electronics Services from the Schedule of Respondents.

- (j) Industrial Micro Products (Aust): according to an ASIC Business Name Extract, the business name Industrial Micro Products (Aust) is now cancelled. The company Industrial Micro Products Pty Limited changed its name to Industrial Micro Products Pty Limited, and then to Pulsat Developments Pty Ltd (A.C.N. 087 893 267). The company was deregistered in 2011. It is therefore appropriate that the name be removed from the Schedule of Respondents.
- (k) Jemal Products Pty Ltd: according to an ASIC Company Extract, the company with this name and A.C.N. 008 886 682 changed its name to Huphim Pty Ltd and has its registered office in Como. It is therefore appropriate that the name be changed in the Schedule of Respondents.
- (l) Lion Electronics: according to an ABN Lookup search, this now cancelled business name was registered to The Trustee for the Pink Diamond Trust. The trust has an active ABN (ABN 41 312 243 949) for a different, apparently unrelated business, Archer Street Newsagency. From 2019 to present, The Trustee for the Pink Diamond Trust was Hyperlogic Pty Ltd.

Hyperlogic Pty Ltd was served with a copy of the application, but has not responded to it.

No results for a business trading as 'Lion Electronics' appear in open source searches.

I am therefore satisfied that neither Hyperlogic Pty Ltd nor the Pink Diamond Trust operate in the electronics industry in Western Australia. It is therefore appropriate that the name be removed from the Schedule of Respondents.

- (m) Micro Controls Ltd: according to an ASIC Company Extract, this company was deregistered in 1994. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (n) Precision Microsystems Pty Ltd: according to an ASIC Company Extract, this company was deregistered in 2007. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (o) Radiolab Limited: according to an ASIC Company Extract, this company was deregistered in 1993. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (p) Mike Steward Electronic and Electrical Services: according to an ASIC Company Extract, the company Mike Steward Electronic and Electrical Services Pty Ltd (A.C.N. 059 458 230) changed its name and is now IBES Australia Pty Ltd. It is therefore appropriate that the name be changed in the Schedule of Respondents accordingly.
- (q) Unidata Australia: according to the ASIC Australian Business Register, the company Unidata Australia Pty Ltd A.C.N. 088 222 780 previously held the trading name Unidata Australia. This company was deregistered in 2017. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (r) Unitronics Pty Ltd: according to an ASIC Company Extract, this company with A.C.N. 008 933 695 was deregistered in 2008. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (s) Underwater Video Systems Pty Ltd: it is possible that this respondent is incorrectly described in the Schedule of Respondents. According to an ASIC Company Extract, the company that is currently registered with this name, A.C.N. 009 086 828, was registered in Western Australia in 1984 with the name Saquant Pty. Ltd. That appeared to be its name when the Award was made in 1985. It now has its registered office in St Kilda, Victoria. It has an ABN, which is not currently registered for GST, and has not been registered since 2015. Its main business location is listed as Victoria.

Another company, UVS Pty Limited (A.C.N. 150 810 898), trading as Underwater Video Systems, was registered in 2011, after the Award was made. That company is now known as Bluzone Group Pty Ltd and has a registered office in Newcastle, NSW. It appears from the website bluzonegroup.com.au that this company does trade with offices in New South Wales and Perth. However, even if it is or was associated with Underwater Video Systems Pty Ltd, it is clearly not the same entity.

I am satisfied that Underwater Video Systems Pty Ltd has ceased to operate a business in Western Australia, and it is therefore appropriate that it be removed from the Schedule of Respondents.

- (t) N.A. Walker Pty Ltd: according to an ASIC Company Extract, this company was deregistered in 1994. It is therefore appropriate that it be removed from the Schedule of Respondents.
- (u) Anitech: according to an ASIC Business Name Extract, this business name is now cancelled. It is not clear who held the business name when it was registered. In any event, no business with this name, operating in the electronics industry in Western Australia, has been identified in any open source searches. I am satisfied that the inclusion of this name in the Schedule of Respondents does not lead to the identification of any party currently in existence. It is therefore appropriate that the name be removed from the Schedule of Respondents.
- (v) Western Electric (Aust) Pty Ltd: according to an ASIC Company Extract, this company was deregistered in 2014. It is therefore appropriate that it be removed from the Schedule of Respondents.

26 An order will issue in the following terms:

- (a) THAT the *Electronics Industry Award No A22 of 1985* be varied in accordance with the following schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

2023 WAIRC 00049

**ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

-v-

HINCO ENGINEERING AND OTHERS

**RESPONDENTS**

**CORAM**

SENIOR COMMISSIONER R COSENTINO

**DATE**

MONDAY, 23 JANUARY 2023

**FILE NO/S**

APPL 52 OF 2022

**CITATION NO.**

2023 WAIRC 00049

<b>Result</b>	Award varied
<b>Representation</b>	(on the papers)
<b>Applicant</b>	Electrical Trades Union WA
<b>Eleventh</b>	
<b>Respondent</b>	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch

*Order*

WHEREAS the Electrical Trades Union WA applied on 15 November 2022 to vary the *Electronics Industry Award No. A22 of 1985* pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS for the reasons set out in [2023] WAIRC 00030, the Commission is satisfied that the requirements of the IR Act for varying the Award are met, and that it is appropriate that variations to the Award be made as set out in the reasons for decision;

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

THAT the *Electronics Industry Award No. A22 of 1985* be varied in accordance with the following Schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

[L.S.]

(Sgd.) R COSENTINO,  
Senior Commissioner.

SCHEDULE

1. **Clause 9. – Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof the following:**
- (f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$13.90 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid \$9.30 for each meal so required.

2. **Clause 13. – Car Allowance: Delete subclause (3) of this Clause and insert in lieu thereof:**

- (3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

**RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE  
ON EMPLOYER'S BUSINESS  
MOTOR CAR**

Area And Details	Engine Displacement (In Cubic Centimetres)		
	Over 2600cc	1600cc - 2600cc	1600cc & Under
Metropolitan Area	101.7	90.7	78.8
South West Land Division	103.7	92.9	81.0
North of 23.5° South Latitude	113.9	102.5	89.3
Rest of the State	106.9	96.1	83.4
<b>MOTOR CYCLE</b> (In All Areas)	34.6 cents per Kilometre		

3. **Clause 15. – Distant Work: Delete subclauses (4) and (5) of this Clause and insert in lieu thereof:**

- (4) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of \$42.95 for any weekend that the employee returns home from the job, but only if -

- (a) The employee advises the employer or the employer's agent of the employee's intention no later than Tuesday immediately preceding the weekend in which the employee so returns;
- (b) The employee is not required for work during that weekend;
- (c) The employee returns to the job on the first working day following the weekend; and
- (d) The employer does not provide, or offer to provide, suitable transport.

- (5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$18.70 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**4. Clause 20. – Special Provisions:****A. Delete subclauses (1), (2), (3) and (4) of this Clause and insert in lieu thereof the following:**

- (1) **Dirt Money:** An employee shall be paid an allowance of 71 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
- (2) **Confined Space:** An employee shall be paid an allowance of 89 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.
- (3) **Hot Work:** An employee shall be paid an allowance of 71 cents per hour when working in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees Celsius.
- (4) **Height Money:** An employee shall be paid an allowance of \$3.35 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.

**B. Delete subclauses (6), (7) and (8) of this Clause and insert in lieu thereof the following:**

- (6) **Diesel Engine Ships:** The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of \$1.20 per hour whilst so engaged.
- (7) **Percussion Tools:** An employee shall be paid an allowance of 46 cents per hour when working pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.
- (8) **Chemical, Artificial Manure and Cement Works:** An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of \$18.20 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

**C. Delete subclause (14) of this Clause and insert in lieu thereof the following:**

- (14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid \$14.00 per week in addition to their ordinary rate.

**5. Clause 33. – Wages:****A. Delete subclause (2) of this Clause and insert in lieu thereof the following:**

- (2) **Leading Hands:**

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

- |     |  |         |
|-----|--|---------|
| (a) | If placed in charge of not less than three and not more than ten other employees | \$37.00 |
| (b) | If placed in charge of more than ten but not more than twenty other employees    | \$56.10 |
| (c) | If placed in charge of more than twenty other employees                          | \$72.90 |

**B. Delete subclause (5) of this Clause and insert in lieu thereof the following:**

- (5) **Tool Allowance**

- (a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of -
  - (i) \$20.40 per week to such technician, serviceperson, installer; or
  - (ii) In the case of an apprentice a percentage of \$20.40 being the percentage which appears against their year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer or apprentice.
- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
- (c) An employer shall provide for the use of technicians, service people, installers or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

**PART II – CONSTRUCTION WORK****6. Clause 5. – Special Rates and Provisions: Delete subclause (2) of this Clause and insert in lieu thereof the following:**

- (2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of a employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the

provisions of Clause 11. - Sick Leave of PART I – GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during their absence.

- (b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of \$411.30.
- (c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

**7. Clause 6. – Allowance for Travelling and Employment in Construction Work: Delete paragraphs (a), (b) and (c) of subclause (1) of this Clause and insert in lieu thereof:**

- (a) On places within a radius of 50 kilometres from the General Post Office, Perth - \$20.50 per day.
- (b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - \$1.04 per kilometre.
- (c) Subject to the provisions of paragraph (d), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of \$1.04 per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

**8. Clause 7. – Distant Work: Delete subclauses (6) and (7) of this Clause and insert in lieu thereof:**

- (6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of \$41.90 for any weekend that the employee returns home from the job, but only if -
  - (a) The employee advises the employer or the employee's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;
  - (b) The employee is not required for work during that weekend;
  - (c) The employee returns to the job on the first working day following the weekend; and
  - (d) The employer does not provide, or offer to provide, suitable transport.
- (7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of \$18.40 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**9. Clause 10. – Wages: Delete subclauses (5), (6) and (7) of this Clause and insert in lieu thereof the following:**

- (5) Construction Allowances:
  - (a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -
    - (i) \$65.20 per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.
    - (ii) \$58.90 per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.
    - (iii) \$34.50 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.
  - (b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.
- (6) Leading Hand:
 

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	\$37.00
(b)	If placed in charge of more than ten but not more than twenty other employees	\$56.10
(c)	If placed in charge of more than twenty other employees	\$72.90
- (7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of -
  - (i) \$20.40 per week to such Technician, Serviceperson or Installer, or
  - (ii) In the case of an apprentice a percentage of \$20.40 being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award, for the purpose of such Technician,

Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer or Apprentice.

- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
- (c) An employer shall provide for the use of Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.

**10. First Schedule – Schedule of Respondents: Delete this Schedule and insert in lieu thereof the following:**

FIRST SCHEDULE – SCHEDULE OF RESPONDENTS

Ampac Developments Pty Ltd  
 J.R.L. Component Sales Pty Ltd  
 New Era Electro Service (WA)  
 Hingo Engineering  
 Omnitronics Pty Ltd  
 Huphim Pty Ltd  
 IBES Australia Pty Ltd  
 Vix Technology (Aust) Pty Ltd

**2023 WAIRC 00031**

**RADIO AND TELEVISION EMPLOYEES' AWARD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2023 WAIRC 00031
<b>CORAM</b>	:	SENIOR COMMISSIONER R COSENTINO
<b>HEARD</b>	:	ON THE PAPERS
<b>DELIVERED</b>	:	MONDAY, 16 JANUARY 2023
<b>FILE NO.</b>	:	APPL 54 OF 2022
<b>BETWEEN</b>	:	ELECTRICAL TRADES UNION WA
		Applicant
		AND
		ALBANY TV SERVICES AND OTHERS
		Respondents

CatchWords	:	Industrial Law (WA) – Application to vary award – Increasing allowances – Deletion of respondents no longer trading or no longer in existence – Updating respondent's details
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Industrial Relations Commission Regulations 2005</i> (WA)
Result	:	Award varied
<b>Representation:</b>		
Applicant	:	Electrical Trades Union WA
Respondents	:	No appearance

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

*R.J. Donovan and Associates Pty. Ltd. v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch* (1977) 57 WAIG 1317

*Reasons for Decision*

- 1 The Electrical Trades Union WA (ETU) applied to vary the *Radio and Television Employees Award*. The variations are to:
  - (a) increase a number of allowances in the Award; and

- (b) remove from the First Schedule - **Schedule of Respondents** persons and entities who are no longer trading in the Radio and Television Industry or no longer in existence.
- 2 Section 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**) empowers the Commission to vary an award on application of a party to it.
- 3 The ETU is the only named party bound by the Award. It has standing to bring the application: s 40(2) of the IR Act.
- 4 As the application is made outside of the term of the Award, s 40(3) of the IR Act is no barrier to the variations sought.
- 5 The amendments proposed do not affect any substantive change to the scope of the Award or its area of operation. The application therefore does not attract the requirements of s 29A of the IR Act for publication of the proposed amendments or service on the s 29A parties.
- 6 The application has otherwise been duly served as required by the IR Act and the *Industrial Relations Commission Regulations 2005* (WA).

#### Increasing allowances

- 7 The ETU seeks to vary the leading hand and tool allowances in Clause 20 by 4.65% in line with the 2022 State Wage case [2022] WAIRC 00273; (2022) 102 WAIG 431.
- 8 Principle 6.3 of the 2022 State Wage Case Statement of Principles states:  
 Allowances which relate to work or conditions which have not changed, and service increments may be adjusted as a result of the State Wage order, or, if an award contains another method for adjusting such allowances, in accordance with that other method.
- 9 Principle 6.4 applies. It provides:  
 In the absence of any other prescribed method, where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed or service increments for a monetary safety net increase, the method of adjustment shall be as follows: divide the monetary safety net increase by the rate of pay for the key classification in the award which applied immediately prior to the safety net increase, and multiply the resulting figure by 100.
- 10 The ETU also seeks variation of other allowances in line with CPI changes from June 2021 to June 2022. The allowances in this category are:
- (a) Clause 9(3)(f) - Meal Allowance; and
- (b) Clauses 13 and 14 - Travel & Car Allowances.
- 11 Principle 6.1 of the 2022 State Wage Case Statement of Principles states:  
 Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of those expenses.
- 12 The application to vary these allowances is unopposed.
- 13 These allowances were last varied on 1 January 2022: [2022] WAIRC 0023; (2022) 102 WAIG 132. Those variations updated the allowances to include increases based on the 2020 and 2021 State Wage Case decisions, and CPI increases to June 2021.
- 14 The ETU has provided the Commission with a schedule setting out the methodology and calculations supporting the variations now sought. The calculations show that the variations are consistent with the Statement of Principles as set out above. The Award does not itself specify a method for adjusting allowances which is at odds with the methods set out.
- 15 I am therefore satisfied that it is appropriate to make the variations to the allowances as sought.

#### Replacement of Schedule of Respondents

- 16 The application seeks to vary the Award by substitution of a new Schedule of Respondents. This part of the application is also unopposed, as no party has responded to the application.
- 17 The Schedule of Respondents currently lists 10 companies and business names. The application seeks to remove seven of them.
- 18 The Area and Scope Clause of the Award is as follows:  
 This award relates to the Radio and Television Industry within the State of Western Australia and to all work done by employees employed in the classifications shown in Clause 29. - Wages and employed by the respondents in connection with the making, installing, repairing and altering, assembling, testing, aligning, fault locating, rewinding and rewiring radio machines, instruments or other apparatus (including public address and background music systems, tape recorders, stereo and hi-fidelity amplifiers, electronic musical instruments and electronic amusement machines) and television machines, instruments or other apparatus.
- 19 The scope clause is of the same kind as was considered *R.J. Donovan and Associates Pty. Ltd. v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch* (1977) 57 WAIG 1317. The naming of the respondents in the schedule does no more than create a rebuttable presumption that those employers are engaged in the industry referred to in the scope clause.
- 20 Accordingly, the Schedule of Respondents does not have a direct bearing on the scope of the Award. It is not an operative provision. Its practical significance is that the persons and entities listed are parties to the Award pursuant to s 38 of the IR Act. They are therefore entitled to be served with applications made under Part II, Division 2A of the IR Act and to participate in

proceedings initiated by such applications. Additionally, the named respondents are presumed to operate within the Radio and Television Industry.

- 21 The upshot is that there is no good reason for retaining the respondents listed in the Award who have ceased to exist, ceased to trade in the Radio and Television Industry or ceased to be covered by the Award. Rather, their inclusion is obsolete. It is therefore appropriate to update the Schedule of Respondents.
- 22 Turning to the specific respondents listed in the current Schedule of Respondents and the subject of the variations sought:
- (a) Canberra Television Services: according to an ASIC Company Extract, this business name was previously held by Canberra Television Holdings Pty Ltd. The company was deregistered in 2003. The business name is now cancelled. It is therefore appropriate that it be removed from the Schedule of Respondents.
  - (b) Amalgamated Wireless (Australasia) Limited: according to an ASIC Company Extract, the company previously known as Amalgamated Wireless (Australasia) Ltd (A.C.N. 000 005 916) remains registered but has changed its name to Tahal Pty Ltd. The name should be changed in the Schedule of Respondents, to appear as Tahal Pty Ltd formerly Amalgamated Wireless (Australasia) Ltd.
  - (c) Indoor Amusement Games WA Co.: no registered company or business name meeting this description has been located on ASIC's registers. I have reviewed the Commission's file relating to the making of the Award: R 3 of 1980. It shows that no response was filed for this respondent, and it did not participate in those proceedings. Open source searches have not returned any results indicating that a business with this name currently trades in Western Australia, nor who or what entity previously operated the business. In short, I am satisfied that there is no employer currently employing employees in Western Australia and covered by the Award identifiable by this name. Accordingly it is appropriate that it be removed from the Schedule of Respondents.
  - (d) Alberts T.V. & Hi-Fi Centre: it appears in R 3 of 1980 that a warrant for an agent to appear was filed for this respondent, and signed Alberts TV & Hi FI Centre Pty Ltd. An ASIC Company Extract for this company shows it changed its name to Wallis Property & Finance Pty Ltd, and has a registered office in Osborne Park. It is not registered for GST, but is listed as having the trading name Wallis Property & Finance. It appears from this name that the company no longer operates in the industry covered by the Award, and employs no employees covered. This company was served with a copy of the application. It did not file a response. I am therefore satisfied that it is appropriate that it be removed from the Schedule of Respondents.
  - (e) Ian Diffen World of Sound: ASIC's registers do not return any matches to a business or organisation with this exact name. The Commission's file R 3 of 1980 shows the company Ian Diffen Tyre Services Pty Ltd filed a warrant to appear for this respondent. I therefore conclude that the correct respondent was Ian Diffen Tyre Services Pty Ltd and it traded as Ian Diffen World of Sound. According to ASIC's register, Ian Diffen Tyre Services Pty Ltd was deregistered in 1990. It is therefore appropriate to remove the name from the Schedule of Respondents.
  - (f) K.B. Electronics: the warrant to appear filed for this respondent in R 3 of 1980 was signed by Keith Bunn. According to ASIC's registers, the Keith Bunn Family Trust (ABN 51 531 714 942) operated the business name KB Electronics & Marine. The Keith Bunn Family Trust cancelled its ABN status from 30 June 2010 and a company known as Keith Bunn Holdings Pty Ltd was deregistered on 5 September 2011. On this basis, I am satisfied that the entity which was the respondent to the Award no longer exists and so it is appropriate to remove this name from the Schedule of Respondents.
  - (g) Ord Electronics: an ABN Lookup search reveals that a business with the name Ord Electrics held an ABN 61 170 229 088 until it was cancelled on 1 July 2003. The business name was held by John & June L Varga in partnership. A copy of the application was served on an address for J Varga, located through a White Pages search. No response was filed.  
  
Ord Electronics is otherwise not registered as a business name, and no business with this name has been located through open source searches. A search of ASIC's registers indicates that there is no current business name registered to John or June Varga. I am therefore satisfied that John & June Varga no longer trades in the Radio and Television Industry, nor employ employees covered by the Award. Ord Electrics is not a name which is capable of identifying an employer. It is appropriate that the name be removed from the Schedule of Respondents.
  - (h) Bunbury T.V. (Services) Pty Limited: according to an ASIC Company Extract, the company Bunbury T.V. Services (1977) Pty Ltd was deregistered in 2019. As there is no record in ASIC's registers of a company with the exact name as it appears in the Award, I am satisfied that the deregistered company was the correct name and the correct respondent. As it is now deregistered, it is appropriate that it be removed from the Schedule of Respondents.
- 23 An order will issue in the following terms:
- (a) THAT the *Radio and Television Employees Award* be varied in accordance with the following schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.
-

2023 WAIRC 00047

**RADIO AND TELEVISION EMPLOYEES' AWARD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

-v-

ALBANY TV SERVICES AND OTHERS

**RESPONDENTS**

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** MONDAY, 23 JANUARY 2023  
**FILE NO/S** APPL 54 OF 2022  
**CITATION NO.** 2023 WAIRC 00047

**Result** Award varied  
**Representation** (on papers)  
**Applicant** Electrical Trades Union WA

*Order*

WHEREAS the Electrical Trades Union WA applied on 21 November 2022 to vary the *Radio and Television Employees' Award* pursuant to s 40 of the *Industrial Relations Act 1979 (WA) (IR Act)*;

AND WHEREAS for the reasons set out in [2023] WAIRC 00031, the Commission is satisfied that the requirements for varying the Award are met, and that it is appropriate to make the variations as set out in the reasons for decision;

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

THAT the *Radio and Television Employees' Award* be varied in accordance with the following Schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

[L.S.]

(Sgd.) R COSENTINO,  
Senior Commissioner.

## SCHEDULE

**1. Clause 9. – Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof:**

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$15.20 or a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid \$10.25 for each meal so required.

**2. Clause 13. – Car Allowances: Delete subclause (3) of this Clause and insert in lieu thereof the following:**

(3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

**RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE  
ON EMPLOYER'S BUSINESS  
MOTOR CAR**

Area And Details	Engine Displacement (In Cubic Centimetres)		
	Over 2600cc	1600cc - 2600cc	1600cc & Under
Metropolitan Area	99.8	89.1	77.6
South West Land Division	102.0	91.3	79.3
North of 23.5° South Latitude	112.0	100.4	87.7
Rest of the State	105.2	94.3	82.3
<b>MOTOR CYCLE (In All Areas)</b>	34.2 cents per Kilometre		

**3. Clause 14. – Distant Work: Delete subclause (4) of this Clause and insert in lieu thereof the following:**

(4) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$18.65 per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**4. Clause 29. – Wages:**

**A. Delete subclause (2) of this Clause and insert in lieu thereof:****(2) Leading Hands:**

In addition to the appropriate total wage prescribed in subclause (1) of this Clause a leading hand shall be paid:

- |     |  |         |
|-----|--|---------|
| (a) | If placed in charge of not less than three and not more than ten other employees | \$37.00 |
| (b) | If placed in charge of more than ten but not more than twenty other employees    | \$56.40 |
| (c) | If placed in charge of more than twenty other employees                          | \$72.90 |

**B. Delete subclause (5) of this Clause and insert in lieu thereof:**

- (5) (a) Where an employer does not provide a Serviceperson, Installer, Assembler or an apprentice with the tools ordinarily required by that Serviceperson, Installer, Assembler or apprentice in the performance of their work as a Serviceperson, Installer, Assembler or as an apprentice the employer shall pay a tool allowance of:-
- (i) \$20.30 per week to such Serviceperson, Installer or Assembler; or
- (ii) In the case of an apprentice a percentage of \$20.30 being the percentage which appears against their year of apprenticeship in subclause (3) of this Clause, for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler or apprentice.
- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.
- (c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through their negligence.

**5. First Schedule – Schedule of Respondents: Delete this Schedule and insert in lieu thereof the following:**

## FIRST SCHEDULE – SCHEDULE OF RESPONDENTS

Albany TV Services

Tahal Pty Ltd formerly known as Amalgamated Wireless (Australasia) Limited

Hills Limited

## AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2023 WAIRC 00016

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

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

<b>CITATION</b>	:	2023 WAIRC 00016
<b>CORAM</b>	:	COMMISSIONER T EMMANUEL
<b>HEARD</b>	:	FRIDAY, 28 OCTOBER 2022, WEDNESDAY, 2 NOVEMBER 2022, TUESDAY, 8 NOVEMBER 2022
<b>DELIVERED</b>	:	TUESDAY, 10 JANUARY 2023
<b>FILE NO.</b>	:	APPL 15 OF 2022
<b>BETWEEN</b>	:	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS Applicant AND MINISTER FOR CORRECTIVE SERVICES Respondent

CatchWords	:	Interpretation of sub-cl 48.2 of the <i>Department of Justice Prison Officers' Industrial Agreement 2020</i> – Approach to be taken when interpreting an industrial agreement – Clause unambiguous and no need to strain for meaning
Legislation	:	<i>Industrial Relations Act 1979</i> (WA): s 46
Result	:	Declaration made
<b>Representation:</b>		
Applicant	:	Mr J Theodorsen (as agent)
Respondent	:	Mr J Carroll (of counsel)

**Cases referred to in reasons:**

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

*New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50

*The Registrar of Titles of the State of Western Australia v Franzon & others* (1975) 132 CLR 611

*Reasons for Decision*

- 1 The Western Australian Prison Officers' Union (**Union**) and the Minister for Corrective Services (**Minister**) are in dispute about the correct interpretation of sub-cl 48.2 of the *Department of Justice Prison Officers' Industrial Agreement 2020* (**Industrial Agreement**).
- 2 The Union filed an application for an interpretation of sub-cl 48.2 under the *Industrial Relations Act 1979* (**IR Act**).
- 3 In essence, the dispute is about whether prior service in a substantive appointment counts as prior service for the purpose of cl 48.
- 4 Neither party led evidence.

**Question to be answered**

- 5 The Union asks:

When paying a higher duties allowance under sub-clause 48.2 of the Industrial Agreement, must the employer pay an amount equivalent to the increment the Officer had attained in the previous 18 months, regardless of whether:

- (i) the Officer attained the increment through higher duties or substantive appointment; or
- (ii) the Officer had a break in acting of less than 18 months following a disciplinary outcome? (**Question**)

- 6 The Union says that the reference in sub-cl 48.2 to 'acting in another position in the preceding 18 months' means serving in a position at that classification level or higher, whether or not a prison officer serves in a substantive position or by a higher duties arrangement.
- 7 The Minister says that only prior service in an acting appointment, rather than a substantive appointment, qualifies as service for the purpose of sub-cl 48.2.

**The clause**

- 8 Clause 48 provides:

**48. Higher Duties Allowance**

48.1 An Officer required to act for two hours or longer in a Classification with a higher Hourly Annualised Rate of Pay than their ordinary Hourly Annualised Rate of Pay shall be paid such higher Hourly Annualised Rate of Pay.

48.2 Where an Officer is directed to act in a Classification that has an incremental range of Annualised Salaries, the Officer shall be entitled to receive an increase in the higher duties allowance equivalent to the increment the Officer would have received had the Officer been appointed to such position. If the Officer has been acting in another position in the preceding 18 months which also attracted a higher duties allowance, service in the previous position shall count as qualifying service towards an increase in the higher duties allowance payable.

**The Union's submissions**

- 9 The Union says this application arises in the context of a dispute between its member, Ms Jade Smith, and the Minister.
- 10 Ms Smith was a Senior Officer. She had served in that role for enough time to advance to the 'Thereafter' increment under Schedule A to the Industrial Agreement. In May 2021, the Minister reduced Ms Smith's classification following a disciplinary process. From November 2021, the Minister directed Ms Smith to act as Senior Officer on a higher duties basis, paying her a higher duties allowance at the '1<sup>st</sup> Year' increment of the Senior Officer salary range. In effect, after Ms Smith's demotion, the Minister did not recognise Ms Smith's prior service in her substantive appointment as Senior Officer.
- 11 The Union says the Minister's interpretation of sub-cl 48.2 is wrong. In summary, the Union says that sub-cl 48.2 should be read such that any prior service in a higher position counts toward incremental increases in the higher duties allowance, as long as any break between prior service and the current higher duties is less than 18 months.

- 12 The Union argues that the text of sub-cl 48.2 in context shows that the parties to the Industrial Agreement objectively intended to recognise all service at a higher classification in the previous 18 months when calculating increments. Further, the Union says that there is nothing in sub-cl 48.2 or its context that shows the parties intended the entitlement to apply differently to employees whose break in service was due to a disciplinary outcome, and there is no basis for implying a term to that effect.
- 13 The Union points to various authorities and argues:
  - (a) the rules of interpretation that apply to contracts also apply to industrial agreements;
  - (b) industrial agreements should be interpreted generously, not narrowly;
  - (c) industrial agreements should be construed beneficially for employees, where such interpretation is reasonably open;
  - (d) meanings that avoid injustice are preferred, and even a strained interpretation may be reasonable to achieve this; and
  - (e) a term may only be implied if, among other things, the agreement would be ineffective without it and it is so obvious that it goes without saying.
- 14 The Union says that the reference in sub-cl 48.2 to 'acting in another position in the preceding 18 months' means serving in a position at that classification level or higher, whether or not a prison officer serves in a substantive position or by a higher duties arrangement.
- 15 The Union says this is because:
  - (a) the Industrial Agreement does not define 'acting';
  - (b) the ordinary meaning of 'acting' can be broad or narrow;
  - (c) accordingly, a question arises about the parties' objective intention in drafting the Industrial Agreement;
  - (d) a broader meaning of 'acting' is consistent with accepted rules of interpretation, including interpreting the clause liberally, which the Union says is appropriate because sub-cl 48.2 is beneficial; and
  - (e) adopting a narrow meaning of 'acting' could lead to strange and unjust results, which the parties could not have intended.
- 16 The Union says the definition of 'acting' includes 'serving temporarily' or 'functioning'. The Union says 'serving temporarily' is narrower, and likely to only recognise service of a person on higher duties, rather than service in a substantive role. However the Union argues that 'functioning' means anyone undertaking 'normal work, activities or processes' and would include service in a substantive role as well.
- 17 The Union says because the Industrial Agreement is an entire agreement that displaces the relevant award, it is reasonable to assume the parties intended the Industrial Agreement would deal exhaustively with its subject matter. The context leads to the conclusion that the parties intended sub-cl 48.1 – 48.2 to deal comprehensively with the entitlements for employees who work in higher positions; and to benefit employees. The Union says: 'It is hard to imagine the parties thought that recent prior service following a promotion should not be recognised, whereas service performed merely on a higher duties basis should.'
- 18 The Union acknowledges that the Minister's interpretation is available from the text of the Industrial Agreement, but says that objectively the parties could not have intended the meaning the Minister contends, because it would produce strange and unjust results.
- 19 The Union argues that a narrow reading of sub-cl 48.2 is inconsistent with a generous and beneficial construction of sub-cl 48.2 because it restricts or limits the entitlement without the Industrial Agreement expressing a clear intention to do so.
- 20 The Union says the Minister's interpretation results in injustice, for example between employees who have prior service in a substantive role or in an acting role where they suffer a stress-related injury and voluntarily regress to a less demanding role in a lower classification to assist their rehabilitation. If after 6 months they recover and gain higher duties as a Senior Officer, the employee who had prior service in a substantive Senior Officer role will be paid the lowest increment level of higher duties, while the employee who had prior service in an acting Senior Officer role will be paid at the highest increment. The Union also points to injustice in a scenario of regression due to redeployment.
- 21 Fundamentally, the Union's argument in relation to injustice is that an employee is penalised if their service follows a promotion to a position (as opposed to performing a higher position on an acting basis). The Union says a construction that produces such a result is neither generous nor beneficial. It would be so unjust that it would be permissible to strain for an alternative meaning (although the Union says its construction of sub-cl 48.2 does not strain the text).
- 22 The Union argues that its construction of sub-cl 48.2 provides an equitable and logical outcome that sits comfortably with the text of the provision in context and is consistent with accepted rules of interpretation.
- 23 The Union argues that there is nothing in sub-cl 48.2 that says that a person demoted for disciplinary reasons who works in a higher position within 18 months should have their prior service disregarded. An alternative view would involve implying a term in the Industrial Agreement, to specify that sub-cl 48.2 operates differently in the case of an employee who had a break in service at a particular classification level due to disciplinary action. Such a term is not necessary for the Industrial Agreement's operation and there is no reason to imply such a term, let alone that it would be so obvious that it goes without saying.
- 24 The Union says the answer to the Question is 'yes' and asks the Commission to declare:

That the true interpretation of cl 48.2 of the *Department of Justice Prison Officers' Industrial Agreement 2020* is as follows:

When calculating the higher duties allowance payable under clause 48.2, the employer must pay the Officer an amount equivalent to the increment the Officer had attained in the previous 18 months, regardless of whether:

- (i) the Officer attained the increment through higher duties or substantive appointment; or
- (ii) the Officer had a break in acting of less than 18 months following a disciplinary outcome.

#### The Minister's submissions

25 The Minister says the Commission should reject the Union's contention that 'acting in a position' in the second sentence of sub-cl 48.2 means 'working in a position', so that service in a higher classification in the previous 18 months is qualifying service for the purpose of calculating the increments for the higher duties allowance, regardless of whether the prison officer was 'acting' in the role or was substantively appointed to the role when they provided service. The Minister says this is for three reasons.

26 First, in the context in which 'acting' appears in the second sentence of sub-cl 48.2, the relevant definition is plainly 'serving temporarily; substitute'. To read 'acting in' as 'working in' would give the term a meaning other than its ordinary and natural meaning.

27 Second, to read 'acting in' as 'working in' fails to have regard to the rest of the words in the second sentence of sub-cl 48.2:

acting in another position in the preceding 18 months which also attracted a higher duties allowance...(Minister's emphasis)

If the prison officer was previously substantively appointed to the higher position, they would not have received a higher duties allowance, but would have been paid the annualised salary of the higher classification. The rest of the words in the second sentence of sub-cl 48.2 mean that the clause cannot mean what the Union says it means.

28 Third, 'act' is used in sub-cl 48.1 and the first sentence of sub-cl 48.2. Sub-clause 48.1 is plainly directed to the ordinary sense of the term 'act', being temporary service in a position other than one's ordinary position. The purpose of the clause (providing for a higher duties allowance for acting in a role other than one's ordinary role) confirms that. The Minister says the term 'act' in sub-cl 48.2 can bear no meaning other than its ordinary meaning (being temporary service in a position other than one's ordinary position) because the sentence itself draws comparisons to substantive appointment to a higher classification. Accordingly, the Minister says 'act' in sub-cl 48.1 and the first sentence of sub-cl 48.2 are unambiguously used in the ordinary sense of the word, being temporary service in a position other than one's ordinary position.

29 The Minister says there is no ambiguity sub-cl 48.2. It is absolutely clear that 'acting' means acting temporarily in that role. The Union's construction seeks the Commission to find that 'act' should be given different meanings in sub-cl 48.1 and sub-cl 48.2. The Minister argues that it is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise: *The Registrar of Titles of the State of Western Australia v Franzon & others* (1975) 132 CLR 611, 618 per Mason J.

30 The Minister submits that the word 'acting' should not be construed in different ways in sub-cl 48.1 and sub-cl 48.2. He says:

[A]n ordinary principle, a textual construction, not just statutory construction, is that a word would ordinarily have been given the same meaning throughout the instrument. The closer those words are to each other in the instrument, the more likely they're to be given the same meaning – so in the same clause, in the same sentence, it's less likely that an ordinary, reasonable reader of that instrument would be construing the same word to mean different things when they're, essentially, next to each other in a clause.

31 Accordingly, the Minister submits that to understand the word 'acting in' in the relevant sentence, one must read the rest of the sentence. The rest of the sentence is 'acting in another position in the preceding 18 months which also attracted a higher duties allowance.' Understood in its full context, 'acting' means temporarily working in a role in that sense of acting, and not just simply working in a role, whether substantively appointed or not.

32 The Minister argues that the Union's construction requires 're-writing it completely. It's not adding one word, it's not a mere infelicity, it's completely re-writing the parties' agreement. No amount of allowing for drafters not being parliamentary draftspersons could justify such an approach.' The Minister says that the Union's construction goes well beyond straining for meaning.

33 The Minister submits that while it may be possible to strain some language to avoid unjust outcomes, one cannot re-write the agreement to avoid unjust outcomes. Further, the Minister argues that in this matter no particular injustice would arise. He says the scenarios about voluntary regression due to temporary illness or redeployment are exceedingly unlikely and there is a comprehensive compensatory scheme.

34 In relation to the factual foundation for the dispute that led to this application, the Minister says that it is not unjust that a person who is demoted from Senior Officer does not 'get the value' of their prior service as a Senior Officer for higher duties allowances. This is because the main (if not only) rationale for a demotion for disciplinary reasons would be that the conduct the subject of the disciplinary action makes the employee unsuitable for the higher role. In those circumstances, it is not unfair that the employee would not get the benefit of that prior service when acting up.

35 The Minister says the proper test is to construe the parties' objective intentions, as embodied by the text of the instrument, understood in its proper context. Entire agreement or not, it is not for the Commission to consider what the parties should have put in their agreement. Rather, the Commission must objectively consider what the text of the Industrial Agreement means.

36 The Minister relies on the reasoning of the majority of the High Court in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50 at [33]:

[T]hat to commence the process of construction by posing the type of construction to be afforded – liberal, broad or narrow – may obscure the essential question regarding the meaning of the words used. It is one thing to say that no

restricted construction should be given to legislation which confers benefits; but if the focus is on the meaning of specific words, the circumstance for a liberal application may not arise.

### Consideration

- 37 The Commission has the power under s 46 of the IR Act to declare the true interpretation of the Industrial Agreement.
- 38 Smith AP (as she was then, with whom Scott CC agreed) set out the role of the Commission and the approach to be taken when interpreting an industrial agreement under s 46 of the IR Act in *Public Transport Authority of WA v The Australian Rail, Tram and Bus Industry Union of Employees, WA Branch* [2017] WAIRC 00869; [2017] WAIRC 00830. I respectfully agree with her reasoning and apply it in this matter.
- 39 The principles that apply to the interpretation of industrial agreements are the principles that apply to interpretation of contracts. The Full Bench said at [21]-[23] of *Fedec v The Minister for Corrective Services* [2017] WAIRC 00828; (2017) 97 WAIG 1595:

- [21] The approach that is to be applied when interpreting an industrial agreement is well established. This is:
- (a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.
  - (b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362.
  - (c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498; *City of Wanneroo v Holmes* (378 - 379) (French J).

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

The general principles relevant to the proper construction of instruments are well-known. In summary:

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

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

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

The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22].

Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 352; *McCourt v Cranston* [2012] WASCA 60 [23].

- 40 When interpreting industrial agreements, the Commission applies the general principles that apply to the construction of contracts, to determine the parties' objective intention as expressed in the text of the industrial agreement having regard to its context.
- 41 The Industrial Agreement was made between the Union and Minister. It was registered on 18 December 2020 and its nominal expiry date is 10 June 2022. It applies throughout the Western Australia to prison officers employed in the classifications set out in Schedule A to the Industrial Agreement. The Industrial Agreement replaces in full the terms of the *Prison Officers' Award*.
- 42 Schedule A to the Industrial Agreement sets out the annualised salary for each classification. Most classifications have an incremental range of annualised salaries.
- 43 Clause 48 is set out in [8] above. 'Act' and 'acting' are not defined. Clauses 34.4(b), 154 and 172 of the Industrial Agreement also use those terms.
- 44 The *Macquarie Dictionary* (online at 9 January 2023) provides:
- Acting**  
*adjective*
1. Serving temporarily; substitute: *acting governor*.
  2. That acts, functioning.
  3. Provided with stage directions; designed to be used for performance: *an acting version of a play*.
- Noun*
4. Performance as an actor.
  5. The occupation of an actor.
  6. Pretence; make believe.
- 45 The Union's construction of sub-cl 48.2 does not sit comfortably with the text of the provision in context. I am not persuaded that 'act' should be given different meanings in sub-cl 48.1 and sub-cl 48.2, (or indeed, different meanings within sub-cl 48.2).
- 46 In the context in which 'acting' appears in the second sentence of sub-cl 48.2, it clearly means 'serving temporarily; substitute' and not 'working in'. This is because:
- (a) 'acting' in the second sentence of sub-cl 48.2 refers to acting in another position 'which also attracted a higher duties allowance'. Working in a substantive position would not also attract a higher duties allowance, and therefore 'acting' could not mean 'working in'; and
  - (b) the purpose of cl 48 is to provide for a higher duties allowance for acting in a position other than a prison officer's ordinary position. Plainly, 'act' in sub-cl 48.1 can only have the ordinary meaning of temporary service in a position other than one's ordinary position. 'Act' in the first sentence of sub-cl 48.2 can also only mean temporary service in a position other than one's ordinary position, because the sentence itself distinguishes between temporary service in a position other than one's ordinary position and a substantive appointment.
- 47 For the reasons given by the Minister, I consider that the two scenarios outlined by the Union are unlikely. But in any event, while it may be possible in certain circumstances to strain language to avoid unjust outcomes, the Commission cannot re-write the parties' agreement.
- 48 Allowing for a generous construction and that industrial agreements are usually not drafted with careful attention to form by those experienced in drafting statutory instruments or documents with legal effect, I consider that the objective intention of the parties, embodied in the words they have used in the Industrial Agreement, is only to give the higher increment on acting to employees who have acted in a higher position on a temporary (and not substantive) basis in the previous 18 months. The clause is not ambiguous and there is no need to strain for meaning. In my view, this is what a reasonable person would understand sub-cl 48.2 to mean. To understand otherwise would be to re-write the parties' agreement.
- 49 Further, to the extent that an employee is demoted for disciplinary reasons because their conduct the subject of the disciplinary action made them unsuitable for the higher position, it would not be unfair that the employee would not get the benefit of prior service when acting up.
- 50 The text of sub-cl 48.2 in context shows that the parties to the Industrial Agreement did not intend to recognise all service at a higher classification in the previous 18 months when calculating increments. Only prior service in an acting appointment qualifies as service for the purpose of sub-cl 48.2. Prior service in a substantive appointment does not qualify as service for the purpose of sub-cl 48.2. Accordingly, the answer to the Question is 'No'.
- 51 When paying a higher duties allowance under sub-clause 48.2 of the *Department of Justice Prison Officers' Industrial Agreement 2020*, a prison officer is not entitled to an allowance equivalent to the increment the prison officer had attained in the previous 18 months if the prison officer only achieved that increment within the previous 18 months when substantively appointed to the higher position and did not achieve that increment when acting in the higher position.
- 52 A declaration will issue.

2023 WAIRC 00020

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

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	<b>APPLICANT</b>
	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS	
	-v-	
	MINISTER FOR CORRECTIVE SERVICES	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER T EMMANUEL	
<b>DATE</b>	WEDNESDAY, 11 JANUARY 2023	
<b>FILE NO.</b>	APPL 15 OF 2022	
<b>CITATION NO.</b>	2023 WAIRC 00020	

<b>Result</b>	Declaration made
<b>Representation</b>	
<b>Applicant</b>	Mr J Theodorsen (as agent)
<b>Respondent</b>	Mr J Carroll (of counsel)

*Declaration*

HAVING heard Mr J Theodorsen (as agent) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent;  
AND HAVING given reasons for decision in which the Commission made a declaration;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), declares –  
THAT when paying a higher duties allowance under sub-clause 48.2 of the *Department of Justice Prison Officers' Industrial Agreement 2020*, a prison officer is not entitled to an allowance equivalent to the increment the prison officer had attained in the previous 18 months if the prison officer only achieved that increment within the previous 18 months when substantively appointed to the higher position and did not achieve that increment when acting in the higher position.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

**NOTICES—Application for General Order—**

2023 WAIRC 00064

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Level 17, 111 St Georges Terrace, Perth

Ph: (08) 9420 4444

Application No. CICS 3 of 2023

**APPLICATION FOR GENERAL ORDER – PROVISIONS IN INDUSTRIAL INSTRUMENTS FOR SPECIAL DAYS APPOINTED UNDER SECTION 7 OF THE PUBLIC AND BANK HOLIDAYS ACT 1972**

NOTICE is given that an application has been made to the Commission in Court Session by UnionsWA under section 50 of the *Industrial Relations Act 1979* (WA). The application by UnionsWA is for a General Order to provide that all employees covered by an award, an industrial agreement, an enterprise order, or an employer-employee agreement under the *Industrial Relations Act 1979* (WA) that provides for a higher rate of pay for working on a defined public holiday specified in that industrial instrument shall also be paid that higher rate of pay when working on any recognised public holiday pursuant to the *Minimum Conditions of Employment Act 1993* (WA) or the *Public and Bank Holidays Act 1972* (WA).

These matters will be heard on Tuesday, 9 May 2023 at 10:30am.

The application may be inspected at my office by appointment at 111 St Georges Terrace, Perth by any interested person without charge.

The Commission invites interested persons and organisations to make a written submission to the Commission in Court Session on UnionsWA's proposed General Order. Interested persons and organisations may file written submissions with the Registry by no later than 4:00pm on Tuesday, 2 May 2023.

All correspondence should be addressed to the Registrar at the above address or by email to [registry@wairc.wa.gov.au](mailto:registry@wairc.wa.gov.au) quoting matter number CICS 3 of 2023.

Attached are:

1. Schedule A being the proposed General Order in terms proposed by UnionsWA; and
2. Schedule B being a list of awards that UnionsWA have indicated may be impacted by the proposed General Order.

(Sgd.) S BASTIAN,  
Registrar.

[L.S.]

22 February 2023

### Schedule A – Proposed General Order as proposed by UnionsWA

#### 1.- APPLICATION

1. This General Order applies to each employee as defined in subsection 7(1) of the *Industrial Relations Act 1979* (WA) throughout the State of Western Australia.
2. Where an industrial instrument contains a term provided for in this General Order that is more beneficial to an employee, then the more beneficial term shall apply. Otherwise, where there is a conflict between the terms of an industrial instrument and this General Order, the terms of this General Order shall apply.
3. This General Order shall operate on and from the date this General Order issues and shall continue indefinitely unless later rescinded by the Commission.

#### 2.- DEFINITIONS

4. In this General Order:
  - a. The term **defined public holiday** means a day defined or recognised as a public holiday within an industrial instrument.
  - b. The term **industrial instrument** means an award, an industrial agreement, an enterprise order, and an employer-employee agreement under the *Industrial Relations Act 1979* (WA).
  - c. The term **recognised public holiday** means a day mentioned in Schedule 1 of the *Minimum Conditions of Employment Act 1993* (WA) and, for the avoidance of doubt, includes any special day appointed by proclamation under the *Public and Bank Holidays Act 1972* section 7 to be a public holiday.

#### 3.- PUBLIC HOLIDAYS

5. Where an employee is covered by an industrial instrument that provides for a higher rate of pay (for example: overtime, penalty rates, or allowances) for working on a defined public holiday, that higher rate of pay shall also apply to time worked by the employee on any recognised public holiday.

### Schedule B – Awards that may be impacted by the proposed General Order

Award Name	Award No
Animal Welfare Industry Award	25051
Bakers' (Country) Award No. 18 of 1977	R 18/1977
Bakers' (Metropolitan) Award No. 13 of 1987	A 13/1987
Building Trades Award 1968	31/1966
Children's Services (Private) Award 2006	A 10/1990
Cleaners and Caretakers (Car and Caravan Parks) Award 1975	27515
Cleaners and Caretakers Award, 1969	25538
Clerks' (Accountants' Employees) Award 1984	A 8/1982
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	14/1972
Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947	38/1947
Club Workers' Award	28095
Contract Cleaners Award, 1986	A 6/1985
Dental Technicians' and Attendant/Receptionists' Award, 1982	29/1982
Earth Moving and Construction Award	23285
Electrical Contracting Industry Award R 22 of 1978	R 22/1978

Enrolled Nurses and Nursing Assistants (Private) Award No 8 of 1978	28703
Farm Employees' Award 1985	A 19/1984
Fruit Growing and Fruit Packing Industry Award – The	R 17/1979
Furniture Trades Industry Award	A 6/1984
Hairdressers Award 1989	A 32/1988
Hotel and Tavern Workers' Award	R 31/1977
Landscape Gardening Industry Award	R 18/1978
Licensed Establishments (Retail and Wholesale) Award 1979	R 23/1977
Meat Industry (State) Award, 2003	R 9/1979
Metal Trades (General) Award	13/1965
Motel, Hostel, Service Flats and Boarding House Workers' Award	29/1974
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980	A 29/1980
Pastrycooks' Award No. 24 of 1981	A 24/1981
Photographic Industry Award, 1980	A 9/1980
Restaurant, Tearoom and Catering Workers' Award	R 48/1978
Retail Pharmacists' Award 2004	A 8/04
Security Officers' Award	A 25/1981
Sheet Metal Workers' Award No. 10 of 1973	26938
Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 - The	R 32/1976
Transport Workers (General) Award No. 10 of 1961	22555
Transport Workers' (Passenger Vehicles) Award	R 47/1978
Vehicle Builders' Award 1971	26177
Wine Industry (WA) Award 2005	31/1969

2023 WAIRC 00050

**APPLICATION FOR GENERAL ORDER - PROVISIONS IN INDUSTRIAL INSTRUMENTS FOR SPECIAL DAYS  
APPOINTED UNDER SECTION 7 OF THE PUBLIC AND BANK HOLIDAYS ACT 1972**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

UNIONSWA INCORPORATED

**APPLICANT**

-v-

CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA LIMITED,  
AUSTRALIAN MINES AND METALS ASSOCIATION, THE HON. MINISTER FOR  
INDUSTRIAL RELATIONS

**RESPONDENTS****CORAM**

COMMISSION IN COURT SESSION  
CHIEF COMMISSIONER S J KENNER  
SENIOR COMMISSIONER R COSENTINO  
COMMISSIONER T B WALKINGTON

**DATE**

TUESDAY, 24 JANUARY 2023

**FILE NO.**

CICS 3 OF 2023

**CITATION NO.**

2023 WAIRC 00050

<b>Result</b>	Directions issued
<b>Representation</b>	
<b>Applicant</b>	Mr C Fogliani of counsel
<b>Respondents</b>	
<b>The Hon. Minister</b>	Ms A Kothapalli and with her Mr B Entrekin
<b>CCIWA</b>	No appearance
<b>AMMA</b>	No appearance

*Directions*

HAVING HEARD Mr C Fogliani of counsel on behalf of the applicant and Ms A Kothapalli on behalf of the Hon. Minister for Industrial Relations, now therefore, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT the respondents file a Form 4 – Response (General) in response to the application by 23 February 2023.
- (2) THAT the applicant file any affidavit evidence upon which it intends to rely by no later than 28 calendar days prior to the date of hearing.
- (3) THAT the respondents file any affidavit evidence upon which they intend to rely by no later than 21 calendar days prior to the date of hearing.
- (4) THAT the applicant file a written outline of submissions and a list of the legislation and authorities upon which it relies by no later than 14 calendar days prior to the date of hearing.
- (5) THAT the respondents file a written outline of submissions and a list of the legislation and authorities upon which they intend to rely by no later than seven calendar days prior to the date of hearing.
- (6) THAT the application be listed for hearing by the Commission in Court Session for one day on a date to be fixed.
- (7) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,  
Chief Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

## UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2023 WAIRC 00054

### CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2023 WAIRC 00054
<b>CORAM</b>	:	COMMISSIONER C TSANG
<b>HEARD</b>	:	WEDNESDAY, 27 JULY 2022
<b>DELIVERED</b>	:	WEDNESDAY, 1 FEBRUARY 2023
<b>FILE NO.</b>	:	B 6 OF 2021
<b>BETWEEN</b>	:	ASHLEY STEWART
		Applicant
		AND
		UGL OPERATIONS & MAINTENANCE PTY LTD
		Respondent

CatchWords	:	Industrial law WA - Contractual benefit claim - Overcycle payment - Additional days worked - Operational requirements - COVID-19 - Rest and recreation - Discretion to change roster - Flexibility clauses - Applicant did not comply with processes - No finding of denied contractual benefit
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 7, s 29(1)(d)
Result	:	Order issued

**Representation:**

Applicant : Mr L Edmonds (of counsel)  
 Respondent : Mr N Ellery and Ms A Whyte (of counsel)

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

*Belo Fisheries v Froggett* (1983) 63 WAIG 2394

*Byrne & Frew v Australian Airlines Ltd* [1995] HCA 24

*Chevron (Tapl) Pty Ltd v Pilbara Iron Co (Services) Pty Ltd* [2021] WASCA 193

*Hotcopper Australia Ltd v Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704

*Landsheer v Morris Corporation (WA) Pty Ltd* [2014] WASCA 186

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

*Rohan v S&DH Enterprises Pty Ltd* [2022] WAIRC 00196; (2022) 102 WAIG 347

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

*Waroona Contracting v Usher* (1984) 64 WAIG 1500

*Reasons for Decision*

- 1 This application is made pursuant to s 29(1)(d) of the *Industrial Relations Act 1979* (WA) (**Act**) in relation to which the applicant claims that he has been denied a contractual benefit by way of non-payment for overcycle worked under his contract of employment. The applicant claims the sum of \$7,093.80 being the value of the contractual benefit to which he was denied.
- 2 There is no dispute that the applicant's claim is an industrial matter, that the applicant was at the relevant time an employee of the respondent, and that a written contract of employment dated 23 June 2017 governed the terms and conditions of the applicant's employment with the respondent (**Contract**). The Contract consists of the Employment Schedule and the Standard Employment Terms (**SET**).
- 3 The applicant claims the entitlement arises out of clause 5 and part of clause 7 of the Employment Schedule (**Hours of Work Clause** and **Overcycle Clause**, respectively), which states:

**5. Hours of Work****A. Ordinary Hours of Work**

Your ordinary hours of work are 38 hours per week, averaged over a 26-week period (your "normal hours"). Your normal hours are to be worked during the Company's normal business hours (which may vary from time to time).

In addition to your normal hours you are required to work such reasonable additional hours as are necessary for the performance of your duties.

If you are required to work onsite in accordance with the site roster cycle your initial roster will be based on a 4-week block consisting of two (2) weeks of work (at a nominal 12 hours per day) followed by two (2) weeks of rest and recreation leave.

If you are required to work in the Perth office you will be required to work your 38 ordinary hours in normal business hours plus any reasonable additional hours (including Nights/Weekends/Public Holidays).

**7. Allowances and other benefits (clause [9] of SET)****A. Allowances****Overcycle****i. Site-based Employees**

When you first commence employment on the Project, you will be required to undertake inductions and training in Perth prior to mobilising to site and working the site roster. This initial period of employment forms part of your ordinary hours and is not considered to be overcycle work. Once you mobilise to site and commence working the site roster, you may be required to work additional days beyond your 14 day work cycle to meet operational requirements or to complete additional required training. These additional work days may be performed on site or in Perth. Superannuation is not paid on additional days worked as it does not form part of your ordinary time earnings.

All overcycle days worked must be approved by the relevant UGL Manager and/or Chevron Coordinator in order for these days to be paid.

All overcycle days worked in any given month will be processed and paid in the following month's pay cycle. You must submit an approved Overcycle Payment Request Form to your Cost Administrator no later than the first day of the month following the overcycle work.

You will be compensated for any approved additional days worked at the day rate specified in the table below.

Site-based Personnel - Overcycle Calculation for Site Work		Comments
Total Annual Earning	\$ 170,266.05	Base + Uplift (working full 12 months)

Earnings per 4 week cycle	\$ 13,097.39	<i>Base + Uplift/13 cycles</i>
Monthly Salary (per payslip)	\$ 14,188.84	<i>Annual Earnings/ 12 months</i>
Monthly Hours (per payslip)	164.67	<i>notional rostered hours 38 x 4.333 weeks</i>
Normal rostered daily rate	\$ 467.76	<i>paid for all 28 days incl. R&amp;R</i>
<b>Overcycle daily rate (if NO R&amp;R taken)</b>	<b>\$ 935.53</b>	<b><i>Cycle salary / 14 days on site</i></b>
<b>Site-based Personnel - Overcycle Calculation for Perth work</b>		<b><i>Comments</i></b>
Annual Salary	\$ 126,123.00	<i>Base only (no uplift for off-site)</i>
Number of hours per annum	1,976	<i>“annual hours = 52x38”</i>
Effective rate per hour	\$ 63.83	
<b>Off-site overcycle rate per day</b>	<b>\$ 485.09</b>	<i>7.6 hours per day</i>

4 The respondent submits that:

- (a) the applicant was not entitled to the benefit of the overcycle payment because the work performed was not overcycle work;
- (b) the applicant does not meet the other elements prescribed by the Contract for the overcycle payment to apply; and
- (c) in any event, the applicant was not underpaid compared to his contractual entitlements.

#### The applicant's contentions

- 5 The applicant submits that the Contract had an effective start date of 1 July 2017 and applied to his employment subject to the wage increases in the respondent's witnesses' evidence that increased the overcycle daily rate to \$1,013.40.
- 6 The applicant claims the sum of \$7,093.80 under the Contract, in payment for overcycle work he submits arises under the Hours of Work Clause and the Overcycle Clause.
- 7 The applicant submits that he mobilised to site one day earlier due to COVID-19 and commenced his usual 14-day roster cycle on 8 April 2020. He submits that upon arriving on site, he was told by the Offshore Installation Manager (**OIM**) that he would be staying on site for 28 days instead of 14 days.
- 8 The applicant submits that his 14-day work cycle ordinarily ended on 21 April 2020, but as the respondent required him to work an additional 14 days due to operational requirements, he was not relieved from duty until 6 May 2020. As such, the applicant submits that the extended swing, from the 14 days to 28 days, gives rise to an entitlement to overcycle pay for the additional 14 days worked.
- 9 The applicant submits that the overcycle daily rate of \$935.53 per day was set out in the table in the Overcycle Clause at paragraph [3] above (the **Overcycle Clause Table**). However, at the relevant time this had increased to \$1,013.40.
- 10 The applicant submits that he should have been paid the overcycle rate of \$1,013.40 for each of the additional 14 days. The applicant was paid the normal rostered daily rate of \$506.70 per day for each of these days. As a result, the applicant submits that he sustained a loss of \$506.70 a day, totalling \$7,093.80.
- 11 The applicant submits that the following provision in the Hours of Work Clause supports the submission that the applicant is contracted to work two weeks on site:
 

If you are required to work onsite in accordance with the site roster cycle your initial roster will be based on a 4-week block consisting of two (2) weeks of work (at a nominal 12 hours per day) followed by two (2) weeks of rest and recreation leave.
- 12 The applicant submits that the following provision in the Overcycle Clause is pivotal in creating an entitlement to the overcycle rate:
 

Once you mobilise to site and commence working the site roster, you may be required to work additional days beyond your 14 day work cycle to meet operational requirements or to complete additional required training.
- 13 The applicant submits that each day beyond the 14-day work cycle is an overcycle day and therefore provides him with an entitlement to the overcycle rate.
- 14 The applicant submits that there is no term in the Contract that envisages that the respondent retains the discretion to alter the roster as required. The applicant submits that the Contract itself points to a 14-day roster as being the site roster. The applicant relies on:
  - (a) The Hours of Work Clause which refers to a four-week block consisting of two weeks of work, namely 14 days at a nominal 12 hours per day, followed by two weeks of rest and recreation leave (**R&R**);
  - (b) The Overcycle Clause which refers to working additional days beyond the 14-day work cycle to meet operational requirements;
  - (c) The Overcycle Clause Table which refers to 'Earnings per 4 week cycle' and the roster itself comprising a four-week

- cycle with two weeks on and two weeks off;
- (d) The Overcycle Clause Table which refers to 'Base + Uplift' divided by 13 cycles, which the applicant submits results in the 'Earnings per 4 week cycle'. The applicant submits that if the roster was not a four-week cycle with two weeks on and two weeks off, of which there are 13 four-week cycles across the year, then this aspect of the Overcycle Clause Table would not make sense because there would not be 13 cycles in a year. The applicant provides the example that if the roster cycle was an eight-week cycle, there would then be six-and-a-half cycles across the year;
  - (e) The Overcycle Clause Table which refers to 'Monthly Hours (per payslip)' which refers to the 'notional rostered hours' of 38 hours per week multiplied by 4.33 weeks. The applicant submits that this equates to a four-week cycle;
  - (f) The Overcycle Clause Table which refers to 'Normal rostered daily rate' and the content in the comments section that this is 'paid for all 28 days incl. R&R'. The applicant submits that this is a reference to a 28-day cycle including R&R;
  - (g) The Overcycle Clause Table which refers to 'Overcycle daily rate (if NO R&R taken)' and the content in the comments section to the 'Cycle salary' and the reference to '14 days on site';
  - (h) The Flights and Accommodation clause and the reference to 'You will ordinarily fly to site on the morning of the first day of your fourteen (14) day work cycle and depart site to commence your period of R&R at the end of your shift on day fourteen (14) or on day fifteen (15).' The applicant submits that this provision refers to a 14-day work cycle, with the applicant departing on day 14 or day 15 of the cycle; and
  - (i) The Flexible Working Hours clause and the reference to 'Roster patterns and annual leave may change to suit major maintenance events such as shut downs.' The applicant submits that this provision is not inconsistent with his interpretation. He may be required to work during a shut down, but that work would attract the overcycle payments in the ordinary course of events for every day beyond the 14 days.
- 15 The applicant submits that if the Contract did provide a right for the respondent to change the roster at its discretion, that such a right is conditioned by the Overcycle Clause and the reference to 'Once you mobilise to site and commence working the site roster, you may be required to work additional days beyond your 14-day work cycle.' The applicant submits that the Overcycle Clause clarifies that a roster change cannot occur once he has mobilised to site and commenced working. He reasons that once he had commenced working his site roster, which on the days in question was a 14-day work cycle, there was no capacity to amend the roster beyond that, other than to pay the overcycle rate.
  - 16 The applicant submits that any right said to be implied in the Contract enabling the respondent to change the roster, must be implied to be consistent with the provisions of the *Hydrocarbons Industry (Upstream) Award 2020 (Award)*. If the Award terms have not been complied with, then the roster cannot change and the entitlement to the overcycle rate arises.
  - 17 The applicant relies upon clause 32 of the Award titled 'Consultation about changes to rosters or hours of work' which requires the respondent to consult with the applicant about changes to his roster or hours of work. The applicant also refers to clause 14.1 of the Award titled 'Rosters', which requires the respondent to provide two days' notice of a variation to an employee's start and finish times, or days of work, to meet the needs of the business.
  - 18 The applicant submits that the flexibility provisions in the Hours of Work Clause that 'Your normal hours are to worked ... which may vary from time to time', and within the Flexible Working Hours clause that 'You are required to remain flexible in order to meet the operational requirements' and that 'Roster patterns and annual leave may change to suit major maintenance events such as shut downs', should be read in context. The applicant submits that the change to the applicant's roster was not a result of a major maintenance event. The cause of the change to the applicant's roster was COVID-19 and the Contract does not contemplate a change to the roster for that reason. He submits that whilst the Contract contemplates a change to the roster for major maintenance events, these flexibility provisions should not be read to contradict the other clauses' plain meaning.
  - 19 The applicant submits that the flexibility clauses should be read in a way that is consistent with clauses 32 and 14.1 of the Award. The applicant submits that whilst there is an obligation on the applicant to be flexible, when he works additional days in compliance with the obligation to be flexible, he is entitled to be paid double time for the additional days worked through the entitlement to the overcycle rate.
  - 20 The applicant agrees that the Contract provides that he is required to work reasonable additional hours, but submits that those hours need to be reasonable and there is no express obligation to work additional days.
  - 21 The applicant submits that it would be absurd if the respondent could compel him to work an additional 14 days and assert that these days are not overcycle days.
  - 22 The applicant submits that the approval to work overcycle days in the Overcycle Clause that 'All overcycle days worked must be approved by the relevant UGL Manager and/or Chevron Coordinator in order for these days to be paid' can be given expressly or impliedly. The applicant submits that the OIM from Chevron gave him express approval to work overcycle, when he was told he would be working at least 28 days and would not be flown off the rig earlier.
  - 23 The applicant submits that where the only means of being flown off the rig was by helicopter, that was not arranged by him, he had no choice but to work the additional 14 days when he was required to do so. The applicant submits that the approval to work the overcycle days arises from the respondent's compulsion of him to work the additional 14 days.
  - 24 The applicant relies upon his witness statement filed on the morning of the hearing, which annexed emails that he sent on 19 and 20 April 2020. In these emails, the applicant summarises his discussions with Bill Walker (the respondent's Senior Project Engineer) and Melanie Covich (the respondent's Human Resources Manager), which the applicant says is evidence that he made a claim, through the telephone discussions and emails sent to the management of the respondent to be paid the overcycle rate for the additional 14 days that he worked.

- 25 The applicant submits that the reference in the Overcycle Clause Table that 'Overcycle daily rate (if NO R&R taken)' should not be read as meaning there is no obligation to pay the overcycle rate if there is an equivalent amount of R&R taken after he worked the additional days. The applicant submits that the words 'if NO R&R taken' cannot override the plain and ordinary meaning of the balance of the Contract.
- 26 In relation to the words 'initial roster' in the Hours of Work Clause, the applicant submits that even if the words imply that the initial roster can be changed, there are no provisions in the Contract regarding how the roster change is to occur, except in the circumstances set out under the Flexible Working Hours clause. Absent the Contract setting out how the rosters can change, the applicant submits that any changes to the roster need to be read consistently with the Overcycle Clause. The applicant submits that it is inconsistent with the Contract and with the surrounding documents, including the Award that requires consultation, that the Contract provides the respondent with a right to change his roster.
- 27 The applicant submits that it would be an absurd reading of the Contract to say that the respondent reserves the discretion to change his roster once he has arrived on the platform and he has no say in his varied roster.
- 28 The applicant submits that the OIM from Chevron changed his roster and there is no evidence that if the roster changed, who from the respondent changed the roster, how they changed the roster, and when they changed the roster. In contrast, the applicant submits that the Contract provides that if he is required to work more than 14 days, he is entitled to be paid the overcycle rate.
- 29 The applicant agrees that the respondent can request flexible working hours and can request that he work additional time, and that roster patterns and annual leave may change. However, he submits that this does not come at the expense of the Overcycle Clause which creates an obligation on the respondent to pay him the overcycle rate in those circumstances, especially for major maintenance events such as shut downs. The applicant submits that it is not open to the respondent to avoid a payment for overcycle simply by declining to approve it.
- 30 The applicant submits that if he did not work the additional 14 days as requested, he would be in breach of the requirement to remain flexible. The applicant submits that he has met his obligations under the Contract to remain flexible.
- 31 The applicant agrees that the respondent did not approve the overcycle, but submits that it is also clear that he sought for the overcycle to be approved. The applicant submits that whilst he worked the additional days, he did so in circumstances where he was continuing to dispute the nature of the additional 14 days and continuing to seek the overcycle rate for those days. The applicant submits that a failure to submit an Overcycle Payment Request Form does not disentitle him from being paid the overcycle rate, especially in circumstances where he raised the issue as a dispute at the time.
- 32 In relation to clause 4.2 of the SET, the applicant submits that he is not claiming overtime. Rather, he is claiming the overcycle payment, which is not an overtime payment but an additional day payment for working over and above the roster that he had arrived at the work site to work. The applicant submits that once he arrived at the work site, the respondent was able to vary his roster but only consistent with the Overcycle Clause.
- 33 The applicant submits that giving him 28 days of R&R as opposed to his normal 14 days of R&R and then bringing him back to site after that, does not mean the respondent can ignore the Overcycle Clause.
- 34 In relation to clause 8.2 of the SET, the applicant submits that the practice of the parties has been to pay \$1,013.40 for overcycle payments, which amounts to a variation of the contractual rate in the Contract by the conduct of the parties. In the alternative, if the Contract overcycle daily rate is to be applied, then the applicant submits that the financial loss is the difference between the Contract rate of \$935.53 and the amount paid of \$506.70 for the 14 days, totalling \$6,003.62.

#### **The applicant's evidence**

- 35 The applicant gave evidence that:
- (a) The respondent employed him as a helideck operator on the Chevron Wheatstone platform;
  - (b) His terms and conditions of employment are set out in the Contract;
  - (c) His ordinary roster cycle was 14 days on duty followed by a period of 14 days off duty;
  - (d) For the swing the subject to this application, he was initially supposed to return to work on 9 April 2020;
  - (e) He was contacted on 6 April 2020 and advised that due to uncertainty with COVID-19 and flight schedules, he would be required to mobilise to the Wheatstone platform a day earlier than expected to align with flight schedules;
  - (f) He arrived on the Wheatstone platform on 8 April 2020 and, shortly after his arrival, the OIM from Chevron advised that his swing would be four weeks at a minimum and may even be longer;
  - (g) This was the first time he learnt about the change to his roster. He received no correspondence from the respondent's management. He was aware the respondent had circulated a memorandum to employees engaged on the Gorgon Project on Barrow Island, but this did not apply to him on the Wheatstone platform;
  - (h) On 9 April 2020, he completed an Overcycle Payment Request Form to be paid the overcycle rate for 8 April 2020 as he had returned to work a day early. This was a normal practice when returning to work early or leaving the platform later than the roster provided. While he had been advised that his early return to work was due to a need to align flight schedules, when he completed the Overcycle Payment Request Form the Site Services Coordinator, his direct supervisor on the platform, who is a Chevron employee, advised him that the need for the early return was to align to a new four weeks on/four weeks off roster, and this is what he wrote on the Overcycle Payment Request Form as the reason for the overcycle;
  - (i) As he commenced an on-duty period on 8 April 2020, his 14-day work cycle would have ordinarily concluded on 21 April 2020;

- (j) The respondent requested that he continue to work until 5 May 2020, meaning he was required to work for an additional 14 days beyond his 14-day work cycle;
- (k) In this swing, he worked 12 hours per day for the whole 28-day period and was not relieved from duty until 6 May 2020;
- (l) For the days worked between 22 April and 5 May 2020, the Contract entitled him to the payment of the overcycle rate per day;
- (m) As a result of the respondent denying him the overcycle rate, he has suffered a loss;
- (n) The impact of being required to stay on the platform and continue to work for a period that is double the length of his normal swing was stressful for both himself and his family;
- (o) One of the ways the difficulty of extended swings is overcome is the payment of the overcycle rate. The additional pay allows him to make arrangements to allow for short notice care for his children and to rearrange his affairs; and
- (p) Soon after arriving on the platform, he emailed the respondent's Human Resources to find out what the situation was with respect to his roster. He received no response until a telephone call was organised with Mr Walker on or about 16 April 2020. On or about 20 April 2020, the applicant spoke with Ms Covich and she advised that the respondent was unwilling to pay overcycle payments for the additional 14 days on the platform.

#### **The respondent's contentions**

- 36 The respondent agrees that the terms of the Contract govern the applicant's employment and that the applicant's employment with the respondent commenced on 1 July 2017.
- 37 The respondent denies that the applicant is entitled to the benefit of the overcycle payment on three grounds.
- 38 Firstly, the respondent submits that the work performed by the applicant was not overcycle work. The respondent submits that it temporarily changed the roster cycle in accordance with the provisions of the Contract, such that the applicant worked a different roster cycle to his usual 14 days on/14 days off pattern, and the varied roster cycle for the period in question was 28 days on/28 days off. The respondent submits that the applicant's 'usual hours of work' were varied, which had a consequential impact on what hours would be considered overcycle. The respondent submits that the Contract clearly provided for the respondent to vary the applicant's roster at its discretion, and it did so to extend both the applicant's work cycle and the R&R period in response to changes requested by its client as a result of COVID-19.
- 39 The respondent submits that the Overcycle Clause provides for the following elements to be satisfied in order for work performed to attract the overcycle rate:
  - (a) The work must occur on additional days over and above the rostered work cycle. While the Contract envisages an initial 14 days on/14 days off cycle, it is readily apparent from the surrounding terms of the Contract that the respondent maintained discretion to alter that roster as required;
  - (b) Overcycle days worked must be approved by the relevant UGL Manager and/or Chevron Coordinator in order for these days to be paid as overcycle; and
  - (c) The Overcycle daily rate would only apply if no R&R was taken.
- 40 The respondent submits that the purpose of the reference to the overcycle rate in the Overcycle Clause Table is to illustrate that the calculation of the daily rate of pay for overcycle includes consideration for the site uplift
- 41 The respondent submits that the Overcycle Clause Table specifies that the rate is conditional on no R&R being taken. The respondent submits that the reference to 'if NO R&R taken' reinforces that overcycle is time worked, which displaces time otherwise rostered off.
- 42 The respondent relies on the provision of the Hours of Work Clause that 'If you are required to work onsite in accordance with the site roster cycle your initial roster will be based on a 4-week block consisting of two (2) weeks of work (at a nominal 12 hours per day) followed by two (2) weeks of rest and recreation leave' as providing the respondent with a contractual entitlement to change the applicant's roster. The respondent submits that the reference to an 'initial roster' clearly infers that the roster cycle may change.
- 43 The respondent also relies upon the following clauses of the Contract, which the respondent submits that when taken together makes clear that the Contract contemplates and provides for the respondent to make changes to the applicant's roster cycle:
  - (a) The Working Hours Clause which states that 'Your ordinary hours of work are 38 hours per week, averaged over a 26-week period (your 'normal hours'). Your normal hours are to be worked during the Company's normal business hours (which may vary from time to time)';
  - (b) The Flexible Working Hours clause which states that 'You are required to remain flexible in order to meet operational requirements. This flexibility includes but is not limited to the following'; and
  - (c) The Flexible Working Hours clause which states that 'Roster patterns and annual leave may change to suit major maintenance events such as shut downs'.
- 44 In relation to the Working Hours Clause, the respondent submits that the words 'which may vary from time to time' must be given something to do. The respondent submits that the critical and only logical conclusion that can be drawn from these words is that the Contract provides that the applicant's ordinary hours of work can vary.
- 45 The respondent submits that the Working Hours Clause provides that 'In addition to your normal hours you are required to work such reasonable additional hours as are necessary...' which is an express agreement stated between the parties that there may be a requirement to work reasonable additional hours.

- 46 The respondent submits that the reference to 'initial roster' in the Working Hours Clause that 'If you are required to work onsite in accordance with the site roster cycle your initial roster...' provides that the roster may change. The respondent submits that the word 'initial' means exactly that, and that is the initial roster that the parties envisaged at the time, and the use of the word in the Contract shows that it was clearly understood and agreed between the parties that the roster may change. The respondent submits that the words 'initial roster' have a purpose: to describe the initial roster and contemplate that the roster might change.
- 47 The respondent submits that the words in the Overcycle Clause Table that 'Normal rostered daily rate' of '\$467.76' and the comment 'paid for all 28 days incl. R&R' indicates the rate that was contractually agreed and is the rate for all days of a cycle including R&R. The respondent submits that the parties agreed for the applicant to work even time, where the applicant worked an even amount of time and was paid the same rate on the days he worked and on the days he did not work. The respondent submits that this is separate to annual leave, which is not taken into account in the arrangement as R&R is not annual leave, and annual leave is a separate and additional entitlement. The respondent submits that the even time concept provides for the applicant to be paid the rate of \$467.76 for every day of the cycle, including the days he did not work because he was on R&R.
- 48 The respondent submits that the words in the Overcycle Clause Table that 'Overcycle daily rate (if NO R&R taken)' with the double rate of \$935.53 makes plain that the rate of \$935.53 is what the applicant would receive if he did not get R&R. The respondent submits that at the relevant time, the applicant worked for 28 days, then had 28 days of R&R, for which he was paid. The respondent submits that the applicant is not entitled to the overcycle rate for the days in dispute because the clause only entitles the applicant to the overcycle rate if no R&R is taken, and the applicant took R&R.
- 49 The respondent submits that the word 'ordinarily' in the Flights and Accommodation clause that 'You will ordinarily fly to site on the morning of the first day of your fourteen (14) day work cycle' contemplates that there will be times when the applicant will do something different. The respondent submits that the clause provides the ordinary arrangement but contemplates that there will be other arrangements from time to time.
- 50 In relation to the Flexible Working Hours clause, the respondent submits that the words 'not limited to the following' in the clause that 'You are required to remain flexible in order to meet operational requirements. This flexibility includes but is not limited to the following:' and followed by sub-paragraphs (a) to (f), indicates the parties turned their minds to and agreed that there will be circumstances where there would be flexibility beyond and outside the matters in sub-paragraphs (a) to (f).
- 51 The respondent submits that sub-paragraph (c) of the Flexible Working Hours clause that 'Roster patterns and annual leave may change to suit major maintenance events such as shut downs' does not apply as there was not a major maintenance event because the respondent required the applicant to vary his roster pattern due to COVID-19 issues with travel. The respondent submits that the Flexible Working Hours clause shows that the parties turned their mind to the fact that there might be flexibility changes for a range of reasons, and whilst the parties had not turned their minds to COVID-19, the clause provides for changes for a range of reasons not limited to the matters stated at sub-paragraphs (a) to (f).
- 52 The respondent submits that clause 4.2 of the SET:
- Your Total Fixed Remuneration has been set at a level that takes into account your normal duties and any reasonable additional hours you may be required to work. This may include working additional hours during weekdays, weekends or public holidays. The Company has had regard for these requirements in determining your salary, i.e. you agree that your remuneration is inclusive of all hours you work and that you will not be paid overtime for hours worked in excess if [sic] your normal hours. You acknowledge and agree that having regard to the nature of your position, the operational requirements of the Company and your salary, such additional hours are reasonable.
- shows that the parties agreed that there would not be overtime because the parties had agreed on a rate the applicant would be paid that takes into account additional hours that might be required. The respondent submits that the Contract provides flexibility resulting in additional hours being worked from time to time, which are compensated for in the rate of pay set. The respondent submits that the Contract sets a separate specific entitlement for overcycle work, which arises in the specific circumstances provided for in the Contract, which did not arise for the days in dispute.
- 53 The respondent submits that the applicant's revised work cycle, confirmed with the applicant prior to the commencement of the revised arrangements, included a rostered off period of 28 days which immediately followed the 28 days rostered on.
- 54 The respondent submits that whilst the applicant's initial roster was 14 days on/14 days off, from on or about 8 April 2020, as a consequence of the restrictions in relation to COVID-19, the respondent advised employees that flights to and from site would be restricted and as a consequence required employees on the site to temporarily move to a four on/four off roster. The respondent submits that this meant the applicant would work 28 days on/28 days off instead of 14 days on/14 days off. The respondent submits that this arrangement was expected to be for about three cycles, however, the arrangement was in place for only two cycles before flights to site returned to the prior frequency.
- 55 The respondent submits that during the period that the site roster cycle was varied to four weeks on/four weeks off:
- (a) Total hours rostered on did not change;
  - (b) Total hours rostered off did not change;
  - (c) The roster remained even time, i.e. the same number of days worked as the number of days rostered off;
  - (d) Due to fewer roster cycles, commuting time for employees was significantly reduced; and
  - (e) Pay arrangements (frequency of pay and rate of remuneration) did not change.
- 56 The respondent submits that overcycle work is time worked over the cycle. During the period in question, the cycle was 28 days on/28 days off. The respondent submits that this meant that any additional time worked over the period rostered on

results in a corresponding reduction in time rostered off in that cycle. The respondent provides an example that if during a 28 days on/28 days off roster, an employee works for 29 days, they would have 27 days rostered off in that cycle.

- 57 Secondly, the respondent submits that the applicant did not meet the other elements prescribed by the Contract for the overcycle payment to apply. The respondent submits that the Overcycle Clause requires 'All overcycle days worked must be approved' by the relevant manager, and the 14 days in dispute were not approved as overcycle, and the applicant did not seek and was not granted any approval for working overcycle days in the period from 22 April to 5 May 2020. As a consequence, the applicant has not satisfied the preconditions for the contractual benefit of an overcycle payment.
- 58 The respondent submits that the Overcycle Clause requires that an overcycle day must be approved to be an overcycle day. The respondent submits that this is further emphasised by the word 'must' in the clause that 'You must submit an approved Overcycle Payment Request Form to your Cost Administrator'. The respondent submits that the Overcycle Clause provides a time for the Overcycle Payment Request Form to be submitted following the overcycle work and the applicant did not submit an Overcycle Payment Request Form. The respondent submits that the applicant expressed a desire or a wish for the time to be regarded as overcycle, but he did not submit an Overcycle Payment Request Form at any time for the relevant days in question. The respondent submits that the applicant had used the process to submit Overcycle Payment Request Forms for the prior periods of his employment. The respondent submits that the words 'You must submit an approved' form are critical words in the Contract.
- 59 Thirdly, the respondent submits that the applicant has not been underpaid compared to his contractual entitlements. The respondent submits that the applicant has not suffered any financial loss because the respondent has paid the applicant amounts above what he is entitled to under the Contract.
- 60 The respondent relies upon the Performance and Total Fixed Remuneration Reviews clause of the SET that entitles the applicant to remuneration reviews and on clause 8.2 of the SET that 'Any increase in your Total Fixed Remuneration under this clause will: (1) not amount to a variation of the Agreement' in support of the contention that the applicant's overcycle rate changed from \$935.53 to \$1,013.40, which was the rate that the applicant was being paid in practice, but the varied amount was not the applicant's contractual rate of pay. The respondent submits that the applicant's contractual rate of pay is that set out in the Contract.
- 61 The respondent submits that the Contract provides that the overcycle daily rate is \$935.53 per day, whilst the applicant was paid at the rate of \$1,013.40 per day, being an amount in excess of his contractual entitlement. The respondent submits that the applicant regularly worked overcycle, and in the period between January 2020 and December 2021, the applicant worked overcycle on 16 occasions, for which he was paid \$1,013.40 per day, which represents an additional payment of \$77.95 per day.
- 62 The respondent submits that given the applicant had been rostered to work for approximately 500 days, the overpayment amounts to \$38,975. The respondent submits that the applicant also received discretionary payments of three hours travel pay of approximately \$253.35 per swing on an estimated minimum of 50 occasions, totalling \$12,668.
- 63 The respondent submits that these discretionary payments, totalling over \$50,000, should be taken into consideration when considering the applicant's application.
- 64 The respondent submits that whether or not the Award and the consultation obligations therein were complied with is not relevant to the applicant's application. The respondent submits that the Award has no relevance to the operation of the Hours of Work Clause and the Overcycle Clause. The respondent submits that there is no basis to imply or be informed by the Award terms in interpreting the Contract.
- 65 The respondent submits that the fact that the Contract does not define in detail how and when the applicant's roster changes are irrelevant as the applicant's roster did change. The applicant worked the changed roster; he then had 28 days R&R, which he was paid for.
- 66 The respondent submits that in the relevant period the applicant worked the days requested in circumstances where he was informed he would not receive the overcycle daily rate, which the respondent submits indicates that the applicant accepted and understood that he would not receive the overcycle daily rate for any of the 28 days that he worked.

#### **The respondent's evidence**

- 67 The applicant raised objections to some of the respondent's evidence. Having heard from counsel in relation to these matters, I indicated that I would consider the objections raised as matters of weight. Where evidence may generally infringe principles applicable to evidence, then little weight would be accorded to it.
- 68 Mr Aaron Lake gave evidence that:
- (a) He has been employed by the respondent since 20 January 2020 as a Senior People and Culture Business Partner and has been responsible for supporting the respondent's Operations team on the Chevron contract since approximately April 2021;
  - (b) During the period claimed by the applicant, the applicant was paid on a monthly basis, two weeks in advance and two weeks in arrears on or about the 15th of each month;
  - (c) The applicant's annualised base salary during the period covered by his claim was \$136,621.00. The applicant was paid a site uplift of 35% of his base salary, being \$47,817.35. The applicant's Total Annual Earnings were therefore \$184,438.00;

- (d) The overcycle daily rate calculation for site work for the applicant is outlined in the following table:

Site - Based Personnel - Overcycle Calculation for Site Work	Amount	Comments
<b>Total Annual Earnings</b>	\$184,438.00	Base + Uplift (working full 12 months)
<b>Earnings per 4 week Cycle</b>	\$14,187.54	Base + Uplift / 13 Cycles
<b>Monthly Salary (per payslip)</b>	15,369.83	Annual Earnings / 12 months
<b>Monthly Hours (per payslip)</b>	164.67	Notional ordinary hours 38 x 4.333 weeks
<b>Normal Rostered daily rate</b>	506.70	Paid for all 28 days incl. R+R
<b>Overcycle daily rate (if NO R&amp;R taken)</b>	1013.40	Cycle Salary / 14 days on site

- (e) The applicant's payslip for the month of May 2020 shows that the applicant was paid his gross salary for the period of \$15,369.87 being 1/12 of his Total Annual Earnings, and an additional \$1,013.40 for a day of overcycle;
- (f) On 9 April 2020, the applicant submitted an Overcycle Payment Request Form that corresponds to the overcycle payment made to the applicant in the payslip for the month of May 2020. The applicant did not submit an Overcycle Payment Request Form for any of the other days worked in the period 22 April to 5 May 2020;
- (g) On the Overcycle Payment Request Form submitted by the applicant on 9 April 2020, the applicant states '[he] returned to work 1 day early to align with new 4+4 roster';
- (h) The applicant was paid the overcycle payment for 8 April 2020, as he had returned early to his rostered work schedule, reducing his prior R&R period by one day;
- (i) In line with the temporary roster change, the applicant was rostered to work a 28-day period from 8 April until 5 May 2020. The applicant was paid the Normal Rostered daily rate of \$506.70 for each day of rostered work in this period;
- (j) The other way to calculate the pay received during each rostered work cycle is to pay \$1,013.40 for each day of rostered work in the period, and then \$0 for each day of R&R in the period;
- (k) The applicant was then rostered for a 28-day R&R period from 6 May until 2 June 2020. As the period of 6 May until 2 June 2020 was R&R, the applicant was also paid the Normal Rostered daily rate of \$506.70 for each day of this R&R period. The applicant was not required to (and did not) work during this period;
- (l) The entitlement to R&R is separate to any annual leave entitlements. As a result, the applicant was not required to take annual leave for the period 6 May until 2 June 2020. Business records indicate that the applicant was absent from work from 3 June 2020. On returning to work, the applicant returned to a 14 days on/14 days off roster;
- (m) The applicant's payslip for the month of April 2020 shows what the applicant was paid in April 2020; and
- (n) There have been a number of situations on a number of the respondent's different operations on the Chevron contract where employees have requested to leave based on a personal or a family emergency and have departed from site early. He is not aware of a situation where someone has asked to leave a facility early and it has been denied. The applications that cross his desk are generally emergency situations. If someone was just requesting to leave early, it wouldn't come to him; that would be an operational decision.

69 Mr Scott Ellevsen gave evidence that:

- (a) He has been employed by the respondent, first as a Site Superintendent on the Gorgon Gas Plant on Barrow Island from April 2019 until October 2019, then as Maintenance and Projects Manager from October 2019;
- (b) He has managerial responsibility for the respondent's operations for Chevron at the Wheatstone Offshore Platform;
- (c) The applicant was hired on 1 July 2017 under the terms of the Contract. The Contract sets out the remuneration for the position the applicant holds. The remuneration consists of a Total Fixed Remuneration of \$138,104.68 made up of a base salary of \$126,137.68 plus \$11,967 in superannuation contributions;
- (d) In addition to the contract terms, the respondent has made other discretionary payments to the applicant, such as paid travel time;
- (e) The rate currently paid to the applicant is a Total Fixed Remuneration of \$149,600 (inclusive of superannuation) as spelled out in the letter to the applicant dated 1 April 2019;
- (f) Over time, the respondent has made discretionary increases to the remuneration paid under the Contract, however, these increases do not form part of the Contract. The current Total Fixed Remuneration of \$149,600 currently paid to the applicant amounts to a base salary of \$136,621. Adding the site uplift of 35% to this base salary results in a Total Annual Earning, excluding superannuation of \$184,438. Dividing this rate by the number of days worked in a year on an even time roster (182) results in a pay rate of \$1,013.40 per 12-hour day;
- (g) This is the daily rate the respondent pays for each day worked, and is also the daily rate paid for any overcycle approved and worked;
- (h) The applicant regularly worked approved overcycle and was paid for time worked at the rate of \$1,013.40 per day. Records provided by payroll indicate the applicant had worked overcycle on 16 occasions since January 2020. This is in lieu of time rostered off, i.e., time worked in addition to time rostered to work in the prevailing cycle;
- (i) The applicant working overcycle is not unusual, as most of the crew are approved to work overcycle for part of the day following the last rostered day prior to flying out;

- (j) As a consequence of restrictions in relation to COVID-19, the respondent advised employees that flights to and from site would be restricted and as a consequence required its employees on the site to temporarily move to a four weeks on/four weeks off roster. This meant employees would work 28 days on/28 days off instead of 14 days on/14 days off. This was expected to be for about three cycles; however the arrangement was in place for only two cycles before flights to site returned to the prior frequency; and
- (k) The revised arrangements were put in place and commenced on 8 April 2020. The applicant was rostered to work 28 days from 8 April until 5 May 2020, with a corresponding rostered off period of 28 days from 6 May to 2 June 2020. As is customary, the applicant worked overcycle for a period before flying out on the morning of 6 May 2020 (day 29).

### Considerations

- 70 The Full Bench in *Simons v Business Computers International Pty Ltd* (1985) 65 WAIG 2039 found that the jurisdiction of the Commission in matters pursuant to s 29(1)(d) (previously s 29(b)(ii)) of the Act is judicial:

The jurisdiction of the Commission which is founded by proceedings brought under section 29 (b) (ii) of the Act is judicial. It is not arbitral or legislative. The Commission's jurisdiction is thus limited to the ascertainment of existing rights by a determination of whether or not an employee has been denied a benefit not being a benefit under an award or an order, to which the employee is entitled under a contract of service.

- 71 An employee must therefore establish that their claim is for a benefit to which they are entitled under their contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit that has been denied under the contract having regard to the obligations on the Commission to act according to equity, good conscience, and the substantial merits of the case: *Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.
- 72 The meaning of 'entitled' in the context of the section must mean entitled as a matter of legal right because it refers to benefits under the contract: *Perth Finishing College Pty Ltd v Watts* at 2313. To establish that there is a claim for a benefit under the contract the terms of the contract must be considered.
- 73 The principles applying to a claim of denied contractual benefit are well settled: *Hotcopper Australia Ltd v Saab* [2001] WAIRC 03827 at [34]; (2001) 81 WAIG 2704 at 2707:

The limitations (and/or conditions precedent to the exercise of jurisdiction and/or power) include the following –

- (a) The claim must relate to an "industrial matter", as defined in s7 of the Act.
  - (b) The claim must be made by an "employee", as defined in s7 of the Act.
  - (c) The benefit claimed must be a contractual benefit, i.e. the claimant must be entitled to the claim under his/her contract of service.
  - (d) The subject contract must be a contract of service.
  - (e) The benefit must not arise under an award or order of the Commission.
  - (f) The benefit must have been denied by the employer.
- 74 There is no dispute the applicant's claim is an industrial matter, the applicant was at the relevant time an employee of the respondent, the benefit claimed is a contractual benefit, the Contract is a contract of service, and the benefit does not arise under an award or order of the Commission.
- 75 The remaining question for resolution is whether the applicant was denied a benefit that was otherwise due to him. Determining this question requires a determination of what were the terms of the Contract that relate to the payment of the overcycle rate and specifically, whether the terms provide for the applicant to be entitled to payment of the overcycle rate for the days worked between 22 April and 5 May 2020 inclusive.
- 76 The Court of Appeal relevantly summarised the principles that apply to the construction of a contract in *Chevron (Tapl) Pty Ltd v Pilbara Iron Co (Services) Pty Ltd* [2021] WASCA 193 at [127]:

The principles applicable to the construction of written contracts established by decisions of the High Court are well known. They were outlined in *Black Box Control v TerraVision* and in *Sino Iron Pty Ltd v Mineralogy Pty Ltd*. By way of summary:

- (1) The construction of a contract involves a determination of the meaning of the words of the contract by reference to its text, context and purpose. The starting point for the proper construction of a clause is the language used in the clause. In particular, one starts by identifying the possible meanings that the words chosen by the parties can bear.
- (2) Ascertaining the meaning of terms in an instrument requires a determination of what a reasonable person would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract, and the commercial purpose or objects to be secured by the contract.
- (3) The instrument must be read as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed to have some operation.
- (4) The general principle applicable to the construction of commercial contracts is that they should be given a businesslike interpretation. Absent a contrary intention, the court approaches such contracts on the basis that the parties intended to produce a result which makes commercial sense. This requires that the construction placed

on the term or terms in question is consistent with the commercial object of the agreement. However, it must also be borne in mind that business common sense may be a topic on which minds may differ.

- 77 The approach to be adopted in determining the rights and liabilities of the parties to a contract was summarised in *Rohan v S&DH Enterprises Pty Ltd* [2022] WAIRC 00196 at [19]; (2022) 102 WAIG 347:

An objective approach is to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of the employment contract is to be determined by what a reasonable person would have understood those terms to mean, which involves consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract: *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2019] WASCA 80; (2019) 55 WAR 89 at [295] citing *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 and *Magbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 201 CLR 181 at [11].

- 78 The applicant submits that any right said to be implied in the Contract enabling the respondent to change the roster, must be implied to be consistent with the Award including the consultation obligations therein.
- 79 The respondent submits that whether or not the Award and the consultation obligations therein were complied with is not relevant to the applicant's application. The respondent submits that the Award has no relevance to the operation of the Hours of Work Clause and the Overcycle Clause. The respondent submits that there is no basis to imply or be informed by the Award in interpreting the Contract.
- 80 I find that clauses 32 and 14.1 of the Award do not aid in the interpretation of the Contract. This is consistent with *Byrne & Frew v Australian Airlines Ltd* [1995] HCA 24 and the longstanding principle that industrial awards and employment contracts operate in parallel and award terms are not, unless expressly so, incorporated into employment contracts.
- 81 Having regard to the principles for the construction of contracts, in particular, consideration of the language used and the circumstances addressed by the Contract, that the Contract is to be read as a whole, a construction that makes the various parts of the Contract harmonious is preferable, and each part of the Contract should be construed to have some operation, I find that the Contract entitles the respondent to vary the applicant's roster because of the use of the words 'initial roster' in the Hours of Work Clause and because of the various flexibility provisions in the Flexible Working Hours clause.
- 82 Consistent with the principles for the construction of contracts at paragraphs [76(2)] and [77] above, I find that a reasonable person would have understood the words 'initial roster' to mean that the roster may change.
- 83 Further, I find that a reasonable person would have understood the words 'includes, but is not limited to' in the Flexible Working Hours clause to mean the applicant is required to remain flexible in order to meet operational requirements beyond those specifically listed in the Flexible Working Hours clause. This means the various flexibility provisions in the Flexible Working Hours clause are not exhaustive and therefore allow for the respondent to change the roster in circumstances outside of those outlined in sub-paragraphs (a) to (f). Relevantly, this includes the circumstances arising from flight restrictions to and from site as a result of COVID-19.
- 84 The applicant submits that even if the initial roster can be changed, absent the Contract setting out how the rosters can change, any changes to the roster need to be read consistently with the Overcycle Clause.
- 85 The Contract does not outline the mechanism as to how the respondent would go about varying the applicant's roster, and does not outline, as the applicant has submitted, who is to make the decision to vary the applicant's roster, how they are to vary it, and when that would occur. Whilst it may have provided certainty for the parties if the Contract did outline the mechanism for the roster variation, I do not consider it necessary for the Contract to contain such provisions. I find it is sufficient for the Contract to contain a right for the respondent to vary the applicant's roster, and for the respondent to then do so.
- 86 There is no dispute that the applicant's roster in the relevant work cycle was varied from a 14 days on/14 days off to a 28 days on/28 days off work cycle. The issue in dispute is what rate of pay the applicant was entitled to when he worked the additional 14 days in the work cycle.
- 87 The applicant says he was first informed by the OIM from Chevron that his roster was to change from a 14 days on/14 days off to a 28 days on/28 days off work cycle when he arrived at site, and he takes issue with what he says is the lack of communication from the respondent's Human Resources department to his enquiries regarding what he would be paid whilst working the additional 14 days in the work cycle. However, the facts are that the applicant's roster did change and the applicant worked the additional 14 days.
- 88 I understand the applicant is not contending that the respondent was not entitled to vary his roster from a 14 days on/14 days off to a 28 days on/28 days off work cycle, but rather that once the respondent varied his roster, that this variation entitled him to the overcycle rate for the days worked above his usual roster of 14 days on/14 days off.
- 89 I find that, at the relevant time, the applicant was working a varied roster of 28 days on/28 days off.
- 90 The consequence of this is that the applicant was not working 'over' the cycle, such as to trigger the payment of the overcycle rate.
- 91 The Overcycle Clause Table provides an overcycle daily rate 'if NO R&R taken'. In relation to these words, the applicant submits that they should not be read as meaning there is no obligation to pay the overcycle rate if the applicant was given an equivalent amount of R&R to the days that he worked. The respondent submits that these words make the payment of the overcycle daily rate conditional on no R&R being taken and reinforces that overcycle is time worked displacing time otherwise rostered off.
- 92 There is no dispute that the applicant was rostered to, and took, a 28-day period of R&R from 6 May until 2 June 2020.
- 93 In circumstances where I have found the applicant was working a 28 days on/28 days off roster, and having regard to the principles for construction of contracts set out in the cases cited above, I find that the words 'if NO R&R taken' means the

applicant was not entitled to the overcycle rate because immediately following the days the applicant worked, he took a corresponding period of R&R.

- 94 I am therefore satisfied that the applicant has not discharged the onus upon him to establish, on the balance of probabilities, the existence of an entitlement to the payment of the overcycle rate for the days worked between 22 April and 5 May 2020 inclusive.
- 95 For the preceding reasons, I do not consider it necessary to make any findings about whether the applicant is disentitled to the overcycle rate because he did not submit an Overcycle Payment Request Form as set out in the Overcycle Clause, or whether he is disentitled to the overcycle rate because he was paid above the rates outlined in the Contract.

**Conclusion**

- 96 For the preceding reasons, I am not persuaded that the applicant has established his claim for a denied contractual benefit.
- 97 Accordingly, application B 6 of 2021 will be dismissed.

2023 WAIRC 00058

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ASHLEY STEWART

**APPLICANT**

-v-

UGL OPERATIONS & MAINTENANCE PTY LTD

**RESPONDENT**

**CORAM**

COMMISSIONER C TSANG

**DATE**

FRIDAY, 3 FEBRUARY 2023

**FILE NO/S**

B 6 OF 2021

**CITATION NO.**

2023 WAIRC 00058

**Result**

Application dismissed

**Representation**

**Applicant**

Mr L Edmonds (of counsel)

**Respondent**

Mr N Ellery and Ms A Whyte (of counsel)

*Order*

HAVING HEARD from Mr L Edmonds (of counsel) on behalf of the applicant, and Mr N Ellery and Ms A Whyte (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application B 6 of 2021 is dismissed.

[L.S.]

(Sgd.) C TSANG,  
Commissioner.

2023 WAIRC 00053

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MEMET DEMIROSKI

**APPLICANT**

-v-

ANDO REAL ESTATE PTY LTD

**RESPONDENT**

**CORAM**

COMMISSIONER T KUCERA

**DATE**

TUESDAY, 31 JANUARY 2023

**FILE NO/S**

B 107 OF 2022

**CITATION NO.**

2023 WAIRC 00053

**Result** Application dismissed  
**Representation**  
**Applicant**  
**Respondent**

*Order*

WHEREAS the applicant, Mr Memet Demiroski, on 29 September 2022 filed an application under s 29(1)(d) of the *Industrial Relations Act 1979* (**the IR Act**) for a denied contractual benefit remedy (application);

AND WHEREAS a conciliation conference regarding the application was held on 16 December 2022

AND WHEREAS the parties reached agreement on the terms of settlement during the conciliation conference (**the agreement**);

AND WHEREAS the Commission considers the respondent has complied with the agreement;

AND WHEREAS pursuant to the terms of the agreement the applicant was to file a notice of discontinuance by 5:00PM on 6 January 2023;

AND WHEREAS the applicant did not file a notice of discontinuance as required under the agreement;

NOW THEREFORE the Commission pursuant to the powers vested in it under s 27 of the IR act hereby ORDERS –

THAT the application be dismissed.

(Sgd.) T KUCERA,  
Commissioner.

[L.S.]

**PRACTICE NOTES—**

**2023 WAIRC 00066**

**THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**PRACTICE NOTE 1 OF 2023**

Interlocutory proceedings before the Full Bench and its presiding Commissioner, the Commission in Court Session or the Chief Commissioner sitting alone

**Introduction**

*This Practice Note 1 of 2023 replaces Practice Note 6 of 2021, issued on 23 March 2021.*

1. Practice Note 1 of 2023 is issued by The Western Australian Industrial Relations Commission (**the Commission**). This Practice Note has application in proceedings before the Commission which are constituted by a Full Bench and its presiding Commissioner; the Commission in Court Session; the Commission constituted to hear and determine appeals under s 106 of the *Prisons Act 1981*; s 11CH of the *Young Offenders Act 1994*; and s 33P and s 33ZI of the *Police Act 1892*; or the Chief Commissioner sitting alone, where the parties are represented by legal practitioners or agents.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* (**the IR Act**) and reg 39(3) of the *Industrial Relations Commission Regulations 2005* (**the Regulations**), Practice Note 1 of 2023 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 22 February 2023, and remains in force until such time as it is replaced.

**Interlocutory applications**

3. In all interlocutory matters, the parties will file a written outline of submissions, to which their respective arguments will be confined.
4. The applicant must file their outline of submissions at the time of filing their application unless the Commission otherwise directs.
5. The respondent must file its response to the applicant's application within three calendar days.
6. The applicant may file any additional submissions in reply to the respondent's response within a further three calendar days.
7. The Commission, at its discretion, may fix alternative time limits to those set out in pars 4, 5 and 6 above where circumstances require that to occur.
8. The Commission may also, at its discretion, limit oral arguments, conduct interlocutory proceedings by telephone or video-link, or decline to hear oral submissions in cases where written submissions have been filed.
9. In accordance with reg 32A of the Regulations, the Commission may decide in a particular case that it is appropriate for interlocutory proceedings to be determined by conducting a hearing on the papers.

**Applications to stay the operation of a Commission order**

10. This Practice Note, with any required modifications, also applies to any interlocutory proceedings before the presiding Commissioner of a Full Bench in an application made to stay the operation of a Commission order, pursuant to s 49(11) of the IR Act.

**Relevant legislation**

*Industrial Relations Act 1979*, ss 27, 28, 49, 55, 66, 67, 71, 71A, 72, 73, 84A, 113.

*Industrial Relations Commission Regulations 2005*, regs 20, 21, 22, 23, 24, 27, 32A, 35, 36, 39.

**Useful resources**

11. The Commission's website contains additional **resources**.

[L.S.]

(Sgd.) S J KENNER,  
Chief Commissioner.

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## PROCEDURAL DIRECTIONS AND ORDERS—

2023 WAIRC 00059

### REVIEW OF FARM EMPLOYEES' AWARD 1985 PURSUANT TO S 40B OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

COMMISSION'S OWN MOTION

**APPLICANT**

-v-

(NOT APPLICABLE)

**RESPONDENT**

**CORAM**

SENIOR COMMISSIONER R COSENTINO

**DATE**

MONDAY, 6 FEBRUARY 2023

**FILE NO/S**

APPL 58 OF 2022

**CITATION NO.**

2023 WAIRC 00059

**Result**

Order issued

**Representation**

Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations

Mr C Dunne and Ms E Ong of counsel on behalf The Australian Workers' Union, West Australian Branch, Industrial Union of Workers

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*Order*

HAVING heard from Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations and Mr C Dunne and Ms E Ong of counsel on behalf The Australian Workers' Union, West Australian Branch, Industrial Union of Workers, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT any party referred to in s 40B(2) of the Act is at liberty to file a list of additional variations to the *Farm Employees Award 1985* which:
  - (a) the party considers are required for a purpose or purposes set out in s 40B(1) of the Act; and
  - (b) are not identified in list circulated by the Commission at the directions hearing of 2 February 2023, by no later than 2 March 2023.
2. THAT these proceedings be adjourned to a conference at 2.00 pm on Friday, 10 March 2023.

[L.S.]

(Sgd.) R COSENTINO,  
Senior Commissioner.

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2023 WAIRC 00034

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

CHRISTOPHER FRAWLEY

**APPLICANT**

-v-

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION, THE  
CONSTRUCTION, FORESTRY AND ANOTHER**RESPONDENTS****CORAM** SENIOR COMMISSIONER R COSENTINO**DATE** TUESDAY, 17 JANUARY 2023**FILE NO/S** B 111 OF 2022**CITATION NO.** 2023 WAIRC 00034**Result** Order issued**Representation****Applicant** Mr J Theodorsen as agent and Mr A Drake-Brockman as agent**Respondents** Mr T Dixon of counsel and Mr D Rafferty of counsel*Order*

HAVING heard from Mr J Theodorsen as agent and Mr A Drake-Brockman as agent on behalf of the applicant and Mr T Dixon of counsel and Mr D Rafferty of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1976* (WA), and by consent, hereby orders –

1. THAT the applicant file Further and Better Particulars in response to the respondent's request dated 12 January 2023 by no later than 23 January 2023.
2. THAT the respondent file a response to the claim by no later than 6 February 2023.
3. THAT the matter be listed for a directions hearing on Wednesday, 15 February 2023 at 10.00 am.

(Sgd.) R COSENTINO,  
Senior Commissioner.

[L.S.]

2023 WAIRC 00036

**ELECTORATE OFFICERS AWARD 1986**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

DEPARTMENT OF THE LEGISLATIVE COUNCIL (WA) AND OTHERS

**RESPONDENTS****CORAM** PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER R COSENTINO**DATE** THURSDAY, 19 JANUARY 2023**FILE NO** P 3 OF 2022**CITATION NO.** 2023 WAIRC 00036**Result** Order issued**Representation** (on the papers)**Applicant** Civil Service Association of Western Australia Incorporated**Respondents** Department of the Legislative Council (WA) and others

*Order*

WHEREAS the Executive Director, Government Sector Labour Relations filed an application on behalf of the respondents on 17 January 2023 requesting an extension of the time prescribed by reg 13(6) of the *Industrial Relations Commission Regulations 2005* for filing a response;

AND WHEREAS on 17 January 2023, the applicant advised that it has no objections to the granting of an extension of time as sought;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* together with reg 36 of the Regulations, and by consent, hereby orders –

THAT the time for filing a response to the application be extended to 24 February 2023.

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

[L.S.]

**2023 WAIRC 00037**

**EDUCATION DEPARTMENT MINISTERIAL OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD  
1983**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

DEPARTMENT OF EDUCATION

**RESPONDENT**

**CORAM**

PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER R COSENTINO

**DATE**

THURSDAY, 19 JANUARY 2023

**FILE NO**

P 4 OF 2022

**CITATION NO.**

2023 WAIRC 00037

<b>Result</b>	Order issued
<b>Representation</b>	(on the papers)
<b>Applicant</b>	Civil Service Association of Western Australia Incorporated
<b>Respondent</b>	Department of Education

*Order*

WHEREAS the Executive Director, Government Sector Labour Relations filed an application on behalf of the respondent on 17 January 2023 requesting an extension of the time prescribed by reg 13(6) of the *Industrial Relations Commission Regulations 2005* for filing a response;

AND WHEREAS on 17 January 2023, the applicant advised that it has no objections to the granting of an extension of time as sought;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* together with reg 36 of the Regulations, and by consent, hereby orders –

THAT the time for filing a response to the application be extended to 24 February 2023.

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

[L.S.]

2023 WAIRC 00038

**JUVENILE CUSTODIAL OFFICERS' AWARD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

DEPARTMENT OF JUSTICE

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

THURSDAY, 19 JANUARY 2023

**FILE NO**

P 5 OF 2022

**CITATION NO.**

2023 WAIRC 00038

<b>Result</b>	Order issued
<b>Representation</b>	(on the papers)
<b>Applicant</b>	Civil Service Association of Western Australia Incorporated
<b>Respondent</b>	Department of Justice

*Order*

WHEREAS the Executive Director, Government Sector Labour Relations filed an application on behalf of the respondent on 17 January 2023 requesting an extension of the time prescribed by reg 13(6) of the *Industrial Relations Commission Regulations 2005* for filing a response;

AND WHEREAS on 17 January 2023, the applicant advised that it has no objections to the granting of an extension of time as sought;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* together with reg 36 of the Regulations, and by consent, hereby orders –

THAT the time for filing a response to the application be extended to 24 February 2023.

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

[L.S.]

2023 WAIRC 00039

**COUNTRY HIGH SCHOOL HOSTELS AUTHORITY RESIDENTIAL COLLEGE SUPERVISORY STAFF AWARD  
2005**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

DEPARTMENT OF EDUCATION

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

THURSDAY, 19 JANUARY 2023

**FILE NO**

P 6 OF 2022

**CITATION NO.**

2023 WAIRC 00039

<b>Result</b>	Order issued
<b>Representation</b>	(on the papers)
<b>Applicant</b>	Civil Service Association of Western Australia Incorporated
<b>Respondent</b>	Department of Education

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*Order*

WHEREAS the Executive Director, Government Sector Labour Relations filed an application on behalf of the respondent on 17 January 2023 requesting an extension of the time prescribed by reg 13(6) of the *Industrial Relations Commission Regulations 2005* for filing a response;

AND WHEREAS on 17 January 2023, the applicant advised that it has no objections to the granting of an extension of time as sought;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* together with reg 36 of the Regulations, and by consent, hereby orders –

THAT the time for filing a response to the application be extended to 24 February 2023.

[L.S.]

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

**2023 WAIRC 00040**

**GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

DISABILITY SERVICES COMMISSION

**RESPONDENT**

**CORAM**

PUBLIC SERVICE ARBITRATOR

SENIOR COMMISSIONER R COSENTINO

**DATE**

THURSDAY, 19 JANUARY 2023

**FILE NO**

P 7 OF 2022

**CITATION NO.**

2023 WAIRC 00040

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<b>Result</b>	Order issued
<b>Representation</b>	(on the papers)
<b>Applicant</b>	Civil Service Association of Western Australia Incorporated
<b>Respondent</b>	Disability Services Commission

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*Order*

WHEREAS the Executive Director, Government Sector Labour Relations filed an application on behalf of the respondent on 17 January 2023 requesting an extension of the time prescribed by reg 13(6) of the *Industrial Relations Commission Regulations 2005* for filing a response;

AND WHEREAS on 17 January 2023, the applicant advised that it has no objections to the granting of an extension of time as sought;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* together with reg 36 of the Regulations, and by consent, hereby orders –

THAT the time for filing a response to the application be extended to 24 February 2023.

[L.S.]

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

2023 WAIRC 00041

**PUBLIC SERVICE AWARD 1992**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
 CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**PARTIES****APPLICANT**

-v-

CHEMISTRY CENTRE (WA) AND OTHERS

**RESPONDENTS****CORAM**

PUBLIC SERVICE ARBITRATOR  
 SENIOR COMMISSIONER R COSENTINO

**DATE**

THURSDAY, 19 JANUARY 2023

**FILE NO**

P 8 OF 2022

**CITATION NO.**

2023 WAIRC 00041

<b>Result</b>	Order issued
<b>Representation</b>	(on the papers)
<b>Applicant</b>	Civil Service Association of Western Australia Incorporated
<b>Respondents</b>	Chemistry Centre (WA) and others

*Order*

WHEREAS the Executive Director, Government Sector Labour Relations filed an application on behalf of the respondents on 17 January 2023 requesting an extension of the time prescribed by reg 13(6) of the *Industrial Relations Commission Regulations 2005* for filing a response;

AND WHEREAS on 17 January 2023, the applicant advised that it has no objections to the granting of an extension of time as sought;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* together with reg 36 of the Regulations, and by consent, hereby orders –

THAT the time for filing a response to the application be extended to 24 February 2023.

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

[L.S.]

2023 WAIRC 00042

**GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
 CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**PARTIES****APPLICANT**

-v-

AGRICULTURAL PRODUCE COMMISSION AND OTHERS

**RESPONDENTS****CORAM**

PUBLIC SERVICE ARBITRATOR  
 SENIOR COMMISSIONER R COSENTINO

**DATE**

THURSDAY, 19 JANUARY 2023

**FILE NO**

P 9 OF 2022

**CITATION NO.**

2023 WAIRC 00042

<b>Result</b>	Order issued
<b>Representation</b>	(on the papers)
<b>Applicant</b>	Civil Service Association of Western Australia Incorporated
<b>Respondents</b>	Agricultural Produce Commission and others

*Order*

WHEREAS the Executive Director, Government Sector Labour Relations filed an application on behalf of the respondents on 17 January 2023 requesting an extension of the time prescribed by reg 13(6) of the *Industrial Relations Commission Regulations 2005* for filing a response;

AND WHEREAS on 17 January 2023, the applicant advised that it has no objections to the granting of an extension of time as sought;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* together with reg 36 of the Regulations, and by consent, hereby orders –

THAT the time for filing a response to the application be extended to 24 February 2023.

[L.S.]

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

**2023 WAIRC 00043**

**GOVERNMENT OFFICERS (INSURANCE COMMISSION OF WESTERN AUSTRALIA) AWARD 1987**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

INSURANCE COMMISSION OF WESTERN AUSTRALIA

**RESPONDENT**

**CORAM**

PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER R COSENTINO

**DATE**

THURSDAY, 19 JANUARY 2023

**FILE NO**

P 10 OF 2022

**CITATION NO.**

2023 WAIRC 00043

<b>Result</b>	Order issued
<b>Representation</b>	(on the papers)
<b>Applicant</b>	Civil Service Association of Western Australia Incorporated
<b>Respondent</b>	Insurance Commission of Western Australia

*Order*

WHEREAS the Executive Director, Government Sector Labour Relations filed an application on behalf of the respondent on 17 January 2023 requesting an extension of the time prescribed by reg 13(6) of the *Industrial Relations Commission Regulations 2005* for filing a response;

AND WHEREAS on 17 January 2023, the applicant advised that it has no objections to the granting of an extension of time as sought;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* together with reg 36 of the Regulations, and by consent, hereby orders –

THAT the time for filing a response to the application be extended to 24 February 2023.

[L.S.]

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

**2023 WAIRC 00033**

**ORDER PURSUANT TO S.66**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

SAMANTHA FENN

**APPLICANT**

-v-

THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

**FIRST RESPONDENT**

THE RETURNING OFFICER, WESTERN AUSTRALIAN ELECTORAL COMMISSION

**SECOND RESPONDENT**

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**INTERVENER**

**CORAM**

CHIEF COMMISSIONER S J KENNER

**DATE**

MONDAY, 16 JANUARY 2023

**FILE NO/S**

PRES 10 OF 2022

**CITATION NO.**

2023 WAIRC 00033

<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr D Rafferty of counsel
<b>First Respondent</b>	Ms B Burke of counsel
<b>Second Respondent</b>	Ms S Keighery of counsel
<b>Intervener</b>	Mr J Carroll of counsel

*Order*

HAVING heard Mr D Rafferty of counsel on behalf of the applicant, Ms B Burke of counsel on behalf of the first respondent, Ms S Keighery of counsel on behalf of the second respondent and Mr J Carroll of counsel on behalf of the intervener, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders –

- (1) THAT order 7 of the orders dated 23 November 2022 (the orders) be varied to no later than Friday, 10 February 2023 and that the term "parties" be deleted and replaced with "applicant, first respondent and second respondent".
- (2) THAT order 8 of the orders be varied to no later than Friday, 17 February 2023.
- (3) THAT order 9 of the orders be varied to no later than Friday, 3 March 2023.
- (4) THAT order 10 of the orders be varied to no later than Friday, 10 March 2023 and that the term "parties" be deleted and replaced with "applicant, first respondent and second respondent".
- (5) THAT order 11 of the orders be varied to no later than Friday, 10 March 2023.
- (6) THAT order 12 of the orders be varied to no later than Friday, 17 March 2023.
- (7) THAT order 13 of the orders be varied to on or after Thursday, 23 March 2023.
- (8) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,  
Chief Commissioner.

[L.S.]

**2023 WAIRC 00022**

**ORDER PURSUANT TO S.66**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

PAUL BERGESIO

**APPLICANT**

-v-

UNITED WORKERS UNION (WA)

**RESPONDENT**

**CORAM** CHIEF COMMISSIONER S J KENNER  
**DATE** THURSDAY, 12 JANUARY 2023  
**FILE NO.** PRES 13 OF 2022  
**CITATION NO.** 2023 WAIRC 00022

<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr P Bergesio of counsel
<b>Respondent</b>	Mr J Nicholas of counsel

*Direction*

HAVING heard Mr P Bergesio of counsel on behalf of the applicant and Mr J Nicholas of counsel on behalf of the respondent the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

- (1) THAT the parties file any written submissions in relation to this application by 19 January 2023.
- (2) THAT the parties file a minute of proposed orders sought in relation to this application by 19 January 2023.
- (3) THAT unless otherwise directed by the Chief Commissioner, the application be determined on the papers.
- (4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,  
Chief Commissioner.

[L.S.]

2023 WAIRC 00057

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 21 DECEMBER 2021**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	RANDALL BURRIDGE	<b>APPELLANT</b>
	-v-	
	DIRECTOR GENERAL, THE DEPARTMENT OF COMMUNITIES	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER T B WALKINGTON – CHAIR MR B HAWKINS – BOARD MEMBER MS M DI LELLO – BOARD MEMBER	
<b>DATE</b>	THURSDAY, 2 FEBRUARY 2023	
<b>FILE NO.</b>	PSAB 7 OF 2022	
<b>CITATION NO.</b>	2023 WAIRC 00057	
<b>Result</b>	Direction issued	
<b>Representation</b>		
<b>Appellant</b>	Mr R Burridge	
<b>Respondent</b>	Mr M McIlwaine (of counsel)	

*Direction*

WHEREAS this is an appeal against a decision referred in s 78(1)(b) of the *Public Sector Management Act 1994* (WA);  
AND WHEREAS on 29 November 2022 the respondent filed a *Form 1A – Multipurpose* requesting the Public Service Appeal Board dismiss this appeal under s 27(1)(a) of the *Industrial Relations Act 1979* (WA);  
AND WHEREAS on 2 February 2023 at a Directions Hearing, the Board heard from the appellant on his own behalf and Mr McIlwaine on behalf of the respondent;  
NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the matter be adjourned to allow the appellant an opportunity to seek advice and consider the remedy sought;
2. THAT by no later than 16 February 2023, the appellant confirm by way of email to the Associate of the Board, of his intentions with respect to progressing this appeal and the remedy he is seeking; and
3. THAT the appellant has liberty to apply at short notice.

(Sgd.) T B WALKINGTON,  
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2023 WAIRC 00023

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

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	ZACHARY JAMES ALACH	<b>APPELLANT</b>
	-v-	
	DEPARTMENT OF HEALTH	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON MR G BROWN - BOARD MEMBER MR M GOLESWORTHY - BOARD MEMBER	
<b>DATE</b>	FRIDAY, 13 JANUARY 2023	
<b>FILE NO.</b>	PSAB 48 OF 2022	
<b>CITATION NO.</b>	2023 WAIRC 00023	

**Result** Order issued  
**Representation**  
**Appellant** Mr Z Alach on his own behalf  
**Respondent** Mr J Carroll of counsel

*Order*

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

1. THAT the orders issued on 2 November 2022 ([2022] WAIRC 00768) be vacated.
2. THAT the parties file any statement of agreed facts and agreed documents by no later than 2 February 2023.
3. THAT the appellant file by no later than 16 February 2023:
  - 3.1 any documents upon which he intends to rely which are not included in the agreed documents filed under Order 2;
  - 3.2 a written outline of submissions; and
  - 3.3 an outline of the evidence in chief of any witness the appellant proposes to call to give evidence at the hearing of the appeal, including the appellant, complying with Practice Note 9 of 2021.
4. THAT the respondent file by no later than 2 March 2023:
  - 4.1 any documents upon which it intends to rely which are not included in the agreed documents filed under Order 2;
  - 4.2 a written outline of submissions; and
  - 4.3 an outline of the evidence in chief of any witness the respondent proposes to call to give evidence at the hearing of the appeal complying with Practice Note 9 of 2021.
5. THAT the appellant has liberty to file any submissions and evidence in response to the respondent's submissions and evidence by no later than 16 March 2023.
6. THAT the appeal be listed for a final hearing on a date to be fixed after 16 March 2023.

(Sgd.) R COSENTINO,  
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

**2023 WAIRC 00035**

**APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 29 MARCH 2022**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	MARGARET MEO	<b>APPELLANT</b>
	-v-	
	DEPARTMENT OF COMMUNITIES	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER T B WALKINGTON - CHAIR MR G BROWN - BOARD MEMBER MR N CINQUINA - BOARD MEMBER	
<b>DATE</b>	WEDNESDAY, 18 JANUARY 2023	
<b>FILE NO.</b>	PSAB 54 OF 2022	
<b>CITATION NO.</b>	2023 WAIRC 00035	

**Result** Direction issued  
**Representation**  
**Appellant** Ms M Meo  
**Respondent** Mr D Anderson (of counsel)

*Direction*

HAVING heard from the appellant on her own behalf and Mr D 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 respondent file and serve upon the appellant an amended s 27(1) application by no later than 14 February 2023;
2. THAT the respondent file and serve upon the appellant any outlines of witness evidence and any documents upon which they intend to rely by no later than 28 February 2023;
3. THAT the appellant file and serve upon the respondent any outlines of witness evidence and any documents upon which they intend to rely by no later than 14 March 2023;
4. THAT the respondent file and serve upon the appellant an outline of submissions by no later than 28 March 2023;
5. THAT the appellant may file and serve upon the respondent an outline of submissions by no later than 11 April 2023;
6. THAT the matter be listed for hearing for 1 day on a date to be determined; 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.]

2023 WAIRC 00021

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ADRIAN DOYLE

**APPLICANT**

-v-

ROMAN CATHOLIC BISHOP OF BUNBURY

**RESPONDENT**

**CORAM**

COMMISSIONER T KUCERA

**DATE**

THURSDAY, 12 JANUARY 2023

**FILE NO/S**

U 48 OF 2022

**CITATION NO.**

2023 WAIRC 00021

**Result**

Programming orders issued

**Representation**

**Applicant**

Mr A Doyle

**Respondent**

Mr I Curlewis, of counsel

*Order*

WHEREAS this is an application pursuant to s 23A of the *Industrial Relations Act 1979* (WA) (**the IR Act**);

AND WHEREAS a scheduling conference was held on 11 January 2023;

NOW THEREFORE the Commission pursuant to the powers conferred under the IR Act, and by consent, hereby orders –

1. THAT the hearing listed for 24 January 2023 be vacated.
2. THAT the applicant's application for the Commission to accept his application out of time be listed for a hearing of one day's duration, on 24 February 2023.

(Sgd.) T KUCERA,  
Commissioner.

[L.S.]

2023 WAIRC 00062

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

BENJAMIN LETTS DAWKINS

**APPLICANT**

-v-

BRONWEN O'SULLIVAN

**RESPONDENT**

**CORAM** COMMISSIONER T B WALKINGTON  
**DATE** WEDNESDAY, 8 FEBRUARY 2023  
**FILE NO.** U 111 OF 2022  
**CITATION NO.** 2023 WAIRC 00062

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**Result** Direction issued  
**Representation**  
**Applicant** Mr B Dawkins (in person)  
**Respondent** Mr D Markovich (of counsel)

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*Direction*

HAVING heard from the applicant on his own behalf and Mr Markovich 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;
2. THAT the applicant file and serve any outlines of witness evidence and any documents upon which they intend to rely by no later than 23 February 2023;
3. THAT the respondent file and serve any outline of witness evidence and any documents, upon which they intend to rely by no later than 23 March 2023;
4. THAT the applicant file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 6 April 2023;
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 20 April 2023;
6. THAT the matter be listed for hearing for 2 days on a date to be fixed; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
 Commissioner.

[L.S.]

2023 WAIRC 00051

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

BEN GARDNER

**APPLICANT**

-v-

NORTH METROPOLITAN HEALTH SERVICE

**RESPONDENT**

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** TUESDAY, 24 JANUARY 2023  
**FILE NO/S** U 112 OF 2022  
**CITATION NO.** 2023 WAIRC 00051

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr B Gardner
<b>Respondent</b>	Ms L Sisti

*Order*

HAVING heard from Mr B Gardner on his own behalf and Ms L Sisti on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

1. THAT the issue of whether the applicant is a “government officer” and precluded from the Commission’s general jurisdiction be determined as a **preliminary issue**.
2. THAT the parties file any documentary evidence that they seek to rely upon in relation to the preliminary issue by 8 February 2023.
3. THAT the respondent file its written submissions in relation to the preliminary issue by 22 February 2023.
4. THAT the applicant file his written submissions in relation to the preliminary issue by 8 March 2023.
5. THAT the respondent file any reply to the applicant’s written submissions by 15 March 2023.
6. THAT unless otherwise ordered, the preliminary issue be determined on the papers.

(Sgd.) R COSENTINO,  
Senior Commissioner.

[L.S.]

## PUBLIC SERVICE APPEAL BOARD—

**2023 WAIRC 00060**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT DATED 15 SEPTEMBER 2021  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

<b>CITATION</b>	:	2023 WAIRC 00060
<b>CORAM</b>	:	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON – CHAIR MS B CONWAY - BOARD MEMBER MR M JOZWICKI - BOARD MEMBER
<b>HEARD</b>	:	THURSDAY, 17 FEBRUARY 2022 AND FRIDAY, 18 FEBRUARY 2022 WITH CLOSING SUBMISSIONS FILED 28 FEBRUARY 2022 AND 8 MARCH 2022
<b>DELIVERED</b>	:	TUESDAY, 7 FEBRUARY 2023
<b>FILE NO.</b>	:	PSAB 22 OF 2021
<b>BETWEEN</b>	:	KAREN ROTHERHAM Appellant AND DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIONS Respondent

<b>CatchWords</b>	:	PSAB – Public Service Appeal Board – Misconduct – Negligent and Careless Conduct – Discipline – Workload – Dismissal
<b>Legislation</b>	:	<i>Industrial Relations Act 1979</i> (WA) <i>Interpretation Act 1984</i> (WA) <i>Public Sector Management Act 1994</i> (WA)
<b>Result</b>	:	Appeal dismissed
<b>Representation:</b>		
<b>Appellant</b>	:	Ms H Harper (as agent) With Her Ms J Moore (of counsel)
<b>Respondent</b>	:	Mr M McIlwaine (of counsel)

**Case(s) referred to in reasons:***Aitken v CUB Pty Ltd* [2016] FWC 2668*Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224*Blyth v Birmingham Waterworks Co* (1856) 11 Ex 784*Blyth Chemicals Ltd v Bushnell* [1933] HCA 8; (1933) 49 CLR 66*Director General, Department of Biodiversity, Conservation and Attractions v Cosentino & Ors* [2022] WASC 306*Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525*Milentis v The Honourable Minister for Education* (1987) 67 WAIG 1124*Miles v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385*Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266*Re v Inspector of Custodial Services* [2013] WAIRC 00830; (2013) 93 WAIG 1776*State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169*Thavarasan v The Water Corporation* [2006] WAIRC 04089; (2006) 86 WAIG 1434*Titilius v Public Service Appeal Board & Ors* [1999] WASCA 19*Titilius v Director General of the Department of Justice* [2019] WAIRC 00195; (2019) 99 WAIG 597*X v The Commonwealth* [1999] HCA 63; (1999) 200 CLR 177*Reasons for Decision*

- 1 The appellant, Ms Rotherham, was employed by the Director General, Department of Biodiversity, Conservation and Attractions at the Perth Zoo in the role of a Senior Technical Officer (Zoology) colloquially known as a Zookeeper. The appellant was dismissed on 15 September 2021 and has applied to the Public Service Appeal Board (the Board) for a review of her employers' decision.
- 2 The appellant says that when all the circumstances are taken into account they do not give rise to a loss of trust and confidence to justify dismissal. Further, that the respondent did not consider all the relevant circumstances surrounding the incident, including any mitigating circumstances, and the decision to terminate was harsh, oppressive, unfair and disproportionate.
- 3 The appellant seeks reinstatement on the basis that the penalty of termination is disproportionate.
- 4 The employer opposes the reinstatement of the appellant and says that the decision to dismiss the appellant was proportionate disciplinary action in all of the circumstances. The respondent contends that the appellant's actions in April 2021 ought not to be viewed in isolation and the appellant's previous conduct of a similar nature results in a conclusion that the appellant acts without due care. In this workplace the failure to act with due care presents a risk of serious injury to animals, staff and visitors which is real and ubiquitous.
- 5 The Department's letter to Ms Rotherham of 6 August 2021 sets out the findings of the investigation into the incident in April 2021 in which the appellant failed to secure the outer gate padlock on the sun bear exhibit. The Department concluded that the appellant:
  - a. failed to padlock the secondary airlock gate to the sun bear exhibit (AS X13).
  - b. breached the General Husbandry and Security of Perth Zoo Animals Standard Operating Procedure specifically section 2.2(i).
  - c. breached sun bear Exhibit Security Standard Operating Procedure, specifically section 2.3(e) and 2.3(f).
  - d. failed to comply with the Code of Conduct, specifically the sections relating to Personal Behaviour and Health and Safety.
- 6 The Department asserts that the breach of discipline in April 2021, when considered in the context of previous breaches of discipline of a similar nature, results in a loss of trust and confidence in the appellant and her ability to follow the Standard Operating Procedures and reliably comply with risk management requirements.

**Background and Facts**

- 7 The appellant commenced employment with the Zoological Parks Authority (Perth Zoo) on 19 July 1998 as a Level 1.1 'Zookeeper' under the Zoological Gardens Employees Award No. 29 of 1969 and the Zoological Gardens (Operations Employees) Enterprise Bargaining Agreement 1996. In April 2013 the appellant became covered by the Government Officers Salaries, Allowances and Conditions Award 1989 (GOSAC) as a Level 4.3 'Senior Technical Officer'.
- 8 The appellant has made a valued contribution to the Perth Zoo over a long period of employment.
- 9 On 28 July 2008 the respondent acknowledged 10 years of contribution by the appellant to the Perth Zoo and noted she had 'proven herself to be a diligent and committed team member'. At that time the respondent also acknowledged the value of the appellant's participation in a Zookeeper work exchange with Whipsnade Zoo (London Zoological Society) for approximately one year.
- 10 The appellant also undertook a Zookeeper work exchange with Auckland Zoo for approximately 2 months. The appellant is also acknowledged by the respondent for her dedication after she was selected by the respondent to accompany a sun bear to Wellington Zoo, New Zealand. During the 36 hour journey the appellant was responsible for observing, feeding, medicating and caring for the bear's overall welfare.
- 11 On 22 October 2008 the respondent acknowledged the appellant's 'excellent work' acting on numerous occasions as a Level 5 Supervisor Zoology.

- 12 On 1 August 2012 the respondent acknowledged the appellant's commitment when she travelled to Ocean Park Zoo, Hong Kong, as an advisor and Perth Zoo representative to assist in designing their red panda breeding program.
- 13 The appellant was selected through a competitive process from more than 10 applicants, to tenant a house on the Perth Zoo property for one year, followed by a two-year extension. Three years was the maximum term an employee may be selected to lease a Perth Zoo house at the time.
- 14 On 26 March 2021 the respondent presented the appellant a Long Service Award in recognition of 22 years' service to Perth Zoo and her commitment to saving wildlife.

#### **Breach of Discipline on 5 April 2021**

- 15 On 5 April 2021 the appellant returned to the workplace following an eight week period of purchased leave and was rostered as supernumerary to the Asian Carnivore rounds (AC rounds) for the first three shifts.
- 16 Mr Martin Boland, Acting Senior Technical Officer, was acting in the appellant's substantive role during her absence and was responsible for the Asian Carnivore 1 (Bear, Tiger and Turtles) round.
- 17 Another Technical Officer, Mr Bailey Rae, was responsible for the Asian Carnivore 2 (Otter, Binturong and Red Panda) round.
- 18 On her return to work on 5 April 2021, the appellant undertook duties such as catching up on emails, receiving handovers from Mr Boland regarding the AC rounds and other administrative tasks. During discussions on the day, it was agreed between Mr Boland and the appellant she would assist with cleaning the sun bear enclosures.
- 19 At approximately 1:00pm, the appellant presented at the sun bear enclosures, ASX13 and ASX14, to assist Mr Boland, with cleaning the enclosures. Ms Alex Bateman (fixed term contract Technical Officer) and Mr Isaac Towne (casual Technical Officer) were also present to assist with the task.
- 20 The male and female sun bears were secured in the ASX14 exhibit and the four staff members cleaned the ASX13 exhibit for approximately 30 minutes.
- 21 Mr Boland went to the night quarters section to commence movement of the sun bears from ASX14 to ASX13 so that ASX14 could be cleaned.
- 22 The appellant was the last worker to exit ASX13 and locked the enclosure door behind her.
- 23 The appellant was standing in the airlock with some cleaning equipment when Mr Boland called her on a two-way radio and said words to the effect, 'is ASX13 secure, can I move them?'. The appellant responded, 'yes'.
- 24 The appellant removed the cleaning equipment from the airlock and closed and bolted the second door behind her. The appellant did not secure the padlock. Rather, the padlock was left hanging on the yellow recognition panel.
- 25 The appellant accepts that as she was the last person to leave the enclosure and that she had the responsibility to ensure the lock to the airlock gate was secure, which includes the gate being padlocked.
- 26 The appellant, Ms Bateman and Mr Towne moved into the airlock of ASX14 with the cleaning equipment. The appellant called Mr Boland on the two-way radio and said words to the effect of, 'is it safe? Can we go through?' Mr Boland responded, 'yes'. The appellant unlocked the enclosure and the staff entered.
- 27 It took approximately 30 minutes for the staff to clean ASX14 and exit the enclosure. The appellant was again the last worker to exit and double-locked the enclosure door and bolted and padlocked the airlock door.
- 28 At approximately 2:00pm the cleaning of ASX13 and ASX14 was complete.
- 29 The appellant checked with Mr Boland that there were no further tasks for her, which he confirmed there were none. The appellant left the area and returned to administrative duties in the office.
- 30 Mr Boland stayed in the sun bear location to facilitate access for the sun bears to be separated into different enclosures before leaving the area.
- 31 At approximately 5:00pm, Mr Boland returned and gave the sun bears their last feed and locked up the night quarters area.
- 32 The airlock gate for ASX13 remained closed and bolted overnight, but the padlock was not in place. Rather, the padlock was located on the yellow recognition panel but this was not observed by Mr Boland when he returned to feed and secure the sun bears.
- 33 On 6 April 2021, at approximately 8:20am, Mr Rob Herkes, Technical Officer, found the airlock door to ASX13 closed and bolted, but the padlock was not in place. Rather, the padlock was located on the yellow recognition panel.
- 34 Mr Herkes completed and submitted a 'near miss' report on the Perth Zoo OSH Reporting System.
- 35 An investigation into the report was completed on 24 April 2021. The investigation gave the near miss an initial risk rating of high, but a revised risk rating of medium.

#### **The Disciplinary Process**

- 36 By letter dated 3 May 2021, the appellant was notified by Mr Stephen Bradfield, Acting Manager People Services for the respondent, that she was suspected to have committed a breach of discipline by failing to lock the ASX13 airlock gate during the AC1 round. She was suspended on full pay from the date of the letter.
- 37 The disciplinary allegations were that, by failing to lock the airlock gate, the appellant had contravened Standard Operating Procedure – General Husbandry and Security of Perth Zoo Animals – #20573 and Standard Operating Procedure – Sun Bear Exhibit Security – #256920.

- 38 It was also alleged that the appellant had breached the Department of Biodiversity, Conservation and Attractions Code of Conduct by failing to act in accordance with the Standard Operating Procedures.
- 39 On 31 May 2021, the appellant responded to the disciplinary allegations through her Community and Public Sector Union, Civil Service Association (CSA) representative.
- 40 On 6 August 2021, the respondent notified the appellant that the investigation had determined that the allegations were substantiated and the proposed penalty for the breaches of discipline was dismissal. The respondent also provided a copy of the Report of a Disciplinary Investigation.
- 41 The Investigation Report dated 3 August 2021 was attached to the letter and recommended that Ms Rotherham's employment be terminated.
- 42 On 1 September 2021, Ms Rotherham's CSA representative responded on behalf of Ms Rotherham to the allegations of misconduct. Through her representative, the appellant disputed the proposed dismissal on the basis that it was out of proportion to the substantiated conduct. She also disputed the proposed dismissal on the basis that it was unfair taking into consideration her length of service, her contrition and acceptance of responsibility, and the extenuating circumstances of the appellant suffering work-related stress, anxiety and burn out.
- 43 On 14 September 2021 the Department wrote to Ms Rotherham and advised that her response had been considered and notified that her employment was terminated effective on the same day. Ms Rotherham received this letter on 15 September 2021. The appellant was provided five weeks' pay in lieu of notice.

#### Previous Incidents

- 44 The respondent asserts that the appellant's failure to lock the sun bear exhibit is not a one-off action. The appellant agrees that she has made similar mistakes.
- 45 On 12 August 2014, after servicing the sun bear exhibit ASX14, the appellant left both doors to the exhibit open resulting in the escape of the female sun bear from the exhibit. As a result of the escape, the Zoo had to enact emergency procedures by activating a team of trained staff to recapture the sun bear. As a result of the above incident, the appellant received a written warning and was advised that further similar mistakes may result in disciplinary action including dismissal.
- 46 On 15 April 2015 the appellant failed to secure a padlock to the door of the tiger night quarter yard (ASH05) before leaving the area. The appellant self-reported the omission to secure the padlock. As a result of the above incident the appellant received a written warning and was advised that further similar mistakes may result in disciplinary action including dismissal. Following this incident a yellow tag system for the outer locks was implemented.
- 47 On 4 July 2020 the appellant failed to appropriately secure the otter enclosure ASX09, resulting in an otter pup escaping the service area of the Sumatran Tiger enclosure. As a result of the above incident the appellant received a formal written reprimand and was advised that further similar mistakes may result in disciplinary action including dismissal.

#### Questions to be Answered

- 48 Both parties agree that the appellant misconducted herself in failing to lock the outer lock of the sun bear enclosure and that the Board need not make findings concerning this fact.
- 49 Therefore, the first question the Board must answer is whether the decision to dismiss the appellant was harsh or unjust?
- 50 If the answer to the first question is yes, the second question is whether it is impracticable to reinstate the appellant?

#### The Board's Jurisdiction and Nature of the Appeal

- 51 The relevant provision of Part IIA – Division 2 of the *Industrial Relations Act 1979* (WA) (the IR Act) is s 80I which is in the following terms:

##### 80I. Board's jurisdiction

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

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

[(2) deleted]

- (3) A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in the *Public Sector Management Act 1994* section 94 or 95A.
- 52 The appeal involves the review of the respondent's decision de novo. As such, the Board is to consider the appeal based on the evidence before it, not merely on the basis of whether the respondent made the right decision available to it at the time. The Board has greater scope to substitute its own view for that of the respondent. In the case of dismissal for misconduct, it is for the employer to establish on the evidence that the misconduct occurred: *Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266; *Thavarasan v The Water Corporation* [2006] WAIRC 04089; (2006) 86 WAIG 1434.
- 53 The Department's decision is not to be totally disregarded by the Board hearing and determining the matter. That the appeal involves a hearing de novo does not necessarily mean that the Board must re-hear every aspect of the allegations afresh. What precisely the Board must consider in the proceedings ultimately depends upon the nature of the challenge to the decision under review: *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525 at [26], [29].
- 54 An appeal to the Board is a hearing de novo, however the respondent's decision is not to be totally disregarded: *Milentis v The Honourable Minister for Education* (1987) 67 WAIG 1124. To determine whether a dismissal was unfair the Board must consider whether the respondent exercised its right to terminate the applicant in such a manner as to amount to an abuse of that right: *Miles v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385.
- 55 It is well established that the Board's power, under s 80I(1) of the IR Act is to 'adjust' a decision to dismiss a government officer, which means to 'reverse' the decision resulting in the person being in the same position that they were in prior to the decision being made: *State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169 at 2170 cited in *Re v Inspector of Custodial Services* [2013] WAIRC 00830; (2013) 93 WAIG 1776 at [21] Also considered recently in *General, Department of Biodiversity, Conservation and Attractions v Cosentino & Ors* [2022] WASC 306.
- 56 The Board's jurisdiction does not extend to, for example, adjusting the decision of the respondent and then ordering the respondent to re-employ the appellant in a different position, or to the same position as it was designed years prior to the dismissal: *Re v Inspector of Custodial Services*.
- 57 *Harvey v Commissioner for Corrections, Department of Corrective Services* at [30]

In cases such as this where the primary finding of fact, leading to breaches of discipline are in dispute, the circumstances enable the Appeal Board to decide for itself, based on all the evidence, whether the relevant misconduct took place. **There may be other cases for example, where there is no challenge to the factual findings, but there is a challenge to the severity of the penalty imposed. In this situation, a hearing before the Appeal Board will be much more confined.** There may be other situations where discrete issues are raised, such as an allegation of a denial of natural justice in the procedure followed leading to disciplinary decision, rather than a challenge to the primary facts. Both situations will obviously not require the matter to be reheard over again in its entirety (See too: *CSA v Director General, Department of Family and Children's Services* [2003] WAIRC 07213; (2003) 83 WAIG 390). (emphasis added).

- 58 In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224, 229 the Full Bench of the South Australian Commission stated that the following factors were relevant when dealing with a dismissal based upon alleged misconduct. The employer will satisfy the evidentiary onus on it to demonstrate that before dismissing the employee it conducted a full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances. The employer must also give the employee every reasonable opportunity and sufficient time to answer all allegations. If the employer then believes and has reasonable grounds for deciding that the employee was guilty of the misconduct alleged and after taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, it may decide whether such misconduct justifies dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

#### Employees Duty to Exercise Reasonable Care and Skill - Principles

- 59 The key facts in this appeal are not in dispute. Ms Rotherham admits she had responsibility for ensuring the outer gate was secured including locking the padlock and did not do so. Both parties agree this omission is an act of misconduct by Ms Rotherham.
- 60 There is an implied term in every contract of employment that the employee possesses and exercises reasonable care and skill in carrying out the employment: *X v The Commonwealth* [1999] HCA 63; (1999) 200 CLR 177 at [31] per McHugh J.
- 61 The *Public Sector Management Act 1994* (WA) (the PSM Act) provides that a negligent or careless performance of a function is a breach of discipline:

#### 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]

62 The PSM Act defines 'function' in s 3:

**function** has the meaning given by section 5 of the *Interpretation Act 1984*;

63 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;

64 Accordingly, the performance of a function includes the execution of duties and the exercise of responsibility.

65 The meaning of 'negligent' and 'careless' was considered by the Board chaired by Senior Commissioner Kenner (as he then was) in *Titelius v Director General of the Department of Justice* [2019] WAIRC 00195; (2019) 99 WAIG 597 for the purposes of s 80(d) of the PSM 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'.

66 '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 Public Service Appeal Board & Ors* [1999] WASCA 19. That is, the objectively reasonable standard of conduct is judged against a reasonable person in the position of the relevant employee.

67 In this matter the Board considers the appellant's actions are clearly careless and negligent when assessed in reference to a reasonable person in the position of the appellant. That is, the appellant did not pay sufficient attention to what they were doing. The appellant's actions result in a breach of discipline consistent with s 80(d) of the PSM Act.

#### Delayed Action by Employer

68 It is not contested that the appellant was not stood down immediately following the discovery that she had neglected to secure the outer lock. A near miss incident report was submitted the following day. The appellant was permitted to continue on rounds and retain keys for 28 days following the submission of the near miss incident report and during this time the evidence is that the appellant continued to train others.

69 The appellant asserts that the failure to take any action diminishes the respondent's claim of concerns for the risk posed by the appellant's continued employment. The appellant contends that there were a number of options available to the respondent to address their concerns for any risk the appellant may pose by remaining in the role. These options included being moved from a Code 1 round and assigning others to supervise or check the locking of enclosures by the appellant.

70 The appellant met with Dr Liptovszky on or around 14 April 2021. The purpose of meeting was to discuss issues raised by the appellant in her earlier email of 26 February 2021, sent prior to her return to work. At the beginning of this meeting, the appellant raised not having locked the sun bear enclosure. The evidence is that Dr Liptovszky advised the appellant that this omission was not serious and that at the most it would result in her being counselled or reprimanded.

71 The respondent submits that during the 28 days in which the appellant remained in the role of Senior Technical Officer following the incident, it was gathering information to inform a view on the need for a disciplinary investigation. Once it formed the view that an investigation was required it then suspended the appellant from the workplace while it investigated. The respondent says this is a preferable course of action to one that would require all employees to be immediately suspended or stood down even in circumstances where it may arrive at a view that a disciplinary investigation is not warranted.

72 The respondent contends that the failure to pad lock the outer secure gate was a serious error which presents a real risk of harm to those who attend the zoo. The Board is of the view that the respondent cannot rely on this factor and not act consistent with their belief that the actions of the appellant present a risk so serious that it warrants the ultimate sanction.

73 However, the Board must consider the facts of this matter not merely on the basis of whether the respondent made the right decision available to it at the time. The Board has greater scope to substitute its own view for that of the respondent and must decide whether disciplinary action is appropriate in the circumstances put before it.

74 In circumstances where this was the only occasion in which the appellant had misconducted herself in this way, the Board would be inclined to consider the respondent's actions were not proportionate. In this appeal, however, the respondent asserts that the Board ought to consider that this incident was not the only occasion on which the appellant made similar mistakes.

#### Were the Appellant's Mistakes a Pattern of Conduct?

75 The respondent contends the appellant has made similar errors concerning failures to secure enclosures on three previous occasions. The respondent submits that the Board ought to consider the sanction imposed in circumstances in which the misconduct has been repeated and evince a pattern of conduct and find that it is not unfair to terminate the employment of the appellant.

- 76 The appellant contends that the failure to secure the lock and the previous incidents cited by the respondent do not display a pattern of behaviour of not complying with Standard Operating Procedure because these mistakes have been intermittent and irregular over a 22-year period. Ms Rotherham submits that her propensity for human error is no more than one would expect from others in any normal circumstance. The appellant submits that there is a toleration for mistakes.
- 77 The respondent submits that an employer is not required to perpetually tolerate an employee making the same mistake, especially in circumstances where the employee has been warned on three prior occasions about similar mistakes and where the mistake can result in serious harm to staff, visitors and animals.
- 78 The respondent's evidence was that the risk of serious harm and or death was real and not theoretical. The safety of staff, visitors and animals was paramount. The task of ensuring an exhibit was properly secured before leaving the exhibit was one of the most fundamental aspects of a Zookeeper's job that was taught on day one of their training. The appellant agrees that the work of a Zookeeper can involve significant risks and that at times engagement with dangerous animals is required.
- 79 The respondent contends that it can no longer trust the appellant to reliably perform her duties nor have confidence that she will not fail to comply with the Standard Operating Procedure. Consequently, the respondent submits that it is no longer viable to continue the appellant's employment.
- 80 The appellant asserts that it is significant that the investigation report completed on 24 April 2021 gave an initial rating of high, but this was revised to a risk rating of medium. The appellant does not make any submissions for their belief that the change in rating is significant. The Board considers the change in rating to convey that the consequences of the mistake were not the most extreme and therefore, if this incident was the only mistake by the appellant the Board would view the decision to dismiss as disproportionate.
- 81 A dismissal is not unfair when an employee consistently demonstrates, through a pattern of conduct, they could not or would not comply with reasonable rules or directions: *Aitken v CUB Pty Ltd* [2016] FWC 2668 at [127].
- 82 The Perth Zoo is an unusual environment, what is regular and habitual needs to be understood in the context of the workplace environment. The evidence is that the appellant omitted to lock exhibits on four occasions over a period of 22 years. On 12 August 2014, 15 April 2015, 4 July 2020 and 5 April 2021. On the three previous occasions, Ms Rotherham was notified that should performance and/or conduct standards not be met following this warning, further discipline action could be taken and advised that a further error of the same nature may result in termination of employment.
- 83 The appellant submits that the mistakes concerning securing enclosures over a period of twenty-two years do not constitute a pattern of behaviour as these mistakes have been intermittent and irregular. The appellant argues that her propensity for human error is no more than what one would expect from others in any normal circumstance.
- 84 The respondent's evidence is that securing of enclosures is a fundamental element of the role and must be performed at a consistently high standard and that the failure to secure enclosures is not a common occurrence. The respondent's evidence is that the appellant's repeated failures to secure enclosures are unusually high in comparison to other employees.
- 85 It appears to the Board that the appellant has not learnt from previous mistakes and is concerned that they would act in a similar way in the future.
- 86 The Board finds that the securing of enclosures is a fundamental element of the role and is at the heart of a Zookeepers work. The Board's considerations are not confined to that of proportionality but also include confidence in the employee's ability to comply with and perform the requirements of the role in circumstances where the appellant has repeatedly demonstrated errors which strike at the heart of the contractual requirements of the job. The Board is guided by the principle articulated in *Blyth Chemicals Ltd v Bushnell* [1933] HCA 8;(1933) 49 CLR 66 at 81 that conduct which strikes at the heart of the contract is serious misconduct which may justify dismissal.

#### **Does an Unreasonable Workload Mitigate Against Finding Employee Fault?**

- 87 The appellant submits that the Board ought to consider the circumstances in which the appellant made the two most recent errors and conclude that there were mitigating circumstances.
- 88 The appellant asserts that her workload was excessive and that this caused anxiety and stress and resulted in the appellant making arrangements to take a period of leave in February and March 2021. The appellant says she was concerned that she would make a mistake and she had communicated this concern to her employer.
- 89 On 5 April 2021, the appellant returned to work after an eight-week period of purchased leave taken to assist her to address her workplace stress and anxiety concerns.
- 90 The appellant asserts that she had been suffering burnout during recent years. In March 2020 the appellant identified that she experienced increasing levels of anxiety and sought assistance from a psychologist. Consistent with this advice the appellant proposed modifications to her work routine to her line management.
- 91 The appellant contends that the respondent did not take any meaningful action to address her concerns. On 4 July 2020, the appellant made a mistake and an otter pup escaped its enclosure. Consequentially the appellant's level of stress and anxiety elevated and she requested three months leave which the respondent granted.
- 92 On 25 September 2020 the appellant emailed her line managers, Mr Daniel Noble and Mr John Lemon, advising that she was apprehensive to return to the workplace of a similar situation to that when she had taken leave. The appellant requested that she be assigned one round rather than the two Asian/Carnivore rounds she had previously been assigned or that the display otters and red necked sliders be removed from a round. The appellant requested that a meeting be set up to discuss this matter. On the same day, Mr Noble replied by email that he would roster the appellant in the office for the first couple of days at least so the appellant could catch up and familiarise herself with the changes that had been made on the section. Mr Noble further advised that changes to the work arrangements had occurred especially in relation to the routine, noting that it was one of the rounds on

the section that allowed for a decent amount of time with the animals. The appellant was advised that it was not possible to remove animals from the round, however, he would be happy to chat further about this once the appellant was back and had seen the changes made to date.

- 93 On 25 September 2020 the appellant replied to Mr Noble by email reiterating that she did not wish to be in charge of two rounds and that this matter was something that needed to be worked on as a section.
- 94 On 28 September 2020 the appellant returned to the workplace. The appellant's evidence is that her workload remained the same, with the same number of animals or exhibits and the round she was assigned had the same intensity. The appellant says that despite seeking specific adjustments these have not been accommodated by the respondent.
- 95 During the three months that followed her return, the appellant experienced increasing levels of workload stress and anxiety and initiated arrangements to facilitate access to purchased leave. The appellant says she believed she needed to take action herself because her workload concerns had not been addressed by the respondent.
- 96 The appellant took purchased leave during February and March 2021.
- 97 On 26 February 2021 the appellant emailed the Director of Life Sciences, Dr Liptovszky, expressing concerns that the matters she has previously raised are not being heard and that she fears there will be no change to her workload. The appellant requested a meeting to discuss solutions and options.
- 98 The respondent contends that it assessed the workload of the appellant to ascertain if the workload was reasonable and implemented strategies to address the appellant's concerns.
- 99 Mr Lemon's evidence is that he discussed the option of the appellant reducing her hours of work and working part-time. The appellant agrees that she was offered a permanent reduction to part-time employment but declined to do so because she believed a reduction in hours would not address the cause of the workload concerns and may even exacerbate the pressure. The Board is of the view that the appellant's decision to decline to reduce her hours of work ought not count against her and in the absence of an explanation of how a reduction in hours would reduce the workload, the Board considers the appellant's concerns for the effectiveness of this strategy would be genuine.
- 100 Dr Liptovszky discussed a reduction of classification with the appellant. Ms Rotherham agrees she was offered a permanent demotion to a Level 2 Technical Officer position and declined to do so because she says that objectively this is not a fair and reasonable way to address workload concerns. The Board is of the view that the appellant's decision to decline to reduce her classification is not a decision that counts against her.
- 101 Mr Lemon says that as a result of the appellant's workload concerns an additional Zookeeper was allocated to the Asian/Carnivore round. The appellant contends that an additional position was added to the Carnivore/Ungulate section and not specifically the Asian/Carnivore rounds. There are five rounds within the Carnivore/Ungulate section and the additional position works across all five rounds. This was a mechanism to add resources to the whole section, not to specifically address Ms Rotherham's workload concerns.
- 102 The appellant says that strategies the respondent implemented did not directly nor significantly assist in resolving her concerns as follows:
- a. Roster changes implemented as a mechanism to reduce COVID-19 risks, and not as a mechanism to address Ms Rotherham's workload concerns. The roster changes did relieve a portion of Ms Rotherham's workload stress, but not significantly. A return to the non-COVID roster would eliminate any gains.
  - b. The Zoo made efforts to recruit to the Supervisor vacancy, however Ms Rotherham is unable to identify how this assisted to alleviate her workload concerns. The Supervisor position was rarely vacant as someone was acting in the role for the majority of the time.
  - c. Ms Rotherham was encouraged to access the Employee Assistance Program (EAP), which she did, but this only assisted her to manage her stress and anxiety and did not address the cause of the workload concerns. She testified she had discussions with a Supervisor, Ms Holly Thompson, about seeking the assistance of the EAP to undertake a workplace assessment for Ms Rotherham but this assessment did not eventuate.
  - d. Ms Rotherham was also given access to leave. She was granted three months of leave immediately after the otter escape on 4 July 2020 which exhausted her existing leave accruals. She was then granted eight-weeks' purchased leave to assist her 'mental health' immediately prior to the 5 April 2021 event. Neither block of leave assisted Ms Rotherham to address the cause of her workload concerns, but the leave did assist Ms Rotherham's health by giving her reprieve from the cause of her anxiety and stress.
- 103 When disciplined for a previous incident the appellant was given a written warning and it contained the following '[s]hould you have any concerns about your ability to manage your workload you must immediately discuss these concerns with your supervisor and your curator in order for them to provide appropriate advice and support'. Mr Lemon agrees that Ms Rotherham raised issues of workload consistently, politely, appropriately and constructively and agrees that Ms Rotherham repeatedly stated that she was fearful of making a mistake because her workload was too high, Mr Lemon accepted this but said this did not occur at every meeting. Mr Lemon spoke at length with Ms Rotherham many times with the respondent's Human Resources Manager. Mr Lemon accepts that Ms Rotherham was stressed. Mr Lemon agrees he knew she was stressed, fearful of making a mistake and that she was concerned for her workload before the otter pup incident.
- 104 Mr Lemon's evidence is that they did their due diligence by reviewing the workload by speaking with other Zookeepers who also undertook the round allocated to Ms Rotherham and they said they were ok with the workload 'so we did due diligence to see if others were struggling with the workload'. Mr Lemon agrees that there was not a 'forensic assessment' described as an audit or study into Ms Rotherham's workload.

- 105 Mr Lemon gave evidence that after the appellant first raised concerns with him regarding her workload, he gathered the views of other Zookeepers on the same round and concluded that the other Zookeepers did not have an issue with the workload on the Asian/Carnivore round.
- 106 The appellant explains there is a connection between her mental state on the day and her having made the error of failing to secure the padlock on the outer gate of the enclosure. The appellant says she concluded the workload concerns that had resulted in her taking leave had not been addressed. The appellant says that she was not in the present moment because of her belief that despite having taken steps to address the situation herself there had been no change at the workplace and she was coming back to the same situation that had caused her great anxiety.
- 107 The appellant submits that this situation mitigates against concluding that the ultimate penalty of termination of her employment ought to be the penalty.
- 108 There is no prescription as to what criteria a decision maker is to apply in forming a decision on the appropriate penalty for a breach of discipline. There is no list of factors which might justify or mitigate a loss of confidence.
- 109 The respondent contends that the appellant was offered support and assistance when the appellant raised her concerns about workloads. The form of support cited by the respondent was the offer of a change in working arrangements for the appellant which resulted in either a reduction in her classification or a reduction in her hours of work. The Board considers that these two options had negative consequences for the appellant and her rejection of them ought not be seen as unfavourable to her.
- 110 It is unclear to the Board how the workload concerns impacted the conduct of the role by the appellant on the relevant date of the 2021 incident. There is little evidence concerning the nature of the workload concerns and how the appellant's workload had developed over a period of time, nor any comparison with her workload over her period of employment and that of other Zookeepers. The respondent's evidence is that enquires of other Zookeepers whom undertook the same round as that of the appellant did not indicate any concerns for the workload associated with that round. This evidence was not contested by the appellant.
- 111 Prior to returning to the workplace the appellant expressed concern for how she would cope with returning to the same situation she had left. The appellant was advised that she would initially be engaged in administrative tasks to reintegrate into the workplace and assured that some changes had been made and that there would be an opportunity to evaluate these changes and the impact on workloads.
- 112 The respondent's evidence is that its engagement of an additional Zookeeper on the Asian/Carnivore round and changes to the roster are initiatives that would have been beneficial in addressing workload concerns. The appellant contends that these initiatives did not have a beneficial impact on her workload. However, it is not clear to the Board the reasons the appellant holds this belief, particularly in circumstances where the appellant had not worked for a period adequate to assess impacts.
- 113 The Board has considered the respondent's response to the appellant's concerns for her workload and expresses the view that suggestions of reductions in classifications or reductions in hours were not appropriate and lacked empathy. In the Board's view the respondent ought to have conducted a more thorough assessment and evaluation of the situation when the appellant first raised her concerns. The Board accepts the respondent's evidence that there had been changes made to the staffing levels through the engagement of an additional Zookeeper and changes to the roster. The Board finds that the appellant's statements concerning the changes to be confused and lacking in clarity.
- 114 The appellant says that her oversight in not properly securing the enclosure is a result of her concerns and that she had formed the view that adequate changes had not been made to the round. In this state of mind, she made the error. It is not clear to the Board the reasons for the appellant's misgivings when she had had such a limited period of time to assess the changes made prior to the mistake in neglecting to properly secure the enclosure.
- 115 The appellant says that she had concerns that she would make an error because she anticipated she would be returning to the same situation she left. The appellant also explains the error as an aberration because the day was unusual and not routine.
- 116 The respondent contends that in these circumstances it has lost trust and confidence in the appellant's capacity to follow the standard operating instructions and considers the appellant cannot be relied upon to perform a key element of the role of a Zookeeper which is ensuring enclosures are properly secured.
- 117 The Board considers the responsibility of ensuring enclosures are properly secured to be a fundamental element of the role of a Zookeeper. The evidence is that in a series of different circumstances the appellant did not execute this responsibility with adequate care and attention. The Board accepts that there ought to be a degree of tolerance provided to employees who make genuine mistakes. However, on weighing the appellant's repeated errors, along with considerations of the evidence of similar mistakes by other employees, and the various circumstances in which the appellant made these mistakes, the Board does accept that the conclusion that there is a loss of confidence in the appellant's abilities is not unfair. It is difficult for the Board to be confident that the appellant would be able to conduct her role and not make errors in the circumstance of a routine situation or an unusual situation.
- 118 In her application filed on 5 October 2021 the appellant seeks that the Board adjust the respondent's decision by reversing it, such that she be reinstated to her former position.
- 119 Under cross examination Ms Rotherham says that she wants to return to her position under different circumstances, being that her responsibility is reduced to one round and not the two rounds she was previously assigned. The appellant states that changes ought to be implemented and suggested two people check locks, or one person does one lock and the other person does the other lock. The appellant says she will say no to being allocated two rounds and will not take on extra work so that she will be mindful at all times.
- 120 The respondent opposes reinstatement of the appellant on the basis that a medical report prepared for workers compensation purposes indicates that the appellant has decided to take a different career path. The respondent asserts this demonstrates that

she does not wish to return to her previous position. The Board does not accept that the medical report is sufficient to conclude that the appellant no longer wishes to return to her job. The Board accepts the appellant's evidence that she does wish to return to her role as a Zookeeper and she seeks specific adjustments to the work arrangements. The Board considers the adjustments sought are beyond the scope of the powers granted to the Board to make.

121 For these reasons the Board will dismiss the appeal.

**2023 WAIRC 00061**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT DATED 15 SEPTEMBER 2021**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	KAREN ROTHERHAM	<b>APPELLANT</b>
	-v-	
	DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIONS	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIR MS B CONWAY - BOARD MEMBER MR M JOZWICKI - BOARD MEMBER	
<b>DATE</b>	TUESDAY, 7 FEBRUARY 2023	
<b>FILE NO</b>	PSAB 22 OF 2021	
<b>CITATION NO.</b>	2023 WAIRC 00061	

<b>Result</b>	Appeal dismissed
<b>Representation</b>	
<b>Appellant</b>	Ms H Harper (as agent) with her Ms J Moore (of counsel)
<b>Respondent</b>	Mr M McIlwaine (of counsel)

*Order*

HAVING heard from Ms H Harper (as agent) and Ms J Moore (of counsel) on behalf of the appellant 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:

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

[L.S.]

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

**2023 WAIRC 00028**

**APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 25 OCTOBER 2022**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	LOANNE CARTER	<b>APPELLANT</b>
	-v-	
	DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION WA	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE APPEAL BOARD COMMISSIONER C TSANG – CHAIR MS R ANDERSON – BOARD MEMBER MR N CINQUINA – BOARD MEMBER	
<b>DATE</b>	FRIDAY, 13 JANUARY 2023	
<b>FILE NO</b>	PSAB 66 OF 2022	
<b>CITATION NO.</b>	2023 WAIRC 00028	

**Result** Order issued  
**Representation**  
**Appellant** Mr T Carter (on behalf of the appellant)  
**Respondent** Ms E Negus (of counsel)

*Order*

HAVING heard from Mr T Carter 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 on it under the *Industrial Relations Act 1979* (WA), hereby orders:

1. THAT the appellant is granted leave to file an amended Notice of Appeal.
2. THAT the appellant's amended Notice of Appeal be accepted out of time.

(Sgd.) C TSANG,  
 Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

**2023 WAIRC 00029**

**APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 25 OCTOBER 2022**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

LOANNE CARTER

**APPELLANT**

-v-

DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION WA

**RESPONDENT**

**CORAM**

PUBLIC SERVICE APPEAL BOARD  
 COMMISSIONER C TSANG – CHAIR  
 MS R ANDERSON – BOARD MEMBER  
 MR N CINQUINA – BOARD MEMBER

**DATE**

FRIDAY, 13 JANUARY 2023

**FILE NO.**

PSAB 66 OF 2022

**CITATION NO.**

2023 WAIRC 00029

**Result** Direction issued  
**Representation**  
**Appellant** Mr T Carter (on behalf of the appellant)  
**Respondent** Ms E Negus (of counsel)

*Direction*

HAVING heard from Mr T Carter 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 on it under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the respondent provide the appellant with informal discovery relating to the removal of the appellant from the respondent's systems by 27 January 2023.
2. THAT the appellant file an amended Notice of Appeal by 10 February 2023.
3. THAT The respondent file an amended Response by 24 February 2023.
4. THAT the parties file a statement of agreed facts and bundle of agreed documents by 17 March 2023.
5. THAT the parties confer regarding the witnesses to be called in the matter by 24 March 2023.
6. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which they intend to rely upon at the hearing by 7 April 2023.
7. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which they intend to rely upon at the hearing by 21 April 2023.
8. THAT the appellant file an outline of legal submissions by 5 May 2023.
9. THAT the respondent file an outline of legal submissions by 19 May 2023.
10. THAT the matter be listed for hearing on a date to be fixed.

11. THAT the parties have liberty to apply at short notice.

(Sgd.) C TSANG,  
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2023 WAIRC 00001

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 15 OCTOBER 2020**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2023 WAIRC 00001  
**CORAM** : PUBLIC SERVICE APPEAL BOARD  
 SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON  
 MR G SUTHERLAND - BOARD MEMBER  
 MS M BUTLER - BOARD MEMBER  
**HEARD** : TUESDAY, 5 JULY 2022, WEDNESDAY, 6 JULY 2022, THURSDAY, 7 JULY 2022,  
 FRIDAY, 8 JULY 2022, MONDAY, 5 DECEMBER 2022  
**DELIVERED** : THURSDAY, 5 JANUARY 2023  
**FILE NO.** : PSAB 31 OF 2020  
**BETWEEN** : SANJA SPASOJEVIC  
 Appellant  
 AND  
 SPEAKER OF THE LEGISLATIVE ASSEMBLY  
 Respondent

**CatchWords** : Industrial Law (WA) – Public Service Appeal Board – Dismissal decision – Electorate Officer – Nature of leave entitlements – Abuse of personal leave entitlements – Abuse of annual leave entitlements – Whether misconduct established – Whether dismissal oppressive, harsh or unfair – Whether disparate treatment – Whether conduct condoned – Mitigating factors  
**Legislation** : *Industrial Relations Act 1979* (WA)  
*Parliamentary and Electorate Staff (Employment) Act 1992* (WA)  
*Fair Work Act 2009* (Cth)  
**Result** : Appeal dismissed  
**Representation:**  
**Appellant** : Mr S Heathcote of counsel  
**Respondent** : Mr M Ritter SC of counsel

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

*Csomore v Public Service Board of New South Wales* (1986) 10 NSWLR 587  
*Pantovic v Public Transport Authority of Western Australia* [2011] WAIRC 00876; (2011) 91 WAIG 2094  
*Milentis v The Honourable Minister for Education* (1987) 67 WAIG 1124  
*Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors* [2020] HCA 29; (2020) 271 CLR 495  
*Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU)* [2019] FCAFC 138; (2019) 289 IR 29  
*O'Connor v State of Queensland (Dept of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships)* [2021] QIRC 123  
*Spasojevic v Speaker of the Legislative Assembly* [2022] WAIRC 00165; (2022) 102 WAIG 322  
*Walker v Bow Tie Removals and Storage Pty Ltd* [2012] FWA 2851

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*Reasons for Decision*

- 1 Whist working as an Electorate Officer employed by the **Speaker** of the Legislative Assembly Ms Sanja Spasojevic received salary for several periods when she was overseas on holidays, in hospital, or otherwise physically absent from her electorate office. Some payments were deducted from her accrued personal leave. Other payments were made without any deduction from her leave accruals.
- 2 Ms Spasojevic was dismissed from her employment for misconduct, following an investigation into allegations that she had ‘failed to apply for authorised leave’. In this appeal, she alleges that the dismissal was harsh, oppressive or unfair. She asks the Public Service Appeal **Board** to adjust the dismissal decision by reinstating her employment.
- 3 The Board must decide whether misconduct occurred or not. If misconduct occurred, the Board must also decide whether or not dismissal was a fair sanction for the misconduct.
- 4 The Speaker has the onus of establishing the misconduct occurred. To do so, the Speaker relied on the written policies and procedures that applied to Electorate Officers.
- 5 Ms Spasojevic focused on what she described as the ‘informal procedures’ which operated in the electorate office. She says she complied with those informal procedures, if not the formal ones. Her case is that, in reality, there were two systems for approving leave: one formal represented by the Speaker’s written procedures, and one informal, being the custom and practice in electorate offices. She maintains she was compliant with the informal procedures and so her leave was authorised. She also emphasised that the Member of Parliament (**MP**) with whom she worked always knew where she was, even when she was not at work. She says she always complied with the Member’s instructions.
- 6 Whether or not misconduct occurred does not depend on proof of a contravention of a policy or procedure, whether it be formal or informal. The real question is whether Ms Spasojevic acted knowingly and dishonestly by claiming benefits that she was not entitled to receive. An employee’s duty of fidelity and good faith is fundamental to employment. Dishonestly receiving unearned benefits is inimical to this duty. So, in determining whether Ms Spasojevic has committed misconduct or not, the purpose and nature of leave entitlements is paramount.
- 7 Four witnesses gave evidence to the Board. The Speaker relied on the evidence of Ms Spasojevic’s co-workers, Ms Slobadanka Goricanec and Ms Zoey McMillan. Both worked with Ms Spasojevic as Electorate Officers. Their evidence concerned the practices for applying for leave and recording leave taken.
- 8 The Speaker also called Ms Jane Meehan. At the relevant time, she was the Principal Human Resources Advisor within People and Governance Services, Department of the Premier and Cabinet. Her evidence was about what employees were told about leave and the systems for processing and recording employee leave. She also talked about the circumstances leading to the investigation of Ms Spasojevic’s leave history, the making of the allegations of misconduct, and the investigation into those allegations.
- 9 Ms Spasojevic gave evidence about the processes concerning taking leave as she understood them, and the circumstances relevant to each of the allegations against her.
- 10 Many documents were provided to the Board. In these reasons we do not make specific reference to all aspects of the witnesses’ evidence or all of the documents. We have, nonetheless, fully considered all of the documents and evidence relevant to the issues for determination in arriving at our ultimate conclusions.

### Board's jurisdiction and approach in appeals

- 11 The parties agree, and we find, that Ms Spasojevic was a 'government officer' for the purpose of Part IIA, Division 2 of the *Industrial Relations Act 1979* (WA) (**IR Act**). Accordingly, Ms Spasojevic has standing to appeal the decision to dismiss her under to s 80I(1)(d) of the *IR Act*.
- 12 The principles that apply in determining appeals under s 80I are also agreed. We summarised those principles in *Spasojevic v Speaker of the Legislative Assembly* [2022] WAIRC 00165; (2022) 102 WAIG 322 at [16]-[20]. There is no need for us to repeat those principles here.
- 13 The Board must determine the appeal afresh from the start (de novo). The Speaker submits that in this process, the decision of the employer is not to be ignored: *Pantovic v Public Transport Authority of Western Australia* [2011] WAIRC 00876; (2011) 91 WAIG 2094 at [88] and the Board should be 'slow to disagree' with the employer's decision: *Milentis v The Honourable Minister for Education* (1987) 67 WAIG 1124 at 1126. However, in this case, the Speaker did not express any reasoning for its decision in its written dismissal decision. Indeed, it is not clear what, if any findings the Speaker made to ultimately find the allegations against Ms Spasojevic substantiated.
- 14 In these circumstances, the Board is required to re-hear every aspect of the allegations afresh. The Board is really required to decide for itself whether misconduct occurred, and substitute its own view for that of the employer.

### Ms Spasojevic's employment as an Electorate Officer

- 15 The following matters about Ms Spasojevic's employment and the work of Electorate Officers were largely uncontentious.
- 16 Ms Spasojevic commenced employment as a part-time Research Officer in the electorate office of the Member for Kwinana, the Honourable Roger Cook MLA (**Minister**), on 11 March 2011. On 30 June 2017, her position was made redundant, and she ceased that employment.
- 17 Ms Spasojevic commenced a second period of employment, in the same electorate office, on 6 November 2017. The employment was part-time, four days a week, until 28 April 2019. She was paid at the highest salary increment of ER7 under the then operative *Electorate and Research Employees General Agreement 2014*.
- 18 Between 30 August 2018 and 7 March 2019, Ms Spasojevic worked a fifth day each week, Thursday, in a different electorate office for another MP.
- 19 From 28 April 2019, Ms Spasojevic worked full-time, that is, five days a week, in the Kwinana electorate office.
- 20 Electorate Officers are employed under the *Parliamentary and Electorate Staff (Employment) Act 1992* (WA). Under that Act, the Speaker is the employing authority of an Electorate Officer for Members of the Legislative Assembly.
- 21 According to the Job Description Form (**JDF**), an Electorate Officer's primary role is to be the initial point of contact for all constituent enquiries. The position's responsibilities include assisting constituents, providing advocacy, liaising with government agencies, Ministerial officers and other MPs. There are also a range of administrative functions relating to the operation of the electorate office and in support of the relevant MP.
- 22 The JDF for the position requires Electorate Officers to 'Develop and maintain accurate and correct record keeping system for correspondences and documentations'.
- 23 Electorate officers report to the relevant MP as their line manager, who in turn reports to the Speaker as the employing authority.
- 24 Ordinarily, each MP is entitled to two full-time equivalent Electorate Officers/Research Officers. Mainly for safety reasons, electorate offices are encouraged to have two staff present in the electorate office at any one time. This means that, if an electorate office has only two full-time staff, and one staff member takes leave, relief cover is generally required to ensure at least two Electorate Officers are present in the office.
- 25 Each electorate office has a budget of 150 hours of relief cover to draw from, beyond which approval for additional hours is required. Ordinarily, this incentivised 'judicious' use of relief hours.
- 26 The Minister was approved for three full-time equivalent Electorate Officers. This was because his role as Deputy Premier, Minister for Health and Mental Health, meant that his electorate office would deal with a broader range of issues and a more significant workload compared with other electorate offices.
- 27 As a consequence, when a staff member in the Kwinana electorate office was on leave, there would ordinarily remain two other staff present, so relief was often not required to maintain the minimum staffing levels.
- 28 Full-time hours for Electorate Officers are 37.5 hours per week. An MP may approve flexible working arrangements: *Parliamentary Electorate Office Handbook (PEO Handbook)* paragraph 2.1.
- 29 As at the time of her engagement in November 2017, Ms Spasojevic suffered from several long-standing medical issues relating to her diagnosis of Type 1 Diabetes. She had to attend medical appointments from time to time for various reasons. She had regular medical appointments every Monday morning and Thursday morning.
- 30 Ms Spasojevic had an arrangement with the Minister whereby she was able to take time off work for medical appointments and other matters relating to her medical issues during normal working hours, and make up the time outside of normal working hours, without having to take time off as leave. Flexibility was afforded to her in order to accommodate her medical conditions. Because of this, she understood that she should make herself available to the Minister outside of normal business hours.
- 31 Three other Electorate Officers were employed to work at the Kwinana electorate office: Ms Goricanec, Ms Sherri Bothma and Ms McMillan. Each was employed part-time, to make up a total of three full-time equivalence.

- 32 There was no time recording procedure implemented in the Kwinana electorate office. Electorate office staff were not required to clock-on and off, nor to record their hours of work.
- 33 It was common practice for the Kwinana electorate office staff to ‘duck out’ of the office from time to time and make up that time outside of standard hours.
- 34 Ms McMillan said that Electorate Officers’ regular hours were 9.00 am to 5.00 pm, but staff could, for example, come in at 8.00 am and work until 4.00 pm. She said there was no formal arrangement for time off in lieu but:
- ...There was an understanding, we were all working with other caring roles that there - you know, there may have been times when you had to duck off for an appointment or things like that and there was an understanding around that.
- 35 Ms McMillan agreed that there were possibly around 20 occasions throughout the course of 12 months when she attended to personal matters during work time, without seeking formal approval or making a leave application. She said she would make up the time by working early or late, or working through her lunch break.
- 36 The Minister was physically present at the Kwinana electorate office only occasionally and for short periods. The witnesses disagreed as to precisely how often the Minister attended at the Kwinana electorate office. Ms Spasojevic maintained he attended every Friday throughout her employment. Ms McMillan suggested it was more likely monthly rather than weekly, although she agreed he would generally attend the office on Fridays.
- 37 It is unlikely that the Minister invariably attended the electorate office weekly. On 25 March 2019, Ms Spasojevic wrote an email to the other staff. The email said that it was impossible for the Minister to attend the office weekly. However, nothing really turns on this point. In any case, it is clear that the Electorate Officers were required to work autonomously, and largely without the Minister’s direct supervision.
- 38 There was no formal hierarchy amongst the four staff employed at the Kwinana electorate office. No one Electorate Officer had a formal direct reporting line to another Electorate Officer. But Ms Spasojevic was the most experienced of the four Electorate Officers and had worked with the Minister for the longest time cumulatively. We consider further the evidence as to, and consequences of, Ms Spasojevic’s ‘seniority’ in paragraphs [262] to [268] below.
- 39 Ms Spasojevic readily accepted that the position of Electorate Officer required a high degree of trust and confidence, is given a great degree of trust, with a fair degree of autonomy. The nature of the role of an Electorate Officer, arising both from its political context and its position within the public service, is such that Electorate Officers must have a high level of integrity.
- 40 The **Human Resources** Services Branch of the Department of Premier and Cabinet was responsible for administering employment entitlements for Electorate Officers on behalf of the Speaker. It processed leave applications, performed payroll functions and maintained the usual payroll records.
- 41 Ms Spasojevic’s counsel described Ms Spasojevic’s role as involving blurred lines between private and work time, and that Ms Spasojevic was expected to be available 24 hours a day. He did not specify who had this expectation. We accept Ms Spasojevic understood she was to be flexible in her availability as part of the ‘give and take’ of the flexibility afforded to her to accommodate her medical needs; she said: ‘...I believed that I owed [the Minister] to be available’. But we do not accept Ms Spasojevic’s was a 24 hour a day job, or that the Speaker or the Minister required her to be available around the clock.
- 42 Ms Spasojevic said that she received calls from the Minister sometimes at 2.00 am or 3.00 am. However, she did not say how these calls related to her work as an Electorate Officer, only that the Minister spoke to her about things that had happened.
- 43 The duties of an Electorate Officer can and should ordinarily be performed in a normal working day. An Electorate Officer is not an emergency service worker. The fact that until 28 April 2018, Ms Spasojevic worked part-time hours in the Kwinana electorate office and part-time hours for another Member also confirms the reality that the work/private divide was less ‘blurred’ than Ms Spasojevic sought to make out.

#### **The dismissal decision**

- 44 On 1 July 2020, Ms Sharon Basini, from Human Resources, contacted Ms Spasojevic by telephone whilst Ms Spasojevic was working in the electorate office. She told Ms Spasojevic that her employment was no longer required. According to Ms Spasojevic, Ms Basini referred to Ms Spasojevic as having committed fraud because she had not signed leave forms. Ms Basini told Ms Spasojevic that a settlement deed would be sent to her, and that she needed to leave the office immediately.
- 45 Despite what Ms Basini said in this conversation, Ms Spasojevic’s employment was not terminated. Rather, an investigation was commenced during which Ms Spasojevic continued to be employed.
- 46 The Speaker rightly concedes that what occurred on 1 July 2020, including Ms Basini’s conversation with Ms Spasojevic, was ‘messy and unfortunate’.
- 47 In a letter dated 27 July 2020, the Speaker advised Ms Spasojevic that two allegations of suspected misconduct had come to the Speaker’s attention. Ms Spasojevic was invited to respond to the allegations. The two allegations were:

#### **Allegation 1**

You have repeatedly absented yourself from work without prior approval, in breach of your employment duties.

#### **Allegation 2**

On 1 July 2020 you knowingly made false representations that you had worked for the Hon Roger Cook MLA on days that you had not, in breach of your employment duties.

- 48 The letter gave details of Allegation 1, by reference to four separate occasions when Ms Spasojevic was allegedly not at the electorate office. The details are described further below. Allegation 2 referred to Ms Spasojevic’s confirmation, by her

signature, that her Leave Record was correct and up to date, even though her Leave Record allegedly did not accurately reflect her absences and the nature of them, as referred to in Allegation 1.

- 49 In September 2020, the Speaker added two more occasions in support of Allegation 1, making six occasions in total. The additional details related to April 2018 when Ms Spasojevic was in Vietnam, and March 2020, when she was in hospital.
- 50 The allegations are expressed poorly. What is meant by ‘prior approval’? Why is ‘prior approval’ necessary for the proper exercise of the right to be absent from work on annual leave or personal leave? Nevertheless, the details provided made it clear enough that Ms Spasojevic was suspected of abusing her leave entitlements and knowingly obtaining benefits to which she was not entitled, relating to those six absences from work.
- 51 On 15 October 2020, after Ms Spasojevic responded in writing to the allegations, she was summarily dismissed. The letter giving notice of the termination of the employment states:

...

I am satisfied that you repeatedly failed to apply for authorised leave prior to numerous periods of absence from the workplace, including extended periods of absence whilst overseas. The fact that you did not retrospectively apply for authorised leave is an aggravating circumstance. The salary payments made in respect of those periods of absence from the workplace is a financial benefit to which you were not entitled.

I note your explanation that the Hon Roger Cook has generally been aware of your whereabouts and that you answered emails, working remotely and flexibly during periods of absence from the workplace.

For the avoidance of doubt, it is not said that the Hon Roger Cook was unaware that you were periodically absent from the workplace, but rather that you were absent from the workplace without authorised leave...

- 52 Unfortunately, the termination letter does not reveal any reasoning process to get to the implicit finding of misconduct. It does not reveal what precise findings were made in relation to the details of the allegations against Ms Spasojevic. Greater clarity and transparency in reasoning may have helped narrow the dispute between the parties.

#### The purpose and nature of leave entitlements

- 53 The starting point in analysing the issues in this appeal is the well-established industrial principle of no work, no pay. Ms Spasojevic’s entitlement to payment of salary is derived from her contract of employment, which requires that she perform the full range of work assigned to her. Unless that requirement is waived or unless an applicable industrial instrument provides otherwise, payment of salary is conditional upon the performance of work: *Csomore v Public Service Board of New South Wales* (1987) 10 NSWLR 587, per Rogers J at 595.
- 54 Leave entitlements, whether contained in the contract, industrial instruments, or legislation, are exceptions to the primary obligation to perform work. A leave entitlement is an authorised absence from work: *Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors* [2020] HCA 29; (2020) 271 CLR 495 per Gageler J at [47]. See also, *Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU)* [2019] FCAFC 138; (2019) 289 IR 29 at [195]. To state the obvious, paid leave entitlements create an exception to the general principle that work must be performed before there is a liability to pay wages or salary.
- 55 Generally, paid leave provisions in industrial instruments involve two components: the entitlement to be absent from work and the entitlement to be paid in respect of such absence despite not rendering any service: *Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU)* [2019] FCAFC 138; (2019) 289 IR 29 at [147]. There may also be leave entitlements that authorise an absence from work, but do not involve any liability for the employer to pay.
- 56 There is no at large entitlement to take leave. Leave can only be taken in the circumstances set out in the relevant clauses of the industrial instrument creating the leave entitlement: *Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU)* [2019] FCAFC 138; (2019) 289 IR 29 at [72].
- 57 This case is only about paid personal leave and annual leave. The authorisation for Ms Spasojevic to take personal leave was contained in the industrial agreements that applied to her. Between April 2018 and March 2022, the applicable industrial agreements were: *Electorate and Research Employees General Agreement 2014*, *Electorate and Research Employees CSA General Agreement 2017* and *Electorate and Research Employees CSA General Agreement 2019*. Each industrial agreement dealt with personal leave in substantially the same terms: (2014 Agreement Clause 16, 2017 Agreement Clause 17, and 2019 Agreement Clause 22).
- 58 Clause 14 of the *Electorate Officers Award 1986* applied throughout Ms Spasojevic’s employment. It authorised annual leave.
- 59 The purpose of personal leave is to protect employees against loss of earnings when unable to work due to illness, injury or unexpected emergency. Personal leave is not intended for the purpose of ‘recharging the batteries’. That is the role of annual leave.
- 60 Justice Gageler in *Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors* [2020] HCA 29; (2020) 271 CLR 495 made other observations about the nature of personal leave entitlements. Although these observations are directed to the *Fair Work Act 2009* (Cth), they apply equally to the entitlement under the above *Agreements* (citations omitted):

[77] By operation of s 97(a) of the *Fair Work Act*, paid personal/carer’s leave can be taken “because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee”. In that respect, paid personal/carer’s leave is the modern equivalent of what used to be known as “sick pay” or paid “sick leave”: “the

right of an employee to receive [their] ordinary wages in respect of a period during which [they are] unable, by reason of sickness or accident, to perform [their] duties". Sickness being "a misfortune to which all are subject", sick leave protects employees against the hardship associated with the loss of earnings they would have expected to earn had they been well. By operation of s 97(b), paid personal/carer's leave can only otherwise be taken "to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of ... a personal illness, or personal injury ... or ... an unexpected emergency affecting the member". In that respect, paid personal/carer's leave is an extension of sick leave designed to assist employees in reconciling their employment and family responsibilities.

- [78] Procedural rules safeguard against "sickies". An employee taking paid personal/carer's leave must give the employer notice of the period or the expected period of the leave and, if required by the employer, must give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in s 97(a) or (b).
- [79] By operation of s 99, "the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work" during whatever period the employee takes paid personal/carer's leave within the scope of the employee's accrued entitlement.
- [80] The nature of the entitlement that appears when s 96(1) is read in combination with ss 97(a) and (b) and 99 was well-stated by Bromberg and Rangiah JJ in the decision under appeal. They described paid personal/carer's leave as "a statutory form of income protection ... provided by *authorising* employees to be absent from work during periods of illness or injury and requiring employers to pay employees as if they had not been absent". Illness and injury, it need hardly be said, tend to be random in their occurrence as, by definition, do unexpected emergencies. Effects of those contingencies on fitness for work tend in human experience to be felt more in days or parts of days than in hours or parts of hours. The entitlement to paid personal/carer's leave ensures that, if, when, and for so long as, illness, injury or unexpected emergency results in unfitness of an employee for work, the employee continues to receive the base rate of pay that the employee would have received had the contingency not occurred.
- 61 When Gageler J observed that procedural rules safeguard against 'sickies', his Honour was averting to abuse of the entitlement by paid absence from work in circumstances that do not qualify for the entitlement. The procedural rules, however, do not condition the entitlement. The entitlement depends, relevantly, on an employee being unfit for work due to an illness or injury.
- 62 While there may be procedural rules, processes and procedures designed to prevent the abuse of leave entitlements, compliance with the procedure does not, in and of itself, give rise to an entitlement to the benefit. The preconditions for the benefit must always be met. The other side of the coin is that satisfying the procedural rules is not, in and of itself, conclusive as to whether there has been an abuse of the entitlement. Rules can be used dishonestly, just as they can be improperly evaded.
- 63 So, when speaking about whether leave is authorised or not, the authorisation is not to be sought in any process, form, or signature but rather in the terms of the applicable industrial instrument. The processes, forms, etc. are relevant only to the extent that the industrial instrument, the source of the entitlement and authorisation for the leave, requires them. To this extent, we agree with Ms Spasojevic's counsel's submission that the PEO Handbook is the wrong measure against which Ms Spasojevic's conduct is to be assessed.
- 64 Further, the measure of whether Ms Spasojevic has engaged in misconduct is not answered by determining what process existed for employees seeking access to paid leave. Rather, the relevant questions are whether Ms Spasojevic was entitled to the leave benefits? If not, was she dishonest in her receipt of them?

**Can Ms Spasojevic rely on an 'informal system' for approval of leave?**

- 65 A large amount of evidence concerned the documented processes for applying to take leave, and the processes the Electorate Officers in the Kwinana electorate office followed in practice. Ms Spasojevic says there was an informal system pursuant to which her leave was authorised verbally, and it was not necessary to submit leave application forms.
- 66 As already indicated, the ultimate question is not which process Ms Spasojevic had to comply with, but whether she was entitled to the benefits she claimed. The processes are the vehicles used to claim the benefits.
- 67 For other reasons, Ms Spasojevic's case about an informal system leads to a dead end. She asserts in a general way that her leave was approved verbally and that she was excused from making leave applications. But she did complete leave application forms for four of the six occasions. For the other two occasions, her reason for not submitting a leave application form was that she was working, that is, not on leave. In respect of those absences, the overarching case that her leave was approved verbally has no role to play.
- 68 Even if this theme in Ms Spasojevic's case was relevant, we are not persuaded that it was okay for her to be absent from work without providing accurate leave application forms to Human Resources, except in the case of the Christmas shutdown, and instances of 'ducking out' of the office and making up the time out of ordinary hours. Nor are we persuaded that she believed that it was okay, either.
- 69 From time to time, Human Resources issued and updated the PEO Handbook. There are several versions of the PEO Handbook in evidence. Their content does not differ in any material way in relation to leave application processes. Ms Spasojevic had at least one version of the PEO Handbook and was aware of its provisions in relation to the taking of leave.
- 70 The PEO Handbook requires leave applications to 'be submitted via completion of an Application for Leave form, which is available on [the intranet for Electorate Officers, known as] EO Net. The type of leave sought must be clearly indicated and signed by the Member and forwarded to [Human Resources]'.
- 71 At least two versions of leave application forms were available to and used by Electorate Officers. Each version contained a space where the type of leave being applied for could be inserted, as well as the dates of the leave and the number of hours or

days. There was also a space for the signature of the employee applying for leave and a space for the MP to sign the application as 'approved'.

- 72 On the face of the leave application form, the MP's signature is expressed as 'approval' of an 'application for leave'. The MP is not purporting to grant the leave, but only to approve of the employee applying for leave. Put another way, the approval confirms the MP has knowledge of, and agrees to, the absence from work. It does not go any further than that. Critically, it does not in and of itself entitle the staff member to be paid for the absence.
- 73 Obviously, the MP's signature on a leave application form for a specified period of leave cannot be agreement, approval or authorisation for periods of leave not specified on the form. So, for example, if a staff member submits a form for three days' leave, the MP's signature on the form cannot be taken to be an agreement for leave to be taken beyond the three days specified. Nor does it amount to an agreement that the staff member need not make other applications for leave for absences that might extend beyond the three days referred to.
- 74 The forms do not suggest that the leave is 'authorised' by the MP's signature in the sense of creating the right to the leave. This is consistent with the fact that neither personal nor annual leave require 'authorisation' beyond meeting the entitlement conditions. If the conditions for taking the leave are met, an employee is authorised to be absent from work and is entitled to be paid for the absence, subject to having accrued the entitlement. The nature of the entitlement is such that the presentation of a form cannot create or determine any rights or obligations. The form simply serves as an administrative tool for assessing and processing the leave entitlements.
- 75 Taking the example of annual leave, the conditions for exercising the entitlement are first, that the leave has accrued to the employee, and second, that the employer approves the time the leave is taken: Award, Clause 14(3)(b). The MP's signature on a leave application form might establish the second condition, that is, approval of the time for leave to be taken. But the signature does not entitle the employee to payment for that period if the employee does not have an accrued annual leave entitlement to cover it. Approval of an absence of eight weeks, where there is an accrued entitlement of only four weeks, cannot have the effect that the employee is entitled to be paid for eight weeks of leave.
- 76 There is no evidence that the Minister had any involvement in maintaining Electorate Officer payroll or leave records. The Minister was not responsible for preparing or submitting leave forms to Human Resources. This was done by the Electorate Officers. There is no evidence that the Minister would or should have any knowledge of what leave entitlements Electorate Officers have used or accrued. Rather, Ms Meehan's unchallenged evidence was that it was Human Resources' responsibility to administer payroll and leave accruals, and to maintain records in relation to those matters.
- 77 So, when an MP 'approves' a 'leave application' they are not doing anything determinative of the Electorate Officer's entitlement to be paid for the absence. Rather, the MP's approval of the leave application is a step in the process required for Human Resources to then assess the application for leave, determine what entitlements are available and should be paid, process payment and make and keep the required records.
- 78 There was ample evidence showing that Electorate Officers in the Kwinana electorate office, including Ms Spasojevic, followed the procedure set out in the PEO Handbook. They completed the forms provided on EO Net before or after taking a period of leave, presented the form for signing by the Minister, and submitted the form to Human Resources once signed. The Electorate Officer making the leave application completed the forms and mostly submitted them to Human Resources. Sometimes they would leave the completed and signed application form for one of the other Electorate Officers to submit to Human Resources on their behalf (usually by email copied to the applying Electorate Officer).
- 79 Ms Spasojevic submits that, in practice, the Minister had virtually complete discretion and autonomy in relation to how the electorate office was run. However, even if the Minister's discretions and instructions overrode documented procedures for the running of the electorate office, the Minister clearly had no involvement in or control over payroll. There was no evidence of the Minister ever giving instructions about payments to be made to Ms Spasojevic, or about deductions to leave accruals. It was not seriously suggested he had the right to. Ms Spasojevic submitted that it was the Minister's instruction that she had to follow, not the PEO Handbook. But there is simply no instruction from the Minister to the effect that Ms Spasojevic be paid without deduction of annual leave accruals for the annual leave she took.
- 80 This shows that there is no scope for Ms Spasojevic's theory that there was an informal process for approval of leave, or that her leave could be approved verbally by the Minister. That case is simply inconsistent with the nature of leave entitlements and how those entitlements can be used.
- 81 Part of Ms Spasojevic's case about there being an informal system for approving leave was that in the Kwinana electorate office, there was a practice whereby no leave application form was required if relief staff was not required to cover the absence. Again, the factors we have discussed above leave no scope for such a system. In any event, we do not accept there was, in fact, such a system.
- 82 The Minister was not always willing to approve the use of relief staff to cover for Ms Spasojevic's absences. We accept that there were occasions when the Minister told Ms Spasojevic that it was not necessary that she apply for relief cover for periods when she was absent from work. Naturally, the Minister could expect that between the three other permanent Electorate Officers, Ms Spasojevic's absence did not require relief to ensure minimum staffing levels were maintained.
- 83 There is no evidence that waiving the requirement for leave forms unless relief was required was generally practiced, other than Ms Spasojevic's assertion that this was so.
- 84 Ms Spasojevic asks the Board to equate the Minister's desire not to engage relief staff with excusing her from applying for leave at all. It hardly needs to be stated that the issue of arranging relief and the entitlement to take and be paid for leave are entirely separate issues. The Minister's indication of a preference not to arrange relief says nothing about Ms Spasojevic's entitlement to be absent from work and her entitlement to payment for absences. Ms Spasojevic knew, or ought to have known,

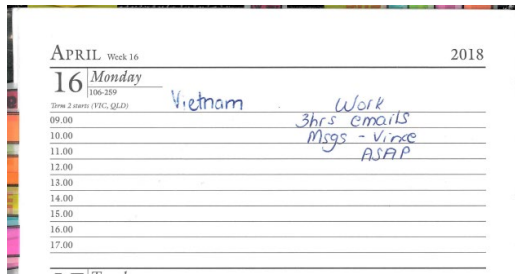
that relief and leave were separate issues, including because one form of leave application she herself filled out on many occasions prompted her to select 'Relief required: Yes/No'.

- 85 When relief was required, Human Resources needed to be involved, and would be alerted to the fact of a permanent Electorate Officer's absence. This would trigger a check on whether an application for leave had been made. Ms Spasojevic knew this. When no relief was required to cover Ms Spasojevic's absences, this created an opportunity for Ms Spasojevic to not apply for leave and so preserve her leave accruals, without being caught.
- 86 Ms Spasojevic knew, or reasonably ought to have known, that there was no place for an informal arrangement excusing her from submitting leave application forms to Human Resources for periods when she was taking leave. She must also have known that she had a duty to ensure the accuracy of her own leave records because:
- (a) In 2014, she had taken leave in excess of her leave credits, and was required to pay back a salary overpayment.
  - (b) In 2014, Human Resources told her that it had not received leave application forms for the entire period of an absence, and she agreed to complete the forms and submit them upon her return from leave. She then retrospectively completed leave application forms and submitted them. She included an application for leave without pay for 13 days because her absence exceeded her accrued entitlements.
  - (c) All queries and correspondence about Ms Spasojevic's leave were between Ms Spasojevic and Human Resources without any involvement of the Minister. The Minister was not privy to such exchanges and had no input into them.
  - (d) Ms Spasojevic stated that she agreed that the Minister relied upon the Electorate Officers to give him leave forms to sign, and relied on the Electorate Officers to submit the signed forms to Human Resources.

**First Absence: Did Ms Spasojevic commit misconduct when taking personal leave to travel to Vietnam?**

- 87 In about March 2018, Ms Spasojevic's husband bought a 'Luxury Escape' package for a trip to Vietnam. According to Ms Spasojevic, on or about 9 March 2018 she attended a staff meeting where she told the Minister about the Luxury Escape package, but that her doctor had not given her clearance to fly. She told the Minister, 'I need the week off. Whether I get clearance to go to Vietnam or not, I need the week off'. According to Ms Spasojevic, the Minister responded, 'That's fine'. He also said that it would not be necessary to organise any relief staff, as Ms Goricane and Ms McMillan could provide cover.
- 88 Ms Spasojevic booked flights to Vietnam for her and her family, arriving Saturday, 14 April 2018 and returning on 21 April 2018.
- 89 On 26 March 2018, Ms Spasojevic completed a leave application form for that period. The leave form indicated it was for personal leave for illness or injury from 16 April 2018 to 20 April 2018.
- 90 The Minister signed the form on 27 March 2018. On the same day, he also signed an application for a public service holiday in lieu which Ms Spasojevic submitted, for another unconnected date.
- 91 Ms Spasojevic then travelled to Vietnam with her family on the Luxury Escape package. Consequently, she did not attend work from Monday, 16 April 2018 to Friday, 20 April 2018. She was paid personal leave for this period.
- 92 Clearly, Ms Spasojevic made advance plans to travel to Vietnam to have a holiday with her family.
- 93 We accept Ms Spasojevic's evidence that she discussed her plans to travel to Vietnam with the Minister. Accordingly, the Minister was aware that Ms Spasojevic planned to take a trip to Vietnam for a week at some point after 9 March 2018.
- 94 However, the discussion with the Minister occurred on 9 March 2018, more than a fortnight before the Minister signed the leave form. Further, there is no evidence that Ms Spasojevic told the Minister on 9 March 2018 the dates when she was planning to travel to Vietnam. What she told the Minister was that the Luxury Escape package had 'no date attached to it'. She said to the Minister that she needed a week off, not which week. Nor did she alert the Minister to the fact that the personal leave application form he was signing two weeks later on 27 March 2018, was for the Vietnam trip they had discussed on 9 March 2018.
- 95 Notably, the evidence in relation to this allegation does not amount to a claim that the Minister directed, asked, permitted or instructed Ms Spasojevic not to make an accurate and true application for leave. It is merely evidence that the Minister knew of Ms Spasojevic's plans to travel to Vietnam in the future.
- 96 Ms Spasojevic's evidence was that she 'needed a break' and that she was justified in taking the period as personal leave. Ms Spasojevic said she needed the week off because 'I was tired. I was tired and I was unwell'.
- 97 She obtained a medical certificate that said she was fit to travel. She produced no evidence that she was unfit for work.
- 98 We do not accept that Ms Spasojevic was unfit for work due to illness, qualifying for personal leave. The trip to Vietnam was planned to use the Luxury Escape package her husband had purchased. It was obviously to have a recreational holiday.

- 99 Somewhat at odds with her case that she was unwell and could legitimately claim personal leave for this trip, Ms Spasojevic also sought to defend herself because she did some work while in Vietnam. In this regard, she relied upon an entry in her personal diary for Monday, 16 April 2018:



- 100 For the balance of that week, the only diary entries are the word ‘Vietnam’ on each day (and a crossed-out entry).
- 101 Ms Spasojevic was asked what the 16 April 2018 entry meant. Her response was vague:  
 ...It just put in the work three hours emails messages. Vince - Vince is a constituent that I had to call. Um, I just put that in so not to forget and then arrived back home on Sunday, 22nd.
- Ms Spasojevic provided no other detail of what she was doing on 16 April 2018 relating to this diary entry. Nor did she explain how she could do the job of an Electorate Officer for the Kwinana electorate office from Vietnam.
- 102 Ms Spasojevic also said that she set up meetings for the Minister while she was in Vietnam. In this regard, she relied upon a text message to the Minister at 4.10 pm on the Monday after she returned to Perth, which referred to two meetings scheduled for 18 May 2018.
- 103 We consider Ms Spasojevic’s evidence about this work to be contrived. The text message refers to some input from Ms McMillan, who was in the office in Perth. There is no reference to this work in Ms Spasojevic’s personal diary, even though she recorded work on 16 April 2018. The message was sent towards the end of a full working day, with no explanation as to why, if the meetings were set up the week earlier, the message was not sent sooner. Finally, given the meetings were not to occur for several weeks, and Ms Spasojevic’s evidence was that she needed a break from work, no explanation was given as to why she would do this work during the break she so badly needed.
- 104 On 23 April 2018, the Minister sent Ms Spasojevic a text message saying, ‘Welcome home!’. This shows that the Minister was, at that time, aware that Ms Spasojevic had returned from a trip. It is safe to infer the Minister knew she had travelled to Vietnam, given the evidence of their discussion some six weeks earlier. However, this does not demonstrate that the Minister had directed, condoned, encouraged or required Ms Spasojevic to use personal leave for the trip.
- 105 If Ms Spasojevic wanted to be paid for the time she spent in Vietnam, she ought to have completed an application for annual leave. Instead, she applied for personal leave, knowing that the purpose of the leave was not for illness or injury but rather for a holiday. The fact that she spent some time checking emails or made a call to a constituent during her absence does not detract from the misconduct involved in submitting an application for personal leave for this period.
- 106 By claiming paid personal leave for this period of travel, Ms Spasojevic dishonestly claimed and was paid an amount that she was clearly not entitled to receive. Her attempts to portray the leave as legitimate personal leave demonstrate that she was aware of the purpose of personal leave, and that she knowingly claimed it when not entitled to receive it.
- 107 Misconduct is established.

**Second Absence: Did Ms Spasojevic commit misconduct by failing to apply for leave for dates when she was in Serbia in December 2018 and January 2019?**

- 108 According to Ms Spasojevic, on Friday, 30 November 2018, she had a conversation with the Minister about electorate office staffing arrangements over Christmas and the New Year. In this conversation, the Minister confirmed the electorate office would be closed: ‘as per usual it would be the first week before Christmas’. She explained this was because there were often many functions in the week leading up to Christmas, although why this should mean the electorate office remains closed is not apparent.
- 109 Ms Spasojevic said that during this conversation, she told the Minister she was going to Serbia ‘In part in regards to a house we had bought over there, in part to receive medical treatment’. The Minister said ‘That’s fine’ and suggested she work out the staffing arrangements with the other staff.
- 110 Ms Spasojevic was asked what she discussed with the Minister about her travel:

Mr Heathcote: Did you tell Mr Cook when you were planning to leave?

Ms Spasojevic: Yes, I did.

Mr Heathcote: And what did you tell him? What day were you going to leave?

Ms Spasojevic: I believe I was going to be leaving 13 December 2018 and coming back 21 January 2019.

Mr Heathcote: And did you tell Mr Cook why you were going to Serbia?

Ms Spasojevic: Yes, I did.

Mr Heathcote: So what did you tell him?

- Ms Spasojevic: I told him that we were going to Serbia to visit our family, all of my husband's family and all of my extended family in Serbia. I told him we were going because I was going to get medical treatment over there. And I told him we were going there to renovate or fix up our ski cabin we had purchased.
- Mr Heathcote: And what did he say to that?
- Ms Spasojevic: He said "Yes, sounds great".
- Mr Heathcote: Was there any discussion about the leave to be taken or the form of leave to be taken?
- Ms Spasojevic: Yes, there was.
- Mr Heathcote: What was the substance of that discussion?
- Ms Spasojevic: The substance was do we need relief staff. And I said "I believe that I will need relief staff because I'm going a week before the office is officially closing", which I believe at the time was 19 December.
- Mr Heathcote: Did you discuss whether there was a need for you to make an application for leave?
- Ms Spasojevic: Yes, I did.
- Mr Heathcote: And what was the substance of that discussion?
- Ms Spasojevic: The substance of the discussion was "Okay, get Barry Winmar in for the three or four days before office is closed".
- 111 Notably, in this first version Ms Spasojevic gave of her discussion with the Minister, she made no suggestion that the Minister excused her from having to apply for leave.
- 112 On 3 December 2018, Ms Spasojevic submitted an application to her private health insurer seeking to suspend her insurance cover as she intended to travel overseas from 12 December 2018 to 13 February 2019.
- 113 On 7 December 2018, Ms Spasojevic completed an application to take leave over the period 14 December 2018 to 19 December 2018. She applied for three days of personal leave and one day of public service holiday in lieu, to cover the four days she would ordinarily have worked in that period.
- 114 The Minister signed the leave application form on 9 December 2018.
- 115 After the Minister signed the leave form, Ms Spasojevic submitted the leave application form to Human Resources, together with a medical certificate of Dr Zdenka Papak-Gutovic. The medical certificate is dated 10 December 2018, so it was created after the Minister signed the leave form. Ms Spasojevic's diary contains an entry on 10 December 2018 at 9.30 am for an appointment with 'Zdenka'.
- 116 This timing of the General Practitioner's appointment is remarkable, because it shows Ms Spasojevic sought a medical certificate to support a personal leave application she had already completed and presented to the Minister. That is, she sought personal leave before she had medical certification regarding her fitness for work.
- 117 The medical certificate states:
- This is to certify that Mrs Sanja Spasojevic is receiving medical treatment.
- She will be unfit to continue her usual occupation for the period of 13/12/2018 to 19/12/2018 inclusive.
- 118 Inexplicably, the medical certificate says nothing of Ms Spasojevic's fitness for work on the date of the appointment, 10 December 2018, nor why her fitness for work status had suddenly changed between 10 and 13 December 2018.
- 119 Ms Spasojevic described the circumstances in which she obtained the certificate:
- ...I was unwell and I was afraid that I would not be able to travel to Serbia, so I had to have treatment, which I believe were antibiotics.
- 120 This obtuse account emphasises how artificial the medical certificate was. If her evidence was accepted as true, the medical treatment presumably improved her health to enable her to travel to Serbia on 12 December 2018.
- 121 Around this time, Ms Spasojevic had also applied for personal leave from her employment in the other MP's office. Her application in relation to the other MP included 20 December 2018, which fell outside the period covered by the medical certificate.
- 122 By an email to Ms Spasojevic of 11 December 2018, Human Resources queried the discrepancy in the dates between the medical certificate and the leave application forms. Ms Spasojevic responded that:
- ...I will not be taking leave for the whole time as some are just appointments and tests.
- 123 This was a lie. Ms Spasojevic knew she was going to be absent from work on all dates in that period, as she was going to be travelling and overseas. By this time, she had a confirmed travel itinerary for business class flights with Qatar Airways returning 21 January 2019. Even on her own account, the medical certificate had nothing to do with appointments and tests. She did not produce any evidence that she had scheduled appointments or tests, although she told the Board she intended to have hyperbaric chamber therapy in Serbia.
- 124 In any event, Ms Spasojevic's email, in turn, prompted Human Resources to advise her that:
- You can only use Personal leave if you are ill so I will process all the leave dates past 19/12/18 as Annual Leave...
- 125 There was only one date past 19 December 2018 included in the leave application, namely, 20 December 2018.

126 On 11 December 2018, Ms Spasojevic asked Human Resources:

...Can I use Cultural Leave in January as that is when I celebrate Serbian Orthodox Christmas, New Year and Saints Day...

127 This email confirms that Ms Spasojevic was aware of the need to apply for leave for the time she intended to be absent from work in January 2019 while she remained in Serbia. It also confirms that she did not believe the Minister's approval of her personal leave application form on 9 December 2018, or any earlier conversation with him, amounted to authorisation for her intended January 2019 absence.

128 Human Resources responded to Ms Spasojevic:

Personal leave is to be taken if you are ill or looking after someone who is – like a sick child for example. It can be used for unanticipated matters of an urgent nature – like your hot water system stopped working or car broke down.

Cultural Leave is an entitlement under the Award but it is taken off your annual or long service leave credits.

Basically you need to take annual or LSL for this type of leave.

...

129 At this point, Ms Spasojevic should have applied for annual leave at least for the period in January when she planned to be overseas and not at work. She did not make any such application.

130 In re-examination, Ms Spasojevic suggested, for the first time, that she had spoken to another person in Human Resources, Ms Mei Wood, to ask her whether she needed to provide medical certificates while she was overseas. She said she was told:

“No, Sanja, that's not necessary. Talk to your [M]ember. See what he wants to do but we have the medical certificate for the leave...”

131 We have reservations about the truth of Ms Spasojevic's evidence about a discussion with Ms Wood. Ms Spasojevic's email correspondence with Human Resources at that time was with two other people, not Ms Wood. Ms Wood was not copied in, or addressed. There was no explanation as to why either Ms Spasojevic or Ms Wood would instigate a separate and independent exchange about the leave.

132 Ms Spasojevic did not state when this conversation with Ms Wood occurred. If it occurred, it must have been after 10 December 2018 when she had submitted her medical certificate to Human Resources, given Ms Wood referred to having received it. There was no evidence that Ms Spasojevic did then speak to the Minister, as Ms Wood recommended, between 10 December 2018 and 12 December 2018 when she departed for Serbia. Nor did Ms Wood address the need for a leave application form for periods beyond that stated in the medical certificate. The evidence, therefore, does not assist Ms Spasojevic, even if it were accepted.

133 Whatever the situation concerning Ms Wood, the fact that Ms Spasojevic was communicating with Human Resources about her leave entitlements is severely at odds with her case that she was only required to follow the Minister's instructions and guidelines, and not Human Resources'. It also seriously undermines her case that her conduct was not knowingly dishonest.

134 Ms Spasojevic's diary indicates that she left the office at 2.30 pm on 12 December 2018 (not a day when leave was applied for), had her nails done that afternoon before flying out of Perth at 7.00 pm on the evening of 12 December 2018.

135 As things transpired, Ms Spasojevic became unwell while she was overseas and for that reason her return to Perth was delayed until 29 January 2019.

136 For reasons that were not explored in the hearing, but entirely properly, Ms Spasojevic was not paid for personal leave for any of the period she was overseas. She was paid a public service holiday in lieu for 14 December 2018, and annual leave for three days between 15 December 2018 and 20 December 2018. Her ordinary working days in that period would have been 17, 18 and 19 December 2018.

## 21 December 2018

137 Ms Spasojevic was overseas on 21 December 2018 and so not at work. She made no application for leave for this date.

138 Ms Spasojevic says the Minister was aware that she was in Serbia. We readily accept that to be the case. However, more relevantly, she knew well before this date that she would not be at work. The Minister being aware that she was not at work does not explain why she failed to make an application for annual leave.

139 Ms Spasojevic also suggested that 21 December 2018 was during the Kwinana electorate office's shutdown period. This was at odds with Ms McMillan's and Ms Goricanec's evidence that the shutdown period was between Christmas and New Year.

140 By failing to complete and submit an application for leave, the practical effect was that Ms Spasojevic claimed salary for a day when she knew she had no intention of working and did not work. A leave application form was required to ensure that her annual leave accruals were correctly recorded, and she was not paid salary she was not entitled to receive. Further, for reasons set out above, Ms Spasojevic knew this was the effect of her failure, so that her conduct was knowing and deliberate.

141 Given that the Minister knew Ms Spasojevic was in Serbia at this time, does it assist Ms Spasojevic that the Minister:

- (a) signed a leave application form that did not cover this date; and
- (b) failed to insist on a further leave form being submitted for approval?

142 The Minister could have done more to ensure that Ms Spasojevic was fulfilling her obligations and responsibilities in relation to the processing of her leave applications. However, his failure to do so does not assist Ms Spasojevic. As she herself readily accepted, the Minister was a very busy individual. He relied upon her to submit leave application forms. Indeed, her job

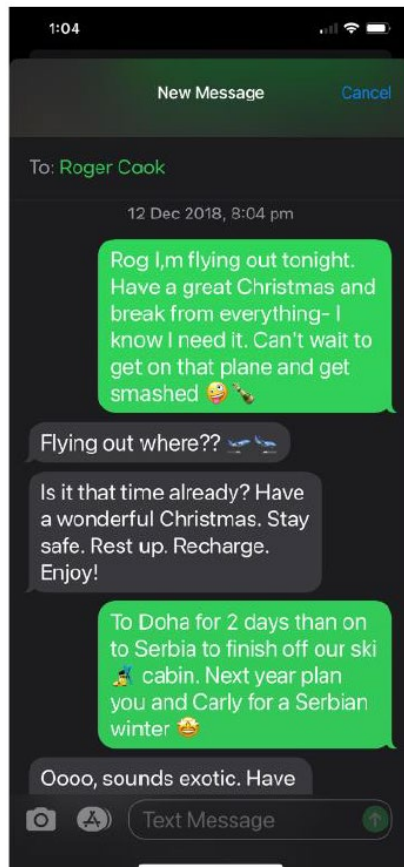
description expressly states that accurate record keeping in relation to the electorate office administration is the Electorate Officers' responsibility, not the Minister's.

143 In her first response to the allegations about this absence from work, Ms Spasojevic said:

I continued to answer emails for the Member and myself and worked remotely and flexibly throughout this time.

144 She also referred to a discussion between her and the Minister in the electorate office on 19 December 2018. However, as she was overseas 19 December 2018, it is not possible that such a discussion occurred. It may be that she was confusing December 2018 with an unrelated discussion in December 2019. That confusion on her part is enough to cast doubt generally over her evidence about what she was doing in this period.

145 There are other reasons to reject Ms Spasojevic's suggestion that she did not have to apply for leave, and was entitled to be paid ordinary salary for this time, because she was working. The following text messages were exchanged between her and the Minister:



146 It is clear from the tone and content of this exchange that Ms Spasojevic's travel was for recreation and a break from work. The references to a 'break from everything', 'rest up' 'recharge' and 'exotic' are all inconsistent with the suggestion that she and the Minister contemplated that she would continue to work as an Electorate Officer, or indeed that she would remain in contact with the Minister whilst overseas.

147 This text message exchange also casts doubt over the truthfulness of Ms Spasojevic's evidence to the effect that she told the Minister in December 2018 that her travel was for the purpose of medical treatment. First, because there is no reference to medical treatment in her text message, which only refers to doing up the ski cabin. Second, if the Minister thought she was travelling for medical reasons, he would be unlikely to suggest the trip sounded 'exotic' or worthy of wishing her a 'great time'.

148 Ms Spasojevic's diary contains no records of any medical appointments until she unexpectedly became unwell. She produced no evidence of any pre-arranged medical treatment or appointments, such as medical reports, appointment reminders or receipts for payment for treatment.

149 During December 2018 and January 2019, Ms Spasojevic did send 13 work emails, which mainly involved on-forwarding emails rather than composing anything substantive. This indicates Ms Spasojevic had access to and was monitoring work emails. This is not working in the sense of performing the duties of an Electorate Officer, entitling her to receive pay.

#### **7, 8, 9-11, 14-16, and 18 January 2019**

150 The Kwinana electorate office was closed from Monday, 24 December 2018 to Friday, 4 January 2019. Staff in the Kwinana electorate office were permitted to take this time off in lieu of additional hours they had worked in the course of the year without making an application for leave.

151 The next day that Ms Spasojevic would ordinarily have worked was 7 January 2019.

- 152 Of course, Ms Spasojevic did not work, because she was overseas. She did not return to work until 30 January 2019. However, because Ms Spasojevic did not submit any leave forms for this period, she was paid salary for the entire period as if she was at work and working.
- 153 Ms Spasojevic submits that she committed no misconduct in failing to submit leave application forms because of a practice known as the ‘skeleton crew arrangement’.
- 154 At this time, there were four employees employed at the Kwinana electorate office, all of whom worked part-time. The electorate office was usually less busy in January compared with other times of the year. At the same time, there was a higher demand amongst staff to take leave, because it was school holidays. Accordingly, an arrangement evolved whereby each part-time Electorate Officer picked up extra hours to work full-time for a week or two in January, and in return, take an entire week of January off work.
- 155 The arrangement was described in the most coherent terms by Ms McMillan:
- ...So because for the two weeks that we – the other two were in the office, you actually did more hours than what you would normally do, so you would normally do – we were all part-time so we would be doing four days a week, um, because you did the additional, you’d do a full week so you’d do five days and you’d done two weeks, you’d got – you’d worked an extra two days. So on the week that you had off, two days were already covered because you’d worked two days and the third day you were already part-time, so you got an additional two days.
- 156 Although this arrangement only accounted for taking three of five working days off work, Ms McMillan frankly stated that no leave application was submitted for the other two days. When asked why that was, she responded:
- ...we understood that the skeleton staff was something we were entitled to...Ms Spasojevic said that she’d spoken to the Member and she had also spoken to other Electorate Officers.
- 157 The Board can infer that the Minister knew about the skeleton crew arrangement, including that he knew Electorate Officers did not make leave applications for time off, because he referred to ‘skeleton crew’ in a text to Ms Spasojevic in January 2018.
- 158 The difficulty for Ms Spasojevic is that in 2018/2019, she did not participate in the skeleton crew arrangement, so it is not available to her as a justification for not applying for leave. Ms Spasojevic had not agreed to, and had no intention of, working additional hours in January as a quid pro quo for taking time off. Although Ms Spasojevic was originally planning to work the week following her planned return to Perth on 21 January 2019:
- (a) According to the Flight Itinerary, the first day in that week, 21 January 2018, Ms Spasojevic would still be travelling, not being due to return until the evening.
  - (b) Ms Spasojevic would ordinarily have worked in the other MP’s electorate office on the Thursday of that week, 24 January 2019, and was therefore not available to work any additional hours in the week (She had only applied for leave from the other Member’s electorate office until 17 January 2019).
- 159 Rather than work additional hours to earn a week off, Ms Spasojevic would have worked fewer hours even in the week of January that she was planning to work.
- 160 After Ms Spasojevic gave the evidence referred to in paragraph [110] above, she revised her evidence about the 30 November 2018 conversation with the Minister. On this second occasion she said:
- Mr Heathcote: Okay, so this other leave form related to the other side of the Christmas break?
- Ms Spasojevic: That’s right.
- Mr Heathcote: - - - when you were supposed to be doing the skeleton. What about the period of time in the middle?
- Ms Spasojevic: No.
- Mr Heathcote: You didn’t make a leave application for that?
- Ms Spasojevic: No.
- Mr Heathcote: Why not?
- Ms Spasojevic: Roger Cook did not want us to make an application.
- Mr Heathcote: How do you know that?
- Ms Spasojevic: He told me.
- Mr Heathcote: So in a conversation?
- Ms Spasojevic: Yes.
- Mr Heathcote: When?
- Ms Spasojevic: I believe it was during the Cockburn Civic Dinner.
- Mr Heathcote: That’s the discussion in November?
- Ms Spasojevic: Yes.

This was quite different to the account of the conversation as set out in paragraph [110] above. Ms Spasojevic’s evidence did not answer the question put to her, which was about her own leave. Her answer was about ‘us’, meaning all Electorate Officers. The other Electorate Officers were working skeleton crew arrangements in January.

- 161 We accept the Minister did not expect the Electorate Officers to apply for leave if they were participating in the skeleton crew arrangement. The expectation does not cover Ms Spasojevic who did not participate in the skeleton crew arrangement.
- 162 We reject the suggestion that the skeleton crew arrangement justified Ms Spasojevic's failure to apply for annual leave for her travel in January 2019. At best, the arrangement merely reflected a quieter period during which Ms Spasojevic was able to remain away from the workplace, without significant disruption to her co-workers.

### **21-23 and 25 January 2019**

- 163 As things transpired, Ms Spasojevic became unwell whilst overseas, with an infection to her toe. This delayed her return to work, so she did not work the week commencing 21 January 2019 as planned. She advised the Minister that her return to Perth from overseas would be delayed.
- 164 These events may have entitled Ms Spasojevic to be absent from work because she was unfit due to illness or injury. She may have been entitled to be paid personal leave for this period, provided she had personal leave accrued to her, and she met the notice and evidentiary requirements.
- 165 Ms Spasojevic did not claim personal leave. She submitted no leave form for this period. She received her normal salary as if she was at work and working.
- 166 Originally, Ms Spasojevic explained she completed a leave form. When asked what happened to her leave application form, she said 'Roger said that it wasn't necessary, so Ms Pusic did not get paid. He would not sign her leave form or mine. He said that Ms McMillan and Ms Goricanec could do it'. This evidence does not make sense. Ms Danijela Pusic had not taken leave and had no reason to submit a leave form.
- 167 Later, returning to this topic, Ms Spasojevic said this discussion occurred on her return to work on Friday, 1 February 2019. She explained Ms Pusic was the relief staffer who had relieved her in the last week of January. She gave a different account of the conversation:

...Roger told me that it was not necessary for me to submit a leave form and I told him that then Danijela wouldn't be paid and he said it was fine because Boba and Zoey were okay, it's the two of them. He seemed a little angry and said "They can handle it". So I called Danijela and I said "I'm sorry, Roger will not be signing the form for you to be paid"...

- 168 This slightly more comprehensive evidence about the discussion shows it was not really about a leave form at all, but about relief arrangements.
- 169 We note that in Ms Spasojevic's diary for this date, there is an entry: 'Spoke to Roger about Dani P relief'.
- 170 There is no logical reason for the Minister to be 'angry' and seek to deprive a relief worker of entitlements, while at the same time apparently intending to give Ms Spasojevic the benefit of being paid, whilst not working and not having accrued leave deducted.
- 171 Finally, the Minister's references to Boba and Zoey 'handling it' have no apparent relevance to the subject of Ms Spasojevic applying for leave. Rather, such comments would more naturally be directed at whether relief was required, consistent with the diary entry referring to a discussion about 'relief' not 'leave'.
- 172 We accept that a discussion between the Minister and Ms Spasojevic did occur on 1 February 2019, but the discussion concerned the application for relief cover for the previous week, not whether Ms Spasojevic needed to make an application for leave for her absence. We also infer that based on that discussion, Ms Spasojevic decided for herself not to make an application for leave, and accordingly she did not do so, confident that the omission would not be discovered by Human Resources.
- 173 In cross-examination, it was put to Ms Spasojevic that she did not complete a leave form for annual leave for the period covering December 2018 to January 2019. Ms Spasojevic answered, 'I submitted an annual leave form for the last week when I had a relief staffer'.
- 174 Ms Spasojevic appeared to be making her evidence up as she went. There was no reason for her to submit an annual leave application, as opposed to a personal leave application, for the last week in January. Also, no suggestion was ever made by Ms Spasojevic in her responses to the allegations or in her evidence in chief that she had completed an annual leave application.
- 175 Ms Spasojevic knew that in the absence of an application for leave being submitted, she would receive payment of salary as if she was working, and her personal leave accruals would not be deducted. Accordingly, she knew she improperly benefited from not making an application for leave.

### **Third Absence: Did Ms Spasojevic work on 4-6 June 2019?**

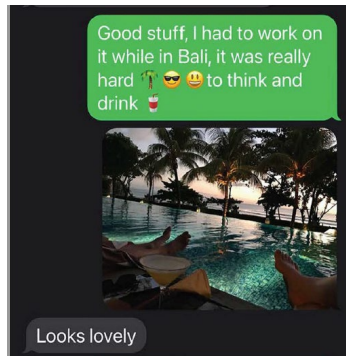
- 176 The issue in relation to this absence is simply whether Ms Spasojevic was working on these dates, or not.
- 177 Monday, 3 June 2019, was a public holiday.
- 178 Ms Spasojevic said that she had a hospital appointment at 1.30 pm on 4 June 2019. It was a recurring six-weekly appointment. However, she believes she was at work before and after the appointment. This was despite the fact that she filed a Response to a Notice to Admit Facts, in which she admitted that she was not present at the Kwinana electorate office on 4 June 2019. In the Response, she said she was working from home that day.
- 179 The Speaker relied on this admission. The Speaker also relied upon Ms McMillan's evidence that Ms Spasojevic was not at work on 4 June 2019. Ms McMillan states that she kept a note of Ms Spasojevic's absences, and her note indicated that Ms Spasojevic was not working. Ms McMillan's note was fairly rough. It appeared to be recorded on a mobile phone over a period of time. Although Ms McMillan was not cross-examined on the accuracy of the note, it contained some obvious inaccuracies, including duplicated entries for '6/6' and reference to a date that fell on a weekend. Despite this, Ms McMillan confirmed the record was 'correct'.

- 180 It is agreed that Ms Spasojevic was at work on the morning of 5 June 2019, but left at around midday. Ms Spasojevic says she was unwell on the afternoon of 5 June 2019 and the full day of 6 June 2019, and so worked from home on these dates.
- 181 Ms Spasojevic supplied a screen shot of a text message from her to Ms Goricanec and Ms McMillan in which she informs them she has a temperature and mild flu symptoms, and asks what they think about her working from home the following day, 6 June 2019.
- 182 Ms Spasojevic could not have performed the full range of her duties as an Electorate Officer from home. In particular, she could not deal with constituents who walk into the electorate office, or take telephone calls to the electorate office, as the number for the electorate office was not diverted to Ms Spasojevic's home or mobile telephone.
- 183 However, we accept that Ms Spasojevic could perform some of the duties of an Electorate Officer from home on a short-term basis. She could, for example, deal with emails from constituents, and liaise between the Minister and other parties. In this regard, Ms Spasojevic's evidence was that in January 2018, the Minister approved a home office to be set up for the specific purpose of working from home. She said she had access to the same software and programs that she used when in the office.
- 184 Accordingly, it is not improbable that Ms Spasojevic was performing work from home on 5 and 6 June 2019.
- 185 For these days, the Speaker has not discharged the onus on it of establishing that Ms Spasojevic was not working, nor that these were days when she was obliged, but failed, to submit an application for leave.

**Fourth Absence: Did Ms Spasojevic fail to apply for annual leave for her trip to Bali?**

- 186 Ms Spasojevic travelled to Bali between 17 June 2019 and 21 June 2019. She was paid her normal wages for this period. No accrued leave was deducted in respect of it.
- 187 When the detail about this absence was first put to Ms Spasojevic, her response was simply that the Minister '...has always been aware of where I am and when'. She referred to the text message exchange reproduced at paragraph [197(c)] below.
- 188 At the time of the hearing, Ms Spasojevic's evidence-in-chief was that she spoke to the Minister about completing a leave form for the period she was to be away, and that he said, 'I don't think it's necessary'. She then pointed out to him that relief was required, and asked for relief.
- 189 We find that the Minister was referring to relief as being unnecessary, rather than a leave application form. This is because Ms Spasojevic's response to the Minister was about relief.
- 190 In any event, and regardless of what the Minister did or did not say, Ms Spasojevic told us that she submitted an application for leave. She also agreed that it would have been improper to claim personal leave for this period. Her case was, in effect, that she made the proper application for annual leave for this period. This is another instance where Ms Spasojevic's case that she followed the Minister's instructions gets her nowhere.
- 191 An application for leave for this period was produced. It was for four days' personal leave for the period that coincided with Ms Spasojevic's Bali travel dates. It is not signed by Ms Spasojevic, but it does appear to be completed in her handwriting. It is signed by the Minister, but has no date of signing by him.
- 192 Ms Spasojevic denied that she had ever previously seen this form and denied she had filled it in.
- 193 Ms McMillan told us that she was present at a meeting with the Kwinana electorate office staff and the Minister when the Minister signed this leave application form. Her evidence did not go so far as to verify that she saw Ms Spasojevic complete the form, nor that she saw Ms Spasojevic physically present it to the Minister. However, she did see that the form referred to personal leave, and she thought it was inappropriate for a Bali trip.
- 194 Because of her concerns, Ms McMillan took a photo of the leave application form once it had been scanned into the computer system, on 17 June 2019. She was familiar with Ms Spasojevic's handwriting, and she believed it was Ms Spasojevic's handwriting on the form.
- 195 Ms Meehan's evidence was that no leave application form for this period could be located in Human Resources' records.
- 196 The evidence as a whole in relation to this matter is troubling. Ms Spasojevic maintains that she submitted a leave application. Human Resources denies a leave application form could be located, but somehow a leave application form has been produced, which Ms Spasojevic denies she completed. None of it adds up.
- 197 It seems most probable that Ms Spasojevic did complete the application for personal leave for 17 June 2019 to 21 June 2019. It looks like her handwriting. However, it is not really necessary for the Board to make a positive finding about the personal leave application form. More significantly, we find Ms Spasojevic did not complete or submit an application for annual leave for this trip, despite knowing she ought to have done so. What leads to this conclusion is:
- (a) The first occasion any mention is made by her of completing an application for annual leave was in cross-examination. No mention was made of completing an application for annual leave in any of her responses to the allegations, or in her evidence-in-chief. This omission is inexplicable. The most obvious and best defence to the allegation would have been that a leave application form was properly and accurately completed and submitted.
  - (b) The effect of Ms Spasojevic's evidence-in-chief was that she submitted an application for leave to secure relief cover, despite being told by the Minister, 'I don't think it's necessary'. In re-examination, she explained the reason she believed she submitted a leave form is because she recalled discussing matters with a relief staffer, and for a relief staffer to be working, some approval of relief was needed. This says nothing of the type of leave that was applied for, that is, annual or personal leave.

- (c) Her recent case that an application for annual leave was submitted is inconsistent with what appeared to be the earlier substantive defence to the allegation, which was that Ms Spasojevic was working while she was in Bali. In this regard, she relied on a text message exchange with the Minister dated 25 June 2019 (after her return from leave) in which the Minister commends her for some work she had done. She replied with the following message:



Had Ms Spasojevic genuinely believed that she had applied for annual leave, there would be no reason for her to attempt to portray her holiday as working time in response to the allegations.

- (d) Ms McMillan's evidence that the application for personal leave was presented to the Minister for signing is cogent and supported by the photograph of the same leave form taken on 17 June 2019. If Ms Spasojevic completed an application for personal leave, it is unlikely she would submit an application for annual leave for the same period.

- 198 At the end of the day, the leave was not processed as personal leave or at all. We will not speculate as to why that was the case.
- 199 Less than six months before this date, Ms Spasojevic was advised by Human Resources that personal leave could not be used unless the usual requirements (illness, injury) had been met (see paragraph [128] above). She knew that her trip to Bali did not qualify for payment of personal leave. Had she submitted a personal leave application form, she would have been guilty of misconduct.
- 200 We are unable to find the personal leave application form was submitted, given Human Resources had no record of receiving it. At the end of the day, Ms Spasojevic's misconduct is not the form of leave application made, but her receipt of salary, without deduction of any leave accrual. She knew she was not entitled to receive such benefits. It was her knowing conduct that created this situation.

#### **Fifth Absence: Did Ms Spasojevic work on 1 July 2019?**

- 201 Ms Spasojevic admits she was not present at the electorate office in the morning of 1 July 2019 because she was attending a hospital appointment.
- 202 Ms Spasojevic says she returned to the electorate office by 12.00 pm and continued to work until 8.00 pm, making up her hours. She referred to a diary entry she made. It records times that other electorate office staff went to lunch and left the office.
- 203 To prove this instance of misconduct, the Speaker relied upon Ms McMillan's evidence. Ms McMillan, in turn, relied upon the note that she made that Ms Spasojevic was 'not in' on this date.
- 204 Again, the informal nature of Ms McMillan's notes of Ms Spasojevic's attendance in the electorate office means we are not confident of its accuracy. It is possible that the note was made in the morning, whilst Ms Spasojevic was attending a medical appointment. It is therefore plausible that Ms Spasojevic did attend the electorate office after the medical appointment and worked late, consistent with the records in Ms Spasojevic's diary, or that Ms McMillan was out when Ms Spasojevic was in.
- 205 The Speaker has not proven misconduct in respect of this absence.

#### **Sixth Absence: Did Ms Spasojevic commit misconduct by applying for only 2 days' personal leave when she was in hospital for eight days?**

- 206 Ms Spasojevic was very ill on 9 March 2020. She was admitted to hospital that day and was discharged on the afternoon of 18 March 2020. She was absent from work for eight days which she ordinarily would have worked.
- 207 Ms Spasojevic produced various text messages between herself, her husband and the Minister, which showed that the Minister knew she was not at work and was in hospital for this entire period.
- 208 When she returned to work on 24 March 2020, Ms Spasojevic signed a leave application form seeking approval of personal leave 'for the period 10 March to 17 March'. In the box 'total days', she wrote '2'. Under 'number of hours', she wrote '15'. The form does not include 18 March 2020. The effect is that the application for leave form seeks leave for only two days in a period which involved eight working days.
- 209 The Minister signed the form on 26 March 2020.
- 210 The entries of two days and 15 hours appear to be in the same handwriting but a different pen to the other parts of the form. It is possible that these entries were inserted after the form was signed by the Minister, but this was not put to Ms Spasojevic in cross-examination. She said only that the form was entirely in her handwriting, that she filled it in and completed it to reflect the days that relief staff were needed. The Minister did not give evidence.
- 211 In answer to her own counsel's question about whether she had discussions with the Minister about the need to apply for leave for this period, Ms Spasojevic said that while she was in hospital she contacted the Minister and told him that she would need to put in an application for relief staff, and he said 'Why?' This is another instance of Ms Spasojevic either conflating the

separate issues of relief and leave in her own mind or attempting to sidestep the question of leave in the hope the Board would confuse relief with leave. A discussion with the Minister about the need for relief is not a discussion about the need to complete and submit a leave application form or to otherwise takes steps to ensure the period was properly paid for and recorded.

- 212 Another exchange highlights Ms Spasojevic's fallacy. In re-examination, Ms Spasojevic's counsel asked her why she had only applied for two days' leave. Her response was that Ms Goricaneč had contacted her and said that they needed a relief staffer for the two Tuesdays of the period, because Ms Goricaneč was not at work on those days. It would follow, from this response, that if no relief was required, Ms Spasojevic would not have regarded herself as being required to submit any leave application form at all. It is untenable that she would believe no leave application form would be required for this significant absence simply because no one asked for relief to cover it.
- 213 Ms Spasojevic's counsel submitted that Ms Spasojevic's completion of the leave application form shows she turned her mind to relief staff being paid. But the topic of relief is only a small part of the leave application form. The balance of the form clearly, on its face, concerns an application for Ms Spasojevic to utilise her leave entitlements.
- 214 Nothing we have heard or seen establishes that Ms Spasojevic had a reasonable basis to believe she could or should apply for leave only for two days during her hospitalisation. There is no doubt that she was ill, and so entitled to be absent from work due to illness. However, she was not entitled to be paid ordinary salary without deduction of personal leave accruals. Her selectivity in applying for leave only for the two days when relief was required was deliberate conduct on her part to ensure she obtained the benefit of being paid for that time, whilst minimising the deduction from her personal leave accruals. She was also selective in applying only up to 17 March 2020, the second Tuesday when relief was required, rather than 18 March 2020, when she was discharged from hospital.
- 215 Ms Spasojevic deliberately engineered the leave application form to preserve her personal leave accruals. As a result, she received payments she was not entitled to receive and saved personal leave accruals she was not entitled to save.

**Did Ms Spasojevic's response to the 'Leave Audit' aggravate the misconduct?**

- 216 The Speaker submits that Ms Spasojevic's conduct constitutes gross misconduct, and that the misconduct is aggravated or added to by a 'declaration' that Ms Spasojevic made to Human Resources on 1 July 2020 to the effect that her leave record was correct.
- 217 By March 2020, the Minister's Chief of Staff had noticed that the annual leave balances of the Kwinana electorate office staff 'stood out': presumably, that they appeared understated. In an email dated 2 March 2020 he asked the Minister if he should send a '...simple reminder for everyone to submit forms and an explicit request to submit forms for any periods of leave they may have overlooked'.
- 218 This email was sent just one week prior to Ms Spasojevic's hospitalisation, which is the sixth absence.
- 219 The Board was not told what, if any, action followed from this email request.
- 220 It appears, on the evidence before the Board, that the issue of the Kwinana electorate office's leave bookings was not revisited with Human Resources again until 22 June 2020. At about that time, apparently again at the request of the Minister's Chief of Staff, Human Resources reviewed the leave records for all Kwinana electorate office staff.
- 221 Ms Meehan was provided with a record of Ms Spasojevic's leave bookings as at June 2020. It showed that Ms Spasojevic had used only four days of annual leave in the three years she had been employed.
- 222 Ms Meehan suspected that Ms Spasojevic's records were inaccurate because, in the course of dealing with Ms Spasojevic about her working from home arrangements, she had investigated Ms Spasojevic's activities on social media. She was, therefore, aware that Ms Spasojevic had been overseas several times.
- 223 On 30 June 2020, Ms Meehan sent emails to all of the Kwinana electorate office staff asking them to verify the completeness of their leave records. Ms Meehan did not refer to her suspicions 'that there was something that wasn't right'. Rather, her email to Ms Spasojevic opaquely said:
- Please find attached a record of your leave taken. Please can you confirm this is correct and you have no outstanding leave applications.
- We are soon to be transferring to an online booking system when leave will be able to be booked online and want to make sure our records are correct.
- 224 Attached to the email was a document headed 'Sanja Spasojevic – Recorded leave bookings as at 29/06/2020'.
- 225 Under 'Annual Leave Bookings' the document lists:
- 7.5 hours taken on 27 March 2019; and
- 22.5 hours between 15 December 2018 and 20 December 2018.
- No other annual leave is recorded in the form.
- 226 Under 'Personal Leave' there are 17 entries, including:
- 30 hours for the period 16 April 2018 to 20 April 2018, when Ms Spasojevic was in Vietnam; and
- Only two days in the period 10 March 2020 to 18 March 2020.
- 227 No leave is recorded in the period 21 December 2018 to 25 January 2019 when Ms Spasojevic was in or travelling from Europe.
- 228 No leave is recorded for the period 17 to 20 June 2019, when Ms Spasojevic was in Bali.

- 229 For completeness, Ms Spasojevic had not taken long service leave for these periods. She had not accrued a long service leave entitlement.
- 230 The bottom of the document says:  
Please sign if the above leave record is correct and up to date. If it is incorrect and not up to date, please submit outstanding leave applications as a matter of urgency.
- 231 Ms Spasojevic signed the form 'as correct' and returned it to Ms Meehan.
- 232 Upon receipt, Ms Meehan asked Ms Spasojevic:  
Thank you for the leave audit. Can you confirm you have no outstanding leave applications please  
On the return to work we do require a fit to return to work from your Dr as currently we only have that you are not able to return until Aug. Please can you arrange this
- 233 Ms Spasojevic responded:  
Dear Jane  
Yes that is correct.  
This is the report from Podiatrist from last night in which I discussed my return to the office...
- 234 The leave record was not correct, and Ms Spasojevic could not have reasonably considered that it was correct. An obvious omission was the Bali absence which Ms Spasojevic conceded ought to have been annual leave. The leave record did not record any leave for that trip.
- 235 Ms Spasojevic implicitly accepted that the leave record was incorrect because she went to lengths in her evidence to deny she read it or checked its accuracy. She said:  
...I signed it, I thought it was a formality. I did not see - I didn't even look at it...  
...  
I understood that everyone was going on an online system, that's what was told to me. It wasn't told to me that I should look into this leave, I was under investigation, and that I would need to check this leave. I didn't even look at this form.
- 236 She strenuously denied that she confirmed its correctness a second time when she said 'Yes that is correct' in the later email to Ms Meehan. If the later email was confirmation, it would obviously aid a conclusion that her responses were considered, knowing and deliberate.
- 237 In relation to this email, Ms Spasojevic's evidence was that she was responding only to the second part of Ms Meehan's email relating to the request to arrange a fit to return to work certification:  
...What I'm referring to as 'that is correct', is medical clearance or issues at - in my head at the time. I did not believe that this was being questioned.  
...  
...I was responding to the last sentence.
- 238 Ms Spasojevic's explanations are implausible and contrived. To accept her version would be to find that:
- (a) she did not respond at all to Ms Meehan's first simple and straightforward request. That is, she completely ignored Ms Meehan's question; and
  - (b) she responded nonsensically to Ms Meehan's second simple and straightforward request. In effect, she agreed as being correct Ms Meehan's request that Ms Spasojevic arrange for medical certification.
- 239 Ms Spasojevic does not have difficulty with written or oral communication. Her job as Electorate Officer required her to advocate for constituents and deal with government agencies and the media. In her response to the allegations, Ms Spasojevic produced several references attesting to her 'strong' verbal and written communication skills, describing her as a 'brilliant and effective communicator', and an 'excellent communicator'. The answers in paragraph [237] above were just dishonest.
- 240 Accordingly, we find that Ms Spasojevic confirmed the leave record was correct twice. Even if she did not look at it closely, or appreciate the importance of its accuracy when she initially signed it as correct, when Ms Meehan asked her to confirm its accuracy a second time, she ought to have known that accuracy was important.
- 241 Ms Spasojevic kept personal diaries throughout the relevant period, in which she made records of her appointments, travel, time in the office and time working from home. It would have been easy for her to check the accuracy of the leave record and submit, or re-submit, applications for leave records not shown.
- 242 By failing to correct the accuracy of the leave record, and especially, by failing to identify the omission of any leave for her Bali holiday, Ms Spasojevic failed in her duty to her employer. By not then applying for missing leave, she also disobeyed the lawful and reasonable direction contained in the form itself to submit outstanding leave applications as a matter of urgency.
- 243 We are therefore satisfied that Ms Spasojevic committed further misconduct when she confirmed that the leave record was correct and complete. This instance of misconduct adds to the seriousness of the misconduct that was committed when Ms Spasojevic knowingly received benefits to which she was not entitled during her absences from work.

**Was dismissal too harsh a sanction? Mitigating factors**

- 244 The Board is satisfied that Ms Spasojevic committed misconduct when she:
- (a) improperly claimed personal leave for her Vietnam holiday;

- (b) failed to apply for leave for periods when she was on holiday in December 2018 and January 2019;
- (c) failed to apply for annual leave for the Bali holiday, and failed to correct the leave record when she saw this period was not included; and
- (d) failed to apply for personal leave for days when she was in hospital in March 2020.

245 The next question is whether the dismissal was too harsh in view of any relevant mitigating factors.

246 The particular mitigating factors which Ms Spasojevic relied upon are:

- (a) that her conduct was condoned or encouraged by the 'informal' practices in the Kwinana electorate office, including by the Minister himself. In essence, she says her conduct was consistent with a culture that prevailed in the Kwinana electorate office of 'rewarding' employees by allowing them to take paid time off exceeding their legal entitlements; and
- (b) disparate treatment. She says that her co-workers had similarly failed to apply for leave for periods they were not at work, but they remained in their employment. She says she was unfairly targeted for disciplinary action.

**Was Ms Spasojevic's conduct condoned or part of an accepted culture?**

247 Ms Spasojevic told the Board that she did not apply for periods of leave because the Minister told her not to or that he suggested applications for leave were not necessary. We reject this explanation. As we have set out above, there was no evidence before the Board that the Minister directed, asked or suggested that Ms Spasojevic not submit a leave application form for periods she intended to be away from work in general. We accept that the Minister on occasion questioned the need for relief cover for Ms Spasojevic's specific absences. That is an entirely different matter to whether a leave application form needed to be submitted.

248 Nor do we accept that there was a culture generally where it was acceptable not to submit leave application forms unless relief cover was required. There is ample evidence before the Board of instances where staff in the Kwinana electorate office submitted leave application forms either as an independent process to applying for relief cover, or when relief was unnecessary.

249 Rather, the clear pattern that emerged from the evidence was that Ms Spasojevic adapted her leave application practices to only apply for leave when forced to because relief was needed. This practice was acceptable in her mind only.

250 As for there being a culture of 'informality' generally such that it could be said that Electorate Officers were not held to account for their leave application forms' accuracy, Ms Spasojevic was most likely the architect of that culture. We explain under the next heading why we say so. More importantly, the informality only extended to flexi time for individual instances of 'ducking out' of the office, the Christmas shutdown period and the January skeleton crew arrangement.

251 As detailed under paragraphs [72] to [77] above, the Minister was not responsible for preparing or submitting electorate office staff's leave application forms. The Electorate Officers themselves had that responsibility. Any failure by the Minister to follow up leave application forms for periods of absence does not mitigate Ms Spasojevic's conduct, nor does it indicate the conduct was condoned.

252 However, there were two times when the Minister's acts or omissions enabled Ms Spasojevic's conduct. That is not to say that the Minister condoned or encouraged Ms Spasojevic's conduct. But the Minister did not do everything he could and should have done to ensure leave entitlements were not abused.

253 The first occasion was when the Minister signed Ms Spasojevic's application for personal leave in June 2019. We infer that the Minister knew, or ought to have known, that Ms Spasojevic intended to use that leave to travel to Bali. In particular, Ms Spasojevic said that she spoke to the Minister about going to Bali before the Minister signed the leave application form. Ms McMillan's evidence was that during the meeting at which the Minister signed the leave application form, he was speaking in jovial terms about all the travel that staff were planning.

254 The Minister did not give evidence at hearing, and so the Board is without any explanation as to why the Minister signed the form for personal leave, apparently without raising any query, question or concern about it.

255 As discussed above at paragraphs [72] to [77], the Minister's signature on the form does not authorise the type of leave, nor does it override an Electorate Officer's responsibility to submit an accurate and complete application for leave. For example, it is not the Minister's role to check whether the evidentiary requirements for personal leave have been met. However, as Ms Spasojevic's line manager, the Minister ought to have exercised greater diligence in supervising Ms Spasojevic's conduct. The Minister should have questioned the leave type stated in the application form.

256 As it turned out, personal leave for this period was not processed. Therefore, the mitigating effect of the Minister's involvement is minor. The Minister was not involved when Ms Spasojevic declared on 30 June 2020 that her leave record (which omitted any leave at all for this period) was correct, nor in her failure to then apply for the missing leave.

257 The second time was when the Minister signed the application for leave for Ms Spasojevic's hospitalisation in March 2020. The Minister knew that Ms Spasojevic was not at work for the entire period from 10 March 2020 through 18 March 2020. Ms Spasojevic submitted a leave application form which referred to the dates 10 to 17 March 2020 and then only sought leave for two days in that period.

258 As we indicated earlier, the evidence before the Board did not fully explore what parts of the form were completed at the time it was presented to the Minister for signing. But it has not escaped our attention that as recently as 2 March 2020 the Minister's Chief of Staff had alerted the Minister to a suspicion that the Kwinana electorate office staff had excessive amounts of leave accrued and may not have consistently applied for leave that was being taken. By this time, the Minister ought to have been on-guard in relation to the management and administration of leave. Even if the form was incomplete, and dishonestly manipulated after the Minister had signed it:

- (a) it was unwise for the Minister to have signed an incomplete form in the circumstances; and,
- (b) the Minister did not ensure that the leave form included 18 March 2020 when he knew Ms Spasojevic was in hospital on that day.

259 The Minister, as Ms Spasojevic's line manager, was in a position where he could have prevented Ms Spasojevic's misconduct. He did not do so. To that extent, his involvement is a mitigating factor. Had the sixth absence been the only ground for the allegations against Ms Spasojevic, it would be harsh for Ms Spasojevic to be dismissed for it in these circumstances.

**Was Ms Spasojevic treated harshly compared to other Electorate Officers?**

260 The other Kwinana electorate office staff took days off work in January of each year, which were not always traded for additional days worked, and for which they did not make applications for leave. Ms Goricanec conceded that she had taken personal leave in February 2020, during which she travelled to Sydney for a child's folk dancing event. She considered she was entitled to do so in respect of the Sydney trip because:

...I just needed some time off...there would be, maybe, reason for me just to go somewhere and relax my brain.

261 Therefore, it appears that the abuse of leave was not confined to Ms Spasojevic.

262 However, it was also apparent that Ms Spasojevic set the example that others followed.

263 For example, when asked why no one filled in applications for annual leave over the end-of-year shutdown period, Ms Goricanec said:

...You see, I don't know - personally, I don't know. As I said, Sanja was the one who was the senior staffer, she knew how the system works. And I'm pretty sure the other offices were similar...we just took that over from Sanja...Instructed by Sanja.

264 In relation to her application for personal leave to travel to Canada in 2018, Ms Goricanec said that she signed an incomplete application for leave form and the dates and type of leave were entered by Ms Spasojevic:

...I trusted Sanja, She told me to leave that blank and she will fill that in.

265 Ms Goricanec also stated that Ms Spasojevic had encouraged her to see Ms Spasojevic's own GP to obtain a medical certificate for the purpose of claiming personal leave 'because she told me she did that once, and it worked for her'.

266 Ms Spasojevic's counsel invited the Board to reject the suggestion that Ms Spasojevic was in a position to influence the other staff in this manner, because there was no formal hierarchy in the electorate office. But Ms Spasojevic's own evidence was that her job title was 'Executive Officer'. This was the title on her business card, and email signature. While she had no formal responsibility for supervising other Electorate Officers, and others were not obliged to follow her instructions, the practical reality was that she was in a position of influence.

267 This is most vividly demonstrated by Ms Spasojevic's email communication to the other three Electorate Officers, Ms Bothma, Ms McMillan and Ms Goricanec dated 25 March 2019. In it, Ms Spasojevic states:

Dear Sherri and to the other staff members in the office

I appreciate you might have a different view and belief at how the running of the Electorate office should be organised. I have factored that in to my response, but currently I am the Office Manager- Executive officer, unless Roger clearly states otherwise.

I am the senior staffer due to the years in this position (there is really no other reason), it is the experience. Staff in other EOs and in the SPLP contacts list have either used Exec officer or Office Manager. This has been discussed as a necessary introduction after the Election due to many experienced Eos moving on to other roles and a defined and clear hierarchy was needed in Electorate offices to identify the senior staffer, as so many Members were also new to their role, and the other Members like Roger had taken on immense responsibilities and very complex and demanding portfolios. Hence the senior staffer's scope of responsibilities has changed dramatically.

...

Roger's role as the Local Member has changed immensely with his Ministerial and Deputy Premier roles. Roger is not able to physically or mentally manage so much responsibilities, it is not humanly possible.

The reason titles such as Officer Manager and Exec officer have been introduced after the 2017 Election is to counteract the negative effects of an absent Local Member. One of these is to have a senior staffer manage the [electorate office] in the Member's absence...

...

I feel my current role is to filter what I believe needs to be acted and decided upon- prioritising the importance and complexity of issues and what Roger's involvement should be.

...

...I would rather have Roger rested and able to perform at his best when he is here than have him here every Friday but a Zombie. To prevent Roger from being inundated from an overload of information I feel it is my role to filter what is important and what can be completed without his input.

...

My role currently is the senior staffer, EO, OM whatever you may like to call it and this is not set in stone. If someone feels they are more capable to fill this role and will do a better job of managing the [electorate office] they have every

right to voice this opinion, but once it has been resolved it should not be brought up again and the directive by the Member should be followed without further questioning.

Unless stated otherwise I do not want my authority and experience being placed under the microscope anymore, as it is bloody exhausting.

...

268 Other indicators of Ms Spasojevic's seniority and influence include:

- (a) Ms Spasojevic was the only one of the four Electorate Officers who had an office.
- (b) Leave forms were kept in Ms Spasojevic's office.
- (c) Ms McMillan said that Ms Spasojevic delegated work to the other Electorate Officers and there was a common expectation that the other Electorate Officers would do what Ms Spasojevic requested of them.
- (d) Ms Spasojevic told the Board that she was contacted by Ms Goricanec 'many times' by text message and email for guidance on electorate office matters when at home and even whilst she was in hospital.

269 Finally, it appears that Ms Spasojevic's abuse of the leave application process was far more extensive than her co-workers'. This is evident from a comparison of leave balances for Ms Spasojevic, Ms McMillan and Ms Goricanec.

270 All three employees had similar lengths of service: Ms Goricanec and Ms McMillan both commenced in 2017, around six months before Ms Spasojevic's most recent period of service. For most of the relevant period, all three employees worked part-time. Yet, as at January 2020, Ms Spasojevic had an annual leave balance of 237.562 hours compared with Ms McMillan's balance of 86.321 hours and Ms Goricanec's balance of 103.15 hours. Compounding the difference, Ms Spasojevic's leave balance excluded 53 additional hours of annual leave, which she had accrued, but transferred to her employment with another MP's electorate office.

271 We accept that all Kwinana electorate office staff would, from time to time, be absent from the office during ordinary working hours to attend to personal matters. This flexibility was afforded to them in consideration of their availability to work outside of ordinary hours, which they frequently did. Ms Spasojevic took full advantage of this flexibility to manage her medical issues.

272 We reject the suggestion that this flexibility somehow mitigates Ms Spasojevic's conduct concerning her failure to make leave applications or the proper leave applications. If anything, the flexibility emphasises the degree of autonomy, and with it, the level of trust placed in Electorate Officers to do the right thing. It therefore heightens the seriousness of Ms Spasojevic's abuse of that trust.

273 We do not consider these matters mitigate Ms Spasojevic's conduct.

### Summary

274 The Speaker has proven that Ms Spasojevic committed misconduct as set out in paragraph [244] above.

275 The misconduct was deliberate. Ms Spasojevic was aware of the purpose of personal leave and annual leave, the need to apply for leave and the processes to do so. Her counsel submits she did not wilfully disobey any direction. That is not to the point. She was dishonest in her conduct. Her conduct was not disobedient (except for failing to submit outstanding applications as directed on 30 June 2020.) It was fraudulent.

276 Ms Spasojevic's counsel submitted that her view was that if it was okay for her to be away, it was okay for her to be paid because of the blurred lines between personal and work time. That might justify Ms Spasojevic's failure to seek leave for a few hours absence here and there, taking advantage of the privilege of flexibility. It cannot sensibly extend to prolonged absences overseas or in hospital. Ms Spasojevic was not that naive.

277 Ms Spasojevic engineered her applications for leave and the circumstances when she would be absent without making any application for leave, around the need for relief workers, in the knowledge that if no relief was needed, she could get away with not seeking leave.

278 Misuse of sick leave constitutes misconduct sufficient to justify termination of employment: *Walker v Bow Tie Removals and Storage Pty Ltd* [2012] FWA 2851; *O'Connor v State of Queensland (Dept of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships)* [2021] QIRC 123. The misconduct the subject of the first and second absences justify, on their own, a sanction of dismissal. Ms Spasojevic's conduct was dishonest and amounts to an abuse of the privilege, trust and confidence enjoyed by a public servant. The Board has not found that Ms Spasojevic's conduct on these occasions is mitigated by any factors or circumstances which would result in dismissal being too harsh a sanction.

279 The misconduct the subject of the third absence was aggravated because Ms Spasojevic did not correct her leave record concerning this period of absence when given the opportunity to, but is also mitigated by the fact that her manager signed the leave application form. The misconduct relating to the third absence also, on its own, justifies dismissal.

280 The sixth absence is mitigated because Ms Spasojevic's manager signed either an incomplete or incorrect leave application form. The sixth absence would not, on its own, justify dismissal. However, the mitigating circumstance of this absence does not change the ultimate result, which is that the decision to dismiss Ms Spasojevic from her employment was not harsh, unjust or unreasonable.

281 Accordingly, we decline to adjust the Speaker's decision. The appeal will be dismissed.

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2023 WAIRC 00003

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 15 OCTOBER 2020**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

SANJA SPASOJEVIC

**APPELLANT**

-v-

SPEAKER OF THE LEGISLATIVE ASSEMBLY

**RESPONDENT****CORAM**

PUBLIC SERVICE APPEAL BOARD

SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON

MR G SUTHERLAND - BOARD MEMBER

MS M BUTLER - BOARD MEMBER

**DATE**

THURSDAY, 5 JANUARY 2023

**FILE NO**

PSAB 31 OF 2020

**CITATION NO.**

2023 WAIRC 00003

**Result**

Appeal dismissed

**Representation****Appellant**

Mr S Heathcote of counsel

**Respondent**

Mr M Ritter SC of counsel

*Order*

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

THAT appeal be and is hereby dismissed.

(Sgd.) R COSENTINO,  
Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

**PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—**

2023 WAIRC 00017

**REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION**

: 2023 WAIRC 00017

**CORAM**

: COMMISSIONER T EMMANUEL

**HEARD**

: TUESDAY, 20 SEPTEMBER 2022, MONDAY, 12 DECEMBER 2022, THURSDAY, 15 DECEMBER 2022

**DELIVERED**

: TUESDAY, 10 JANUARY 2023

**FILE NO.**

: APPL 36 OF 2022

**BETWEEN**

: PENELOPE ANNE FAGAN

Applicant

AND

WILLIAM (BILL) JOHNSTON MINISTER FOR CORRECTIVE SERVICES

Respondent

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CatchWords	:	28-day limitation period in s 29(2) does not apply to referrals made under s 78(2)
Legislation	:	<i>Health Services Act 2016</i> (WA): s 172(2), s 172(4) & s 172(5) <i>Health Services (General) Regulations 2019</i> (WA): r 13 <i>Industrial Relations Act 1979</i> (WA): s 23, s 23A, s 29, s 29(1), s 29(1)(b), s 29(1)(b)(i), s 29(1)(b)(ii), s 29(1)(c), s 29(1)(d), s 29(2), s 29(3), s 80J & s 80J(a) <i>Industrial Relations Commission Regulations 2005</i> (WA): r 63A & r 107(2) <i>Public Sector Management Act 1994</i> (WA): s 78(1), s 78(2), s 78(2)(b) & s 82A(3)(b)
Result	:	Declaration made
<b>Representation:</b>		
Applicant	:	Mr C Fordham (of counsel)
Respondent	:	Mr J Carroll (of counsel)

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**Cases referred to in reasons:**

*Aurion Gold v Bilos* [2004] WASCA 270; (2004) 144 IR 122

*Federal Commissioner of Taxation v Tomaras* [2018] HCA 62

*Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70

*Guest v Kimberley Land Council* [2009] WAIRC 00668; (2009) 89 WAIG 2063

*Johnston v Mr Ron Mance, Acting Director General Department of Education* [2002] WAIRC 06155; (2002) 83 WAIG 1553

*Matthews v Cool or Cosy Pty Ltd & Anor* [2004] WASCA 114

*Magyar v Department of Education* [2019] WAIRC 00321; (2019) 99 WAIG 804

*Magyar v Department of Education* [2019] WAIRC 00781; (2019) 99 WAIG 1595

*Reasons for Decision*

- Ms Fagan has referred to the Commission the Minister for Corrective Service's (**Minister**) decision to take disciplinary action against her by way of dismissal on 30 May 2022.
- Ms Fagan referred this decision to the Commission on 15 August 2022. The parties are in dispute about whether Ms Fagan's referral was made out of time.

**What I must decide**

- I must decide whether a limitation period of 28 days applies to Ms Fagan's referral.

**Background**

- In her referral to the Commission, Ms Fagan argues that the disciplinary finding that she disobeyed a lawful order is incorrect and her dismissal by way of letter dated 26 May 2022 is unfair. She asks the Commission to reinstate her and make an order for continuity of service.
- The Minister raised a preliminary issue for the Commission to deal with before Ms Fagan's referral can be heard and determined. He says that a limitation period of 28 days applies to this type of application. The Minister argues that Ms Fagan's referral was made outside that limitation period and she has not sought leave for her referral to be accepted out of time.
- Ms Fagan disagrees that a limitation period of 28 days applies to her referral.
- The parties asked the Commission to deal on the papers with the question of whether Ms Fagan's referral is out of time. The parties each filed written submissions.
- Ms Fagan's matter is referred to the Commission by way of s 78(2) of the *Public Sector Management Act 1994* (WA) (**PSM Act**) on the basis that she is aggrieved by a disciplinary decision made under s 82A(3)(b) of the PSM Act.

**Background and relevant provisions**

- The Commission has a broad jurisdiction to enquire into and deal with any industrial matter: s 23 of the *Industrial Relations Act 1979* (WA) (**IR Act**). The IR Act limits who can refer matters to the Commission and imposes limitation periods on some applications.
- The PSM Act provides a right of appeal to the Commission in respect of certain decisions and findings. Section 78(2) of the PSM Act provides:
  - Despite section 29 of the *Industrial Relations Act 1979*, but subject to subsection (3), an employee or former employee who —
    - is not a Government officer within the meaning of section 80C of that Act; and
    - is aggrieved by —
      - a decision made in respect of the employee under section 79(3)(b) or (c) or (4); or

- (ii) a finding made in the exercise of a power under section 87(3)(a)(ii); or
- (iii) a decision made under section 82 to suspend the employee on partial pay or without pay; or
- (iv) a decision to take disciplinary action made under section 82A(3)(b), 88(b) or 92(1),

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

- 11 There is no s 29(b) of the IR Act and there was not when s 78(2) of the PSM Act was enacted either. At that time, s 29 of the IR Act provided:

**29. Who may refer industrial matters to Commission**

- (1) An industrial matter may be referred to the Commission —
- (a) in any case, by —
    - (i) an employer with a sufficient interest in the industrial matter; or
    - (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or
    - (iii) the Minister;
 and
  - (b) in the case of a claim by an employee —
    - (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
    - (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,
 by the employee.
- (1a) A party to an employer-employee agreement has the right to refer to the Commission constituted by a commissioner where the Commission so constituted is the relevant industrial authority under Part VID —
- (a) any question, dispute or difficulty that the Commission as so constituted has jurisdiction to determine under section 97WI; or
  - (b) an allegation referred to in section 97WK(2).
- (2) Subject to subsection (3), a referral under subsection (1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated.
- (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.

- 12 Section 29 of the IR Act was amended on 20 June 2022 by the *Industrial Relations Legislation Amendment Act 2021* (WA). Section 29 of the IR Act now provides:

**29. Who may refer industrial matters to Commission**

- (1) An industrial matter may be referred to the Commission —
- (a) in any case, by —
    - (i) an employer with a sufficient interest in the industrial matter; or
    - (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or
    - (iii) the Minister;
 and
  - (b) except as provided in section 51Q(2), in the case of an equal remuneration order — by an application made by any of the following —
    - (i) an employee to be covered by the order;
    - (ii) an organisation in which employees to be covered by the order are eligible to be enrolled as members;
    - (iii) an organisation in which employers of employees to be covered by the order are eligible to be enrolled as members;
    - (iv) UnionsWA;
    - (v) the Chamber;
    - (vi) the Minister;
    - (vii) the Commissioner for Equal Opportunity;
 and

- (c) in the case of a claim by an employee that the employee has been harshly, oppressively or unfairly dismissed from the employee's employment — by the employee; and
  - (d) in the case of a claim by an employee that the employer has not allowed the employee a benefit, other than a benefit under an award or order, to which the employee is entitled under the contract of employment — by the employee; and
  - (e) in the case of an industrial matter mentioned in section 7(2A) — by the worker.
- (1a) A party to an employer-employee agreement has the right to refer to the Commission constituted by a commissioner where the Commission so constituted is the relevant industrial authority under Part VID —
- (a) any question, dispute or difficulty that the Commission as so constituted has jurisdiction to determine under section 97WI; or
  - (b) an allegation referred to in section 97WK(2).
- (2) Subject to subsection (3), a referral under subsection (1)(c) is to be made not later than 28 days after the day on which the employee's employment is terminated.
- (3) The Commission may accept a referral by an employee under subsection (1)(c) that is out of time if the Commission considers that it would be unfair not to do so.

13 In effect, s 29(1)(b)(i) was replaced by s 29(1)(c) and s 29(1)(b)(ii) was replaced by s 29(1)(d).

14 The PSM Act has not been consequentially amended.

15 The parties agree that the reference in s 78(2) of the PSM Act to s 29(b) is a typographical error and it should be a reference to s 29(1)(b) of the IR Act.

16 The parties also agree that Ms Fagan:

- a. seeks to refer the Minister's decision to take disciplinary action in the form of dismissal under s 82A(3)(b) of the PSM Act; and
- b. is a person aggrieved by that decision.

#### The Minister's case

17 The Minister says that s 78(2) of the PSM Act allows certain decisions or findings to be referred to the Commission 'as if that decision or finding were an industrial matter mentioned in section 29(b) of that Act'.

18 Further, s 29(2) of the IR Act provides that 'a referral under subsection (1)(c) is to be made not later than 28 days after the day on which the employee's employment is terminated'.

19 The Minister says that the constructional question is whether the limitation period of 28 days prescribed by s 29(2) of the IR Act applies to the type of referral described in s 78(2) of the PSM Act, where the referral relates to a decision to dismiss. In essence, the Minister says that the reference to s 29(b) in s 78(2) of the PSM Act should be properly understood as a reference to s 29(1)(c) of the IR Act.

20 The Minister draws the Commission's attention to two relevant authorities: *Johnston v Mr Ron Mance, Acting Director General Department of Education* [2002] WAIRC 06155; (2002) 83 WAIG 1553 (*Johnston*) and *Magyar v Department of Education* [2019] WAIRC 00321; (2019) 99 WAIG 804 (*Magyar*).

#### *Johnston*

21 The Minister says that in *Johnston*, Kenner C (as he was then) observed, without deciding the issue, that the 28-day limitation period would arguably not apply to referrals made under s 78(2) of the PSM Act, because one could argue that referrals would be made 'under' s 78(2) of the PSM Act and not s 29(1)(b)(i) of the IR Act, so on that basis s 29(2) of the IR Act would not apply.

22 The Minister submits that taking this approach would ignore 'important words in s 78(2), namely, that a referral can be made *as if* the decision or finding were an industrial matter mentioned in s 29(1)(c) of the IR Act' (original emphasis).

23 The Minister says that these words 'as if that decision or finding were an industrial matter' would not be needed if s 78(2) of the PSM Act itself provided the basis for referral to the Commission. If that were the case, s 78(2) could simply have said: 'Despite s 29 of the IR Act, an employee or former employee who is aggrieved by [the identified findings and decisions] may refer the decision or finding to the [WAIRC], and the IR Act applies to and in relation to that decision accordingly.'

24 Instead, s 78(2) says 'as if that decision or finding were an industrial matter'. The Minister says the effect of these words is 'to create a statutory fiction that the decision or finding is referred to in s 29(1)(c) of the IR Act, and the referral is then under s 29(1)(c) of the IR Act (as enlarged by s 78(2) of the [PSM Act]).' Because the referral is 'under' s 29(1)(c) of the IR Act, the limitation period in s 29(2) of the IR Act applies when the referral relates to a dismissal.

#### *Magyar*

25 The Minister also refers to *Magyar* and says that in that matter, the applicant referred three decisions to take disciplinary action to the Commission. Those decisions had been made by the respondent around 1.5 years or more before the referrals were made and were not dismissals. Two of those applications were dismissed on the basis that it was not in the public interest for the matters to proceed given the challenge to the decisions was not made within a reasonable period of time: *Magyar* at [13]-[22].

26 The Minister argues that while limitation periods are not referred to in *Magyar*, 'it is implicit from the decision that it was accepted that no statutory time limits applied to the referrals under consideration'.

### Conclusion

- 27 The Minister argues that the Commission should afford a construction that gives all of the words in the provision work to do. This approach is consistent with common sense. There are statutory limitation periods that apply to ‘any other appeal or referral’ of a matter relating to dismissal, where that referral is made by an individual employee to the Commission or Public Service Appeal Board. There is an obvious need for ‘such time limits’ so that allegations of unfair dismissal can be dealt with promptly. There should be clear words to the contrary in the IR Act or PSM Act.
- 28 Taking into account the typographical error in s 78(2) of the PSM Act and the recent amendments to the IR Act, the Minister argues that the reference to s 29(b) in the PSM Act should properly be understood as a reference to s 29(1)(c) of the IR Act.
- 29 The Minister argues that on that basis, Ms Fagan’s referral is ‘well out of time’. The Commission should find that Ms Fagan needs leave to refer her matter out of time.

### Ms Fagan’s case

- 30 Ms Fagan says the ‘jurisdictional fact’ in dispute appears to be whether her referral is properly identified as a referral under s 78(2) of the PSM Act or a referral under s 29(1)(c) of the IR Act.
- 31 Ms Fagan argues that the nature of this dispute is not particular to her matter and goes to ‘the legislative will behind the framework of the PSM Act and the IR Act.’ Ms Fagan relies on Ritter AP’s reasons (with Scott C, as she was then, and Mayman C agreeing) in *Guest v Kimberley Land Council* [2009] WAIRC 00668; (2009) 89 WAIG 2063 at [75] where he cites with approval the following passage from Brennan J’s reasoning at 141-142 of *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70:

There is a distinction between a judicial finding of a fact in issue between parties upon which a law operates to establish or deny a right or liability and a judicial determination of the validity or scope of a law when its validity or scope turns on a matter of fact. *When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend on the course of private litigation. The legislative will is not surrendered into the hands of the litigants.* (Ms Fagan’s emphasis)

- 32 Ms Fagan says that ‘an issue of this significance cannot be swayed by the brief explanatory description contained in [her] initiating claim form.’

### Ms Fagan’s standing

- 33 Ms Fagan says that the provisions under s 29(1)(b) of the IR Act were not themselves a source of power, but conferred standing on an employee to refer particular industrial matters to the Commission: *Mathews v Cool or Cosy Pty Ltd & Anor* [2004] WASCA 114 (*Cool or Cosy*).
- 34 In this matter, Ms Fagan initially sought to refer her application by relying on standing conferred by s 29(1)(c) of the IR Act. She discontinued that referral and filed a new one ‘with standing conferred by s 78(2) of the PSM Act’. Whether her referral is made with standing conferred by s 29(1)(c) of the IR Act or by s 78(2) of the PSM Act, the Commission’s powers to deal with her referral ‘emanate from s 23A of the IR Act’.
- 35 Ms Fagan argues that she has standing to make her referral to the Commission under s 78(2) of the PSM Act because she meets the ‘criteria for standing’ under that provision, being that:
- (a) she is a former employee within the meaning of the PSM Act;
  - (b) she is not a government officer within the meaning of s 80C of the IR Act; and
  - (c) she is aggrieved by the Minister’s decision to take disciplinary action under s 82A(3)(b) of the PSM Act.
- 36 These conditions mean that arguably, an employee may not qualify for standing under the PSM Act to refer to the Commission a matter relating to that employee’s dismissal, where the dismissal arose without an identifiable decision to take disciplinary action. Ms Fagan submits that this is a meaningful difference between ‘asserting standing under the IR Act as compared to standing under the PSM Act’ and this difference is ‘intended to be so’.

### Construction of s 78(2) of the PSM Act

- 37 Ms Fagan notes that *Johnston* was delivered before ‘the principles explained by the Industrial Appeal Court in *Cool or Cosy*’.
- 38 Considering those decisions, Ms Fagan said the following meanings can be adduced from the PSM Act and the IR Act:
- (a) as with the relevant provisions in s 29 of the IR Act, s 78(1) and s 78(2) of the PSM Act confer standing on a person to refer matters set out in those sections;
  - (b) the standing provisions in the IR Act and the PSM Act are not a source of power; and
  - (c) where a referral is made with standing conferred by s 78(2) of the PSM Act, the Commission’s powers to deal with that referral are found in either s 23 or s 23A of the IR Act, depending on whether the referral involves a claim of harsh, oppressive or unfair dismissal.
- 39 Ms Fagan says that s 78(2) of the PSM Act exists as a standing provision. This is important because it helps to interpret the meaning of words in that provision, including the words: ‘Despite section 29 of the *Industrial Relations Act 1979*...’ Here, the ability for an employee to have standing to refer a matter under s 78(2) of the PSM Act exists ‘despite’ s 29 of the IR Act. The Cambridge Dictionary meaning of the word ‘despite’ is: ‘without taking any notice of or being influenced by’.
- 40 The effect of this is that the standing conferred by s 78(2) of the PSM Act is independent of and unaffected by the existing standing provisions of the IR Act.

- 41 Further, Ms Fagan argues that the meaning of the words ‘subject to subsection (3)’ in s 78(2) of the PSM Act ‘should be read as providing standing subject to subsection (3) of the PSM Act, and not s 29(3) of the IR Act.’
- 42 Ms Fagan disagrees with the Minister’s submission that a referral made under the PSM Act should be deemed to have been made under s 29(1)(c) of the IR Act. She says ‘the nature of the statutory fiction is to make provision for standing for specific circumstances even though those words and circumstances do not actually exist within s 29 of the IR Act.’ Further, she says: ‘That s 78(2) has been framed as a deeming provision does not import an assumption that other provisions of the IR Act relating to standing have application.’

#### Conclusion

- 43 Ms Fagan submits that the Commission need not look beyond the plain words of s 29(2) and s 29(3) of the IR Act to see that the 28-day limitation period and ability to seek leave to apply out of time only relate to a referral made under s 29(1)(c) of the IR Act. These do not apply to referrals made through any other standing provision.
- 44 She says it would be ‘a misapplication of legal principle to construe either s 29(2) or s 29(3) by imputing an intention upon parliament for those particular provisions to apply other than to the referral that is listed within the subsections themselves.’

#### Magyar Full Bench

- 45 After the parties’ written submissions were filed, the Commission identified a further decision that it considered may be relevant to the question in issue, *Magyar v Department of Education* [2019] WAIRC 00781; (2019) 99 WAIG 1595 (**Magyar Full Bench**).
- 46 My Associate wrote to the parties and said:

The Commission has asked me to write to you to bring to your attention the Full Bench decision in *Magyar v Department of Education* [2019] WAIRC 00781, in particular [19], where Kenner SC (as he was then) said (with Emmanuel and Walkington CC agreeing):

It would appear that the reference to “section 29(b) of that Act”, in s 78(2)(b) of the PSM Act, is a drafting error as there is no such provision and nor was there at the time of the enactment of s 78(2)(b) of the PSM Act and it seems it was intended to refer to “section 29(1)(b)” instead. This matter was considered in *Johnston v Mr Ron Mance, Acting Director-General Department of Education* [2002] WAIRC 06155; (2002) 83 WAIG 1553. As it is only applications under s 29(1)(b)(i) of the Act that are subject to a statutory time limit of 28 days, with an opportunity for a late claim to be considered by the Commission, there is no time limit on claims made under s 78(2) of the PSM Act. No time limit is referred to in reg 63A of the *Industrial Relations Commission Regulations 2005* either.

The Commission would like to hear the respondent’s view in relation to the above case, and the applicant’s response to the respondent’s view.

- 47 The Minister replied to my Associate and expressed the following view:

As with the two decisions referred to in the respondent’s written submissions (*Johnston* and *Magyar*), [*Magyar Full Bench*] dealt with a referral under s 78(2) of the PSMA to the WAIRC by an employee or former employee aggrieved by a decision to take disciplinary action under Part 5 of the PSMA where the disciplinary action was not dismissal (see [5] of the decision). None of those three cases gave rise to the issue as to whether the PSMA and IR Act, properly construed, imposed a time limit on referrals to the WAIRC when the disciplinary action taken under Part 5 of the PSMA was dismissal. For that reason, if [19] of [*Magyar Full Bench*] is properly understood as finding that no time limit applies in those circumstances, the respondent submits that such a finding is obiter dicta which was not (at least on the face of the decision) the subject of argument. The respondent maintains his submissions set out in [22] to [32] of his written submissions on the preliminary issue that the provisions properly construed do place a time limit on such referrals.

- 48 Ms Fagan submitted that *Magyar Full Bench* represents a ‘meaningful authority that supports the proposition that a referral under s 78(2)(b) of the PSM Act is of a different category to a referral under s 29(1)(c) of the IR Act, even where a referral includes an allegation of harsh, oppressive or unfair dismissal.’
- 49 Further, counsel for Ms Fagan said:

The Applicant understands by the comments at [18] in [*Magyar Full Bench*], that the observations made by the Commission at [19] of that decision were designed to draw a distinction between the present case and other case authorities where an applicant had applied expeditiously (within a strict limitation period), but the applicant had then not proceeded expeditiously after a case had been commenced.

We understand the distinction in [*Magyar*] to be that the applicant in that case apparently did not act expeditiously at the point where he delayed in the initial filing of his referrals under s 78(2)(b) of the PSM Act.

The Commission went on to observe at [19] that, contrary to applications made under s 78(2)(b) of the PSM Act, “it is only applications under s 29(1)(b)(i) of the Act that are subject to a statutory time limit of 28 days” (our emphasis). On the plain words that appear at [19] of the reasons in *Magyar*, the Full Bench has drawn a distinction in the way that a referral is to be treated under s 78(2)(b) of the PSM Act as compared to a referral under s 29(1)(b)(i) of the IR Act (now being 29(1)(c) of the IR Act).

The distinction that was made by the Full Bench in [*Magyar Full Bench*] between a referral under what is now s 29(1)(c) of the IR Act and s 78(2)(b) of the PSM Act does not seem to be just obiter.

The Commission went on in [*Magyar Full Bench*] to rely upon the finding made at [19] of the decision to identify the appropriate legal principles to be applied in the disposition of that appeal.

### Consideration

- 50 The only fair reading of Ms Fagan's statement that 'the referral is made under s 29(1)(b) of the *Industrial Relations Act 1979* as expanded by s 78(2) of the *Public Sector Management Act 1994*' in her referral on Form 5 is that she contests the disciplinary action taken against her under the PSM Act. For the reasons that follow, I consider that the limitation period in s 29(2) of the IR Act does not apply to Ms Fagan's referral.
- 51 Ms Fagan made a number of submissions in relation to jurisdiction that were not relevant to the matter in issue. In my view, it is beyond doubt that even if the limitation period in s 29(2) of the IR Act applied to Ms Fagan's referral, the Commission would nevertheless have jurisdiction to hear and determine her referral, subject to the discretionary power to accept such a referral out of time: EM Heenan J in *Aurion Gold v Bilos* [2004] WASCA 270; (2004) 144 IR 122 at [65].
- 52 Ms Fagan appeals the Minister's decision made under s 82A(3)(b) of the PSM Act to take disciplinary action in the form of dismissal. Pursuant to s 78(2) of the PSM Act, Ms Fagan has referred the Minister's decision as if that decision were an industrial matter mentioned in s 29(1) of the IR Act.
- 53 The Minister says the Commission should construe s 78(2) of the PSM Act and s 29 of the IR Act such that the limitation period in s 29(2) of the IR Act applies to appeals made under s 78(2) of the PSM Act. This is because the Minister says the reference in s 78(2) of the PSM Act to s 29(b) should be understood to be a reference to s 29(1)(c) of the IR Act.
- 54 In short, I am not persuaded that is the correct construction.
- 55 Section 78(2) of the PSM Act provides a right of appeal of certain decisions and findings. It also confers standing for employees who are not government officers to refer a decision or finding to the Commission. In my view, an application of this type comes to the Commission by way of an appeal under s 78(2) of the PSM Act. The referral can be made *as if* it were an industrial matter mentioned in s 29(1) of the IR Act, but that does not mean that the referral is made under s 29(1)(c) of the IR Act. The phrase '**Despite** section 29 of the *Industrial Relations Act 1979*...' in s 78(2) of the PSM Act supports a construction that standing to refer under s 78(2) is unaffected by the standing provisions within s 29, including s 29(1)(c).
- 56 The previous s 29(1)(b) was repealed and in effect replaced by s 29(1)(c) and (d) of the IR Act. I do not accept the Minister's submission that the reference in s 78(2) of the PSM Act to s 29(b) of the IR Act must be understood to be a reference to s 29(1)(c) (formerly s 29(1)(b)(i)). It has long been accepted by the Commission (and its constituent authorities) that the reference in s 78(2) of the PSM Act to s 29(b) of the IR Act is a typographical error that was intended to be reference to s 29(1)(b) of the IR Act, not a more narrow reference to s 29(1)(b)(i) of the IR Act - see for example *Magyar Full Bench* per Kenner SC (as he was then), Emmanuel and Walkington CC at [19], *Johnston* per Kenner C (as he was then) at [14] and *Ayling v Director General, Department of Education and Training* [2009] WAIRC 00413; (2009) 89 WAIG 824 per Smith SC (as she was then) at [1].
- 57 Recently the Full Bench in *Magyar Full Bench* held at [19]:
- It would appear that the reference to "section 29(b) of that Act", in s 78(2)(b) of the PSM Act, is a drafting error as there is no such provision and nor was there at the time of the enactment of s 78(2)(b) of the PSM Act and it seems it was intended to refer to "section 29(1)(b)" instead. This matter was considered in *Johnston v Mr Ron Mance, Acting Director-General Department of Education* [2002] WAIRC 06155; (2002) 83 WAIG 1553. As it is only applications under s 29(1)(b)(i) of the Act that are subject to a statutory time limit of 28 days, with an opportunity for a late claim to be considered by the Commission, there is no time limit on claims made under s 78(2) of the PSM Act. No time limit is referred to in reg 63A of the *Industrial Relations Commission Regulations 2005* either.
- 58 As the Minister submits, in *Magyar Full Bench* the disciplinary action appealed was not dismissal and the parties did not make arguments in relation to whether a limitation period applies where the disciplinary action taken is dismissal. However the Full Bench expressed a clear view about that issue, concluding that only applications under s 29(1)(b)(i) (now s 29(1)(c) of the IR Act) are subject to a statutory limitation period of 28 days, and that there is no limitation period on claims made under s 78(2) of the PSM Act. Respectfully, I share that view. I am not persuaded by the Minister's arguments in this case that it is wrong.
- 59 Considering the wording of s 78(2) of the PSM Act and s 29 of the IR Act, I find that the referral in this matter is still a referral under s 78 of the PSM Act, and not a referral under s 29(1)(c) of the IR Act.
- 60 More broadly, I agree with the Minister that in the case of a referral that appeals a decision to dismiss, there are obvious reasons why such matters should be dealt with promptly. Short limitation periods apply to certain applications or appeals in relation to decisions to dismiss. For example, s 29(2) of the IR Act provides that an unfair dismissal application made under s 29(1)(c) of the IR Act must be made within 28 days. Section 172(2) of the *Health Services Act 2016* (WA) (**HS Act**) confers standing for government officers to appeal certain decisions and findings, including a decision to dismiss arising from disciplinary proceedings. Section 80J of the IR Act provides that such an appeal must be made within the prescribed time, being 21 days: reg 107(2) *Industrial Relations Commission Regulations 2005* (**IRC Regulations**). Section 172(4) of the HS Act confers standing for employees who are not government officers to refer certain decisions or findings to the Commission, including a decision to dismiss arising from disciplinary proceedings, 'as if the decision or finding were an industrial matter that could be so referred' under the IR Act. Section 172(5) of the HS Act provides that such a referral must be made within the prescribed period, being 28 days: reg 13 of the *Health Services (General) Regulations 2019*. An appeal under s 78(1) of the PSM Act to the Public Service Appeal Board, including an appeal against a decision to dismiss, must be made within 21 days: s 80J(a) of the IR Act and reg 107(2) of the IRC Regulations.
- 61 However, it is not always the case that a limitation period is provided by statute in a matter involving or connected to dismissals. For example, Parliament has not imposed a limitation period for disputes about dismissal that come before the Commission by way of s 44 of the IR Act. Relevantly here, Parliament has not imposed a limitation period for referrals made

under s 78(2) of the PSM Act and reg 63A of the IRC Regulations does not refer to a limitation period. The limitation period in s 29(2) of the IR Act only applies where the referral is made under s 29(1)(c) of the IR Act.

**Conclusion**

62 The limitation period of 28 days in s 29(2) of the IR Act does not apply to Ms Fagan's referral in application APPL 36 of 2022.

63 This matter will be programmed for hearing.

**2023 WAIRC 00019**

**REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

PENELOPE ANNE FAGAN

**APPLICANT**

-v-

WILLIAM (BILL) JOHNSTON MINISTER FOR CORRECTIVE SERVICES

**RESPONDENT**

**CORAM** COMMISSIONER T EMMANUEL  
**DATE** WEDNESDAY, 11 JANUARY 2023  
**FILE NO.** APPL 36 OF 2022  
**CITATION NO.** 2023 WAIRC 00019

**Result** Declaration made

**Representation**

**Applicant** Mr C Fordham (of counsel)

**Respondent** Mr J Carroll (of counsel)

*Declaration*

HAVING heard Mr C Fordham (of counsel) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent;

AND HAVING given reasons for decision;

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

THAT the limitation period in section 29(2) of the *Industrial Relations Act 1979* (WA) does not apply to the applicant's referral in application APPL 36 of 2022.

(Sgd.) T EMMANUEL,  
 Commissioner.

[L.S.]